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## ACCOMMODATING CHILDHOOD IN IMMIGRATION REMOVAL PROCEEDINGS

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*The United States of America's adversarial immigration court system adultifies children. Approximately one million children in immigration court must navigate notoriously complex proceedings while being held to virtually the same standards and procedures as adults. Children—even infants—are expected to respond to the charges against them, present and rebut evidence, make legal arguments, and pursue their claims for legal relief, all without appointed counsel. As a result, most are unrepresented and predictably unsuccessful in their fight against deportation. The challenges these children face are compounded by issues of race, ethnicity, class, language, trauma, dependency on adults, and other factors that limit the children's resources and increase their vulnerabilities. Despite this, lawmakers and judges so far have been unwilling to extend special protections to children in immigration court.*

*But children are not simply miniature adults. Recent advances in our understanding of child development and brain science reveal that children are different from adults in ways highly relevant to legal proceedings. Our immigration court system must change to reflect these new insights.*

*This Article is the first to marshal current scientific findings regarding the cognitive, developmental, emotional, and social immaturity of children to argue children are developmentally incompetent to represent themselves in immigration court. This Article establishes that it is unfair to nominally provide children with the same rights and responsibilities as adults without considering their ability to meaningfully effectuate them. Brain and behavioral science can and should be used in the immigration context, much like*

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*their present use in the juvenile delinquency and juvenile sentencing context, to compel appointed counsel and other accommodations like child advocates and specialized juvenile dockets. Applying a developmental lens to the treatment of children in removal proceedings exposes how structural inequities baked into the immigration court system uniquely harm children, thereby unlocking new insights and strategies for advocates and policy makers to create a fairer immigration court system for children.*

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## I. INTRODUCTION

*About twenty kids as young as four years old form a single file line as they wait to go through security. Wide-eyed boys in t-shirts and jeans crack their knuckles. They have never been to a courtroom before. Some are wearing suits, in an attempt to make a good first impression.*

*They take a seat on one of the thinly padded metal chairs, crossing and recrossing their legs. Teenage girls with colorful hair braids study their surroundings. Toys, stuffed animals and coloring books decorate the waiting room. The children have come here not to play, but to stand in front of an immigration judge and defend themselves against deportation.*

*“It looks almost like you’re going into a pediatrician’s office,” said Katie Annand, managing attorney with Kids in Need of Defense (“KIND”), an organization that helps immigrant children find attorneys. “There are children lining the benches of the courtroom and have no one to represent them.”<sup>1</sup>*

Across the country, 953,835 children ages 0–17 are fighting against deportation in immigration court.<sup>2</sup> And just like the children in the story above, the vast majority—73% of these children—are doing so without the help of legal counsel.<sup>3</sup> Fiscal year 2024 saw an all-time high for new removal proceedings initiated against children ages 0–17: 424,170 new cases.<sup>4</sup> These numbers correlate with the high rates of political instability, crippling poverty, gang violence, and environmental destruction across the globe.<sup>5</sup> While data from fiscal year 2025 indicates the number of new deportation proceedings and southwest land border crossings has dropped, the pressures on children fighting deportation

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1. Misyrlena Egkolfopoulou, *Alone*, UNEQUAL FROM BIRTH (May 10, 2018), <https://unequalfrombirth.com/revise/alone/> [<https://perma.cc/XGC2-P92S>].

2. *Immigration Court Backlog*, TRAC IMMIGR., <https://tracreports.org/phptools/immigration/backlog/> [<https://perma.cc/MJN4-W4GM>] (last visited Mar. 8, 2026) (archived). The data shows that at the end of fiscal year 2024 there were 281,964 pending cases for children ages 0–4, 384,594 pending cases for children ages 5–11, and 287,277 pending cases for children ages 12–17. There is no way to disaggregate data for children ages 18–20 so they are not included in these calculations. *Id.*

3. *Id.* The data shows that at the end of fiscal year 2024 of the 953,835 pending cases for children ages 0–17, 694,025 or 73% of these children were unrepresented.

4. *New Proceedings Filed in Immigration Court*, TRAC IMMIGR., <https://tracreports.org/phptools/immigration/ntanew/> [<https://perma.cc/K5GV-98JA>] (last visited Mar. 8, 2026) (archived) (figures computed by looking at age group and then sorting by fiscal year case first arrived).

5. *Who Is An Unaccompanied Child?*, NAT. IMMIGR. JUST. CTR., <https://immigrantjustice.org/issues/unaccompanied-immigrant-children> [<https://perma.cc/59PX-5QMY>] (last visited Mar. 8, 2026) (“Children seek refuge in the United States for many reasons: to escape war, gangs, or violence; to flee abuse; or to reunite with family.”); see U.N. HIGH COMM’R FOR REFUGEES, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION 7–12 (U.N. High Comm’r for Refugees 2016), <https://www.unhcr.org/us/sites/en-us/files/legacy-pdf/56fc266f4.pdf> [<https://perma.cc/72DM-G27G>] [hereinafter UNHCR]; Amelia Cheatham & Diana Roy, *U.S. Detention of Child Migrants*, COUNCIL ON FOREIGN RELS. (Mar. 27, 2023, at 15:11 ET), <https://www.cfr.org/background/us-detention-child-migrants> [<https://perma.cc/39EH-7NF9>] (“Immigration authorities encountered more than 152,000 unaccompanied minors at or near the U.S.-Mexico border in fiscal year 2022 (FY2022), an all-time high.”).

under the second Trump administration have increased.<sup>6</sup> Indeed, since January 2025, the second Trump administration has enacted various immigration policy and enforcement reforms that directly harm and target children.<sup>7</sup>

Despite their tender age and developmental immaturity, children in removal proceedings are held to the same standards as adults with no right to government appointed counsel.<sup>8</sup> The precarity of children facing deportation is compounded from day one by their race, ethnicity, class, language, trauma, dependency on adults, immigration status, and other factors that limit their resources and increase their risk for harm.<sup>9</sup> Additionally, most children must try to defend themselves against charges from trained government attorneys without a lawyer.<sup>10</sup> This structural asymmetry results in poor outcomes for the children: a removal order, colloquially known as a deportation order, is the most likely ruling for an unrepresented child in immigration court.<sup>11</sup> A removal order was nearly 4.2 times more likely for unrepresented children than children represented by counsel.<sup>12</sup> The consequences of these outcomes for children are severe—they

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6. See U.S. Customs & Border Protection, *Southwest Land Border Encounters*, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> [<https://perma.cc/FV7G-4P9C>] (last visited Mar. 8, 2026) (charting southwest land border encounters by month in 2023 (2,475,669), 2024 (2,135,005), and 2025 (443,671)); Anna Flagg & Shannon Heffernan, 'Why Is this Happening to Us?' *Daily Number of Kids in ICE Detention Jumps 6x Under Trump*, MARSHALL PROJECT (Jan. 29, 2026, at 16:00 ET), <https://www.themarshallproject.org/2026/01/29/ice-kids-in-detention-numbers> [<https://perma.cc/BP2J-HFWJ>]; *UN Experts Alarmed by Child Rights Violations in USA Immigration Procedures*, U.N. Office of the High Commissioner for Human Rights (Jan. 27, 2026), <https://www.ohchr.org/en/press-releases/2026/01/un-experts-alarmed-child-rights-violations-usa-immigration-procedures> [<https://perma.cc/2QTS-LTRT>] (condemning actions by the U.S. government against children in deportation proceedings as serious violations of the rights of children).

7. Immigration law and policy are rapidly evolving under the second Trump administration, but not all recent developments are addressed in this Article due to their unsettled and evolving nature. See Flagg & Heffernan, *supra* note 6; *A Timeline: Tracking How the Second Trump Administration Is Rolling Back Protections for Unaccompanied Children*, KIDS IN NEED OF DEF. (Jan. 2026), [https://supportkind.org/wp-content/uploads/2026/01/26\\_Tump-Admin-Rollbacks-Timeline\\_Jan-Update-2.pdf](https://supportkind.org/wp-content/uploads/2026/01/26_Tump-Admin-Rollbacks-Timeline_Jan-Update-2.pdf) [<https://perma.cc/LV7U-NSW5>]; Maggie Grether, *Trump Wants Thousands of Migrant Children to Represent Themselves in Court*, THE NATION (May 23, 2025), <https://www.thenation.com/article/politics/unaccompanied-migrant-children-trump-cuts-legal-representation/> [<https://perma.cc/9UQX-2V9G>] (describing the impact of funding cuts on the legal representation of unaccompanied migrant children).

8. Benjamin Good, Note, *A Child's Right to Counsel in Removal Proceedings*, 10 STAN. J. C.R. & C.L. 109, 111, 114–15 (2014) (“But when faced with deportation, children have no right to representation by counsel, even when they are unaccompanied, and even though they face deprivations that are at least as severe as those that have supported recognition of the right in other contexts.”).

9. Laila L. Hlass, Rachel Leya Davidson & Austin Kocher, *The Double Exclusion of Immigrant Youth*, 111 GEO. L.J. 1407, 1420–21 (2023) (explaining the state of insecurity is “politically induced, a result of social systems as well as historic and ongoing discrimination”).

10. *New Proceedings Filed in Immigration Court*, *supra* note 4. Data between fiscal years 2019 and 2024 show a higher percentage of children without counsel than with counsel, except for 2021 which had representation rate of 51%.

11. *Outcomes of Immigration Court Proceedings*, TRAC IMMIGR., <https://tracreports.org/phptools/immigration/closure/> [<https://perma.cc/N4S4-GNNB>] (last visited Mar. 8, 2026). Removal orders were the most common outcome for children 0–17 for cases that ended between fiscal years 2004 and 2024.

12. *Id.* By sorting the data by outcome (removal order), representation (not represented or represented), and age (0–4, 5–11, and 12–17) and then adding up the corresponding values I was able to calculate that between fiscal year 1998 to April 2025, there were 93,114 represented children with removal orders versus 390,371 unrepresented children with removal orders. *Id.*

face expulsion from the place they now call home, along with family separation, violence, or neglect if deported.<sup>13</sup>

There is a robust body of legal scholarship critiquing children's experience in immigration court and arguing for appointed counsel under due process, children's rights, and statutory construction theories.<sup>14</sup> There is also a rich body of scholarship and caselaw in the juvenile law context that marshals scientific findings from neuroscience, adolescent brain development, and developmental psychology research to argue for child-specific protections and developmentally informed legal analysis.<sup>15</sup> There is a gap, however, in the literature analyzing immigration removal proceedings from a child development lens. This Article fills that gap.

This Article is the first to argue that children are developmentally incompetent to represent themselves in immigration court. Developmental incompetence is a child's inability to understand, reason, communicate, or meaningfully participate in legal proceedings because of normal developmental immaturity across social, emotional, communication, physical, and cognitive domains. This Article centers on the lived realities of migrant children and explores how their normative development and heightened rates of trauma impact their experience in immigration court and curtail their ability to meaningfully exercise their rights. It concludes that brain and behavioral science should be used in the immigration context—much like their use in the juvenile delinquency and juvenile sentencing

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13. UNHCR, *supra* note 5, at 6 (basing this prediction on 58% of the children interviewed by UNHCR indicating that they had experienced or were at substantial risk of experiencing these harms); Meghan Scholnick, *Trump Administration Intentionally Expelled Thousands of Unaccompanied Children to Danger Under Title 42*, LOY. U. CTR. HUM. RTS. CHILD. 1, 1 (2024) (discussing the extreme danger to nearly 16,000 children expelled from the U.S.).

14. See, e.g., Kevin Lapp, *A Child Litigant's Right to Counsel*, 52 LOY. L.A. L. REV. 463, 467 (2019) (acknowledging his theory for appointed counsel is untethered from "empirical findings from neuroscience, adolescent brain development, or developmental psychology"); Erin B. Corcoran, *Deconstructing and Reconstructing Rights for Immigrant Children*, 18 HARV. LATINO L. REV. 53, 54–55 (2015); Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 HARV. J. LEGIS. 331, 331 (2013); Olga Byrne, *Promoting A Child Rights-Based Approach to Immigration in the United States*, 32 GEO. IMMIGR. L.J. 59, 62–63 (2017); Linda Kelly Hill, *The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41, 41 (2011); Good, *supra* note 8, at 110; Wendy Shea, *Almost There: Unaccompanied Alien Children, Immigration Reform, and a Meaningful Opportunity to Participate in the Immigration Process*, 18 U.C. DAVIS J. JUV. L. & POL'Y 148, 150–51 (2014); Shani M. King & Nicole Silvestri Hall, *Unaccompanied Minors, Statutory Interpretation, and Due Process*, 108 CALIF. L. REV. 1, 3 (2020).

15. See generally Jennifer K. Pokempner, Riya Saha Shah, Mark F. Houldin, Michael J. Dale & Robert G. Schwartz, *The Legal Significance of Adolescent Development on the Right to Counsel: Establishing the Constitutional Right to Counsel for Teens in Child Welfare Matters and Assuring a Meaningful Right to Counsel in Delinquency Matters*, 47 HARV. C.R.-C.L. L. REV. 529, 531 (2012) (Part I of this Article describes adolescent characteristics as explained by developmental research, and Part II argues that a constitutional right to counsel for these children rests in this scientific reasoning); Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 13 (2009); C. Antoinette Clarke, *Bridging the Gap: An Interdisciplinary Approach to Juvenile Justice Policy*, 56 DEPAUL L. REV. 927, 929 (2007); *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005); *Graham v. Florida*, 560 U.S. 48, 68 (2010); *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011); *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

context<sup>16</sup>—to animate legal analysis and compel appointed counsel and other accommodations for children such as child advocates and specialized juvenile dockets.

The current immigration court system, which treats children like adults, is fundamentally flawed and unfair. Recent advances in our understanding of child development and brain science reveal that children are different from adults in ways highly relevant to legal proceedings.<sup>17</sup> This Article proceeds in four Parts to argue that children are developmentally incompetent to represent themselves in immigration court and the government must appoint counsel and implement additional accommodations as a result.

Part II explores the research on children’s physical, communicative, cognitive, and psychosocial development. In doing so, it lays the foundation for why children do not get a fair day in court when threatened with deportation because the system fails to acknowledge and accommodate their normative development. Part III highlights the demographics of children in removal proceedings, the challenges these children uniquely face, and the disparate outcomes they receive as a result. Part IV gives the general background of immigration removal proceedings. It discusses the rights of noncitizens in removal proceedings generally and children specifically. Part V applies research on childhood development to advance legal and policy arguments for appointed counsel and other rights affirming accommodations for children. This Part also counters critiques that counsel for children and other accommodations are too costly or administratively burdensome. Data from pilot projects show that investments in lawyers reduce court costs, improve court efficiency, and strengthen confidence in the reliability of decisions.<sup>18</sup> Ultimately, this Article uses a development-informed framework to reimagine what a fair immigration court system for children could look like.

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16. See generally RESTATEMENT OF THE LAW, CHILDREN IN THE LAW, Part III (A.L.I., Tentative Draft No. 6, 2024) (“This Restatement grapples with enormously complex issues in a balanced and sophisticated manner, weaving together a deep understanding not only of legal doctrine but also of public policy and a variety of other disciplines, including developmental psychology and neuroscience.”).

17. See *infra* Section II.B.

18. See generally Matthew Boaz, *Practical Abolition: Universal Representation as an Alternative to Immigration Detention*, 89 TENN. L. REV. 199, 255–57 (2021) (discussing research that supports fiscal arguments for universal representation); Kari Hong, *Gideon: Public Law Safeguard, Not A Criminal Procedural Right*, 51 U. PAC. L. REV. 741, 782–86 (2020) (arguing investment in lawyers results in other important cost savings); M. Margaret McKeown & Allegra McLeod, *The Counsel Conundrum: Effective Representation in Immigration Proceedings*, in REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 289 (Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag eds., 2009) (“At every stage of immigration proceedings, as in other areas of litigation and adjudication, the presence of competent counsel improves the efficiency of case processing and the administration of justice.”).

## II. DEVELOPMENTAL DIFFERENCES BETWEEN CHILDREN AND ADULTS

America's immigration system adultifies<sup>19</sup> children. The existing laws, rules, and policies governing immigration removal proceedings fail to treat children like children.<sup>20</sup> Instead, they are treated like adults and forced to take on adult responsibilities.<sup>21</sup> Yet, with nearly one million children in active removal proceedings,<sup>22</sup> an interrogation and correction of this adult-centric system is well past due.

The weight of scientific evidence shows that children's brains function differently from adult brains.<sup>23</sup> These differences impact children's behavior and affect their decision-making responses in ways that are highly relevant to their removal proceedings. Despite this, our immigration system treats children like mature adults and thus does not accommodate the physiological,<sup>24</sup> neurological,<sup>25</sup> cognitive,<sup>26</sup> psychological,<sup>27</sup> and psychosocial<sup>28</sup> development of children. The promise of full and fair court proceedings will never ring true unless our immigration court system reflects and incorporates research on normative child development. Part V of this Article offers examples of how this might be done, including appointing counsel for all children. But first, this Part provides an

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19. Adultification means "the process or fact of treating or considering a child as if they are an adult, usually in a way that is wrong or harmful." *Adultification*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/adultification> [<https://perma.cc/F7M2-AHJ9>] (last visited Mar. 8, 2026).

20. Laila L. Hlass, *The Paradox of Immigrant Children's Rights*, 104 TEX. L. REV. ONLINE 142, 145 (2025) ("Children confront the same immigration legal and policing regime as adults, experiencing arrest, detention, and deportation proceedings, and they do so without necessary accommodations and with fewer rights.").

21. There is also a racial component to the adultification of immigrant youth. In her article, *The Adultification of Immigrant Children*, scholar Laila Hlass explores how the immigration system adultifies immigrant children, who are largely youth of color, by perceiving them as more mature and less innocent than their white counterparts. Laila Hlass, *The Adultification of Immigrant Children*, 34 GEO. IMMIGR. L.J. 199, 202–03 (2020).

22. See *Immigration Court Backlog*, *supra* note 2.

23. See GENEVIEVE SANSONE, ASHLEY VANDERMORRIS, BARBARA FALLON, CHERYL MILNE & MARK WAYDE, LITERATURE SYNTHESIS: ADOLESCENT NEURODEVELOPMENT AND IMPLICATIONS FOR THE CRIMINAL JUSTICE SYSTEM 1 (Fraser Mustard Inst. of Hum. Dev., Pol'y Bench 2023), [https://socialwork.utoronto.ca/wp-content/uploads/2023/04/Policy-Bench-Lit-Synthesis-Adolescents\\_Justice-System-Final-web.pdf](https://socialwork.utoronto.ca/wp-content/uploads/2023/04/Policy-Bench-Lit-Synthesis-Adolescents_Justice-System-Final-web.pdf) [<https://perma.cc/BZ29-RGXQ>]; *but see* Buss, *supra* note 15, at 14 (cautioning that scientific assessments of children's capacities "is endlessly complicated and incompletely studied, making it difficult for the law to 'fit' the social science with any accuracy").

24. Physiological means "characteristic of or appropriate to an organism's healthy or normal functioning." *Physiological*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/physiological> [<https://perma.cc/N9E6-RUAH>] (last visited Mar. 8, 2026).

25. Neurological means "a branch of medicine concerned especially with the structure, function, and diseases of the nervous system." *Neurology*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/neurological> [<https://perma.cc/87RD-64D9>] (last visited Mar. 8, 2026).

26. Cognitive means "of, relating to, being, or involving conscious intellectual activity (such as thinking, reasoning, or remembering)." *Cognitive*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/cognitive> [<https://perma.cc/4QPW-EXZ3>] (last visited Mar. 8, 2026).

27. Psychological means "of, relating to, or occurring in the mind." *Psychological*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/psychological> [<https://perma.cc/8QV9-92MP>] (last visited Mar. 8, 2026).

28. Psychosocial means "involving both psychological and social aspects." *Psychosocial*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/psychosocial> [<https://perma.cc/7EY7-QFXF>] (last visited Mar. 8, 2026).

overview of normative childhood development, trauma and its unique impact on children's developing brains, and the relevance of these findings to immigration court proceedings.

### A. Normative Child Development

Childhood is a period of incredible transformation. Every child is unique and their development is impacted by genetics, the environment, and life experiences.<sup>29</sup> That said, generally accepted stages of normative child development that correspond to rough age markers can be helpful for legal line drawing: early childhood (ages 0–4), middle childhood (ages 5–9), and adolescence (ages 10–21).<sup>30</sup> Early childhood has long been recognized as an important period of development.<sup>31</sup> Research also evidences that adolescence—the transition period between childhood and adulthood—is another phase of immense neuroplasticity and critical development.<sup>32</sup> The period of adolescence is commonly defined as beginning around age ten and ending in a person's early to mid-twenties.<sup>33</sup> This has important implications for the immigration court system, as approximately one out of every four individuals in immigration court are “adolescents.”<sup>34</sup> This is an overrepresentation of the general population of adolescents in the United States.<sup>35</sup>

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29. Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895, 918 (1999) [hereinafter Buss, *Confronting Developmental Barriers*].

30. AM. ACAD. OF PEDIATRICS, BRIGHT FUTURES: GUIDELINES FOR HEALTH SUPERVISION OF INFANTS, CHILDREN, AND ADOLESCENTS 303, 501, 649, 731 (Joseph F. Hagan, Judith S. Shaw & Paula M. Duncan eds., 2017) (providing a pocket guide for health care professionals that includes list of developmental milestones at various stages); Buss, *Confronting Developmental Barriers*, *supra* note 29, at 919–20 (acknowledging that child development does not offer “definitive, fixed information upon which to ground simple, age-based rules” but still offers “the best means of testing whether the legal system’s goals appropriately and realistically reflect the life experiences of the children subject to those goals”).

31. Nat’l F. on Early Childhood Pol’y and Programs & Nat’l Sci. Council on Developing Child, *Building the Brain’s “Air Traffic Control” System: How Early Experiences Shape the Development of Executive Function 4* (Ctr. Dev. Child Harv. Univ., Working Paper No. 11, 2011), <https://developingchild.harvard.edu/resources/working-paper/building-the-brains-air-traffic-control-system-how-early-experiences-shape-the-development-of-executive-function/> [<https://perma.cc/AW8T-MUTX>] [hereinafter *Building the Brain’s “Air Traffic Control”*].

32. Eduardo R. Ferrer, *Transformation Through Accommodation: Reforming Juvenile Justice by Recognizing and Responding to Trauma*, 53 AM. CRIM. L. REV. 549, 554 (2016) (citing LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 5 (2014)).

