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**CHILD COMPETENCY AND A SCIENCE-BASED APPROACH TO A RIGHT TO  
COUNSEL FOR CHILDREN IN IMMIGRATION PROCEEDINGS**

**Angelica M Mercado  
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## I. INTRODUCTION

An undocumented immigrant is arrested, sitting in a Rikers prison cell, and, as a matter of law, a criminal facing deportation. He is only seventeen has been transient, depending on a resistant sibling for shelter or living on the streets. He is detained for two months without ever speaking to an attorney, and, upon release, is immediately picked up by Immigration and Customs Enforcement (“ICE”), designated as an unaccompanied minor, and transferred into the custody of the Office of Refugee Resettlement (“ORR”). He is examined by a psychiatrist who determines that his cognitive functions are severely impaired. He struggles to communicate but eventually reveals a long history of physical abuse and a solitary, traumatic journey from his home in Mexico to New York at the age of ten. He has no family willing to care for him, struggles in school due to his limited comprehension, and eventually resorts to petty theft in order to eat.

Once in ORR custody, he has an opportunity to meet an immigration attorney who assesses his eligibility for relief, but his mental deteriorates rapidly. He does not remember dates and details, although his account of the abuse he has endured remains consistent. His journey to legal status has just begun, but his experiences and trauma will continue to present obstacles moving forward.<sup>1</sup>

What he has endured is, unfortunately, not unique. Instead, it is indicative of the experiences and challenges faced by undocumented children in the United States. In the increasingly hostile political climate for immigrants, the absence of protections and the promulgation of restrictive policies have left more and more children in immigration custody in administrative limbo.<sup>2</sup> Those policies have stripped those not in custody of the guaranteed representation necessary to make

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<sup>1</sup> SUSAN J. TERRIO, *WHOSE CHILD AM I? UNACCOMPANIED, UNDOCUMENTED CHILDREN IN U.S. IMMIGRATION CUSTODY* 175-80 (University of California Press) (2015). The facts from this anecdote reflect the story of an actual child documented in Terrio’s book. She conducted a series of interviews with the child’s case manager, foster mother, and attorney, reviewed confidential legal files, and attended an immigration hearing to piece together an account of the child’s story.

<sup>2</sup> Vivian Yee & Miriam Jordan, *Migrant Children in Search of Justice: A 2-Year Old’s Day in Immigration Court*, N.Y. TIMES, Oct. 8, 2018, <https://www.nytimes.com/2018/10/08/us/migrant-children-family-separation-court.html>.

any—let alone an effective—claim for relief.<sup>3</sup> Expected to state *and* defend their claims for relief, immigrant children are facing linguistic, cultural, intellectual, and psychological hurdles on their path to legal status against the legal expertise of government attorneys.<sup>4</sup>

In a system where a person’s future is often entirely dependent on a finding of credibility,<sup>5</sup> children bear the heavy burden of proving that they are eligible for and legally entitled to immigration relief.<sup>6</sup> The immigration courts decidedly depart from the safeguards recognized in the United States criminal and juvenile systems and, instead, steadfastly commit to a rigid framework delineated by the INA.<sup>7</sup> Despite children’s unique vulnerabilities, “immigration courts make no allowance for developmental immaturity, cultural incapacity, or special vulnerability” and “lack meaningful safeguards for children [. . .] with mental disorders and cognitive impairments who are in removal proceedings.”<sup>8</sup> While the criminal and juvenile delinquency court systems have recognized and evolved as awareness has increased regarding the impacts of age and competency,<sup>9</sup> the immigration system lags far behind. This paper argues that, where the American

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* The Homeland Security Act of 2002 dismantled what was then the Immigration and Naturalization Service (“INS”) and created three separate immigration enforcement agencies: U.S. Citizenship and Immigration Services (“USCIS”), Immigration and Customs Enforcement (“ICE”), and Customs and Border Patrol (“CBP”). 6 U.S.C.A. § 251. The Homeland Security Act of 2002 restructured the Department of Homeland Security with the stated intention of combatting the risks posed by terrorism, including the “exploitable liability” of open borders. H.R. REP. NO. 107-609, at 64 (2002). The creation of separate arms of DHS’s immigration enforcement infrastructure leaves USCIS charged with the adjudication of immigrant visa petitions, naturalization petitions, asylum and refugee applications, and all other immigration benefits. 6 U.S.C.A. § 271. Further, the Act delegated authority for the care and treatment of immigrant children in federal custody to the Office of Refugee Resettlement. 6 U.S.C.A. § 279.

<sup>5</sup> *See* 8 U.S.C. § 1158(b)(1)(B)(iii) (2019).

<sup>6</sup> *See* 8 U.S.C. § 1158(b)(1)(B)(i) (2019). The one form of relief available specifically to children, Special Immigrant Juvenile Status (“SIJS”), requires that a child be dependent on the State and unable to reunify with one or both parents because of abuse, abandonment, or neglect. 8 U.S.C. § 1101(a)(27)(J). Even though SIJS recognizes the unique position faced by immigrant children, its recognition does not extend beyond the single immigration application designated for these abandoned, abused, and neglected children. *Id.* Furthermore, this special classification *still* does not confer on immigrant children a right to a government-funded representative outside of the family or juvenile court setting. *Id.*

<sup>7</sup> TERRIO, *supra* note 1, at 162.

<sup>8</sup> *Id.*

<sup>9</sup> *See, e.g.,* *Wade v. Mayo*, 334 U.S. 672 (1948); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Roper v. Simmons*, 542 U.S. 551 (2005).

immigration system fails to recognize the developmental needs of children and mandate government-funded representation and protections for them, children in immigration proceedings are deprived of access to the relief to which they are entitled and, thus, to procedural due process.

Part I of this paper provides an overview of the body of laws governing immigration proceedings and, specifically, children. Part II discusses the scholarly literature and examines the two primary theoretical bases for which scholars have argued for government-funded representation: a constitutional argument and a children's rights-based approach. Part III explores the rationales and approaches adopted in the criminal, family, and juvenile delinquency systems. Part IV discusses studies that have delved into questions of children's brains and cognitive development and the legal implications. Part V concludes by proposing recommendations for the redress of immigration law's weaknesses in the treatment of children.

## **II. LEGAL AUTHORITIES**

Courtrooms, by their nature, invoke a sense of apprehension, uncertainty, and, often, fear.<sup>10</sup> The room is arranged to be adversarial, with a single judge or panel of judges positioned in front of the parties to the proceeding, regardless of whether the proceedings are legally adversarial or administrative.<sup>11</sup> Despite the potentially severe consequences of an adverse immigration decision, the law deems immigration proceedings to be civil actions.<sup>12</sup> This classification effectively denies respondents in immigration proceedings the right to government-funded counsel that is afforded to criminal or delinquent defendants under the Sixth Amendment's right to counsel and the Constitution's guarantees of procedural due process and fundamental fairness.<sup>13</sup> In defending the

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<sup>10</sup> See, e.g., Julia Preston, *Young and Alone, Facing Court and Deportation*, N.Y. TIMES, Aug. 26, 2012, <https://www.nytimes.com/2012/08/26/us/more-young-illegal-immigrants-face-deportation.html>.

<sup>11</sup> See, e.g., *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

<sup>12</sup> *Id.* at 1038.

<sup>13</sup> *Id.*

classification of removal proceedings as civil in nature, the Supreme Court reasoned in *I.N.S. v. Lopez-Mendoza* that the purpose of a deportation proceeding is to determine eligibility to remain in the United States and not to punish unlawful presence, although the Court did acknowledge that a “judge’s sole power is to order deportation.”<sup>14</sup> This paper argues that immigration proceedings fit squarely into legal frameworks adapted to criminal and delinquency law, and as such, the constitutional interests at stake are more akin to those of a criminal or juvenile dependent than a party to an administrative proceeding. This section provides a general overview of some of the legal frameworks that govern the processes undergone by undocumented immigrant children.

### A. THE CONSTITUTION

The reality of the American immigration system is that immigration courts increasingly mirror and are intertwined with the criminal system.<sup>15</sup> The costs of adverse immigration decisions can result in life-altering consequences and losses of liberty and opportunity.<sup>16</sup> Unlike the criminal system, a right to government-funded counsel<sup>17</sup> does not apply to immigrant respondents.<sup>18</sup> Despite the liberty interests at stake in immigration and removal proceedings, the courts have

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<sup>14</sup> *Id.*

<sup>15</sup> See Won Kidane, *Revisiting the Rules of Procedure and Evidence Applicable in Adversarial Administrative Deportation Proceedings: Lessons from the Department of Labor Rules of Evidence*, 57 CATH. U. L. REV. 93, 108 (2007) (explaining that “[d]eportation itself not only increasingly looks like a criminal punishment, but also the proceeding itself now shares some of the most fundamental characteristics of a criminal proceedings”). The overlap between the criminal system and qualification for most forms of immigration relief renders any claim that the two bodies of law are separate and apart moot. *Id.* Even relatively minor offenses classified as “crimes of moral turpitude” may carry with them the possibility of deportation. 8 U.S.C. § 1227(1)(2)(A)(i) (2019). The Immigration Court frequently interprets criminal law in order to determine eligibility for immigration relief, often resting immigration decisions on the same evidence used to reach decisions in criminal prosecutions. Kidane, *supra* note 16, at 110.

<sup>16</sup> Shani M. King, *Child Migrants and America’s Evolving Immigration Mission*, 32 HARV. HUM. RTS. J. 59, 88-89 (2019). (“While violence is a significant “push factor” behind recent migrant surges, so too is poverty and fleeing migrants desire to reconnect with family members in the United States. In addition to ranking among the world’s most dangerous places, Honduras, Guatemala, and El Salvador are also among the poorest—with more than one-third of employed people surviving on incomes of less than \$ 4 a day. Thus, while many UACs have valid claims for political asylum or other forms of humanitarian relief and are thus entitled to remain in the country, others do not. Such a mixed flow of migrants poses significant challenges to the American immigration system, which must balance the need to maintain border controls with the responsibility to protect genuinely vulnerable children.”).

<sup>17</sup> U.S. CONST. amend. VI.

