Divided States of America: Why the Right to Counsel is Imperative for Migrant Children in Removal Proceedings

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COMMENTS

DIVIDED STATES OF AMERICA:
WHY THE RIGHT TO COUNSEL IS IMPERATIVE
FOR MIGRANT CHILDREN IN REMOVAL PROCEEDINGS

CATRINA L. GUERRERO*

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* St. Mary’s University School of Law, J.D., expected May 2020; Texas A&M University–Kingsville, B.A., Political Science, Minor, English, December 2016. I would like to dedicate this piece to my mom for constantly pushing me to work hard and for instilling in me that my education is the one thing that cannot be taken away from me. To my husband for his continuous love, support, and encouragement from day one. To my family and friends for their support. To The Scholar Staff Writers and Editors, especially Pearl D. Cruz and Nadeen Abou-Hossa, for all their hard work editing this piece.
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INTRODUCTION

We are all well aware America was built by immigrants. While the history is not a pleasant one, it is nevertheless the reason many of us enjoy the freedoms and opportunities we have today. The United States has a vast amount of power and the potential to implement significant changes to the immigration system and ensure the protection of the rights of adults and children.

From 2017 to 2019, various immigration policies were introduced. Politics aside, most agree President Trump’s “zero tolerance” policy—which resulted in family separations—was not only a disaster but hard to watch. Day after day, for hours at a time, the news showed reporters,

1. See Ensuring Fairness and Due Process in Immigration Proceedings, A.B.A. 1, https://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/immigration/2008dec_immigration.authcheckdam.pdf [https://perma.cc/ZGS5-8TEZ] (detailing the tension between our history as a nation of immigrants with the need to protect our borders).

2. See generally OSCAR HANDELIN, THE UPROOTED (2d ed. 1973) (describing the trials and tribulations experienced by the early immigrants to America).


politicians, and activists attempting to enter the shelters which held hundreds of children. In addition to the lack of transparency, there was no timeline in place to reunite the families, and those in charge lacked any comprehensive plan to move forward. Eventually, the family separations ceased, but children still experienced the trauma of separation, and frazzled judges still had courtrooms filled with crying children as they awaited their hearings for a chance to stay in the United States.

While explaining the “zero tolerance” policy for immigration, Former Attorney General, Jeff Sessions, cited Romans 13 to defend the

d2 [https://perma.cc/2DPE-D4W3] (showing the moment MSNBC host, Rachel Maddow, broke down while on air explaining the “tender age” shelters in South Texas which houses babies).


The policy called for criminal prosecution of all illegal border crossings. As a result, parents traveling with their children were arrested and, because children cannot be jailed with their parents, the children must be detained in a separate facility.

While the “zero tolerance” policy was new, what is not new is that those who are put into removal proceedings often appear in front of a judge without counsel. Both children and adults, who do not have a working knowledge of our legal system and most likely do not speak English, are forced to represent themselves in removal proceedings.

The Sixth Amendment affords the right to counsel when criminally

11. See Colleen Long, Watch: Sessions Cites Bible to Defend Separating Immigrant Families, PBS (June 14, 2018, 5:30 PM), https://www.pbs.org/newshour/politics/watch-live-attorney-general-jeff-sessions-talks-about-immigration [https://perma.cc/QS2T-XHUN] (“I would cite you to the Apostle Paul and his clear and wise command in Romans 13, to obey the laws of the government because God has ordained them for the purpose of order, orderly and lawful processes are good in themselves and protect the weak and lawful.”); see also Romans 13:1–3 (indicating that Christians are to follow the government).

12. Immigration Nationality Act of 2018 § 275(a), 8 U.S.C. § 1325(a) (2012); see Aric Jenkins, Jeff Sessions: Parents and Children Illegally Crossing the Border Will Be Separated, TIME (May 7, 2018), http://time.com/5268572/jeff-sessions-illegal-border-separated/ [https://perma.cc/8YVI-NGEB] (“The new policy is being implemented with the goal of a 100% prosecution rate for all that enter the [United States] illegally, officials said. Charged adults will be sent directly to federal court. Children in turn will be sent to the Department of Health and Human Services’ Office of Refugee Resettlement, which works with shelters or relatives in the [United States]”).

13. See Jenkins, supra note 12 (explaining the consequences of criminal prosecutions for illegal border crossings).

14. See Exec. Order No. 13841, 84 Fed. Reg. 122 (2018) (contradicting President Trump’s claims that ending the family separation policy could not be done with an executive order). But see Shear et al., supra note 7 (“The president signed the executive order days after he said that the only way to end the division of families was through congressional action because ‘you can’t do it through an executive order.’ But he changed his mind after a barrage of criticism from Democrats, activists, members of his own party and even his wife and eldest daughter, who privately told him the policy was wrong.”).


17. See generally id. at 1–2 (detailing how immigrants are at a disadvantage in our justice system).
However, the Sixth Amendment has yet to be interpreted to extend that right to those in removal proceedings. Justice Alito characterized removal and immigration law as so legally and factually complicated that it is unrealistic for a criminal defense attorney to advise them; thus, it is impractical to believe that a pro se detainee can successfully litigate their case.

This comment proposes protections afforded under the Sixth Amendment; namely, the right to counsel must extend to immigration removal proceedings. Additionally, this comment will show how providing counsel to detainees in removal proceedings will improve our immigration system’s efficiency. This comment advances that representation is the most critical factor affecting the outcome of immigration proceedings, and no one should face this process without a lawyer.

Given that we currently live in a society where unpredictable

18. U.S. CONST. amend. VI.
19. See AM. IMMIGRATION COUNCIL, supra note 16 at 1–2 (describing the differences between citizens and immigrants in the context of an individual’s Sixth Amendment right to counsel).
21. See U.S. CONST. amend. VI. (providing for a right to counsel).
23. See Jacqueline Bhabha & Wendy Young, Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines, 11 INT’L REFUGEE L. 84, 118 (1999) (“The role of counsel is particularly crucial for a child claiming asylum.”); see also Devon A. Connel, On the Way to Grandmother’s House: Is U.S. Immigration Policy More Dangerous Than the Big Bad Wolf for Unaccompanied Juvenile Aliens, 109 PENN ST. L. REV. 609, 649 (2004) (discussing the need for children to have counsel to uphold their constitutional rights); see generally Sharon Finkel, Voice of Justice: Promoting Fairness Through Appointed Counsel for Immigrant Children, 17 N.Y.L. SCH. J. HUM. RTS. 1105, 1114 (2001) (explaining the issues children face in removal proceedings without lawyers); Laila L. Hlass, Minor Protections: Best Practices for Representing Child Migrants, 47 N.M. L. REV. 247, 247–48 (2017) (“[M]any of these children are eligible for protection from deportation, but without access to attorneys, most will be deported anyway.”); Shani M. King, Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors, 50 HARV. J. ON LEGIS. 331, 338 (2013) (“[R]epresentation is often considered the most important factor affecting the outcome of immigration proceedings”); ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 107 (Bernard K. Johnpoll ed., 1985) (arguing that even if aliens were granted a fair hearing for their deportation they would still be at a serious disadvantage because they do not have the right to a lawyer); ARNOLD & PORTER, supra note 22 (providing an argument for proposals regarding representation for noncitizens in removal proceedings); In re Gault, 387 U.S. 1, 36–37 (1967)
and unprecedented measures are aimlessly implemented to combat not only illegal but also legal immigration, the right to counsel is crucial in our contemporary political society.\(^\text{24}\)

I. HISTORY

Approximately 11.1 to 11.4 million undocumented individuals live in the United States.\(^\text{25}\) The United States Constitution provides for the right to counsel through the Fifth,\(^\text{26}\) Sixth,\(^\text{27}\) and Fourteenth Amendments.\(^\text{28}\) However, the right to state funded appointed counsel is not recognized in immigration proceedings.\(^\text{29}\) The Fifth Amendment affords due process in connection to counsel.\(^\text{30}\) Aliens are entitled to effective counsel during civil immigration proceedings—when their right to a fair hearing is infringed.\(^\text{31}\) On its face, it seems the right to a fair hearing would involve

\[\text{"[T]he assistance of counsel is . . . essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution";}\]

\text{BARRY} \text{C. FELD, JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURTS, 13–14 (Northeastern U. Press, 1993) (giving an overview on the importance of counsel for juveniles).}

\(^{24}\) See Peter L. Markowitz & Lindsay C. Nash, \text{ACCESSING JUSTICE: THE AVAILABLE AND ADEQUACY OF COUNSEL IN REMOVAL PROCEEDINGS, 33 CARDOZO L. REV.} \text{357, 363–64 (2011)} (explaining that over seventy percent of persons that were not detained and represented in removal proceedings were successful in their cases and only eighteen percent that were detained and represented had successful outcomes); \text{see also All Things Considered, NPR (Aug. 10, 2018), https://www.npr.org/2018/08/10/637614632/more-than-360-immigrant-children-still-separated-from-their-parents [https://perma.cc/SZ8D-3WTL] (showing more than three hundred sixty children still remained separated as of early August 2018); see generally Trump’s Full Speech from Oval Office Address on Shutdown and Border Wall, YouTube (Jan. 9, 2019), https://www.youtube.com/watch?v=KWcmZ8hozU [https://perma.cc/T83T-P45P] (showing President Trump used federal workers and their families as pawns in an effort to fire up his base over a border wall along the United States-Mexico border).\(^\text{25}\)


\(^{26}\) U.S. CONST. amend. V.

\(^{27}\) U.S. CONST. amend. VI.

\(^{28}\) U.S. CONST. amend. XIV.

\(^{29}\) Immigration Nationality Act of 2018 § 292, 8 U.S.C. § 1362 (2018); \text{see generally United States v. Tejada, 255 F.3d 1 (1st Cir. 2001)} (discussing the right to state-funded counsel in an immigration proceeding).

\(^{30}\) U.S. CONST. amend. V; \text{see Magallanes-Damian v. INS, 783 F.2d 931, 933 (9th Cir. 1986)} (finding that the lawyer’s conduct did not constitute ineffective assistance of counsel, but merely a tactical decision).

\(^{31}\) Magallanes-Damian, 783 F.2d at 933.
having representation, but the Ninth Circuit ruled deficiencies regarding ineffective counsel should pertain to the actual substance of the hearing.\textsuperscript{32} Counsel may be appointed in removal proceedings on a case-by-case basis when the assistance of counsel would be necessary to provide fundamental fairness.\textsuperscript{33} Notably, no published case has granted counsel.\textsuperscript{34}

Ineffective counsel is essentially no counsel; the consequence can be the same if not worse for a child appearing pro se in a removal proceeding.\textsuperscript{35} While it is clear the absence of counsel raises severe constitutional concerns; courts fail to recognize that children are entitled to the opportunity to combat their immigration proceedings with counsel.\textsuperscript{36}

A. What Have Past Administrations Done With Immigration?

Immigration is a tough issue which continues to vex this country.\textsuperscript{37} As a result, many policies are implemented and subsequently fail.\textsuperscript{38} On the surface, other policies provide relief but fail to address the real issues and fall short of bringing about change.\textsuperscript{39} From amnesty,\textsuperscript{40} to sending

\begin{itemize}
\item \textsuperscript{32} See Lara-Torres v. Ashcroft, 383 F.3d 968, 973 (9th Cir. 2004) ("None of Pineda’s purported deficiencies pertain to the actual substance of the hearing (e.g., evidence presented, or omitted arguments raised or overlooked), let alone called the hearing’s fairness into question.").
\item \textsuperscript{33} Aguilera-Enriquez v. INS, 516 F.2d 565, 568 (6th Cir. 1975).
\item \textsuperscript{34} ARNOLD & PORTER, supra note 22 at 23.
\item \textsuperscript{35} See generally Iturribarria v. INS, 321 F.3d 889, 896 (9th Cir. 2003) (discussing the ramifications of ineffective counsel).
\item \textsuperscript{36} See C.J.L.G. v. Sessions, 880 F.3d 1122, 1143 (9th Cir. 2017) rev’d en banc, 923 F.3d 622 (9th Cir. 2019) (holding that regardless of the strength of the minor alien’s interest in not being deported, he did not show a necessity for government-funded, court-appointed counsel to safeguard his due process right to a full and fair hearing).
\item \textsuperscript{37} JOHN S.W. PARK, IMMIGRATION LAW AND SOCIETY 125 (Polity Press, 2018).
\item \textsuperscript{38} See Mathias Czaika & Hein de Haas, The Effectiveness of Immigration Policies, 39 POPULATION & DEV. REV. 487 (2013) (discussing why immigration policies have not been successful).
\item \textsuperscript{40} See Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-28 (Sept. 30, 1996) (granting amnesty to millions of undocumented immigrants living in the United States at the time while militarizing enforcement at the border and muddling other paths to citizenship).
\end{itemize}
the United States military to the Texas-Mexico border, to shutting down the federal government over funding for a border wall, immigration reform is always on the political agenda.


In 1990, President George H.W. Bush signed into law the Immigration Act of 1990. The passage of this Act resulted in an increase of reported entries into the United States to fifteen percent—a nine percent increase since 1990. Additionally, the Act increased immigration enforcement in the field and in the court. The Immigration Act of 1990 drastically increased the overall number of immigrants allowed into the United States. The Act provided family-based immigration visas, created employment-based visas, and formed a diversity visa program. Furthermore, Congress created the temporary protected status (TPS) visa, which allowed the Attorney General to provide temporary visas to those unable to safely return to their home country. This Act also abolished the English testing process for naturalization.


42. See YOUTUBE, supra note 24 (including President Trump’s speech to the American people, where he declares the government shutdown over funding for a border wall).

43. See PARK, supra note 37 at 126 (discussing a brief history of federal, state, and local immigration laws).


The Clinton Administration took steps in the opposite direction. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 took a hard stance on deportation and muddled many paths to citizenship. These policies resulted in increased deportation of legal immigrants. Unauthorized immigrants living in the United States for many years were met with increased obstacles to obtain a cancellation of removal order. Overall, the 1996 Act heavily regulated not only illegal immigration but, more significantly, legal immigration.


President George W. Bush passed the Enhanced Border Security and Visa Entry Reform Act of 2002 shortly after the tragic September 11th. Notably, this Act prohibited the admission of an alien from a country “designated to be a state sponsor of international terrorism (as defined by this Act) unless the Secretary has determined that such individual does not pose a risk or security threat to the United States.” Additionally, President Bush enacted the Homeland Security Act (HSA) in response to the September 11th incidents. HSA created the United States
Department of Homeland Security (DHS).\textsuperscript{59} In March 2003, United States Immigration and Customs Enforcement, or ICE, was created under DHS.\textsuperscript{60} Immigration enforcement after September 11th was at an all-time high, and removals—both deportations and voluntary departures—doubled by 2011.\textsuperscript{61}


In 2012, President Barack Obama, through executive order, introduced Deferred Action for Childhood Arrivals (DACA).\textsuperscript{62} DACA allowed certain individuals, who came to the United States as children, to remain in the United States, go to school, and work.\textsuperscript{63} There are several requirements to be eligible for DACA.\textsuperscript{64} To be eligible for DACA, a person must be born on or after June 16, 1981 and come to the United States before his or her sixteenth birthday.\textsuperscript{65} That person must also have a high school diploma or GED, been honorably discharged from the armed forces, or currently enrolled in school.\textsuperscript{66} Moreover, an individual applying for DACA must not have a criminal record or pose a threat to national security.\textsuperscript{67} President Obama also issued an executive order, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), granting deferred action status to undocumented immigrants with children who are either American citizens or lawful residents.

\textsuperscript{59} Id.


\textsuperscript{63} See Prosecutorial Discretion Towards Children Memo, supra note 39 (detailing deferment criteria for certain individuals who came to the United States as children).

\textsuperscript{64} See id. (providing the specific DACA eligibility requirements).

\textsuperscript{65} Id.

\textsuperscript{66} Id.

\textsuperscript{67} Id.
permanent residents. However, neither DACA nor DAPA offer a path to citizenship.