33. See, e.g., *Adolescence*, APA DICTIONARY OF PSYCH. (Nov. 15, 2023), <https://dictionary.apa.org/adolescence> [<https://perma.cc/MZ3S-66JK>] (defining adolescences as beginning at age ten and ending at approximately nineteen); STEINBERG, *supra* note 32, at 5 (defining adolescence as the period from ages ten to twenty-five); see also Alexa Mousley, Richard A.I. Bethlehem, Fang-Cheng Yeh & Duncan E. Astle, *Topological Turning Points Across the Human Lifespan*, NAT. COMMUN. (Nov. 25, 2025), <https://www.nature.com/articles/s41467-025-65974-8> [<https://perma.cc/HQK6-4UPW>] (emerging research suggests adolescence may extend into a person’s early thirties).

34. *Immigration Court Backlog*, *supra* note 2. Data shows that at the end of fiscal year 2024, there were 3,716,106 pending cases across all immigration courts and age ranges. 859,178 of those pending cases were for individuals ages 12–24. There is no way to disaggregate the data to capture alternative adolescent age ranges like 10–21. *Id.*

35. U.S. Census data from 2019 indicates that adolescents—defined as those between the ages of ten and nineteen—make up 12.8% of the population in the United States and that proportion will continue to decrease

Child development research explores how children's minds and bodies grow.<sup>36</sup> This Section provides a general overview for lawyers, judges, and policymakers of key scientific findings that can and should inform policy and litigation related to children in removal proceedings. This Section intentionally focuses on adolescent development since that developmental stage accounts for a larger share of children in removal proceedings. Moreover, because the research demonstrates that adolescents lack the developmental capacity to fairly represent themselves in court, it naturally follows that those in the younger developmental stages also lack such capacity.<sup>37</sup>

In their seminal book *Rethinking Juvenile Justice*, Dr. Laurence Steinberg and Professor Elizabeth Scott describe the developmental stage of adolescence as “a complex mixture of the transitional and the formative.”<sup>38</sup> It is a period marked by rapid and critical changes in a person's brain, body, and social contexts which play a large role in shaping a person's future.<sup>39</sup> Historically, most of the research on adolescent cognitive and psychosocial development involved standard tools of psychological studies such as interviews, observation, and surveys.<sup>40</sup> Recent advances in neuroimaging technology, however, give new insights that explore how the brain's structure and functioning change with age.<sup>41</sup> For example, functional magnetic resonance imaging (“fMRI”), which measures brain activity, was not developed until the early 1990s, and research using fMRI and MRI (magnetic resonance imaging that can create a 3D anatomical map of the brain) on adolescents did not begin to flourish until the early 2000s.<sup>42</sup> When these tools are combined, the psychological and newer neurobiological research tells a compelling story of the developmental differences between adolescents and adults.

MRI scans can differentiate between gray matter and white matter brain tissue. Data from MRI scans shows that during adolescence, white matter increases and grey matter thins.<sup>43</sup> This is the result of two critical brain maturation

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with time. *America's Diverse Adolescents*, OFF. OF POPULATION AFFS., <https://opa.hhs.gov/adolescent-health/adolescent-health-data/americas-diverse-adolescents> [<https://perma.cc/YB56-4C6V>] (last visited Mar. 8, 2026).

36. See Pokempner et al., *supra* note 15.

37. *Immigration Court Backlog*, *supra* note 2. Data shows that at the end of fiscal year 2024 there were 859,178 pending cases for individuals ages 12–24 versus 666,558 pending cases for children ages 0–11.

38. ELIZABETH S. SCOTT & LAURENCE D. STEINBERG, *RETHINKING JUVENILE JUSTICE* 32 (2008).

39. *Id.*

40. *Id.* at 44.

41. *Id.* at 45–46.

42. Sarah-Jayne Blakemore, *Imaging Brain Development: The Adolescent Brain*, 61 *NEUROIMAGE* 397, 399 (2012).

43. Nikki C. Lee, Miriam Hollarek & Lydia Krabbendam, *Neurocognitive Development During Adolescence*, in *HANDBOOK OF ADOLESCENT DEVELOPMENT RESEARCH AND ITS IMPACT ON GLOBAL POLICY* 48 (Jennifer E. Lansford & Prerna Banati eds., 2018); Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 *NAT. NEUROSCI.* 861, 861–62 (1999) (reporting age-related increase in white matter and nonlinear changes in cortical gray matter during development); see also Anne-Lise Goddings, David Roalf, Catherine Lebel & Christian K. Tamnes, *Development of White Matter Microstructure and Executive Functions During Childhood and Adolescence: A Review of Diffusion MRI Studies*, 51 *DEV. COGN. NEUROSCI.*, Aug. 2021, at 1–6 (reviewing diffusion MRI studies demonstrating age-related increases in white matter microstructure during childhood and adolescence).

processes: “myelination” and “synaptic pruning.”<sup>44</sup> Myelination improves the efficient transmission of electronic impulses in the brain by effectively insulating the neural circuits with a fatty white substance called myelin.<sup>45</sup> The increase in white matter volume and integrity rises in adolescence and continues to increase into adulthood.<sup>46</sup> This strengthens the white matter networks that connect different brain regions, enables integration of the different brain hemispheres, and promotes top-down control by higher-order brain functions.<sup>47</sup>

Grey matter thinning during adolescence is the result of synaptic pruning.<sup>48</sup> Synaptic pruning improves information processing by reducing the number of unnecessary neuron connections and strengthening the connections—or synapses—that remain.<sup>49</sup> Newer research has shown that synaptic pruning happens in different parts of the brain at different times—with the prefrontal cortex finishing last and into a person’s mid-twenties.<sup>50</sup> The synapses between the frontal regions of the context and other parts of the brain that process social and emotional information mature at a similar timeline, through adolescence and into early adulthood.<sup>51</sup>

Due to the ongoing pruning and maturation of the prefrontal cortex during adolescence, a person’s cognitive control system is not yet at full capacity.<sup>52</sup> It is not until a person’s mid-twenties that the part of the brain associated with “high-level reasoning, executive function, weighing of consequences, planning, organization, emotional regulation, and rational decision-making” matures.<sup>53</sup> A mature executive function—the brain’s “air traffic control system”—allows adults to control impulses, stay focused on multiple streams of information at the same time, monitor errors and adjust accordingly, utilize working memory, and nimbly switch gears to adjust to changing situations or information.<sup>54</sup>

Socioemotional systems composed largely of limbic and paralimbic structures mature slightly earlier—in puberty—than cognitive systems, creating an imbalance in maturation with significant implications for adolescent decision-making: “the ability to regulate and understand emotions remains underdeveloped, susceptibility to peer influence is greater, the ability to delay rewards is limited, and adolescents and young adults are more likely than adults to engage

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44. Lee et al., *supra* note 43.

45. SCOTT & STEINBERG, *supra* note 38, at 45.

46. B.J. Casey, Nim Tottenham, Conor Liston & Sarah Durston, *Imaging the Developing Brain: What Have We Learned About Cognitive Development?*, 9 TRENDS COGN. SCI. 104, 105 (2005).

47. Lee et al., *supra* note 43, at 48.

48. *Id.*

49. *Id.*

50. See SCOTT & STEINBERG, *supra* note 38, at 45.

51. *Id.*

52. *Id.* at 44–45.

53. Douglas S. Dickema, *Adolescent Brain Development and Medical Decision-Making*, 146 PEDIATRICS S18, S21 (2020); Lee et al., *supra* note 43, at 51 (noting the research shows more complex aspects of executive functions that are critical for high order abilities have longer development trajectories and continue to develop into adulthood).

54. *Building the Brain’s “Air Traffic Control”*, *supra* note 31, at 1–2.

in a variety of risky behaviors . . . .”<sup>55</sup> Additionally, the myelinated cables connecting the prefrontal cortex (cognition) and the limbic system (socioemotional) are not fully strengthened until adulthood.<sup>56</sup> Adolescent brains employ fewer coordinated regions of their brain than adult brains in performing complicated tasks and thus are more vulnerable to becoming overwhelmed.<sup>57</sup>

While an adolescent brain may be capable of making decisions in “cold” or calm situations, they become less capable and their overall cognitive performance diminishes when placed in “hot” or emotionally charged and stressful situations.<sup>58</sup> Adolescents’ normative development in the various domains means that when they are placed in a high stress situation like immigration court and then are expected to represent themselves in complex proceedings, they will predictably struggle with comprehension, analytical thinking, impulse control, expression and regulation of emotion, evaluation of risk and reward, and “good”<sup>59</sup> decision making.<sup>60</sup> This is not pathological—it is the function of hard wiring in the brain and part of the natural and normal process of maturation.

### B. Developmental Milestones

Developmental milestones are a set of functional skills or tasks that a normally developing child can complete by a certain age range on their path to adulthood.<sup>61</sup> As stated above in Section II.A, genetics and the environment impact a child’s development, and challenges in either area can disrupt a child’s healthy development.<sup>62</sup> A basic understanding of major child development milestones in various domains is useful for highlighting the misalignment between the law’s expectations for children’s abilities in immigration removal proceedings and the functional skills most children possess.

As outlined in Table 1 below, social and emotional development milestones encompass ways that children interact with others and show emotion.<sup>63</sup> Social and emotional development are closely intertwined and help children build skills like self-control, empathy, and the ability to identify, express, and regulate

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55. Diekema, *supra* note 53, at S21.

56. Laurence Steinberg, *The Science of Adolescent Brain Development and Its Implications for Adolescent Rights and Responsibilities*, in HUMAN RIGHTS AND ADOLESCENCE 64 (Jacqueline Bhabha ed., 2014).

57. SCOTT & STEINBERG, *supra* note 38, at 45.

58. Diekema, *supra* note 53, at S21–22.

59. Dr. Laurence Steinberg and Professor Elizabeth Scott define bad decision making as “choices that threaten the welfare of the teenager or others.” SCOTT & STEINBERG, *supra* note 38, at 14.

60. *Id.*

61. *See infra* Table 1–Table 4.

62. Gene Griffin, *Child Development and the Impact of Abuse and Neglect*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 70 (Donald N. Duquette, Ann M. Haralambie & Vivek S. Sankaran eds., 3d ed. 2016).

63. *Module 2: Understanding Children’s Developmental Milestones*, CDC: WATCH ME! TRAINING MODULES, <https://www.cdc.gov/ncbddd/watchmetraining/module2.html> [https://perma.cc/3STT-F6MA] (last visited Mar. 8, 2026).

emotions.<sup>64</sup> Because social and emotional development lags behind cognitive maturation, adolescents are more sensitive to peer influence, more likely to focus on short-term versus long-term consequences, and are more impulsive, moody, and risky than adults.<sup>65</sup> To illustrate an example relevant to asylum claims, which is a common form of relief from deportation in which a noncitizen claims they will face persecution in their country of origin, a child's maturation in this domain impacts their sense of identity and ability to perceive discrimination and threats of harm by individuals and institutions.<sup>66</sup>

TABLE 1: EXAMPLES OF SOCIAL & EMOTIONAL SKILLS BY AGE<sup>67</sup>

| Developmental Stage | Common Milestones  |
|---------------------|--|
| Early Childhood     | A fifteen-month-old child claps when they are excited, copies other children while playing, and points to ask for something.   |
| Middle Childhood    | A five-year-old child is aware of gender, begins to have a sense of their racial and ethnic identity, and can distinguish “real” from “make-believe.”  |
| Adolescence         | A seventeen-year-old child has developed a sense of self-identity, engages in increased risk-taking behavior, exhibits difficulty self-regulating their emotions under stress, and can perceive societal and institutional discrimination. |

As seen in Table 2, the language and communication developmental domain relates to how children express their needs, share what they are thinking, and understand what is being said to them.<sup>68</sup> Children lack the verbal and communication skills to share basic biographical details or answer legal questions from a judge or prosecutor but are routinely expected to do so in immigration court.<sup>69</sup>

64. *Domain 3: Social and Emotional Development*, IDAHO DEP'T HEALTH & WELFARE (Jan. 28, 2026), <https://healthandwelfare.idaho.gov/services-programs/domain-3-social-and-emotional-development> [<https://perma.cc/326V-JHTJ>].

65. SCOTT & STEINBERG, *supra* note 38, at 14.

66. Christia Spears Brown & Rebecca S. Bigler, *Children's Perceptions of Discrimination: A Developmental Model*, 76 CHILD DEV. 533, 541, 548, 550 (2005); *see also* Shayla Chilliak, Sabrina Musacchio, Tina Montrueil & Shanna Williams, *Interviewing Asylum-Seeking Children: A Scoping Review of Research to Inform Best Practices*, TRAUMA VIOLENCE ABUSE (July 2024), <https://pmc.ncbi.nlm.nih.gov/articles/PMC11545363/> [<https://perma.cc/7K3R-3PVR>] (describing how developmental limitations in memory, language, and social understanding create additional challenges for asylum-seeking children when being interviewed or when testifying).

67. AM. ACAD. OF PEDIATRICS, *supra* note 30, at 528, 802; *Milestone Marker Checklist*, CDC (2022), [https://www.cdc.gov/ncbddd/actearly/pdf/LTSAE-Checklist\\_COMPLIANT\\_30MCorrection\\_508.pdf](https://www.cdc.gov/ncbddd/actearly/pdf/LTSAE-Checklist_COMPLIANT_30MCorrection_508.pdf) [<https://perma.cc/8V55-KTV9>] [hereinafter CDC Milestone]; Griffin, *supra* note 62, at 75; *Cognitive and Social Skills to Expect From 3 to 5 Years*, AM. PSYCH. ASS'N (2017), <https://www.apa.org/act/resources/fact-sheets/development-5-years> [<https://perma.cc/74HC-PAW6>]; Brown & Bigler, *supra* note 66, at 541.

68. *Module 2: Understanding Children's Developmental Milestones*, *supra* note 63.

69. *See* Katelyn Vue, *Minnesota's Unaccompanied Minors Face Scrutiny at Home, Hurdles in Court*, SAHAN J. (July 29, 2025), <https://sahanjournal.com/immigration/unaccompanied-minors-minnesota-immigration-court-deportation/> [<https://perma.cc/R2KM-3LNQ>] (“The most difficult thing is that you have a minor dealing

TABLE 2: EXAMPLES OF LANGUAGE & COMMUNICATION SKILLS BY AGE<sup>70</sup>

| Developmental Stage | Common Milestones  |
|---------------------|--|
| Early Childhood     | A fifteen-month-old child imitates scribbling, uses three words other than names, and follows directions given with both a gesture and words.                            |
| Middle Childhood    | A five-year-old child can tell a simple story using full sentences, use appropriate tenses, and keep a conversation going with more than three back-and-forth exchanges. |
| Adolescence         | A seventeen-year-old child communicates like an adult, can lose track of long, complex questions, and may still struggle to understand double negatives.                 |

As shown in Table 3, the physical development domain relates to how children use their bodies.<sup>71</sup> Imaging studies show that brain regions associated with more basic functions like motor and sensory processes mature first, followed by associated areas involving in top-down control of thoughts and action.<sup>72</sup> Thus, while adolescents may physically appear mature, as discussed below, they lack fully developed neural systems responsible for executive control that is needed to represent themselves in court.<sup>73</sup> Children in early and middle childhood often lack the fine motor skills necessary to hold a pencil or type, yet they may be expected to complete written applications or file motions in their own defense.<sup>74</sup>

with adult problems, very consequential decisions and processes that affect their future.”); Brief of Former Judges et al. as Amici Curiae Supporting Plaintiffs, *Cnty. Legal Servs. in E. Palo Alto v. United States Dep’t of Health & Human Servs.*, No. 25-cv-2847, at 6 (N.D. Cal. Mar. 31, 2025), [https://storage.courtlistener.com/recap/gov.uscourts.cand.447078/gov.uscourts.cand.447078.23.1\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.cand.447078/gov.uscourts.cand.447078.23.1_1.pdf) [<https://perma.cc/5532-R77E>] (“The former judge reports that one of the most surreal and heartbreaking aspects of that role [in immigration court] was having to ‘swear in’ children who could not yet speak in full sentences, let alone understand the legal implications of asylum, persecution, or statutory bars.”); Video posted by Congresswoman Primila Jayapal, FACEBOOK, *Can You Imagine a Child who Struggles to Understand English, Representing Themselves in a Legal Proceeding, Trying to Cross-Examine a Witness, and Going up Against a Seasoned Immigration Attorney?* (Dec. 17, 2025), <https://www.facebook.com/watch/?v=1634471737535794> [<https://perma.cc/CM3F-M88G>] (describing Congresswoman Jayapal’s observations of juvenile immigration court docket and her conclusion it is an “absurd nightmare”).

70. AM. ACAD. OF PEDIATRICS, *supra* note 30, at 528, 656; CDC Milestone, *supra* note 67; *Adolescence (11-18 years) Factsheet*, JUD. COLL. OF VICT.: CHILD WITNESS SERV., <https://judicialcollege.vic.edu.au/media/64/file> [<https://perma.cc/N9PY-CGFW>] (last visited Mar. 8, 2026).

71. *Module 2: Understanding Children’s Developmental Milestones*, *supra* note 63.

72. Casey et al., *supra* note 46, at 105.

73. See *Physical Development During Adolescence*, in CHILD AND ADOLESCENT PSYCHOLOGY 46, 46–47 (2022), <https://csi.pressbooks.pub/childandadolescentpsychology/chapter/physical-development-during-adolescence/> [<https://perma.cc/4A2K-CXQV>] (describing how physical growth (height, body build, sexual maturity) occurs earlier than neural maturation that underlies cognitive control).

74. See Hannah Gross, *The Children in Newark Immigration Court*, NJ SPOTLIGHT NEWS (Aug. 19, 2025), <https://www.njspotlightnews.org/2025/08/children-in-newark-immigration-court/> [<https://perma.cc/FK5W-2URQ>] (noting that young children are increasingly forced to navigate complex immigration proceedings and appear in court without parents or lawyers and raising concerns about their ability to fill out forms, understand what is happening in court, and advocate for themselves in these matters).

TABLE 3: EXAMPLES OF PHYSICAL DEVELOPMENTAL SKILLS BY AGE<sup>75</sup>

| Developmental Stage | Common Milestones  |
|---------------------|--|
| Early Childhood     | A fifteen-month-old child can crawl up a few steps, make marks with a crayon, and use their fingers to feed themselves.  |
| Middle Childhood    | A five-year-old child walks more like an adult, can hop on one foot, and has a mature pencil grasp.  |
| Adolescence         | A seventeen-year-old child will have likely completed or nearly completed their growth spurt and puberty – shifting into their adult bodies and physical capabilities. |

Finally, as highlighted in Table 4, the domain of cognitive development refers to how children learn, think, reason, remember, and solve problems.<sup>76</sup> Cognitive development revolves around two key concepts: “*understanding*—the ability to comprehend information relevant to the decision; and *reasoning*—the ability to use information logically to make a decision.”<sup>77</sup> The exercise of cognitive skills is impacted both by the access to information for decision-making and also by a child’s ability to then process that information.<sup>78</sup> While adolescents’ reasoning and understanding skills approach adult levels by their late teens, the research indicates they are less capable than adults in *exercising* these skills, particularly in “hot” stressful situations (like court proceedings).<sup>79</sup>

75. AM. ACAD. OF PEDIATRICS, *supra* note 30, at 528, 656; CDC Milestone, *supra* note 67; OFF. OF POPULATION AFF., ADOLESCENT DEV. EXPLAINED 3–5 (2018), <https://opa.hhs.gov/sites/default/files/2021-03/adolescent-development-explained-download.pdf> [<https://perma.cc/NU4U-C6A2>].

76. *Module 2: Understanding Children’s Developmental Milestones*, *supra* note 63.

77. M. Aryah Somers, Pedro Herrera & Lucia Rodriguez, *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL’Y 311, 325 (2010) (emphasis added) (footnote omitted).

78. SCOTT & STEINBERG, *supra* note 38, at 37.

79. *Id.* at 14; Brief of Former Judges et al., *supra* note 69, at 9–11 (former judges note that “[t]he entire process is beyond the capabilities of an adult much less an unaccompanied child to pursue”); Brief of Young Ctr. for Immigrant Children’s Rights as Amicus Curiae Supporting Plaintiffs, *Cnty. Legal Servs. in E. Palo Alto v. United States Dep’t of Health & Human Servs.*, No. 25-cv-2847, at 17 (N.D. Cal. Mar. 31, 2025), [https://www.theyoungcenter.org/wp-content/uploads/2025/06/2025\\_04\\_10\\_51YoungCenterAmicusBrief.pdf](https://www.theyoungcenter.org/wp-content/uploads/2025/06/2025_04_10_51YoungCenterAmicusBrief.pdf) [<https://perma.cc/5VCE-2S2R>] (describing a hearing immigration hearing the judge asked each child, via an interpreter whether they wanted additional time on their case—“One teenage girl responded in Spanish, ‘No.’ When the judge asked if the youth wished to represent herself, the youth responded in Spanish, ‘No.’ The judge then asked the youth why she did not want more time. The youth then became confused and responded, ‘No entiendo nada,’ indicating that she did not understand anything being said”).

TABLE 4: EXAMPLES OF COGNITIVE SKILLS BY AGE<sup>80</sup>

| Stage & Age      | Common Milestones  |
|------------------|--|
| Early Childhood  | A fifteen-month-old child can stack at least two small objects and tries to use things the correct way.  |
| Middle Childhood | A five-year-old child is beginning to understand the relationship of cause and effect, understands future tense, and can pay attention for five to ten minutes during activities.                                  |
| Adolescence      | A seventeen-year-old child can engage in abstract thought but reverts to concrete thought under stress, has a better sense of time but may still struggle with dates, and uses independent decision-making skills. |

Due to their inherent developmental immaturity, children simply do not experience immigration removal proceedings the same way as adults, and children cannot exercise their rights in the same manner as their adult counterparts. Developmental research does not evidence that all children lack the capacity to make important decisions about their futures or participate in the legal proceedings to which they are a party.<sup>81</sup> This Article, however, argues in Part V that it does make them developmentally incompetent to represent themselves in removal proceedings.<sup>82</sup>

Developmental research should inform our thinking about what full and fair immigration removal proceedings look like for children. Children must be provided with developmentally appropriate tools and accommodations—including the right to appointed counsel—so they can make informed decisions about their court cases and meaningfully exercise their statutory and constitutional rights. The concept of developmental incompetence advanced in this Article is used to help children effectuate their rights, not to reduce their autonomy. As explored in Part V, research on child development has important implications for creating a just immigration court system that is compatible with the law’s theoretical commitment to a fair process.