<sup>18</sup> See 8 U.S.C. § 1229a(b)(4)(A) (2012).

maintained that, because of the civil classification of immigration law, an absence of counsel does not automatically equate to a denial of procedural due process and fundamental fairness.<sup>19</sup>

Because the Court's Sixth Amendment interpretations have limited a right to government-funded counsel to criminal and delinquency defendants,<sup>20</sup> the Courts have rarely found access to counsel claims viable in the immigration context.<sup>21</sup> Indeed, courts have *only* found a violation of an immigrant's right to counsel in immigration proceedings where the immigration courts entirely denied the respondent access to counsel.<sup>22</sup> This is because the right of access to counsel in this context is limited to the rights to a reasonable opportunity to find counsel,<sup>23</sup> to have counsel present in the courtroom,<sup>24</sup> and against deprivation of counsel based on personal animosities.<sup>25</sup>

The Supreme Court has not construed the Fifth Amendment's provision of procedural due process to guarantee a right to counsel in administrative cases such as immigration proceedings.<sup>26</sup>

The Court adopted a three-factor balancing test in *Mathews v. Eldridge*<sup>27</sup> assess what process is

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<sup>19</sup> See, e.g., *Aguilera-Enriquez v. INS*, 516 F.2d 565, 569 (6th Cir. 1975) ("In petitioner's case the absence of counsel at his hearing before the Immigration Judge did not deprive his deportation proceeding of fundamental fairness. . . The lack of counsel before the Immigration Judge did not prevent full administrative consideration of his argument. Counsel could have obtained no different administrative result. 'Fundamental fairness,' therefore, was not abridged during the administrative proceedings, and the order of deportation is not subject to constitutional attack for a lack of due process.").

<sup>20</sup> See, e.g., *Lopez-Mendoza*, *supra* note 11 (holding that the Sixth Amendment right to counsel does not extend to a respondent in an immigration proceeding); *In re Gault*, 387 U.S. 1, 34 (1967) (holding that individuals in juvenile court are entitled to specific due process guarantees, including the right to meaningful representation of counsel).

<sup>21</sup> See, e.g., *Castro-Nuno v. I.N.S.*, 577 F.2d 940 (9th Cir. 2012) (determining that the respondent had been unjustly denied a right to counsel after the immigration judge flatly refused to continue a deportation hearing to allow him to locate counsel).

<sup>22</sup> Note, *The Right to Be Heard From Immigration Prisons: Locating a Right of Access to Counsel for Immigration Detainees in the Right of Access to Courts*, 132 HARV. L. REV. 726, 731 (2018).

<sup>23</sup> See, e.g., *Biwot v. Gonzales*, 403 F.3d 1094, 1098-99 (9th Cir. 2005) (holding that aliens must be provided with reasonable time to locate counsel and to allow counsel to prepare for the hearing).

<sup>24</sup> See, e.g., *Castro-Nuno*, *supra* note 21, at 579 (determining that the respondent had been unjustly denied a right to counsel after the immigration judge refused to continue a deportation hearing to allow him to locate counsel).

<sup>25</sup> See, e.g., *Baltazar-Alcazar v. INS*, 386 F.3d 940 (9th Cir. 2012) (finding deprivation of right to counsel where immigration judge denied respondent access to attorney because of the judge's negative opinion about attorney).

<sup>26</sup> *Henriques v. I.N.S.*, 465 F.2d 119, 120 n.3 (2d Cir. 1972) ("[W]e can agree with, and follow, the majority in *Argersinger* and *Gideon*, each involving the sixth amendment and criminal cases, without reaching a blanket rule that the fifth amendment requires, as a matter of due process, counsel for indigent aliens in deportation cases, regardless of their nature.").

<sup>27</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

due to an individual once a protected liberty interest is found to be implicated in an administrative case. The *Mathews* test balances three distinct elements of the analysis: (1) the individual’s private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of that interest and the probable value of the procedural safeguard; and (3) the government’s interests at stake, such as costs and burdens of implementation of the safeguard.<sup>28</sup> The Court explained: “The essence of due process is the requirement that ‘a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.’ ...All that is necessary is that the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard’ ...to [e]nsure that they are given a meaningful opportunity to present their case.”<sup>29</sup> However, the *Mathews* test has been criticized for often skewing the balancing of interests in favor of the government and for its inadequacy in addressing the “Civil Gideon” issue, *i.e.*, the basic procedural right to counsel.<sup>30</sup>

Despite the shortcomings of the *Mathews* test, the courts have consistently applied this standard to assess whether a right to counsel would be necessary to satisfy the Fifth and Fourteenth Amendments’ requirements of due process and fundamental fairness.<sup>31</sup> In *Lassiter v. Dep’t of Social Services of Durham County, N.C.*, the Supreme Court held that the due process requirement of “fundamental fairness” mandates a right to appointed counsel when a litigant may be deprived

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<sup>28</sup> *Id.* at 334-35.

<sup>29</sup> *Id.* at 348-50.

<sup>30</sup> Stan Keillor, James H. Cohen, & Mercy Changwasha, *The Inevitable, if Untrumpeted, March Toward “Civil Gideon”*, 64 SYRACUSE L. REV. 469, 481 (2014) (“The *Mathews v. Eldridge* balancing test not only ignores the dignitary value of added process, but also skews the result in favor of governmental interests. As Reich points out, ‘*Mathews v. Eldridge* represents an outlook that treats the government’s claims as having greater urgency than the claims of individuals.’ This may be an appropriate approach for incremental safeguards, such as the right to present post-hearing argument. But it is completely inadequate for a protection as fundamental as the assistance of counsel in an adversarial proceeding. ...The inadequacy of the *Mathews v. Eldridge* test in this context is illustrated by both *Lassiter* and *Turner*.”).

<sup>31</sup> *See, e.g.*, *Lassiter v. Dep’t of Soc. Serv. of Durham Cnty., N.C.*, 452 U.S. 18, 26-27 (1981) (using the *Mathews* test to analyze a right to counsel in termination of parental rights cases); *Turner v. Rogers*, 564 U.S. 431 (2011) (using the *Mathews* test to analyze a right to counsel in civil contempt proceedings); Aguilera-Enriquez, *supra* note 19 (using the *Mathews* test to analyze a right to counsel in immigration proceedings).



of his *physical* liberty.<sup>32</sup> The Court in *Lassiter*, a termination of parental rights case, denied the parents a right to counsel and emphasized a presumption *against* a right to counsel where there was no threat of incarceration, citing a number of criminal cases in which the Court determined the scope of the Sixth Amendment right.<sup>33</sup> Seemingly conflating the limitations of the Sixth Amendment right to counsel with the scope of the Fifth and Fourteenth Amendments' procedural rights, the Court established a limited procedural right to counsel where the personal interest at stake is the person's freedom,<sup>34</sup> effectively making the *Mathews* analysis of private interests a comparison between of civil and criminal liberty interests.<sup>35</sup> However, the Court's emphasis on physical liberty interests in *Lassiter* has opened the door for respondents in immigration proceedings who face the possibility of detention or removal from the United States,<sup>36</sup> with some courts even arguing that freedom from immigration detention and the "significant risk that the individual will be needlessly deprived of the fundamental right to liberty" were at the core of the liberty interests imagined in the Constitution's due process procedural rights.<sup>37</sup>

Notably, the Supreme Court has acknowledged that removal is a severe penalty akin to the interests at stake in a criminal proceeding, although not a criminal sanction in a strict sense.<sup>38</sup> Although immigration law's proximity to the criminal system has not compelled the Court to acknowledge a Sixth Amendment guarantee of counsel, the Court in *Padilla v. Kennedy* acknowledged that immigrants in criminal proceedings have a Sixth Amendment right to *effective*

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<sup>32</sup> *Lassiter*, *supra* note 31, at 26-27.

<sup>33</sup> *Id.* at 25-27.

<sup>34</sup> *Id.*

<sup>35</sup> Stan Keillor, et al, *supra* note 30, at 482.

<sup>36</sup> *See, e.g.*, *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017).

<sup>37</sup> *Id.* at 993.

<sup>38</sup> *Padilla v. Kennedy*, 559 U.S. 356, 366 (2010).

counsel,<sup>39</sup> reasoning that the Court’s ruling in *Strickland*<sup>40</sup> applied to a claim of ineffective assistance of counsel where the collateral consequence of the representation was deportation.<sup>41</sup> While a right to effective assistance of counsel in immigration proceedings has not been recognized by the Supreme Court, the First Circuit in *Lozada v. I.N.S.* has recognized a narrow window for these claims<sup>42</sup>; where, due to ineffective representation, “the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case,” an immigrant respondent may have a viable procedural due process claim.<sup>43</sup>

The Bureau of Immigration Appeals (“BIA”) set out a strict framework for assessing whether a noncitizen has a basis for an ineffective assistance of counsel claim, requiring a showing of the client’s agreement with counsel and how the attorney did not comply with that agreement, requiring that the attorney be informed of and allowed to respond to the claims, and mandating that the complaint be filed with the attorney’s professional disciplinary authority.<sup>44</sup> Despite the *Lozada* court’s limited recognition of a potential right to effective representation, some scholars have argued that “access to counsel could be protected under the right to effective assistance of counsel, because if you cannot access your lawyer, presumably she cannot assist you effectively.”<sup>45</sup> However, the courts have not adopted this view, and due process claims by noncitizen litigants who are unable to procure counsel have generally proven unsuccessful under *Lozada*’s stringent standards.<sup>46</sup>

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<sup>39</sup> *Id.*

<sup>40</sup> *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing a standard for Sixth Amendment ineffective assistance of counsel claims).

<sup>41</sup> *Padilla*, *supra* note 38, at 366.

<sup>42</sup> *See Lozada v. I.N.S.*, 857 F.2d 10 (1st Cir. 1988).

<sup>43</sup> *Id.* at 13.

<sup>44</sup> *Matter of Lozada*, 19 I. & N. Dec. 637, 639 (1988).

<sup>45</sup> Note, *The Right to Be Heard From Immigration Prisons: Locating a Right of Access to Counsel for Immigration Detainees in the Right of Access to Courts*, *supra* note 22, at 732.

<sup>46</sup> *See, e.g., Nikollbibaj v. Gonzales*, 232 Fed.Appx. 546, 554-55 (6th Cir. 2007).