The Obama Administration also faced a massive influx of unaccompanied minors fleeing gang violence in Central America. In 2012, Customs and Border Patrol officers apprehended almost 30,000 minors. Approximately 25,000 of those minors were unaccompanied. President Obama proposed “common sense” immigration reform. This reform included calling for stronger border security, more immigration judges, uncovering employers who hire illegal immigrants, and assisting the more than eleven million undocumented immigrants already in the United States to come out of the shadows.

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71. U.S. CUSTOMS AND BORDER PATROL, supra note 70; Kendel, supra note 70.

72. Id.


74. Id.
Despite President Obama’s efforts to bring these individuals out of the shadows, he deported more people than any president in the 20th century.\footnote{75} Between 2009 and 2015, President Obama deported more than 2.5 million people.\footnote{76} Notwithstanding these daunting numbers, President Obama directed United States Immigration and Customs Enforcement (ICE) to concentrate their deportations on criminals, \textit{not families}.ootnote{77} In 2015, ninety-one percent of all interior removals\footnote{78} were previously convicted of a crime.\footnote{79}

5. \textit{Donald J. Trump (2017–Present)}

President Trump has taken a vastly different approach to immigration—which began the day he announced his presidency.\footnote{80} From day one, then-Candidate Trump expressed propositions of a massive wall along the United States-Mexico border.\footnote{81} In a letter to Congress, President Trump expressed dismay with the “loopholes” preventing removal of unaccompanied minors, stating, “rather than being

\footnote{75}{See U.S. Dep’t of Homeland Sec., Yearbook of Immigration Statistics, https://www.dhs.gov/immigration-statistics/yearbook# [https://perma.cc/S5AK-34AM] (providing annual statistical information on immigrant enforcement actions such as apprehensions, removals, and returns); \textit{see also} Park, supra note 37 at 138 (“[F]rom 2008 to 2012, deportations exceeded 400,000 persons per year.”); Serena Marshall, \textit{Obama Has Deported More People Than Any Other President}, ABC News (Aug. 29, 2016, 2:05 PM), https://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661 [https://perma.cc/D5QB-5Y7P] (comparing the number of people former President Obama deported in comparison to previous United States presidents).}

\footnote{76}{Marshall, supra note 75.}

\footnote{77}{Park, supra note 37 at 139.}

\footnote{78}{See U.S. Immigr. & Customs Enf’t, U.S. Dep’t of Homeland Sec., ICE Immigration Removals (2015) https://www.ice.gov/removal-statistics/2015 [https://perma.cc/Z4P7-XMPG] (defining interior removal as “[a]n individual removed by ICE who is identified or apprehended in the United States by an ICE officer or agent” and excluding an individual “[a]pprehended at the immediate border while attempting to unlawfully enter the United States.”).}

\footnote{79}{Id.}

\footnote{80}{See Here’s Donald Trump’s Presidential Announcement Speech, TIME (June 16, 2015), http://time.com/3923128/donald-trump-announcement-speech/ [https://perma.cc/EL3B-SZPG] (demonstrating Donald Trump’s intent to change the way immigration is handled if elected as the next President of the United States).}

\footnote{81}{\textit{See id.} (“I will build a great, great wall on our southern border. And I will have Mexico pay for that wall.”); \textit{see also} Park, supra note 37 at 67 (“[Donald Trump] proposed building a ‘big, beautiful wall’ across the Southern Border.”).}
Since President Trump took office, not only has he dismantled DACA, he has implemented the travel ban, the “zero tolerance” policy, sent active military troops to the United States-Mexico border ahead of a supposed invasion of a migrant caravan, and forced the longest government shutdown in United States history over funding for his border wall.\footnote{83}

The Trump Administration’s “zero tolerance” policy requires prosecution of anyone caught crossing the border illegally.\footnote{84} In the past, ICE prosecutors had discretion in pursuing removal of a particular noncitizen.\footnote{85} As a result of this new policy, many children who arrived with their parents were classified as unaccompanied minors and forced to go through removal proceedings to determine their future without a lawyer.\footnote{86} This policy imposed the unaccompanied minor status on thousands of children who, in reality, did not have to be unaccompanied.\footnote{87}

The Trump Administration cracked down on both illegal and legal immigration.\footnote{88} Moreover, President Trump released statements...
suggesting an end to all due process for illegal border crossings.\textsuperscript{89} Trump also suggested the solution to the backlog of immigration cases is not to hire more immigration judges because it is a “ridiculous and corrupt system.”\textsuperscript{90} Rather than allowing those who illegally cross the border to see an immigration judge to decide their fate, President Trump suggested that we “bring them back where they came from.”\textsuperscript{91}

The Trump Administration defended this proposal by comparing it to voluntary departure and expedited removal—stating that individuals are not denied due process merely because they do not get their day in court.\textsuperscript{92} There are several instances in which a person does not appear before an immigration judge; however, a person subject to an expedited removal because he or she is a severe threat or voluntarily leaving their county, for example, is not comparable to nonchalantly throwing people back who are attempting to assert claims for relief.\textsuperscript{93} The Trump Administration’s disregard for the rights and the laws that protect all

\begin{itemize}
\item S. 1720, 115th Cong. (2017) (“the bill [seeking to] amend the Immigration and Nationality Act . . . set a limit on the number of refugees admitted annually to the United States.”).
\item \textsuperscript{89} See e.g., Louis Nelson, \textit{Trump Amplifies Push to End Due Process for Illegal Immigrants}, \textit{POLITICO} (June 25, 2018, 9:44 AM), https://www.politico.com/story/2018/06/25/trump-due-process-immigrants-669334 [https://perma.cc/58X7-BFUQ] (statement of President Donald Trump) (“[W]hen somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.”).
\item \textsuperscript{90} See \textit{Watch: Trump: We Have the Worst Immigration Laws in the World}, \textit{FOX & FRIENDS} (May 24, 2018, 5:37 PM), https://video.foxnews.com/v/5789096673001/?sp=show-clips [https://perma.cc/RSR4-3MLS] (discussing why he would not support legislation unless included money for a border wall and heightened security).
\item \textsuperscript{91} Nelson, \textit{supra} note 89.
\item \textsuperscript{93} See \textit{Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment}, G.A. Res. 39/46 (Dec. 10, 1984) http://www.hrweb.org/legal/cat.html [https://perma.cc/39HE-URGA] (“No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that [they] would be in danger of being subjected to torture.”); see also \textit{American Declaration of the Rights and Duties of Man}, \textbf{INTER-AMERICAN COMMISSION ON HUMAN RIGHTS} art. XXVII (1948), https://www.cidh.oas.org/basicos/english/basic2.american%20declar.htm [https://perma.cc/C5KJ-6YCL] (“Every person has the right in case of pursuit no resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.”). But see Nelson, \textit{supra} note 89 (“[W]hen somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came . . . we cannot allow all of these people to invade our Country.”).
\end{itemize}
immigrants is precisely why there is a need for stronger protections. It would be naive to suggest everyone crossing illegally is an upstanding citizen; however, it is ignorant to assume none of them have valid and horrifying reasons behind their decision to make the dangerous journey in crossing the border.

B. What Can Individuals Expect When Navigating the Immigration System?

While presidents and policies change, the fact that millions of individuals seeking better lives for themselves and their families in the United States will not. Immigration will never.

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94. Compare 8 U.S.C. § 1158(a)(1) (2017) (“Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien’s status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.”), with Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims (Nov. 9, 2018) (EOIR No. 18-0501) https://www.federalregister.gov/documents/2018/11/09/2018-24594/aliens-subject-to-a-bar-on-entry-under-certain-presidential-proclamations-procedures-for-protection [https://perma.cc/MY8H-KCJF] (rendering aliens claiming asylum ineligible to claim asylum if they contravene a presidential proclamation), and OFF. PUB. AFF., DEP’T OF JUST., DOJ AND DHS Issue New Asylum Rule (Nov. 8, 2018), https://www.justice.gov/opa/pr/doj-and-dhs-issue-new-asylum-rule/?fbclid=IwAR25IRfcGoHo7lc30qfZyQggKWrPCGOO0QDTL4HfDwGU7VBeoa84fV8JFsI [https://perma.cc/C433-RHQ4] (announcing that asylum may only be requested at a port of entry thereby contradicting 8 U.S.C. § 1158(a)(1)—which governs asylum.).

95. See Jill H. Wilson, CONG. RESEARCH SERV., Recent Migration to the United States from Central America: Frequently Asked Questions 7 (Jan. 29, 2019) https://fas.org/sgp/crs/row/R45489.pdf [https://perma.cc/LLL9-QR54] (“In past years, ad hoc processions have been loosely organized by nonprofit groups wanting to call attention to the plight of migrants in their home communities, particularly those of families with children fleeing unsafe environments, poverty, and lack of protection from gang violence and extortion.”).

96. See PARK, supra note 37 (discussing the change in attitudes about immigration as administrations change).

97. See EDWIN HARWOOD, IN LIBERTY’S SHADOW: ILLEGAL ALIENS AND IMMIGRATION LAW ENFORCEMENT 6–9 (Hoover Inst. Press, 1986) (summarizing the historical and yet contemporary reasons individuals decide to immigrate to the United States); see also LAURA E. BERK & ADENA B. MEYERS, INFANTS AND CHILDREN: PRENATAL THROUGH MIDDLE SCHOOL 37 (Pearson, 8th ed. 2016) (discussing the academic and societal achievements that immigrant children meet after fleeing their homes and coming to the United States).

98. See PARK, supra note 37 at 165 (clarifying that amnesty will not solve the issue of illegal immigration and that people will continue to immigrate regardless); see also Vivian Yee et al., Here’s the Reality About Illegal Immigrants in the United States, N.Y. TIMES (Mar. 6, 2016), https://www.nytimes.com/interactive/2017/03/06/us/politics/undocumented-illegal-immigrants.html [https://perma.cc/RJ3W-9C63] (explaining differing views on the millions of undocumented individuals living in the United States).
and while these individuals coming into our country may or may not have entered lawfully, it does not change the fact that they are humans who have rights. This section will briefly explain the process of a removal proceeding and illustrate the difficulty of navigating the system.

A removal proceeding is an administrative adjudication hearing intended to determine a non-citizen’s eligibility to remain in the United States. Immigration judges adjudicate the removal proceedings and similar matters under the auspices of the Executive Office for Immigration Review (EOIR), a sub-agency within the Department of Justice. EOIR’s Office of the Chief Immigration Judge consists of approximately three hundred and fifty immigration judges who conduct removal hearings in around sixty immigration courts nationwide.

An individual suspected of entering the United States illegally or without inspection is subject to arrest by local and federal law enforcement. After the initial arrest, the suspected individual is transferred to the custody of ICE. ICE agents have the authority to make arrests in various places, including homes, schools, and

99. See MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 55 (Princeton Univ. Press 2004) (stating that, in 1929, the State Department moved to restrict Mexican immigration through administrative means by implementing a new policy that denied visas to prospective immigrants—thinking it would decrease immigration, while, in reality, it only increased illegal immigration).

100. See Vivian Yee et al., supra note 98 (“There are 11 million [immigrants], the best estimates say, laboring in American fields, atop half-built towers and in restaurant kitchens, and swelling American classrooms, detention centers and immigration court.”).


103. Id. at 1.

104. Id.


courthouses. If ICE makes an arrest, they have discretion in pursuing removal.

Unaccompanied minors found within the borders of the United States are apprehended, processed, and detained by a Customs and Border Patrol officer. If the child is from a contiguous country, he or she is screened by a Customs and Border Patrol officer and the officer determines whether the child can make decisions, is a victim of trafficking, or fears persecution in his or her home country. If the officer determines none of the above apply, the child will be immediately returned to Mexico or Canada. If the child is from a non-contiguous country, he or she is placed in a standard removal proceeding. Additionally, children from non-contiguous countries must be transferred from Customs and Border Patrol to the Health and Human Services Department of the Office of Refugee Resettlement within seventy-two hours of apprehension.

108. See id. (describing the different avenues that ICE can take when pursuing a removal); 8 C.F.R. § 1003.1(d)(1)(ii) (2019).
110. See What Does Contiguous Mean In Geography?, WORLDATLAS (Apr. 25, 2017), https://www.worldatlas.com/articles/what-does-contiguous-mean-in-geography.html [https://perma.cc/H392-MT2Q] (defining a contiguous country as one in which there is no physical separation by an ocean; therefore, Mexico and Canada are contiguous to the United States); see also AM. IMMIGR. COUNCIL, supra note 70 (“At the outset, unaccompanied children must be screened as potential victims of human trafficking. However, . . . procedural protections for children are different for children from contiguous countries (i.e., Mexico and Canada) and non-contiguous countries (all others”).)
112. 8 U.S.C. § 1232(a)(2)(B) (2018); see AM. IMMIGR. COUNCIL, supra note 70 at 5 (“Mexican and Canadian children are screened by CBP for trafficking and, if no signs of trafficking or fear of persecution are reported, may be summarily returned home pursuant to negotiated repatriation agreements.”).
113. See 8 U.S.C. § 1232(a)(5)(D) (2018) (proscribing placement in removal proceedings for alien children from non-contiguous countries); see also AM. IMMIGR. COUNCIL, supra note 70 at 7 (“Children from non-contiguous countries, such as El Salvador, Guatemala, or Honduras, are placed into standard removal proceedings in immigration court.”).
114. 8 U.S.C. § 1232(b)(3) (2018); AM. IMMIGR. COUNCIL, supra note 70 at 7 (“[Customs and Border Patrol] must transfer custody of these children to Health and Human Services (HHS), Office of Refugee Resettlement (ORR), within 72 hours.”).
Once an individual is found to have entered the United States, either illegally or by overstaying their visa, he or she faces deportation through expedited removal. 115 Expedited removal orders are not appealable; therefore, an individual’s only recourse is to show the order was improperly issued and ask the government to dismiss the case. 116 While there are numerous restrictions to the expedited removal process, the Trump Administration has proposed expansions. 117 However, unaccompanied minors cannot be placed in expedited removal proceedings. 118

In determining whether to detain an individual awaiting removal or to grant bond, a number of factors, such as safety and security risks, are considered. 119 A detained individual is held in either an immigration detention center or a contracted prison. 120 Immigration detention centers are no different from prisons. 121

When unaccompanied children are apprehended, there are special laws that govern their detainment. 122 In addition to being transferred to Health and Human Services’ custody within seventy-two hours, steps should be taken to ensure the welfare of the child—while keeping the child’s best interests in mind. 123 While they await their court date, the Office of Refugee Resettlement manages the custody and care of the children until they are released to a family member or to another

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115. Immigration Nationality Act of 2018 § 238, 8 U.S.C. § 1228 (2018); see Wise & Petra, supra note 106 (“Currently, expedited removals can only take place if individuals are arrested within 100 miles of the U.S. borders and if they’ve been inside the U.S. two weeks or less.”).


118. AM. IMMIGR. COUNCIL, supra note 70 at 7.

119. Wise & Petra, supra note 106.

120. Id.


122. AM. IMMIGR. COUNCIL, supra note 70; see 8 U.S.C. § 1232 (2018) (outlining the procedures that officers and officials who come into contact with children must follow to combat abuse and trafficking).

123. AM. IMMIGR. COUNCIL, supra note 70 at 7, 9.
organization. However, according to international law, “[children] should in principle not be detained at all.”\textsuperscript{125} Alternatively, an individual can choose to leave voluntarily, in hopes they can re-enter the United States legally at a later time.\textsuperscript{126} The Attorney General has the authority to permit an individual to leave voluntarily, in lieu of removal proceedings, or before the completion of the removal proceedings.\textsuperscript{127} Voluntary departures are the safer option\textsuperscript{128} for undocumented immigrants who do not have other options to gain legal status.\textsuperscript{129} Moreover, one can have up to one hundred and twenty days to depart from the United States, which offers an individual the opportunity to settle their affairs before leaving.\textsuperscript{130} Relief based on asylum or cancellation of removal is waived if an individual chooses to leave voluntarily.\textsuperscript{131}

When an immigration court receives the notice to appear from the DHS, it then files what is called a “master calendar hearing.”\textsuperscript{132} During the master calendar hearing, a federal immigration judge reads the charges brought against the individual, which the individual must then admit or deny.\textsuperscript{133} If an individual presents a valid defense, they are permitted to remain in the United States.\textsuperscript{134} Typically, a valid defense

\textsuperscript{124} Id. at 9.