80. AM. ACAD. OF PEDIATRICS, *supra* note 30, at 105; CDC Milestone, *supra* note 67; Griffin, *supra* note 62, at 76; *Cognitive and Social Skills*, *supra* note 67; *Developmental Milestones for Teens (13-18 Years)*, CORAL CARE, <https://www.joincoralcare.com/developmental-guides/milestones-teens-13-18-years> [https://perma.cc/35QR-CHCZ] (last visited Mar. 8, 2026); Lee et al., *supra* note 43, at 53 (noting that research shows development of hot executive functions lag behind cold executive functions and therefore reach maturity at a later age).

81. See Buss, *Confronting Developmental Barriers*, *supra* note 29, at 897.

82. Capacity relates to the ability to make a decision or perform a task in a given context. Competency is legal construct and finding with context specific implications. See Kimberly M. Mutcherson, *Minor Discrepancies: Forging a Common Understanding of Adolescent Competence in Healthcare Decision-Making and Criminal Responsibility*, 6 NEV. L.J. 927, 933 (2006). This Article defines developmental incompetence as a child’s inability to understand, reason, communicate, or meaningfully participate in legal proceedings because of normal developmental immaturity.

### C. *Trauma and Its Impact on Child Development*

Most children in immigration removal proceedings have experienced childhood trauma.<sup>83</sup> The American Psychological Association defines trauma as “an emotional response to a terrible event like an accident, crime, natural disaster, physical or emotional abuse, neglect, experiencing or witnessing violence, death of a loved one, war, and more.”<sup>84</sup> Trauma impacts children uniquely because of their still developing brains and bodies.<sup>85</sup> Neurobiological changes during childhood make them especially vulnerable to the maladaptive effects of trauma, which can impair cognitive processes crucial for court participation, including emotional regulation, impulsivity, working memory, the ability to distinguish danger from safety, and executive functioning.<sup>86</sup> Thus, while normative child development alone requires accommodation for children in removal proceedings, the compounding impacts of trauma on cognition lend further support to the need for child-specific protections, rules, and policies.

Abuse, chronic neglect, exposure to violence, natural disasters, discrimination, and extreme poverty are all examples of adverse childhood experiences prevalently experienced by children fighting deportation.<sup>87</sup> The prolonged, severe, or frequent stress stemming from these types of experiences can create toxic stress.<sup>88</sup> Toxic stress adversely impacts a child’s developing brain, resulting in long-term consequences for their learning, behavior, memory, and physical and

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83. See *infra* Part III; see also Amanda NeMoyer, Trinidad Rodriguez & Kiara Alvarez, *Psychological Practice with Unaccompanied Immigrant Minors: Clinical and Legal Considerations*, 5 *TRANSL. ISSUES PSYCHOL. SCI.* 4, 6–9 (Mar. 2020) (describing traumatic experiences faced by unaccompanied minors before, during, and after migration).

84. The American Psychological Association defines trauma as “an emotional response to a terrible event like an accident, crime, natural disaster, physical or emotional abuse, neglect, experiencing or witnessing violence, death of a loved one, war, and more.” *Trauma*, AM. PSYCH. ASS’N, <https://www.apa.org/topics/trauma> [<https://perma.cc/7LEJ-XY8F>] (last visited Mar. 8, 2026).

85. CATHERINE INSEL, STEPHANIE TABASHNECK, FRANCIS X. SHEN, JUDITH G. EDERSHEIM & ROBERT T. KINSCHERFF, *CTR. FOR L. BRAIN & BEHAV., MASS. GEN. HOSP., WHITE PAPER ON THE SCIENCE OF LATE ADOLESCENCE: A GUIDE FOR JUDGES, ATTORNEYS, AND POLICY MAKERS* 18 (2022); Sara E. Gold, *Trauma: What Lurks Beneath the Surface*, 24 *CLINICAL L. REV.* 201, 213 (2018).

86. INSEL ET AL., *supra* note 85, at 18; Gold, *supra* note 85, at 216.

87. ANNE ELIZABETH SIDAMON-ERISTOFF, EMILY M. COHODES, DYLAN G. GEE & CATHERINE JENSEN PENA, *TRAUMA EXPOSURE AND MENTAL HEALTH OUTCOMES AMONG CENTRAL AMERICAN AND MEXICAN CHILDREN HELD IN IMMIGRATION DETENTION AT THE UNITED STATES-MEXICO BORDER* 1 (2021); EMILY M. COHODES ET AL., *MIGRATION-RELATED TRAUMA AND MENTAL HEALTH AMONG MIGRANT CHILDREN EMIGRATING FROM MEXICO AND CENTRAL AMERICA TO THE UNITED STATES: EFFECTS ON DEVELOPMENTAL NEUROBIOLOGY AND IMPLICATIONS FOR POLICY* 1 (2021); MANUEL PARIS, JR. ET AL., *IMMIGR. POL’Y WORKING GRP., VULNERABLE BUT NOT BROKEN: PSYCHOSOCIAL CHALLENGES AND RESILIENCE PATHWAYS AMONG UNACCOMPANIED CHILDREN FROM CENTRAL AMERICA* 55 (2018), <https://www.apa.org/topics/immigration-refugees/vulnerable.pdf> [<https://perma.cc/ZNH3-Z8YP>].

88. When a person encounters a challenge, problem, or threat there may be a response that triggers stress hormones that cause physiological changes in a person’s body. Toxic stress is when that stress is prolonged, severe, or chronic and negatively impacts a person’s functioning, health, and development. *Toxic Stress*, ADMIN. FOR CHILD. & FAMS., <https://www.acf.hhs.gov/trauma-toolkit/toxic-stress> [<https://perma.cc/HDB7-Y86W>] (last visited Mar. 8, 2026).

mental health.<sup>89</sup> For example, exposure to toxic stress and the resulting increase in amygdala-driven cortisol can impede development of the hippocampus, a brain structure critical for learning, memory, anxiety regulation, and emotional control.<sup>90</sup>

The impact of trauma on a child's development is influenced by their developmental stage, culture, resilience, and access to supportive people and resources to mitigate harm and foster healthy development.<sup>91</sup> Chronic insecurity and lack of support, common experiences for many children facing removal, can lead to complex trauma,<sup>92</sup> manifesting in dissociation, impulsivity, difficulty concentrating, emotional and behavioral dysregulation, and a diminished sense of self.<sup>93</sup> Thus, trauma-related developmental delays and disruptions can further hinder a child's ability to navigate the complexities of immigration court proceedings.<sup>94</sup>

### III. SNAPSHOT OF CHILDREN IN IMMIGRATION REMOVAL PROCEEDINGS

Since 2008, there has been a growing number of noncitizen children attempting to enter the United States at the U.S.-Mexico border. According to U.S. Customs and Border Patrol ("CBP") data, there was a five-fold increase in the number of children ages 0–17 that CBP officers encountered at the southern border between fiscal years 2008–2019.<sup>95</sup> Fiscal year 2022 set records for the total

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89. Clare Huntington, *Neuroscience and the Child Welfare System*, 21 J.L. & POL'Y 37, 47–48 (2012); *ACEs and Toxic Stress: Frequently Asked Questions*, HARV. UNIV.: CTR. ON DEVELOPING CHILD (Aug. 3, 2018), <https://developingchild.harvard.edu/resources/infographics/aces-and-toxic-stress-frequently-asked-questions/> [<https://perma.cc/6CQT-8Q6F>].

90. Lynn Hecht Schafran, *Domestic Violence, Developing Brains, and the Lifespan: New Knowledge from Neuroscience*, 53 JUDGES' J. 32, 34 (2014); *Trauma and Adverse Childhood Experiences*, ADMIN. FOR CHILD. & FAMS.: HEAD START (Mar. 25, 2025), <https://eclkc.ohs.acf.hhs.gov/publication/trauma-adverse-childhood-experiences> [<https://perma.cc/XH36-B3VR>].

91. PARIS ET AL., *supra* note 87, at 55.

92. The National Child Traumatic Stress Network defines complex trauma as "both children's exposure to multiple traumatic events—often of an invasive, interpersonal nature—and the wide-ranging, long-term effects of this exposure." *Complex Trauma*, NAT'L CHILD TRAUMATIC STRESS NETWORK, <https://www.nctsn.org/what-is-child-trauma/trauma-types/complex-trauma> [<https://perma.cc/MN8P-N4NN>] (last visited Mar. 8, 2026).

93. PARIS, JR. ET AL., *supra* note 87, at 55.

94. See Brief of Young Ctr. for Immigrant Children's Rights, *supra* note 79, at 7–8 (citing research on trauma history to argue for legal representation for children). The advocates explain that representation from a lawyer "with whom the child can build rapport and trust over time and who is able to identify and address the impact of trauma on a child's oral account of their experience, is critical to ensuring that their story and expressed wishes are heard during their immigration proceedings." *Id.*

95. See *Growing Numbers of Children Try to Enter the U.S.*, TRANSACTIONAL REC. ACCESS CLEARINGHOUSE: IMMIGR. (June 28, 2022), <https://trac.syr.edu/immigration/reports/687/#f4> [<https://perma.cc/XFP3-XBCY>]. CBP data has two demographic classifications for children: accompanied minors and unaccompanied children/single minors. According to the CBP data dictionary an accompanied minor "represents a child accompanied by a parent or legal guardian and the parent or legal guardian is either a U.S. Citizen, Lawful Permanent Resident, or admissible noncitizen, and the child is determined to be inadmissible." The CBP data does disaggregate children within a family unit or include a way to account for children ages 18–21. *Nationwide Encounters*, U.S. CUSTOMS & BORDER PROT. (Oct. 24, 2025), <https://www.cbp.gov/newsroom/stats/nationwide-encounters> [<https://perma.cc/U8SJ-MJ9D>] [hereinafter CBP Nationwide Encounters]; *Southwest Land Border Encounters*, U.S. CUSTOMS & BORDER PROT. (Jan. 20, 2025), <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> [<https://perma.cc/9BN3-YGCQ>]. An unaccompanied child is defined by U.S. law as

number of accompanied and unaccompanied children encountered by CBP at the border: 155,020 children aged 0–17.<sup>96</sup> And fiscal years 2023 and 2024 saw high numbers as well: 139,810 and 111,669, respectively.<sup>97</sup>

Data from the Transactional Records Access Clearinghouse (“TRAC”), a data research organization founded at Syracuse University, provides further insight into the demographic makeup of children in removal proceedings.<sup>98</sup> The data included here is from their “New Proceedings Filed in Immigration Court” tool, which allows for sorting of data by the fiscal year the case arrived,<sup>99</sup> age groups,<sup>100</sup> gender,<sup>101</sup> and legal representation.<sup>102</sup> An exploration of the available data revealed some interesting trends related to children in removal proceedings.

First, between fiscal year 2012 and April 2025, children ages 0–17 have represented on average 19% of all new removal proceedings filed in immigration court.<sup>103</sup> A closer look at the data, however, shows a considerable increase in the share of children’s cases beginning in 2014, prior to that children’s cases represented an average of only 4% of all new filings.<sup>104</sup> Not only have the percentages grown, but the sheer total number of new cases for children have increased dramatically since 2014: there were 15,333 new cases for children under eighteen in fiscal year 2013 compared to 55,551 in 2014, 150,821 in 2019, and 424,170 in 2024.<sup>105</sup>

Second, the TRAC data paints a clear picture of the shifting demographics of children in removal proceedings. The age of children with new removal cases

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follows: (1) under the age of 18, (2) without lawful immigration status, and (3) without an accompanying parent or legal guardian. 6 U.S.C. § 279(g)(2). The federal statute uses the phrase “unaccompanied alien child.” This Article will omit the word “alien” and use the phrase “unaccompanied child” instead when referring to those children included in the 6 U.S.C. § 279(g)(2) definition.

96. CBP Nationwide Encounters, *supra* note 95 (2,963 accompanied minors and 152,057 unaccompanied minors).

97. *Id.* (2,535 accompanied and 137,275 unaccompanied minors in 2023, and 1,671 accompanied and 109,998 unaccompanied minors in 2024).

98. As of early January 2025, the Syracuse University webpage hosting TRAC and its immigration court data portal is no longer available. Immigration Prof, *TRAC Is Offline. Is It Gone for Good?*, TYPEPAD: L. PROFESSOR BLOGS NETWORK (Jan. 9, 2025), <https://lawprofessors.typepad.com/immigration/2025/01/trac-is-offline.html> [<https://perma.cc/Q7B9-BWUQ>]. The website and data were subsequently moved to the website [tracreports.org](https://tracreports.org) in February 2025. Immigration Prof, *TRAC Is Back Up*, TYPEPAD: L. PROFESSOR BLOGS NETWORK (Feb. 7, 2025), <https://lawprofessors.typepad.com/immigration/2025/02/trac-is-back-up.html> [<https://perma.cc/3LGT-GF4Y>].

99. *New Proceedings Filed in Immigration Court*, *supra* note 4 (“This selection displays cases for the entire fiscal year, or for the current fiscal year through the latest month that data are available. The federal government’s fiscal year runs from October 1 to September 30.”).

100. *Id.* (grouping data by age as follows: 0–4, 5–11, 12–17, 18–24, 25–34, 35–44, 45–59, 60+, and unknown).

101. *Id.* (including male, female, and unknown gender options and failing to account for nonbinary people or other genders).

102. *Id.* (“Represented. Whether the individual did (“Represented”) or did not (“Not Represented”) have an attorney to help present the individual’s case.”).

103. *Id.* (showing that, between 2012 and April 2025, 1,919,158 out of 9,972,208 new cases, or 19%, were for children ages 0–17).

104. *Id.*

105. *New Proceedings Filed in Immigration Court*, *supra* note 4.

has trended younger over the past few years.<sup>106</sup> Beginning in 2019, a larger share of new cases filed in immigration court for children were for those under the age of twelve.<sup>107</sup> Indeed, fiscal years 2024 and 2023 saw the highest number of new cases for children aged 0–4 years old: 120,291 and 119,706 cases, respectively.<sup>108</sup> Historically, Guatemala, Honduras, Mexico, and El Salvador have been the largest sending countries.<sup>109</sup> Recently, there has been a significant uptick in Venezuelans.<sup>110</sup>

Third, legal representation rates for children are low. There is no right to appointed counsel in immigration court and formidable barriers exist to hiring an attorney.<sup>111</sup> Children ages 0–4 have the lowest rates of legal representation.<sup>112</sup> This has remained constant since 2012.<sup>113</sup> And beginning with cases filed in fiscal year 2019, the majority of children have no legal counsel.<sup>114</sup> TRAC data last updated in April 2025 shows 88% of children with removal cases opened in fiscal year 2025 and 81% opened in fiscal year 2024 have no attorneys.<sup>115</sup> Both the TRAC data and published research findings make clear that attorneys play a critical and often decisive role in outcomes.<sup>116</sup> A national study in 2015 found that respondents were five-and-a-half times more likely to obtain relief from removal when represented by counsel.<sup>117</sup> That rate increases when looking solely at

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106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Immigration & Nationality Act § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A); Ingrid V. Eagly, Steven Shafer & Renee Moulton, *Access to Counsel in Immigration Court, Revisited*, 111 IOWA L. REV. 1, 2–3 (2025) (“Although immigrants have a right to be represented by counsel at a removal hearing in the United States, there is no requirement that counsel be provided at government expense.”). Barriers to hiring an attorney include geographic disparity in the availability of counsel, federal funding cuts, pressure on pro bono and nonprofit programs by the federal government to decline representation. *Id.* at 10, 19; *see also* Chiara Galli & Tatiana Padilla, *New Data on Unaccompanied Minors in US Immigration Court (2009-2023)*, INT’L MIGRATION REV. (Mar. 2025), <https://journals.sagepub.com/doi/10.1177/01979183251316528> [<https://perma.cc/PK4H-2SG4>] (describing the geographic and demographic barriers in legal representation); Lilly Yu, *Third-Party Brokers: How Administrative Burdens on Nonprofit Attorneys Worsen Immigrant Legal Inequality*, 9 RUSSEL SAGE FOUND. J. OF SOC. SCI. 133, 134–35 (Sep. 2023) (exploring how administrative burden regimes affect third-party brokers of immigrant legal pathways); Brief of Young Ctr. for Immigrant Children’s Rights, *supra* note 79, at 20 (explaining how pro bono representation is not enough to fill the gap created by the termination in funding); Grether, *supra* note 7.

112. *See Immigration Court Backlog*, *supra* note 2 (showing that, at the end of fiscal year 2024, 213,781 of the 281,964 children ages 0–4 with pending cases were unrepresented, equating to 76%, and showing that 67% of children ages 12–17 were unrepresented at the end of fiscal year 2024).

113. *Id.*; *New Proceedings Filed in Immigration Court*, *supra* note 4.

114. *New Proceedings Filed in Immigration Court*, *supra* note 4.

115. *Id.*

116. *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 2 (2015) (stating “immigrants with attorneys fare[] far better” and are 5.5 times more likely to get relief from removal); John R. Mills, Kristen M. Echemendia & Stephen Yale-Loehr, “*Death Is Different*” and a Refugee’s Right to Counsel, 42 CORN. INT’L L.J. 361, 362 (2009) (stating asylum seekers with representation are three times more likely to obtain asylum); Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007) (stating asylum seekers represented by counsel were successful 45.6% of the time compared to 16.3%); Hlass et al., *supra* note 9, at 1467 (showing high approval rates for petitions filed by frequent filing organizations).

117. *See* Eagly & Shafer, *supra* note 116, at 9.

children under the age of eighteen—children were nearly *twelve* times more likely to obtain relief from removal when represented by counsel.<sup>118</sup>

The TRAC data reveals who is in immigration court and is helpful for getting a clear sense of the magnitude of the access to counsel problem for children. The data alone, however, does not explain why these children are migrating to the U.S. or the reasons for changes in patterns. Nor does it show how and why their unique challenges require special attention once they appear in a courtroom, which this Article puts forth below in Part V in connection with trauma and its impact on child development.

Children who migrate to the U.S. do so in response to many of the same interconnected, macro-level push and pull factors as adults, including economic, social, political, demographic, and environmental factors.<sup>119</sup> But there are also unique drivers and characteristics of child migration.<sup>120</sup> Worldwide, children are over-represented in the context of forced migration.<sup>121</sup> Studies show that violence is a primary factor driving child migration to the U.S.<sup>122</sup> The vast majority of children apprehended at the U.S.-Mexico border are unaccompanied children from Mexico, El Salvador, Honduras, and Guatemala.<sup>123</sup> These countries have been plagued by endemic domestic, gender, and gang violence that uniquely

118. *Outcomes of Immigration Court Proceedings*, *supra* note 11 (showing that, between fiscal years 2023 and 2024, 16,904 represented children won relief compared to 1,424 unrepresented children).

119. *The Global Context of International Migration: Drivers of International Migration*, ESSENTIALS OF MIGRATION MGMT. 2.0, <https://emm.iom.int/handbooks/global-context-international-migration/drivers-international-migration> [<https://perma.cc/3AJN-C5TJ>] (last visited Mar. 8, 2026); Francesco Castelli, *Drivers of Migration: Why Do People Move?*, J. TRAVEL MED. 1, 1 (2018).

120. See MARTINA BELMONTE & SIMON MCMAHON, INT’L ORG. FOR MIGRATION, SEARCHING FOR CLARITY: DEFINING AND MAPPING YOUTH MIGRATION 4 (2019), [https://publications.iom.int/system/files/pdf/mrs\\_59.pdf](https://publications.iom.int/system/files/pdf/mrs_59.pdf) [<https://perma.cc/9ABC-XLQ6>] (specifying migration for young people is driven by economic opportunity, presence of social networks, youth unemployment, violent conflict, and other factors); *Child and Young Migrants*, MIGRATION DATA PORTAL (Sep. 12, 2024), <https://www.migrationdataportal.org/themes/child-and-young-migrants> [<https://perma.cc/2TWY-RHZW>] (children are forcibly displaced by conflict, violence, persecution, and human rights violations) [hereinafter Migration Data Portal]; KIDS IN NEED OF DEF., WHY ARE CHILDREN LEAVING CENTRAL AMERICA AND ARRIVING AT THE U.S. BORDER? 1 (2025), <https://supportkind.org/wp-content/uploads/2021/05/Root-Causes-Fact-Sheet-7.pdf> [<https://perma.cc/3RWV-V3T3>] (stating drivers of child migration from Central America include instability, violence and crime, poverty, injustice and impunity, and inequality and discrimination); Michael A. Clemens, *Violence, Development, and Migration Waves: Evidence from Central American Child Migrant Apprehensions* (Ctr. Glob. Dev., Working Paper No. 459, 2017), <https://www.cgdev.org/sites/default/files/violence-development-and-migration-waves-evidence-central-american-child-migrant.pdf> [<https://perma.cc/EY42-7WHH>] (“[S]ix additional homicides [per year] . . . caused . . . 3.7 additional unaccompanied child apprehensions in the United States.”).

121. See BELMONTE & MCMAHON, *supra* note 120, at 4 (“It should also be noted that young people are over-represented in contexts of forced migration.”).

122. See Michael Clemens & Kate Gough, *Child Migration from Central America—Just the Facts*, CTR. GLOB. DEV. (June 20, 2018), <https://www.cgdev.org/blog/child-migration-central-america-just-facts> [<https://perma.cc/VX52-VXM6>] (“[V]iolence was a major decision factor driving migration.”) (emphasis in original); Clemens, *supra* note 120 (finding increased homicide causes increased child apprehensions in the U.S.); Migration Data Portal, *supra* note 120 (finding a 230% increase in forcibly displaced children due in part to violence).

