

# Securing Access to Justice for Children

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*Civil courts are uniquely important to children as democratic citizens. Because children are restricted from many core forms of democratic participation, courts provide a rare forum for children to voice their perspectives and concerns, seek redress for harms, and vindicate their legal rights. Yet, courts also are uniquely inaccessible to many child litigants.*

*Several age-based procedural barriers restrict children's access to the courts. Because these barriers impose substantial financial costs, they can operate as an absolute bar to claims by low and moderate-income children. Federal courts bear a special obligation to protect child litigants within civil litigation. Yet, rather than help children surmount procedural barriers, courts frequently dismiss children's claims altogether, communicating implicitly, and sometimes explicitly, that children are better served by not pursuing justice.*

*This Article explores the special importance of court access for children themselves and for the democratic system. It examines the doctrinal and philosophical foundations of the procedural barriers that exclude children's claims. And it proposes specific reforms to eliminate these barriers and facilitate access to civil justice for all children.*

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## INTRODUCTION

In 2008, eighteen-year-old Gavin Pierson filed a civil rights action on his own behalf against Sheriff David Allison and Pearl River County, Mississippi to challenge the conditions of his pretrial detention.<sup>1</sup> Among other things, Gavin alleged that he “was placed in lockdown 24 hours a day and only allowed out for approximately one hour every four days,” suffered beatings by officers, and was subjected to living conditions that made him ill.<sup>2</sup> The court, however, dismissed Gavin’s case because he lacked the capacity to advance his claim without counsel.<sup>3</sup> In Mississippi, children do not reach the age of majority, and thereby attain full legal rights, until after their twenty-first birthday.<sup>4</sup> The court acknowledged its authority to appoint counsel to represent Gavin, which would enable the case to proceed, but declined to take this step.<sup>5</sup> Instead, the court concluded that “Plaintiff’s Complaint should be dismissed without prejudice *in order to protect Plaintiff’s rights* and give him the opportunity to either 1) bring this suit by a parent or guardian that is represented by counsel, 2) wait till [sic] he is twenty-one, Mississippi’s age of majority, and bring this suit through counsel, or 3) wait till [sic] he is twenty-one and bring this action *pro se*.”<sup>6</sup>

By contrast, in 2017, fourteen-year-old Brandi Levy was a rising high school sophomore when she raised a First Amendment challenge to her removal from her school’s cheerleading squad as punishment for using an expletive on her private social media account.<sup>7</sup> Throughout the entirety of the litigation, Brandi was represented by both her parents as her adult representatives and counsel from the American Civil Liberties Union.<sup>8</sup> No concerns

<sup>1</sup> Pierson v. Allison, No. 1:08cv208–JMR, 2009 WL 3049220, at \*1 (S.D. Miss. Sept. 17, 2009).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at \*2.

<sup>4</sup> *Id.*; Age, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>5</sup> Pierson, 2009 WL 3049220, at \*2–\*4.

<sup>6</sup> *Id.* at \*4 (emphasis added).

<sup>7</sup> Complaint, B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., No. 3:17-CV-01734, at \*1 (M.D. Pa., Sept. 25, 2017).

<sup>8</sup> *Id.* at \*1, \*13

were raised regarding Brandi's capacity nor the suitability of her representatives.<sup>9</sup> Meeting all procedural requirements, Brandi's case progressed to the Supreme Court and established new limits on schools' power to regulate off-campus student speech.<sup>10</sup>

As the contrast between Gavin's and Brandi's cases shows, children's ability to vindicate their legal rights depends on whether they have supportive adults in their lives and whether those adults are able to retain counsel. Both Gavin and Brandi sought court intervention to protect fundamental constitutional rights, but they had starkly different opportunities to secure relief from the courts.

Throughout the twentieth and twenty-first centuries, courts and scholars have paid increasing attention to children's legal rights.<sup>11</sup> This attention has primarily focused on articulating the substantive scope and content of children's rights, including how and whether such rights should differ from those accorded adults and how to reconcile children's rights with both parents' liberty interests and the state's authority to protect children.<sup>12</sup> The project remains ongoing, and although the contours of children's rights remain somewhat amorphous and unsettled, today we have a clearer picture of children's position within the law.

Yet, rights have little meaning if they cannot be enforced. Amidst more prominent efforts to advance and clarify children's legal rights, a raft of little-known and commonly misunderstood procedural rules often prevents civil claims brought by and on behalf of children from proceeding. These procedural barriers have three primary sources. The first barrier arises from children's legal dependency upon adults. Although children enjoy legal

<sup>9</sup> B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 289 F. Supp. 3d 607, 613 (M.D. Pa. 2017) (granting a preliminary injunction in favor of B.L.); B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429 (M.D. Pa. 2019) (granting summary judgment for B.L.), *aff'd*, 964 F.3d 170 (3d Cir. 2020), *cert. granted*, 141 S. Ct. 976, 208 L. Ed. 2d 509 (2021), *aff'd*, Mahanoy Area Sch. Dist. v. B. L., 594 U.S. \_\_\_ (2021).

<sup>10</sup> Mahanoy Area Sch. Dist. v. B. L., 594 U.S. \_\_\_ (2021).

<sup>11</sup> See, e.g., Cheryl Bratt, *Top-Down or from the Ground?: A Practical Perspective on Reforming the Field of Children and the Law*, 127 YALE L.J. F. 917 (2018); Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345 (2011); Martha Minow, *Whatever Happened to Children's Rights?*, 80 MINN. L. REV. 267 (1995); Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255 (1979); Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487 (1973).

<sup>12</sup> See, e.g., MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* (2005); Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371 (2020); Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1451, 1484 (2018); Lois A. Weithorn, *A Constitutional Jurisprudence of Children's Vulnerability*, 69 HASTINGS L.J. 179, 233 (2017); Emily Buss, *Developmental Jurisprudence*, 88 TEMPLE L. REV. 741 (2016); Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099 (2011); Kristin Henning, *The Fourth Amendment Rights of Children at Home: When Parental Authority Goes Too Far*, 53 WM. & MARY L. REV. 55 (2011); Vivian E. Hamilton, *Immature Citizens and the State*, 2010 BYU L. REV. 1055; Barbara Bennett Woodhouse, "Who Owns the Child"? Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992).

rights, as legal minors they typically lack the capacity to advance their own legal interests in courts.<sup>13</sup> Instead, children generally must rely on adults to pursue legal claims on their behalf.<sup>14</sup> Thus, in children's cases, procedural doctrine generally requires that an appropriate adult represent the child in the litigation to redress the child's lack of capacity and protect the child's interests.<sup>15</sup> The second barrier arises from the imposition of substantial costs upon children and their adult representatives. These costs primarily result from doctrine requiring the adult representative for a child's claim to privately retain counsel, barring them from advancing children's claims *pro se*.<sup>16</sup> The third barrier results from time constraints. In some jurisdictions, certain children's claims must be filed within a statute of limitations period that expires before the child reaches adulthood.<sup>17</sup> For children to have any opportunity to pursue such claims, they must overcome the dependency and cost barriers during their childhood—they cannot simply wait until they reach the age of legal majority to seek relief.

Although intended to facilitate children's participation in court processes, these requirements sometimes create insurmountable barriers that preclude children from vindicating their rights. Some children, like Gavin, lack adults who can play the representative role. Even where such adults exist, they may have difficulty securing court recognition as an adult representative, as the process for such recognition is often underdeveloped and unclear.<sup>18</sup> Adult representatives and children who lack the financial means to pay counsel have no right to appointed counsel and no ready source for free legal representation, yet they cannot proceed *pro se*.<sup>19</sup> These barriers become all the more urgent when statutes of limitations run and expire during childhood. Where all three of these barriers collide, a child may forever lose the

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<sup>13</sup> See *Capacity*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>14</sup> 4 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 17.21[3][a] & n.16 (3d ed. 2018); 6A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: CIVIL § 1570 (3d ed. 2020).

<sup>15</sup> See *infra* Part II.A.

<sup>16</sup> See *infra* Part II.B.

<sup>17</sup> See *infra* Part II.C.

<sup>18</sup> See *infra* Part II.A.

<sup>19</sup> See *infra* Part II.B. Unlike in state family courts, where in recent decades state legislation has mandated the provision of independent counsel to children to ensure their voices are heard in matters concerning their interests, there is no requirement that children be appointed counsel in federal civil cases. 42 U.S.C. § 5106a(b)(2)(B)(xiii) (requiring states to appoint advocates for children in abuse and neglect proceedings as a condition of federal child welfare funding); CHILD'S BUREAU, REPRESENTATION OF CHILDREN IN CHILD ABUSE AND NEGLECT PROCEEDINGS: STATE STATUTES CURRENT THROUGH DECEMBER 2017, <https://www.childwelfare.gov/pubPDFs/represent.pdf>, archived at <https://perma.cc/JPP8-ZRNL>; *Charts 2019: Family Law in the Fifty States, D.C., and Puerto Rico*, 53 FAM. L.Q. 353, 358–64 (2020) [hereinafter *Family Law in the Fifty States*] (identifying whether states authorize courts to appoint an attorney or guardian ad litem to represent children's interests in custody cases); Lisa V. Martin, *No Right to Counsel, No Access Without: The Poor Child's Unconstitutional Catch-22*, 71 FLA. L. REV. 831 (2019) (evaluating the source and impact of the federal mandate that counsel be retained to advance children's federal civil claims in light of the lack of a federal right to counsel in civil cases).

opportunity to pursue a valid claim simply because she is unable to secure an authorized adult representative and/or retain counsel— requirements she would not have to satisfy as an adult.

If children lack adult representatives and the ability to retain counsel, their legal claims need not founder. Courts bear a special obligation to protect child litigants under both Federal Rule of Civil Procedure 17, which governs children’s claims,<sup>20</sup> and the inherent powers doctrine, which vests courts with the authority to control litigation.<sup>21</sup> Each of these authorities accord courts significant responsibility and discretion to protect children’s interests. To carry out this responsibility, courts can appoint an adult representative, replace an adult representative with one better fit to serve the child, request counsel for the child, and even permit the child to proceed alone if her interests will be adequately protected.<sup>22</sup> Yet, when presented with children’s cases that fail to meet procedural standards, courts often do none of these things. Instead, like in Gavin Pierson’s case, courts routinely dismiss children’s claims.<sup>23</sup>

The exclusions of children’s claims on these procedural grounds most often result when children lack counsel. Children like Brandi Levy who are represented by counsel—either individually or as part of a class action—typically overcome these procedural hurdles.<sup>24</sup> For children from economi-

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<sup>20</sup> FED. R. CIV. P. 17; *Garrick v. Weaver*, 888 F.2d 687, 693 (10th Cir. 1989) (“Rule 17(c) flows from the general duty of the court to protect the interests of infants and incompetents in cases before the court.”); 6A WRIGHT ET AL., *supra* note 14, § 1571 (“[Rule 17(c)] manifests a desire to protect the interest of infants and incompetent persons by assuring them proper representation in and access to a federal forum.”).

<sup>21</sup> *Coulson v. Walton*, 34 U.S. (9 Pet.) 62, 84 (1835) (“It is the duty of the court to protect the interests of minors.”); *see also* *Bank of U.S. v. Ritchie*, 33 U.S. (8 Pet.) 128, 144 (1834) (“In all suits brought against infants, whom the law supposes to be incapable of understanding and managing their own affairs, the duty of watching over their interests devolves, in a considerable degree, upon the court.”); *Lisa V. Martin, Litigation as Parenting*, 95 N.Y.U. L. REV. 442, 449–50 (2020) (exploring courts’ authority under inherent powers doctrine).

<sup>22</sup> FED. R. CIV. P. 17(c)(2) (granting courts the discretion to appoint guardians ad litem “or issue another appropriate order” to protect the interests of minors in litigation); 28 U.S.C. § 1915 (e)(1)(A) (authorizing courts to request counsel to represent litigants who cannot afford counsel); *Developmental Disabilities Advoc. Ctr., Inc. v. Melton*, 689 F.2d 281, 285 (1st Cir. 1982) (whether to appoint a next friend or guardian ad litem rests is a matter reserved to the trial court’s discretion); *M. S. v. Wermers*, 557 F.2d 170, 174 (8th Cir. 1977) (noting that courts can even determine that no adult representative is necessary if a minor’s interests will be protected).

<sup>23</sup> *See infra* Part II.

<sup>24</sup> *See e.g.*, *J.D. v. Azar*, 925 F.3d 1291 (D.C. Cir. 2019) (class action brought on behalf of unaccompanied minors detained by Immigration and Customs Enforcement with ACLU as counsel and ACLU staff as GAL proceeds past procedural hurdles); *Christine S. v. Blue Cross Blue Shield N.M.*, 428 F. Supp. 3d 1209, 1214 (D. Utah 2019) (denying motion to dismiss and affirming father’s standing to bring ERISA Mental Health Parity and Addiction Equity Act claims on behalf of his son as his general guardian where counsel represented father and son); *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 323 F. Supp. 3d 1030, 1032 n.1, 1033 (S.D. Ind. 2018) (permitting a seventeen-year-old to represent his own interests in a case challenging his school district’s refusal to allow him to use the restroom that matched his gender identity after defendant challenged the propriety of the adult who initially served as the plaintiff’s next friend in light of the plaintiff’s representation by “experienced and suitable counsel”).

cally disadvantaged families, the persistent dearth of free and low-cost legal services, decline of class action litigation, and intractability of barriers to securing counsel faced by disadvantaged groups can make these procedural prerequisites insurmountable.<sup>25</sup>

Perhaps because these exclusions are procedural rather than substantive, they remain largely unnoticed.<sup>26</sup> Still, procedural exclusions cause real harm. Excluding children from the courts deprives them of any possibility of securing immediate legal relief from ongoing harms. This not only subjects children to the risk of further harm but also guts the practical efficacy of their legal rights.<sup>27</sup> Gavin Pierson sought the court's intervention to halt the physical mistreatment he was suffering during the pendency of his case—it would be little comfort that he could return to court “to protect [his] rights” in two-plus years. Exclusions also undermine the viability of individual claims, as delay can result in the loss of evidence and fading of witnesses' memories and undercut the efficacy of legal rights in deterring those who would infringe them.<sup>28</sup>

In theory, these exclusions are only temporary—once counsel is retained or once children reach adulthood, the procedural deficiencies are cured, and children's claims can be re-filed and proceed. Yet, my research suggests that in practice, these dismissals are often final. Children's claims are not typically re-filed; instead, justice delayed becomes justice denied.<sup>29</sup>

Beyond harms inflicted upon individual plaintiffs, excluding poor children as a group from the courts also causes harm to the democratic system. Silencing poor children's voices in the courts—a rare democratic forum in which children ostensibly can participate—makes democracy even less aware of and responsive to children's concerns, stunts the development of the law, and squanders a critical opportunity to engage children in the polity. As children represent a disproportionate share of those living in poverty, and as children living in poverty are overwhelmingly children of color, excluding poor children's perspectives skews the collective understanding of children's

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<sup>25</sup> See *infra* Sections I.A. & II.B.

<sup>26</sup> ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 5 (2017) (“If the same rights secured by litigation were to be eliminated directly, by legislative or court action, such attempt would meet with great opposition. Yet procedural limitations are little noticed or discussed, even when they profoundly diminish people's ability to enforce rights they rely on and care about.”).

<sup>27</sup> Woodhouse, *supra* note 12, at 1051–52 (“Historically, children's rights have been severely limited in practice because they depend upon adults for articulation, assertion, and enforcement.”).

<sup>28</sup> See *infra* Part I.B.2.