## B. THE IMMIGRATION AND NATIONALITY ACT

The Immigration and Nationality Act (“INA”), the statutory authority for immigration law, provides that a noncitizen has “the privilege of being represented, *at no expense to the Government*, by counsel of the alien’s choosing . . . .”<sup>47</sup> The INA further provides an alien the right to “have a reasonable opportunity to examine the evidence against [them], to present evidence on [their] own behalf, and to cross-examine witnesses presented by the Government . . . .”<sup>48</sup> The limited rights conferred by the INA are effectively inaccessible to respondents in immigration proceedings where the statutes do not confer a simultaneous right to government-funded counsel.<sup>49</sup>

The courts have increasingly recognized that constitutional rights and liberty interests can be implicated in immigration proceedings.<sup>50</sup> The Ninth Circuit has held that “accurate and just results are most likely to be obtained through equal contest of opposed interests” in the court’s adversarial setting, affirming a public policy interest in ensuring effective representation for litigants with a liberty interest at stake.<sup>51</sup> Moreover, in applying the *Mathews* test, the Ninth Circuit has recognized that “the government has no legitimate interest in detaining individuals who have been determined not to be a danger in the community and whose appearance at further immigration proceedings can be reasonably ensured.”<sup>52</sup> The “significant risk that [an] individual will be needlessly deprived of the fundamental right to liberty” are at the core of the liberty interests imagined in the Constitution’s conferral of procedural due process rights.<sup>53</sup> Thus, the courts consideration of whether the appointment of counsel for an indigent noncitizen would be necessary to satisfy the

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<sup>47</sup> 8 U.S.C. § 1229a(b)(4)(A) (2012).

<sup>48</sup> 8 U.S.C. § 1229a(b)(4)(B) (2012).

<sup>49</sup> See Aguilera-Enriquez, *supra* note 19, at 571-72 (DeMascio, J., dissenting).

<sup>50</sup> See, e.g., Aguilera-Enriquez, *supra* note 19; Hernandez, *supra* note 37; Lozada, *supra* note 42, at 13.

<sup>51</sup> Lassiter, *supra* note 31, at 28.

<sup>52</sup> Hernandez, *supra* note 36, at 993.

<sup>53</sup> *Id.*

Fifth Amendment's requirements of "fundamental fairness" and procedural due process was a logical step in the analysis of immigrants' constitutional rights.<sup>54</sup>

In *Aguilera-Enriquez v. INS*, the Sixth Circuit examined whether an immigrant respondent was constitutionally entitled to the assistance of counsel during his deportation hearing.<sup>55</sup> The Court conceded that if a provision of the INA were not to provide an alien with procedural due process, the statutory requirements of the INA would have to "yield [to] the constitutional guarantee of due process [and] must provide adequate protection during the deportation process."<sup>56</sup> "The test for whether due process requires the appointment of counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide 'fundamental fairness the touchstone of due process.'"<sup>57</sup> The Court determined that, where assistance of counsel could not have resulted in a different decision by the Immigration Judge, the lack of counsel "did not prevent full administrative consideration of his argument."<sup>58</sup> Thus, fundamental fairness "was not abridged, and the order of deportation [was] not subject to constitutional attack for a lack of due process."<sup>59</sup> The Sixth Circuit's decision, although denying the petitioner's due process claim here, created a potential (albeit limited) window for procedural due process claims where immigrant respondents' inability to procure counsel results in a fundamentally unfair proceeding.<sup>60</sup>

However, the *Aguilera-Enriquez* dissent highlights the shortcomings of a case-by-case "fundamental fairness" analysis.<sup>61</sup> Justice DeMascio argued that "because the consequences of a

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<sup>54</sup> *Aguilera-Enriquez*, *supra* note 19; see also Walter S. Gindin, Note, *(Potentially) Resolving the Ever-Present Debate Over Whether Noncitizens in Removal Proceedings Have a Due-Process Right to Effective Assistance of Counsel*, 96 IOWA L. REV. 669, 679-80 (2011).

<sup>55</sup> *Aguilera-Enriquez*, *supra* note 19, at 567.

<sup>56</sup> *Id.* at 568.

<sup>57</sup> *Id.* (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)).

<sup>58</sup> *Id.* at 569.

<sup>59</sup> *Id.* at 568.

<sup>60</sup> Gindin, *supra* note 54, at 680.

<sup>61</sup> *Aguilera-Enriquez*, *supra* note 19, at 571-72 (DeMascio, J., dissenting).

deportation proceeding parallels punishment for crime, only a per se rule requiring appointment of counsel will assure a resident alien due process of law.”<sup>62</sup> Justice DeMascio critiqued the majority’s case-by-case approach to fundamental fairness, emphasizing that procedural due process cannot be ensured without a constitutional guarantee of counsel.<sup>63</sup> Moreover, the dissenting opinion noted:

When the government, with plenary power to exclude, agrees to allow an alien lawful resident, it is unconscionable for the government to unilaterally terminate that agreement without affording an indigent resident alien assistance of appointed counsel. Expulsion is such lasting punishment that meaningful due process can require no less. Assuredly, it inflicts punishment as grave as the institutionalization which follow an *In re Gault* finding of delinquency. A resident alien’s right to due process should not be tempered by a classification of the deportation proceeding as “civil”, “criminal”, or “administrative.” No matter the classification, deportation is punishment, pure and simple.<sup>64</sup>

Yet, even as courts conceptually recognize that Fifth Amendment principles of due process and fundamental fairness may require a right to counsel in immigration proceedings, courts’ reluctance to adopt the *Aguilera* test, to confer this right onto immigrants, and to hold unconstitutional those provisions of the INA that constructively restrict noncitizens’ access to counsel has its most detrimental effects on those least capable of representing themselves—children.<sup>65</sup>

### C. UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

The United Nations Convention on the Rights of the Child (“CRC”) proposes minimum universal standards for the protection of children’s human rights, particularly in the context of

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<sup>62</sup> *Id.* at 573 (DeMascio, J., dissenting).

<sup>63</sup> *Id.* at 574 (DeMascio, J., dissenting).

<sup>64</sup> *Id.* at 572. Although dissenting opinion in *Aguilera-Enriquez* emphasizes the petitioner’s former legal residency as a basis for his entitlement to due process, *Id.* at 572-74, the Supreme Court has long recognized that immigrants are entitled to the Fifth and Sixth Amendments’ constitutional protections. *See Wong Wing v. United States*, 163 U.S. 228 (1896). Thus, Justice DeMascio’s argument extends to immigrant respondents without legal status, as well. *Aguilera-Enriquez*, *supra* note 20, at 571-72 (DeMascio, J., dissenting).

<sup>65</sup> Immigrants represented by counsel are fifteen times more likely to seek qualified relief under the INA, and five times more like to be granted relief from deportation than those without representation. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 2 (2015). Despite the Supreme Court’s decision guaranteeing due process to immigrants over one hundred years ago, *Yamataya v. Fisher*, 189 U.S. 86 (1903), immigrants who face educational, linguistic, or financial obstacles to legal representation continue to be denied full access to counsel and fundamentally fair proceedings. Gindin, *supra* note 55, at 679.

migration.<sup>66</sup> The CRC identifies refugee children as independent “rights-bearers” entitled to the protection and assistance of receiving governments, intergovernmental organizations, and nongovernmental organizations.<sup>67</sup> Furthermore, the CRC recognizes refugee children’s need for special safeguards and care, interpreted contextually with relation to “[the child’s] interactions with her specific sociocultural environment and in relation to her developmental experiences.”<sup>68</sup>

Scholars and politicians have been unable to consistently define the concept of a “refugee child,” and this lack of consensus has resulted in the marginalization of refugee children in humanitarian discourse.<sup>69</sup> Traditional conceptions of the nuclear family have perceived children as an arm of the biological family and not as individuals entitled to their own human rights protections.<sup>70</sup> Indeed, immigration law reflects traditional conceptions of children as dependent beings within the biological family unit in its reliance on the biological determinants of a familial relationship instead of the functional determinants that satisfy the day-to-day needs of the child.<sup>71</sup>

In *Reno v. Flores*, the Supreme Court affirmed its adherence to these traditional conceptions when it examined the INA’s limitations on the custodial release of juvenile immigrant detainees.<sup>72</sup> Regulations provided that “alien juveniles ‘shall be released, in order of preference, to: (i) a parent; (ii) a legal guardian; or (iii) an adult relative (brother, sister, aunt, uncle, grandparent) who are not

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<sup>66</sup> UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, ART. 22. (“States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.”).

<sup>67</sup> *Id.*

<sup>68</sup> Jeanette A. Lawrence, Agnes. E. Dodds, Ida Kaplan, & Maria M. Tucci, *The Rights of Refugee Children and the UN Convention on the Rights of the Child*, 8 LAWS 20, 2 (2019) (Austl.).

<sup>69</sup> *Id.*

<sup>70</sup> Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family that Protects Children’s Fundamental Human Rights*, 41 COLUM. HUM. RTS. L. REV. 509, 511 (2010).

<sup>71</sup> *Id.*

<sup>72</sup> *Reno v. Flores*, 506 U.S. 292, 294 (1993).

presently in INS detention,’ unless the INS determine[d] that ‘the detention of such juvenile is required to secure his timely appearance . . . or to ensure the juvenile’s safety or that of others.’”<sup>73</sup> A class of juvenile detainees sought release from government custody into the care of a “willing-and-able private custodian,” arguing that the regulation violated both substantive and procedural due process by not requiring a case-by-case examination of whether release “to some other ‘responsible adult’” was in the child’s best interests.<sup>74</sup> The Court affirmed the traditional rationale, holding that “where a juvenile has no available parent, close relative, or legal guardian, where the conditions of governmental custody are decent and humane, [government] custody surely does not violate the Constitution.”<sup>75</sup> The Court continued on to say that “[t]he best interests of the child’ is likewise not an absolute and exclusive constitutional criterion for the government’s exercise of the custodial responsibilities that it undertakes. . . .”<sup>76</sup>

Moreover, the United States is the *only* country that has not ratified the CRC.<sup>77</sup> Up until 2015, the only two other countries that had not ratified the CRC were Somalia and South Sudan, nations with dismal human rights records.<sup>78</sup> The debate over the ratification of the CRC has prompted federalism concerns in the United States, where certain procedural and substantive rights guaranteed to children can be consistent with state-regulated family law.<sup>79</sup> However, in practice, “the Tenth Amendment, reserving to the several States the powers not delegated to the United States, does not limit the power to make treaties or other agreements,” and, as such, has not

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<sup>73</sup> *Id.* at 297 (quoting 8 C.F.R. § 242.24(b)(1) (1992)).