123. See *Unaccompanied Children: Fact Sheets and Data*, OFF. OF REFUGEE RESETTLEMENT (Oct. 15, 2025), <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data> [<https://perma.cc/Z47S-5QZD>]; CBP Nationwide Encounters, *supra* note 95.

target and impact children.<sup>124</sup> And the uptick in Venezuelan children coincides with the severe economic and political upheaval facing that country.<sup>125</sup>

While poverty, family reunification, and generalized violence certainly factor into child migration, research suggests a majority of children are coming to the United States to flee violence specifically directed at them.<sup>126</sup> For example, a United Nations High Commissioner for Refugees (“UNHCR”) survey of 404 unaccompanied children from El Salvador, Guatemala, Honduras, and Mexico, found that 58% of those interviewed suffered or were threatened with harms, indicating a need for international protection.<sup>127</sup> The report included representative quotes from children describing the harm they experienced:

*I like playing football [soccer] outside, but I can't really play anymore. My friends from my neighborhood all moved because their brothers were killed. The cartel killed them, and the entire family left. So now I don't have anyone to play soccer with.*

JUAN, MEXICO, AGE 13<sup>128</sup>

*I am here because the gang threatened me. One of them “liked” me. Another gang member told my uncle that he should get me out of there because the guy who liked me was going to do me harm. In El Salvador they take young girls, rape them and throw them in plastic bags. My uncle told me it wasn't safe for me to stay there.*

MARITZA, EL SALVADOR, AGE 15<sup>129</sup>

*My grandmother wanted me to leave. She told me: “If you don't join, the gang will shoot you. If you do join, the rival gang will shoot you—or the cops will shoot you. But if you leave, no one will shoot you.”*

KEVIN, HONDURAS, AGE 17<sup>130</sup>

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124. See Julio Ernesto Acuna Garcia, *Central American Kids Come to the U.S. Fleeing Record-High Youth Murder Rates at Home*, CONVERSATION (July 13, 2018, at 06:25 ET), <https://theconversation.com/central-american-kids-come-to-the-us-fleeing-record-high-youth-murder-rates-at-home-99132> [<https://perma.cc/AY9B-WA6J>]; UNHCR, *supra* note 5, at 93; Kevin Ackerman et al., “*There Is No One Here to Protect You*”: Trauma Among Children Fleeing Violence in Central America, PHYSICIANS FOR HUM. RTS. (June 10, 2019), <https://phr.org/our-work/resources/there-is-no-one-here-to-protect-you/> [<https://perma.cc/98PA-BQ8M>].

125. See Ari Hoffman & Jeanne Batalova, *Venezuelan Immigrants in the United States*, MIGRATION POL'Y INST. (Feb. 15, 2023), <https://www.migrationpolicy.org/article/venezuelan-immigrants-united-states-2021> [<https://perma.cc/C5PW-93S9>]; Arelis R. Hernández, *A Migrant Family Is Undeterred by Biden's Push to Restrict Asylum*, WASH. POST (June 6, 2024), <https://www.washingtonpost.com/nation/2024/06/06/biden-immigration-asylum-policy-migrant-family/> [<https://perma.cc/UN4V-CR2D>]; Betilde Muñoz-Pogossian & Alexandra Winkler, *The Persistence of the Venezuelan Migrant and Refugee Crisis*, CTR. FOR STRATEGIC & INT'L STUD. (Nov. 27, 2023), [https://www.csis.org/analysis/persistence-venezuelan-migrant-and-refugee-crisis\\_](https://www.csis.org/analysis/persistence-venezuelan-migrant-and-refugee-crisis_) [<https://perma.cc/4YP6-QR99>].

126. See Acuna Garcia, *supra* note 124; Clemens, *supra* note 120; UNHCR, *supra* note 5, at 11; Ackerman et al., *supra* note 124.

127. UNHCR, *supra* note 5, at 36.

128. *Id.* at 39.

129. *Id.* at 9.

130. *Id.* at 36.

Every day, more children with stories<sup>131</sup> like these appear in immigration courts, confused and alone, unable to participate in the process, while judges are left overwhelmed and without adequate tools or procedures to avoid an uncomfortable reality check—that our system fails when it pretends that a child is no different than an adult and that we owe no duty to meet these children where they are.

#### IV. NAVIGATING THE LABYRINTH OF IMMIGRATION COURT AS A CHILD

There are no age limits in immigration removal proceedings.<sup>132</sup> Infants are prosecuted just like adults.<sup>133</sup> The same adult laws and adult procedures apply to the approximately one million children currently in immigration removal proceedings.<sup>134</sup>

To better envision the current, impossible situation facing children navigating our immigration courts today, it is useful to understand the procedures, rules, rights, and policies applicable to removal proceedings. This Section describes immigration court procedures and governing law before outlining the contours and scope of the problem.<sup>135</sup> The resulting picture that emerges is a complex, overburdened system that a child cannot navigate alone.

##### A. *Overview of Immigration Removal Proceedings*

In her book, *Tell Me How It Ends*, Dr. Valeria Luiselli writes about her experience volunteering as an interpreter for children at the immigration court in New York City.<sup>136</sup> Her description of the experiences of children in immigration court provides useful context for the legal overview that is to follow in this section:

*Children leave their homes with a coyote. They cross Mexico in the hands of this coyote, riding La Bestia. They try not to fall into the hands of rapists, corrupt police-men, murderous soldiers, and drug gangs who might enslave them in poppy or marijuana fields, if they don't shoot them in the head and mass-bury them. If something goes wrong, and something happens to a child, the coyote is not held accountable. In fact, no one is ever held accountable. The children who make it all the way to the U.S. border turn themselves in to Border Patrol officers and are formally detained.*

131. See Egkolfopoulou, *supra* note 1; Wendy Fry, *California Helped This Teen Fight Deportation. Now the Program is on the Chopping Block*, CAL MATTERS (July 30, 2024), <https://calmatters.org/california-divide/2024/07/unaccompanied-minors-legal-advocacy-ending/> [<https://perma.cc/L7MY-ADBX>].

132. See Egkolfopoulou, *supra* note 1.

133. Sasha Ingber, *1-Year-Old Shows Up In Immigration Court*, NPR (July 8, 2018, at 17:22 ET), <https://www.npr.org/2018/07/08/627082032/1-year-old-shows-up-in-immigration-court> [<https://perma.cc/4BSE-UCZ5>] (quoting an immigrant judge in Phoenix who was “embarrassed to ask” if the respondent, a baby drinking a bottle of milk, understood the proceedings).

134. See *Immigration Court Backlog*, *supra* note 2 (showing that at the end of fiscal year 2024, there are 281,964 pending cases for children ages 0–4, 384,594 pending cases for children ages 5–11, and 287,277 pending cases for children ages 12–17).

135. See *infra* Sections IV.A, IV.B, IV.C & IV.D.

136. VALERIA LUISELLI, *TELL ME HOW IT ENDS: AN ESSAY IN FORTY QUESTIONS* 51 (2017).

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*(Often by officers who say things like “Speak English! Now you’re in America!”) They are then placed in the icebox. And, later, in a temporary shelter. There they must start looking for their parents—if they have parents—or for relatives who will sponsor them. Later, they are sent to wherever their sponsor lives. And finally, they have to appear in court, where they can defend themselves against deportation—if they have a lawyer.<sup>137</sup>*

• • • •

*But of course it doesn’t end there. That’s just where it begins, with a court summons: a first Notice to Appear. Once children receive a Notice to Appear, they have to present themselves in immigration court. If they don’t show up (because they fear going to court, or perhaps because they have since moved, or because they simply didn’t get the notice) they are usually “removed in absentia.” An immigration judge, assisted by a translator, informs the ones who do show up that they have the right to an attorney, but at no expense to the U.S. government. In other words, it is the children’s responsibility to find and pay for a lawyer, or find a free lawyer, who can help them defend their case against the U.S. government attorney seeking to deport them.<sup>138</sup>*

As Dr. Luiselli describes in her book, a typical removal case begins with the Department of Homeland Security (“DHS”) filing a charging document called a Notice to Appear (“NTA”) in immigration court.<sup>139</sup> The NTA includes allegations regarding the person’s citizenship and violations of law that make them inadmissible or deportable.<sup>140</sup> Once the NTA is filed, a trained government attorney prosecutes the case in immigration court before an immigration judge who determines if there are grounds to remove the respondent (the formal term used for people charged with a violation of immigration law).<sup>141</sup> If a judge finds grounds for removal, the respondent then has the burden to defend against deportation and may apply for forms of relief from removal such as asylum, adjustment of status, or cancellation of removal, which the immigration judge then adjudicates.<sup>142</sup> If a noncitizen is successful in their application for relief from removal, then their court proceedings are terminated, and they gain lawful immigration status in the United States.<sup>143</sup> If they lose, then they receive a deportation order.<sup>144</sup>

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137. *Id.*

138. *Id.* at 58.

139. 8 U.S.C. § 1229(a).

140. *See* 8 C.F.R. § 1239.1 (2004).

141. *See* U.S. Dep’t of Justice, Exec. Office for Immigration Review, Immigration Court Practice Manual ch. 4.3 (2024); Brief of Former Judges et al., *supra* note 69, at 2–10 (outlining the flow of immigration cases from the perspective of judges adjudicating claims for unrepresented children).

142. Asylum is discussed in Section IV.E. Adjustment of status refers to the process for becoming a lawful permanent resident status (also known as applying for a Green Card) when present inside the United States. 8 U.S.C. § 1255; 8 C.F.R. § 245 (2025). A judge can “cancel removal” and allow a noncitizen to remain in the United States with a pathway to lawful residency if they can demonstrate their US citizen or lawful permanent resident family members will suffer extreme hardship if they were deported, among other things. 8 U.S.C. § 1229(b).

143. 8 C.F.R. § 1240.11(a) (2023).

144. 8 C.F.R. § 1240.12 (2025).

As a preliminary matter, it is important to note that immigration removal proceedings have been classified by the courts as civil and not criminal proceedings.<sup>145</sup> This classification is justified by the entrenched—albeit tenuous—conclusion that removal is not a punishment.<sup>146</sup> As a result, the constitutional safeguards that apply in criminal proceedings do not apply in immigration proceedings. Unlike criminal defendants, noncitizens defending against removal have no right to a trial by jury,<sup>147</sup> no Sixth Amendment right to the assistance of appointed counsel,<sup>148</sup> and no right to the exclusion of evidence gained in violation of the Fourth Amendment,<sup>149</sup> among other lack of protections.

Additionally, in the criminal law and juvenile delinquency context, a defendant must be competent to stand trial.<sup>150</sup> A defendant is competent to stand trial if they can consult with their lawyer with a “reasonable degree of rational understanding” and have a “rational as well as factual understanding of the proceedings.”<sup>151</sup> If competency cannot be established or restored, then the criminal or delinquency prosecution cannot proceed.<sup>152</sup> In immigration court, however, even when incompetency has been established, the proceedings can and do move forward.<sup>153</sup> This poses a significant challenge for children, who by nature of their normative development, are de facto and legally incompetent but still are expected to defend themselves with only a charade of safeguards.<sup>154</sup>

145. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (“A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry.”).

146. *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (“The order of deportation is not a punishment for crime.”). The Supreme Court, however, has also observed that removal is “a drastic measure and at times the equivalent of banishment of exile” and deportation may result in the loss “of all that makes life worth living.” *Fong Haw Tan v. Phelan*, 333 U.S. 6, 9–10 (1948) (finding deportation only authorized where an alien is a repeat offender because deportation “is a drastic measure”); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

147. *Fong Yue Ting*, 149 U.S. at 730.

148. *Lara-Torres v. Ashcroft*, 383 F.3d 968, 973 (9th Cir. 2004) (“But since deportation and removal proceedings are civil, they are ‘not subject to the full panoply of procedural safeguards accompanying criminal trials,’ including the right to counsel under the Sixth Amendment.”) (quoting *Magallanes–Damian v. INS*, 783 F.2d 931, 933 (9th Cir. 1986)), *amended by sub nom.*, *Lara-Torres v. Gonzales*, 404 F.3d 1105 (9th Cir. 2005).

149. *See Lopez-Mendoza*, 468 U.S. at 1033.

150. *See, e.g., Drope v. Missouri*, 420 U.S. 162, 171 (1975) (noting that the “common-law prohibition” on trying incompetent criminal defendants “has long been accepted”); Fatma E. Marouf, *Incompetent but Deportable: The Case for a Right to Mental Competence in Removal Proceedings*, 65 HASTINGS L.J. 929, 951 (2014) (acknowledging that although the Supreme Court has not yet addressed whether a child must be competent to be adjudicated delinquent, the majority of states have statutes or caselaw that explicitly require this).

151. *Dusky v. United States*, 362 U.S. 402, 402 (1960).

152. 21 AM. JUR. 2D *Criminal Law* § 102 (2024) (describing the “effect of finding of incompetence to stand trial”).

153. Elizabeth Jordan, *Accommodating Incompetency in Immigration Court*, 119 NW. U. L. REV. 513, 529–30 (2024) (comparing and contrasting competency processes in immigration and criminal proceedings and noting that immigration proceedings continue even if a respondent is incompetent). *See, e.g., M-J-K-*, 26 I. & N. Dec. 773, 773 (B.I.A. 2016) (reversing an immigration judge’s termination of removal proceedings against a respondent deemed incompetent despite the immigration judge’s determination that no safeguard was adequate).

154. Scholar Elizabeth Jordan calls this “safeguards theater” in which immigration judges provide safeguards unrelated to the respondent’s disability and push removal proceedings forward despite clear indications the respondent is still unable to understand and meaningfully participate in their proceedings. Jordan, *supra* note 153, at 518–19.

*B. Due Process Rights in Immigration Removal Proceedings*

Respondents in immigration removal proceedings “face the full power of the Government just as defendants in criminal trials do, but without even the minimal protections available in the criminal setting.”<sup>155</sup> This imbalance is exacerbated by the plenary power doctrine.<sup>156</sup> Historically, the U.S. Supreme Court has recognized and respected Congress’ power to regulate immigration and has been reluctant to review the constitutionality of immigration laws.<sup>157</sup> As summarized by immigration scholar Stephen Legomsky, under the plenary power doctrine, “the Supreme Court has accorded exceptional deference to Congress, often approaching non-reviewability, whenever there are issues concerning the constitutionality of immigration legislation.”<sup>158</sup>

One key exception to the plenary power doctrine, however, has been procedural due process.<sup>159</sup> Procedural due process relates to the procedures the government must follow before depriving someone of “life, liberty, or property.”<sup>160</sup> The due process clause has been interpreted to require “fundamental fairness” of proceedings.<sup>161</sup> Whether procedural due process has been met is dependent on the circumstances, but at a minimum requires a meaningful opportunity to be heard.<sup>162</sup>

A broader discussion of the evolution, application, and force of due process rights for respondents in removal proceedings has been explored by many scholars.<sup>163</sup> The U.S. Supreme Court, Courts of Appeal, and the Board of Immigration Appeals have continued to recognize that noncitizens within the United States have procedural due process rights “whether their presence here is lawful, unlawful, temporary, or permanent.”<sup>164</sup> And in the context of removal proceedings,

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155. Elizabeth Keyes, *Zealous Advocacy: Pushing Against the Borders in Immigration Litigation*, 45 SETON HALL L. REV. 475, 494 (2015).

156. *See id.*

157. This deference is grounded in the plenary power doctrine that was first articulated by the U.S. Supreme Court in 1889 in *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889). *See also* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1626 (1992) (“Courts have been reluctant to apply constitutional norms and principles to test the validity of subconstitutional immigration law.”); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1984) (“[T]he Court has declined to review federal immigration statutes for compliance with substantive constitutional restraints.”) [hereinafter Legomsky, *Plenary Congressional Power*].

158. Stephen H. Legomsky, *Immigration Exceptionalism: Commentary on Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 307, 307 (2000).

159. David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 51 (2015); Legomsky, *Plenary Congressional Power*, *supra* note 157, at 259.

160. U.S. CONST. amend. V.

161. *See Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 24–25 (1981) (considering what “fundamental fairness” means under the Due Process Clause in the context of right to counsel).

162. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

163. *See, e.g.*, Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 879, 926–36 (2015); Legomsky, *Plenary Congressional Power*, *supra* note 157, at 255; Diana G. Li, Note, *Due Process in Removal Proceedings After Thuraissigiam*, 74 STAN. L. REV. 793, 826–44 (2022); Valeria Gomez, *Geography as Due Process in Immigration Court*, 2023 WIS. L. REV. 1, 11–17 (2023).

164. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

the courts have interpreted due process to require “fundamental fairness,” which equates to “the right to meaningfully contest the government’s charges of removability and fully and fairly raise any applications for relief from removal that may be available to an individual.”<sup>165</sup>

The due process right to counsel in immigration proceedings is undisputed. There remains, however, an open question: whether due process requires the right to counsel *paid for by the government*. While some circuit courts have stated that due process *may* require government appointed counsel for respondents on a case-by-case basis, no court has found a constitutional mandate for appointed counsel in immigration removal proceedings.<sup>166</sup> And while the U.S. Supreme Court *has* recognized due process requires appointed counsel for children in juvenile delinquency proceedings—a civil context arguably akin to removal proceedings—no federal court has reached the same conclusion for children in the immigration context.<sup>167</sup>

The principle of due process is critically important in the administration of justice to ensure removal proceedings incorporate the basic elements of fairness.<sup>168</sup> Accuracy in decision making and meaningful participation are the two primary animating values of fundamental fairness of proceedings.<sup>169</sup> Yet, as argued in Subsection V.A.i, failure to account for normative child development in a manner that maintains fidelity to these principles distorts the due process analysis and outcomes for children in removal proceedings. Children’s developmental immaturity adversely impacts children’s ability to understand their removal proceedings and carry out basic functions within it, like responding to the charges of removability, presenting documentary and testimonial evidence, or

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165. Gomez, *supra* note 163, at 4 (first quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982); and then citing *Mathews*, 424 U.S. at 333).

166. See *C.J.L.G. v. Barr*, 923 F.3d 622, 629 (9th Cir. 2019) (Paez, J., concurring) (arguing that due process allows indigent children under 18 to have appointed counsel in immigration proceedings); *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034, 1048 (C.D. Cal. 2010) (discussing whether a mentally incompetent plaintiff should be appointed counsel for removal proceedings); Michael Kaufman, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 136–37 (2008); *Right to Counsel—Right to Appointed Counsel*, 1 IMMIGR. L. & DEF. § 7:56 (2025); King & Hall, *supra* note 14, at 17–20. As discussed in more detail below in Subsection V(a)(iii), disability law has been the only area where respondents have had success arguing for appointed counsel. See *Franco-Gonzalez v. Holder*, No. CV 10-02211, 2013 WL 3674492, at \*5 (C.D. Cal. Apr. 23, 2013); *M-A-M-*, 25 I. & N. Dec. 474, 484 (B.I.A. 2011); *M-J-K-*, 26 I. & N. Dec. 773, 775–76 (B.I.A. 2016).

167. The Supreme Court in *In re Gault*, found that juveniles have a right to appointed counsel in the adjudication stage of civil delinquency proceedings because “[t]he juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.” 387 U.S. 1, 36 (1967). For a discussion on constitutional and statutory rights to appointed counsel for children in other proceedings, please see Lapp, *supra* note 14, at 479–95; *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1029 (9th Cir. 2016) (ruling on jurisdictional arguments and failing to address the arguments for appointed counsel for children under the INA and Fifth Amendment); *C.J.L.G.*, 923 F.3d at 625 (ruling on grounds other than the statutory and due process arguments for appointed counsel for children).

168. See Kaufman, *supra* note 166, at 114–15.

169. See Emily Buss, *Constitutional Fidelity Through Children’s Rights*, 2004 SUP. CT. REV. 355, 364–65 (2004) (discussing the precepts of fundamental fairness inherent in due process and its application to children).

completing application forms.<sup>170</sup> A child-sensitive, developmentally informed due process rights analysis recognizes that immigration removal proceedings can never be fundamentally fair if they treat children the same as adults and expect them to represent themselves in court.

### C. *Statutory Rights in Immigration Removal Proceedings*

At the outset of removal proceedings, the immigration judge is required under the Immigration and Nationality Act (“INA”) to advise respondents of the following: the right to representation by private counsel at no expense to the government, the availability of pro bono legal services, and the right to cross-examine witnesses and to examine, present, and object to evidence.<sup>171</sup> Generally, the court then proceeds to ask the respondent questions about the exercise or waiver of these and other rights.<sup>172</sup> Given their normative development and the complexity of the immigration labyrinth, these adult-centric advisals are meaningless for children.<sup>173</sup> Comedian John Oliver’s 2018 segment on children in immigration court used satire to highlight the absurdity of asking young children questions like “what is your best language” and “if you were removed, would you like to designate a country of removal?” by showing clips of unscripted children responding to these questions with answers like “I placed a tie over fairies to [unintelligible words]” and “pizza” respectively.<sup>174</sup>

Additionally, immigration judges are required to meaningfully advise respondents of apparent eligibility for relief from removal and then afford an opportunity for respondents to apply for relief during the hearing.<sup>175</sup> This requirement is triggered any time the facts before the immigration judge raise “reasonable possibility that the petitioner may be eligible for relief.”<sup>176</sup> Similarly, immigration judges must advise respondents who have expressed fear of persecution upon return to their home countries of their right to apply for asylum or withholding of removal.<sup>177</sup> These duties, however, are inconsistently

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170. See *id.* at 365–78; Brief of Former Judges et al., *supra* note 69, at 8 (“Without such representation, the child can almost certainly not file a brief, call witnesses or articulate his or her eligibility for relief from removal.”).

171. 8 C.F.R. § 1240.10(a)(4) (2022).

172. *Master Calendar Checklist for the Immigration Judge*, U.S. DEP’T JUST., [https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Script\\_MC\\_Checklist.pdf](https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Script_MC_Checklist.pdf) [<https://perma.cc/PNE4-93GV>] (last visited Mar. 8, 2026) (includes a template script for initial hearings, called master calendar hearings, for judges to follow which includes legalese and complex concepts.).

173. See Buss, *supra* note 169, at 365–78.

174. LASTWEEKTONIGHT, *Immigration Courts, Trump’s Health & Egypt Election: Last Week Tonight with John Oliver*, at 11:49–19:05 (YouTube, Sep. 15, 2024), [https://youtu.be/BWQOiq7FQyY?si=w4TIQ0SWrny9IEE\\_&t=709](https://youtu.be/BWQOiq7FQyY?si=w4TIQ0SWrny9IEE_&t=709) [<https://perma.cc/A9WR-6SSJ>].

175. 8 C.F.R. § 1240.11(a)(2) (2023); *Moran-Enriquez v. INS*, 884 F.2d 420, 423 (9th Cir. 1989) (explaining that the immigration judge must advise a noncitizen of eligibility for relief and give him an opportunity to raise the issue when the record shows the petitioner may be eligible for relief).

176. *Moran-Enriquez*, 884 F.2d at 423.