<sup>29</sup> My research suggests that the re-filing of cases dismissed under the counsel mandate is rare. A review of fifty cases selected from a set of over 500 in which the counsel mandate was an issue identified zero cases in which a child re-filed claims dismissed under the counsel mandate once the child reached adulthood. Cases were selected for this review based on their filing date (prior to 2006) and geographic diversity across federal courts. Given the dates of adjudication and the ages of the children during the litigation, most if not all claims have now expired. LISA V. MARTIN, TABLE OF COUNSEL MANDATE CASE OUTCOMES (unpublished)(on file with author).

needs toward the racially and economically privileged.<sup>30</sup> Excluding poor children as a class also undermines core values of the civil justice system in a uniquely troubling way, including that the courts are open to all citizens—children and adults<sup>31</sup>—regardless of financial means,<sup>32</sup> that no person is above the law,<sup>33</sup> and that the courts should foster the resolution of disputes on the merits in a manner that is not only inexpensive but also just and speedy.<sup>34</sup>

This Article is the fourth in a series exploring procedural issues unique to children’s civil claims that obstruct children’s access to the civil courts. In other works, I examine the particulars of several of these issues, including: (1) tracing the common law mandate that claims brought on behalf of children be advanced by privately retained counsel;<sup>35</sup> (2) mapping courts’ understanding of which adults can serve as children’s representatives in civil cases and what preference should be given to parents;<sup>36</sup> and (3) evaluating the circumstances under which courts can and should permit adolescents to represent their own interests in civil cases.<sup>37</sup> This Article takes a broader view. It explores the special importance of access to justice for children them-

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<sup>30</sup> In 2019, children constituted nearly one-third of people living in poverty in the United States, experiencing a poverty rate one and one half times higher than adults. Over seventy percent of children living in poverty in 2019 were children of color. Black children experienced poverty at a rate over three times larger than white children, Hispanic and American Indian/Alaska Native children experienced poverty rates over twice that of white children. The youngest children were more likely to live in poverty than older children. CHILD.’S DEF. FUND (CDF), CHILD POVERTY IN AMERICA 2019: NATIONAL ANALYSIS 1 (2020) (distilling data from the U.S. CENSUS BUREAU CURRENT POPULATION SURVEY, 2019 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT tbl.POV-01 (2020), <https://www.census.gov/topics/income-poverty/data/tables.html>, archived at <https://perma.cc/77M3-D7AR>). The 2020 global pandemic exacerbated child poverty. See Zachary Parolin, Megan A. Curran, Jordan Matsudaira, Jane Waldfoegel, & Christopher Wimer, *Monthly Poverty Rates in the United States during the COVID-19 Pandemic* 9 (Ctr. on Poverty & Soc. Pol’y, Columbia Univ., Oct. 15, 2020). Temporary income supports enacted by Congress relieved the overall poverty rate in January 2021. Zachary Parolin & Megan A. Curran, *Monthly Poverty Rate Declines to 13.2% in the United States in January 2021*, CTR. ON POVERTY & SOC. POL’Y, COLUMBIA UNIV. (Mar. 4, 2021). The long term effects of the pandemic on child poverty remain to be seen.

<sup>31</sup> FED. R. CIV. P. 17.

<sup>32</sup> 28 U.S.C. § 1915 (permitting litigants to seek waiver of fees in the federal courts); *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331 (1948) (“Section 1 of [§ 1915] is intended to guarantee that no citizen shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, ‘in any court of the United States’ solely because his poverty makes it impossible for him to pay or secure the costs.”); see generally Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478 (Apr. 2019) (exploring the history and application of 28 U.S.C. § 1915).

<sup>33</sup> See, e.g., *Trump v. Vance*, 591 U.S. \_\_\_ (2020) (applying the principle when holding that a sitting President must comply with subpoenas for records in criminal proceedings).

<sup>34</sup> FED. R. CIV. P. 1; Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 557 (2002) (noting that the Federal Rules are animated by an overarching vision that “litigants should have their day in court”); Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179 (1989) (the Federal Rules aim to promote resolution on the merits and avoid exclusion on technical grounds).

<sup>35</sup> Martin, *supra* note 21.

<sup>36</sup> *Id.*

<sup>37</sup> Lisa V. Martin, *Modernizing Capacity Doctrine*, 73 FLA. L. REV. 821 (2021).

selves and for democracy at large. It interrogates why, when confronted with age-based procedural issues, courts choose to dismiss children's cases rather than redress procedural problems. It posits that these dismissals disproportionately exclude the claims of children from low-to-middle income families. And it proposes concrete reforms to remove these barriers and facilitate children's access to the courts.

The Article proceeds in four parts. Part I first briefly outlines common circumstances in which children come before the courts and introduces children as parties to civil litigation. It then explores why children's access to civil justice is important, both for children themselves and for the functioning of the democratic system. It identifies three primary benefits that warrant attention. First, litigation offers a rare and critical avenue for children's participation in democracy. Participation is vital because it encourages children's future engagement in self-government and enables democratic debate to incorporate children's perspectives. Second, litigation fortifies children's legal rights and remedies and facilitates the development of the law to address children's concerns. Finally, ensuring access to the courts provides children a measure of social equality and treats them with dignity. Litigation is not a panacea for children's problems; indeed, litigation imposes a range of significant costs.<sup>38</sup> Yet, for these reasons and others, it is critical that children have a viable opportunity to present their claims before the civil courts.

Part II evaluates the procedural doctrines and practices that exclude children's claims. The exclusions result from three primary sources: doctrines and practices that have developed to accommodate children's legal dependence on adults, costs generated by age-based procedural requirements, and the intersection of these issues with time limits imposed upon children's claims. Although courts have discretion to assist children to overcome these barriers, they often decline to do so.

Part III seeks to understand why exclusion has become a dominant response to children's claims despite courts' authority to proceed differently. To do so, this Part identifies potential philosophical foundations underlying these exclusionary policies and practices, including the valorization of autonomy, the location of responsibility for dependence with the family, the prioritization of dispute resolution and docket management as courts' core task, the appeal of formalism in the face of uncertainty and risk, and the influence of bias.

Part IV envisions a different path. It proposes several reforms to change courts' orientation to child litigants and facilitate children's access to justice. These include the proposed adoption of three common law presumptions to clarify capacity doctrine and reduce courts' dismissal of children's cases on capacity-related grounds. The proposals also call for courts to discard or overturn precedent that simultaneously conditions children's claims on the retention of private counsel and allows children's claims to expire during

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<sup>38</sup> See *infra* Part IV.D.

their minority. In combination, these precedents deprive children who cannot afford counsel of a meaningful opportunity to advance their claims.

In recommending these steps, this Article joins the rich literature exploring access to justice barriers and their impact on low-income communities.<sup>39</sup> It also advances the movement to examine procedure “from the bottom up,” investigating the lived experiences of litigants—especially those living in poverty—who seek justice from the federal courts as a way to identify the system’s gaps.<sup>40</sup> Above all, the article seeks to reaffirm that child litigants belong in civil courts. Constructing civil justice for children not only fortifies children’s place within the law and democracy but strengthens democracy itself.

## I. THE IMPORTANCE OF CHILDREN’S ACCESS TO CIVIL JUSTICE

To understand the significance of civil justice to children, this Part first explores the ways in which courts address children’s interests and introduces children as parties to civil litigation. It then examines why children’s access to the civil courts is important, both to children themselves and to democracy.

### A. *Children in the Courts*

Courts address children’s interests across a wide range of case types. Critically, the legal support that children receive to assert their interests in courts varies widely according to the nature of the case.

First, family courts routinely address children’s interests in cases including divorce, child custody, child support, abuse and neglect.<sup>41</sup> Although children may not be litigants in these cases, contemporary public policy recognizes children’s significant stake in the outcome.<sup>42</sup> Thus, public policy often facilitates children’s participation in such matters by authorizing court appointment of independent counsel or guardians ad litem to represent chil-

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<sup>39</sup> See, e.g., Am. Acad. Arts & Sci., *Access to Justice*, 148 DÆDALUS (Winter 2019) (compiling twenty-four essays evaluating “the national crisis in civil legal services facing poor and low-income Americans”).

<sup>40</sup> Hammond, *supra* note 32, at 1526–27 (recognizing federal courts as “fora for poor people,” and promoting the evaluation of “how people with few resources access systems of adjudication” because their experiences “expose cracks in adjudicatory systems”).

<sup>41</sup> See, e.g., Barbara A Babb, *Reevaluating Where We Stand: A Comprehensive Survey of America’s Family Justice Systems*, 46 FAM. CT. REV. 230, 241 n.1 (Apr. 2008).

<sup>42</sup> Children are not litigants/parties in divorce, child custody, and child support cases. As a result, states’ approaches to considering children’s views in such matters varies widely. See, e.g., Barbara A. Atwood, *The Child’s Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 ARIZ. L. REV. 629 (2003). Children are more likely to have rights akin to parties in dependency proceedings. American Bar Ass’n, Center on Children and the Law, *Youth Engagement State by State* (August 2014), [https://www.americanbar.org/content/dam/aba/administrative/child\\_law/youthengagement/youth-engagement-state-summary.pdf](https://www.americanbar.org/content/dam/aba/administrative/child_law/youthengagement/youth-engagement-state-summary.pdf), archived at <https://perma.cc/6B3U-LVX8>.

dren's interests.<sup>43</sup> By contrast, juvenile and, in some cases, adult criminal courts assess children's culpability for criminal offenses. In these cases, children enjoy constitutional rights to appointed counsel and their parents may have a protected role within the case.<sup>44</sup>

Finally, civil courts hear children's claims for relief against private and public actors.<sup>45</sup> Like adults, children enjoy a fundamental right of access to the courts<sup>46</sup> and standing to pursue civil legal remedies when they suffer harms.<sup>47</sup> Unlike adults, children generally lack the legal capacity to represent their own interests before the courts.<sup>48</sup> Except in limited circumstances involving older adolescents, children's claims must be advanced by adults acting on children's behalf.<sup>49</sup>

Children's federal claims run the gamut of civil case types, including actions in contract, tort, civil rights, education rights, disability rights, constitutional rights, ERISA, immigration, petitions for habeas corpus, social security, civil remedies for human trafficking and international terrorism,

<sup>43</sup> Federal child welfare funding is conditioned on states appointing advocates for children in abuse and neglect proceedings. 42 U.S.C. § 5106a(b)(2)(B)(xiii); *see generally* CHILD'S BUREAU, *supra* note 19; *Family Law in the Fifty States*, *supra* note 19. (tracking "Custody Criteria," including whether courts are authorized to appoint an attorney or guardian ad litem to represent children's interests in the case).

<sup>44</sup> Interestingly, but beyond the scope of this paper, children and their parents have been permitted to waive appointment of counsel in some juvenile cases and elect for the child to proceed *pro se*, a choice routinely denied to children and parents in civil litigation. *See, e.g.*, Huff v. K.P., 302 N.W.2d 779, 779, 783 (N.D. 1981) (a father of an eleven-year-old may waive the child's right to counsel and appear for her "albeit rather ineffectively"); *infra* Section II.B.

<sup>45</sup> It is worth noting the imperfections of this three-case-type framing. Family and juvenile courts, for example, also hear civil matters and thus also are civil courts in a broad sense. And exceptions apply to each of the general descriptions I provide. Still, understanding the broad distinctions between these three imperfect categories helps contextualize the particular issues that arise for children in civil courts.

<sup>46</sup> *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (recognizing the right of access to the courts as fundamental); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.") More may be required to make the right of access meaningful for juveniles than for adults. *John L. v. Adams*, 969 F.2d 228, 234 (6th Cir. 1992) (for the right of access to the courts to be meaningful for incarcerated juveniles they must have access to counsel).

<sup>47</sup> Standing encompasses "a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Standing*, BLACK'S LAW DICTIONARY (11th ed.). "A plaintiff's age is not determinative of standing; children possess certain personal rights that are enforceable in federal court." *Gonzalez ex rel. Gonzalez v. Reno*, 86 F. Supp. 2d 1167, 1180–81 (S.D. Fla.), *aff'd sub nom.*, *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000).

<sup>48</sup> Capacity entails a party's "satisfaction of a legal qualification, such as legal age or soundness of mind, that determines one's ability to sue or be sued." *Capacity*, BLACK'S LAW DICTIONARY, *supra* note 13. Essentially, standing dictates an individual's right to seek relief in court, whereas capacity dictates her ability to represent her own interests in court. *See* Lisa Vollendorf Martin, *What's Love Got to Do with It: Securing Access to Justice for Teens*, 61 CATH. U. L. REV. 457, 469–70, 477–78 (2012) (distinguishing between the legal concepts of standing and capacity).

<sup>49</sup> *See generally* Martin, *supra* note 21; Martin, *supra* note 37.

and even bankruptcy.<sup>50</sup> Unlike in certain family, juvenile, and criminal proceedings, children enjoy no constitutional or statutory entitlement to counsel in civil proceedings.<sup>51</sup> Just like adults, child litigants in civil proceedings generally must secure their own legal assistance.<sup>52</sup> As has been extensively documented elsewhere, securing counsel presents significant challenges to low and moderate-income litigants, including children and those advancing claims on their behalf.<sup>53</sup>

This Article examines how children's claims—claims brought by and on behalf of children—fare in civil courts.<sup>54</sup>

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<sup>50</sup> These case types were identified through research on federal claims (via docket search) and published federal opinions issued in cases involving minors in federal courts in 2018–2019. This research identified 250 minors' cases that were pending before the courts during this period. This dataset is very likely incomplete for a number of reasons but provides some insight into the range of claims children bring before the federal courts. Lisa V. Martin, Table of 2018–2019 Federal Children's Cases (unpublished) (on file with author). Dockets were identified using Bloomberg docket search by selecting civil U.S. district court opinions, entering "a minor" in the party search field, and limiting the date range to 1/1/2018–12/31/2019. Published opinions were identified on Westlaw Edge by searching for Fed. R. Civ. P. 17, following the "Citing References" link, selecting the "Cases" filter link, clicking the "Jurisdiction" expander, and checking the "Federal" filter in the expander), and by compiling cases discovered through prior research. Similarly, a prior review of 523 children's federal cases implementing the doctrine I have called the counsel mandate revealed that the cases involved the following underlying legal claims: 64% civil rights, 15% disability rights under the IDEA and/or the ADA, 9% torts, 4% SSI, and additional cases including claims regarding bankruptcy, fair debt collection practices, insurance, and tax liens. Martin, *supra* note 37, at 839 n.45.

<sup>51</sup> See *infra* Section II.B.

<sup>52</sup> Turner v. Rogers, 564 U.S. 431, 444–48 (2011) (the appointment of counsel is not required in every civil proceeding that threatens physical liberty, rather it requires a case specific determination); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25–27 (1981) (the due process clause does not provide a general right to appointment of counsel for indigent litigants but only in certain limited circumstances, including where proceedings put the deprivation of an individual's physical liberty at stake).

<sup>53</sup> See, e.g., Martin, *supra* note 37, at 855–58; LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2017) [hereinafter THE JUSTICE GAP]; Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 749–52 (2015) (reviewing recent research on *pro se* litigants and access to counsel); Debra Cassens Weiss, *Middle-Class Dilemma: Can't Afford Lawyers, Can't Qualify for Legal Aid*, A.B.A. J. (July 22, 2010); see also *infra* Section II.B.

<sup>54</sup> Because of the variance across state doctrine at the granular level, my research has focused largely on children's claims in the federal district courts. Many of the issues, doctrines, and impacts that I evaluate apply in state courts as well. See, e.g., Cikraji v. Snowberger, 410 P.3d 573, 577 (Colo. Ct. App. 2015) (dismissing with prejudice parent's appeal of child's claims for lack of counsel); Blue v. People, 585 N.E.2d 625, 626 (Ill. App. 1992) (holding in the absence of precedent that one not authorized to practice law cannot advance a minor's claim without counsel and thus voiding the proceedings below and striking the briefs on appeal). Yet, in other contexts, states sometimes explicitly permit some children or their parents to advance certain children's claims *pro se*. See Martin, *supra* note 37, at 838 n.34 (compiling examples of state laws permitting children or their parents to represent children's interests in courts without counsel); Lisa V. Martin, *Restraining Forced Marriage*, 18 NEV. L.J. 919, 964–65, 1000 (2018) (summarizing state laws designating the adults who qualify to seek restraining orders on behalf of minors); Martin, *supra* note 48, at 475–76, 484–85.

*B. Why Children's Access to Justice Matters*

Children's access to the courts facilitates their participation in democracy, ensures the efficacy of children's legal rights and remedies, and promotes children's dignity and social equality.

*1. Enabling Democratic Participation*

Ensuring children's access to the courts fortifies democracy by teaching children how to engage in self-government and making the system more responsive to children's concerns. The courts provide children with a rare avenue for participation in the democratic system. Democratic participation theorists argue that participation is vital to a healthy democracy because it promotes effective decisions and also develops the social and political capabilities of individuals.<sup>55</sup> Participating in democracy builds citizens' confidence and sense of political empowerment and teaches citizens how to engage effectively in self-government.<sup>56</sup> Essentially, practicing participation equips citizens with the psychological and practical tools they need to participate effectively, and in doing so, encourages further participation.<sup>57</sup>

Litigation constitutes a distinct means of democratic participation. Although courts oft have been conceived as anti-democratic, or at least countermajoritarian, because judicial review is insulated from popular will, as a democratic institution open to the public, courts also provide a forum for citizen engagement in self-government.<sup>58</sup> Litigation enables individuals to direct the attention of government officials to their problems and engage in democratic debate.<sup>59</sup> Court access is particularly critical to children as democratic citizens. Children are excluded from many of the central means of democratic participation, including voting and holding public office.<sup>60</sup> Along with popular protests,<sup>61</sup> courts have the potential to provide a rare democratic forum in which children are ostensibly authorized and welcomed to participate.

Moreover, the litigation of children's claims provides the democratic system a rare opportunity to incorporate children's asserted needs and perspectives into democratic debate. Litigation contributes to a robust demo-

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<sup>55</sup> CAROL PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 42–46 (1970).

<sup>56</sup> *Id.* at 42–46, 105.