<sup>74</sup> *Id.* at 300.

<sup>75</sup> *Id.* at 303.

<sup>76</sup> *Id.* at 304.

<sup>77</sup> Sarah Mehta, *There’s Only One Country that Hasn’t Ratified the Convention on Children’s Rights: US*, ACLU (November 20, 2015), <https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens>.

<sup>78</sup> *Id.*

<sup>79</sup> Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 402 (1998).

uniformly prevented the signing and ratification of treaties historically.<sup>80</sup> As such, while the CRC outlines a minimal framework for the rights of the child, it serves more as a theoretical guide for scholars as opposed to a legal mandate for the American legal system.<sup>81</sup> However, some scholars retain a belief in the conceptual utility of the CRC for U.S. policy, even absent its ratification.<sup>82</sup>

### **III. ACADEMIC REVIEW**

Nationally and internationally, scholars and advocates have argued for a right to counsel for children in immigration proceedings. The following sections provide a brief overview of the two leading arguments in support of this right: a due process argument and a child-rights argument.

#### **A. THE DUE PROCESS APPROACH**

The most prevalent argument for a government-funded right to counsel for children is based on the assertion that the deprivation of counsel is an inherent violation of the child's due process rights.<sup>83</sup> The law governing the evolution of juvenile delinquency proceedings has been instructive in this regard.<sup>84</sup> Unlike the juvenile delinquency law that grants children limited autonomy while simultaneously affording them special protections, immigration law neither entitles children to the full rights granted to children in other areas of the law nor grants them the protections otherwise afforded in those contexts. Like the juvenile court system, the immigration courts treat eighteen as the age of majority, and to a certain degree, immigration law has recognized age as categorically

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<sup>80</sup> *Id.* at 393-94.

<sup>81</sup> See Jennifer Kasper & Paul Wise, *The Relevance of the United Nations Convention on the Rights of the Child for United States Domestic Policy: Welfare Reform and Children in Immigrant Families*, HEALTH AND HUMAN RIGHTS: AN INTERNATIONAL JOURNAL (VOL. 5, NO. 2) 64, 74 (2001).

<sup>82</sup> *See Id.*

<sup>83</sup> *See, e.g.*, Sharon Finkel, Notes & Comments, *Voice of Justice: Promoting Fairness Through Appointed Counsel for Immigrant Children*, 17 N.Y.L. SCH. J. HUM. RTS. 1105, 1107 (2001); Genieva A. Hylton, Note, *Justice for All: The Right to Counsel for Unaccompanied Alien Children*, 31 GEO. IMMIGR. L.J. 157, 171 (2017).

<sup>84</sup> Samantha Casey Wong, Note, *Perpetually Turning Our Backs to the Most Vulnerable: A Call for the Appointment of Counsel for Unaccompanied Minors in Deportation Proceedings*, 46 CONN. L. REV. 853, 870 (2013).



distinguishing the needs of children from those of adults.<sup>85</sup> Further, in the context of juvenile rights, the Supreme Court has explicitly stated that the “acceptance of juvenile courts distinct from the adult criminal justice system assumes that juvenile offenders constitutionally may be treated differently from adults.”<sup>86</sup> However, immigration law’s failure to distinguish between adults and children with regard to procedural accommodations relevant to those distinct needs effectively diminishes children’s access to the due process rights to which they are entitled.<sup>87</sup>

Indeed, the Court’s position in *Bellotti v. Baird* has provided much of the basis for the argument that due process demands a government-funded right to counsel for children in immigration law.<sup>88</sup> In *Bellotti v. Baird*, the Supreme Court examined the constitutionality of a Massachusetts statute that required parental consent in order for a minor to access an abortion.<sup>89</sup> The Court conceded that “although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children’s vulnerability” and can “limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences.”<sup>90</sup> Given the severity of the abortion decision and the long-term ramifications of not being able to access an abortion, the Court found the statute unconstitutional where it would restrict access to a remedy even where a minor was deemed mature, competent, and entitled to make the decision.<sup>91</sup> The Court’s decision acknowledged that a qualified right does not necessarily provide an effective avenue to access that right, particularly to children who, due to age, are legally vulnerable.<sup>92</sup> Given

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<sup>85</sup> See, e.g., 6 U.S.C. § 279(g)(2) (2012) (defining an unaccompanied minor as being under the age of 18); 8 C.F.R. § 1240.10(c) (2013) (prohibiting legal admissions by unrepresented minors in immigration proceedings).

<sup>86</sup> *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

<sup>87</sup> Finkel, *supra* note 83, at 1129-30.

<sup>88</sup> See, e.g., Finkel, *supra* note 83, at 1129-30; Wong, *supra* note 84, at 871.

<sup>89</sup> *Baird*, *supra* note 87, at 635.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 651.

<sup>92</sup> *Id.* at 647.

the emphasis on the long-term consequences, the Court’s logic underscores the importance of the accessibility of a right in determining a statute’s constitutionality.<sup>93</sup> Thus, some scholars have argued that any right to counsel granted to children by the INA is purely theoretical where most children in immigration proceedings will be unable to procure or afford counsel.<sup>94</sup>

## **B. THE CHILD-RIGHTS APPROACH**

Some scholars have argued for a children’s right to counsel in immigration proceedings based on children’s autonomy and their fundamental distinction from adults.<sup>95</sup> Child-rights, as a legal basis for children’s right to counsel, is founded upon international law’s recognition of the children’s autonomy and fundamental human rights.<sup>96</sup>

The historical development of child rights has traced children’s legal existence from being parental property to existing as somewhat-independent persons.<sup>97</sup> Human rights theory provides the foundation for the assertion of child rights, centering entitlement to certain rights on children’s personhood and, thus, qualifying children as rights holders, “even in instances where the child may lack capacity to exercise rights autonomously.”<sup>98</sup> Given the broad scope and the magnitude with which the CRC has been accepted globally for its approach to children’s human rights, scholars and policy makers often look to the CRC as a guiding conceptual framework for the analyses of

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<sup>93</sup> *Id.* at 652.

<sup>94</sup> Finkel, *supra* note 83, at 1131 (2001).

<sup>95</sup> *See, e.g.,* Olga Byrne, *Promoting a Child’s Rights-Based Approach to Immigration in the United States*, 32 GEO. IMMIGR. L.J. 59 (2017); David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979 (2002).

<sup>96</sup> *See, e.g.,* Brief for Human Rights Watch as Amicus Curiae Supporting Plaintiffs-Appellees, J.E.F.M. et al. v. Lynch, 837 F.3d 1026 (9th Cir. 2016) (No. 15-35738, 15-35739). Counsel for Human Rights Watch, relying on international law to emphasize the importance of preserving a forum for children’s claims for a right to appointed counsel, cited to the Universal Declaration of Human Rights, to international treaties, such as the Convention on the Rights of the Child, the Convention Against Torture, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination, and to the Inter-American court system, including the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights.

<sup>97</sup> Thronson, *supra* note 95, at 981 (“Yet, despite skepticism, there is consensus that control of children by parents, or the State, is not absolute and that children do have rights.”).

<sup>98</sup> *Id.* at 988-89.

the treatment of children in the U.S.<sup>99</sup> More specifically, the CRC provides four key principles through which to assess the treatment of children's rights: non-discrimination in Article 2; the best interests of the child in Article 3; the right to participation in Article 12; and the right to life, survival, and development in Article 6.<sup>100</sup>

First, the CRC's non-discrimination principle dictates that all children be treated equal, regardless of citizenship status or national origin.<sup>101</sup> Despite there being no express policies directed at the disparate treatment of noncitizen children, the reality is that migrant children are perceived by the law, first, as "aliens" and, then, as children.<sup>102</sup> The treatment of children under immigration law, as a result, deprives children of the protections available to American citizen children in other areas of the law, such as a right to counsel in juvenile court.<sup>103</sup> Thus, the unavailability of this right to children in immigration proceedings effectively discriminates against noncitizen children based on their citizenship status.<sup>104</sup>

Second, with the exception of SIJS, there is no provision of the INA that requires immigration officials to consider the best interests of the child in making an immigration determination.<sup>105</sup> Moreover, noncitizen children do not have an inherent right to participate in immigration

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<sup>99</sup> See *Id.*; Byrne, *supra* note 95; see also *Roper v. Simmons*, 542 U.S. 551, 576-77 (2005). In *Roper*, Justice Kennedy, writing for the majority, makes specific reference to the standards outlined in the CRC proscribing the use of capital punishment against juveniles under the age of 18.

<sup>100</sup> UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD; see also Byrne, *supra* note 95, at 77.

<sup>101</sup> UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, ART. 2.

<sup>102</sup> See Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 L. & CONTEMP. PROBS. 1, 6 (2009).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* ("In modern times, popular American culture, taking a hint from the terminology of the immigration laws, often demonizes current and prospective immigrants as 'aliens' or, even worse, 'illegal aliens.' Class and racial aspects of the stereotypes contribute to the conventional wisdom that immigrants are a pressing social problem necessitating extreme measures.").