\textsuperscript{131} U.S. DEP’T OF JUSTICE, supra note 102 at 5.

\textsuperscript{132} Id.

\textsuperscript{133} Id. at 2.

\textsuperscript{134} Id. at 3.
includes asylum, cancellation of removal, marriage to a United States citizen, or another relative-based petition.

Then, at the merits hearing, the immigration judge decides the deportability of an alien after hearing arguments for both sides. An ICE attorney represents the government, and the individual facing removal may retain an attorney. This portion of the removal process is where many complex legal and constitutional issues arise, because there is no right to government-funded counsel for immigration proceedings. Despite the difficulty of navigating the system—even for a seasoned attorney—immigration proceedings do not require the appointment of an attorney, as immigration proceedings are not criminal proceedings. Furthermore, removal from the United States, which more than likely will result in the loss of one’s job, family, and home, is not considered punishment; therefore, there are no constitutional protections related to the government appointment of counsel. While individuals facing removal proceedings do not have a constitutionally protected right to appointed counsel, they still have the option to be represented—at no cost to the government—by counsel or any authorized agent.

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137. See Immigration and Nationality Act of 2018 § 240A, 8 U.S.C. § 1229b (2018) (detailing that cancellation of removal typically occurs when an individual has been present in the United States for a long period of time—regardless of lawful or unlawful entry).


139. Id.


141. See id. at 1038–39 (holding that a deportation proceeding is a purely civil action to determine eligibility to remain in this county, not to punish an individual for unlawful entry); see also Lara-Torres v. Ashcroft, 383 F.3d 968, 973 (9th Cir. 2004) (citing Magallanes-Damian v. INS, 783 F.2d 931 (9th Cir.1986) (stating aliens are not entitled to the right to counsel because deportation and removal proceedings are not criminal trials); see generally THE FUTURE OF IMMIGRATION LAW PRACTICE: A COMPREHENSIVE REPORT, AM. IMMIGR. LAWYERS ASS’N 4–8 (2016), https://www.aila.org/File/Related/The_Future_of_Immigration-Report.pdf [https://perma.cc/F73B-HAD8] (stating that although a lawyer may not be necessary due to the complexity of an issue, procedural complexities call for the expertise of an immigration lawyer).

142. INS, 468 U.S. at 1038–39.
The exact language of the code uses the word “privilege” to describe an individual who is facing removal’s “right to counsel.”

A decision may be appealed to the federal circuit courts, and possibly, the Supreme Court. During this time, the individual has the option to request a delay of deportation. Like most appeals, it is a lengthy process, and incarcerated individuals ineligible for bond can remain imprisoned for the time being. Unfortunately, for many who lose their cases, the final step is removal. Individuals, who come from a country bordering the United States, are flown to an American border city and then given the option to walk or take a bus back to the country from which they immigrated. Those individuals from non-contiguous countries are placed on a direct flight to their country of origin. If you are overwhelmed with all this information, you are not alone.

An individual in the United States without status may have options for legal representation, but many individuals lack the financial resources to hire counsel. One can always represent themselves pro se, but an

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143. 8 C.F.R. § 1292.1 (2018); see Immigration and Nationality Act of 2018 § 292, 8 U.S.C. § 1362 (2018) (defining an “authorized representative” as a law student and law school graduate not yet admitted to the bar, reputable individual of good moral character who have a personal or professional relationship with the represented noncitizen, or an accredited official of the government to which the represented noncitizen owes allegiance; then describing “qualified organizations” to include: non-profits, religious organizations, charitable, social services, or similar organizations).

144. See Immigration and Nationality Act of 2018 § 240(b)(4)(A), 8 U.S.C. § 1229a (b)(4)(A) (2018) (“[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings.”).

145. Wise & Petra, supra note 106; see also U.S. DEP’T OF JUSTICE, supra note 102 at 7.


147. Wise & Petra, supra note 106.

148. See id. (describing the process of deportation—including expedited removals, removal orders, and appealing removals).

149. See id. (providing details on what immigrants can do following removal orders).


151. See generally Egkolfopoulou, supra note 87 (explaining a journalist’s overwhelming experience when observing children alone in Immigration Court).

152. See Peter L. Markowitz, Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study, 78 FORDHAM L. REV. 541, 548 (2009)
individual without knowledge of the United States’ immigration system nor the relief available is set up for failure and denied justice.153 There are options for legal representation such as clinics, pro bono attorneys, and other charitable legal organizations.154 Nevertheless, situations such as limited resources; attorneys taking on too many cases; and individuals taking advantage of desperate individuals present those seeking a better life in the United States at a serious disadvantage.155

II. ANALYSIS

The United States is regarded as the land of freedom and opportunity built by immigrants.156 We need law and order for our government and society to function; thus, we cannot let every individual immigrate into our country without regulations.157 However, maintaining order is not mutually exclusive to the idea of treating those who come into this country, legally or illegally, with respect and judicial recourse—especially when it comes to children in removal proceedings.158 The Supreme Court recognized that the perceived mistreatment of aliens in the United States might lead to harmful treatment of American citizens abroad.159 We should want to be known as a country who values

(surveying a population of those in deportation proceedings and arguing that many respondents simply lack financial resources to hire private counsel).

153. See Mark Noferi, Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings, 18 Mich. J. Race & L. 63, 72 (2012) (“The complexity of the immigration proceedings (particularly mandatory detention hearings), the asymmetry of trained government counsel on the other side, and the particular vulnerabilities of a detained foreign population all make it difficult for a pro se detainee to be meaningfully heard.”).

154. Markowitz & Nash, supra note 24 at 387, 396, 400–01.

155. Id. at 387–88.

156. See Robert A. Katzmann, The Legal Profession and the Unmet Needs of the Immigrant Poor, 21 Geo. J. Legal Ethics 3 (2008) (“[W]e are a nation of immigrants, whose contributions have been vital to who we are and hope to be.”); see also ANNA O. LAW, THE IMMIGRATION BATTLE IN AMERICAN COURTS 1 (Cambridge U. Press 2010) (examining the country’s legacy as a nation of immigrants and its commitment to provide equal treatment under the law).

157. See HARWOOD, supra note 97 at 1 (“Although we want as a nation to keep the door open, we also want to control the terms of entry and residence. Today, many Americans believe we have lost the ability to set the terms for admission because we have lost the ability to control our borders.”); LAW, supra note 156 (examining the country’s legacy as a nation of immigrants and its commitment to provide equal treatment under the law).

158. See Katzmann, supra note 156 (providing suggested moral and ethical duties that a judge shall comply with when handling immigration issues).

humanity. While we are not able to grant citizenship or some legal status to everyone, we do not want to be known as a country who separates families at the border and subsequently forces those children to represent themselves in removal proceedings.160

Removal proceedings cannot be analogized to situations such as contesting a traffic ticket, which merely confers a mild fine.161 While removal proceedings are civil,162 deportation is closely related to the criminal process.163 Further, there are serious consequences with classifying deportation as civil rather than punitive.164 Removal is punishment.165 Typically, there is an arrest, followed by deprival of liberty, removal from one’s home, family, business, and property.166

Removal proceedings are complex, and while they are technically not criminal proceedings, there is still just as much on the line.167 Those

163. See Bridges v. Wixon, 362 U.S. 135, 154 (1945) (“Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty – at times a most serious one – cannot be doubted.”); see also Padilla v. Kentucky, 559 U.S. 356, 364 (2010) (“Although removal proceedings are civil, deportation is intimately related to the criminal process, which makes it uniquely difficult to classify as either a direct or a collateral consequence.”); see generally HARWOOD, supra note 97 at 48 (reviewing how criminal and immigration laws intersect).
164. LAW, supra note 156 at 198.
165. See Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) (“’[B]anishment’ is thus defined: ‘A punishment by forced exile, either for years or for life; inflicted principally upon political offenders, ‘transportation’ being the word used to express a similar punishment of ordinary criminals.’”).
166. See INS v. St. Cyr, 533 U.S. 289, 322 (2001) (“Preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.”); see also T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY 361, 573–76 (West Pub. Corp., 8th ed. 2016) (discussing the financial and, more importantly, the psychological hardship spouses and families endure when their loved one faces removal); see generally LAW, supra note 156 at 195–204 (detailing an overview of the arguments that equate removal with punishment).
167. See Padilla v. Kentucky, 559 U.S. 356, 360 (2010) (exhibiting that removal is a civil proceeding, yet Congress continues to add dubious crimes to make an individual deportable); Katzmann, supra note 156 at 3, 4 (“The importance of quality representation, be it paid or pro bono, is especially acute for immigrants, not only because the stakes are often so high—whether individuals will be able to stay in this country or reunite their families or be employed—but also because there is a wide disparity in the success rate of those who have lawyers and those who proceed pro se.”).
who have not been in the United States long enough to establish a life and contribute to our community often face the possibility of death when sent back “home.”

Migrant children who come to the United States are exposed to horrendous situations and lifestyles, and some are subjected to torturous activities. Others witness their parents murdered and refuse to become a part of a gang. Sending these children back without a proper evaluation of their case by a lawyer is depriving the children of justice.

The United States Court of Appeals for the Ninth Circuit hinted that ineffective assistance of counsel could constitute grounds for reopening immigration proceedings. However, because removal proceedings

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169. See generally King, supra note 23 at 341–43 (conducting a case study over the journey of fourteen-year-old Catherine Wong who fled China because her parents attempted to marry her off to a man who raped her).

170. See, e.g., Camara v. Ashcroft, 378 F.3d 361, 365 (4th Cir. 2004) (“[P]olice arrested and detained 44 persons, including children, women, old men, and an imam. They were taken to a military camp, where they reportedly were stripped, threatened, beaten, and tortured.”); see generally How the Convention Against Torture Applies to Children and Whether CAT Should Address Aspects of it More Robustly, OMCT (June 21, 2018), http://blog.omct.org/how-the-convention-against-torture-applies-to-children-and-whether-cat-should-address-aspects-of-it-more-robustly/ [https://perma.cc/ZQ6C-CCLC] (discussing torture and its impacts on children).

171. See A.B.A., supra note 168 (providing examples of reasons for recent exodus—one of which being gang violence).


173. Iturribarria v. INS 321 F.3d 889, 894–97 (9th Cir. 2003).
are civil, they are not subject to the safeguards of the Sixth Amendment. Instead, effective assistance of counsel is required by the Fifth Amendment’s due process right to a fair hearing. In order to establish due process violation, two things must be shown: first, the alleged ineffective assistance had to have rendered “the proceeding . . . so fundamentally unfair that [the individual was] prevented from reasonably presenting their case,” and two, “substantial prejudice,” which “is essentially demonstrating that the alleged violation affected the outcome of the proceeding.”

Despite the new barriers implemented to bar children seeking safer lives in the United States, the courts have not expanded Constitutional protections to children appearing pro se. Over the course of three years, several initiatives have taken effect which drastically hinders a child’s opportunity to live outside of the shadows in the United States. When the Department of Justice terminated the justice AmeriCorps program, ICE began targeting children’s sponsors—adding new

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174. Magallanes-Damian v. INS, 783 F.2d 931, 933 (9th Cir. 1986).
175. Magallanes-Damian, 783 F.2d at 933.
176. Iturribarria, 321 F.3d at 899.
177. Lata v. INS, 204 F.3d 1241, 1246 (9th Cir. 2000).
178. See, e.g., C. J.L.G. v. Sessions, 880 F.3d 1122 (9th Cir. 2017) (holding that, regardless of the strength of the minor alien’s interest in not being deported, the minor did not show a necessity for government funded or court appointed counsel to safeguard his due process right to a full and fair hearing).
hurdles to asylum applications, terminating the child refugee program, and imposing new restrictions for judges. With an already convoluted system becoming more complicated by the day, the need for children to have representation during removal proceedings is crucial for a fair and just society.

A. Succeeding in a Complex Removal Proceeding Requires a Lawyer to Know What Relief to Seek

Most individuals are incapable of retaining adequate legal assistance. In 2009, over sixty-percent of individuals in removal

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185. See generally LAW, supra note 156 at 202 (providing a judiciary’s perspective on how one does not need to be a supporter of immigration to support due process).

186. Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings, 33 CARDOZO L. REV. 357, 363 (2011); see Tom K. Wong et al., Paths to Lawful Immigration Status: Results and Implications from the PERSON Survey, 2 J. ON MIGRATION & HUMAN SECURITY 287, 301 (2014) (discussing immigrants who may be eligible for relief but do not know it and do not have access to counsel); see generally Laila L. Hlass, Minor Protections: Best Practices for Representing Child Migrants, 47 N.M. L. REV. 247 (2017) (providing a study on the impacts a lawyer makes for an unaccompanied minor’s case).
proceedings were unrepresented.\textsuperscript{187} Anyone can litigate a case pro se, but the actions and knowledge of a seasoned attorney are central to the success of a detainee’s claim.\textsuperscript{188} Even the most skilled advocates run into barriers interpreting the complex system of immigration offenses, defenses, and possibilities for relief.\textsuperscript{189}  

In addition to working in a system that is constantly changing with each administration, the law is often a formidable task for some of the best immigration attorneys.\textsuperscript{190} Further, factors specific to immigration proceedings intensify the risks of wrongful detention and deportation without counsel.\textsuperscript{191} On top of all this, it is important to consider the stress placed on a child who likely lacks the capacity to effectively articulate their case to an intimidating judge.\textsuperscript{192} The essential skills

\begin{itemize}
  \item \textsuperscript{187} See Markowitz & Nash, supra note 24 at 372 (2011) (detailing that only forty percent of detainees were able to secure legal services in New York, a state with many immigration attorneys, while only twenty seven percent of individuals who were not detained lacked counsel).
  \item \textsuperscript{188} Id. at 370.
  \item \textsuperscript{189} Harper, supra note 97 at 33; Michael Kaufman, Note: Detention, Due Process, and the Right to Counsel in Removal Proceedings, 4 STAN. J.C.R. & C.L. 113, 122 (2008).
  \item \textsuperscript{190} See Elizabeth Anne Campbell et al., Immigration Relief: Legal Assistance for Noncitizen Crime Victims 69, 101 (2014) (articulating the complexities of the immigration proceedings); see also Lawyers in Practice: Ethical Decision Making in Context (Leslie C. Levin & Lynn Mather eds., 2012) (discussing the issues many immigration lawyers face in what they deem an unjust system).
  \item \textsuperscript{191} See Noferi, supra note 153 (“The complexity of immigration proceedings, the asymmetry of trained government counsel on the other side, and the particular vulnerabilities of a detained foreign population all make it difficult for a pro se detainee to be meaningfully heard.”).
  \item \textsuperscript{192} See Kopan, supra note 10 (discussing the story of an initially cheerful eight year old girl who, after thorough interviews by her attorney, uncovered that she was being assaulted by her mother’s boyfriend); see also Laurence Steinberg, Adolescent Development and Juvenile Justice, ANN. REV. OF CLINICAL PSYCHOL. 48, 68 (Apr. 27, 2009), https://www.journals.uchicago.edu/doi/abs/10.1146/annurev.clinpsy.032408.153603 [https://perma.cc/8292-U4LG] (“Intellectual, emotional, and psychological immaturity may undermine the ability of some adolescents to grasp accurately the meaning and significance of matter that they seem to understand factually.”); Berk & Meyers, supra note 97 at 508, 511 (“[C]hildren are being called to testify in court cases involving child abuse . . . child witness are faced with an unfamiliar situation—at the very least an interview in the judge’s chambers at most an open courtroom with judge, jury . . . Not surprisingly, these conditions can compromise the accuracy of children’s recall.”); Thomas Grisso et al., Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants, 27 L. & HUM. BEHAVIOR 333, 356–58 (2003) (finding that some adolescents ranging from ages eleven to sixteen evidenced impairment at a level comparable to mentally ill adults who had been found incompetent to stand trial with respect to either their ability to reason with facts and understand the trial process); Lanie Friedman Ross, Against the Tide: Arguments Against Respecting a Minor’s Refusal of Efficacious Life-Saving Treatment, CAMBRIDGE Q. HEALTHCARE ETHICS (July 2009), https://www.cambridge.org/core/journals/cambridge-quarterly-
lawyers refine over years of practice—such as conducting legal analysis, preparing defenses, conducting a factual investigation, testing evidence, and preparing the child to testify—are crucial to minimizing the risk of error in complex immigration proceedings.