<sup>57</sup> *Id.*

<sup>58</sup> *See, e.g.,* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334–55 (1998) (exploring scholars' concerns with courts as countermajoritarian and antidemocratic).

<sup>59</sup> *See* LAHAV, *supra* note 26, at 84, 87–88.

<sup>60</sup> *See id.* at 4–5 (identifying four central mechanisms for arguing contentious issues in democratic society: litigation, elections, legislative debates, and popular protests).

<sup>61</sup> Jessica Kulynych, *No Playing in the Public Sphere: Democratic Theory and the Exclusion of Children*, 27 SOC. THEORY & PRAC. 231, 263 (Apr. 2001); Anu Toots, Natalie Worley, & Anna Skosireva, *Children as Political Actors*, in SAGE HANDBOOK OF CHILD RESEARCH 54, 65 (Melton et al. eds., 2014).

cratic debate in several ways. First, litigation enables discovery and disclosure of critical information, which shines light on problems that might otherwise remain hidden and holds powerful interests to account.<sup>62</sup> Furthermore, litigation provides a central, visible forum for presenting, arguing, and resolving contentious issues.<sup>63</sup> In the course of such arguments, litigation clarifies how law applies to particular circumstances and peoples' obligations to one another. In providing such clarity, litigation makes law more predictable, understandable, and fair. In revealing laws that are unfair, litigation can promote social change through other avenues.<sup>64</sup>

Excluding children from the courts deprives them of an extraordinary opportunity to participate and grow as democratic actors.<sup>65</sup> Courts ostensibly stand as a rare, protected conduit for including children's perspectives within democratic debate, but courts' exclusion of poor children's claims erases such children as a constituency experiencing injustice and having needs the government should address. Instead, such children are rendered legally invisible and politically insignificant. Children's exclusion from the courts further distorts a democratic debate that already tilts heavily towards adults—making it less just and less equipped to appreciate and respond to children's concerns.<sup>66</sup>

## 2. *Fortifying Rights and Remedies*

Facilitating children's access to the civil courts also promotes the fulsome development of the law and the viability of legal remedies to redress harm to children. First, adjudicating children's claims enables courts to develop the law to address children's needs.<sup>67</sup> Litigation brings legal questions before the courts, and, in doing so, identifies gaps, inconsistencies, and examples of how laws treat some groups or circumstances unfairly. When courts hear children's claims, courts resolve legal questions salient to chil-

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<sup>62</sup> LAHAV, *supra* note 26, at 2; Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917, 931–932 (2012) (exploring the value of litigation in holding powerful interests accountable).

<sup>63</sup> LAHAV, *supra* note 26, at 5 (“The central contribution of litigation is to promote reasoned discussion of competing values through the language of the law by allowing individuals to present their arguments on equal terms and with information that supports those arguments.”); Resnik, *supra* note 62, at 939–960 (identifying litigation as a means of allowing public input into governing norms).

<sup>64</sup> LAHAV, *supra* note 26, at 58; Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 487–90 (2004) (constructing a history of the use of litigation to galvanize support for ideas and draw attention to problems).

<sup>65</sup> Kulynych, *supra* note 61, at 242.

<sup>66</sup> *Id.* at 250 (arguing that children constitute a social group with a “particular social perspective,” the inclusion of which enhances the quality of democratic debate and improves the justice of solutions debate generates).

<sup>67</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) (citing *Marbury v. Madison*, 1 Cranch 137, 177 (1803)) (“Interpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy.”).

dren's circumstances and thereby develop the law to account for their interests.<sup>68</sup>

Second, ensuring children's access to justice facilitates the rule of law and enables children to enforce their rights.<sup>69</sup> The knowledge that individuals can turn to courts to seek accountability and redress for wrongdoing encourages compliance with legal standards.<sup>70</sup> Courts play a particularly important dispute resolution function for economically disadvantaged individuals, including children, because these individuals often lack the means or influence required to redress grievances through other avenues.<sup>71</sup>

Additionally, enabling children's access provides children with opportunities for timely intervention. Children experience harms during childhood that can be avoided and redressed by court action.<sup>72</sup> Ensuring children's access enables courts to protect children's present interests and promotes the viability of children's claims, avoiding the risks of fading memories and lost evidence posed by dismissal and delay.<sup>73</sup>

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<sup>68</sup> Hammond, *supra* note 32, at 1478 (arguing that cumbersome in forma pauperis processes may reduce claims brought by poor people and thereby distort federal jurisprudence).

<sup>69</sup> *Chambers v. Balt. & Ohio R.R.*, 207 U.S. 142, 154 (1907) ("The right to sue and defend in the courts is the alternative to force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.").

<sup>70</sup> LAHAV, *supra* note 26, at 87.

<sup>71</sup> Such other avenues of influence include leveraging political, social, or economic pressure against an opposing party. *Id.* at 5, 113–14 ("Limitations on lawsuits have the practical effect of limiting individual rights, because lawsuits are the central mechanism for enforcing and protecting rights in the United States."); Hammond, *supra* note 32, at 1526–29 (positing that poor people rely on courts to resolve disputes because they lack access to alternative means of dispute resolution); Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1548 (2016) (arguing low-income litigants must rely on courts to resolve their problems because they "generally lack the political power with which to reliably resolve or reform widespread abuses" through other avenues of influence).

<sup>72</sup> Dailey & Rosenbury, *supra* note 12, at 1481–82. Ongoing harms to children may be especially important to prevent because of the long-term impacts of trauma experienced during childhood on brain development, health, and well-being. *See, e.g.*, Vincent J. Felitti, Robert F. Anda, Dale Nordenberg, David F. Williamson, Alison M. Spitz, Valerie Edwards, Mary P. Koss, & James S. Marks, *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTATIVE MED. 245, 255–56 (1998).

<sup>73</sup> *Crozier for A.C. v. Westside Cmty. Sch. Dist.*, 973 F.3d 882, 891–92 (8th Cir. 2020) (reversing district court dismissal of minor's claim for lack of counsel and noting that although the minor could bring her own claim when she reaches majority, "that course would entail substantial delay and potential prejudice in pursuing the vindication of her alleged rights."). Defendants' employment of age-related procedural doctrine to protect themselves from children's claims suggests they see dismissal and delay as advantageous to their interests. *See, e.g.*, *Garcia v. City of New York*, No. 15 Civ. 7470 (ER), 2018 WL 2085335, at \*5 (S.D.N.Y. May 3, 2018) (declining to join minor plaintiff in light of defendants' objection that her minority prevented her from representing her own interests and the adult Plaintiffs could not represent her *pro se*).

### 3. *Advancing Social Equality*

Finally, ensuring children's access to the civil courts provides them with a measure of social equality. Children, of course, are not equal to adults under the law.<sup>74</sup> Yet, they are at least formally guaranteed legal rights,<sup>75</sup> including the right of access to the courts.<sup>76</sup> Indeed, for children, as for others denied political rights, the courts "provide a refuge of equal treatment" and a forum in which they are accorded respect and dignity as individuals with intrinsic worth.<sup>77</sup>

Courts' demonstration of equal respect for children, in turn, promotes the rule of law and the legitimacy of courts.<sup>78</sup> Individuals' willingness to submit their disputes to courts' authority depends upon their belief that courts will treat them fairly.<sup>79</sup> Thus, ensuring children access to justice strengthens democracy by building children's confidence in courts.

## II. MECHANISMS OF EXCLUSION

To access justice from the civil courts, children must overcome dependence, cost, and time barriers that require significant resources and affirma-

<sup>74</sup> Indeed, scholars argue that the created notion of childhood justifies the power structure in democracy, as a foil to the rational, autonomous, adult democratic actor who consents to be governed by elected leaders. Annette R. Appell, *The Child Question*, 2013 MICH. ST. L. REV. 1137, 1146–47.

<sup>75</sup> *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."); *Sorenson v. Sorenson*, 339 N.E.2d 907, 912 (Mass. 1975) ("Children enjoy the same right to protection and to legal redress for wrongs done [to] them . . . . Only the strongest reasons, grounded in public policy, can justify limitation or abolition of [children's] rights.");

<sup>76</sup> *Chambers v. Balt. & Ohio R.R.*, 207 U.S. 142, 148 (1907) (identifying the right of access to the courts as "highest and most essential privileges of citizenship," and "the right conservative of all other rights"); *John L. v. Adams*, 969 F.2d 228, 234 (6th Cir. 1992) (holding that incarcerated juveniles must be provided counsel to ensure their right of access to the courts is meaningful); *Ad Hoc Comm. of Concerned Teachers ex rel. Minor & Under-Age Students Attending Greenburgh Eleven Union Free Sch. Dist. v. Greenburgh No. 11 Union Free Sch. Dist.*, 873 F.2d 25, 31 (2d Cir. 1989) (appointing a non-guardian next friend as the adult representative for a minor in state custody suing the public schools because "[t]he right of access to courts by those who feel they are aggrieved should not be curtailed; and this is particularly so in the instance of children who, rightly or wrongly, attribute such grievances to their very custodians") (internal citation omitted); see also Martin, *supra* note 37 at 860–65 (evaluating the right of access to the courts and its application to child litigants).

<sup>77</sup> LAHAV, *supra* note 26, at 113–14 ("The fact that people who are excluded or marginalized can sue when they cannot exercise other political rights makes litigation an irreplaceable avenue for the realization of equal treatment under law for everyone."); Hammond, *supra* note 32, at 1534 (identifying dignitary harms when economic barriers preclude access to courts); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1172.

<sup>78</sup> LAHAV, *supra* note 26, at 130.

<sup>79</sup> Tom. R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 128–32 (1988) (the procedural justice of court decision-making—especially fairness, honesty, and ethicality—is as important to participants' view of the proceeding as the outcome).

tive support to surmount. Children who lack such resources—particularly economically disadvantaged children—are frequently excluded from the courts on several grounds.<sup>80</sup>

### A. *Dependence*

First, children are excluded from civil justice by virtue of their legal dependence upon adults. Law defines the legal bounds of childhood and adulthood by establishing the age of majority.<sup>81</sup> Individuals who are younger than the age of majority are children—legal “minors.”<sup>82</sup> The law imposes upon minors a “legal disability” for their protection,<sup>83</sup> which deprives minors of the authority to take legal action for most purposes.<sup>84</sup> Instead, author-

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<sup>80</sup> The full scope and extent of this problem is difficult to quantify. My research of federal court dockets through PACER, Bloomberg, Lexis, and Westlaw has uncovered no searchable case identifier for minor parties. Searching for the word “a minor” within the “parties” field within Bloomberg’s docket search identifies some portion of children’s claims but fails to capture children’s cases that do not include the term in the caption or party names. Some captions, for example, simply identify minors by their initials, or their initials and reference to an adult representative. Moreover, it is unclear to what extent cases filed *pro se* on behalf of children end up on published federal dockets. My search of 2018-2019 federal dockets identified only one minor’s case docket without a reference to counsel, whereas my research of court opinions from that period identified over eighty cases brought *pro se* on behalf of minors during that time. Lisa V. Martin, Table of 2018-2019 Federal Children’s Cases (unpublished) (on file with author). Searches for court opinions citing Rule 17(c) or counsel mandate precedent only identify *published* cases, and only those in which these issues were raised and considered by courts. Furthermore, legal doctrines that result in dismissal of children’s claims need not be raised in cases where neither courts nor parties perceive a concern. Nevertheless, published cases document the problem’s persistence and its enduring impact upon children’s claims.

<sup>81</sup> 43 C.J.S. *Infants* § 1 (noting “one cannot be both a minor and an adult; the terms are mutually exclusive”); 1 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN § 11:2 (rev. 2d ed. 2005) (“The age of majority is the age at which the disabilities of minority are removed and the young person legally becomes an adult, free of parental authority and control, and entitled to the full enjoyment of all civil rights and decision-making authority over his or her own life.”). Eighteen is the age of majority in 47 states. Legal Ages, 6 NATIONAL SURVEY OF STATE LAWS 563, 564–74 (Richard A. Leiter ed., 6th ed. 2008). The age of majority remains twenty-one in Mississippi and nineteen in Alabama and Nebraska. ALA. CODE § 26-1-1; MISS. CODE ANN. § 1-3-27; NEB. REV. STAT. § 43-2101. The traditional age of majority under common law was twenty-one. *See State v. Taylor*, 214 A.2d 362, 366–67 (Conn. Ct. Err. 1965); *Gastonia Pers. Corp. v. Rogers*, 172 S.E.2d 19 (N.C. 1970). Indeed, law is argued to construct the categories of childhood and adulthood to facilitate the distribution of power and resources between these classes. *See also Appell, supra* note 74, at 1144–45.

<sup>82</sup> Minority is “[t]he quality, state, or condition of being under legal age.” *Minority*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>83</sup> *See, e.g., City of New York v. Stringfellow’s of N.Y., Ltd.*, 684 N.Y.S.2d 544, 551 (1999) (describing “infancy” as a legal disability and noting that: “It is the policy of the law to look after the interests of infants, who are considered incapable of looking after their own affairs, to protect them from their own folly and improvidence, and to prevent adults from taking advantage of them.”).

<sup>84</sup> *See, e.g., Kelly v. United States*, 809 F. Supp. 2d 429, 434 (E.D.N.C. 2011) (declining to enforce a minor’s waiver of liability because minors lack legal capacity to contract under North Carolina law); *State ex rel. J. M. v. Taylor*, 276 S.E.2d 199, 203 (W. Va. 1981) (listing examples of the incapacities law imposes upon minors); 43 C.J.S. *Infants* §§ 220-221 (indicating that minors’ lack of legal capacity is a privilege extended for minors’ protection).

ized adults—usually parents and guardians—must take legal action on a child’s behalf.<sup>85</sup>

Federal procedural doctrine both accommodates and reproduces children’s legal dependence within civil litigation. Federal Rule of Civil Procedure 17 incorporates the longstanding principle that for most purposes, children are deemed to lack the legal capacity to pursue civil legal claims.<sup>86</sup> As a result, an adult generally must file civil claims on a child’s behalf and represent the child’s interests before the court.<sup>87</sup> Such an adult may be a child’s legal guardian or may be recognized or appointed as a child’s “next friend” or “guardian ad litem” by the court.<sup>88</sup> Often parents, close relatives, or others invested in a child perform this role voluntarily.<sup>89</sup> When a child lacks adults in her life who are able or willing to play this role, or whom the child is willing to involve, a court has the discretion to appoint an adult representative, permit the child to proceed alone, or dismiss the case.<sup>90</sup>

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<sup>85</sup> See, e.g., *Johnson v. Ford Motor Co.*, 707 F.2d 189, 193 (5th Cir. 1983) (noting that under Louisiana law, “[a]n unemancipated minor has no legal capacity; he may neither enforce nor relinquish rights and may only act through his parents, if both are alive and not legally separated or divorced, or through a court-designated tutor or tutor”); Constitutional doctrine and state guardianship law place children under parental control and discipline until they reach the age of majority. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (declaring that “the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children”); Note, *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1187–1193 (1980); Peter Mosanyi II, Comment, *A Survey of State Guardianship Statutes: One Concept, Many Applications*, 18 J. AM. ACAD. MATRIM. LAW. 253, 253–54 (2002); 1 HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 9.4 at 557 (practitioner’s ed., 2d ed. 1987).

<sup>86</sup> Capacity is a party’s “ability to sue or be sued,” which is determined by a party’s “satisfaction of a legal qualification, such as legal age or soundness of mind . . . .” *Capacity*, BLACK’S LAW DICTIONARY, *supra* note 13; MOORE ET AL., *supra* note 14, § 17.21[3][a] & n.16 (discussing the rule that minors generally lack the capacity to sue and required procedures in minors’ cases); 6A WRIGHT ET AL., *supra* note 14 § 1570; 2 THOMAS A. JACOBS, *CHILDREN AND THE LAW: RIGHTS AND OBLIGATIONS* § 11:13 (3d ed. 2018) (discussing the general rule that unemancipated minors generally lack the capacity to sue). In federal litigation, capacity is determined by the law of the state in which an individual is domiciled. FED. R. CIV. P. 17(b); see also *supra* note 81.

<sup>87</sup> FED. R. CIV. P. 17(c); 4 MOORE ET AL., *supra* note 14, § 17.21[3][a] & n.16; 6A WRIGHT ET AL., *supra* note 14, § 1570.

<sup>88</sup> Adult representatives’ roles and responsibilities within a child’s case are the same regardless of the designation accorded such adults by the courts. Martin, *supra* note 21, at 455–70 (*exploring court practices in alternately designating parents as guardians, next friends, and guardians ad litem as they seek to represent their children in civil cases*).

<sup>89</sup> *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 841 n.44 (1977) (“[C]hildren usually lack the capacity to make [decisions about their interests;] . . . their interest is ordinarily represented in litigation by parents or guardians.”); *Bank of United States v. Ritchie*, 33 U.S. (8 Pet.) 128, 144 (1834) (“[Infants] defend by guardian to be appointed by the court, who is usually the nearest relation not concerned, in point of interest, in the matter in question.”).