<sup>105</sup> 8 U.S.C. § 1101(a)(27)(J). SIJS, again, is only available to children who have been abused, abandoned, or neglected. *Id.* SIJS-eligible noncitizen children must, first, be determined to be unable to reunify with a parent by a state court, and it is the state court that assesses the best interests of the child in returning to their country of origin. *Id.*

proceedings.<sup>106</sup> “Adults and decision-makers must be equally mindful to carry out their duties on both sides of this spectrum: to adequately fulfill younger, or more dependent children’s right to participate while also respecting more mature children’s ability to carry and express their own views.”<sup>107</sup> Where the CRC emphasizes children’s agency and simultaneous need for protections, U.S. immigration law does not reflect this ideal.<sup>108</sup>

Finally, a child’s right to development and survival is particularly implicated in the context of family separation and detention practices.<sup>109</sup> There are limited protections available for migrant children who meet the INA’s stringent eligibility requirements for “refugee” status<sup>110</sup> and for victims of trafficking, but the vast majority of migrant children do not qualify for these protections.<sup>111</sup> Children’s legal, physical, and mental health needs are jeopardized under the current U.S. immigration regime,<sup>112</sup> and scholars advocating for a child-rights approach suggest a critical need for reform in the best interests of children regardless of nationality.<sup>113</sup>

In sum, the child-rights approach to immigration policy calls for the recognition of children’s independent rights while also protecting their need for protection and assistance.<sup>114</sup> Using the CRC as a theoretical framework against which to analyze U.S. immigration policy, scholars critically

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<sup>106</sup> Indeed, 8 C.F.R. § 1240.4 provides that, “when it is impracticable for the respondent to be present at the hearing because of mental incompetency,” the courts can ask another party, whether it be an attorney, family member, or custodian, to appear on the respondent’s behalf. This can apply to children deemed mentally incompetent to appear in court, but it does not categorically apply to children based on their developmental limitations.

<sup>107</sup> Byrne, *supra* note 95, at 93-94.

<sup>108</sup> *Id.* (“This dynamic comes into play in the context of children’s asylum claims. . . . [Y]oung people seeking protection based on their political opinions have faced skepticism or even incredulity of decision-makers who may hold assumptions that children are unable to hold political views.”). On the other hand, children who are derivatives of a parent’s asylum claim do not make their own claim for relief and lack the ability to participate in the process. Nadwa Mossad, *Refugees and Asylees: 2017*, DEP’T OF HOMELAND SEC. (2017).

<sup>109</sup> See JOANNE M. CHIEDI, U.S. DEP’T OF HEALTH AND HUM. SERV., CARE PROVIDER FACILITIES DESCRIBED CHALLENGES ADDRESSING MENTAL HEALTH NEEDS OF CHILDREN IN HHS CUSTODY (2019).

<sup>110</sup> 8 U.S.C. § 1101(a)(42) (2014).

<sup>111</sup> See Byrne, *supra* note 95, at 77-78.

<sup>112</sup> See CHIEDI, *supra* note 109.

<sup>113</sup> See Joyce Koo Dalrymple, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 B.C. THIRD WORLD L.J. 131 (2006).

<sup>114</sup> See Thronson, *supra* note 95.

point to the law's disregard for children's independent rights except in the cases of unaccompanied children who are treated wholly as adults<sup>115</sup> and to its inconsistency with international norms for the protection of *all* children, regardless of whether they are migrants or citizens.<sup>116</sup>

#### **IV. IMMIGRATION LAW AND CHILDREN'S RIGHT TO COUNSEL**

This paper takes a distinct approach to finding a right to government-funded counsel for children in immigration proceedings. Where criminal courts provide a right-to-counsel for all criminal defendants because of costs of deprivation of liberty and delinquency courts afford a right to counsel to incompetent minors based on their cognitive abilities, immigration courts have only begun to recognize the need for counsel for mentally incompetent respondents. The Supreme Court recognizes that a child's mental capacity and cognitive development categorically distinguish him from an adult and require special procedural protections, but immigration law has not yet implemented the necessary changes to address children's vulnerabilities. This paper argues that children's cognitive development, in addition to the Supreme Court's recognition of a constitutional mandate for additional procedural due process protections for children, demands a right to counsel for children in immigration proceedings.

##### **A. CHILDREN AND CRIMINAL LAW**

Over the course of the twentieth century, the historical development of a right to counsel in criminal proceedings demonstrated an increasing recognition of the potential prejudicial and

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<sup>115</sup> *Id.* at 1000 (“Given that the procedural framework of immigration law fails to recognize that children exist without parents, substantive and procedural rules do virtually nothing to account for the possibility of children in proceedings unaccompanied by parents.”).

<sup>116</sup> Byrne, *supra* note 96, at 90 n.17. Byrne notes that, where the Unaccompanied Refugee Minors Program had approximately 1,300 children enrolled as of October 2017, CBP reported that almost 60,000 unaccompanied children had been apprehended by the end of 2016. By the end of the 2018 fiscal year, 50,036 unaccompanied children had been detained at the U.S. southern border by CBP. U.S. Customs and Border Protection, *U.S. Border Patrol Southwest Border Apprehensions by Sector FY 2018*, U.S. DEP'T OF HOMELAND SEC. (2018).

disparate impacts that lack of legal representation could have on criminal defendants.<sup>117</sup> The Court has evolved from declaring a constitutional right to counsel only where an indigent defendant is charged with a capital offense<sup>118</sup> to upholding a right to counsel for all defendants charged of any crime that risks “that actual deprivation of a person’s liberty.”<sup>119</sup> Indeed, in extending an unequivocal right to counsel in felony proceedings, the Court in *Gideon v. Wainwright* stated: “[R]eason and reflection require us to recognize that, in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . [O]ur state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.”<sup>120</sup>

Even before the Court guaranteed a right to counsel for all criminal defendants facing a loss of liberty, the Court began to recognize that certain circumstances could give rise to a heightened demand for the appointment of counsel.<sup>121</sup> Specifically, the Court in *Wade v. Mayo*<sup>122</sup> acknowledged that young and mentally incompetent individuals would require the appointment of

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<sup>117</sup> See, e.g., *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (“[I]n a capital case, where the defendant is unable to employ counsel, and is incapable of adequately making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law. . . .”); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243-244 (1936) (“We concluded that certain fundamental rights, safeguarded by the first eight amendments against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in criminal prosecution.”).

<sup>118</sup> *Powell*, *supra* note 117.

<sup>119</sup> *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972); see also *Gideon v. Wainwright*, *supra* note 9, at 344 (“Not only these precedents, but also reason and reflection, require us to recognize that, in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . .”).

<sup>120</sup> *Gideon*, *supra* note 9, at 344.

<sup>121</sup> See *Betts v. Brady*, 316 U.S. 455, 473 (1942) (“To deduce from the due process clause a rule binding upon the States in this matter would be to impose upon them, as Judge Bond points out, a requirement without distinction between criminal charges of different magnitudes or in respect of courts of varying jurisdiction.”). Although the Court departed from the *Betts* rationale in *Gideon*, the *Betts* approach gave way to factual analyses of right-to-counsel claims in non-criminal cases, many of which were overturned by the Court for failure to appoint counsel.

<sup>122</sup> *Wade v. Mayo*, *supra* note 9.

counsel in criminal proceedings because “[t]here are some individuals who, by reason of age, ignorance or mental capacity are incapable of representing themselves adequately in a prosecution of a relatively simple nature . . . [and] [w]here such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment.”<sup>123</sup> Thus, the evolution of the Court’s treatment of a right to counsel presents two major points. First, the transition to a more generalized recognition of a right to counsel, rooted in a belief that fundamental fairness cannot be achieved in a system where the layman is expected to defend himself against the expertise of an experienced government attorney, demonstrates the Court’s willingness to expand the scope of an individual’s right to counsel where due process rights are at risk.<sup>124</sup> Second, the Court has recognized that individuals’ abilities to access a fundamentally fair court proceeding could be impaired by such factors as age,<sup>125</sup> ignorance, or mental competency.<sup>126</sup>

Since *Wade v. Mayo*, the Court has further elaborated on the mitigating effects of age and competency on culpability in the juvenile-criminal context.<sup>127</sup> Indeed, the Court has acknowledged

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<sup>123</sup> *Wade v. Mayo*, *supra* note 9, at 684; *see also* *Massey v. Moore*, 348 U.S. 105, 108-09 (1954); *Palmer v. Ashe*, 342 U.S. 134, 136-38 (1951).

<sup>124</sup> *See Massey v. Moore*, *supra* 123, at 108-09 (“We have not allowed convictions to stand if the accused stood trial without the benefit of counsel and yet was so unskilled, so ignorant, or so mentally deficient as not to be able to comprehend the legal issues involved in his defense. No trial can be fair. That leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court. Even the sane layman may have difficulty discovering in a particular case the defenses which the law allows.” (internal citations omitted)).

<sup>125</sup> *Wade v. Mayo*, *supra* note 9, at 684; *see also Massey v. Moore*, *supra* note 123, at 108-09; *Palmer v. Ashe*, *supra* note 123, at 136-38.

<sup>126</sup> *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (holding that, in the criminal context, a person is not competent to stand trial if “he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense”).

<sup>127</sup> *See, e.g., Roper v. Simmons*, *supra* note 99, at 568-67 (“Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parents knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions. . . . The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . . This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. . . . The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.”).

the fundamental neurological and psychological differences between juveniles and adults and conceded that a juvenile’s culpability and, consequentially, punishment cannot be equated to that of an adult.<sup>128</sup> Juveniles are ill-equipped to assess the nature of the consequences of certain choices, ill-experienced to have the judgment to avoid detrimental choices, and not competent to defend themselves before the law.<sup>129</sup> Juveniles’ abilities to advocate on their own behalf and comprehend their interests are notably impaired because of their age, particularly in situations where the juvenile can be susceptible to coercion or duress.<sup>130</sup> “The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.”<sup>131</sup> As such, the criminal courts have categorically distinguished children and juveniles from adults in this context.<sup>132</sup>

## **B. JUVENILE DELINQUENCY COURTS**

*Wade v. Mayo* presented the Court’s first unequivocal affirmation in the criminal right-to-counsel context that children have categorically distinct due process needs by virtue of their age.<sup>133</sup>

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<sup>128</sup> See *Graham v. Florida*, 560 U.S. 48, 68 (2011) (“[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. . . . It remains true that from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.” (internal citations omitted)); *Roper v. Simmons*, *supra* note 100, at 571 (“[I]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. The same conclusions follow from the lesser culpability of the juvenile offender.” (internal citations omitted)).

<sup>129</sup> Baird, *supra* note 86, at 635.