177. 8 C.F.R. § 1240.11(c)(1) (2023).

followed.<sup>178</sup> And, even if a judge advises a child of their eligibility for lawful status, there are consequential barriers to submitting applications for status if they do not have legal counsel, especially when it comes to Special Immigrant Juvenile Status (“SIJS”).<sup>179</sup>

Respondents also have a statutory right to counsel in removal proceedings codified at INA sections 1229a(b)(4)(A) and 1362.<sup>180</sup> While the wording of the two sections differ slightly, their meaning is essentially the same.<sup>181</sup> All respondents in removal proceedings “have the privilege of being represented, at no expense to the Government, by counsel of [their] choosing.”<sup>182</sup> Although the statute refers to the “privilege” of representation, the legislative history of the right to counsel provision,<sup>183</sup> along with the INA headings,<sup>184</sup> and associated federal regulations,<sup>185</sup> evidence congressional intent to confer a right.<sup>186</sup>

The scope of this right to counsel is disputed and unsettled. The government and some courts have used statutory language to claim the right to counsel is narrow in scope.<sup>187</sup> Namely, it only extends to the right to counsel of one’s choice at one’s own expense.<sup>188</sup> The courts have generally viewed this right as satisfied when the immigration judge advises the respondent in a language they can understand of their right to counsel, the respondent has a reasonable period of time to obtain counsel at their own expense, and any waivers of this right are knowing and voluntary.<sup>189</sup> Violation of this right alone may not be grounds for reopening

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178. *See* *Quintero v. Garland*, 998 F.3d 612, 641–42 (4th Cir. 2021) (immigration judge has a duty to fully develop the record for a pro se asylum applicant); *Mills et al.*, *supra* note 116, at 362 (“Although immigration judges must inform petitioners of their right to an attorney and provide a list of pro bono legal services, immigration judges sometimes fail to inform petitioners of their rights and, more frequently, provide lists that are outdated or incorrect.”).

179. Special Immigrant Juvenile Status is discussed in more detail in Section IV.E of this Article.

180. 8 U.S.C. §§ 1229a(b)(4)(A), 1362.

181. *See supra* note 179 and accompanying text.

182. 8 U.S.C. § 1229a(b)(4)(A).

183. *See* H.R. REP. NO. 82-1365, at 57 (1952), *reprinted in* 1952 U.S.C.A.N. 1653, 1712.

184. 8 U.S.C. §§ 1229a(b)(4), 1362.

185. *See, e.g.*, 8 C.F.R. § 1240.10(a)(1) (2022).

186. *See* KATE M. MANUEL, CONG. RSCH. SERV., R43613, ALIENS’ RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS: IN BRIEF 2, 6 (2016), <https://sgp.fas.org/crs/homsec/R43613.pdf> [<https://perma.cc/H866-RBF6>] (explaining noncitizens have been found to have “constitutional and statutory rights to counsel at their own expense” but not at the government’s expense).

187. *See supra* note 168 and accompanying text.

188. *See, e.g.*, *El Rescate Legal Servs., Inc. v. Exec. Off. Immigr. Rev.*, 959 F.2d 742, 750 (9th Cir. 1991) (discussing congressional intent that the government not be required to pay for appointed counsel in immigration court proceedings); *Escobar Ruiz v. INS*, 838 F.2d 1020, 1028 (9th Cir. 1988) (stating that 8 U.S.C. § 1362 “expresses Congress’ intent to grant aliens the right to be represented by counsel in such proceedings, but not to grant indigent aliens the right to have counsel appointed at government expense”); Defendants’ Motion to Dismiss the Amended Complaint at 14, *J.E.F.M. v. Holder*, 107 F. Supp. 3d 1119 (W.D. Wash. 2015) (No. C14-1026), 2014 WL 11149714 (“no expense to the government” means counsel need not be provided at taxpayer expense).

189. *See* MANUEL, *supra* note 186, at 5; *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1046 (9th Cir. 2012); *United States v. Ramos*, 623 F.3d 672, 682 (9th Cir. 2010); *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004).

a case or reconsidering a removal order.<sup>190</sup> Indeed, there is a circuit split as to whether a respondent who was improperly denied counsel must demonstrate that the denial also resulted in prejudice.<sup>191</sup>

A small minority of courts and government officials have suggested the INA provisions regarding the right to counsel “at no expense to the government” categorically bars the government from appointing or otherwise paying for counsel for respondents.<sup>192</sup> But the plain language of the statute does not support that reading, and courts and even DHS officials have recognized the government may pay for respondents’ counsel pursuant to other provisions of the law or at its discretion.<sup>193</sup> As immigration law scholars Shani M. King and Nicole Silvestri Hall explain, “[t]he plain text makes it abundantly clear that [INA section 1229a(b)(4)(A)] is not intended to be the source of a right to appointed counsel” but instead refers to the privilege of “chosen representation” and “therefore it cannot operate to prohibit appointed counsel at government expense where it is needed.”<sup>194</sup>

Finally, the INA codifies a respondent’s right to a full and fair hearing at section 1229a(b)(4)(B).<sup>195</sup> Under this provision, respondents must (1) have a

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190. See *Cruz Rendon v. Holder*, 603 F.3d 1104, 1109 (9th Cir. 2010) (requiring prejudice for reconsideration); see also *Alzainati v. Holder*, 568 F.3d 844, 851 (10th Cir. 2009) (noncitizen must establish error and prejudice).

191. See *Delgado-Corea v. INS*, 804 F.2d 261, 263 (4th Cir. 1986) (prejudice must be shown); *Patel v. INS*, 803 F.2d 804, 807 (5th Cir. 1986) (requiring a showing of substantial prejudice); *Njoroge v. Holder*, 753 F.3d 809, 812 (8th Cir. 2014) (showing prejudice to alien is required). *But see* *Montes-Lopez v. Holder*, 694 F.3d 1085, 1093–94 (9th Cir. 2012) (“An alien who shows that he has been denied the statutory right to be represented by counsel in an immigration proceeding need not also show that he was prejudiced by the absence of the attorney.”); *Montilla v. INS*, 926 F.2d 162, 169–70 (2d Cir. 1991) (no showing of prejudice required).

192. See 8 C.F.R. § 1240.10(a)(1) (2022); Defendant-Appellants’ Third Brief on Cross-Appeal at 46–49, *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016) (Nos. 15-35738, 15-35730), 2016 WL 2641154 (arguing “at no expense to the Government” bars appointment of counsel to aliens at government expense”); King & Hall, *supra* note 14, at 6–7. *But see* Opposition to Defendants’ Motion to Dismiss the Amended Complaint at 18, *J.E.F.M. v. Holder*, 107 F. Supp. 3d 1119 (W.D. Wash. 2015) (No. C14–1026), 2014 WL 11149667 (opposing defendants’ contention that Congress determined “the INA can never create an affirmative obligation to provide counsel for any noncitizen in immigration proceedings”).

193. See MANUEL, *supra* note 186, at 6–11 (explaining that noncitizens could have a right to counsel at government’s expense on grounds other than the Sixth Amendment or the INA); Somers et al., *supra* note 77, (“Section 292 does not prohibit the government from voluntarily funding counsel.”). Indeed, federal funds have been used for pilot projects with subcontractors to provide attorneys to select children in immigration removal proceedings with a lawyer. See *Justice Department and CNCS Announce \$1.8 Million in Grants to Enhance Immigration Court Proceedings and Provide Legal Assistance to Unaccompanied Children*, U.S. DEP’T JUST.: OFF. PUB. AFFS. (Sep. 12, 2014), <https://www.justice.gov/opa/pr/justice-department-and-cnacs-announce-18-million-grants-enhance-immigration-court-proceedings> [<https://perma.cc/55FK-D6H9>]; GREG CHEN & JORGE LOWEREE, AM. IMMIGR. COUNCIL, POLICY BRIEF: THE BIDEN ADMINISTRATION AND CONGRESS MUST GUARANTEE LEGAL REPRESENTATION FOR PEOPLE FACING REMOVAL 3, 6–8 (2021), [https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/the\\_biden\\_administration\\_and\\_congress\\_must\\_guarantee\\_legal\\_representation\\_for\\_people\\_facing\\_removal.pdf](https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/the_biden_administration_and_congress_must_guarantee_legal_representation_for_people_facing_removal.pdf) [<https://perma.cc/9LEA-SES9>]; *EOIR Announces “Access EOIR” Initiative*, U.S. DEP’T JUST.: EXEC. OFF. IMMGR. REV. (Sep. 28, 2021), <https://www.justice.gov/eoir/pr/eoir-announces-access-eoir-initiative> [<https://perma.cc/C84A-47GS>] (Counsel for Children Initiative provides federal funding for representation for certain unaccompanied children who have been released from custody and are in removal proceedings in certain cities).

194. King & Hall, *supra* note 14, at 24.

195. 8 U.S.C. § 1229a(b)(4)(B).

reasonable opportunity to examine the evidence against them, (2) be able to present evidence on their own behalf, and (3) have a chance to cross-examine government witnesses.<sup>196</sup> The statutory right to a fair hearing mirrors a respondent's procedural due process right to a fair hearing.<sup>197</sup> Consequently, most of the case law and scholarship centers on constitutional interpretation and application.<sup>198</sup>

Just like with due process protections, these statutory rights are de facto nonexistent for children since immigration law fails to meaningfully account for the developmental differences of child respondents and the unique challenges they face by nature of their age and dependency.<sup>199</sup> As A.L.'s story below shows, telling a child they have a right to hire an attorney without providing the child with the tools to do so, is meaningless.<sup>200</sup>

*During the twenty-three-day journey by himself on foot and bus to the U.S.-Mexico border, A.L. said he was robbed by Mexican police. He crossed near the Rio Grande, and U.S. border authorities sent him to live in a center for unaccompanied children in San Antonio, Texas. There, he said, he often did not have enough food to eat, and he was not allowed to make phone calls to his family or to find an attorney.*

*When he was finally released to his family in California at age fifteen, he was given a long list of attorneys' names that he was expected to call on his own to secure legal representation for his pending immigration case.*

*"I tried to call and call and call many lawyers. Some of them never answered me, and others said they were already too busy. In the end, no one was able to help me. From that long list of attorneys, none of them could help me." [...] Soon, he received a deportation order.<sup>201</sup>*

In sum, although children in removal proceedings have statutory rights just like adults, the law fails to consider how children's developmental capacities affect their ability to exert those rights and participate in high-stakes hearings, leaving children with only a shadow of the rights afforded to their adult counterparts.

#### D. Children Specific Rights and Policies in Immigration Court

As discussed above, immigration law generally makes no distinction between children and adult respondents.<sup>202</sup> There are a few narrow exceptions.<sup>203</sup> First, in cases where the respondent is under the age of fourteen, the government must serve a copy of the NTA upon an adult residing with the child and, when

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196. *Id.*

197. *Vasquez-Galdamez v. Barr*, 830 Fed. Appx. 97, 99 (4th Cir. 2020) ("Asylum and removal proceedings are subject to both the Fifth Amendment's guarantee of due process and statutory guarantee of a fair hearing."); *Pouhova v. Holder*, 726 F.3d 1007, 1011 (7th Cir. 2013) ("Any proceeding that meets the requirements of the statute also satisfies constitutional due process."); see *Kaufman*, *supra* note 166, at 131.

198. *King & Hall*, *supra* note 14, at 21 (pointing to scholarship that argues a constitutional basis for right to counsel).

199. *Buss*, *supra* note 169, at 355.

200. See *infra* note 201 and accompanying text.

201. *Fry*, *supra* note 131.

202. *Supra* notes 128–31 and accompanying text.

203. See discussion *infra* notes 204–209.

possible, the child's relative, guardian, or friend.<sup>204</sup> Additionally, the regulations direct an immigration judge not to accept an admission of removability for a child under the age of eighteen unless they are accompanied by counsel or a relative, guardian, or friend.<sup>205</sup> Yet, as Justice Paez notes in his concurrence in *C.J.L.G. v. Barr*, these children-specific rights are meaningless without the assistance of counsel and consequently, "[p]roviding children with counsel in removal proceedings is the next logical step."<sup>206</sup>

In addition to the statutory and regulatory framework, the government has adopted various immigration court practices and policies over the years that recognize a need for enhanced procedural protections for children.<sup>207</sup> Immigration courts, however, are administrative courts within the Department of Justice ("DOJ").<sup>208</sup> Given this structure, children specific court policies are vulnerable to shifting political priorities and directives.<sup>209</sup> Indeed, the Trump Administration rescinded the Biden Administration's more child-friendly court policies within days of taking office.<sup>210</sup>

#### E. *Child Development Implications for Immigration Removal Proceedings*

Child respondents are at a unique disadvantage in immigration court by virtue of their normative development.<sup>211</sup> Immigration law's erroneous treatment of children as miniature adults and lack of provision of appointed counsel assumes children can represent themselves in an adult-centric court system.<sup>212</sup> Yet, the still-developing brains of children render them developmentally incompetent when tasked with navigating immigration court proceedings.<sup>213</sup>

Even older adolescents are less capable of exercising executive functions than adults in stressful situations due to their still developing "hot cognition

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204. 8 C.F.R. § 103.8(c)(2)(ii) (2011). This section also applies to individuals with mental incompetency, lending support to the argument that children should be accommodated similar to those with disabilities. Additionally, in the Ninth Circuit, parents or guardians of a child under 18 released from federal custody must be served with the child's NTA. *See Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1163 (9th Cir. 2004). The BIA has similarly held that upon release from ORR custody, an unaccompanied minor's sponsor must be served with the NTA. *In re Mejia-Andino*, 23 I. & N. Dec. 533, 536 (B.I.A. 2002).

205. 8 C.F.R. § 1240.10(c) (2022). This section also applies to individuals with mental incompetency, lending support to the argument that children should be accommodated similar to those with disabilities.

206. *C.J.L.G. v. Barr*, 923 F.3d 622, 635 (9th Cir. 2019) (Paez, J., concurring).

207. KIDS IN NEED OF DEFENSE, COMPARISON OF GUIDELINES FOR IMMIGRATION COURT CASES INVOLVING JUVENILES 1 (2024), [https://supportkind.org/wp-content/uploads/2024/03/24\\_Chart\\_Comparison-of-Guidelines-for-Immigration-Court-Cases-Involving-Juveniles-v4.pdf](https://supportkind.org/wp-content/uploads/2024/03/24_Chart_Comparison-of-Guidelines-for-Immigration-Court-Cases-Involving-Juveniles-v4.pdf) [<https://perma.cc/99AS-M9T9>].

208. *Immigration Court*, ICE PORTAL, <https://portal.ice.gov/immigration-guide/court> [<https://perma.cc/N8BP-LRWS>] (last visited Mar. 8, 2026).

209. KIDS IN NEED OF DEFENSE, *supra* note 207 (demonstrating the first Trump administration rescinded Obama's immigration policy, then the Biden administration rescinded Trump's policy).

210. Sirce E. Owen, *Cancellation of Director's Memorandum 24-01 and Reinstatement of Operating Policies and Procedures Memorandum 17-03*, U.S. DEP'T OF JUST., PM 25-10 (Jan. 29, 2025), <https://www.justice.gov/eoir/media/1387496/dl?inline> [<http://perma.cc/SQJ9-D8QP>] (memorandum from the second Trump administration rescinding the Biden administration's policy on children's cases) [hereinafter PM 25-10].

211. *See discussion infra* notes 214-38.

212. Buss, *supra* note 169, at 355.

213. *See discussion infra* notes 214-38.

skills.”<sup>214</sup> This means they likewise struggle more than adults with attention, comprehension, reasoning, memory, narrative abilities, language pragmatics, and other high-level executive functions in stressful situations like court.<sup>215</sup> This in turn frustrates their ability to understand the substantive law and procedural rules, comprehend the roles of the different court actors, complete and file written application forms, effectuate service of process on the government, testify, connect their life experiences to the law, present evidence to meet their burdens of proof, withstand cross-examination, and attack evidence and argument proffered by the government.<sup>216</sup> Additionally, children, especially adolescents, are prone to impulsivity and prioritizing short-term gains.<sup>217</sup> Consequently, they may accept voluntary departure to quickly end court proceedings or leave detention, even when they have valid claims for asylum or other relief.<sup>218</sup>

Children lack developmental capacity to effectively advance their own interests in removal proceedings without the help of counsel.<sup>219</sup> For example, two of the most common forms of immigration relief available to children, asylum and Special Immigrant Juvenile Status (“SIJS”), are virtually inaccessible to most unrepresented children.<sup>220</sup> Asylum is a form of protection and relief from removal available to individuals who are afraid to return to their home countries.<sup>221</sup> To win asylum, the child must present evidence and argument to demonstrate they suffered or have a well-founded fear of future persecution on account of race, nationality, religion, political opinion, or membership in a social group.<sup>222</sup> While a robust discussion of the intricacies of asylum law can be found elsewhere,<sup>223</sup> it suffices here to say the law on asylum eligibility is a maze of ever-changing and convoluted requirements and pitfalls. Indeed, Jeremy McKinney, former president of the American Immigration Lawyers Association (“AILA”), compares asylum law to the children’s game “Chutes and Ladders”

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214. Joshua Wyman, Rachel Dianiska, Hayden Henderson & Lindsay C. Malloy, *Adolescent Victims and Witnesses: Disclosures, Memory, and Suggestibility*, in THE OXFORD HANDBOOK OF DEVELOPMENTAL PSYCHOLOGY AND THE LAW 235 (Allison D. Redlich & Jodi A. Quas eds., 2023).

215. *Id.* at 235–36.

216. Kalina M. Brabeck, Deborah Gonzalez, Sarah Rendón García & Adrian Pendergast, *A Developmental Perspective on Unaccompanied Migrant Youth in the U.S. Immigration Legal System*, in THE OXFORD HANDBOOK OF DEVELOPMENTAL PSYCHOLOGY AND THE LAW 156–57 (Allison D. Redlich & Jodi A. Quas eds., 2023) (discussing children’s impaired capacity to participate in formal proceedings).

217. *Id.* at 160.

218. *Id.*; INSEL ET AL., *supra* note 85, at 28.

219. See discussion *infra* Section V.A.

220. See discussion *infra* notes 221–29 and accompanying text.

221. 8 C.F.R. § 1240.11(c) (2023).

222. U.S. asylum law is codified at United States Code (U.S.C.), Title 8, Chapter 12, Section 1158 and Section 208 of the Immigration and Nationality Act (I.N.A.). The principle of nonrefoulement is codified in U.S. law under the name “Withholding of Removal” and can be found at 8 U.S.C. § 1231(b)(3). The primary sources of international refugee protection are the 1951 U.N. Convention Relating to the Status of Refugees and the 1967 U.N. Protocol. See G.A. Res. 429 (V), at 48 (Dec. 14, 1950); G.A. Res. 2198 (XXI), at 48 (Dec. 16, 1966).

223. Those interested in learning more about asylum might find the following resources helpful: DREE K. COLLOPY, *AILA’S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE* (9th ed. 2023); Jacqueline Bhabha & Wendy A. Young, *Through a Child’s Eyes: Protecting the Most Vulnerable Asylum Seekers*, 75 No. 21 INTERPRETER RELEASES 757, 758 (1998); Heather L. Scavone, *A Duty to Protect, But Not to Provide: Bringing the American Dream Within Reach of Asylees in the U.S.*, 41 HARBINGER 209 (2016).

but with potentially deadly consequences.<sup>224</sup> Given the complexity of asylum, a recent report from the AILA found that most asylum applications take an estimated minimum of fifty to seventy-five hours for an experienced immigration attorney to prepare.<sup>225</sup> Thus, it is hardly surprising that between fiscal year 2001 and April 2025, children ages 0–17 were eleven times more likely to win asylum if they were represented by counsel.<sup>226</sup>

SIJS provides another defense to deportation and pathway to citizenship for children whose parents have abused, abandoned, or neglected them.<sup>227</sup> SIJS is unique in that it first requires the child to obtain an order from a juvenile court that makes certain findings about their mistreatment, best interests, and custody and care before they can even petition the federal government for protection.<sup>228</sup> This requirement serves as a formidable barrier for otherwise eligible children, especially given that children generally cannot initiate the predicate state court proceedings on their own.<sup>229</sup>

Children's ability to accurately report detailed information about their experiences has a direct impact on the chances of a child's ability to fight deportation since both asylum and SIJS are dependent on a child's ability to provide information about their living arrangements, mistreatment, and fears.<sup>230</sup> Yet, the

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224. See AMY GRENIER, AM. IMMIGR. LAWS. ASS'N, HIGH-STAKES ASYLUM: HOW LONG AN ASYLUM CASE TAKES AND HOW WE CAN DO BETTER, 3 (2023), <https://www.aila.org/aila-files/91508EE0-B02C-4D8F-869C-78B697B68E56/23061202.pdf> [<https://perma.cc/94TZ-XD6L>].

225. *Id.* at 5.

226. *Asylum Decisions*, TRAC IMMIGR., <https://tracreports.org/phptools/immigration/asylum/> [<https://perma.cc/S3ZT-AY6A>] (last visited Mar. 8, 2026) (By sorting the data by fiscal year, decision (asylum granted), age (0–4, 5–11, or 12–17), and represented (not represented or represented) and then adding up the corresponding values I was able to calculate that between fiscal year 2001 and April 2025 there were 35,388 represented children versus 3,090 unrepresented children with asylum approvals). The low grant rates for unrepresented children does not reflect the eligibility for relief but instead the reality that legal counsel is the greatest predictor of success for children in immigration court. See, e.g., Annie Chen & Jennifer Gill, *Unaccompanied Children and the U.S. Immigration System: Challenges and Reforms*, 68 COLUM. U. J. INT'L AFFS. 115, 122 n.50 (May 2015) (citing data collected in 2014 by the Refugee and Immigrant Center for Education and Legal Services indicating 63% of the 925 unaccompanied minors screened were likely eligible for relief from deportation).

227. See Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 4978 (amending 8 U.S.C. § 1101(a)(27)); U.S. CITIZENSHIP & IMMIGR. SERVS., POL'Y MANUAL (6)(J.1)(A) (2025), <https://www.uscis.gov/book/export/html/68600> [<https://perma.cc/783S-XBRD>]. Currently, unmarried individuals under the age of twenty-one (1) who are "dependent" upon a juvenile court or "committed to, or placed under the custody of" the State or other court-appointed individual or entity, (2) who cannot reunify with one or both parents "due to abuse, neglect, abandonment, or a similar basis found under State law," and (3) whose return to their country of origin is not in their best interests, may be able to obtain Special Immigrant Juvenile Status ("SIJS") from the federal government. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044, 5079 (2008).