<sup>90</sup> FED. R. CIV. P. 17(c)(2) (“A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.”); see generally Martin, *supra* note 37 (evaluating jurisprudence permitting minors to represent their own interests in civil cases and

Unfortunately for children, the federal rule provides little further guidance as to how their cases should proceed.<sup>91</sup> This lack of specificity, coupled with an absence of interpretive guidance from the Supreme Court and federal rulemaking bodies, has resulted in a jurisprudence that is underdeveloped and inconsistent.<sup>92</sup>

Courts disagree both about the procedures an adult must complete to serve as a child's representative or whether any procedures are required at all. Courts also disagree about the specific designations that adult representatives should hold under Federal Rule 17(c).<sup>93</sup> For example, courts disagree about whether parents are (1) automatically entitled to serve as children's representatives as their guardians, (2) eligible to serve as "next friends" with court approval, or (3) ineligible to serve unless they file and the court grants a motion for appointment as guardian ad litem.<sup>94</sup> Moreover, in interpreting

dismissing cases for lack of an adult representative); Martin, *supra* note 21 at 451 (*analyzing court processes in approving adult representatives for child litigants*).

<sup>91</sup> The full text of FED. R. CIV. P. 17(c) provides:

(c) Minor or Incompetent Person.

(1) *With a Representative.* The following representatives may sue or defend on behalf of a minor or an incompetent person:

- (A) a general guardian;
- (B) a committee;
- (C) a conservator; or
- (D) a like fiduciary.

(2) *Without a Representative.* A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.

<sup>92</sup> See *Vroon v. Templin*, 278 F.2d 345, 347 (4th Cir. 1960) ("It may be said that Rule 17 is lacking in complete clarity."); *T.W. ex rel. Enk v. Brophy*, 124 F.3d 893, 897 (7th Cir. 1997) (noting "the almost complete lack of authority on the question" of who may serve as a next friend); *Gaddis v. United States*, 381 F.3d 444, 452 (5th Cir. 2004) ("[T]he Supreme Court has never construed, interpreted, or applied [Federal Rule of Civil Procedure 17(c)] in any opinion."); see also Martin, *supra* note 21, at 452 n.50 (*exploring the lack of discussion of the meaning and impact of Rule 17 by drafting committees*).

<sup>93</sup> Courts themselves recognize these incongruities. *Brophy*, 124 F.3d at 895 ("Just to add to the confusion, when the child does have a general representative, the representative will usually be designated as the child's 'next friend,' despite the wording of Rule 17(c) . . . ."); *Doe v. Carnival Corp.*, 37 F. Supp. 3d 1254, 1258 (S.D. Fla. 2012) ("There is a certain fluidity in the relationship between the provisions of Rule 17(c)(1) and Rule 17(c)(2), in the sense that one who qualifies as a 'general guardian' may also be appointed as a 'next friend' under Rule 17(c)(2)."). See generally Martin, *supra* note 21. See also *supra* note 88 and accompanying text.

<sup>94</sup> Compare *Fonseca v. Kaiser Permanente Med. Ctr. Roseville*, 222 F. Supp. 3d 850, 860 (E.D. Cal. 2016) ("Given Ms. Fonseca's status as Israel's mother and general guardian, she may litigate here on his behalf."), with *In re Murray*, 199 B.R. 165, 173 (Bankr. M.D.Tenn. 1996) ("[T]he debtor's mother may act as the debtor's next friend."); and *Mayall v. USA Water Polo, Inc.*, No. SACV 15-171-AG (RNBx), 2015 WL12907832, at \*3 (C.D. Cal. June 8, 2015) (dismissing case upon defendant's motion for failure of mother to seek appointment as guardian ad litem for child plaintiff and finding that guardian ad litem appointment is a prerequisite to a parent bringing a case on behalf of a child). See also Martin, *supra* note 21, at 455–70.

the relevant rules, some courts look to state law, and some do not.<sup>95</sup> Some federal courts have enacted local rules providing more detail regarding the relevant procedures, and some have not.<sup>96</sup> The range of approaches varies so widely that litigants must discern local court and even individual judge's practices to understand how to proceed.<sup>97</sup> This understanding is critical for children's access to justice: courts can and do dismiss children's claims outright when adult representatives fail to meet bespoke procedural requirements dictated by courts but not clearly mandated by procedural rules.<sup>98</sup>

For older children, the analysis is further befuddled by the tangled doctrine governing the circumstances under which they can represent their own interests.<sup>99</sup> Capacity doctrine historically has treated children as a homogeneous group that uniformly lacks legal agency.<sup>100</sup> Yet, bright line rules establishing the age of legal capacity at 18, 19, or 21 are outdated. They fail to reflect contemporary, nuanced understanding of adolescent developmental capabilities, the range of authority that laws now confer upon adolescents in a variety of circumstances, and the developmental and social benefits of ena-

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<sup>95</sup> Compare *Developmental Disabilities Advocacy Ctr., Inc. v. Melton*, 689 F.2d 281, 285–86 (1st Cir. 1982) (interpreting Rule 17(c)(1) according to New Hampshire law), with *Fallat v. Gouran*, 220 F.2d 325, 328 (3d Cir. 1955) (“Rule 17(c) . . . apparently gives a guardian the right to sue in the federal courts *irrespective* of his capacity under state law. From this it might be argued . . . that Rule 17(b) does not apply to guardians but that their capacity to sue in the federal courts now stands solely on the basis of federal law.”). See also Martin, *supra* note 21, at 452–53 (evaluating the range of court conclusions regarding whether procedural doctrine requires courts to look to state law to resolve questions regarding the suitability of adult representatives for child litigants).

<sup>96</sup> See, e.g., C. D. CAL. Local Civ. R. 17-1.1 (“When the appointment of a guardian ad litem is required by F.R.Civ.P. 17(c)(2), a relative or friend of the minor or incompetent person, the minor if age 14 or over, or other suitable person must file a Petition for the Appointment of a Guardian Ad Litem at the time of the minor’s or incompetent person’s first appearance.”). My research of federal district court local rules revealed that 19 out of 94 federal district courts have local rules addressing capacity. Lisa V. Martin, Table: Local District Court Capacity Rules 2021 (unpublished table) (on file with author).

<sup>97</sup> *Id.* See also Martin, *supra* note 21, at 454 (describing findings from a review of 87 cases brought on behalf of minors from 2015–2018, which revealed different practices across and sometimes within particular district courts regarding the required process and role for parents to serve as adult representatives in their children’s cases).

<sup>98</sup> See, e.g., *Mayall v. USA Water Polo, Inc.*, No. SACV 15-171-AG (RNBx), 2015 WL12907832, at \*3 (C.D. Cal. June 8, 2015) (dismissing case brought *pro se* for mother’s failure to seek appointment as guardian ad litem for child plaintiff). Because courts routinely apply the counsel mandate to dismiss cases brought by *pro se* adult representatives on behalf of child litigants, it is difficult to assess the frequency with which courts would dismiss cases exclusively on grounds that parents failed to meet prerequisites for appointment as next friends or guardians ad litem were counsel not a barrier. See, e.g., *Oliver v. Southcoast Med. Grp.*, No. CV411-115, 2011 WL 2600618, at \*1 n.5 (S.D. Ga. June 13, 2011) (applying counsel mandate to dismiss claim brought by father *pro se* and noting that the court has no need to assess the father’s ability to serve as the child’s representative because of his failure to retain counsel); Martin *supra* note 21 at 447.

<sup>99</sup> Martin, *supra* note 37 (analyzing court responses to claims filed by children).

<sup>100</sup> JACOBS, *supra* note 86, § 11:1 (“The law has historically treated childhood as a homogeneous status continuing from the age of birth to the age of majority.”).

bling adolescents to make independent decisions when they wish to do so.<sup>101</sup> Contemporary developmental science, for example, shows that by ages fifteen to seventeen, most children have capabilities of reasoning and comprehension equal to adults, and can exercise sound decision-making even in complex settings like courts, especially when supported by knowledgeable adults.<sup>102</sup> For these and other reasons, modern understandings of adolescence support courts treating older minors differently than younger children when they wish to advance their own claims.<sup>103</sup>

Rule 17(c) grants courts the discretion to adjudicate cases in any posture that protects child litigants' interests—including with children representing themselves.<sup>104</sup> Although courts have exercised this discretion in cases dating back decades to enable older minors to represent themselves, no unified standard has emerged to guide courts in making this determination.<sup>105</sup> Lacking such guidance, some courts apply bright line rules of legal capacity and dismiss claims filed by older minors outright, without making any contextualized assessment as to whether adult involvement is required to protect their interests or whether they could proceed alone.<sup>106</sup> Courts' failure to dis-

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<sup>101</sup> Martin, *supra* note 37 (arguing that procedural capacity doctrine should be modernized to better account for developments in scientific, social, and legal understandings of adolescence).

<sup>102</sup> Laurence Steinberg, Elizabeth Cauffman, Jennifer Woolard, Sandra Graham, & Marie Banich, *Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOL. 583, 586–87 (Oct. 2009) (summarizing studies).

<sup>103</sup> Martin, *supra* note 37; *see also* Huntington & Scott, *supra* note 12, at 1377–78, 1432–33 (arguing that to promote child well-being policies should enable adolescents to exercise agency while protecting them from serious harm and should generally withhold decision-making privileges from younger children because they lack the maturity to exercise agency safely and self-interestedly).

<sup>104</sup> This discretion stems from Rule 17(c)(2), which instructs courts to “appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.” FED. R. CIV. P. 17(c)(2). *See also* Gardner *ex rel.* Gardner v. Parson, 874 F.2d 131, 140 (3d Cir. 1989) (when confronted with an unrepresented child litigant “under Rule 17(c), a court may appoint a guardian, or it may decline to do so if the child’s interests may be protected in an alternative manner”); Wermers at 174 (advising that the “[a]ppointment of a guardian ad litem is considered to be discretionary under the Federal Rules, provided the District Court enters a finding that the interests of the minor are adequately protected in the event it does not make such appointment”); *Roberts v. Ohio Cas. Ins. Co.*, 256 F.2d 35, 39 (5th Cir. 1958) (holding that under Rule 17(c) courts may decline to appoint a guardian ad litem and permit a minor to advance a case alone if the court determines the minor is adequately protected).

<sup>105</sup> Martin, *supra* note 37 (evaluating cases in which courts have permitted children to advance their claims without adult representatives).

<sup>106</sup> *See, e.g.*, *Pierson v. Allison*, No. 1:08cv208-JMR, 2009 WL 3049220, at \*1 (S.D. Miss. Sept. 17, 2009) (dismissing eighteen or nineteen year old’s claim challenging conditions of confinement for lack of counsel and lack of an adult representative because he remained a legal minor in Mississippi until age twenty-one); *Ellis v. McDonalds Corp.*, No. 05-CV-3961NGG, 2005 WL 2155547 (E.D.N.Y. Sept. 7, 2005) (dismissing claim alleging sexual harassment in the workplace because of the plaintiff’s minority and lack of legal capacity); *Matos ex rel. Rosario v. N.Y.C. Bd. of Educ.*, No. 96 CIV. 4621(DLC), 1997 WL 375599, at \*1–2 (S.D.N.Y. July 7, 1997) (dismissing a minor’s case challenging permanent suspension from school for failure to appear by an adult representative and counsel).

tinguish between older and younger minors for capacity purposes stands at odds with developments in other laws, public policy, and child development science, all of which distinguish the decision making capabilities of older adolescents from other children.<sup>107</sup> The absence of clear doctrine tailored to adolescents results in the needless exclusion of cases in which adolescent claimants could capably represent their own interests.<sup>108</sup>

Although the complexities of capacity doctrine apply to all children's claims brought before the courts, they tend to contribute to dismissal only where children and their adult representatives lack counsel.<sup>109</sup> As with other aspects of procedure, the involvement of counsel helps child litigants and their adult representatives overcome capacity-related procedural barriers that contribute to the exclusion of unrepresented children's claims. Thus, the ambiguities within capacity doctrine pose a particular challenge to the ability of economically disadvantaged children to access the civil courts.

### B. Costs

In addition to limitations created by dependence, costs often foreclose civil remedies to economically disadvantaged children who seek legal relief in the federal courts. Like the dependence limitations, these costs result from special protections created for children within procedural doctrine, ostensibly for children's benefit.

The primary and most significant cost barrier for child litigants derives from the common law mandate that an adult representative for a child litigant must be represented by counsel.<sup>110</sup> Although adult litigants are entitled to advance their own claims *pro se*,<sup>111</sup> courts generally preclude adults from representing child litigants' interests for three primary reasons. First, because adult representatives advance another's (the child's) claim, rather than their own, courts conclude that proceeding without counsel constitutes the unauthorized practice of law.<sup>112</sup> Second, some courts conclude that the right of

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<sup>107</sup> See generally Martin, *supra* note 37 (arguing that capacity doctrines continued reliance on the bright line age of majority is outdated and inappropriate).

<sup>108</sup> Martin, *supra* note 37 (evaluating cases in which minors' claims were dismissed for lack of an adult representative and reasons why minors might appear before courts without an adult).

<sup>109</sup> *Id.* at 22 (finding courts most likely to permit minors to represent their own interests where minors have counsel); Martin *supra* note 21 at 447 (noting it is difficult to assess how closely courts would scrutinize the propriety of *pro se* adult representatives because courts often apply the counsel mandate to dismiss such cases).

<sup>110</sup> *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986). The *Meeker* opinion has been cited hundreds of times by federal courts applying the counsel mandate that *Meeker* established. See Martin, *supra* note 37, at 834 n.19, 840 n.54 (noting the author's documentation of over five hundred federal cases imposing the counsel mandate).

<sup>111</sup> 28 U.S.C. § 1654 (2012) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.").

<sup>112</sup> See, e.g., *Elustra v. Mineo*, 595 F.3d 699, 705 (7th Cir. 2010) ("One consequence of the normal rule is that a next friend may not, without the assistance of counsel, bring suit on

self-representation generally guaranteed to federal litigants does not extend to children because children lack the capacity for autonomous choice that the right is intended to respect.<sup>113</sup> Conversely, some courts hold that the decision to retain counsel is a “right” that belongs exclusively to a child and cannot be waived by an adult representative on a child’s behalf.<sup>114</sup> Finally, courts express concern that children’s interests are insufficiently protected when advanced by “unskilled, if caring, parents.”<sup>115</sup>

The government provides virtually no support to enable adults to meet this “counsel mandate” on behalf of child litigants. There is no constitutional right to appointed, government-funded counsel in civil litigation for children or adults.<sup>116</sup> At best, federal courts have the option to request counsel to accept a referral for pro bono representation.<sup>117</sup> Without well-established means to pay or to compel paid or unpaid service, courts understandably evidence strong reluctance to exercise this authority.<sup>118</sup> My research identified over 80 cases between 2018–2019 brought by adults *pro se* on behalf of children in which courts invoked the counsel mandate. I did

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behalf of a minor party.”); *see also* Martin, *supra* note 37, at 841–45 (analyzing the unauthorized practice of law rationale for the counsel mandate).

<sup>113</sup> *See, e.g.,* Cheung v. Youth Orchestra Found. of Buffalo, Inc., 906 F.2d 59, 61 (2d Cir. 1990) (“The choice to appear *pro se* is not a true choice for minors, who under state law, cannot determine their own legal actions. There is thus no individual choice to proceed *pro se* for courts to respect, and the sole policy at stake concerns the exclusion of non-licensed persons to appear as attorneys on behalf of others.”).

<sup>114</sup> Osei-Afriyie *ex rel.* Osei-Afriyie v. Med. College of Pa., 937 F.2d 876, 883 (3d Cir. 1991) (“The right to counsel belongs to the children, and . . . the parent cannot waive this right.”).

<sup>115</sup> Devine v. Indian River Cnty. Sch. Bd., 121 F.3d 576, 582 (11th Cir. 1997), *abrogated by* Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 550 U.S. 516 (2007).

<sup>116</sup> *See* Lassiter v. Dep’t Soc. Servs., 452 U.S. 18, 25 (1981) (holding the constitutional right to appointment of counsel applies only where an indigent litigant’s physical liberty is at risk); Turner v. Rogers, 564 U.S. 431, 444–48 (2011) (the constitutional right to counsel for indigent litigants does not apply categorically in civil contempt cases that threaten incarceration; its availability is a case-specific determination).

<sup>117</sup> 28 U.S.C. § 1915(e)(1) (2012) (“The court may request an attorney to represent any person unable to afford counsel.”).