<sup>130</sup> See Brief of Amici Curiae Juvenile Law Center, Campaign for the Fair Sentencing of Youth, Campaign for Youth Justice, Center for Law, Brain and Behavior, Civitas Childlaw Center, National Juvenile Justice Network, Juvenile Justice Network, Phillips Black Project, Robert F. Kennedy Human Rights, W. Haywood Burns Institute, and Youth Law Center in Support of Petitioner Dassey. V. Dittman, No. 12-1172, 6-7 (2018) (“*In re Gault*, for example, this Court emphasized that certain pressures might cause a person, especially one of defective mentality or peculiar temperament to falsely confess because the untrue acknowledgement of guilt is at the time the more promising of two alternatives between which he is obliged to choose. . . . Conduct under duress involves a choice and conduct devoid of physical pressure but not leaving a free exercise of choice is the product of duress as much so as choice reflecting physical restraint.”).

<sup>131</sup> *J.D.B. v. North Carolina*, 564 U.S. 261, 273 (2011).

<sup>132</sup> See, e.g., *Roper v. Simmons*, *supra* note 9 (proscribing the death penalty in cases of juvenile offenders); *Graham v. Florida*, *supra* note 128 (proscribing life sentences for juvenile nonhomicide crime); *J.D.B. v. North Carolina*, *supra* note 131 (holding that a child suspect’s age informs the legality of police questioning).

<sup>133</sup> *Wade v. Mayo*, *supra* note 9.



Recognizing youth as a disadvantage that compromises a defendant's ability to adequately represent himself, the Court determined that the defendant was "an inexperienced youth incapable of adequately representing himself even in a trial which apparently involved no complicated legal questions."<sup>134</sup> Thus, the denial of appointed counsel denied him of due process of law under the Fourteenth Amendment.<sup>135</sup> This 1948 decision preceded the Court's decision in *Gideon*, suggesting that the Court has long recognized age to be a pivotal factor in the determination of procedural fairness.<sup>136</sup> However, the Court did not extend procedural due process protections to juvenile delinquency proceedings until almost two decades later.<sup>137</sup>

In the 1960s, the federal courts began to examine questions of the scope of the constitutional rights afforded to children in juvenile court proceedings.<sup>138</sup> In *Kent v. United States*, the Court declined to declare that the same protections afforded to adults in criminal proceedings would apply to children in juvenile delinquency proceedings.<sup>139</sup> It nonetheless conceded: "There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections afforded to adults nor the solicitous care and regenerative treatment postulated for children."<sup>140</sup> One year later, the Court extended this view

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<sup>134</sup> *Id.*, at 683.

<sup>135</sup> *Id.*, at 684. The Wade decision identified a due process violation under the Fourteenth Amendment, and not the Fifth Amendment, because the case examined the denial of appointed counsel at the state trial level. *Id.* at 675.

<sup>136</sup> Compare *Gideon v. Wainwright*, *supra* note 9 with *Wade v. Mayo*, *supra* note 9.

<sup>137</sup> See *Kent v. U.S.*, 383 U.S. 541 (1966).

<sup>138</sup> See, e.g., *Black v. United States*, 355 F.2d 104, 106 (1965) (holding that "[t]he need [for assistance of counsel] is even greater in the adjudication of waiver [of Juvenile Court jurisdiction] . . . since it contemplates the imposition of criminal sanctions"); *Watkins v. United States*, 343 F.2d 278 (1964) (holding that a child's attorney must be granted full access to information available to the juvenile court in the determination of jurisdictional waiver in order to provide effective assistance); *Kent*, *supra* note 137, at 555 ("While there can be no doubt of the original laudable purpose of the juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable to immunity of the process from the reach of constitutional guarantees applicable to adults.").

<sup>139</sup> *Kent*, *supra* note 137, at 561-62 ("The right of representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice. . . . We do not mean this to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.").

<sup>140</sup> *Id.*, at 556.

even further, doing away with the distinction between adult and juvenile proceedings where the loss of liberty is at stake.<sup>141</sup> In *In re Gault*, the Court reasoned that a juvenile needs the assistance of a counsel to navigate the complex processes of a legal proceeding, to ensure procedural fairness, and to mount an effective defense where the consequences could curtail the child's freedom.<sup>142</sup> As such, the Court conferred a right to government-funded counsel in juvenile delinquency proceedings as a requirement for due process.<sup>143</sup>

Since then, debates surrounding theories of justice in the quasi-criminal context of juvenile proceedings continue to raise questions around the fairness of procedures that do not afford children *all* of the protections available to adults in criminal proceedings.<sup>144</sup> As Benjamin Good has observed, the juvenile court system often finds itself balancing two competing conceptions of the State-child relationship: the view that a child is dependent on the State as *parens patriae* and that the State has the duty to protect the child's best interests, and the position that a child is the State's adversary where the child has violated some social responsibility.<sup>145</sup> Indeed, this paradox of the juvenile delinquency system has both propelled the expansion of legal protections to children while limiting the Court's treatment of children's entitlement to all legal protections.<sup>146</sup>

However, some scholars argue that, even where the Court has expanded procedural protections to children in juvenile court, procedural justice requires a standard specific to the needs of children

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<sup>141</sup> *In re Gault*, *supra* note 20, at 36.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 41.

<sup>144</sup> See, e.g., Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFFALO L. REV. 1447 (2009); David R. Katner, *Eliminating the Competency Presumption in Juvenile Delinquency Cases*, 24 CORNELL J. L. & PUB. POL'Y 403 (2015); Vance L. Cowden & Geoffrey R. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings—Cognitive Maturity and the Attorney-Client Privilege*, 33 U. OF LOUISVILLE J. OF FAM. L. 629 (1995).

<sup>145</sup> Benjamin Good, *A Child's Right to Counsel in Removal Proceedings*, 10 STAN. J.C.R. & C.L. 109, 122 (2014).

<sup>146</sup> *Id.*

instead of a mere extension of the adult standard.<sup>147</sup> The fundamental basis for the distinction between adults and children in criminal and juvenile proceedings has been that age and maturity are critical determinants of a child's capacity to stand trial.<sup>148</sup> "The ongoing process of adolescent development can amplify mental illness or intellectual disabilities that are already affecting a youth's competence. And the developmental immaturity alone can raise concerns about a youth's competence to stand trial."<sup>149</sup> Thus, the role of an attorney in advocating on behalf of a child goes beyond solely mounting an effective legal defense.<sup>150</sup> Attorneys often have to account for inconsistent client information resulting from impaired memory and comprehension<sup>151</sup> and emotional stress and trauma that impacts a child's ability to process information and make decisions,<sup>152</sup> and must then be able to communicate complex legal information to a less-than-competent juvenile client.<sup>153</sup>

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<sup>147</sup> Birkhead, *supra* note 144, at 1505; *see also* Tiffani N. Darden, *Constitutionally Different: A Child's Right to Substantive Due Process*, 50 LOY. U. CHI. L.J. 211, 250 (2018).

<sup>148</sup> Cowden et al., *supra* note 144, at 633 (" . . . [a] child under the age of seven had no criminal capacity or responsibility; at fourteen, a child had the same capacity as an adult; and between the ages of seven and fourteen, a rebuttable presumption of incapacity existed, with a duty on the government to prove capacity beyond a reasonable doubt. These references to age were to physical or chronological age, not mental age. The establishment of the juvenile justice system was in part a result of this perceived difference in criminal capacity based on age and in part a response to growing recognition of the special needs of children.").

<sup>149</sup> Katner, *supra* note 144, at 418.

<sup>150</sup> Cowden et al., *supra* note 144, at 642-43 (discussing the enhanced duties of attorneys where clients' physical and mental conditions present issues of competency); *id.* at 645 ("The fundamental decisions in the process, such as whether to accept diversion with conditions, the nature of the plea to be entered, whether to testify, and whether to appeal, . . . are decisions to be made by the child after full consultation with the lawyer . . . . In this regard there is really no. distinction between representing a juvenile and an adult.")

<sup>151</sup> Cowden et al., *supra* note 144, at 643 n.83 (noting the impact of post-traumatic stress on memory recall).

<sup>152</sup> 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, 532-33 (2012) ("[P]sychosocial factors influence adolescents' perceptions, judgments, and decision-making abilities, and limit their capacity to autonomous choice. . . . Youth may be less likely to perceive the long-term consequences of their decisions without guidance and feedback. These findings are consistent with neuroscientific research, showing that areas of the brain associated with impulse control, judgment, and the rational integration of cognitive, social, and emotional information do not fully mature until early adulthood.").

<sup>153</sup> Cowden et al., *supra* note 144, at 642-43 (discussing the enhanced duties of attorneys where clients' physical and mental conditions present issues of competency); *id.* at 645 ("The fundamental decisions in the process, such as whether to accept diversion with conditions, the nature of the plea to be entered, whether to testify, and whether to appeal, . . . are decisions to be made by the child after full consultation with the lawyer . . . . In this regard there is really no. distinction between representing a juvenile and an adult.").

Although the juvenile courts, which are technically civil forums, now recognize a right to counsel based on children’s inherent developmental limitations, this right has not been extended to another class of quasi-criminal, civil proceedings—immigration courts.<sup>154</sup> Neither adults nor children are afforded a judicially-recognized right to counsel in immigration court notwithstanding that the possibility of removal poses the risk of a deprivation of liberty in the event of an adverse immigration decision.<sup>155</sup> Furthermore, the Supreme Court’s recognition of a categorical distinction between children and adults has not translated into meaningful procedural changes or protections for children in the immigration context.<sup>156</sup> This inconsistency in the legal treatment of children both deprives children of due process and of their unique human rights, but the immigration courts are increasingly recognizing that mental incompetency drastically impacts a respondent’s access to relief,<sup>157</sup> which presents the immigration courts the opportunity to expand its interpretation of mental incompetency to include children’s limited developmental capacities.

### **C. *MATTER OF M-A-M-* AND MENTAL COMPETENCY IN IMMIGRATION COURT**

The respondent in *Matter of M-A-M-* was a Jamaican citizen who was lawfully admitted to the United States as a child but who was served a Notice to Appear<sup>158</sup> charging him with removability based on multiple convictions for crimes involving moral turpitude in 2008.<sup>159</sup> The respondent had been diagnosed with schizophrenia and indicated that he required medication, had not been treated

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<sup>154</sup> Lopez-Mendoza, *supra* note 11.

<sup>155</sup> Aguilera-Enriquez, *supra* note 19.

<sup>156</sup> The INA does proscribe the admission of removal by a child without the representation of counsel. 8 C.F.R. § 1240.10(c). However, this does not confer a right to counsel in a removal proceeding.