In prophesying the outcome of removal proceedings, one study revealed the single most significant non-merit factor which mattered was representation. A child is not old enough to apply for a visa to come to the United States; nonetheless, the law provides that a child is old enough to represent themselves in removal proceedings. Furthermore, immigration laws have been deemed to be the second most complicated area of law to navigate, trailing behind the Internal Revenue Code.

193. See BERK & MEYERS, supra note 97 at 511 (discussing procedures that legal professionals must use to ensure a child is prepared to testify in court).

194. Noferi, supra note 153 at 109 (2012); see Hlass, supra note 186 at 271 (“Representation is also critical for affirmative applications for immigration protection, as immigrants otherwise may not realize they may be eligible to receive an immigration benefit.”); see also Katzmann, supra note 156 at 7 (2008) (“Quality legal representation in gathering and presenting evidence in a hearing context and the skill in advocacy as to any legal issues and their preservation for appeal can make all the difference between the right to remain here and being deported. It also means that getting effective counseling before, not after, petitioning for relief or getting immersed in proceedings provides the best chance for fleshing out the merits of the case, avoiding false or prejudicial filings, and securing lawful status or appropriate relief.”); Powell v. Alabama, 287 U.S. 45, 63–69 (1932) (reversing the conviction of nine young black men for allegedly raping two white women; reasoning that the right to retain and be represented by a lawyer was fundamental to a fair trial); see Gideon v. Wainwright, 372 U.S. 335, 342–45 (1963) (holding that a criminal defendant has the right to appointed counsel if they are unable to afford private representation); DEBORAH L. RHODE ET AL., LEGAL ETHICS 786 (Robert C. Clark et al. eds., 7th ed. 2016) (revealing that even after years of schooling and years of practice, some lawyers are incompetent to help the poor, and therefore, the poor are far less competent to represent themselves—especially when they lack the opportunity to attain competency like lawyers can).


197. HULL, supra note 23; Castro-O’Ryan v. U.S. Dep’t of Immigration and Naturalization, 847 F.2d 1397, 1312 (9th Cir. 1987) (quoting Elizabeth Hull, Without Justice for All 107 (1985));
Considering the added measures for apprehending and removing unaccompanied minors,\(^{198}\) the success rate for unaccompanied minors without counsel is no better for children than it is for adults.\(^{199}\) Roughly sixty-one percent of unaccompanied minors appear in court without representation.\(^{200}\) Astonishingly, seventy-three percent of unaccompanied minors who were able to secure legal representation were successful in their cases.\(^{201}\) Comparatively, a mere fifteen percent of unaccompanied minors who appeared in court alone were allowed to remain in the United States.\(^{202}\) Immigration may not be a right, but it does not mean an individual should be deprived of due process and proper procedures—especially when seeking relief such as asylum.\(^{203}\)

Despite the horrifying stories shown daily on the news,\(^{204}\) minors have options for remaining in the United States lawfully.\(^{205}\) According to a

Jennifer Barnes, *The Lawyer-Client Relationship in Immigration Law*, 52 EMORY L.J. 1215, 1219 (2003); see Hlass, *supra* note 186 at 254–60 (discussing the extensive journey children face navigating the immigration court system).


199. Egkolfopoulou, *supra* note 87; see Podkul & Shindel, *supra* note 179 (explaining that immigration judges have been instructed to treat children’s cases in the same manner as adults’ cases).


201. *Id.*

202. *Id.*

203. See United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954) (holding that just because immigration cannot be conceived as a “right” does not mean that the federal courts have no role in ensuring that proper procedures were followed).

204. See Miroff et al., *supra* note 5 ("The Trump administration’s ‘zero tolerance’ crackdown at the border this spring was troubled from the outset by planning shortfalls, widespread communication failures and administrative indifference to the separation of small children from their parents . . . .").

2014 study, the Refugee and Immigrant Center for Education and Legal Services (RAICES) found that sixty percent of the children interviewed in Health and Human Services’ custody were likely to be eligible for relief in an immigration court. However, an unaccompanied minor would have a significantly higher chance of successfully obtaining relief if the minor had the assistance of a lawyer—rather than litigating pro se against trained government counsel in a complex legal matter.

1. Special Immigrant Juvenile Status

A route to lawful permanent residence is through Special Immigrant Juvenile Status. This relief is provided for undocumented minors who are deemed wards of the state. In many cases, the minors arrived in the United States alone and are victims of abuse, abandonment, or neglect by one or both of their parents. This remedy will allow the minor to become a legal permanent resident, regardless of whether he or she entered illegally or failed to show a means of financial support.


206. Letter from Jonathan D. Ryan, Exec. Director, RAICES, to President Barack Obama (July 18, 2014), http://immigrationimpact.com/wp-content/uploads/2014/07/Letter-to-President-Obama-from-RAICES.pdf [https://perma.cc/E793-HMU4] [hereinafter RAICES Letter to President Obama]; see Brockway, supra note 196 at 195 (“Without government-appointed counsel to help them navigate the complexities of the immigration system, unrepresented [unaccompanied immigrant children] cannot present a sufficient defense to removal or a successful asylum petition and thus, do not receive the full and fair hearing due process requires.”); see generally HARWOOD, supra note 97 at 2-4 (providing a brief historical overview on immigration and the issues surrounding INS turning away citizens and lawful immigrants after failing to credit their claims).

207. See Noferi, supra note 153 at 112 (“the asymmetry of pro se detainees litigating these complex proceedings against trained government counsel exacerbated the risk of an erroneous decision.”); see also Hlass, supra note 186 at 261–75 (studying the outcomes of children seeking relief from removal and their success with counsel versus their success without counsel); see generally FELD, supra note 23 at 142 (studying the impact lawyers have for a juvenile’s case).

208. See 8 C.F.R. § 204.11(a) (2018) (overviewing the qualifications to obtain lawful residency with Special Immigrant Juvenile Status.).

209. Id.


The attorney must show the minor was abused, neglected, or abandoned. The court must also find it is in the minor’s best interest not to return to their home country. Immigration officials do not make these determinations; a judge must make them.

Lawyers are crucial for several reasons. The application process must commence while the minor is still under the age of twenty-one. A lawyer is also in a better position to determine whether the minor will qualify for such status. More importantly, it is a question of state law which varies from state to state as to whether the minor was abused, neglected, or abandoned. Depending on the jurisdiction, the matter is handled by juvenile, family, or probate courts. The correct application must also be filed with the United States Citizenship and Immigration Services (USCIS), along with the order recognizing the child as a Special Immigrant Juvenile. Moreover, the lawyer must file the appropriate applications to adjust the child’s status if they are not in removal proceedings. Time is of the essence, and a lawyer’s role is crucial to ensure filings are correct, timely, and filed in the appropriate court.

212. 8 C.F.R. § 204.11(a) (2018).
214. 8 C.F.R. § 204.11(c)(6) (2018).
216. 8 C.F.R. § 204.11(c)(1) (2018).
217. See CAMPBELL ET AL., supra note 190 at 85, 101 (describing the extreme complexity of asylum law and the importance of having a lawyer during the application process); see generally KIDS IN NEED OF DEF., supra note 215 (describing the difficult process of obtaining Special Immigrant Juvenile Status).
218. KIDS IN NEED OF DEF., supra note 215; see CAMPBELL ET AL., supra note 190 at 71 (“State court proceedings, therefore, are intentionally distinct and separate from federal immigration processes and are the proper venue for required factual findings [in a Special Immigrant Juvenile Status proceeding].”).
219. CAMPBELL ET AL., supra note 190 at 70; KIDS IN NEED OF DEF., supra note 215 at 2.
220. CAMPBELL ET AL., supra note 190 at 82–83.
221. Id. at 83, 101.
222. See KIDS IN NEED OF DEF., supra note 215 (describing the process of obtaining Special Immigrant Juvenile Status and explaining the consequences of inaccurate responses in the application).
However, if the minor is already in removal proceedings, the path to lawful permanent residency narrows. Since USCIS is the only entity that can adjudicate the Special Immigrant Juvenile Status petition and the immigration judge is the only person with jurisdiction to adjudicate a lawful permanent residency application, the minor must act promptly. A minor in removal can ask the immigration judge for a continuance of the removal proceeding to allow USCIS to adjudicate the Special Immigrant Juvenile Status petition. The minor can also request the immigration judge to administratively close the removal proceedings, so that USCIS can adjudicate the Special Immigrant Juvenile Status and then allow adjudication of their lawful permanent residency application. Finally, a request to completely terminate the removal proceeding is possible. Termination would allow the minor to apply for a work permit and, more importantly, enable the minor to avoid being in a removal proceeding.

It is not impossible to obtain legal status without an attorney’s aid. However, a child will likely not know or have someone to direct them. Once children are in removal proceedings, they can ask to terminate the proceeding and be permitted to live in the United States because they experienced abuse or neglect. Assuming they are aware of their right to apply for lawful permanent residency as a Special Immigrant Juvenile, the process is extraordinarily complex and involves compiling evidence...
and preparing petitions.\(^{232}\) It may seem like a simple process of gathering all of one’s documents; filling out an application; and speaking to a USCIS, but one misstep, such as leaving out a traffic ticket, can have detrimental effects on a case.\(^ {233}\) The American Bar Association recognizes it is imperative for the child applicant to have a lawyer because the potential issues that may arise during the process “are exceedingly complex.”\(^ {234}\) An individual’s livelihood is on the line, and removal from the United States can be the end of the road for some.\(^ {235}\) By denying children the right to a court-appointed attorney, practical solutions are easily overlooked.\(^ {236}\)

2. Asylum Claims

Another form of relief for unaccompanied minors is an asylum claim.\(^ {237}\) “Asylum” is a form of protection and relief from removal for individuals who have experienced or have a well-founded fear of persecution in their home country and a fear of returning.\(^ {238}\) Children asylum claims vary in several ways from adult asylum claims; therefore, it is crucial that an attorney is aware of such disparities.\(^ {239}\) An attorney is crucial for several reasons—but especially in asylum claims where the consequences of losing includes returning the child to a life of persecution.\(^ {240}\) An attorney’s job is to craft an argument and bring to

\(^{232}\) See KIDS IN NEED OF DEF., supra note 215 (explaining the petitions needed to attain lawful permanent residency as a Special Immigrant Juvenile).

\(^{233}\) See id. (highlighting the Special Immigrant Juvenile Status process and explaining the importance of accurate records and statements in the application).

\(^{234}\) CAMPBELL ET AL., supra note 190 at 85.

\(^{235}\) See Markowitz & Nash, supra note 24 at 359, 378–380 (signifying the need of counsel because of the severe consequences of removal).

\(^{236}\) See Katzmann, supra note 156 at 4–5, 9 (revealing the devastating differences in outcomes between represented individuals a pro se individuals); see also Markowitz & Nash, supra note 24 at 359, 378–380 (indicating that having counsel positively correlated with the filing of relief applications).


\(^{239}\) See KIDS IN NEED OF DEF., supra note 238 (highlighting that adults and children fare differently when trauma and fear are involved).

\(^{240}\) See id. (explaining the proper course of action that should be taken in Asylum claims).
light all relevant facts to ensure the claim is not overlooked as merely “unfortunate incidents.”

Eligibility for an asylum claim requires the applicant meet the definition of a refugee. A “refugee” is one who has faced persecution in the past or has a well-founded fear of persecution on account of race, religion, ethnicity, political opinion, or membership in a particular social group by a government actor or someone who the government is unwilling or unable to control. The difference between a refugee and an asylum seeker is that a person seeking asylum must be present in the United States.

The burden of proof is on the child. Therefore, it is up to the attorney to show the government that this child has a reasonable possibility of persecution. A meticulous and comprehensive fact-based case analysis is needed to successfully prove persecution. A child who experiences less trauma or persecution than an adult is not barred from successfully pursuing an asylum claim. For this reason,

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241. See Osorio v. INS, 18 F.3d 1017, 1023, 1028 (2d Cir.1994) (holding that the Immigration Judge and the Bureau of Indian Affairs were incorrect in denying Osorio asylum relief because they misinterpreted Osorio’s claim for relief based on political persecution and dismissed his plea for asylum in one paragraph); see also Linda Kelly Hill, The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children, 31 B.C. THIRD WORLD L.J. 41, 67 (2011) (discussing the role a lawyer plays in crafting a defense and arguments and can protect their child client’s interests and future); Markowitz & Nash, supra note 24 at 386–87 (suggesting that those who are unaware that they have viable claims for relief will not seek out legal representation).


246. See INS v. Cardoza-Fonseca, 480 U.S. 421, 438–39 (1987) (reasoning that the applicant’s fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition).


248. See Kholyavskiy v. Mukasey, 540 F.3d 555, 571 (7th Cir. 2008) (holding that the adjudicator should have considered the “cumulative significance” of the applicant’s childhood because he was subjected to regular “discrimination and harassment [that] pervaded his neighborhood,”—including being regularly mocked and urinated on by other school children for being Jewish; being forced by his teachers to stand up and identify himself as Jewish; being called
it is crucial that an attorney navigate a child’s case to avoid any abuse of discretion by the government. Notably, a child need not show he or she has experienced persecution if he or she can show a well-founded fear of persecution. A ten percent chance of persecution would satisfy the well-founded fear requirement.

Even if an attorney is unable to show one of the nexus requirements, the fight is not over. If the objective circumstances support the child’s claim that at least one reason for the past or future persecution is a protected ground, then an attorney can still show the child is eligible for asylum. The burden is on the child to establish that he or she belongs to the protected group and that he or she has suffered or fear suffering persecution.

Often, all a child has is ghastly stories—lacking the slurs, and being physically abused in his neighborhood; see also Liu v. Ashcroft, 380 F.3d 307, 314 (7th Cir. 2004) (finding that persecution did not take place, the court stated, “age can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted . . . there may be situations where children should be considered victims of persecution though they have suffered less harm than would be required for an adult.”).

See AM. IMMIGR. LAWYERS ASS’N, supra note 141 (“While some cases may not require sophisticated analysis or sustained advocacy, there are far too many pitfalls or hidden dangers in immigration law that require expertise to navigate.”). But see Osorio v. INS, 18 F.3d 1017, 1023 (2d Cir. 1994) (reversing the Bureau of Indian Affairs’ denial of asylum, noting that it explained their denial in only one paragraph and characterized the petitioner’s experienced acts of violence as “unfortunate incidents” when denying his claim for asylum); C.J.L.G. v. Sessions, 880 F.3d 1122, 1143 (9th Cir. 2017) rev’d en banc, 923 F.3d 622 (9th Cir. 2019) (holding that, regardless of the strength of the minor alien’s interest in not being deported, he did not show a necessity for government-funded, court-appointed counsel to safeguard his due process right to a full and fair hearing).

Immigration Nationality Act of 2018 § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2018); see Matter of Mogharrabi, 19 I. & N. 439, 441–45 (BIA 1987) (listing a four-part test for establishing asylum eligibility based on a well-founded fear: (1) the applicant possesses a belief or characteristic that a persecutor seeks to repress in others by means of punishment of some sort (2) the persecutor is already aware, or could become aware, that the respondent possesses this belief or characteristic (3) the persecutor has the capacity to punish the respondent (4) the persecutor has the inclination to punish the respondent).