<sup>118</sup> *See, e.g.,* A.L. v. Holliday, No. 1:18CV76-LG-RHW, 2018 U.S. Dist. LEXIS 163785 (S.D. Miss. Sept. 25, 2018)(finding father presented no exceptional circumstances warranting appointment of counsel for claims on behalf of child); McCauley v. Centenary Coll. of La., No. 15-2723, 2019 WL 3948832 (W.D. La. June 25, 2019) (denying grandmother’s motion for appointment of counsel to represent children’s claims). *See also* Martin, *supra* note 37, at 855–56 n.132 (collecting cases in which courts imposed the counsel mandate and declined parents’ requests for appointment of counsel). Some courts do appoint counsel for children, but my research has uncovered only a few examples of courts doing so. *See, e.g.,* Crozier for A.C. v. Westside Cmty. Sch. Dist., 973 F.3d 882, 891–92 (8th Cir. 2020) (reversing dismissal of complaint brought by parents on behalf of minor asserting violation of her first amendment rights and remanding and directing district court to request counsel for plaintiffs); Woodburn v. Sec’y of Fla., No. 09-20981, 2010 U.S. Dist. LEXIS 151816 (S.D. Fla. 2010)(appointing counsel for indigent disabled child plaintiff); Brown v. Ortho Diagnostic Sys., Inc., 868 F. Supp. 168, 171–72 (E.D. Va. 1994) (appointing counsel for minor plaintiff to enable claim to proceed); *cf.* Gallo v. United States, 499 F.Supp.2d 697, 698–99 (E.D. Va. 2007)(detailing court efforts to preserve a child’s claim, which would be time-barred if dismissed, including by appointing a guardian ad litem to review the child’s medical records and report to the court on the viability of the claim).

not identify any cases during this time period in which courts appointed counsel for such adults.<sup>119</sup> Thus, in practice, to advance claims on behalf of child litigants, adult representatives must themselves be lawyers, retain and pay private counsel with their own funds, find a lawyer who will accept a contingency fee, secure the lucky lottery ticket of free legal services, or face dismissal of the case.<sup>120</sup>

Unsurprisingly, courts dismiss numerous children's claims each year purely for want of counsel.<sup>121</sup> In this way, the imposition of the counsel mandate operates as a tax on children's civil litigation.<sup>122</sup> This tax not only disadvantages children as compared to adults, but also creates two classes of child litigants: those who can pay the tax and thus have meaningful legal rights and those who cannot.

The shrinking availability of class action litigation amplifies the exclusionary effect of the counsel mandate on children's claims, and particularly on poor children's claims. During the past fifty years, the availability of class action litigation has been compromised by judicial and legislative restrictions on the device, Congressional prohibitions against federally funded legal aid lawyers undertaking class action cases, and the proliferation of arbitration clauses within consumer and other contracts.<sup>123</sup> The unavailability of this litigation mechanism increases the likelihood that children's claims

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<sup>119</sup> Lisa V. Martin, Table of 2018–2019 Federal Children's Cases (unpublished) (on file with author).

<sup>120</sup> *Hootstein v. Amherst-Pelham Reg'l Sch. Comm.*, 361 F. Supp. 3d 94, 102 (D. Mass. 2019) (dismissing minor's claims out of deference to the counsel mandate precedent but noting "the potential unfairness of the rule is evident to the court because it prevents minors—who cannot bring their own *pro se* actions—from vindicating their rights in federal court unless they are represented by counsel. As a result, children are denied access to our legal system if their guardians are not attorneys, cannot afford counsel, or cannot find an attorney willing to take a case on contingency."). Federal courts have established only one doctrinal exception to the counsel mandate, holding it does not apply in Supplemental Security Income cases because in such matters parents' and children's interests are aligned, claims are by eligibility limited to people living in poverty, and parents are permitted to advance the claims *pro se* at the agency level. *See, e.g., Machadio v. Apfel*, 276 F.3d 103, 106–08 (2d Cir. 2002); Martin, *supra* note 37, at 843–45 (evaluating the SSI exception to the counsel mandate and limited other individual circumstances where courts have permitted a representative to advance another's claim without counsel).

<sup>121</sup> My research of federal cases involving children's claims from 2018–2019 identified over 80 cases in which courts applied the mandate. Lisa V. Martin, Table of 2018–2019 Federal Children's Cases (unpublished) (on file with author); *see also* Martin, *supra* note 37, at 839 n.45 (describing research identifying over 500 cases applying the counsel mandate).

<sup>122</sup> Hammond, *supra* note 32 at 1504 (arguing that applications for *in forma pauperis* status that require extensive paperwork function as a tax on litigation by poor people).

<sup>123</sup> Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 59–60 (2017) (summarizing the judicial and legislative efforts to restrict the availability of class action litigation); Andrew Hammond, *Poverty Lawyering in the States, in HOLES IN THE SAFETY NET: FEDERALISM AND POVERTY* 215, 222–23 (Ezra Rosser ed., 2019) (describing Congressional restrictions precluding lawyers funded by the Legal Services Corporation from bringing class actions); Gilles, *supra* note 71; Laura K. Abel & David S. Udell, *If You Gag the Lawyers, Do You Choke the Courts?: Some Implications for Judges When Funding Restrictions Curb Advocacy by Lawyers on Behalf of the Poor*, 29 FORDHAM URB. L. J. 873, 873–75 (2002)

must be advanced individually and therefore with individually-funded counsel. Class action litigation facilitates equity and access to justice for low-income individuals by enabling collective action to remedy harms caused by powerful and well-financed private business or government institutions.<sup>124</sup> Collective action is particularly critical in this context because the aggregation of small value claims makes cases economically viable for lawyers, distributes time, cost, resource burdens across class members, and reduces the fear of retaliation that can otherwise preclude low-income litigants from pursuing individual legal claims.<sup>125</sup> Indeed, significant legal advances for children have resulted from class action litigation, including mandates to racially integrate public schools,<sup>126</sup> reform foster care systems,<sup>127</sup> improve conditions of juvenile detention,<sup>128</sup> define disabled children's right to a free appropriate public education,<sup>129</sup> and clarify minors' authority to engage in reproductive decision-making.<sup>130</sup> Some children's cases continue to break through the present barriers to the class action remedy, but narrowing this mechanism means that the most viable path to civil justice for children today often requires the filing of individual claims: for children, this also requires individually funding the costs of counsel.<sup>131</sup>

In addition to costs of counsel, courts may direct children or their parents to pay the costs of a court-appointed representative. Unlike adults with a pre-existing relationship with a child, adults who serve as a child's litigation

<sup>124</sup> 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE CIVIL § 1754 (3d ed. 2005).

<sup>125</sup> Gilles, *supra* note 71, at 1546–47 (evaluating the particular importance of class actions to remedy harms experienced by the economically vulnerable); Laura K. Abel & David S. Udell, *If You Gag the Lawyers, Do You Choke the Courts? Some Implications for Judges When Funding Restrictions Curb Advocacy by Lawyers on Behalf of the Poor*, 29 FORDHAM URB. L.J. 873 (2002) (restrictions against class action litigation increase *pro se* representation and reduce concerns about retaliation that deter individual claims).

<sup>126</sup> *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>127</sup> *See, e.g.*, *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997). *See generally* David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777 (2016) (collecting class action cases that have resulted in judicial supervision of dozens of state child welfare systems).

<sup>128</sup> *See, e.g.*, *Alexander S. ex rel. Bowers v. Boyd*, 876 F.Supp. 773 (D.S.C. 1995). *See generally* Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers*, 32 U.S.F. L. REV. 675 (1998).

<sup>129</sup> *See, e.g.*, *Battle v. Pennsylvania*, 629 F.2d 269, 280 (3d Cir. 1980). *See generally* Mark C. Weber, *IDEA Class Actions After Wal-Mart v. Dukes*, 45 U. TOL. L. REV. 471, 475–77 (2014) (evaluating the historical use of class actions for litigation under the Individuals with Disabilities in Education Act).

<sup>130</sup> *See, e.g.*, *Baird v. Bellotti*, 393 F. Supp. 847, 850 n.5 (D. Mass. 1975), *vacated*, 428 U.S. 132 (1976).

<sup>131</sup> *See* Garza v. Hargan, 304 F. Supp. 3d 145 (D.D.C. 2018), *aff'd in part, vacated in part, remanded sub nom.* J.D. v. Azar, 925 F.3d 1291 (D.C. Cir. 2019) (certifying class of pregnant unaccompanied immigrant minors in federal custody); *C.B. v. Walnut Grove Corr. Auth.*, Consent Decree, Civ. No. 10-663, S.D. Miss., Feb. 3, 2012 (class action resulting in the reform of the juvenile detention system in Mississippi); *Class Actions, CHILD'S RIGHTS*, <https://www.childrensrights.org/our-campaigns/class-actions/>, archived at <https://perma.cc/6876-JXHJ>. But many children's cases do not overcome the restrictions. *See, e.g.*, Weber, *supra* note 129 (collecting cases in which classes of students were decertified or not certified in actions asserting rights under the IDEA).

representative solely by virtue of court appointment, often as guardian ad litem, typically receive payment for their services.<sup>132</sup> The doctrine is unclear about who should pay for such costs. Courts typically impose them on the child, the non-prevailing party, or even the parents of child litigants.<sup>133</sup> Because the decision of whether guardian ad litem appointment will be required in a particular case is left to judicial discretion without clear governing doctrine, those advancing claims on behalf of children face the risk of bearing not only the costs of attorney's fees, but potentially guardian ad litem fees as well.<sup>134</sup>

### C. Time

Beyond dependence and cost barriers, child litigants confront time barriers that uniquely reduce their access to civil justice and hollow out their legal rights.<sup>135</sup> These time barriers arise when statutes of limitations fail to toll during childhood.<sup>136</sup> When statutes of limitations run during minority, children must retain counsel and reach adulthood before their claims expire, or forever lose the opportunity to pursue their claims. In such cases, children are not only denied access to a legal remedy when they do not retain counsel, but are permanently denied relief when they do not retain counsel in time.

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<sup>132</sup> See generally Martin, *supra* note 37, at 473–74.

<sup>133</sup> See, e.g., Gaddis v. United States, 381 F.3d 444, 454–55 (5th Cir. 2004) (the court has the discretion to tax guardian ad litem fees as costs to the non-prevailing party or to designate guardian ad litem fees as expenses to be paid out of any fees recovered for the minor party); Bhatia v. Corrigan, No. C 07-2054 CW, 2007 WL 1455908, at \*2 (N.D. Cal. May 16, 2007) (directing the payment of guardian ad litem fees “either out of any damages award or by Jane Doe, through her father”). One court dismissed an action for a plaintiff’s failure to pay or find a solution to cover the costs of an attorney guardian ad litem for a minor defendant. United States v. Simmons, No. 4:13-CV-066-A, 2013 WL 5873366, at \*4–7 (N.D. Tex. Oct. 31, 2013).

<sup>134</sup> Some courts seek to avoid guardian ad litem appointment to eliminate such costs. See United States v. Noble, 269 F. Supp. 814, 816 (E.D.N.Y. 1967) (“Every effort should be made by the District Courts of the United States to reduce costs by avoiding the appointment of independent guardians unless there is a substantial probability of a conflict of interest and need for protection.”).

<sup>135</sup> “A right to pursue a remedy, without the ability to pursue it in fact, is an empty right.” LAHAV, *supra* note 26, at 128.

<sup>136</sup> Although the general, historic rule is that statutes of limitation toll for minority, exceptions abound, especially in the context of tort claims. See 54 C.J.S. *Limitations of Actions* § 161 (describing the general rule and noting that unless excepted, minors are treated like adults). The Federal Tort Claims Act stands as one notable exception to this general rule. See, e.g., Booth v. United States, 914 F.3d 1199, 1207 (9th Cir. 2019) (affirming the constitutionality of two-year statute of limitations for minors’ claims under the Federal Tort Claims Act). By contrast, claims asserting violations of children’s civil rights under 42 U.S.C. § 1983 may toll for minority where the statute borrows state statutes of limitations that toll. *Booth*, 914 F.3d at 1205 n.5.

Federal doctrine affirms the constitutionality of federal statutes of limitations expiring during minority,<sup>137</sup> whereas state law is mixed: some states mandate that limitations periods toll to preserve minors' state constitutional rights to access the courts,<sup>138</sup> whereas others do not.<sup>139</sup>

In permitting limitations periods to expire during minority, courts presume that parents will act on their children's legal interests.<sup>140</sup> That is, courts infer that parents should be aware of harms suffered by their children and that parents can be relied upon to take timely action to seek legal redress for those harms during limitations periods.<sup>141</sup> Consequently, such courts conclude that parents' failure to bring claims on behalf of children within limitations periods should be understood as appropriate exercises of parental authority, and courts' deference to that authority does not deprive children's rights.<sup>142</sup> Yet, this analysis completely overlooks the unique cost barriers courts impose upon children's claims only during their minority. The mandate that parents retain counsel with private funds to advance children's

<sup>137</sup> *Vance v. Vance*, 108 U.S. 514, 521 (1883) ("The exemptions from the operation of statutes of limitations, usually accorded to infants . . . do not rest upon any general doctrine of the law . . . but in every instance upon express language in those statutes giving them time, after majority . . . to assert their rights."); *Vogel v. Linde*, 23 F.3d 78, 80 (4th Cir. 1994) ("The blackletter rule . . . is that a statute of limitations runs against all persons, even those under a disability, unless the statute expressly provides otherwise."). Notably, the Federal Tort Claims Act does not toll for minority. *See, e.g., Booth*, 914 F.3d at \_ (affirming the constitutionality of two-year statute of limitations for minors' claims under the Federal Tort Claims Act). By contrast, claims asserting violations of children's civil rights under 42 U.S.C. § 1983 may toll for minority where the statute borrows state statutes of limitations that toll. *Booth*, 914 F.3d at 1205 n.5.

<sup>138</sup> *See, e.g., Barrio v. San Manuel Div. Hosp.*, 692 P.2d 280, 286 (Ariz. 1984) (en banc) (failing to toll statutes of limitations unlawfully deprives minors of constitutional rights; minors are wholly dependent upon others, whom they cannot control, to act on those rights); *Piselli v. 75th St. Med.*, 808 A.2d 508, 523–24 (Md. 2002); *Mominee v. Scherbarth*, 503 N.E.2d 717, 722 (Ohio 1986) (applying limitations to minors violates rights to due process and right to a remedy); *Kordus v. Montes*, 337 P.3d 1138, 1141–42, 1148 (Wyo. 2014) (applying a statute of limitations to minors deprives them of their fundamental right to access the courts). Many states have codified minority tolling of statutes of limitations. *See, e.g., CAL. CIV. PROC. CODE* § 352(a).

<sup>139</sup> *See, e.g., Smith v. Cobb Cnty.-Kennestone Hosp. Auth.*, 423 S.E.2d 235, 239–40 (Ga. 1992) (the running and possible expiration of a statute of limitations during minority does not deprive children of constitutional rights; parents can be relied upon to advance claims); *Harfinger v. Martin*, 754 N.E.2d 63, 70–71 (Mass. 2001) (expiration of statute of repose during minority does not violate due process guarantees); *Willis v. Mullett*, 561 S.E.2d 705, 709–711 (Va. 2002) (same).

<sup>140</sup> *Id.*; *see also United States v. Alvarez*, 710 F.3d 565, 568 n.10 (5th Cir. 2013) ("The federal courts have consistently rejected requests to create tolling exceptions for minors, reasoning that in the absence of an express legislative directive to the contrary, parents and guardians are assumed to be adequate surrogates.").

<sup>141</sup> *See supra* note 139; *Alvarez*, 710 F.3d at 568.

<sup>142</sup> *See supra* note 141. I have argued that parents, as opposed to other adults, should have preference in bringing children's claims and that parents' litigation decisions should be viewed as an extension of parental authority. *See generally* *Martin, supra* note 37. I also have argued that a parent's failure to pursue a child's legal claims in the face of the counsel mandate cannot be considered a true "choice" for low and middle income parents. *Martin, supra* note 37 at 881.

claims may preclude parents who cannot afford counsel from pursuing children's litigation no matter how worthy parents believe the claims to be.<sup>143</sup>

Taken together, these barriers of dependence, cost, and time present substantial obstacles that particularly preclude poor children from accessing the civil courts.

### III. FOUNDATIONS OF EXCLUSIONIST POLICIES

The laws and policies creating the dependence, cost, and time barriers that exclude children from courts appear disparate, but they can be understood to share five animating foundations. These include ideologies valorizing autonomy, locating sole responsibility for care and dependence with the family, and understanding dispute resolution as the core function of courts; judicial practices that turn to formalism in the face of uncertainty and risk; and apparent biases about the underlying motivations for and value of children's claims. Because courts often discuss their reasons for dismissal only briefly, this Part both explores explanations within court opinions and presents hypotheses about potential unstated motivations.