<sup>157</sup> See *Matter of M-A-M-*, 25 I. & N. Dec. 474 (BIA 2011).

<sup>158</sup> “In removal proceedings under section 1229a of this title, written notice (in this section referred to as a ‘notice to appear’) shall be given in person to the alien . . . specifying the following: (A) The nature of the proceedings against the alien. (B) The legal authority under which the proceedings are conducted. (C) The acts or conduct alleged to be in violation of the law. (D) The charges against the alien and the statutory provisions alleged to have been violated . . .” 8 U.S.C. § 1229(a)(1) (2019).

<sup>159</sup> A crime of moral turpitude is vaguely defined as a “depraved or immoral act, or a violation of the basic duties owed to fellow man, or recently as a ‘reprehensible act’ with a *mens rea* of at least recklessness.” IMMIGRANT LEGAL RESOURCE CENTER, § N.7 CRIMES INVOLVING MORAL TURPITUDE (2013).

while detained, and wished to see a psychiatrist.<sup>160</sup> The court denied his requests for accommodations for his mental illness, including a change of venue to be located closer to his attorney and family.<sup>161</sup> Although initially indicating that he was unable to represent himself, the respondent eventually said that he “believed” that he could answer the questions put to him by the judge and the DHS attorney, and the Immigration Judge proceeded with the merits hearing where respondent appeared *pro se*.<sup>162</sup> At the commencement of the Board of Immigration Appeals (“BIA”) appeal, there was no indication that the respondent had ever seen a psychiatrist, and, through counsel, the respondent’s argument rested on the Immigration Judge’s failure to properly assess his mental competency.<sup>163</sup>

On review, the BIA examined three principles issues: “(1) When should Immigration Judges make competency determinations? (2) What factors should Immigration Judges consider and what procedures should they employ to make those determinations? (3) What safeguards should Immigration Judges prescribe to ensure that proceedings are sufficiently fair when competency is not established?”<sup>164</sup> The BIA submitted that, although immigration proceedings are civil in nature, the well-developed criminal law treatment of mental competency would be instructive to the questions of competency in immigration law.<sup>165</sup> As such, the BIA adopted the Supreme Court’s definition of mental incompetency almost verbatim,<sup>166</sup> stating that “the test for determining

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<sup>160</sup> Matter of M-A-M-, *supra* note 157, at 475.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 476.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 478. This point, alone, arguably undermines the distinctions between criminal and civil proceedings in the context of immigration hearings. This paper argues that a right to counsel in immigration proceedings based on mental competency should, too, follow the criminal and juvenile law’s recognition that mentally incompetent individuals are unable to understand that nature and object of the proceedings, to consult with counsel, and to assist in their own defense. This definition of incompetency, adopted by the Supreme Court in *Drope*, *supra* note 126, categorically applies to all children, as children are developmentally unable to comprehend the scope of the proceedings and to make long-term decisions while rationally understanding the implications. *See Pokempner, et al, supra* note 153.

<sup>166</sup> *See Drope, supra* note 126.

whether an alien is competent to participate in immigration proceedings is whether he or she 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>167</sup>

As a threshold matter, the BIA affirmed that all respondents have a presumption of competency that can only be rebutted “if an Immigration Judge finds, by a preponderance of the evidence, that the respondent is unable because of a mental disorder to perform any of the functions listed in the definition of competence to represent oneself.”<sup>168</sup> Competence is not an observable incapacity in and of itself but, rather, is indicated by behavioral signs that a person may lack the ability to perform a function demanded in a particular situation.<sup>169</sup> Indicia of incompetency could include observations of certain behaviors, such as the inability to stay on topic or a high level of distraction, or other evidence of mental illness or incompetence, such as medical reports, past judicial, medical, or school assessments, or affidavits from friends and family.<sup>170</sup>

Prior to *M-A-M-*, the INA prescribed safeguards for mentally incompetent individuals where it would be impracticable for the person to be present at the proceeding.<sup>171</sup> The INA required additional safeguards for unaccompanied and incompetent individuals and prevented immigration judges from accepting admissions of removability.<sup>172</sup> However, the INA did not provide a framework for assessing the competency of the individual and, as such, left determinations of mental competency up to the discretion of individual judges.<sup>173</sup> The BIA decision in *Matter of M-*

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<sup>167</sup> Compare *Matter of M-A-M-*, *supra* note 157, at 479 with *Drope*, *supra* note 126.

<sup>168</sup> EXECUTIVE OFFICE OF IMMIGRATION REVIEW, PHASE I OF PLAN TO PROVIDE ENHANCED PROCEDURAL PROTECTIONS TO UNREPRESENTED DETAINED RESPONDENTS WITH MENTAL DISORDERS (2013).

<sup>169</sup> *Id.*

<sup>170</sup> *Matter of M-A-M-*, *supra* note 157, at 479-80.

<sup>171</sup> See 8 U.S.C. § 1229a(b)(3) (2006).

<sup>172</sup> 8 C.F.R. § 1240.10(c).

<sup>173</sup> *Matter of M-A-M-*, *supra* note 157, at 478.

*A-M-*, in this regard, provided the immigration courts with the first such framework that limited the practicable identification of incompetent respondents.<sup>174</sup>

Despite expanding the protections for mentally incompetent individuals, *Matter of M-A-M-* limited an immigration judge's duties in cases of possible incompetency to the simple requirement of an assessment of competency and the implementation of safeguards.<sup>175</sup> A competency assessment could constitute a psychiatric evaluation or simply a series of simple questions to the respondent, and remains within the discretion of the individual immigration judge.<sup>176</sup> Similarly, the BIA did not prescribe minimum requirements for the safeguards to be implemented to protect the interests of an incompetent respondent.<sup>177</sup> So, while *Matter of M-A-M-* provides only limited protections for individuals who are unable to participate in their claims for relief, the BIA decision puts forth a vague definition of competency that could potentially be expansive enough to include children, whose cognitive development renders them unable to fulfill all of the functions required of an immigration proceeding.<sup>178</sup>

## V. A SCIENCE-BASED ARGUMENT FOR A RIGHT TO COUNSEL

Research has repeatedly confirmed that many juveniles and most children under the age of fourteen are not competent to understand legal proceedings and participate in the defense of their

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<sup>174</sup> *Matter of M-A-M-* left the task of identifying signs of incompetency to immigration judges, legal experts who are likely insufficiently qualified to make comprehensive and accurate psychological determinations about individuals with whom they have limited interactions. For example, the BIA stated that a diagnosis of mental illness would not automatically result in a finding of incompetency. *Id.* at 480. An immigration judge who has no medical training and who took no part in the respondent's diagnosis would be ill-equipped to understand the nuanced nature of mental illness and its effects on the respondent's decision-making and reasoning capacities.

<sup>175</sup> *Matter of M-A-M-*, *supra* note 157, at 480-81.

<sup>176</sup> *Id.*

<sup>177</sup> Interestingly, *Matter of M-A-M-* makes specific reference to the use of an attorney as a qualifying safeguard, where an attorney was able to introduce evidence, cross-examine witnesses, and secure testimony from a doctor about the respondent's medical condition. *See Matter of M-A-M-*, *supra* note 157, at 482 (referencing *Matter of H-*, 6 I. & N. Dec. 358 (BIA 1954)).

<sup>178</sup> This paper argues that children's developmental and psychosocial limitations fall within the scope of this definition of incompetency, as children are unable to fully understand the scope of the immigration law, the proceedings, or the long-term implications.

claims for relief.<sup>179</sup> Given the quasi-adversarial nature of immigration proceedings and the BIA's reliance on criminal and juvenile delinquency law in treating the issue of competency, immigration law's reluctance to extend special procedural safeguards to children runs counter to accepted legal authority on the issue. Moreover, immigration law largely ignores accepted scientific evidence that juveniles as a *whole* lack the biological development necessary to understand and access their rights without the guaranteed assistance of a qualified adult, here legal counsel. Children's capacity to appear coherent at an immigration proceeding does not equate to competency to understand the proceeding or its implications, and reliance on an immigration judge to make that distinction puts the task of evaluating a child's psychosocial performance in the hands of an individual whose expertise lies in the law.

Children's competency can be influenced by any number of factors, such as cognitive and intellectual abilities, mental health disorders, their development, and their behavior.<sup>180</sup> The bases for indicating incompetency can be influenced by physical disabilities; educational and cultural backgrounds; language, vocabulary, and comprehension, trauma and migration-related factors, and custodial placement and post-release accommodations.<sup>181</sup> Needless to say, the assessment of mental competency and capacities of a migrant child, who more often than not cannot even communicate with an immigration judge in the same language,<sup>182</sup> are critically impaired within the framework provided by the BIA in *Matter of M-A-M-*. A migrant child's access to relief should not be vested in an immigration judge's limited ability to assess the complex and nuanced nature of a child's mental state, particularly where significant numbers of those children are

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<sup>179</sup> Brief of Amicus Curiae on behalf of Appellant, *Gingerich v. Indiana*, No. 43A05-1101 (2011).

<sup>180</sup> VERA INSTITUTE OF JUSTICE'S UNACCOMPANIED CHILDREN PROGRAM, PRACTICE ADVISORY, "CHILDREN IN IMMIGRATION PROCEEDINGS: CONCEPTS OF CAPACITY AND MENTAL COMPETENCE" (2014).