See Osorio v. INS, 18 F.3d 1017 (2d Cir. 1994) (describing the Bureau of Indian Affairs’ characterization of petitioner’s persecution as solely on account of his economic activities and holding that this was not reasonably supported by the evidence because there was evidence that petitioner suffered persecution on account of his political beliefs); see also Ramji-Nogales et al., supra note 247 at 376 (tracking down supporting evidence and expert witness make claims for relief more likely to succeed).

evidence which would help establish one of the protected grounds.254 This limited access to evidence does not mean the child is not a victim or will not become a victim if he or she is returned to their country.255 For this reason, a lawyer’s skills are imperative to prepare a child’s case and ensure that their story is credible and supported with reliable testimony and evidence to establish a claim for relief.256

Common grounds for persecution include persecution based on race, religion, and nationality which demands the skills of a lawyer to successfully present.257 While defending non-conventional refugee claims, some of the most original lawyering has been crafted under membership in a particular social group.258 Membership under a particular social group is extremely broad. However, per the United Nations High Commissioner for Refugees (UNHCR) Handbook, there are specific criteria which need to be established for a child to prevail.259

Under federal law, there are two required parts for a social group: (1) “members must share a common immutable characteristic which the member of the group cannot or should not be required to change because it is fundamental to their individual identities or consciences,” and (2) the social group must be socially visible.260 A child may not understand


255. Matter of S-M-J-, 21 I&N Dec. at 731; see Matter of Dass, 20 I&N Dec. at 124 (discussing the evidentiary sufficiency of a child’s testimony which is believable, consistent, and sufficiently detailed); see also BERK & MEYERS supra note 97 at 362 (“[Y]oung children focus on the most obvious aspects of a complex emotional situation to the neglect of other relevant information.”).

256. See KIDS IN NEED OF DEF., supra note 238 at 29 (discussing generally the need for adequate preparation on the part of attorneys representing child asylum applicants).


258. KIDS IN NEED OF DEF., supra note 238 at 29.

259. See U.N. HIGH COMM’R FOR REFUGEES, supra note 257 at 4 (outlining specific criteria for membership in a specific social group); see also Kniffin, supra note 168 at 323–24 (describing broadly efforts by both the federal courts and the United Nations High Commissioner for Refugees to establish criteria for membership in a particular social group).

their persecution or know they are a part of a protected social group.\textsuperscript{261} The lawyer must speak to the child and ascertain whether he or she has been subjected to persecution and whether they are a member of a particular social group.\textsuperscript{262} Moreover, a lawyer must craft an argument which shows that the child cannot return home safely.\textsuperscript{263}

A child is also eligible for asylum relief based on political opinions.\textsuperscript{264} Relief based on political opinions does not require the child be involved in politics or be a part of a political party.\textsuperscript{265} A political opinion may be imputed to the child.\textsuperscript{266} A child’s age is not a bar to whether they are successful in this cause of action, though age is considered when assessing a claim based on political opinion.\textsuperscript{267}

Even the most successful legal arguments vary in their outcomes.\textsuperscript{268} Gang-based persecution is an ever-growing issue, especially for children in Central America.\textsuperscript{269} Nonetheless, numerous Federal Circuit Courts refuse to recognize an individual fleeing gang persecution as part of a particular social group in need of protection.\textsuperscript{270}

\begin{itemize}
\item \textsuperscript{261} See Berk & Meyers, supra note 97 at 509 (explaining the impact of ethnic and political violence on children and the adjustments children are forced to make to justify their exposure to violence and terrorism); see also Anne Graffam Walker, Questioning Young Children in Court: A Linguistic Case Study, 17 L. & Hum. Behav. 59, 79 (1993) (finding that poor questioning of children can lead to harmful consequences for children).
\item \textsuperscript{262} Model Rules of Prof’l Cond. r. 1.1 (A.M. Bar Ass’n 2018).
\item \textsuperscript{263} Id. at cmt. 5.
\item \textsuperscript{265} Kids In Need of Def., supra note 238 at 11.
\item \textsuperscript{266} See Civil v. INS, 140 F.3d 52, 61 (1st Cir. 1998) (affirming the underlying denial of asylum and criticizing the immigration judge’s presumption that youth are unlikely targets of political violence in Haiti).
\item \textsuperscript{267} Id.
\item \textsuperscript{268} See Dennis v. Gonzales, 182 F. App’x 27 (2d Cir. 2006) (unpublished opinion) (refusing to recognize an individual fleeing gang persecution as being a group in need of protection); see also Menjivar v. Gonzales, 416 F.3d 918, 922 (8th Cir. 2005) (concluding that the gang members’ actions should not be considered “persecution” attributable to the government).
\item \textsuperscript{269} See Kniffin, supra note 168 at 315–16 (2011) (discussing the impact of MS-13 over young people and their families).
\item \textsuperscript{270} Dennis, 182 F. App’x at 27 (unpublished opinion); see Menjivar, 416 F.3d at 922 (concluding that substantial evidence supported the immigration judge’s conclusion that the gang members’ actions should not be considered “persecution” attributable to the government); see also Kniffin, supra note 168 at 315 (2011) (“[T]he majority of the individuals fleeing MS-13 will not receive the protection of asylum once they arrive in the United States”).
\end{itemize}
Asylum law is extraordinarily complex. Seemingly insignificant and accidental errors can result in disastrous consequences for the applicant. Given its discretionary nature, a lawyer is crucial for a successful asylum case—especially where the applicant’s case is weak on its face. It is not feasible for a child or their non-lawyer representative to prepare an extremely complex form and submit proof of identity with evidence corroborating the child’s claim.

### 3. U and T Visas

“U” and “T” visas are relatively new forms of relief for unaccompanied minors. Congress created the “U” visa for victims of substantial physical or mental abuse and the “T” visa for victims of trafficking. Not surprisingly, the undocumented population is a vulnerable one. In addition to the fear of reporting crimes they are not a party to, undocumented individuals are also fearful of reporting crimes where they are a victim.

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271. Campbell et al., supra note 190.
272. See id. (explaining the major consequences that accompany minor errors).
273. See id. (describing the complexity of asylum cases).
274. See id. (explaining the lengthy steps asylum seekers must take).
279. See, e.g., Samantha Schmidt, Deputy Accused of Sexually Assaulting Girl, 4, Threatening to Have Mother Deported if She Spoke Up, WASH. POST (June 18, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/06/18/deputy-accused-of-sexually-assaulting-girl-4-threatening-to-have-mother-deported-if-she-spoke-up/?utm_term=.28b5ff0a70e5 [https://perma.cc/SFW7-DNPL] (exposing a Bexar County Sheriff’s Deputy’s cruel actions of repeatedly sexually assaulting a four-year-old girl and blackmailling her undocumented mother if she reported him).
A “U” visa may be requested for children who are victims of crime or who possess information which can help the United States government. A child in removal proceedings is still eligible to apply for a “U” visa. The United States Code offers a list of crimes which qualify under the “U” visa. To obtain a “U” visa, the petition must contain a certification from the law enforcement official who is investigating or prosecuting the criminal activity. Decisions on certification of helpfulness are made at the sole discretion of law enforcement; therefore, the court does not have the authority to complete certification. This certification is the most difficult portion of applying for the “U” visa. Moreover, there is a greater burden placed on the children to cooperate with law enforcement in order to receive a ‘U” visa than a “T” visa. For this reason, attorneys are aware that it is meaningless to begin the application until certification is secured. The difficulty of obtaining the certification stems from the unfamiliarity of the “U” visas by law enforcement. An attorney’s role is crucial in this aspect of the process because they are the ones with the power and knowledge to highlight their client’s need for the “U” visa to the officer. An attorney must also refrain from attempting to apply for a “U” visa if their client’s status is inadmissible in the United States or ineligible to receive a waiver for inadmissibility. This requires
understanding the grounds of inadmissibility and how they factor into the “U” visa application.\(^{291}\)

The Victims of Trafficking and Violence Protection Act of 2000 (TVPA) created the “T” visa for trafficking victims.\(^{292}\) Several evidentiary requirements must be satisfied for the “T” visa.\(^{293}\) For example, the child needs to submit credible evidence related to the nature and scope of the trafficking.\(^{294}\) For both the “U” and “T” visas, the bulk of the work stems from preparing the application by gathering relevant evidence, filling out the paperwork correctly, and putting forth a credible case for the child.\(^{295}\) However, that is an oversimplification because the process entails much more and involves resources and skills which many unaccompanied minors do not possess.\(^{296}\)

Although relief is available for unaccompanied children, it is imperative that the children know what to apply for and how to comply with the appropriate evidence.\(^{297}\) Although an individual does not need a lawyer to file their application, a lawyer certainly helps move the process along\(^{298}\) and allows children to participate meaningfully in


\(^{293}\) Id.

\(^{294}\) 8 C.F.R. § 214.11(f) (2018).


\(^{296}\) See Barnes, supra note 197 at 1219–20 (explaining that immigration lawyers also need to be familiar with criminal law, family law, administrative law, and procedure; without understanding various areas of the law, they cannot effectively advocate for their client).


\(^{298}\) See Memorandum from U.S. Citizenship and Immigration Services on Issuances of Certain RFEs and NOIDs (July 13, 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf [https://perma.cc/
Recently USCIS was given the discretion to deny benefits requests for failure to establish eligibility based on lack of required initial evidence. If an applicant does not submit a perfect application the first time, they are denied without a request for evidence or notice of intent to deny. This causes delay and extreme hardship for the applicant—not only financially but emotionally as well. This poses a major issue for pro se immigrants, because they can be denied by simply forgetting to include one piece of evidence. Rather than issuing a request for evidence like USCIS has done in the past, they simply issue denials. A skilled attorney is vital in these circumstances. Not only will an attorney craft a credible and effective defense, they will also ensure applications are correctly filed to avoid the delay and waste for their client, as well as USCIS. After all, immigration court is still court. Thus, decisions made in and outside of court are best reached through the knowledge and skills inherent in the adversary process.
B. Children Lack the Ability to Present Their Case Adequately

Children, or minors, are under a legal disability. Children lack the capacity to do anything enforceable by law. Allowing children to represent themselves in court is not only inconsistent with the legal definition, but it also goes against some of the basic principles of psychology.

Children’s minds are under-developed; therefore, their ability to perceive and articulate events is hindered. Research demonstrates that children are in a better position to explain themselves with the assistance of an adult, or, in this case, a lawyer. A child’s inability to properly and accurately communicate their thoughts, feelings, experiences, and arguments will have a detrimental impact on their case. The underdeveloped prefrontal cortex of children impacts a child’s decision-

309. See Immigration and Nationality Act of 2018 § 101(b)(1), 8 U.S.C. § 1101(b)(1) (2018) (stating that, for immigration purposes, the age of majority is often twenty one); see also Minor, BOUVIER LAW DICTIONARY (Compact ed. 2011) (describing a “minor” to be a person under the age of majority, and defining a minor as any person who is not an adult under the law; that is, a person who has not reached the age of majority or has not been removed of the disability of minority by judicial order).

310. See Disability (legal disability), BOUVIER L. DICTIONARY (Compact ed. 2011) (understanding a legal disability to be a person’s lack of capacity to do anything enforceable by law and then stating that a “minority” (or being younger than the age of consent or adulthood required for a given purpose) is a contemporary general legal disability).

311. See id. (“[A] person under a general disability can neither act as a matter of law nor consent to or agree to the act or offer of another”).


313. See id. (understanding that a child’s development must be taken into account); cf. K. Alison Clarke-Stewart & Robert J. Beck, Maternal Scaffolding and Children’s Narrative Retelling of a Movie Story, 3 EARLY CHILDHOOD RES. Q. 409, 429–30 (1999) (studying a child’s ability to explain and retell a story with the guidance of an adult).

314. See Clarke-Stewart & Beck, supra note 313 (finding that children who discussed films with their mothers articulated a higher quality summary to others than those who did not participate in a post-movie discussion); Catherine A. Haden et al., Mother-Child Conversational Interactions as Events Unfold: Linkages to Subsequent Remembering, 72 SOC’Y FOR RES. IN CHILD DEV. 1016, 1027–30 (2001) (analyzing children’s recall performance and concluding that children best recalled those aspects of tasks they had both worked on and discussed with their mothers).

315. See Markowitz & Nash, supra note 24 at 385–88 (stating that the success rate for those represented by counsel is much higher than those who were not represented).
making ability—specifically, their ability to anticipate the consequences of their actions. A child may not understand the consequences of withholding information from the judge. A child’s inability to fully explain his or her situation will result in the omission of significant details—details which could mean removal from the United States, when relief could otherwise be granted.

The Supreme Court has also recognized that children, or minors, possess a vulnerability different from adults. For instance, when deciding that juveniles could not be sentenced to the death penalty, the Court reasoned minors are categorically less culpable than the average criminal. The Court outlined that minors differ from adults in three major ways: (1) the “lack of maturity and an underdeveloped sense of responsibility [were] found in youth more often than in adults and [were] more understandable among the young,” (2) minors were “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” and (3) the character of a minor was not formed as well as that of an adult.

Based on this Supreme Court precedent, it is clear that children are entitled to certain protections under the law and, in most instances, cannot be treated as adults. While juvenile offenders in custody have the right to appointed counsel, children detained by ICE or Customs and

316. See Eveline A. Crone & Maurits W. Van der Molen, Development of Decision Making in School-Aged Children and Adolescents: Evidence from Heart Rate and Skin Conductance Analysis, 78 CHILD DEV. 1288, 1296–99 (2007) (finding that the ability to make long term, advantageous choices does not develop until late adolescence).

317. See id. (describing the different stages of development for a child).

318. Cf. id. (providing a scientific analysis of a child’s development and decisions due to their development).

319. See Roper v. Simmons, 543 U.S. 551, 553, 569 (2005) (“Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.”).

320. See id. at 561–62 (holding that the Eighth Amendment forbids the imposition of the death penalty on juvenile offenders under eighteen).

321. Id. at 569–70.

322. See id. at 561–62 (providing Eighth Amendment protections for juveniles under the age of eighteen); see also PAULSEN & WHITEBREAD, supra note 307 at 1 (“[J]uvenile courts exist to help children in trouble with the law rather than simply to punish them or make them examples, used by society, to deter others.”).

323. See TEX. FAM. CODE § 31.001(a) (2018) (stating the circumstances in which an individual under eighteen may remove the disability of minority).
Border Patrol merely have the privilege. 324 Yet, children struggle whether they are facing the punishment of potential jail time or facing removal from the United States. 325 While some of the children entering this country find themselves with weak cases and will ultimately be returned to their home countries, others have compelling and valid cases which should enable them to remain in the United States. 326 Therefore, their inability to prepare a successful case, alone, must not be the dividing factor in their status. 327

C. Ineffective Counsel is Essentially No Counsel

Despite the fact that non-citizens have the right to an attorney—just not one provided by the government—there are still various issues with seeking representation. 328 Another issue is non-profit organizations and private attorneys taking on too many cases or lacking sufficient resources.
to help.\textsuperscript{329} Additionally, there is a growing issue of fraud.\textsuperscript{330} Some attorneys have taken advantage of this vulnerable community by providing misguided advice and false hope.\textsuperscript{331} After taking money from immigrants or asylum seekers, these attorneys either fail to represent their clients or provide subpar assistance.\textsuperscript{332} By providing government-appointed counsel, the issues associated with current immigration counsel would improve; and as a result, the immigration court system would become more efficient and effective overall.\textsuperscript{333}

1. \textit{Over-Worked Pro Bono Attorneys and Clinics}

Non-profit organizations play a substantial role in removal proceedings, especially those with scarce funds.\textsuperscript{334} These organizations are the best and, likely, the only option for many in removal proceedings, as pro bono services are often limited due to high demand.\textsuperscript{335} For example, even when non-profits have the capacity to represent a large number of individuals, their contributions amount to less than ten percent of the unrepresented individuals in removal proceedings.\textsuperscript{336} Law school clinics also offer invaluable legal services to immigrants and asylum seekers.\textsuperscript{337} Yet, just like non-profits and other organizations, these clinics are also limited in the number of cases they can take on.\textsuperscript{338}

Non-profit organizations are frequently plagued with insufficient

\textsuperscript{329} See \textit{id}. (emphasizing the low number of available and qualified attorneys in the immigration removal field); see also Katzmann, \textit{supra} note 156 at 10 (discussing the quality of representation in relation to volume of cases).

\textsuperscript{330} See Katzmann, \textit{supra} note 156 at 9 (discussing “stall” lawyers who take advantage of vulnerable immigrants).