#### A. *Autonomy as the Foundation of Citizenship*

First, the policies and practices that exclude children from courts often privilege autonomy over virtually all other values and interests. Because children fail to fit the autonomous ideal, their claims are devalued and delayed until adulthood.<sup>144</sup>

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<sup>143</sup> See *supra* Section I.B.; see also Sonja Kerr, Winkelman: *Pro Se* Parents of Children with Disabilities in the Courts (or Not?), 26 ALASKA L. REV. 271, 285 (2009) (noting that “without the right to represent their children in regard to substantive rights, parents may not have the ability or resources to protect those rights. As a result, the children’s underlying claims may be permanently lost”). This analysis also disregards additional practical realities that may prevent a parent from taking action within the limitations period, at no fault of the child, including: lack of knowledge of available remedies or the legal system, lack of time, motivation, or other resources, or lack of involvement in the child’s life. See, e.g., Sax v. Votteler, 648 S.W.2d 661, 667 (Tex. 1983); cases cited in *supra* note 140.

<sup>144</sup> Kulynych, *supra* note 61, at 233–35 (under liberal tradition, eligibility for citizenship depends upon the capacity to consent, and thus excludes children until they acquire that capacity); Hamilton, *supra* note 12, at 1076–77 n.70 (quoting John Stuart Mill, *On Liberty*, in *THE UTILITARIANS* 484 (1961)) (identifying this exclusion and noting that Mill declared that children had no right to liberty at all). Relatedly, treating children differently and more paternalistically than adults is reasoned to be morally consistent with Kant’s freedom-centered ethical and political theory because children have not yet developed a will and authority that warrants deference. Tamar Schapiro, *Childhood and Personhood*, 45 ARIZ. L. REV. 575, 578 (2003) (reconciling children’s unequal treatment under Kantian ethics—which center the categorical imperative that a person’s will is not to be overcome and hold that the state’s one legitimate purpose is ensure individuals’ freedom from oppression by others—by understanding children as “emerging persons” who lack a will that must be respected); see also Tamar Schapiro, *What Is a Child?*, 109 ETHICS 715 (1999) [hereinafter Schapiro, *What Is a Child?*]. Disability justice scholars similarly have mapped the implications of liberal conceptions of autonomy for the treatment and status of disabled adults. See, e.g., Ruth Colker, *Anti-Subordination Above*

This valorization of autonomy is rooted in liberal political theory, which, in the United States, has produced widespread commitment to the value of individual liberty in its negative sense, that is, freedom from interference by others.<sup>145</sup> Liberal theory presumes that democratic citizens are capable, autonomous actors, that the legitimacy of the state derives from citizens' consent to be governed, and that the state's core obligation to citizens is preserving individual liberty.<sup>146</sup> As children are unable to consent and operate autonomously, liberal democracy typically restricts power and participation to adults.<sup>147</sup> Importantly, courts offer a rare exception to the age-based restrictions of many democratic institutions.<sup>148</sup> In theory, courts accommodate children's diminished capacity by creating a role for supportive adults.<sup>149</sup> Yet, in practice, the prevailing influence of liberal political ideology at least in part explains several trends that contribute to the exclusion of children's civil claims.

First, the centering of the autonomous adult as the standard citizen explains the underdevelopment of procedural doctrine relating to child litigants.<sup>150</sup> Procedural rules and practices relating to capacity can develop in inconsistent and confusing ways because child litigants are an exception to the general rules of civil procedure and thus warrant exceptional and ad hoc approaches. Second, practices excluding child litigants on apparently for-

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*All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415 (2007); Katherine L. Moore, *Disabled Autonomy*, 22 J. HEALTH CARE L. & POL'Y 245 (2020).

<sup>145</sup> See generally Hamilton, *supra* note 12, at 1068–76 n.26 (reviewing classical and modern liberal theorists, identifying individual liberty as a core value of both, and arguing that negative liberty (as opposed to positive or republican) is the most widely acceptable conception, and citing Stephen Macedo's observation that "[i]t has long been a truism that the American political tradition is basically a liberal tradition" and that this tradition is the 'basis' of th[e] country's 'national identity.'") (quoting STEPHEN MACEDO, *LIBERAL VIRTUES* 5–6 (1990) (internal citations omitted)). By contrast, the freedom to participate in democratic decision-making can be understood as a positive liberty component of autonomy, as it enables avoidance of domination. See, e.g., Etienne C. Toussaint, *Of American Fragility: Public Rituals, Human Rights, and the End of the Invisible Man*, 52 COLUM. HUM. RTS. L. REV. 826, 869–70 (2021) (citing ISALAH BERLIN AND THE POLITICS OF FREEDOM: "TWO CONCEPTS OF LIBERTY" 50 YEARS LATER 73–114 (Bruce Baum & Gloria Anzaldúa eds., 1981); Danielle Allen, *Political Equality and Empowering Economies—Toward a New Political Economy*, in *POLITICAL EQUALITY AS JUSTICE* 1, 6 (Jan. 9, 2018) (unpublished manuscript)).

<sup>146</sup> MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH* 19–22 (2004); Appell, *supra* note 74, at 1146–47; Hamilton, *supra* note 12, at 1068–76, 1068 n.26.

<sup>147</sup> Appell, *supra* note 74, at 1149 ("[A] legal system that takes the autonomous subject as its norm, and as the site of freedom, does not directly account for those who are not autonomous."); Kulynych, *supra* note 61, at 232 ("The construction of the identity of the public in contemporary democratic theory and in everyday political practice is built upon the exclusion of children."); cf. Schapiro, *What Is a Child?*, *supra* note 144, at 718 (exploring the meaning of adult and child "as status concepts" by "clarifying the guiding notions of 'developed' and 'undeveloped' agency").

<sup>148</sup> Appell, *supra* note 74, at 1148 ("Children do not vote; they are not commentators on television; they generally do not serve in political office or on school boards; the law's default restricts children in the labor market; and if they have money, it is likely that adults control it.").

<sup>149</sup> See *supra* Section II.A.

<sup>150</sup> See *supra* note 92.

malistic grounds evince a sense that courts are not for children.<sup>151</sup> Third, the valorization of autonomy in a negative liberty sense explains the jurisprudence that prioritizes preservation of a child's right to choose to retain counsel at a future date over ensuring a child's present right of access to the courts.<sup>152</sup> In reality, the "choice" preserved is a false one, as a poor child is unlikely to be better positioned to secure counsel when they turn eighteen than their parents are during the child's minority.<sup>153</sup> Thus, preserving "choice" simply divests the courts of responsibility for remedying the need for counsel and ensuring court access for poor children.<sup>154</sup> Each of these trends is consistent with a view that children's claims can wait until adulthood, as they are not serious, pressing, or worthy of sustained judicial attention.<sup>155</sup>

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<sup>151</sup> See, e.g., *Francine v. Dallas Indep. Sch. Dist.*, No. Civ.A. 3:02-CV-1853, 2003 WL 21501838 (N.D. Tex. June 25, 2003) (dismissing IDEA claim mother filed on behalf of child because mother could not proceed as next friend without counsel and the 13-year-old child lacked capacity to sue and "to employ an attorney or anyone else to watch over her interests"); *Burr v. Chitty*, No. 3:04-CV-2562-G, 2005 WL 264943, at \*1–\*2 (N.D. Tex. Feb. 3, 2005) (questioning whether parent, as representative and not party in the case, even has the power to request an attorney on behalf of a child litigant).

<sup>152</sup> *Osei-Afriyie ex rel. Osei-Afriyie v. Med. College of Pa.*, 937 F.2d 876, 883 (3d Cir. 1991) ("The right to counsel belongs to the children, and . . . the parent cannot waive this right."); *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990) ("The choice to appear *pro se* is not a true choice for minors, who under state law, cannot determine their own legal actions. There is thus no individual choice to proceed *pro se* for courts to respect, and the sole policy at stake concerns the exclusion of non-licensed persons to appear as attorneys on behalf of others."). Zohra Ahmed identifies a similar prioritization of autonomy over equity in contemporary Supreme Court jurisprudence governing the Sixth Amendment right to counsel in criminal proceedings. *The Right to Counsel in a Neoliberal Age*, 69 UCLA L. REV. 442 (2022) (identifying a shift in Court priorities from mitigating vulnerability and ensuring fairness to protecting defendant choice in how cases are presented and tracing that shift to the rise in neoliberal ideology and its emphasis on creating choice over ensuring equality of opportunity). See also Grewal & Purdy, 77 L. CONT. PROB. 1, 13 (2015) (identifying the centering of personal autonomy and the promotion of the unfettered consumer-citizen as common features of neoliberalism).

<sup>153</sup> This reality is rooted in the lack of intergenerational economic mobility in the United States, the time it takes to accumulate wealth, and the poor educational opportunities and outcomes for low-income children, which hinder their ability to pursue higher education and secure well-paying jobs. See Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213, 247 (2017) (collecting studies identifying the harms to poor children resulting from policies that burden families with the costs of their upbringing, including insufficient resources to meet their needs, inadequate education, and a lack of economic mobility in adulthood); ROBERT L. WAGMILLER, JR. & ROBERT M. ADELMAN, NAT'L CTR. CHILD. IN POVERTY, CHILDHOOD AND INTERGENERATIONAL POVERTY: THE LONG-TERM CONSEQUENCES OF GROWING UP POOR 1 (Nov. 2009), [https://www.nccp.org/wp-content/uploads/2020/05/text\\_909.pdf](https://www.nccp.org/wp-content/uploads/2020/05/text_909.pdf), archived at <https://perma.cc/2FNS-ATGU> (finding that "individuals who grow up in poor families are much more likely to be poor in early adulthood").

<sup>154</sup> Ahmed, *supra* note 152, at 6 (arguing that, in the context of the Sixth Amendment right to counsel, the prioritization of "[c]hoice has served as a rhetorical tool to justify the abdication of government responsibility for meaningful due process in court and welfare in society writ large," and noting that attention to choice as an abstract priority erases differences in the kinds of choices faced by different groups).

<sup>155</sup> See, e.g., Robert E Goodin & Diane Gibson, *Rights, Young and Old*, 17 OXFORD J. LEG. STUD. 185, 195 (1997) ("We . . . know what children's interests are without their making any choices because they will be making lots of choices in the future and anything that pre-

B. *Dependence as the Responsibility of the Family*

Second, legal doctrines and practices that exclude children from courts evidence the liberal political tendency to place responsibility for dependence with the family.<sup>156</sup> That is, where an individual is unable to function as the autonomous ideal citizen, the family—not the state—must provide whatever care and resources are required to meet the individual’s needs.<sup>157</sup> This general orientation has deep roots in constitutional law. Parents’ liberty interests in the custody, care, and control of their children enjoy long-standing constitutional protection.<sup>158</sup> In accordance with liberal traditions, parents’ constitutional interests are negative liberties that protect against unwarranted state interference, not entitlements to positive supports from the state.<sup>159</sup> Thus, both liberal theory and the constitutional parents’ rights framework encourage courts to look to parents to provide required support for children’s litigation.

This orientation is perhaps most evident in courts’ view of who bears responsibility for children’s litigation costs.<sup>160</sup> Courts’ typically mandate that parents be represented by counsel to advance children’s claims and their refusal to appoint counsel for such parents demonstrates courts’ perception that the financial consequences of children’s dependence—here, attorney’s fees—are the responsibility of private families.<sup>161</sup>

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serves that future choice for them is in their . . . interests.”); Harry Brighouse, *How Should Children Be Heard?*, 45 ARIZ. L. REV. 691, 697 (2003).

<sup>156</sup> FINEMAN, *supra* note 146, at 36–37 (arguing that “inevitable” (or developmental) dependency and the “derivative,” or caretaking, dependency it generates are understood to be private concerns, which the family—not the state or the market—has the responsibility to address).

<sup>157</sup> *Id.*; Eichner, *supra* note 153, at 214 (“Today . . . our law and public policy are premised on the view that families should shoulder their own financial weight.”); Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 L. & CONTEMP. PROBS. 4 25, 26–27 (2014) (arguing that three core neoliberal ideals permeate contemporary constitutional family law: “negative liberty, market distribution, and the minimal state”).

<sup>158</sup> See *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (plurality opinion) (recognizing parents’ fundamental right to “make decisions concerning the care, custody, and control of their children” as “perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court”); see also *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”).

<sup>159</sup> CLARE HUNTINGTON, *FAILURE TO FLOURISH* 100–02 (2014) (the Constitution’s enshrinement of negative liberties and failure to guarantee positive supports promotes social policies that prioritize independence and take a reactive approach to family needs); MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS* 17–26 (2010) (exploring how liberal theory, as articulated by John Rawls, promotes a vision of “families as flourishing autonomously” without state intervention).

<sup>160</sup> This orientation also emerges when courts direct parents to pay for costs incurred by guardians ad litem appointed to represent children’s interests in a case.

<sup>161</sup> *Cf.* Ahmed, *supra* note 152, at 7 (arguing that the Supreme Court’s contemporary prioritization of defendant choice over equality in shaping the right to counsel “has shifted responsibility from the state to the individual to be self-sufficient in court.”).

Notably, this orientation emerges in spite of established federal procedural doctrine that explicitly assigns courts the responsibility to protect child litigants' interests.<sup>162</sup> Courts' common understanding of this charge adheres to liberal notions of the restrained state: courts review the adequacy of measures taken by the family to protect the child litigant and dismisses cases when such measures fall short.<sup>163</sup> Courts rarely express qualms about imposing counsel costs, knowing that at least some children are unlikely to be able to pay and thus dismissal is a likely result, which demonstrates the extent of the entrenchment of the self-reliance ideology.<sup>164</sup>

By contrast, this orientation appears to have far less influence over courts' view of who should exercise responsibility for children's litigation-related decision-making. Indeed, courts demonstrate little consensus regarding whether parents should have priority in serving as the adult representatives in their children's cases.<sup>165</sup> Instead, in this context, courts tend to emphasize their authority to supervise children's litigation and demonstrate a range of inclinations to defer to parents as children's representatives.<sup>166</sup> Courts even dismiss claims brought by parents, in part for parents' failure to demonstrate their qualifications to serve or to satisfy bespoke procedural prerequisites.<sup>167</sup>

### C. *Dispute Resolution as the Core Function of the Courts*

Third, the ready exclusion of children from courts in response to procedural deficiencies manifests a view that courts' core function is dispute resolution, rather than the development of the law, the vindication of norms, or

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<sup>162</sup> See *supra* notes 22-23.

<sup>163</sup> See *supra* Sections I.A.–B.

<sup>164</sup> The rare courts that express qualms about the systemic impact of the counsel mandate often impose it anyway. See, e.g., *Tindall v. Poultney High Sch. Dist.*, 414 F.3d 281, 286 (2d Cir. 2005) (opining that the counsel mandate should be applied “gingerly,” recognizing that the rule sometimes forces children out of court altogether and prevents the vindication of their rights, and nonetheless deferring its decision on the case and directing the child plaintiff’s parent to retain counsel); *Hootstein v. Amherst-Pelham Reg’l Sch. Comm.*, 361 F. Supp. 3d 94, 102 (D. Mass. 2019) (noting “the potential unfairness of the rule” but nonetheless declining to consider the child’s claims because the adult representative lacked counsel).

<sup>165</sup> Compare *T.W. ex rel. Enk v. Brophy*, 124 F.3d 893, 897 (7th Cir. 1997) (stating that ordinarily, the adults eligible to represent a child “will be confined to the plaintiff’s parents, older siblings (if there are no parents), or a conservator or other guardian, akin to a trustee.”), with *Ingram ex rel. Ingram v. Ainsworth*, 184 F.R.D. 90, 92 (S.D. Miss. 1999) (“There are no special requirements for serving as a next friend. At its discretion, the court may consider whether there is a significant relationship between the next friend and the incompetent party and whether there is a legitimate reason why the actual party cannot bring suit.”). One court has even suggested that parents who comply with court mandates to retain (and pay for) private counsel are thereby conflicted out of serving as a representative for their child because of their financial contribution to the case. *Scott v. District of Columbia*, 197 F.R.D. 10, 11 (D.D.C. 2000). A widespread adoption of this practice would cede total control over children’s litigation to the state.

<sup>166</sup> *Martin*, *supra* note 37 (arguing that courts should typically defer to parents to serve as the representatives for their children in litigation).