228. The SIJS regulations define juvenile court broadly as "a court located in the United States that has jurisdiction under State law to make judicial determinations about the dependency and/or custody and care of juveniles." 8 C.F.R. § 204.11(a) (2022).

229. Elizabeth Keyes, *Evolving Contours of Immigration Federalism: The Case of Migrant Children*, 19 HARV. LATINO L. REV. 33, 36 (2016) (describing how the complexity of the law governing Special Immigrant Juvenile Status frustrates its purpose of protecting vulnerable children); see also Laila L. Hlass, *Minor Protections: Best Practices for Representing Child Migrants*, 47 N.M. L. REV. 247, 285 (2017) (quoting interviews with immigration advocates who opined it would be impossible for a child to seek SIJS pro se given the complex relationships between state and federal systems); Chen & Gill, *supra* note 226, at 123.

230. See *supra* notes 136–37 and accompanying text.

developmental research tells us that many children lack the ability to access and cognitively communicate their autobiographical memory until middle childhood.<sup>231</sup> Children's ability to recall and understand experiences improves as they mature.<sup>232</sup> But even adolescents struggle with accurate and detailed recall of traumatic events, especially when under stress.<sup>233</sup> Children in immigration court may experience exacerbated mental health symptoms, including PTSD, due to the court process triggering past trauma, further complicating their testimony.<sup>234</sup>

Furthermore, the adversarial process and failure of immigration judges and prosecutors to consider children's developmental needs can compromise the accuracy of children's testimony.<sup>235</sup> Research suggests that open-ended questioning elicits more accurate and consistent responses from children than closed-ended questions.<sup>236</sup> Children may also inadvertently undermine their claims due to confusion about questioning and a tendency to defer to adults.<sup>237</sup>

Children, as a class, think and function differently from adults.<sup>238</sup> Yet, the developmental differences between children and adults are overlooked in our current immigration system. Children navigating adult spaces, adult laws, and adult procedures is fundamentally unfair. Immigration law and procedure must accommodate childhood to ensure children respondents have full and fair proceedings.

## V. ACCOMMODATING CHILDHOOD

Over the past few decades, both criminal and juvenile law jurisprudence have increasingly recognized and accommodated the neurological, cognitive, and psychosocial differences between children and adults.<sup>239</sup> The time is ripe for fundamental shifts in how we think about fairness and access to justice for children in immigration removal proceedings as well. Immigration courts must be reformed to reflect the needs and developmental capacities of children. Otherwise, we will continue to have fundamentally unfair proceedings and unjust outcomes for children. Brain and behavioral science can and should be used in the immigration context—much like their use in the juvenile delinquency and juvenile sentencing context<sup>240</sup>—to compel appointed counsel and other accommodations for children.

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231. Emily M. Slonecker, Alma P. Olaguez, Rachel L. Taffe & J. Zoe Klemfuss, *Memory, Suggestibility, and Disclosure Processes: Implications for Children in Legal Settings*, in *THE OXFORD HANDBOOK OF DEVELOPMENTAL PSYCHOLOGY AND THE LAW* 57, 58–59 (Allison D. Redlich & Jodi A. Quas eds., 2023).

232. Brabeck et al., *supra* note 216, at 158.

233. *Id.* at 158, 160.

234. *Id.* at 158.

235. *See id.*

236. *Id.* at 159.

237. *Id.* at 159–60.

238. *See* sources cited *supra* note 23.

239. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005); *Graham v. Florida*, 560 U.S. 48, 67 (2010); *J.D.B. v. North Carolina*, 564 U.S. 261, 273–76 (2011); *Miller v. Alabama*, 567 U.S. 460, 472 n.5 (2012).

240. *See* sources cited *supra* note 15.

Due process, statutory rights, and regulatory rights exist for all respondents in immigration court. Children's developmental incompetence, however, necessitates accommodation so children can meaningfully exercise these rights and participate in their cases. This Article proposes three accommodations for children in removal proceedings: (1) government-appointed counsel for all children, (2) child advocates for all children without capacity to direct their legal representation, and (3) court proceedings tailored to children's development, needs, and best interests.

*A. Government Appointed Counsel for All Children in Immigration Removal Proceedings*

Children lack the cognitive, developmental, and emotional maturity necessary to exercise their constitutional and statutory rights in immigration proceedings. This problem is compounded by the trauma most children in immigration court have experienced and the inherent imbalance of power in immigration court. The government is always represented by trained counsel, but most children are not.<sup>241</sup> This structural asymmetry results in disparities in outcomes: as mentioned earlier, but worth repeating, unrepresented children are four times more likely to receive removal orders than children represented by counsel.<sup>242</sup>

In our complex, adversarial immigration court system, provision of legal representation is the only means to ensure children can invoke their rights and be assured a full and fair hearing. Like child defendants in juvenile delinquency proceedings, children respondents in immigration removal proceedings need "assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [they have] a defense and to prepare and submit it."<sup>243</sup> Modern advances in our understanding of child development and trauma bolsters what the Supreme Court found to be true nearly six decades ago, that a child defending themselves in court "requires the guiding hand of counsel at every step in the proceedings against [them]."<sup>244</sup> Appointed counsel can help children access their "cold" cognition skills.<sup>245</sup> Having the time and support for calm deliberation and information sharing empowers children to make informed legal decisions.<sup>246</sup>

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241. *Immigration Court Backlog*, *supra* note 2 (73% of children under the age of eighteen with pending cases at the close of fiscal year 2024 had no lawyers.); Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 14 (2014); 8 C.F.R. § 1240.2(a) (2022).

242. *Outcomes of Immigration Court Proceedings*, *supra* note 11; Johan Fatemi, *A Constitutional Case for Appointed Counsel in Immigration Proceedings: Revisiting Franco-Gonzalez*, 90 ST. JOHN'S L. REV. 915, 932 (2016).

243. *Application of Gault*, 387 U.S. 1, 36 (1967).

244. *Id.*

245. Wyman et al., *supra* note 214, at 235.

246. *Id.*; Kristin Henning, *Juvenile Justice After Graham v. Florida: Keeping Due Process, Autonomy, and Paternalism in Balance*, 38 WASH. U. J.L. & POL'Y 17, 41, 46 (2012) (noting the developmental research indicates youth rely on their decision-making capacity to different degrees in different settings and that while youth may lack cognitive capacity in "hot" settings it doesn't mean they lack cognitive capacity in "cold" settings to direct counsel).

One central challenge is finding the political will for the provision of appointed counsel for all children in immigration court.<sup>247</sup> The immigration court system can and should be reformed through federal legislation and policies that recognize and meaningfully respond to childhood development and trauma. Such reforms, however, have failed over the past two decades, and positive change is unrealistic under the current political climate.<sup>248</sup> How then can advocates leverage recent scientific findings to compel the appointment of counsel for children in removal proceedings? Below are three legal arguments for appointed counsel that can be bolstered by incorporation of the prevailing research on normative childhood development.

1. *Appointed Counsel as a Precondition for Fundamentally Fair Proceedings*

Current research on children's physical, communicative, cognitive, and psychosocial development can and should be used to bolster due process and statutory arguments for appointment of counsel. No court has directly ruled on the existence of a due process or statutory right to appointed counsel for children in removal proceedings.<sup>249</sup> There is dicta in a few circuit court decisions, however, that suggest appointment of counsel might be appropriate in limited circumstances that implicate fundamental fairness of the proceedings.<sup>250</sup>

Children's normative development uniquely impacts their ability to have fundamentally fair immigration removal proceedings, especially when they are expected to represent themselves in court.<sup>251</sup> Consequently, any statutory or due process analysis of rights and remedies should account for children's developmental differences. But as scholar Emily Buss notes in her Article, *Constitutional Fidelity Through Children's Rights*, all too often courts use an "adult-minus" orientation in their analysis of children's rights.<sup>252</sup> Rather than asking "how to achieve the due process value of 'fundamental fairness' for children," Buss

247. Henning, *supra* note 246, at 23.

248. See, e.g., Dan Gooding, *DOJ Stops Federal Legal Aid to Immigrants*, NEWSWEEK (Jan. 23, 2025, at 18:58 ET), <https://www.newsweek.com/doj-stops-legal-aid-immigrants-court-executive-order-2019976> [<https://perma.cc/JP26-B9T6>]; Maya C. Miller, *Congress Clears Measure to Deport Immigrants Accused of Crimes*, N.Y. TIMES (Jan. 22, 2025), <https://www.nytimes.com/2025/01/22/us/politics/laken-riley-act.html> [<https://perma.cc/CS63-6SGK>]. Various versions of the "Fair Day in Court for Kids Act" have been proposed to secure appointed counsel for select noncitizen children in immigration court, but each has failed to pass. See, e.g., S. 2540, 114th Cong. (2016); H.R. 2043, 115th Cong. (2017); S. 662, 116th Cong. (2020); S. 3108, 117th Cong. (2022); S. 3065, 118th Cong. (2024); S. 1297, 119th Cong. (2026).

249. See *supra* Section IV.B.

250. See, e.g., *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 n.3 (6th Cir. 1975) ("Where an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government's expense. Otherwise, 'fundamental fairness' would be violated."); *United States v. Campos-Asencio*, 822 F.2d 506, 509 (5th Cir. 1987) ("[A]n alien has a right to counsel if the absence of counsel would violate due process under the fifth amendment."); *Jie Lin v. Ashcroft*, 377 F.3d 1014, 1034 (9th Cir. 2004) ("Absent a minor's knowing, intelligent, and voluntary waiver of the right to counsel, the IJ may have to take an affirmative role in securing representation by competent counsel."); *United States v. Torres-Sanchez*, 68 F.3d 227, 230 (8th Cir. 1995) ("Nevertheless, in some circumstances, depriving an alien of the right to counsel may rise to a due process violation.")

251. See INSEL ET AL., *supra* note 85, at 13.

252. Buss, *supra* note 169, at 355.

argues the courts too often start with adult rights and an adult application when considering the claims of children.<sup>253</sup> Accordingly, what results is “a range of distortions in analysis and outcome that disserves children and rights alike.”<sup>254</sup>

Buss calls for a better accounting of children’s differences in any constitutional rights analysis.<sup>255</sup> Applying Buss’s argument to the immigration context, the question becomes how can we make meaningful the statutory and constitutional right to fundamentally fair proceedings for child respondents? Under either a statutory, narrow fundamental fairness, or *Mathews v. Eldridge* balancing test analysis,<sup>256</sup> the answer remains the same: provide all children with appointed counsel.

The research discussed in Part II evidences that children are developmentally incompetent to represent themselves in removal proceedings. This makes a strong case that unrepresented children respondents are denied the “the opportunity to be heard ‘at a meaningful time and in a meaningful manner’” as required by due process and the corollary statutory right to a full and fair hearing.<sup>257</sup> And the data on disparate outcomes for unrepresented children versus represented children lends strong support that lack of counsel results in substantial prejudice.<sup>258</sup>

Counsel in the two leading cases on access to counsel for children in removal, *J.E.F.M. v. Lynch* and *C.J.L.G. v. Sessions*, cited scientific studies in their filings to support their claims for appointed counsel.<sup>259</sup> For example, in the opening complaint in *J.E.F.M. v. Lynch*, the plaintiffs cited a report by leading experts on adolescent psychological development, Dr. Laurence Steinberg and Dr. Dustin Albert, as well as scientific studies cited by the Supreme Court in *Graham v. Florida*, 560 U.S. 48 (2010), to argue that children as a class have limited capacity to present complex factual and legal arguments and are entitled to legal

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253. *Id.* at 355–57, 365.

254. *Id.* at 355.

255. *Id.* at 406–07.

256. In 1976, the Supreme Court laid out the current cost-benefit, interest-balancing approach for procedural due process claims in *Mathews v. Eldridge*:

[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 424 U.S. 319, 335 (1976). In the years that have followed the court’s decision, the *Mathews* test has been applied in the immigration context with varying degrees of success in securing rights-affirming outcomes for noncitizens. See Landau, *supra* note 163, at 911 (discussing cases that have used *Mathews* in the immigration context). A full discussion of the *Mathews* test and its application to children’s cases is beyond the scope of this Article and has been discussed by other scholars. See, e.g., Hill, *supra* note 14, at 54.

257. *Mathews*, 424 U.S. at 333; 8 U.S.C. § 1229a(b)(4)(B).

258. See *Outcomes of Immigration Court Proceedings*, *supra* note 11, at 19–27 (showing that unrepresented children lose their cases at higher rates than their represented counterparts).

259. Brief of Jennifer Woolard & Laurence Steinberg as Amici Curiae in *C.J.L.G. v. Sessions*, No. 16-73801 (9th Cir. en banc), cited in *C.J.L.G. v. Barr*, 923 F.3d 622 (9th Cir. 2019) (citing T. Grisso et al., *Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants*, 27 LAW & HUMAN BEHAVIOR 333–63 (2003)); Complaint—Class Action at 10, *J.E.F.M. v. Holder*, 107 F. Supp. 3d 1119 (W.D. Wash. 2015) (No. C14-1026 TSZ), 2014 WL 3753431.

representation in immigration proceedings as a matter of due process.<sup>260</sup> Neither of the decisions in those cases, however, directly ruled on the right to counsel claim or addressed how normative child development impacts an unrepresented child's ability to exert their rights.<sup>261</sup> This leaves the door open for future litigation to use the latest research on child development to support arguments for appointed counsel for children in removal proceedings.

There are undeniable government financial costs and administrative burdens the government must bear if all children in removal proceedings receive government appointed counsel.<sup>262</sup> Even so, as the Supreme Court has recognized, "the cost of protecting a constitutional right cannot justify its total denial."<sup>263</sup> And, as other scholars and policy makers have discussed, there are some cost savings and economic benefits that can come from universal representation for children too, like more efficient court proceedings and reduced detention costs.<sup>264</sup> Furthermore, providing counsel leads to fairer, more accurate decisions.<sup>265</sup> Here, the interest is great enough and the risk of error high enough to overcome the cost concerns. Simply put, ensuring all children have lawyers to represent them in their removal proceedings is not only the right thing to do, but one that is mandated by law and its animating principles of justice and fairness.<sup>266</sup>

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260. Complaint, *J.E.F.M. v. Holder*, *supra* note 259.

261. *C.J.L.G. v. Barr*, 923 F.3d 622, 622 (9th Cir. 2019). The full panel's decision makes no reference to child development and does not address the right to counsel claim. Judge Paez's concurrence briefly references the Amicus Brief of Dr. Jennifer Woolard and Dr. Laurence Steinberg and the scientific studies cited therein to support their assertion children cannot fairly navigate immigration court alone. *Id.* at 635 (Paez, J., concurring). See *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1026 (9th Cir. 2016) (opinion makes no reference to child development).

262. See Good, *supra* note 8, at 139–41. While there are administrative costs associated with building a true universal representation program, there are models and toolkits readily available to build from. Liz Kenney, Karen Berberich, Corey Lazar, Michael Corradini & Tania Sawczuk, *Advancing Universal Representation: A Toolkit* (Apr. 2021), <https://vera-institute.files.svcdn.com/production/downloads/pdfdownloads/advancing-universal-representation-module3-implementing-the-vision.pdf> [<https://perma.cc/K77U-5SXC>]; *New York Immigration Representation Study II: Access to Counsel in Immigration Proceedings*, ARTHUR LIMAN CTR. FOR PUB. INTEREST L., (Feb. 12, 2021), [https://law.yale.edu/sites/default/files/area/center/liman/document/nyirs\\_reportii.pdf](https://law.yale.edu/sites/default/files/area/center/liman/document/nyirs_reportii.pdf) [<https://perma.cc/H7E4-XWJ5>]; see also COLO. FISCAL INST., *A MATTER OF JUSTICE: COST SAVINGS FROM UNIVERSAL LEGAL REPRESENTATION FOR ALL COLORADO IMMIGRATION PROCEEDINGS* (Feb. 2021), <https://www.coloradofiscal.org/wp-content/uploads/2021/02/2.12.21-Final-Report-2.pdf> [<https://perma.cc/PML5-J5FH>] (noting the cost of legal representation falls somewhere between \$2,500–\$7,000).

263. *Bounds v. Smith*, 430 U.S. 817, 825 (1977).

264. See Boaz, *supra* note 18, at 226–30, 255–57 (discussing research that supports fiscal arguments for universal representation); Sam Stanton & Robert Callahan, *Economic Benefits of Immigration Legal Services*, N.Y.C. COMPTROLLER (Mar. 2024), <https://comptroller.nyc.gov/reports/economic-benefits-of-immigration-legal-services/> [<https://perma.cc/JNM5-ZRWN>] (explaining how economic benefits arise from legal services. The same can be extrapolated to children as they will eventually become contributing members of the workforce and society); Eagly & Shafer, *supra* note 116, at 9, 59–72.

265. An initial study of the New York Immigrant Family Unity Project, which provides universal legal representation to detained immigrants, showed both improved outcomes and cost benefits for the community and economy. See Jennifer Stave et al., *Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity*, VERA INST. JUST. 60 (Nov. 2017), <https://vera-institute.files.svcdn.com/production/downloads/publications/new-york-immigrant-family-unity-project-evaluation.pdf?> [<https://perma.cc/9NP4-BL6D>].

266. *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1040 (9th Cir. 2016) (McKeown J., concurring) (discussing the moral obligation of providing counsel to children).

2. *Appointed Counsel as an Appropriate Safeguard for Developmental Incompetency*

Another strategy would be to leverage current statutory protections and Board of Immigration Appeals (“BIA”) decisions regarding mental competency. Under the INA, the Attorney General “shall prescribe safeguards to protect the rights and privileges” of respondents whose “mental incompetency” makes it impracticable to be “present at the proceeding.”<sup>267</sup> The INA does not define “present.”<sup>268</sup> The Eighth Circuit, however, has interpreted the term “present” broadly to include not just physical presence but the ability to meaningfully participate.<sup>269</sup> The INA also does not define mental incompetency,<sup>270</sup> however case law makes clear that mental incompetency is not a medical diagnosis but rather a legal determination.<sup>271</sup> Specifically, the BIA adopted the following test in *Matter of M-A-M-* to determine whether a respondent is mentally competent to participate in immigration removal proceedings: whether the person has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses.<sup>272</sup> This test has been adopted and applied by federal circuit courts as well.<sup>273</sup>

When applying this competency test, the immigration judge “may draw on a ‘wide variety of observations and evidence,’ including his perception of the respondent’s behavior and medical records or psychological assessments.”<sup>274</sup> While a specific diagnosis of a physical or mental disability is neither a precondition nor conclusive evidence of incompetence, it is an important indicator of incompetency, along with “the inability to understand and respond to questions, the inability to stay on topic, or a high level of distraction.”<sup>275</sup> Additional indicia of incompetency could include:

difficulty communicating thoughts completely or coherently, perseveration, overly simplistic or concrete thinking, words or actions that do not make sense or suggest that the person is experiencing hallucinations or an altered version of reality, memory impairment, disorientation, an altered level of consciousness or wakefulness, or a high level of distraction, inattention or confusion.<sup>276</sup>

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267. 8 U.S.C. § 1229a(b)(3).

268. *Id.* § 1229a(e).

269. *Mohamed v. Gonzales*, 477 F.3d 522, 526 (8th Cir. 2007) (citing *Drope v. Missouri*, 420 U.S. 162, 171 (1975)) (“A mentally incompetent person, although physically present, is absent from the hearing for all practical purposes.”).

270. 8 U.S.C. § 1229a(e).

271. *In re M-A-M-*, 25 I. & N. Dec. 474, 477 (B.I.A. 2011).

272. *Id.* at 474.

273. *See, e.g., Diop v. Lynch*, 807 F.3d 70, 75 (4th Cir. 2015); *Salgado v. Sessions*, 889 F.3d 982, 987 (9th Cir. 2018); *Reid v. Garland*, 120 F.4th 1127, 1144 (2d Cir. 2024); *Garmendia v. Att’y Gen.*, 28 F.4th 476, 487 (3d Cir. 2022).

274. *Diop*, 807 F.3d at 75 (internal citation omitted).

275. *In re M-A-M-*, 25 I. & N. Dec. at 479.

276. MELISSA CROW, JANET B. BECK & GEOFFREY A. HOFFMAN, REPRESENTING CLIENTS WITH MENTAL COMPETENCY ISSUES UNDER MATTER OF *M-A-M-*, LEGAL ACTION CTR. 3 (2011).

Arguably, children are mentally incompetent under this standard as these are behaviors children display by virtue of their cognitive, psychosocial, speech and language, and physical development.

For example, under the *Matter of M-A-M*-competency test, those in the period of early childhood (0–4) should be considered mentally incompetent based on their speech and language development alone.<sup>277</sup> Communication milestones for a seven to nine-month-old child include babbling strings of sounds together, while those for a nineteen to twenty-four-month-old child include knowledge of approximately fifty words, and a three to four-year-old child is just beginning to understand and use location words like “inside, on, and under.”<sup>278</sup> Given this, a young child cannot “present evidence and cross-examine witnesses” or “consult with the attorney.”<sup>279</sup> Consequently, all 281,964 child respondents ages 0–4 with pending cases at the close of fiscal year 2024 should categorically have safeguards pursuant to INA section 240(b)(3).<sup>280</sup>

Yet, the argument should not stop there. Children in middle childhood and even adolescent stages are also incompetent under the *Matter of M-A-M*-test by virtue of their still developing cognitive and socio-emotional capacities.<sup>281</sup> Recognizing developmental immaturity as a basis for finding incompetence acknowledges the reality that participating effectively in court proceedings requires a range of developmental capacities that adolescents still do not yet have. For example, by virtue of their normative development, adolescents struggle to “understand abstract and complex ideas, use that abstract knowledge to engage in a deliberative decision-making process, communicate effectively with legal actors, and engage in perspective taking to understand how to effectively respond to the defense attorney, prosecutor, and judge” and these challenges are exacerbated in stressful situations like court.<sup>282</sup> The behaviors and challenges adolescents exhibit in the context of defending themselves in immigration court are similar to the ones that *Matter of M-A-M*-held are indicia of incompetency<sup>283</sup> and thus compel safeguards.

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277. *Communication Milestones: 2 to 3 Years*, AM. SPEECH-LANGUAGE HEARING ASS’N, <https://www.asha.org/public/developmental-milestones/communication-milestones-2-to-3-years/> [<https://perma.cc/W6ZK-D9UL>] (last visited Mar. 8, 2026).