\textsuperscript{331} See \textit{id}. (elaborating on several problematic characteristics of attorneys who represent low income individuals).

\textsuperscript{332} See \textit{id}. (discussing the consequences of inadequate counsel for low income individuals who seek representation).

\textsuperscript{333} See generally \textit{id}. at 20–29 (implying the positive consequences that would result from adequate representation).

\textsuperscript{334} Peter L. Markowitz, \textit{Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, a Case Study}, 79 FORDHAM L. REV. 541, 549 (2009).

\textsuperscript{335} See \textit{id}. (describing the role of non-profits and pro bono programs in immigration proceedings).

\textsuperscript{336} \textit{Id}.

\textsuperscript{337} Katzmann, \textit{supra} note 156 at 17.

\textsuperscript{338} \textit{Id}. at 18.
funding. Furthermore, there are systemic forces which prevent pro bono removal defense and continue to keep such organizations underfunded. Non-profits obtain funding from three sources: the federal government, state and local governments, and foundations. Congress established that it is not interested in funding removal defense work. Typically, state and local governments do not provide funding for immigration representation because they view it as a federal issue. Legal Services Corporation (LSC) offers grants and federal funding to a vast majority of non-profit organizations. However, organizations that accept money from LSCs are restricted from representing non-citizens unless that individual falls into an exception. For this reason, organizations which accept money from LSCs cannot represent individuals in the vast majority of removal proceedings.

With such barriers preventing non-profits from effectively representing such a vulnerable community, anyone—including a child—is at risk of persecution or death. By disallowing such organizations

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339. See Markowitz & Nash, supra note 24 at 395 (emphasizing how the underfunding of many non-profit organizations prevent the hiring of support staff, staff attorneys, and attorneys with substantial immigration experience).

340. See Markowitz, supra note 334 (describing the vicious cycle of underfunding and inadequate counsel).

341. Id. at 549–50.


343. See Markowitz, supra note 334 at 550 (distinguishing the state’s role from the federal government’s role in contributing to immigration issues).

344. See Who We Are, LEGAL SERV. CORP., https://www.lsc.gov/about-lsc/who-we-are (explaining the selection process in deciding which non-profit organizations will receive funding).

345. See 45 C.F.R. § 1626.5 (2018) (listing the exceptions for noncitizens to include: permanent residency and limited other lawful statuses; victims of domestic violence; trafficking and other abuses; and special situations such as international child abduction and citizenship in certain Native American tribes or Pacific Island nations).

346. See id. (indicating that many individuals in removal proceedings do not fall into any of the categories—disqualifying them from representation by organizations that accept money from Legal Services Corporation).

347. See Kniffin, supra note 168 at 337–38 (discussing the Supreme Court’s refusal to address the issue—causing hundreds of innocent individuals to be sent back to countries where they face heightened threats from gangs).
to fully defend children and adults with legitimate cases for remaining in the United States, many individuals slip through the cracks.\textsuperscript{348} Organizations representing clients must consider the expense and time commitment, in addition to limits on already restricted funding, the remote location of many detention centers, and ICE’s authority to transfer individuals.\textsuperscript{349} For example, if a child is in DHS custody, counsel may remain reluctant to enter an appearance because, if the child is transferred across the country, counsel cannot rescind representation without the court’s permission.\textsuperscript{350}

2. \textit{Attorneys Taking on Too Many Cases}

The Chairman of the Board of Immigration Appeals, Juan Osuna, expressed discomfort in the past with the amount of represented individuals navigating the immigration court system who were represented so poorly that they would be better off pro se.\textsuperscript{351} Judge Robert Katzmann admitted that incompetent representation in immigration court is something which keeps him up at night.\textsuperscript{352} One study found that many immigration law firms with relatively few lawyers had over one hundred petitions.\textsuperscript{353} One can imagine the potential for major issues to be overlooked when handling a high volume of cases.\textsuperscript{354}

3. \textit{Fraud}

Judge Robert Katzmann expressed concern with some lawyers

\begin{itemize}
\item\textsuperscript{348} Cf. id. at 338 (detailing the unfortunate consequences of inadequate representation for individuals seeking asylum).
\item\textsuperscript{350} Id.; \textsc{Model Rules of Prof’l Conduct} r. 1.16(c) (AM. BAR ASS’N 2018).
\item\textsuperscript{352} Id.
\item\textsuperscript{353} John R. B. Palmer et al., \textit{Why are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review}, 20 GEO. IMMIGR. L.J. 1, 89 (2005).
\item\textsuperscript{354} See Katzmann, supra note 156 at 10 (describing poor briefs submitted to appellate courts—indicating a dwindling quality of representation).
\end{itemize}
representing their clients with anything less than zeal. Judge Katzmann refers to these lawyers as “stall” lawyers. Some lawyers prey on the immigrant community—taking whatever money they can get only to neglect or abandon their clients.

a. Notarios Publicos

Notarios publicos, or immigration consultants, pose serious risks for non-English speaking immigrants seeking legal representation. Notarios publicos, elite attorneys in Latin America, are often confused with notaries public, the officials who witness signatures in the United States. One in five Latino immigrants reported using a notario, or non-attorney immigration consultant, for assistance with a legal issue.

Notarios, based in the United States, have exploited immigrants by collecting substantial fees only to abandon their cases or fail to complete the tasks for which they are hired. Several factors contribute to notario fraud—including the tremendous number of immigration

355. See Mauro, supra note 351 (emphasizing the inadequate and incompetent representation of immigrants).
357. See id. at 20–21 (providing the sad reality of how many attorneys take advantage of low income individuals); see, e.g., Barnes, supra note 197 at 1218 (explaining that attorneys and notarios promise to get people green cards because those are the magic words to convince someone to hire them; and how many individuals end up losing their money long before they find out they were never eligible to remain in the United States in the first place).
358. See Barnes, supra note 197 at 1217 (“In certain cultures, notario has a different meaning. It refers to a select class of elite attorneys in civil law countries like Mexico or other countries in Central and Southern America. Immigrants who are in this country who see advertisements by people who claim to be a notario may think that they’re actually someone who belongs to this elite class of lawyers. But they’re usually not. Notarios in this country don’t have that same stature.”).
359. See Katzmann, supra note 156 at 8 (“Experience has led [those fleeing persecution] to be distrustful and fearful of the government. Having lived life in the shadows of their native lands, they enter this country afraid and often are easy prey for unscrupulous parties.”).
363. Davis, supra note 360 at 145.
cases, need for legal services, language barriers, lack of understanding about the United States legal system, and financial inability to access traditional legal assistance.\textsuperscript{364} Although there are plenty of \textit{notarios} who perform honest work, those who exploit individuals exacerbate the issue of continuing pro se in a removal proceeding.\textsuperscript{365} In such a case, no lawyer at all would have been a better option.\textsuperscript{366} The cost of individuals hiring \textit{notarios} or notaries increases the likelihood that the “client” will be given wrong or bad advice and will waste resources of the court by holding a removal hearing which did not accomplish anything or did not need to happen.\textsuperscript{367}

b. Non-Lawyers

Licensed attorneys are not the only professionals the government allows to represent individuals in removal proceedings.\textsuperscript{368} Among the list of persons allowed to represent immigrants in convoluted matters are law students and law graduates,\textsuperscript{369} reputable individuals of good moral character,\textsuperscript{370} accredited representatives\textsuperscript{371} or officials,\textsuperscript{372} persons formally authorized to practice law,\textsuperscript{373} and former employees of the Department of Justice.\textsuperscript{374} The rationale is that a non-lawyer is better than no lawyer.\textsuperscript{375} However, logic overlooks the value a lawyer plays in

\textsuperscript{364}. \textit{Id.}

\textsuperscript{365}. \textit{See generally} Katzmann, \textit{supra} note 156 at 10 (describing the impact on the American legal system that individuals who must proceed pro se impose and the challenges brought to both the courts and the individuals themselves).

\textsuperscript{366}. \textit{See generally id.} at 9 (revealing that judges often see unsuccessful cases that could have had a substantially different outcome had that individual not been represented by that lawyer).

\textsuperscript{367}. \textit{See id.} at 8 (“\textit{A}necdotal evidence suggests that not all \textit{notarios} and travel agents are competent or honest; travel agents often refer the immigrants to persons with whom they have relationships, but who are not licensed to practice law.”).

\textsuperscript{368}. 8 C.F.R. § 1292.1 (2018).

\textsuperscript{369}. \textit{Id.} at § 1292.1(a)(2).

\textsuperscript{370}. \textit{Id.} at § 1292.1(a)(3).

\textsuperscript{371}. \textit{Id.} at § 1292.1(a)(4).

\textsuperscript{372}. \textit{Id.} at § 1292.1 (b).

\textsuperscript{373}. \textit{Id.}

\textsuperscript{374}. \textit{Id.} at § 1292.1(c).

\textsuperscript{375}. \textit{See M. Isabel Medina, Challenges of Facilitating Effective Legal Defense in Deportation Proceedings: Allowing Nonlawyer Practice of Law Through Accredited Representatives in Removals, 53 S. Tex. L. Rev.} 459, 462 (2012) (“The argument for nonlawyer representation is simple: having a nonlawyer help with representation is better than no lawyer at all, and nonlawyers can sometimes provide better assistance than lawyers.”).
immigration proceedings and disregards how much is on the line for an individual. The Ninth Circuit recognized the problems with allowing unlicensed legal representatives to take an individual’s life in their hands. However, the Department of Justice holds the problem is not severe enough to provide remedies for those individuals wronged by their unlicensed representatives.

One of the most crucial elements of representing a client is determining whether the client is entitled to relief and if the attorney can obtain that relief. The initial client meeting means more than filling out a simple intake form and conducting a short interview. Difficult and emotionally charged questions must be asked to effectively determine a strategy and identify any potential obstacles in the case. The first thing an immigration lawyer must determine is if an individual has a claim to remain in the United States and if so, what path can be taken to keep them in the country. The lawyer must know what questions to ask and examine all the facts to determine which facts will help the client and which facts will hurt the client. These critical skills can only be

376. See AM. IMMIGR. LAWYERS ASS’N, supra note 141 (“While some cases may not require sophisticated analysis or sustained advocacy, there are far too many pitfalls or hidden dangers in immigration law that require expertise to navigate.”).

377. See e.g., Hernandez v. Mukasey, 524 F.3d 1014, 1018–19 (9th Cir. 2008) (“In sum, non-attorney immigration consultants simply lack the expertise and legal and professional duties to their clients that are necessary preconditions for ineffective assistance of counsel claims.”).

378. See id. at 1020 (holding that an alien may not pursue an ineffective assistance of counsel claim with respect to the conduct of a non-lawyer if they knowingly rely on assistance from someone not authorized to practice law).

379. See generally MODEL RULES OF PROF’L CONDUCT r. 3.1 (AM. BAR ASS’N 2018) (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”).

380. See Barnes, supra note 197 (explaining the expectations of an immigration lawyer and providing an extensive list of questions immigration lawyers should be prepared to ask their clients).

381. See id. at 1218–20 (providing guidelines for the types of questions that an immigration attorney should ask their client).

382. See id. at 1219 (“The attorney has to be able to understand exactly what position this person is in and where they want to get to from there. The attorney needs to understand the client’s history and be able to effectively relay that history to either the INS or the immigration judge.”).

383. Cf. Steinberg, supra note 192 (arguing that developing youths may lack capacities to process information and exercise reason and quality in making trial decisions).
gained through legal education and meaningful experience.\textsuperscript{384}

D. The Right to Counsel is Currently Afforded in Certain Civil Proceedings

Arguments against government-provided counsel in immigration proceedings centers around the fact that immigration proceedings are civil, not criminal.\textsuperscript{385} Thus, there is no constitutionally protected right to representation.\textsuperscript{386} While civil courts are not bound to provide counsel, courts have made several exceptions and appointed counsel in civil matters.\textsuperscript{387} For example, the right to representation is afforded to juveniles in juvenile criminal matters, a process classified as civil.\textsuperscript{388}

\textsuperscript{384} See RHODE ET AL., supra note 194 (“Thinking like a lawyer . . . lies in the abilities (a) to view fact situations as ‘the law’ understand them, and (b) to differentiate strong from weak legal arguments. These . . . come from full and prolonged immersion in the law . . . there is no short cut or substitute to learning to think like a lawyer.”); see also JORDAN FURLONG, Core Competence: 6 New Skills Now Required of Lawyers, LAW TWENTY-ONE (July 4, 2008), https://www.law21.ca/2008/07/core-competence-6-new-skills-now-required-of-lawyers/ [https://perma.cc/9JX9-GWQA] (opining the need for lawyers to have emotional intelligence, financial literacy, project managerial skills, technological affinity, and time management skills—in addition to the traditional skills of analytical ability, attention to detail, logical reasoning, persuasiveness, sound judgment, and writing ability).

\textsuperscript{385} See INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (holding that the exclusionary rule did not apply to civil proceedings such as petitioner’s deportation hearing, since the purpose of the exclusionary rule was to deter police misconduct, and that did not exist in this situation); see also C.J.L.G. v. Sessions, 880 F.3d 1122, 1122 (9th Cir. 2017), rev’d en banc, 923 F.3d 622 (9th Cir. 2019) (holding regardless of the strength of the minor alien’s interest in not being deported, he did not show a necessity for government-funded, court-appointed counsel to safeguard his due process right to a full and fair hearing); United States v. Tejada, 255 F.3d 1 (1st Cir. 2001) (recognizing that the Sixth Amendment guarantees applies to those accused of a crime, not immigrant detainees in civil matters).

\textsuperscript{386} See, e.g., Tejada, 255 F.3d at 4 (recognizing that immigrants do not have a constitutionally protected right to representation).

\textsuperscript{387} See In re Gault, 387 U.S. 1 (1967) (holding that juveniles accused of crimes in a delinquency proceeding must be afforded many of the same due process rights as adults); see also Lassiter v. Dep’t of Soc. Servs., 452 U.S. 18, 33 (1981) (concluding that whether due process required the appointment of counsel for indigent parents in termination of parental proceedings was left to the trial court in the first instance).

\textsuperscript{388} See In re Gault, 387 U.S. at 36 (“The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.”); see also Powell v. Alabama, 287 U.S. 45, 69 (1932) (“[the child] requires the guiding hand of counsel at every step in the proceedings against him.”); Kent v. United States, 383 U.S. 541, 561–62 (1966) (holding that it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefore).
Furthermore, the legislature and the courts recognize that in select circumstances, a parent at risk of losing fundamental parental rights has the right to a lawyer if the parent is unable to afford one. When the court provides counsel, the common theme is that providing legal representation is in the best interest of the child. Therefore, it is not unfathomable for the United States to keep the best interest of the child in mind in removal proceedings.

1. **Juveniles are Provided Government-Appointed Counsel in Civil Court**

“Judges must ensure due process in juvenile court. They must ensure that children are presumed indigent for purposes of counsel, that they are appointed counsel as early as possible, and that the right to waive counsel remains theirs and can only occur following consultation with an attorney.” Children who find themselves at odds with the law are afforded several due process rights. However, juvenile courts are civil courts, often known as “family courts.”

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389. See 25 U.S.C. §1912(b) (2018) (“[A] Native American parent shall have the right to court-appointed counsel in any removal, placement, or termination proceeding.”); see also Lassiter, 452 U.S. at 33 (concluding that whether due process required the appointment of counsel for indigent parents in termination of parental proceedings was left to the trial court in the first instance); In re A.S.A., 852 P.2d 127, 129–130 (Mont. Sup. Ct. 1993) (holding that the due process clause of the Montana Constitution guarantees an indigent parent the right to court-appointed counsel in proceedings brought to terminate parental rights); Flores v. Flores, 598 P.2d 893, 895, 897 (Alaska 1979) (holding that the due process clause of the Alaska Constitution guarantees the right to counsel in child custody proceedings where one party is represented by a public legal agency and the other party is indigent).

390. See In re Gault, 387 U.S. at 55, 58–59 (holding that juveniles accused of crimes in a delinquency proceeding must be afforded many of the same due process rights as adults); see also Lassiter, 452 U.S. at 33 (concluding that whether due process required the appointment of counsel for indigent parents in termination of parental proceedings was left to the trial court in the first instance).