<sup>167</sup> *Id.*

the provision of a forum for democratic participation.<sup>168</sup> Scholars argue that this functional perspective on the role of courts leads to a restrictive orientation toward procedure, which prioritizes docket management over merits-based dispute resolution.<sup>169</sup> Some scholars further posit that a restrictive orientation tends to benefit powerful interests at the expense of the marginalized.<sup>170</sup>

In children's litigation, this restrictive orientation emerges in courts' readiness to dismiss children's claims for resolvable procedural errors. Courts dismiss children's claims for problems relating to the designation and appointment of adult representatives and for failures to retain private counsel.<sup>171</sup> In dismissing such cases rather than seeking to address these problems, courts display an inclination to clear dockets of children's claims and a lack of appreciation for the value of litigation to children.<sup>172</sup>

Dismissal constitutes an unduly harsh remedy for procedural errors in children's cases because procedural prerequisites for children's claims are murky at best and insurmountable at worst. The relative paucity of judicial reflection on the broader implications of doctrines and practices that exclude children's claims reinforces the perception that courts are prioritizing docket management over ensuring children's access to justice.<sup>173</sup> Limiting children's access to courts not only reduces children's opportunities to secure judicial

<sup>168</sup> See Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1087–88 (2018) (describing two primary functions of federal district courts: (1) dispute resolution and (2) law declaration, and introducing scholarly debate about the significance and propriety of the law declaration role); Lobel, *supra* note 64, at 483–93 (identifying three models of litigation: (1) courts as forums for the resolution of private disputes (traditional model), (2) courts as forums for structural reform (public litigation model), (3) courts as forums for protest (public debate model)); Monica Bell, Stephanie Garlock, & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1478, 1507–24 (2020) (presenting an application of demosprudential theory that conceives of judging, in part, as “a conversation between the public and the courts” that can advance democracy and counter balance systemic socioeconomic inequality); see generally Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014) (introducing the theory of demosprudence).

<sup>169</sup> See LAHAV, *supra* note 26, at 21 (“Today procedure is restrictive, aiming to keep cases out of court or dismiss them immediately without giving the participants a chance to develop their proofs and arguments. Federal judges have stated explicitly that there are too many cases and have developed doctrines to cull cases early and often.”); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 354 (2010).

<sup>170</sup> Spencer, *supra* note 169, at 353–54 (arguing that “a ‘restrictive ethos’ prevails in procedure today, with many rules being developed, interpreted, and applied in a manner that frustrates the ability of claimants to prosecute their claims and receive a decision on the merits in federal court,” and that the restrictive ethos favors U.S. society’s dominant interests).

<sup>171</sup> See, e.g., *P.M. v. Evans-Brant Cent. Sch. Dist.*, No. 08-CV-168A, 2008 WL 4379490, at \*12 (W.D.N.Y. Sept. 22, 2008) (dismissing minor’s claims brought by father because the child lacked capacity to sue on his own behalf); *Mayall v. USA Water Polo, Inc.*, No. SACV 15-171-AG (RNBx), 2015 WL12907832, at \*3 (C.D. Cal. June 8, 2015) (dismissal for parent’s failure to file a motion to be appointed as guardian ad litem for the plaintiff child).

<sup>172</sup> See Lobel, *supra* note 64, at 487–90 (analyzing the utility of litigation to garner public support for broader political goals and positions and awareness of particular problems).

<sup>173</sup> Although some courts raise justice concerns about the impact of these doctrines’ on children’s access to the courts, most apply them with little discussion.

remedies, but also denies children the opportunity to educate the public about their concerns.<sup>174</sup>

#### D. Formalism as a Refuge from Uncertainty and Risk

Fourth, courts' routine application of the counsel mandate and narrow construction of capacity rules suggests courts' adoption of a formalistic approach in the face of risk and uncertainty.<sup>175</sup> Bearing responsibility for the protection of child litigants, courts may fear that adult representatives will jeopardize children's legal claims,<sup>176</sup> and may harbor concerns about the true motivations of such adults.<sup>177</sup> Moreover, as capacity jurisprudence offers little guidance as to how courts should navigate doctrinal gaps and nuances, courts may feel ill-equipped to develop case-specific solutions to procedural problems.<sup>178</sup> Indeed, courts demonstrate a greater willingness to interpret procedural doctrines flexibly post-verdict,<sup>179</sup> and where child litigants are

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<sup>174</sup> See Lobel, *supra* note 64 (evaluating the history and constitutional foundations of litigants' use of courts as forums for protest to draw public attention and sympathy to a particular cause); Resnik, *supra* note 62 (arguing that the movement away from adjudication harms democracy because it reduces the valuable contributions to democracy that adjudication provides, including encouraging public input into governing norms and holding powerful interests to account).

<sup>175</sup> By formalism, I mean an approach within a particular case that seeks to identify, distill, and apply clear rules rather than more flexible standards. Adam G. Todd, *An Exaggerated Demise: The Endurance of Formalism in Legal Rhetoric in the Face of Neuroscience*, 23 LEGAL WRITING: J. LEGAL WRITING INST. 84, 88 (2019) (under a formalist approach judges apply law "mechanically and objectively" to particular sets of facts). I do not mean to employ the broader label of "formalism" to suggest that such courts demonstrate general ideological adherence to a particular interpretative strategy. See, e.g., Cass R. Sunstein, *Must Formalism Be Defended Empirically?* (John M. Olin L. & Econ. Working Paper No. 70, 1999); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988). *Kearse v. Aini* provides an example of a ruling that narrowly construes the counsel mandate and capacity doctrine together in a way I would deem formalistic and, in the process, elides the nuances of each: "Plaintiff cannot represent her children or proceed *pro se* on their behalf and, because they are minors, they cannot raise *pro se* claims on their own." No. 19-CV-6429-FPG, 2019 WL 3343409, at \*7\_ (W.D.N.Y. July 25, 2019).

<sup>176</sup> *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d. Cir. 1990) ("It goes without saying that it is not in the interests of minors or incompetents that they be represented by non-attorneys. Where they have claims that require adjudication, they are entitled to trained legal assistance so their rights may be fully protected."); *Mann v. Boatright*, 477 F.3d 1140, 1150 (10th Cir. 2007) (quoting *Cheung*); *Johns v. Cnty. of San Diego*, 114 F.3d 874, 876-77 (9th Cir. 1997); *Osei-Afriyie ex rel. Osei-Afriyie v. Med. College of Pa.*, 937 F.2d 876, 883 (3d Cir. 1991).

<sup>177</sup> Martin, *supra* note 37, at 85 n.120 (identifying cases in which courts expressed skepticism or concern about the motives of adult representatives).

<sup>178</sup> See *supra* notes 91-97.

<sup>179</sup> See, e.g., *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 201 (2d Cir. 2002) (declining to reverse verdict in favor of minor child in IDEA case for failure of parents to retain counsel to represent the child's claims before the district court because such reversal would not serve the child's interests); *In re Cowden*, 154 B.R. 531, 535 (Bankr. E.D. Ark. 1993) (affirming judgment entered in favor of a minor and holding that the minor's interests were adequately protected in the litigation, despite the court's failure to appoint a next friend or guardian ad litem, because the minor's aunt litigated the case and the minor's mother was present throughout the proceedings).

represented by counsel.<sup>180</sup> Faced with this potent combination of special responsibility, risk, and uncertainty, formalism may appeal to courts as an approach that provides certainty, conserves resources, and avoids risks. Yet, the inconsistency and underdeveloped reasoning common to such decisions makes them appear arbitrary and unfair and undermines courts' authority as stewards of children's interests.

### *E. Bias as a Motivator of Exclusion*

Finally, unconscious biases inevitably play some role in poor children's exclusion from the courts.<sup>181</sup> Especially when people act quickly, their choices can often be unconsciously and unintentionally influenced by preferences and stereotypes.<sup>182</sup> These preferences tend to favor people similar to the perceiver and members of social in-groups.<sup>183</sup> In courts, such preferences may cause judges to unconsciously disfavor litigants—including children and their parents—on the basis of characteristics such as poverty, race, and gender.<sup>184</sup>

Judicial decision-making may be influenced by common stereotypes about people living in poverty, including that poor people are dishonest or intellectually and morally deficient.<sup>185</sup> Biases may be amplified when low-

<sup>180</sup> Martin, *supra* note 37 (finding that courts are most likely to permit a minor to represent her own litigation interests when she is represented by counsel).

<sup>181</sup> Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial*, 53 U. RICH. L. REV. 1039, 1043–51 (2019) (exploring definitions of multiple types of explicit and implicit bias and evaluating studies of bias in the courts); Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson, & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012) (introducing scientific literature on implicit bias, theoretical clarifications between explicit and implicit bias, and applying the scientific studies to courtroom experiences); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006) (introducing the definition and prevailing theories of implicit bias).

<sup>182</sup> JENNIFER K. ELEK & ANDREA L. MILLER, NAT'L CTR. STATE CTS., *THE EVOLVING SCIENCE ON IMPLICIT BIAS* 7–8 (Mar. 2021), <https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/911>, archived at <https://perma.cc/PMN8-6FZW> (concluding that circumstances that prioritize efficiency or result in rushed or stressed decision-making increase the likelihood of stereotype influencing judgments).

<sup>183</sup> *Id.* at 5; Sara K. Rankin, *The Influence of Exile*, 76 MD. L. REV. 4, 11 (2016) (compiling social science findings regarding people's tendency to sort themselves into in and marginalized out-groups, and identifying "commonly recognized out-groups" as including "racial or ethnic minorities, LGBTQ individuals, people with physical or mental disabilities, as well as homeless and visibly poor people").

<sup>184</sup> Michelle Benedetto Nietz, *Socioeconomic Bias in the Judiciary*, 61 CLEVELAND ST. L. REV. 137, 142 (2013); see also Gilles, *supra* note 71, at 1561 (arguing that inexperience with the civil claims of the poor wrought by reduced availability of class action litigation may "compound an existing and unconscious predisposition against lower-income claimants").

<sup>185</sup> See Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PENN. L. REV. 399, 432–38 (2019) (evaluating how social location, including gender, race, and economic status, detract from a person's perceived credibility, and identifying negative stereotypes of these groups); Rankin, *supra* note 183, at 14–17 nn.45–58 (collecting examples from social science

income individuals are members of other socially disfavored groups,<sup>186</sup> and where they use different language than the common parlance of courts.<sup>187</sup> Negative stereotypes also may be reinforced where low-income people pursue claims such as torts and civil rights remedies that tend to be disfavored by courts and legislatures, perhaps especially if courts assume that the availability of fee-shifting or contingency fees in such matters should encourage counsel to accept representation in viable cases.<sup>188</sup>

Biases about low-income litigants may subconsciously as well as explicitly contribute to jurisprudence and practices that exclude children's claims in several ways. First, biases may contribute to court distrust of adult representatives' motives.<sup>189</sup> Courts' commitment to the counsel mandate, in part, may stem from a desire to inject counsel—who will have an obligation of veracity to the court—into the proceeding.<sup>190</sup> Second, biases may heighten court concerns about the capability of adult representatives to advance children's claims. These concerns may inform courts' evaluation of the suitability of adults to represent children's interests and also courts' commitment to the counsel mandate.<sup>191</sup> In the same way, bias may influence a court's per-

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research, statutes, media, and policy of cultural disdain for and dehumanization of the homeless and poor, including negative stereotypes of dishonesty, inferiority, laziness, and morally deserving of their hardship); Paul C. Gorski, *Perceiving the Problem of Poverty and Schooling: Deconstructing the Class Stereotypes that Mis-Shape Education Practice and Policy*, 45 EQUITY & EXCELLENCE ED. 302 (2012) (exploring common negative stereotypes about the poor as morally and intellectually deficient in the contemporary United States, in particular stereotypes of laziness, tendency toward alcohol and drug addiction, linguistic deficiency, and lack of concern for education); Bernice Lott, *The Social Psychology of Class and Classism*, 67 AM. PSYCHOL. 650, 655 (Nov. 2012) (describing classist perceptions of low-income people as “lazy, loud, and not too smart”).

<sup>186</sup> Epstein & Goodman, *supra* note 185, at 426–27, 436–37 (evaluating the pernicious effect of the “grasping woman on the make” stereotype, especially for low-income women of color who may face the “welfare queen” trope, and noting how group-based stereotypes of untrustworthiness towards women, people of color, and poor people magnify when an individual belongs to multiple distrusted groups).

<sup>187</sup> Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 543 n.35 (1987–88) (analyzing how courtroom discourse excludes and discredits poor people).

<sup>188</sup> See Kang et al., *supra* note 181, at 1162; see also Spencer, *supra* note 169 (identifying civil rights claims, among others, as disfavored under the rules of procedure); Tracy A. Thomas, *Restriction of Tort Remedies and the Constraints of Due Process: The Right to an Adequate Remedy*, 39 AKRON L. REV. 975 (2006) (detailing legislative restrictions on tort remedies); Martin, *supra* note 37 at 858 (exploring obstacles to securing counsel for individuals from disadvantaged social groups).

<sup>189</sup> See, e.g., Osei-Afryie *ex rel.* Osei-Afryie v. Med. College of Pa., 937 F.2d 876, 882 (3d Cir. 1991) (finding the record showed the father “did not want to retain an attorney because he did not want to share any recovery from the litigation”).

<sup>190</sup> Rosario v. Apfel, No. 96CIV.1227(PKL)(SEG), 1998 WL 685173, at \*1 (S.D.N.Y. Sept. 30, 1998) (identifying “the absence of the ethical obligations imposed on members of the bar” as one reason that adult representatives cannot advance children's claims without counsel).

<sup>191</sup> Oliver v. Southcoast Med. Grp., No. CV411-115, 2011 WL 2600618, at \*1 n.5 (S.D. Ga. June 13, 2011) (dismissing claim brought by father on behalf of child for lack of counsel, declining to assess the father's ability to serve as representative given lack of counsel, and suggesting that father may not be found competent to serve, in part, because “there is some case law indicating that financial wherewithal to competently litigate is a factor”).

ception of a child's capability to represent her own interests in a case when a child seeks to proceed without an adult. Third, biases may fuel negative perceptions of the likely merit of claims advanced by poor children or their parents.<sup>192</sup> Courts often decline to appoint counsel on the basis of such perceptions and then dismiss claims for lack of legal representation.<sup>193</sup>

Together, these ideological commitments, orientations, and biases encourage an approach to poor children's claims that favors non-intervention, dismissal, and delay until adulthood. As discussed in Part I, such delays not only cause harm to individual children, but also undermine democracy, the development of the law, and the broader social standing of children.

#### IV. SECURING CIVIL JUSTICE FOR CHILDREN

Children's theoretical right of access to the courts is meaningless if economic circumstances prevent its realization.<sup>194</sup> Reform of three legal doctrines—Rule 17(c), the counsel mandate, and minority tolling of statutes of limitation—will eradicate key procedural barriers that exclude children's claims and will facilitate poor children's access to the courts.<sup>195</sup>

<sup>192</sup> See Kang et al., *supra* note 181, at 1162–63 (evaluating how the *Iqbal* pleading standard, which similarly requires judges to assess the viability of claims pre-discovery, invites the gap-filling and inferential thinking that is more likely influenced by bias). Relatedly, Professor Alexandra Lahav argues that “assumptions that a lot of litigation brought by the least fortunate in our society is worthless” caused courts and legislature to restrict legal remedies in ways that significantly disadvantage underprivileged people within litigation. LAHAV, *supra* note 26, at 124.

<sup>193</sup> *Berrios v. N.Y. City Hous. Auth.*, 564 F.3d 130, 134 (2d Cir. 2009) (finding that a court may “properly deny a motion to appoint counsel—even for a minor or incompetent person—‘when it is clear that no substantial claim might be brought on behalf of such a party’”) (internal citation omitted). Indeed, some courts further hold that appointment is not warranted where cases lack a sufficiently developed factual record from which a determination of merit can be made. See, e.g., *LeClair v. Vinson*, No. 1:19-CV-28 (BKS/DJS), 2019 WL 1300547, at \*4 n.4 (N.D.N.Y. Mar. 21, 2019). At least one outlier court has held that all claims brought *pro se* by parents are frivolous and warrant dismissal. *Epps v. Russell Cnty. Dep’t Hum. Res.*, No. 3:15cv25-MHT, 2015 WL 1387950, at \*8 (M.D. Ala. Feb. 17, 2015) (“Because it is futile for the Plaintiffs to attempt to pursue claims *pro se* on their children’s behalf, all claims they purport to assert on behalf of their children are frivolous and are due to be dismissed pursuant to 28 U.S.C.A. § 1915(e)(2)(B)(i).”).

<sup>194</sup> FINEMAN, *supra* note 146, at 10 (noting that guarantees of equal access and opportunity mean little in the face of substantive inequality).

<sup>195</sup> Arguably, to make courts truly accessible to children, a substantially wider range of reforms would be required, including measures to make proceedings more understandable and to facilitate children’s access to legal information. Such reforms are beyond the scope of this project but have been proposed by United Nations Committees and scholars in light of the UN Convention on the Rights of the Child’s guarantees of participation, expression, and information, as well as in scholarship evaluating the importance of legal information for self-represented adult litigants in the United States. United Nations Convention on the Rights of the Child, arts. 12, 13, 17, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) (“The Children’s Convention”). Member states detail the steps they have taken to implement Convention guarantees, including with regard to children’s access to justice, in periodic reports to the Committee on the Rights of the Child. *Committee on the Rights of the Child*, U.N. HUM. RTS. OFF. HIGH COMM’R, <https://www.ohchr.org/en/hrbodies/crc/pages/crcindex.aspx>, archived at <https://perma.cc/9NWK-XXXD>. See also Comm. on the Rights of

### A. *Developing Capacity Doctrine*

Three presumptions should be established to guide and standardize courts' application of Rule 17(c) to children's cases.<sup>196</sup> These presumptions could be instituted as common law rules and/or be included within the Advisory Committee's note to Rule 17(c).