278. *Communication Milestones: Birth to 1 Year*, AM. SPEECH-LANGUAGE HEARING ASS’N, <https://www.asha.org/public/developmental-milestones/communication-milestones-birth-to-1-year/> [<https://perma.cc/2NZJ-2TMX>] (last visited Mar. 8, 2026); *Communication Milestones: 19 to 24 Months*, AM. SPEECH-LANGUAGE HEARING ASS’N, <https://www.asha.org/public/developmental-milestones/communication-milestones-19-to-24-months/> [<https://perma.cc/U6ZL-2FRN>] (last visited Mar. 8, 2026); *Communication Milestones: 3 to 4 Years*, AM. SPEECH-LANGUAGE HEARING ASS’N, <https://www.asha.org/public/developmental-milestones/communication-milestones-3-to-4-years/> [<https://perma.cc/B5WQ-ECP2>] (last visited Mar. 8, 2026).

279. *In re M-A-M*-, 25 I. & N. Dec. at 479.

280. See *Immigration Court Backlog*, *supra* note 2.

281. *In re M-A-M*-, 25 I. & N. Dec. at 479 (maintaining that an alien must have “a rational and factual understanding of the nature and object of the proceedings”).

282. Tina M Zottoli, Tarika Daftary-Kapur & Emily Haney-Caron, *Youth in Juvenile and Criminal Court*, in THE OXFORD HANDBOOK OF DEVELOPMENTAL PSYCHOLOGY AND THE LAW 287 (Allison D. Redlich & Jodi A. Quas eds., 2023); OFF. OF POPULATION AFF., *supra* note 75, at 8–9.

283. *In re M-A-M*-, 25 I. & N. Dec. 474, 479 (B.I.A. 2011) (maintaining that an alien must have “a rational and factual understanding of the nature and object of the proceedings”).

Unlike criminal proceedings, immigration removal proceedings may move forward even if a respondent is found incompetent, provided safeguards are put in place to ensure procedural fairness.<sup>284</sup> The decision in *Matter of M-A-M-* included a non-exhaustive list of possible safeguards, including: appearance of a family member or friend to assist the respondent and provide information to the court, participation of a guardian in the proceedings, continuances to allow time for medical treatment to restore competency or hiring of legal counsel, actively aiding in the development of the record, among other things.<sup>285</sup> Additional safeguards contemplated by federal courts and the BIA include suspending the proceedings via administrative closure,<sup>286</sup> termination without prejudice,<sup>287</sup> and exempting the respondent from testifying.<sup>288</sup>

There are no reported cases directly addressing whether an immigration judge can appoint counsel as a safeguard pursuant to INA section 240(b)(3) or *Matter of M-A-M-*.<sup>289</sup> The government has argued there is no such authority.<sup>290</sup> Nonetheless, there may be a colorable claim that judges have wide discretion to do so as an appropriate safeguard.<sup>291</sup> The logistics and funding source for that is a separate issue. Additionally, the BIA indicated in *Matter of M-J-K-* that appointment of counsel for respondents found to lack competency may be an appropriate safeguard, but the decision suggests the authority to appoint counsel in these circumstances stems from the federal government's National Qualified Representative Program arising from the implementation of the settlement agreement in *Franco-Gonzalez v. Holder*<sup>292</sup> and not necessarily the INA or *Matter of M-A-M*.<sup>293</sup>

While the INA and *Matter of M-A-M-* mandated safeguards for incompetent individuals may provide an opening to secure some safeguards for children, including appointment of counsel, it is not expansive enough to cover all children in court. As discussed above, competency under *Matter of M-A-M-* is a narrow

284. *Id.* at 479; *Nee Hao Wong v. I.N.S.*, 550 F.2d 521, 523 (9th Cir. 1977).

285. *In re M-A-M-*, 25 I. & N. Dec. at 483. Later BIA decisions have approved other safeguards: *In re J-R-R-A-*, 26 I. & N. Dec. 609, 612 (B.I.A. 2015); *In re E-S-I-*, 26 I. & N. Dec. 136, 145 (B.I.A. 2013).

286. *Reid v. Garland*, 120 F.4th 1127, 1133 (2d Cir. 2024).

287. *Id.*

288. *In re M-J-K-*, 26 I. & N. Dec. 773, 777 (B.I.A. 2016).

289. Amelia Wilson, *Franco I Loved: Reconciling the Two Halves of the Nation's Only Government-Funded Public Defender Program for Immigrants*, 97 WASH. L. REV. ONLINE 21, 27–28 (2022) (noting that nothing in *In re M-A-M-* and its progeny explicitly authorize immigration judges to appoint counsel after a finding of incompetency).

290. *See Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at \*8 (C.D. Cal. Apr. 23, 2013) (“As Defendants themselves acknowledge, ‘*M-A-M-*’ does not suggest any authority to appoint counsel for individuals not competent to represent themselves.” (internal citations omitted)).

291. *See In re M-A-M-*, 25 I. & N. Dec. at 481–82 (“Based on the statutory and regulatory parameters, we conclude that Immigration Judges have discretion to determine which safeguards are appropriate, given the particular circumstances in a case before them.”). *Id.* at 483 (“Examples of appropriate safeguards include . . . docketing or managing the case to facilitate the respondent’s ability to obtain legal representation . . .”).

292. *See Franco-Gonzalez*, 2013 WL 3674492, at \*20.

293. *In re M-J-K-*, 26 I. & N. Dec. at 777; Executive Office for Immigration Review, *National Qualified Representative Program (NQRP)*, U.S. DEP’T JUST. (Feb. 18, 2020), <https://www.justice.gov/eoir/national-qualified-representative-program-nqrp> [<https://perma.cc/5YPY-AW5H>] [hereinafter NQRP Program].

legal standard.<sup>294</sup> Someone may be competent under this test but still lack the capacity to adequately exert their rights and defend themselves against deportation without legal counsel. Indeed, both advocates and a federal court judge have stressed that *Matter of M-A-M* safeguards are often insufficient to fully protect the rights of mentally incompetent respondents and fail to guarantee an incompetent respondent can participate in their own proceedings as fully as someone who is competent.<sup>295</sup> That said, it is an important tool that can and should be used more frequently in children's cases.<sup>296</sup>

### 3. *Appointed Counsel as a Reasonable Accommodation Under Disability Law*

Disability law has been the only successful means to secure appointed legal representation for respondents in removal proceedings.<sup>297</sup> Specifically, in *Franco-Gonzalez v. Holder*, a class action lawsuit in the Central District of California, a federal court found immigrants in removal proceedings who are incompetent due to mental disorders are entitled to a qualified representative as a reasonable accommodation under Section 504 of the Rehabilitation Act.<sup>298</sup> The court defined a qualified representative as “(1) an attorney, (2) a law student or law graduate directly supervised by a retained attorney, or (3) an accredited representative, all as defined in 8 C.F.R. § 1292.1.”<sup>299</sup> It explicitly acknowledged that a parent willing to help their child, absent appropriate credentials, does not qualify as a qualified representative and emphasized the importance of assistance from someone with “adequate knowledge, information, and experience in immigration law and procedure” in order to provide a meaningful and reasonable accommodation.<sup>300</sup>

The named plaintiff in the lawsuit, José Antonio Franco-Gonzalez, had languished for years in an immigration detention facility in southern California without a court hearing or a lawyer.<sup>301</sup> A psychologist had evaluated Mr. Franco-Gonzalez and determined that due to his cognitive disabilities, “he had no clue

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294. *In re M-A-M*, 25 I. & N. Dec. at 479.

295. See Jordan, *supra* note 153, at 519, 535–37, 543; Aimee L. Mayer-Salins, *Fast-Track to Injustice: Rapidly Deporting the Mentally Ill*, 14 CARDOZO PUB. L. POL'Y & ETHICS J. 545, 557 (2016) (citing argument from the plaintiffs and the ruling in *Franco*).

296. The American Bar Association's Children Immigration Law Academy recently posted a practice advisory urging counsel for unaccompanied children to screen for competency issues in their removal cases. Children's Immigration Law Academy, *Protecting Unaccompanied Children Who Are Not Competent to Participate in Removal Proceedings*, AM. BAR ASS'N (Apr. 17, 2024), <https://cilacademy.org/2024/04/17/protecting-unaccompanied-children-who-are-not-competent-to-participate-in-removal-proceedings/> [<https://perma.cc/E85Q-QK77>].

297. See Jordan, *supra* note 153, at 520.

298. No. CV 10-02211, 2013 WL 3674492, at \*3 (C.D. Cal. Apr. 23, 2013).

299. *Franco-Gonzalez v. Holder*, 828 F. Supp. 2d 1133, 1147 (C.D. Cal. 2011).

300. *Id.*

301. Petition for Writ of Habeas Corpus at 2, *Franco-Gonzalez v. Napolitano*, No. CV10-02211, 2013 WL 942363 (C.D. Cal. Mar. 26, 2010) [hereinafter *Petition*]; First Amended Class-Action Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus at 4, *Franco-Gonzalez v. Holder*, No. CV10-02211, 2013 WL 942363 (C.D. Cal. Nov. 2, 2010) [hereinafter *Complaint*].

as to what type of court Your Honor presided over, what the possible outcomes might be, or how to defend himself at trial.”<sup>302</sup> Additionally, a psychological report indicated Mr. Franco-Gonzalez had an IQ suggesting moderate mental retardation and functioning at the cognitive level of a young child.<sup>303</sup> An immigration judge found Mr. Franco-Gonzalez incompetent and administratively closed his removal proceedings.<sup>304</sup> Despite this, Mr. Franco-Gonzalez remained detained for approximately five years without a hearing.<sup>305</sup>

Mr. Franco-Gonzalez, along with other similarly situated plaintiffs, filed a class action lawsuit in 2010 and alleged various violations of the INA, the Fifth Amendment of the U.S. Constitution, and Section 504 of the Rehabilitation Act.<sup>306</sup> As part of their arguments, the plaintiffs contended that due process, the INA’s full and fair hearing provisions, and Section 504 of the Rehabilitation Act<sup>307</sup> required that the court appoint counsel for unrepresented detained noncitizens who are found to be incompetent to represent themselves in immigration court. The court did not rule on the merits of the due process or statutory claims for appointed counsel.<sup>308</sup> Instead, in April 2013, the court ordered the U.S. government to provide a qualified representative to class members as a reasonable accommodation pursuant to Section 504 of the Rehabilitation Act.<sup>309</sup>

The court found the immigrant detainees were unable to meaningfully participate in their removal and detention proceedings because of their disabilities and that a qualified representative was required as a reasonable accommodation so they could exercise their rights and fully participate in their hearings.<sup>310</sup> Following this order, the parties reached a full settlement agreement concerning the claims and remedies for class members.<sup>311</sup> In the aftermath of the *Franco-Gonzalez* litigation, the Executive Office for Immigration Review expanded these protections to detainees throughout the United States via its National Qualified

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302. Petition, *supra* note 301, at 5.

303. *Id.* at 4.

304. *Id.*

305. *Id.*

306. Complaint, *supra* note 301, at 4–7, 35–40.

307. *Id.* at 35–40. Section 504 of the Rehabilitation Act of 1973, as amended, prohibits federal executive agencies (like the Department of Justice which houses the country’s immigration courts) from discriminating based on disability. 29 U.S.C. § 794(a). Department of Justice regulations, 28 C.F.R. § 39.150, and Department of Homeland Security regulations, 6 C.F.R. § 15.50(c), explicitly recognize applicability of Section 504 to their agencies. Section 504 covers both intentional discrimination and actions that have a disparate impact or discriminatory effect. See Kimani Paul-Emile, *Blackness as Disability?*, 106 GEO. L.J. 293, 324 (2018) (citing 28 C.F.R. § 35.130(b)(3) (2025)); 28 C.F.R. § 35.130(b)(8) (2025); H.R. REP. NO. 101-485, pt. 2, at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 367; 28 C.F.R. § 41.51(b)(3) (2025). Covered entities are required to provide reasonable accommodations to ensure an equal opportunity for qualified individuals with a disability in the United States to access, participate in, or benefit from programs, services, and activities. 28 C.F.R. § 35.130(b)(7) (2025).

308. *Franco-Gonzales v. Holder*, 828 F. Supp. 2d 1133, 1148–49 (C.D. Cal. 2011).

309. *Id.* at 1148.

310. *Franco-Gonzalez*, 2013 WL 3674492, at \*3; *Franco-Gonzalez*, 2013 WL 8115423, at \*1.

311. *Gonzalez v. Holder*, No. 10-CV-02211, 2015 WL 11116905, at \*5 (C.D. Cal. Sep. 25, 2015); Agreement Regarding Procedures for Notifying and Reopening Cases of *Franco* Class Members Who Have Received Final Orders of Removal at 1, *Franco-Gonzalez v. Holder*, No. 10-CV-02211 (C.D. Cal. Feb. 27, 2015).

Representative Program, a nationwide program to provide representation to detained noncitizens found to be incompetent.<sup>312</sup>

While acknowledging the unique challenges faced by adults with mental illness and disabilities, the research suggests that children in deportation proceedings are a similarly situated class.<sup>313</sup> Section 504 of the Rehabilitation Act can serve as a powerful, albeit novel tool to compel appointed counsel as a reasonable accommodation so children can have full and fair court proceedings.<sup>314</sup> Section 504 of the Rehabilitation Act, as amended, prohibits federal executive agencies (like the DOJ and its subagency, the Executive Office for Immigration Review, which houses the country's immigration courts)<sup>315</sup> from discriminating based on disability.<sup>316</sup> Section 504 covers both intentional discrimination and actions that have a disparate impact or discriminatory effect.<sup>317</sup> Covered entities are required to provide reasonable accommodations to ensure an equal opportunity for qualified individuals with a disability in the United States to access, participate in, or benefit from programs, services, and activities.<sup>318</sup>

A qualified individual with a disability under Section 504 is someone who “has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.”<sup>319</sup> Importantly, under the Section 504 analysis, disability is defined in functional and not purely diagnostic terms and should be read expansively.<sup>320</sup> Case law also suggests, however, that Section 504 is narrower in scope for mental impairments than physical impairments given the definition's limitation to “mental or psychological disorder[s]” and omission of conditions.<sup>321</sup> This may pose a challenge for use of this remedy in children's claims based on normative child development.

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312. NQRP Program, *supra* note 293.

313. *See supra* Part II.

314. *See supra* note 301 and accompanying text.

315. *See, e.g.*, 28 C.F.R. § 39.150(a) (2025); 6 C.F.R. § 15.50 (2025) (recognizing, explicitly, the applicability of Section 504 to their agencies).

316. 29 U.S.C. § 794(a).

317. Paul-Emile, *supra* note 307, at 324 (citing 28 C.F.R. §§ 35.130(b)(3), (8); H.R. REP. NO. 101-485, pt. 2, at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 367; 28 C.F.R. § 41.51(b)(3) (2025)).

318. 28 C.F.R. § 35.130(b)(7) (2025).

319. 34 C.F.R. § 104.3 (2025) (defining physical or mental impairment and major life activities); 28 C.F.R. § 39.103 (2025) (defining the implementation of the Dept. of Justice regulations); *see also* 6 C.F.R. § 15.3 (2025) (defining the implementation of the Dept. of Homeland Security regulations).

320. Section 504 of the Rehabilitation Act defines disability as an “impairment that substantially limits one or more major life activities.” 42 U.S.C. § 12102(1)(A); Wendy E. Parmet & Daniel J. Jackson, *No Longer Disabled: The Legal Impact of the New Social Construction of HIV*, 23 AM. J.L. & MED. 7, 23 (1997) (“[T]he definitions in the ADA and the Rehabilitation Act imply that the question of what constitutes a disability is highly fact-specific and dependent on the extent to which impairments, real, recorded or merely perceived, actually affect specific individuals in their particular lives.”).

321. Benjamin C. Hattem, Note, *Carceral Trauma and Disability Law*, 72 STAN. L. REV. 995, 1028–29 (2020) (discussing why Section 504 can be read to cover a narrower scope of psychological disabilities than physical ones and citing decisions in *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1098, 1109 (C.D. Cal. 2015); *Stephen C. v. Bureau of Indian Educ.*, No. CV-17-08004-PCT-SPL, 2018 WL 1871457, at \*4 (D. Ariz. Mar. 29, 2018)).

That said, there may be room for creative arguments. Section 504 permits untraditional and expansive understandings of what qualifies as disabling.<sup>322</sup> While all children facing deportation may not have a specific medical diagnosis of a disability, the weight of scientific research demonstrates that the experience of childhood is comparable to the impact of diagnosable mental disorders in ways that are legally relevant to a Section 504 accommodation claim.<sup>323</sup>

To be clear, this Article recognizes the very real challenges, barriers, and discrimination people with disabilities face every day, and the comparison of childhood to a legal disability is not meant to belittle or diminish that reality.<sup>324</sup> Applying a disability lens to children navigating removal proceedings embraces the social model of disability which “conceptualizes disability as constructed in the environment, rather than in the individual.”<sup>325</sup> Unlike the medical model of disability, which frames disability in terms of a medical diagnosis or biological difference, the social model “roots disability identity in repeated experiences with inaccessible rules, policies, and structures.”<sup>326</sup> The social model recognizes that many conditions understood as disabling do not necessarily arise from a diagnosed medical condition, but are instead traits that create disadvantage when combined with an inhospitable social or physical environment.<sup>327</sup> Just as someone with dyslexia may not be “disabled” until they are called upon to read, children are not “disabled” until called upon to defend themselves alone in immigration court.

Although child development does not rigidly conform to chronological boundaries, the weight of scientific research supports the general premise that children as a class are different from adults in a variety of legally relevant metrics. For example, the prefrontal cortex—the front portion of the frontal lobe of the brain—does not fully mature until a person’s mid to late twenties.<sup>328</sup> This part of the brain is responsible for critical cognitive control and “executive functions” like concentration, reasoning, long-term planning, problem solving, and

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322. Claire Raj, *The Promise and Peril of Using Disability Law as a Tool for School Reform*, 94 WASH. L. REV. 1831, 1857 (2019) (citing a July 26, 2016 Dear Colleague Letter from the U.S. Department of Education to claim Section 504 eligibility “is not limited to medically diagnosable conditions, but can also include traits or characteristics understood to be disabling in certain physical or social environments.”).

323. See *infra* notes 331–32 and accompanying text.

324. See SARAH PARKER HARRIS & ROB GOULD, EXPERIENCE OF DISCRIMINATION AND THE ADA: AN ADA KNOWLEDGE TRANSLATION CENTER RESEARCH BRIEF, ADA NAT’L NETWORK 6 (2019), [https://adata.org/sites/adata.org/files/files/ADA%20Research%20Brief\\_Experiences%20of%20Discrimination\\_LP\\_FINAL\(1\).pdf](https://adata.org/sites/adata.org/files/files/ADA%20Research%20Brief_Experiences%20of%20Discrimination_LP_FINAL(1).pdf) [<https://perma.cc/PYT5-2V3G>] (describing the experiences of people with disabilities in the workplace and community as complex, restrictive, and filled with stigmatic barriers).

325. Andrew Gerst & Tara Schwitzman-Gerst, *Disabling Inequity: How the Social Model of Disability Resists Barriers to Social Security Disability Benefits*, 44 N.Y.U. REV. L. & SOC. CHANGE 145, 150 (2020).

326. *Id.* at 151.

327. *Id.* at 150.

328. Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATR. DIS. TREAT. 449, 450–52 (2013) (describing factors governing brain maturation in ages 10–24); see Elizabeth R. Sowell et al., *Longitudinal Mapping of Cortical Thickness and Brain Growth in Normal Children*, 24 J. NEUROSCI. 8223, 8228–29 (2004); *The Teen Brain: 7 Things to Know*, NAT’L INST. MENTAL HEALTH, <https://www.nimh.nih.gov/health/publications/the-teen-brain-7-things-to-know> [perma.cc/XZY8-4349] (last visited Mar. 8, 2026).

complex decision making.<sup>329</sup> Additionally, there are important psychosocial developmental differences between children and adults, such as impulse control, peer pressure, the impact of adult influence, and stress on decision making.<sup>330</sup> Under the social model of disability, these differences are disabling in the context of removal proceedings where a child is expected to present and rebut evidence, make legal arguments, and pursue their claims for legal relief, all without appointed counsel.<sup>331</sup>

Furthermore, children fighting deportation may have claims for accommodation under the more traditional medical model of disability as well. Many children may also have specific mental health diagnoses such as Post-Traumatic Stress Disorder (“PTSD”), anxiety, depression, and attachment disorders, given the data evidencing high rates of violence, trauma, and other adverse childhood experiences amongst children in removal proceedings.<sup>332</sup> For example, PTSD, a mental disorder caused by exposure to “actual or threatened death, serious injury, or sexual violence” either through direct, proximate, or repeat secondary traumatic experiences, can substantially limit major life activities, especially in children.<sup>333</sup> PTSD can lead to physiological harm to a child’s developing brain and impact a child’s ability to concentrate, think, and communicate, among other things.<sup>334</sup> Those with PTSD are likely to avoid distressing memories and triggers, have difficulty with recall and/or dissociative amnesia, experience problems with concentration, and other negative alterations in cognitions and mood.<sup>335</sup> This, in turn, presents significant challenges for children in court proceedings, particularly given that the general stress and emotional triggers of court are exacerbated by the need to testify and present evidence of past traumatic experiences to defend against removal.<sup>336</sup>

Science tells us that children’s still-maturing abilities in emotional, cognitive, physical, and social domains can cause impairments in removal hearings similar to adults with mental or psychological disorders.<sup>337</sup> In other words, children manifest deficits in legally relevant abilities similar to deficits seen in adults with mental disabilities, but for reasons of immaturity rather than a diagnosed disorder. This is compounded by the high rates of trauma amongst migrant children that impede their ability to understand and participate meaningfully in the

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329. INSEL ET AL., *supra* note 85, at 47–50, 52.

330. Emily Buss, *Kids Are Not So Different: The Path from Juvenile Exceptionalism to Prison Abolition*, 89 U. CHI. L. REV. 843, 854–55 (2022) (noting examples of courts embracing neuroscience in assessing a child’s individual criminal culpability).

331. See 8 U.S.C. § 1229a(b)(4)(A)–(B).

332. See *supra* Section II.C.

333. AM. PSYCHIATRIC ASS’N, *Trauma- and Stressor-Related Disorders*, in DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 271 (5th ed. 2013).

334. *Id.* at 272; Ryan J. Herringa, *Trauma, PTSD and the Developing Brain*, 19 CURRENT PSYCHIATRY REP. 1, 7 (2017).