391. See, e.g., In re Gault, 387 U.S. at 55, 58–59 (focusing on the best interests of the child).


393. In re Gault, 387 U.S. at 36.

394. See FELD, supra note 23 at 14 (“The *parens patriae* doctrine, which underlay both house of refuge and the juvenile court jurisdiction, drew no distinction between criminal and non-criminal youthful conduct. This supported the Progressives’ position that the juvenile court proceedings were civil rather than criminal in nature.”); see also GENNARO F. VITO & CLIFFORD E. SIMONSEN, *JUVENILE JUSTICE TODAY* 43, 127 (Frank Mortimer, Jr. et al., eds. 4th ed. 2004).
Historically, juveniles were stripped of their legal rights because of the civil distinction. The purpose of juvenile court is to separate harsh adult-punishment administered by the criminal justice system from children and the youth.

*In re Gault* transformed the juvenile system, affording basic due process protections to juveniles while maintaining the rehabilitative goal embedded within the system. Additionally, in 1974, Congress passed legislation which called for the separation of criminals and troubled youth in need of rehabilitation. The legislation further promoted the utilization of resources to more effectively deal with youthful criminal offenders.

Within the juvenile system, discretionary and individualized decisions are tailored to each child. This approach fosters reform of the child’s behavior rather than focusing on a punitive outcome. It cannot be ignored that—regardless of what brought an individual before that judge—the individual deserves the right to be heard and have

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395. Vito & Simonsen, supra note 394.

396. See id. (“The separate system and the perpetuation of the doctrine of parens patriae have resulted in a system that largely ignored the legal rights of juveniles.”).

397. See David S. Tannenhaus, *The Constitutional Rights of Children: In Re Gault and Juvenile Justice* 70 (Peter Charles Hoffer & N.E.H. Hull eds., 2011) (discussing that such procedural due process protections strengthen the juvenile court because those protections reinforce the importance of having a less punitive system for juveniles). But see Kent v. United States, 383 U.S. 541, 554 (1966) (noting that the children involved in certain juvenile court proceedings were being deprived of constitutional rights and at the same time were not given the rehabilitation promises); Paulsen & Whitebread, supra note 307 at 1 (“juvenile courts exist to help children in trouble with the law rather than simply to punish them or make them examples, use by society, to deter others.”).

398. See In re Gault, 387 U.S. at 36 (“The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.”).


400. Id.

401. Feld, supra note 23 at 12.

402. Id. at 14; see Paulsen & Whitebread, supra note 307 at 1–2 (describing the unfortunate effects of criminalizing children, leading to the reasons why courts wish to meet the needs to children and serve their best interest).
representation to guard their liberties. In re Gault ended the presumption that civil juvenile courts were beyond the purview of constitutionally protected due process. The juvenile court system made tremendous strides in improving due process and justice for our youth. Consequently, this approach must also be applied in immigration proceedings.

Immigration is civil, but it is not unprecedented to offer constitutional protections in such matters. Immigration court is still court. Just as the doctrine of parens patriae damaged the rights and needs of juveniles, a rigid understanding of immigration as a civil matter also undermines the rights and lives of immigrants. The mission of the immigration court should be to balance the needs of individuals entering the United States with our needs as a country. As discussed previously, the Supreme Court has already supported the notion by affording certain protections to minors in juvenile courts.

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403. See Harwood, supra note 97 at 13–14 (revealing that many raids are initiated by disgruntled citizens); see also Tanenhaus, supra note 397 at 71–72 (highlighting the uproar regarding decisions like Miranda v. Arizona and In re Gault).

404. 387 U.S. at 35.

405. See generally Vito & Simonsen, supra note 394 at 163–69 (describing a historical overview on the juvenile justice systems and the cases that shaped juveniles’ rights today).

406. Kent v. United States, 383 U.S. 541 (1966); In re Gault, 387 U.S. at 36; see Law, supra note 156 at 190–93 (arguing that due process is not stagnant because it continues to evolve as generations progress).

407. Cf. Vito & Simonsen, supra note 394 (explaining the procedural nature of the civil system for juveniles); see Mark Walsh, A Sour Note from Gideon’s Trumpet: Playing the Blues for the Right of Counsel in Civil Cases, 97 A.B.A. J. 14, 16 (2011) (“Georgetown University law professor Peter B. Edelman, an advocate for appointed counsel in civil cases, says the court majority’s view about procedural safeguards as an alternative to counsel was unrealistic. ‘I don’t think the court understands what it’s like to go into court without a lawyer,’ Edelman says. ‘It would be good for the whole lot of them to go spend the day in landlord-tenant court and see if they have the same view.’”).

408. Paulsen & Whitebread, supra note 307 at 5; see Vito & Simonsen, supra note 394 at 13–14 (explaining the origin of parens patriae).

409. Cf. Vito & Simonsen, supra note 394 at 43 (keeping juveniles confined in a mere civil system hindered their rights to a speedy trial, bail, confronting one’s accuser, and counsel).

410. Cf. id. at 127 (quoting Robert E. Shepard Jr. when he stated, “the mission of the juvenile or family court in addressing delinquency should be defined by carefully balancing competing, yet complementary goals—the welfare of children and the protection of the community.”).

411. 387 U.S. at 36; Kent, 383 U.S. at 541.
Critics will analogize the fact that juvenile courts are closely related to criminal courts as these juveniles are being charged with a crime; thus, their life and liberty are on the line. While that is undoubtedly true, individuals placed in removal proceedings in the only country they have ever called home are also at stake of losing their life and liberty.

Immigration law is complex, and it should not be confined within the due process boundaries of civil law. Given the high stakes and multifaceted nature of these cases, every individual should be appointed counsel if they cannot afford it, and their cases should be looked at in an individualized manner as with juvenile law. The goal of the juvenile system is to determine why the child is in court, meaning, why has the child deviated from the law or social norms? This approach must be implemented in the immigration system.

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412. See State v. Borst, 154 N.W.2d 888, 895 (Minn. 1967) (discussing that the possible loss of liberty by an innocent person who does not know how to defend himself is too sacred a right to be sacrificed); see generally Vito & Simonsen, supra note 394 at 138–52 (providing an overview of the juvenile court system).

413. See U.S. CITIZENSHIP AND IMMIGR. SERV., supra note 62 (qualifying for DACA requires certain age and arrival standards, thus, many individuals that qualify for DACA have only known the United States as their home).

414. See Immigration and Nationality Act of 2018 § 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i) (2018) (stating that an alien is barred from re-entering the United States within five years after their first removal); cf. In re Winship, 397 U.S. 358 (1970) (contending that the loss of liberty is no different for a child as it is for an adult; and the loss of liberty is no different for an immigrant than it is for a citizen).


416. See Arnold & Porter, supra note 22 (“[T]he stakes for many noncitizens are high: they face loss of livelihood, permanent separation from U.S. family members or even persecution or death if deported to their native countries.”).


418. See Feld, supra note 23 at 16 (stating that the pressing issues in a juvenile proceeding are typically the child’s background and welfare rather than the commission of a specific crime).

419. See Vito & Simonsen, supra note 394 at 157 (requiring reflection on juvenile proceedings to have a realistic, humane, and practical method of processing and treating juveniles).
country, we should uncover why this child came to the United States and seek reasonable solutions.\footnote{Cf. Feld, supra note 23 at 16 (requiring a determination of why children arrive alone or why their families have decided to flee their countries as an important step forward in assessing how the United States can help these individuals struggling with life changing decisions); Paulsen & Whitebread, supra note 307 at 3 (reiterating the difficult determination of what disposition would be in the best interest of the child and the best interest of the state).}

2. \textit{Indigent Parents Have the Right to Appointed Counsel in Parental Termination Cases}

Another area of civil law where the court and states have recognized the right to counsel is in parental rights termination cases.\footnote{Tex. Fam. Code. § 107.013(a); 25 U.S.C. § 1912 (b) (2018); see In re M.S., 115 S.W.3d 534, 544 (Tex. 2003) (declaring that the statutory right to counsel in parental-rights termination cases embodies the right to effective counsel); see also Lassiter v. Dep’t of Soc. Servs., 452 U.S. 18, 33 (1981) (holding that in certain situations, parents must be appointed counsel when their parental rights are at risk of termination).} In \textit{Lassiter v. Department of Social Services},\footnote{452 U.S. 18, 33 (1981).} the Supreme Court recognized that a parent’s right to counsel should be determined on a case-by-case basis.\footnote{Lassiter v. Dep’t of Soc. Servs., 452 U.S. 18, 33 (1981).} The Court noted that trial courts should apply the balancing test of \textit{Mathews v. Eldridge}\footnote{424 U.S. 319, 335 (1975).} when determining whether to appoint counsel for an indigent parent in a termination case.\footnote{Lassiter, 452 U.S. at 26–27.} In \textit{Lassiter}, the Court determined the parent’s interest in their child is an extremely important one—as is the state’s concern with the welfare and best interest of the child.\footnote{Id.} Additionally, the government has a great interest in avoiding the cost of lengthened proceedings in the event of erroneous decisions which could have been avoided with the presence of a lawyer.\footnote{Id.}

It is easy to see how these factors can fit into an evaluation of the right to counsel for migrant children.\footnote{See id. (referring to the balancing test used in parent-termination cases and the loss of personal freedom faced by migrant children).} It is in the individual’s best interest to have a fair opportunity to present his or her case.\footnote{See id. (describing the best interest test in the parental termination context).} Like \textit{Lassiter}, the government is attempting to ensure it is properly evaluating each individual’s situation and avoiding the cost of lengthy proceedings as a
result of erroneous decisions.430 More importantly, the risk of an
erroneous decision is exceptionally high for an individual who does not
know the ins and outs of the United States immigration system.431

Furthermore, the courts and states show there are due process
protections for appointed counsel in other situations which do not
necessarily fit the presumed mold of loss of liberty.432 Without a lawyer,
indigent parents would be stripped of their rights.433 Just as a lawyer
will seek a solution for their client in those instances, the same should be
done in immigration proceedings.434 It is equally important we protect
the liberties of immigrants—whether they are here legally or not—just as
we protect the liberties of citizen parents at risk of losing their
children.435

Given that courts have held that juveniles receive appointed counsel in
civil and family matters, that right should be extended to indigent migrant
children as well.436 The benefits of protecting the rights of migrant
children far outweigh the government’s interest in not appointing
counsel.437 In addition to avoiding wasting court resources, fraud will

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430. See id. (providing the government’s burden in parental termination cases).
431. See id. (emphasizing the intricate balancing test that takes place in parental termination
cases because of the liberty interests at stake).
432. See In the Interest of K.A.W., 133 S.W.3d 1, 12 (Mo. 2004) (en banc) (implying a due
process right in the parental termination context).
433. See id. (discussing the liberty interests that a parent can lose in a parental termination
case, and therefore the need for counsel).
434. See id. (emphasizing the liberty interests at stake for parental termination cases of
citizens and how that right should be extended to non-citizens under American jurisdiction).
435. See id. (protecting the liberty interest in the parent-child relationship).
436. See In re Gault, 387 U.S. at 30–31 (holding that juveniles accused of crimes in a
delinquency proceeding must be afforded many of the same due process rights as adults); see also
Lassiter, 452 U.S. at 33–34 (holding that in certain situations indigent parents have the right to
counsel in parental termination cases).
437. See Aguilera-Enriquez v. INS, 516 F.2d 565, 568 (6th Cir. 1975) (“[T]he test for
whether due process requires the appointment of counsel for an indigent noncitizen is whether, in
a given case, the assistance of counsel would be necessary to provide ‘fundamental fairness.’”); see,
e.g., Sunday v. Att’y Gen. United States, 832 F.3d 211, 218–19 (3d Cir. 2016) (holding that
removal is not a punishment for a crime therefore, there is no need for the appointment of counsel);
consideration of three distinct factors: first, the private interest that will be affected by the official
action; second, the risk of an erroneous deprivation of such interest through the procedures used,
and the probable value, if any, of additional or substitute procedural safeguards; and finally, the
government’s interest, including the function involved and the fiscal and administrative burdens
that the additional or substitute procedural requirement would entail.”).
be deterred, and the well-being of children will be adequately protected.438

III. SOLUTION

“A lawyer is often the only person who could thread the labyrinth” of immigration law and regulations.439 Immigration law is reform law, and it is constantly changing.440 What has not changed since the late 1880s, however, is the right to appointed counsel in immigration proceedings.441 Providing a lawyer to everyone in a removal proceeding is not a catch-all to solve the issues we see with migrant children and unaccompanied minors.442 The reason why people decide to make the dangerous journey through Central America, overstay their visas, or cross over illegally is a much more complicated decision than many impulsively assume.443 With visa wait times well over twenty years, people become desperate to be with their loved ones.444 Furthermore, those who face gang-ridden, war-torn, torturous situations, and the likes should not be demonized for escaping to a better life.445

In addition to Congress taking steps to provide funding for legal representation, the barriers imposed by Legal Services Corporation must
also be loosened. Moreover, legal education should encourage more students to pursue immigration law. Students should not only consider public service immigration law, but also consider government attorney positions, such as ICE and USCIS as well. In order to improve our immigration system, we need good lawyers on both sides. Additionally, loan forgiveness programs, like the Public Service Loan Forgiveness program, should offer additional assistance to those who choose to serve undocumented individuals in their removal proceedings. Opportunities to alleviate some of the burdensome debt will encourage recent graduates to pursue careers in immigration public service.

A. Congress Should Appropriate Funding to Provide Legal Representation to Children

While pro bono and non-profit organizations play a tremendous role in protecting the rights of unaccompanied minors, the question has been asked: why burden the government with the costs of non-citizens? The stark reality is that nearly thirty percent of unaccompanied migrant

446. See Laura K. Abel & David S. Udell, If You Gag the Lawyers, Do You Choke the Courts - Some Implications for Judges When Funding Restrictions Curb Advocacy by Lawyers on Behalf of the Poor, 29 FORDHAM URB. L.J. 873, 879 (2002) (implying that the legal services restrictions are too burdensome).


451. See id. (emphasizing the purpose of loan repayment assistance programs and how they promote public service practice).

452. Wynne, supra note 205 at 455–56.
children do not receive legal assistance.\textsuperscript{453} Despite the solutions lawmakers have advanced to combat the issue of unaccompanied children,\textsuperscript{454} the solution is not to send them back.\textsuperscript{455} Instead, the solution is to assess the child’s situation and determine what we as a country can do to help them and prevent future harm.\textsuperscript{456} Congressional leaders are not oblivious to this issue—there have been numerous proposals to appropriate funds for this issue in the past.\textsuperscript{457} Unfortunately, each effort has failed.\textsuperscript{458} Until Congress works to pass such legislation, it is important to stress the benefits government-appointed counsel will have on this issue.\textsuperscript{459}

\textbf{1. The Appointment of Counsel Saves Time and Resources by Screening Children for Viable Claims}

By appointing an attorney to children in removal proceedings, time and money will be saved within the court system.\textsuperscript{460} Properly trained

\textsuperscript{453} Id.
\textsuperscript{454} See, e.g., Donovan Slack & Erin Kelly, Baldwin, Johnson Differ on Kids Crossing U.S. Border, GREEN BAY PRESS GAZETTE (July 9, 2014, 9:19 PM), https://www.greenbaypressgazette.com/story/news/politics/2014/07/09/baldwin-johnson-solutions-children-border/12432611/ [https://perma.cc/D2AZ-VBN6] (“‘I can’t think of a more humane thing to do—even though it maybe sounds a little cruel,’ he said. ‘The most compassionate thing to do would be to send planeloads full of those children back to their parents in a safe manner, in as humane a fashion as possible, so that they don’t subject their kids to that very dangerous journey where they’re getting raped and they’re getting killed.’”).
\textsuperscript{456} See id. (sharing ideas on what the United States must do to remedy the issue of family separation and what the United States can do by working with other countries to prevent individuals from fleeing).
\textsuperscript{457} See, e.g., Border Security, Economic Opportunity, and Immigration Modernization Act, 113 H.R. 15 (2013) (proposing that “the Attorney General appoint counsel, at the expense of the Government if necessary, to represent an alien in a removal proceeding who has been determined by the Secretary to be an unaccompanied alien child, is incompetent to represent himself or herself due to a serious mental disability, or is considered particularly vulnerable when compared to other aliens in removal proceedings, such that the appointment of counsel is necessary to help ensure fair resolution and efficient adjudication of the proceedings”).
\textsuperscript{458} See, e.g., id. (illustrating an attempt to solve the issue of unaccompanied children, but failing).
\textsuperscript{459} See ARNOLD & PORTER, supra note 22 at 23 (listing the benefits of appointed counsel).
\textsuperscript{460} See generally BOSTON BAR ASS’N TASK FORCE ON UNREPRESENTED LITIGANTS, REPORT ON PRO SE LITIGATION 51–53 (Aug. 1998), https://www.americanbar.org/content/dam/
attorneys should be able to work with individuals and children to assess their issues and seek relief. In many cases, these adults and children may not have the right to stay in the United States. On the other hand, there are still many others who have some form of relief enabling them to stay in the United States and must be afforded an opportunity to seek such relief. More importantly, the children must be able to seek such relief competently with a lawyer.