First, there should be a presumption against the dismissal of children's cases for failure to meet Rule 17(c)'s requirements.<sup>197</sup> Instead, courts should work to assist children and their adult representatives to overcome capacity-related procedural deficiencies.<sup>198</sup> Second, absent a clear conflict of interests, courts should presumptively defer to parents as the adults best suited to re-

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the Child (CRC), General Comment No. 12: The Right of the Child to Be Heard, ¶ 82–83, U.N. Doc. CRC/C/GC/12 (July 20, 2009) (encouraging states to create media campaigns to educate children about legal rights); Ton Liefwaard, *Access to Justice for Children: Towards a Specific Research and Implementation Agenda*, 27 INT'L J. CHILD.'S RTS. 195, 216–17 (2019) (exploring means to provide children with effective legal information, including by informing parents, teachers, and others who work with children); Andrew Hammond, *The Federal Rules of Pro Se Procedure*, 90 FORDHAM L. REV. 2689 (2022) (cataloguing and evaluating federal district court efforts to provide legal information to unrepresented parties, including through guidebooks, handbooks, help desks, and related assistance programs); Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 375 (2004) (“As legal institutions become increasingly crucial and complex, access to legal assistance also becomes increasingly critical”); Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 19 (1992) (arguing that complexity's costs disproportionately burden the poor “by raising prices and necessitating the services of lawyers and other professionals trained in the management of complexity”). Some programs in the United States already work to expand children's knowledge of the law and the legal system. See, e.g., STREET LAW, <https://www.streetlaw.org/who-we-are>, archived at <https://perma.cc/6WGE-P2W3> (describing its development of legal education programs for high school students and community members since 1972); *Centralized Resource List*, CHICAGO L. & ED. FOUND., <https://lawclef.org/legal-help/>, archived at <https://perma.cc/6VMW-RFDK> (describing legal clinics held at two Chicago High Schools).

<sup>196</sup> I suggest the adoption of these presumptions as common law rules or within the Advisory Committee's note to avoid overly complicating the presently streamlined language of Rule 17(c). See Lumen N. Mulligan & Glen Staszewski, *Civil Rules Interpretive Theory*, 101 MINN. L. REV. 2167, 2221–24 (2017) (arguing that the Advisory Committee is the body best suited to resolve policy questions regarding the rules).

<sup>197</sup> This presumption is consistent with the idea that courts have an obligation to act affirmatively to protect child litigants. See *Gardner ex rel. Gardner v. Parson*, 874 F.2d 131, 139–40 (3d Cir. 1989) (courts must not simply dismiss children's cases for deficiencies under Rule 17(c) but act to ensure children's interests are adequately protected); *Adelman ex rel. Adelman v. Graves*, 747 F.2d 986, 989 (5th Cir. 1984) (“We hold only that the district court's primary concern in the instant case must be to assure, under Rule 17(c), that Daniel's interests in vindicating his statutory and constitutional rights are properly protected.”).

<sup>198</sup> See, e.g., *Alex Anderson v. Dorchester Cnty.*, No. 2:20-cv-2084-DCN-MGB, 2021 WL 1186637 (D.S.C. Mar. 30, 2021); *Beard ex rel. Ford v. Hawkins*, No. 14-13465, 2015 WL 3915877, at \*1 (E.D. Mich. June 25, 2015) (noting that the failure of an adult representative to retain counsel does not require dismissal). This approach might alternately be conceived as employing active judging. Bell et al., *supra* note 168, at 1517 (identifying active judging as one tool to “reduce systemic and substantive bias against the poor” in courts); Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647 (2017). Without support, judges might avoid this approach as ethically ambiguous, contrary to their perceived role and training, and time intensive. Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg, & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L.J. 509 (2022).

present their children's interests.<sup>199</sup> Third, courts should presume that child litigants aged fifteen and older who seek to represent their own interests are capable of doing so.<sup>200</sup> Child development research identifies fifteen as the age at which most adolescents demonstrate abilities to engage in the types of cognitive processing required to engage in effective decision-making in settings, such as courts, "where emotional and social influences on judgment are minimized or can be mitigated, and where there are consultants who can provide objective information about the costs and benefits of alternative courses of action."<sup>201</sup> When courts permit children to represent themselves, courts should ensure children have adequate support from counsel and other trusted adults.<sup>202</sup>

Employing these principles will reinforce courts' problem-solving role, highlight core considerations within capacity doctrine, provide standards to guide judicial decision-making, make case outcomes more principled and predictable, and prevent the dismissal of children's claims for these resolvable issues.<sup>203</sup> Each of these results will better equip courts to protect child litigants' interests.

### B. *Discarding the Counsel Mandate*

Courts should discard the mandate that children's adult representatives must retain private counsel to advance children's claims.<sup>204</sup> Instead, as a

<sup>199</sup> Martin, *supra* note 21 at 489–96.

<sup>200</sup> Martin, *supra* note 37 at 54–55. Applying an age-based rule rather than a totally context-based standard provides a measure of predictability and provides some check against the influence of bias on assessments of cognitive ability. *Id.*

<sup>201</sup> Steinberg et al., *supra* note 102; see also Elizabeth Scott, Natasha Duell, & Laurence Steinberg, *Brain Development, Social Context, and Justice Policy*, 57 WASH. U. J.L. & POL'Y 13, 34 (2018) ("[B]y mid-adolescence, individuals have the cognitive capacity to make rational decisions that is similar to that of adults. A teenager can understand and process information, engage in hypothetical thinking to compare alternative options and make reasoned decisions. In short, when not subject to exogenous influences that undermine rationality, the normative adolescent usually is a competent decision-maker." (footnote omitted)). Moreover, limiting this presumption to cases in which a minor *seeks* to represent her own interests provides some indicia of the child's maturity and preparedness for this task. Martin, *supra* note 37 at 32–36.

<sup>202</sup> Martin, *supra* note 37 at 32–34.

<sup>203</sup> ELEK & MILLER, *supra* note 182, at 7–8, 14 (recommending the incorporation of structure, consistent decision-making procedures, and objective criteria in decision-making to reduce the influence of bias). For more detail regarding the second and third proposed presumptions, see Martin, *supra* note 21 at 489–96; Martin, *supra* note 37.

<sup>204</sup> Although courts generally adhere to *stare decisis*—a presumption against overruling past precedents—it is not absolute. See, e.g., Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001) (exploring the bases on which courts depart from *stare decisis*). Lower courts that feel bound to apply the doctrine by hierarchical precedent could nonetheless raise justice concerns about its application in their opinions as a means of contributing to the democratic dialogue about its legitimacy. Bell et al., *supra* note 168, at 1511–17 (encouraging judges to enhance democracy through opinion-writing, including by "acknowledging the harms at the root of the dispute, educating the public about various harms, recognizing the human interests at the root of the case, . . . engaging discursively with contem-

baseline, courts should permit adult representatives to advance children's claims *pro se* and consider whether additional supports, including court-appointed counsel, are needed to protect children's interests in particular cases.<sup>205</sup> Moreover, courts should reform processes and provide self-help resources to better enable adults to successfully advance children's claims *pro se*.<sup>206</sup>

So long as courts retain the counsel mandate, they must ensure that counsel is available to children. Courts should request and even appoint counsel as necessary where children cannot afford attorney's fees,<sup>207</sup> and work to ensure that their budgets include adequate funding for poor children's attorney's fees,<sup>208</sup> or generate alternate means of assuring cost-free

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porary social movements," "recounting important contextual information," and giving reasons for their decisions).

<sup>205</sup> See, e.g., *Crozier for A.C. v. Westside Cmty. Sch. Dist.*, 973 F.3d 882, 891–92 (8th Cir. 2020); *Brown v. Ortho Diagnostic Sys., Inc.*, 868 F. Supp. 168, 171–72 (E.D. Va. 1994). See generally *Martin*, *supra* note 37, at 885–87 (proposing that courts considering appointment of counsel for child litigants assess whether appointment will protect the child's interests under 17(c) and standard 28 U.S.C. § 1915 appointment factors, including: whether the litigant lacks adequate financial resources, the case is likely "of substance," and the litigant's efforts diligently has attempted to secure counsel; the complexity of legal issues; the litigant's ability to litigate the case; and any "special factors" that make appointment of counsel more likely to result in a just determination). Courts retain the discretion to act to protect children's interests throughout a case, and can intervene for their benefit upon evidence that an adult representative is not acting in a child's interests. *Martin* *supra* note 21 at 488.

<sup>206</sup> *Martin*, *supra* note 37 at 887; Benjamin H. Barton & Stephanos Bibas *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. Pa. L. Rev. 967, 970–71, 987–90 (2012) (arguing that given the failures of the right to counsel in the criminal context, resources should be devoted to implementing sustainable procedural reform to enable *pro se* litigants to effectively navigate civil courts).

<sup>207</sup> FED. R. CIV. P. 17(c)(2) (authorizing courts "to issue another appropriate order to protect a minor . . . who is unrepresented in an action"); 28 U.S.C. § 1915 (e)(1)(B); *Hammond*, *supra* note 32, at 1494–95 & n.69 (identifying local rules that authorize federal district courts to appoint counsel for indigent parties); *Martin*, *supra* note 37, at 885–87 (arguing that courts have the authority under Rule 17(c) to appoint counsel to protect minor litigants' interests). Some federal courts have taken this step. See, e.g., Some state courts applying analogous mandates have held that appointment of counsel is required. See, e.g., *Chisholm v. Rueckhaus*, 948 P.2d 707, 709 (N.M. Ct. App. 1997) (remanding for appointment of counsel for the child since the statute of limitations had run and the child otherwise would lose the opportunity to advance the claim).

<sup>208</sup> Although state courts' inherent powers have been recognized to permit them to compel fiscal expenditures to support their operations in some circumstances, federal courts have not been found to hold the same power given Congress's constitutional authority to appropriate funds and create and control the inferior federal courts. See Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217, 226–27 (1993) (evaluating state jurisprudence defining courts inherent judicial powers to compel fiscal expenditures to fund their operations and arguing that "there is no indication that judicial independence as conceived by the framers of the Constitution entailed the inherent right to compel fiscal expenditure."); Jonathan Bunge, Comment, *Congressional Underappropriation for Civil Juries: Responding to the Attack on a Constitutional Guarantee*, 55 U. CHI. L. REV. 237 (1988) (arguing that Congress's control over the inferior courts deprives federal courts of the inherent authority to compel funding of their expenses and that, where expenses are insufficiently funded but compelled to satisfy constitutional rights, courts should incur the expenses and send Congress a bill); Todd D. Peterson, *Controlling the Federal Courts Through the Appropriations Process*, 1998 WIS. L. REV. 993, 1033 (arguing that Congress should tread lightly in scrutinizing the judiciary's budgetary requests to preserve the judiciary's indepen-

counsel to children, such as developing specialized panels of attorneys willing to accept pro bono appointments in children's cases.<sup>209</sup> Courts should likewise prepare to appoint counsel for adolescents whom courts deem capable of representing their own interests and who lack access to resources to retain private counsel.<sup>210</sup> Given the dearth of legal services available to the indigent,<sup>211</sup> this task will pose significant challenges, but it should be the democratic system's obligation to supply the resources required to redress children's exclusion from justice, not one borne by poor children.<sup>212</sup>

### C. *Minority Tolling*

Finally, courts should require statutes of limitations periods to toll during minority to ensure minors' right of access to the courts.<sup>213</sup> To date, federal courts have evaluated the legality of such statutes in a doctrinal vacuum, failing to reconcile the view that parents should be able to comply with limitations periods with the enormous financial outlay the counsel mandate imposes as prerequisite to the advancement of children's claims.<sup>214</sup> Whereas limitations periods run without regard to financial means, the mandate permits only those who can afford private counsel to bring claims. Taken together, these policies operate as an absolute bar to poor children's claims.

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dence but concluding that the Appropriations Clause means the federal judiciary has very little authority to fund itself); James P. George, *Jurisdictional Implications in the Reduced Funding of Lower Federal Courts*, 25 REV. LITIG. 1, 3–5 (2006) (arguing that where Congress deprives the federal courts of adequate funding it breaches its obligation to provide a forum and courts should determine they therefore lack jurisdiction and halt operations).

<sup>209</sup> Hammond, *supra* note 32, at 1513 & tbl.2 (evaluating federal district court practices regarding appointment of counsel for indigent litigants and cataloguing the composition and mission of civil pro bono attorney panels established by the federal district courts).

<sup>210</sup> Ind. Planned Parenthood Affiliates Ass'n v. Pearson, 716 F.2d 1127, 1137–39 (7th Cir. 1983) (striking down Indiana's judicial bypass statute, in part, because it failed to contain a provision for appointment of counsel to minors and asserting: "A minor, completely untrained in the law, needs legal advice to help her understand how to prepare her case, what papers to file, and how to appeal if necessary. Requiring an indigent minor to handle her case all alone is to risk deterring many minors from pursuing their rights because they are unable to understand how to navigate the complicated court system on their own or because they are too intimidated by the seeming complexity to try.")

<sup>211</sup> THE JUSTICE GAP, *supra* note 53, at 13 (finding that, on average, "[l]ow-income Americans receive inadequate or no professional legal help for eighty-six percent of the civil legal problems they face in a given year."); LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 19–21 (2009) ("Nationally, there are well over ten times more private attorneys providing personal legal services to people in the general population than there are legal aid attorneys serving the poor."); Martin, *supra* note 37 at 835 n.25, 855–58 (evaluating the inaccessibility of counsel for people living in poverty).

<sup>212</sup> One scholar notes that increases in the rent charged the judiciary by the executive branch for the use of federal courthouses is a source of increasing burden on the courts' budget—this could be a potential source for expanded funds for discretionary expenditures, including the appointment of counsel for children). George, *supra* note 208, at 3–5.

<sup>213</sup> See *supra* note 75.

<sup>214</sup> See *supra* notes 93–102.

#### D. *Litigation Is Not a Panacea*

Although these proposals would strengthen children's abilities to prosecute civil claims, litigation is by no means the only—nor necessarily the best—method of solving the problems children face. Litigation constitutes only one of many avenues for resolving individual and systemic problems. Further, litigation imposes financial, personal, social, and political costs that can outweigh its utility to a particular individual or cause.<sup>215</sup> Litigation is also only one method of democratic participation, and an expensive one at that. Promoting other methods of dispute resolution, such as community mediation centers, and other means of democratic participation, such as lowering the voting age to sixteen, could resolve problems more broadly and expand participation—at least by adolescents—at lower cost.<sup>216</sup> Likewise, critics could object to investing limited government resources to facilitate individual children's access to courts that could instead be invested to expand social programs that enhance the well-being of broad swaths of children and their families.<sup>217</sup>

Yet, the current class-based exclusion of low-to-moderate income children from the civil courts is untenable in a democratic system that relies on courts to develop and uphold the rule of law for all citizens. Moreover, by creating a role for adult representatives, courts allow for the voicing of all children's concerns—not simply those of older adolescents. Even if claims are later re-filed, the exclusion of *children's* voices from courts continues unabated where their claims are delayed until adulthood. Children should be able to seek timely redress from courts and also receive social supports from the state that they and their families need to thrive.

#### CONCLUSION

Courts regularly dismiss children's civil claims, particularly poor children's civil claims, on the basis of correctable procedural issues. By excluding these claims, courts contravene core democratic values, undermine the effective functioning of the democratic system and the fulsome development

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<sup>215</sup> See, e.g., Matthew A. Shapiro, *The Indignities of Civil Litigation*, 100 B.U. L. REV. 501 (2020) (examining the ways in which litigation undermines dignity and causes embarrassment); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015) (noting the rise of the term “dispute resolution” with “judicial dispute resolution” or “JDR” as one of many forms); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663 (1995) (evaluating settlement as a form of dispute resolution, identifying others, and compiling critiques of litigation).

<sup>216</sup> See generally Joshua S. Sellers & Roger Michalski, *Democracy on a Shoestring*, 74 VAND. L. REV. 1080 (2021) (empirically tracing the financial costs of elections). Thanks to Clare Huntington for raising these important questions.

<sup>217</sup> See, e.g., Huntington & Scott, *supra* note 12 (arguing that promoting child wellbeing is and should be the lodestar of policymaking regarding children).

of the law, and risk real harm to children. Yet, such dismissals are rarely critically examined by the courts.

The Article charts a new course. It offers specific proposals for doctrinal reform that would remove procedural barriers to children's claims—particularly poor children's claims—while continuing to protect children's interests. Ultimately, in these ways, the Article seeks to fortify democracy and children's place within it by promoting the construction of a civil justice system that serves all children, not simply the most privileged.