<sup>181</sup> *Id.*

<sup>182</sup> See Margaret Graham Tebo, *Children Without a Country: Thousands of Kids Arrive Each Year Without an Adult and Without Knowing English, Lacking a Lawyer. They Face a Daunting Legal System*, 90 A.B.A.J 40, 47 (2004).



unaccompanied, have suffered some form of trauma, have low-educational levels, and may have other underlying mental health issues.<sup>183</sup> Rather, the scientific knowledge available about children’s limited capacities should compel the provision of legal safeguards that guarantee children procedural due process vis-à-vis a right to counsel.<sup>184</sup>

The brains of juveniles are biologically distinct from those of adults.<sup>185</sup> Adolescence marks the most dynamic period of brain development for juveniles.<sup>186</sup> Throughout adolescence, the brain undergoes the process of strengthening connections among its different regions, despite the brain’s physical development being almost complete.<sup>187</sup> Scientists have used a variety of magnetic resonance imaging (“MRI”) technologies, such as the structural MRI, diffusion tensor imaging (DTI), and functional MRI to verify theories about the developmental stage of adolescence and structural and neural changes in the brain, as well as to analyze the real-time responses of subjects to stimuli.<sup>188</sup> Specifically, examinations of the prefrontal cortex (“PFC”) reveal that it takes longer for the PFC to develop than other areas of the brain and that “the subcortical basal ganglia are implicated in numerous functions,” such as behavior selection and cognitive coordination.<sup>189</sup>

Scientists have demonstrated that the relatively late development of the PFC is linked to the maturation of its connections with impulse-generating and emotion-gathering parts of the brain,<sup>190</sup> and juveniles in the adolescent stage of development do not have the same physiological

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<sup>183</sup> *Id.*

<sup>184</sup> VERA INSTITUTE OF JUSTICE’S UNACCOMPANIED CHILDREN PROGRAM, *supra* note 180.

<sup>185</sup> Michael N. Tennison & Amanda C. Pustilnik, “*And if Your Friends Jumped Off a Bridge, Would You Do It Too?*”: *How Developmental Neuroscience Can Inform Legal Regimes Governing Adolescents*, 12 *IND. HEALTH L. REV.* 533, 558-59 (2015).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 558.

<sup>188</sup> *Id.* at 560.

<sup>189</sup> *Id.* (“Related executive functions include planning, sequencing, organization, inhibition, problem solving, and behavior control . . .”).

<sup>190</sup> *Id.* at 561.

brain functions as an adult.<sup>191</sup> Indeed, studies indicate that “adult brains specialize particular prefrontal regions for certain tasks, whereas children’s prefrontal areas function more diffusely, suggesting that neurological development involves both changes within brain regions and among their connections.”<sup>192</sup> Furthermore, delayed development of the frontal regions of the brain cause adolescents to rely heavily on the parts of the brain housing emotional, instead of rational, controls when assessing circumstances and making decisions.<sup>193</sup>

As Laurence Steinberg’s analysis of the juvenile brain succinctly put it, “[a]dolescent immaturity may affect their behavior as defendants in ways that extend beyond competence.”<sup>194</sup> Juveniles’ minds are unstable, at best, unpredictable, at worst, and unreliable in even understanding their own best interests in contexts beyond the scope of their comprehension.

The adolescent’s cognitive, psychological, social, and moral development is not simply a matter of life experience: It has a significant biological basis. New medical imaging techniques, such as PET scans and functional MRI, are starting to reveal aspects of brain development that take place during adolescence. One is the maturation of the frontal lobe that oversees high-level cognitive tasks such as hypothetical thinking, logical reasoning, long-range planning, and complex decision making. We now know that during adolescence, the frontal lobe is a hub of activity: Neurons are wrapping themselves in myelin sheaths that speed the transmission of electrical impulses, while the “pruning” of unneeded synaptic connections is increasing the efficiency of mental processing. Elsewhere in the brain, the limbic system—the center of emotional processing—is increasing its connections, paving the way for a better integration of emotional and cognitive processes.<sup>195</sup>

In addition, external elements that affect children’s capacities, cognition, and overall development are extremely influential in determining their responses in high-stress situations

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<sup>191</sup> See NAT’L SCI. COUNCIL ON THE DEVELOPING CHILD, YOUNG CHILDREN DEVELOP IN AN ENVIRONMENT OF RELATIONSHIPS, CTR. ON THE DEVELOPING CHILD AT HARV. UNIV. 1-8. (2004), <https://developingchild.harvard.edu/resources/wp1/>.

<sup>192</sup> *Id.*

<sup>193</sup> COALITION FOR JUVENILE JUSTICE, EMERGING CONCEPTS BRIEF, WHAT ARE THE IMPLICATIONS OF ADOLESCENT BRAIN DEVELOPMENT FOR JUVENILE JUSTICE? (2006), [http://www.juvjustice.org/sites/default/files/resource-files/resource\\_134.pdf](http://www.juvjustice.org/sites/default/files/resource-files/resource_134.pdf).

<sup>194</sup> Laurence Steinberg, *Juveniles on Trial*, 18 CRIM. JUST. 20, 23 (2003).

<sup>195</sup> *Id.* at 22.

requiring consequential decision-making concerning unfamiliar subject-matter.<sup>196</sup> Developmental traumatology has been instructive here, demonstrating the physiological effects of stress on a child brain development.<sup>197</sup> In spite of this knowledge, DHS, ORR, and immigration enforcement agencies have not adequately addressed or accommodated the unique needs of the children in their care.<sup>198</sup> The Department of Health and Human Services (“DHHS”) reported in September 2019 that the mental health care needs of children in ORR custody exceeded the current capacity of children’s care providers.<sup>199</sup> The DHHS reported in September 2019 that the mental health care needs of children in ORR custody exceeded the current capacity of children’s care providers.<sup>200</sup>

And yet, these children are held to the same legal standards as adults, presumed competent to represent their best legal interests and to defend their rights to relief, under the guise of fundamental fairness and due process. The combined developmental, psychosocial, intellectual, and traumatic/emotional experiences of children uniquely entitle them to special protections that are *necessary* to guarantee them due process. The presumption of competency that extends to children in immigration proceedings ignores the very biology underlying the baseline differences

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<sup>196</sup> *See Id.*

<sup>197</sup>Michael Bellis & Abigail Zisk, *The Biological Effects of Trauma*, 23 CHILD AND ADOLESCENT PSYCHIATRIC CLINICS OF NORTH AMERICA 185 (2014) (“This study observed known differences “in pediatric victims’ stress biology compared to those children who have not experienced trauma. These differences are likely the causes of the greater rates of psychopathology (PTSD, depression, disruptive behaviors, suicidality, substance use disorders) and of the common medical disorders (cardiovascular disease, obesity, chronic pain syndromes, gastrointestinal disorders, immune dysregulation) seen in child victims. . . . Exposure to a traumatic event or series of chronic traumatic events (e.g., child maltreatment) activates the body’s biological stress response systems. Stress activation has behavioral and emotional effects that are similar to individual PTSS symptoms. Further, an individual’s biological stress response system is made up of different, interacting systems, that work together to direct the body’s attention toward protecting the individual against environmental life threats and to shift metabolic resources away from homeostasis and toward a “fight or flight” (and/or freezing) reaction. The stressors associated with the traumatic event are processed by the body’s sensory systems through the brain’s thalamus, which then activates the amygdala, a central component of the brain’s fear detection and anxiety circuits. Cortisol levels become elevated through transmission of fear signals to neurons in the prefrontal cortex, hypothalamus, and hippocampus, and activity increases in the locus coeruleus and sympathetic nervous system. Subsequent changes in catecholamine levels contribute to changes in heart rate, metabolic rate, blood pressure, and alertness. This process also leads to the activation of other biological stress systems.”).

<sup>198</sup> *Id.*

<sup>199</sup> CHIEDI, *supra* note 109.

<sup>200</sup> *Id.*

between children and adults—age, and the developmental differences resulting from age. This presumption of competency assumes that children and adults are equally positioned to fully understand their circumstances and claims of relief and articulate their best defenses. This simply is biologically impossible. As such, even if an immigration judge assesses a child’s indicia of competency to be normal behavior when measured against the average child, those indicia still demonstrate a limited capacity to rationally and factually understand and participate in their proceedings when compared to an adult.<sup>201</sup> The contradictory rationales that the immigration courts have continued to use to justify denying children a right to government-funded counsel simultaneously denies the science applicable to child development and competency.

## **VI. RECOMMENDATIONS**

As the Supreme Court has noted, “[t]he unique role in our society of the family, the institution by which we inculcate and pass down many of our most cherished values, moral and cultural, requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children.”<sup>202</sup> The lack of accommodations in immigration procedures for children’s unique vulnerabilities deviates from the Court’s body of holdings recognizing that children are developmentally different and have unique constitutional needs compared to adults.<sup>203</sup> The only way to adequately conform to the principles established by the Court is to change the procedures and limited protections currently in place for children.

The INA and the BIA’s holdings have established a framework of rules and procedures that are wholly inadequate to guaranteeing children fundamentally fair proceedings and procedural due

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<sup>201</sup> VERA INSTITUTE OF JUSTICE’S UNACCOMPANIED CHILDREN PROGRAM, *supra* note 180 (“A child may be capable of performing a task in an ideal situation, but some contexts, such as a legal setting, may place so much pressure on a child or present so many cultural barriers that it impacts his or her capacity to perform the task . . .”).

<sup>202</sup> Baird, *supra* note 86, at 633 (internal citations omitted).

<sup>203</sup> *See, e.g.* Wade v. Mayo, *supra* note 9; Roper v. Simmons, *supra* note 9; In re Gault, *supra* note 20.

process of law. The following recommendations seek to address a few of the most egregiously unjust attributes of immigration's legal framework. First and foremost, because children are categorically unable to represent themselves in a legal proceeding, Congress should amend the INA to provide a right to government-funded counsel for all children under the age of eighteen, the age of legal maturity. Despite the BIA's insistence on a presumption of competency for all immigration respondents, children are insufficiently cognitively developed to understand, participate in, and represent their interests in a proceeding with ramifications as serious as those in immigration. As such, the BIA should remove any presumption of competency for children, train judges to appropriately handle cases with children, and immediately implement a process to assess the need for procedural and psychological safeguards. These could include the appointment of a guardian ad litem for younger children, in addition to their counsel, a change of venue to a less adversarial setting, or assignment of cases to a judge with special training in children's cases. While the more specific needs of children will vary according to their age, their levels of trauma, or the cultures and language, for example, the only way of guaranteeing that these needs are accommodated, and their rights are accessed is through the unconditional appointment of counsel.

Immigration law's treatment of children disregards the special protections guaranteed to children in other areas of the country's legal system. In addition to the political, racial, and cultural implications of continuing to deny immigrant children fair access and representation before the law, this paper provides a constitutional argument for a child's right to counsel in immigration proceedings, using the Supreme Court's own precedents and legal treatment of children to highlight the brazen inconsistencies in the treatment of immigrant children. A right to counsel will provide immigrant children with the procedural due process of law guaranteed to them by Constitution and withheld from them by immigration law.