335. AM. PSYCHIATRIC ASS’N, *supra* note 333, at 271–72.

336. See *supra* Section VI.E for a discussion of asylum and Special Immigrant Juvenile Status, the two most common defenses for children fighting deportation.

337. Ferrer, *supra* note 32, at 560.

adversarial process.<sup>338</sup> Consequently, the current treatment of children in immigration removal proceedings, including denial of appointed counsel, is a violation of Section 504 of the Rehabilitation Act because (1) children in removal proceedings are qualified persons with disabilities under the Act, (2) they are entitled full and fair immigration hearings under section 240(b)(4)(B) of the INA, and (3) they are denied full participation in their proceedings and meaningful access to the rights and privileges by reason of their disability when the Executive Office for Immigration Review treats them like developmentally mature adults.<sup>339</sup>

Under Section 504 of the Rehabilitation Act, the government has a duty to accommodate the developmental needs of children fighting deportation, just like it did for unrepresented detained individuals with mental disorders in *Franco-Gonzalez v. Holder*.<sup>340</sup> The primary accommodation demanded by Section 504 is appointment of counsel so that children have equal access to their right to full and fair immigration proceedings.<sup>341</sup> The provision of competent counsel able to navigate the immigration court proceedings is the only means by which children may meaningfully invoke their rights given their unique needs.<sup>342</sup>

*B. Child Advocates Appointed for All Children Who Lack the Capacity to Direct Their Own Representation in Immigration Removal Proceedings*

When it is determined that a child lacks capacity to direct their representation, an independent child advocate should be appointed along with an attorney. Children, like adults, are presumed to have capacity to express their wishes in litigation.<sup>343</sup> While this Article argues children's cognitive, developmental, and emotional immaturity makes them developmentally incompetent to represent themselves in immigration court, this does not mean all children lack capacity to direct appointed counsel.<sup>344</sup> Capacity is contextual, incremental, and fluid.<sup>345</sup>

338. See *supra* notes 334–36 and accompanying text.

339. See MANUEL, *supra* note 186, at 10.

340. See *supra* notes 298–300 and accompanying text.

341. See *supra* notes 298–99 and accompanying text.

342. See *supra* Subsection V.A.1.

343. A.B.A., r. 1.14, in MODEL RULES OF PRO. CONDUCT (1983) [hereinafter Pro. Conduct r. 1.14]; A.B.A. COMM'N ON IMMIGR., STANDARDS FOR THE CUSTODY, PLACEMENT AND CARE; LEGAL REPRESENTATION; AND ADJUDICATION OF UNACCOMPANIED ALIEN CHILDREN IN THE UNITED STATES 11 (2018), [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/standards\\_for\\_children\\_2018.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/standards_for_children_2018.pdf) [<https://perma.cc/RW82-6QMG>] [hereinafter ABA STANDARDS].

344. NAT'L ASS'N COUNS. FOR CHILD., RECOMMENDATIONS FOR LEGAL REPRESENTATION OF CHILDREN AND YOUTH IN NEGLECT AND ABUSE PROCEEDINGS 7–8 (2022), <https://naccchildlaw.org/wp-content/uploads/2024/01/NACC-Recommendations-Final.pdf> [<https://perma.cc/CH7B-JTDT>] [hereinafter NAT'L ASS'N COUNS. FOR CHILD]; *Representing Child-Clients with "Diminished Capacity": Navigating an Ethical Minefield*, A.B.A. (Mar. 1, 2016), [https://www.americanbar.org/groups/professional\\_responsibility/publications/professional\\_lawyer/2016/volume-24-number-1/representing\\_childclients\\_diminished\\_capacity\\_navigating\\_ethical\\_minefield.html](https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-1/representing_childclients_diminished_capacity_navigating_ethical_minefield.html) [<https://perma.cc/NXZ7-PYQR>].

345. ABA Standards, *supra* note 343, at 17; Peter Margulies, *Report of the Working Group on Determining the Child's Capacity To Make Decisions*, 64 *FORDHAM L. REV.* 1339, 1339–40 (1996).

Age alone is not a marker of capacity.<sup>346</sup> Instead, capacity must be assessed on an individual basis. A child's capacity and decision-making ability can be assessed by using the following factors outlined in the 1996 Recommendations from the Fordham Law School's Children's Conference: developmental stage of the child client, current medical status, personal history, expression of a relevant position, individual decision-making process, and the ability to understand consequences.<sup>347</sup>

The role of a child advocate is different from the role of an attorney. As argued above in Section V.A, all children in immigration court should be represented by counsel. Attorneys representing children must, in accordance with the rules of professional conduct, make every effort to maintain a normal attorney-client relationship.<sup>348</sup> A child's attorney is bound by duties of loyalty and confidentiality and should zealously advocate for the child's expressed wishes and objectives.<sup>349</sup> Attorneys should make every effort to empower their clients, regardless of age, and minimize their intrusion into the child's decision-making autonomy. That said, if the child is unable to express their wishes, the child's attorney should advocate for legal interests, which will generally involve preserving to the greatest extent possible any immigration remedies available to the child.<sup>350</sup> In instances when a child's diminished capacity compromises their ability to direct their legal representation, an attorney may request appointment of a child advocate to represent the child's best interest as a protective action under the ethical rules.<sup>351</sup>

A child advocate (also known as a Guardian Ad Litem in other contexts) is charged with assessing, evaluating, and advocating for the best interests of the child.<sup>352</sup> A child's best interest should be determined by considering the child's expressed wishes, safety, right to family integrity, liberty, developmental needs, culture, identity, and other factors consistent with the Convention on the Rights of the Child.<sup>353</sup> Critically, best interests determinations must be grounded in children's rights, and child advocates must conduct individualized assessments and take steps to mitigate bias and paternalism in their work.

The appointment of child advocates in immigration proceedings is not without precedent. The Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA") authorizes the Secretary of Health and Human

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346. W. Warren H. Binford, *Giving Voice to Unaccompanied Children in Removal Proceedings*, 21 WILLAMETTE J. INT'L L. & DISP. RESOL. 34, 54 (2013).

347. Margulies, *supra* note 345, at 1341–45.

348. PRO. CONDUCT R. 1.14, *supra* note 343; ABA STANDARDS, *supra* note 343, at 17.

349. ABA STANDARDS, *supra* note 343, at 15–16.

350. As noted by the ABA, "[t]he Child's 'legal interests' are distinct from his 'best interests' and from his 'objectives.'" Legal interests are those interests that are specifically recognized in law and that can be protected through the courts, for example, a release from Custody pending determination of his case or a grant of asylum. *Id.* at 18.

351. PRO. CONDUCT r. 1.14, *supra* note 343.

352. 45 C.F.R. § 410.1001 (2024); Good, *supra* note 8, at 150.

353. G.A. Res. 44/25, art. 3, Convention on the Rights of the Child (Nov. 20, 1989); Convention on the Rts. of the Child, General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1), ¶ 76, U.N. Doc. CRC/C/GC/14 (May 29, 2013).

Services to appoint independent child advocates for trafficking victims and other vulnerable unaccompanied children.<sup>354</sup> The Child Advocate program was expanded in 2013 as part of the Violence Against Women Act reauthorization and was recently strengthened by federal regulations in 2024.<sup>355</sup> The provision of child advocates, however, applies to a small subsection of children, is limited by funding constraints, and subject to political whiplash.<sup>356</sup> This Article proposes building upon the current law to allow appointment of a child advocate in any case where a child lacks capacity to direct representation, regardless of their classification as an unaccompanied child or trafficking victim.

The U.S. Department of Health & Human Services has already contracted with the Young Center for Immigrant Children’s Rights (“Young Center”) to furnish qualified child advocates to unaccompanied children and trafficking victims.<sup>357</sup> The Young Center has done this work capably for approximately two decades.<sup>358</sup> This partnership could continue and expand, with the Young Center using its expertise to train additional child advocates in every city where there is an immigration court.<sup>359</sup> Their work would be substantially the same as that already outlined in the TVPRA and its regulations—the program would just be available to a larger pool of children.

The child advocate’s role in immigration proceedings is to advocate for the child’s best interest from the inception of the case until the immigration judge has made the ultimate decision about whether the child can remain in the United States.<sup>360</sup> To fulfill this role, the child advocate must take care not to rely on their own life experiences or instinct when making their best interest determinations. Instead, child advocates must conduct a full and independent investigation into the child’s situation. This work includes the responsibilities outlined in the federal regulations such as visiting the child, communicating with the child’s family and other caretakers, requesting information from health providers and educators, as well as gathering information on the child’s home country and conducting

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354. 8 U.S.C. § 1232; The term “unaccompanied alien child” was codified into law through the Homeland Security Act of 2002 and is defined as a child under the age of eighteen with no lawful status in the United States, and “with respect to whom (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.” 6 U.S.C. § 279(g)(2).

355. See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 1262(3), 127 Stat. 54, 157; 45 C.F.R. § 410 (2024).

356. Wendy Young & Megan McKenna, *The Measure of A Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.-C.L. L. REV. 247, 258 (2010); OFF. OF THE DIR., CANCELLATION OF DIRECTOR’S MEMORANDUM 23-03 & REINSTATEMENT OF POLICY MEMORANDUM 20-03, U.S. DEP’T OF JUST. (2025), <https://assets.aila.org/files/c5560bc7-f284-4e66-b898-e161f9ef38d9/25020304.pdf?1738600396> [<https://perma.cc/FF2C-BTM2>].

357. *Frequently Asked Questions*, YOUNG CTR. IMMIGRANT CHILDS. RTS., <https://www.theyoungcenter.org/faq> [<https://perma.cc/EDX2-XEWC>] (last visited Mar. 8, 2026).

358. YOUNG CTR. FOR IMMIGRANT CHILDS. RTS., ANNUAL OVERVIEW 2023 3 (2024), <https://static1.square-space.com/static/597ab5f3beba0a625aaf45/t/6655f131371fe01ef59f54bb/1716908344354/2023+ANNUAL+REPORT+Final+Digital+Version.pdf> [<https://perma.cc/A43B-JYPY>].

359. There are approximately seventy-five immigration courts across the country. Exec. Off. for Immigr. Rev., *Immigration Court Operational Status*, U.S. DEP’T OF JUST., <https://www.justice.gov/eoir/immigration-court-operational-status> [<https://perma.cc/BF3W-B552>] (last visited Mar. 8, 2026).

360. YOUNG CTR. FOR IMMIGRANT CHILDS. RTS., *supra* note 358, at 8.

a fact investigation into the circumstances regarding the child's presence in the United States.<sup>361</sup> The gathered information would then be used to advocate for a child's best interests with respect to their care, placement, court proceedings, and applications for relief from removal or repatriation.<sup>362</sup>

The appointment of a child advocate is not a substitute for an attorney, and vice versa. Child advocates are not appointed in all cases—just in those cases whereby reason of development, disability, trauma, or other factors, the child cannot direct representation.<sup>363</sup> As such, child advocates play a critical role in fact gathering and providing a child “holistic assistance to promote the child's best interests” which may include submission of written reports or testimony in a child's case.<sup>364</sup> In doing so, they ensure all decisions in cases where they are appointed to take into consideration a child's best interests.

*C. Court Procedures Must Reflect Child Development and the Best Interest of Children*

Finally, the last proposed accommodation is codification of immigration court procedures that reflect and incorporate child development and the best interests of children. There is robust scholarship that argues a child's best interest should govern court proceedings to which they are a party under children's rights theories and international human rights norms.<sup>365</sup> A discussion of those theories and arguments are outside the scope of this Article. This Article's contribution is to flesh out what this might look like in the immigration context when grounded in developmental research.

The first step in achieving this vision is the creation of specialized children's courts within the Executive Office for Immigration Review (“EOIR”) that have jurisdiction over children's removal proceedings. A roadmap already exists for this in the proposed bipartisan Immigration Court Efficiency and Children's Court Act of 2023.<sup>366</sup> This bill, if passed, would establish specialized children's dockets to adjudicate cases for respondents whose removal proceedings started before their eighteenth birthday.<sup>367</sup> The bill also includes provisions for specialized training requirements for judges and prosecutors working in the children's court, child-centered procedures aimed at maximizing children's participation in proceedings and due process, appointment of child advocates and consideration

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361. 45 C.F.R. § 410.1308 (2024).

362. *Id.*

363. *Id.*

364. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, DEP'T OF JUST., THE ROLE OF CHILD ADVOCATES IN IMMIGRATION COURT 3–5 (2023), <https://cilacademy.org/wp-content/uploads/2024/05/Handout-EOIR-DM-23-03.pdf> [<https://perma.cc/NJT8-9XH2>].

365. G.A. Res. 44/25, Convention on the Rights of the Child, (Nov. 20, 1989); Ann Laquer Estin, *Families and Children in International Law: An Introduction*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 271, 293 (2002) (referring to Article 3 as part of the soul of the treaty); David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 989, 1015 (2002).

366. H.R. 6145, 118th Cong. (2023) (introduced in both chambers of Congress, this bill gathered several cosponsors, but no further committee action, floor consideration, or passage has occurred).

367. *Id.*

of a child's best interest in matters requiring a discretionary analysis, and making efforts to increase access to legal assistance for unaccompanied children.<sup>368</sup>

This Article supports these provisions but recommends the removal of any limitations based on current or former designation as an unaccompanied child and expansion of the court's jurisdiction to cases initiated before a child's twenty-first birthday. These changes are consistent with child development research.<sup>369</sup> It is also consistent with practices under the Biden Administration.<sup>370</sup> Under a now rescinded policy, EOIR established pilot, specialized juvenile dockets in select immigration courts where the age limit was twenty-one, not eighteen, and there were no restrictions based on unaccompanied child status.<sup>371</sup> Passage of federal legislation is needed so that children's dockets and child-centered and trauma-informed practices are not subject to political whims.

Discrete children's dockets will help facilitate the adoption of child-specific safeguards. Having a cohort of judges and prosecutors assigned exclusively or primarily to children's cases will allow for specialization and hopefully minimize the likelihood of children being treated as adults. As proposed by numerous scholars and advocates, judges and prosecutors assigned to these children's dockets must complete specialized training on child development, the impact of trauma on child development, implicit bias, language access, best interest principles, child-friendly questioning techniques, child's competency evaluations, and forms of relief or procedures applicable to children.<sup>372</sup> These trainings must be created in consultation with experts in child development, mental health, and communication, and they should explore how physical, psychological, and emotional development, cognitive processes, culture, and trauma impact a child's comprehension, memory, testimonial capacities, regulation, decision making, and demeanor in the courtroom. Not only must judges and prosecutors receive this specialized training, but attorneys and child advocates should as well.<sup>373</sup>

Attorneys appointed to represent children in these new children's dockets should also have to comply with specialized standards of practice, similar to those promulgated by the Gault Center (formerly the National Juvenile Defender

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368. *Id.*

369. *See supra* Section II.A.

370. EXEC. OFF. FOR IMMIGR. REV., CHILDREN'S CASES IN IMMIGRATION COURT, DEP'T OF JUST. 2 (2023), <https://www.justice.gov/d9/2023-12/dm-24-01.pdf> [<https://perma.cc/TVH3-MGHT>].

371. PM 25-10, *supra* note 210; EXEC. OFF. FOR IMMIGR. REV., *supra* note 370, at 1.

372. *See Corcoran, supra* note 14, at 93–94; A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM, CTR. FOR GENDER & REFUGEE STUD. & KIND 83 (2014), <https://supportkind.org/wp-content/uploads/2015/04/macArthur-report-A-Treacherous-Journey.pdf> [<https://perma.cc/J4UU-BYXC>]; IMPROVING THE PROTECTION AND FAIR TREATMENT OF UNACCOMPANIED CHILDREN, KIND 12 (2016), [https://supportkind.org/wp-content/uploads/2016/09/KIND-Protection-and-Fair-Treatment-Report\\_September-2016-FINAL.pdf](https://supportkind.org/wp-content/uploads/2016/09/KIND-Protection-and-Fair-Treatment-Report_September-2016-FINAL.pdf) [<https://perma.cc/Y6G2-DYYN>].

373. Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 272 (2005) (observing that lack of training on adolescent development can impede the lawyer-client relationship and the child's decision making capacity); Gold, *supra* note 85, at 244 (calling for both lawyers and judicial systems to use trauma-informed practices).

Center) and the National Association of Counsel for Children.<sup>374</sup> If counsel for children is predicated on children's developmental needs, it is critical that attorneys have a framework for client representation that is anchored in science and the professional codes of conduct. A robust understanding of child development can help lawyers improve their interviewing and counseling skills and unlock new insights for creative legal argument in court.<sup>375</sup>

Lastly, the physical spaces of courtrooms housing the children's dockets should also reflect trauma-informed and child-centered design principles. An ethnographic study published by researcher Dr. Jennifer Huynh in 2019 documented and examined the experience of children appearing in twelve pilot juvenile dockets in immigration courts around the country.<sup>376</sup> Huynh observed the physical spaces of the courtrooms were not designed with children in mind, contributing to a sense of isolation, chaos, fear, and surveillance.<sup>377</sup> There is growing recognition that the design of a physical space impacts people's bodies, minds, and experiences, especially in moments of stress like court proceedings.<sup>378</sup> Juvenile court buildings housing juvenile delinquency and child welfare cases have been reconstructed and reimagined in recognition of this reality.<sup>379</sup> Children's immigration courts should too.

Outside the immigration court system, children's court proceedings are designed, at least on paper, to address the special needs and vulnerabilities of children.<sup>380</sup> There are specialized juvenile courts, specialized standards of practice for children's attorneys and best interest advocates, and specialized court and evidentiary rules and procedures that account for the distinct needs of children

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374. NAT'L ASS'N OF COUNS. FOR CHILD., *supra* note 344, at 1–2; see NATIONAL JUVENILE DEFENSE STANDARDS, NAT'L JUV. DEF. CTR. 8 (2013), <https://www.defendyouthrights.org/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf> [<https://perma.cc/V33Y-WMZP>].

375. Henning, *supra* note 373, at 321 (outlining developmentally appropriate lawyering strategies).

376. Jennifer Huynh, *La Charla: Documenting the Experience of Unaccompanied Minors in Immigration Court*, 47 J. ETHNIC & MIGRATION STUDS. 616, 620 (2019).

377. *Id.* at 621, 625–26; LUISELLI, *supra* note 136, at 35–36 (describing the architecture of the immigration court building as a labyrinth where you can get stuck in a “circular nightmare[.]”).

378. Anthony J. Wallace, *Courts with No Columns: How Building Design Affects Kids*, KIDS IMPRISONED (June 18, 2020), <https://kidsimprisoned.news21.com/blog/2020/06/how-architecture-affects-kids-court-experiences/> [<https://perma.cc/LWL4-E6FS>].

379. See, e.g., Kristen DeVall & Sally MacKain, *Trauma-Informed Spaces and Courtrooms*, NAT'L TREATMENT CT. RES. CTR., <https://ntcr.org/trauma-informed-spaces-and-courtrooms/> [<https://perma.cc/U2NQ-D5U3>] (last visited Mar. 8, 2026) (suggesting adjustments to courtrooms to offset the negative impacts of the physical environment on trauma victims); Claire Chiamulera, *Building a Trauma-Informed Court in Memphis, TN*, AM. BAR ASS'N (Apr. 1, 2021), [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practiceonline/january---december-2021/building-a-trauma-informed-court/](https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2021/building-a-trauma-informed-court/) [<https://perma.cc/9URX-WHWC>]; Megan Raposa, *Get a Look at the New Juvenile Justice Center Design*, SIOUX FALLS SIMPLIFIED (Aug. 16, 2023), <https://www.sfsimplified.com/minnehaha-county-get-a-look-at-the-new-juvenile-justice-center-design/> [<https://perma.cc/K6L4-WBW4>].

380. *Youth in the Justice System: An Overview*, JUV. L. CTR., <https://jlc.org/youth-justice-system-overview> [<https://perma.cc/4G28-M5VS>] (last visited Mar. 8, 2026) (noting every state now has dedicated courts for children).

and their best interests.<sup>381</sup> While not perfect, they do a much better job of empowering children and ensuring their meaningful participation in matters of great importance to their lives and futures. It is time for immigration courts to do the same. Whether claims for accommodations or safeguards grounded in child development research are ultimately “successful” in court should not be the ultimate arbitrator of its utility. Developmental research helps us to better understand the problem and injustices children in removal proceedings face<sup>382</sup> and identify developmentally appropriate reforms.

## VI. CONCLUSION

There is a growing body of neurological, psychological, and physiological research that lends scientific evidence to the commonsense conclusion that children are different than adults.<sup>383</sup> In the last decade or so, legislatures and courts have cited this research to support child-specific protections in the juvenile law context.<sup>384</sup> This research, however, has yet to make its way into immigration law jurisprudence, policy, or practice. This Article advances that conversation by arguing children are developmentally incompetent to represent themselves in immigration court. Child development research can and should compel appointed counsel and child-specific accommodations for children in immigration removal proceedings. For laws and policies related to child respondents to be fair and just, they must account for normative child development, especially given the high stakes.

Dana Leigh Marks, a former immigration judge and past president of the National Association of Immigration Judges, famously compared deportation proceedings to death penalty cases in a traffic court setting—describing the absurdity of these cases where deportation can, in effect, be a death sentence—yet there is no right to appointed counsel to help people navigate these notoriously complex and lengthy proceedings.<sup>385</sup> These challenges are exacerbated for children who face adult laws and adult expectations.<sup>386</sup> No child should be forced to face deportation proceedings alone in a court system that fails to accommodate their unique developmental needs.

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381. For example, in Iowa there are specialized juvenile courts that handle delinquency, child in need of assistance, emancipation, and minor guardianship proceedings that are governed by juvenile specific rules, laws, and standards of practice. IOWA CODE §§ 232, 232D (2024); IOWA CT. R., CH. 61–62; IOWA R. JUV. P.

382. See *supra* Section II.A.

383. See *supra* Section II.A.

384. Ferrer, *supra* note 32, at 551 (discussing impact of developmental research in Supreme Court jurisprudence and juvenile justice policy and practice).

385. *How a ‘Dire’ Immigration Court Backlog Affects Lives*, PBS NEWS HOUR (Sep. 18, 2017, at 22:52 ET), <https://www.pbs.org/newshour/show/dire-immigration-court-backlog-affects-lives> [<https://perma.cc/D7S8-NJK9>].

386. See *supra* Section II.A.