It should come as no surprise that each case is different and comes with its own unique set of facts. Thus, each case must be looked at individually, and the only way to do that competently is with the help of a lawyer. As mentioned in the preceding sections, there are several forms of relief for undocumented adults and children to pursue. In order to properly seek such relief, all of the facts must be looked at, and further investigation may be needed to flesh out facts to prove there is a viable claim for relief. Investigations require time and resources

461. See AM. IMMIGR. LAWYERS ASS’N, supra note 141 (“[I]mmigration attorneys have been the gatekeepers for immigrants, defending and advocating for their rights and needs . . . . Likewise, immigrants have relied on immigration attorneys for their knowledge and expertise to navigate the complexities of U.S. immigration law . . . .”); cf. BOSTON BAR ASS’N TASK FORCE ON UNREPRESENTED LITIGANTS, supra note 460 (emphasizing how individuals who represent themselves are destined to lose).

462. See generally FAMILY, supra note 449 (providing a brief overview of the skills needed to defend a client from removal or to reunite families with their loved ones through immigration law).

463. See AM. IMMIGR. LAWYERS ASS’N, supra note 141 (“[I]mmigration attorneys have been the gatekeepers for immigrants, defending and advocating for their rights and needs . . . . Likewise, immigrants have relied on immigration attorneys for their knowledge and expertise to navigate the complexities of U.S. immigration law . . . .”).

464. Cf. BOSTON BAR ASS’N TASK FORCE ON UNREPRESENTED LITIGANTS, supra note 460 at 52 (stressing the challenges judges face dealing with pro se litigants).

465. See AM. IMMIGR. LAWYERS ASS’N, supra note 141 (discussing that immigration clients require different approaches which are unique to their individual situations, experiences, and abilities).

466. Id.

467. See, e.g., id. (providing the different avenues that immigrants can take when looking for solutions—but needing an attorney for every avenue).

468. Id.
which many lay adults—let alone children—do not have the ability to do alone.\footnote{Cf. Stephen McG. Bundy & Einer Richard Elhauge, Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation, 79 CALIF. L. REV. 315, 327–30 (1991) (showing the benefits of investigating and how a lawyer’s expertise can play a role in the outcome of a case).}

Avoiding frivolous claims and unnecessary continuances will slowly clear up the backlog that immigration courts face today.\footnote{See generally TRAC IMMIGR., supra note 200 (illustrating data on the past, current, and future backlogs of immigration courts).} By removing claims from individuals who simply do not have a way to remain in the United States legally, fewer court resources are used, and judges can focus their time and energy on meritorious claims—thus better serving our community.\footnote{See generally Ingrid V. Eagly & Steven Shafer, Article, A National Study of Access to Counsel in Immigration Court, 164 U. PA. L. REV. 1, 63–75 (2015) (detailing a data analysis on the impact of cases with counsel versus pro se litigants in immigration courts).} If someone does not have a valid claim to remain in the United States, they can be advised on the ways they could potentially return legally.\footnote{See generally FAMILY, supra note 449 at 84 (summarizing the skills needed to defend a client from removal or to reunite families with their loved ones via immigration law).}

2. The Appointment of Counsel Will Prevent Fraud and Ineffective Counsel

Fraud and ineffective counsel are other glaring issues that undocumented adults and children face.\footnote{See Iturribarria v. INS, 321 F.3d 889, 893–94 (9th Cir. 2003) (detailing how prevalent issues involving ineffective counsel are in immigration court); see also Katzmann, supra note 156 at 20–21 (“[W]hen immigrants fall prey to… lawyers who do not serve them well, their fates are all but sealed”).} With dissatisfactory attorneys taking advantage of low-income families, many undocumented individuals are left with a false sense of hope and are out thousands of dollars at the end of the day.\footnote{See Langford, supra note 362 at 136 (illustrating the misconduct of some lawyers and how their actions have jeopardized their clients from ever having legal status in the United States); see also Eagly & Shafer, supra note 471 at 48–49 (discussing the issues with poor attorneys and how they take advantage of their client’s vulnerabilities).} Not only are some given unrealistic promises for all the money they have to their name, but they are also drawn to completely incompetent immigration\footnote{See generally TRAC IMMIGR., supra note 200 (illustrating data on the past, current, and future backlogs of immigration courts).}
counsel. As a result, the attorney’s strategy is flawed, and their client is deported when they should not have been. Moreover, because of the current restriction on LSC funding for undocumented immigrants, these undocumented individuals are unable to seek pro bono or low bono representation to seek redress.

Appointment of lawyers to indigent undocumented children will reduce the number of individuals and families impacted by such fraudulent practices. These undocumented children will also be afforded an opportunity to have a competent lawyer review their cases. Moreover, it will reduce the amount of waste within the system caused by fraudulent attorneys and non-attorneys.

A competent attorney is the key to justice within the United States court system. It is for this reason Americans enjoy the right to appointed counsel in criminal cases, if they are unable to afford a lawyer. This right has saved countless individuals from false accusations and abusive tactics. Additionally, this right has helped those found guilty by preventing them from serving cruel and unusual punishments sought and imposed by prosecutors and judges who lose
With the right immigration lawyer, a client can avoid much of the injustice which might be brought upon them. Our system is a burden-shifting justice system; thus, while the ICE attorney must prove why this individual is removable or inadmissible, it is not the end of the line. A good immigration attorney will seek avenues to help their client and not merely allow the government to remove an individual without a fight.

### B. The Barrier That Prohibits Organizations From Using LSC Funds to Assist Non-Citizens Should be Removed

Currently, LSC funds have several restrictions, such as barriers on representing prisoners in civil matters and representing undocumented individuals. These restrictions cause various issues when representing low-income and underrepresented communities. In some instances, grantees of LSC funds are unable to use separate funds to represent individuals, because LSC funds could inadvertently fund cases which they oppose.

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484. See, e.g., Lobato v. State, 96 P.3d 765, 772–73 (Nev. 2004) (highlighting the courts’ vulnerability to reversible errors); People v. Thomas, 8 N.E.3d 308 (N.Y. 2014) (bringing attention to the abusive tactics sometimes used by interrogators).

485. See Osorio, 18 F.3d at 1028 (highlighting the complexity of immigration proceedings by showing how even immigration judges and the Bureau of Indian Affairs misinterpret precedent); see also Markowitz & Nash, supra note 24 at 386 (stressing the important roles lawyers face in identifying viable claims for relief); see Hill, supra note 241 at 67–68 (discussing the importance of having a lawyer to “check the efficiency” of the immigration system); see generally Katzmann, supra note 156 at 9 (discussing the fraud and ineffective counsel Robert Katzman has seen during his time on the bench).

486. See INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984) (holding that the Bureau of Indian Affairs has the burden of proof to show that an individual is deportable by clear, unequivocal, and convincing evidence).

487. See generally FAMILY, supra note 449 (focusing on the ways immigration law can be used to help others).

488. 45 C.F.R. § 1637.3 (2018).

489. Cf. § 1626.5 (limiting funds only to lawfully admitted aliens).

490. See id. (noting the current restrictions on undocumented individuals); see also § 1637.3 (prohibiting representation for low income prisoners in civil matters); Abel & Udell, supra note 446 at 894–96 (burdening courts by eliminating legal services for low-income individuals).

491. See 45 C.F.R. §1626.5 (2018) (allowing such restrictions on undocumented individuals allows for an already vulnerable community to face greater obstacles); see also § 1637.3 (prohibiting representation for low income prisoners in civil matters leaves them vulnerable to abuse); see generally Abel & Udell, supra note 446 at 877–79 (restricting Legal Services Corporation funds in a myriad of ways).
Legal scholars studying the impact on legal social justice conclude such restrictions must dissolve in order to preserve justice for all. These barriers do not allow grantees to represent undocumented individuals in civil matters. Many of these undocumented individuals lack the necessary financial resources and support to defend themselves—not only in immigration matters—but also in basic civil matters, such as landlord-tenant and wage issues.

By allowing grantees of LSC funds to assist undocumented individuals, lawyers can assess their issues and determine the best route. This could mean applying for relief such as asylum, or advising their client that their best route is to voluntarily depart and avoid any further bars on their admission. Eventually, this will clear up the court system and prevent delays which are often brought on by pro se litigants.

492. See Abel & Udell, supra note 446 at 896 (stating how keeping these restrictions will burden courts).

493. See id. at 877–79 (restricting access to legal services to specific categories that exclude many lawful immigrants).

494. See Rebekah Diller & Emily Savner, Restoring Legal Aid for the Poor: A Call to End Draconian and Wasteful Restrictions, 36 FORDHAM URB. L.J. 687, 703 (2009) (discussing that many undocumented individuals face hardship when searching for representation to defend their basic rights); see, e.g., THE LEGAL AID SAFETY NET: A REPORT ON THE LEGAL NEEDS OF LOW-INCOME ILLINOISANS (2005), http://ltf.org/wp-content/uploads/2013/02/legalneeds.pdf [https://perma.cc/C58J-SXXW] (describing an increase in the number of poor Latinos and the general legal issues they face).

495. See id. at 711 (describing how the authorization of lawyers to freely represent their clients without Legal Service Corporation restrictions produces more efficient results); contra Abel & Udell, supra note 446 at 896 (arguing that by removing Legal Service Corporation restrictions, lawyers and courts are better able to administer justice).


497. See generally BOSTON BAR ASS’N TASK FORCE ON UNREPRESENTED LITIGANTS, supra note 460 (discussing the findings on issues judges and court staff see with pro se litigants).
C. Representation in the Immigration Field Will Improve Through the Implementation of More Programs That Encourage Students and Practicing Attorneys to Pursue Immigration Law

Legal educators acknowledge that many law schools are graduating future lawyers who are not prepared to practice. One solution to this issue is to have a greater emphasis on public service during law school. Allowing students to interact and represent real clients with real legal problems helps to fill the gap between legal education and real world practice. This solution can easily transfer over to immigration specific issues. Offering more opportunities for students in law school to practice immigration law will not only serve the underrepresented undocumented community in need of legal services, but it will also shape our future immigration attorneys.

There is a need for good immigration attorneys—who will take each case seriously and seek the proper relief; advise their clients of any benefits they may be entitled to; but also advise their clients of any ill consequences that they can expect. Pro bono and public service

498. Rankin, supra note 448.
499. See generally id. at 19–27 (detailing why students must participate in more public service and pro bono programs in school to better prepare themselves for practice).
500. See Douglas L. Colbert, Clinical Professors’ Professional Responsibility: Preparing Law Students to Embrace Pro Bono, 18 GEO. J. ON POVERTY L. & POL’Y 309, 325 (2011) (setting forth the reality that law students and their mentoring faculty are natural resources for addressing injustice and filling the gap between poverty and access to counsel); see also Rankin, supra note 448 at 22–27 (highlighting the important role public service plays not only in legal education but serving the community as well); Margaret Martin Barry et al., Teaching Social Justice Lawyering: Systematically Including Community Legal Education in Law School Clinics, 18 CLINICAL L. REV. 401, 408 (2012) (discussing that clinical legal education introduces students to the real world of lawyering).
501. See Rankin, supra note 448 (signifying the importance of public service—including immigration work).
502. See id. at 22 (“If we want students to understand and embrace their professional and ethical obligations, there is no substitute for actual public service.”); see also Barry et al., supra note 500 at 407 (“[Clinical legal education] teaches lawyering skills within the context of client representation, transactional lawyering, trial work and other forms of advocacy.”).
during law school helps shape the core lawyering skills which are essential to not only public service immigration representation but also private practice.\textsuperscript{504} Educators found public interest work results in higher student motivation and engagement, thus, higher performances later in practice.\textsuperscript{505} More representatives available, not only as law students but as practicing attorneys, will help bridge some of the gaps between unrepresented children and represented children.\textsuperscript{506}

Encouraging the practice of immigration law in school is an important step; however, with mounting student debts and the uncertainty of public service loan forgiveness programs, the encouragement must not stop at graduation.\textsuperscript{507} Currently, students have an opportunity to have their student loans forgiven after ten years and 120 payments if they decide to work in a qualified public service or government position.\textsuperscript{508} While issues surrounding such programs are beyond the scope of this comment, the concept and implementation is one which can also help pro se undocumented children.\textsuperscript{509}

Allowing loan forgiveness for individuals who chose to practice immigration law will incentivize more competent lawyers to pursue such practices.\textsuperscript{510} Many students choose to accept jobs with large well-paying
firms solely because they have hundreds of thousands of dollars of student debt, families to provide for, and they do not wish to live paycheck to paycheck. Loan forgiveness opportunities are enticing; yet, depending on one’s debt-to-income ratio, it may still not be a viable option to continue to make the required payments for the next ten years while also raising a family. Additionally, some do not wish to put off starting a family because of their debt. Further, flexible loan forgiveness programs for immigration attorneys will not only allow lawyers to practice what they wish to practice, but it will once again help this underserved community of children seek a better life.

CONCLUSION
As a nation founded by immigrants and built on the rule of law, the United States must balance the challenges of controlling borders and protecting national security with the interests of protecting civil liberties and ensuring due process for immigrants.

There is not a straightforward solution to perfecting immigration. Hundreds of thousands of people come to the United States every year, legally and illegally, and children make up a large portion of these individuals. With the Trump Administration constantly implementing immigration policies which undermine the rights and the long-standing rule of law, the need for government-appointed counsel to those who cannot otherwise afford it is imperative. The impact of each

L. REV. 27 (2007) (discussing the benefits of the Public Service Loan Forgiveness program and its impact on allowing students to choose career paths they are happy with).
511. See generally id. (discussing a Public Service Loan Forgiveness program and how it could allow students to choose a career based on their actual interests and not just pay).
512. See generally id. (providing the pros and cons of a loan forgiveness program).
513. See generally id. (discussing the benefits the Public Service Loan Forgiveness program and its impact on allowing students to choose career paths they are happy in rather than a career that will pay their loans off).
514. Cf. id. (incentivizing a loan forgiveness program because of the benefits it could provide for students and for other individuals, such as undocumented children, in need).
517. See Miroff et al., supra note 5 (describing the unfortunate consequences of President Trump’s immigration policies).
president’s policies does not cease at the end of their presidential term. \(^{518}\) Thus, long after President Trump has left office, migrant children will still suffer from the impact of family separation. \(^{519}\) Without a lawyer, these children will likely forgo any relief they are otherwise eligible to receive. \(^{520}\) Alternatively, they may never see their parents again. \(^{521}\)

Society’s basic notion of due process is legal fairness. \(^{522}\) At its basic form, due process requires protection from the government taking a person’s life, liberty, or property. \(^{523}\) Government-appointed counsel for children who cannot afford it not only comports with due process, but is a step in the right direction to improve immigration courts. \(^{524}\) With lawyers, migrant children will not fall victim to fraud and courts will not experience excessive backlogs as a result of continuances and failures to appear. \(^{525}\) More importantly, those children with viable claims for relief will have a true opportunity for justice. \(^{526}\) The United States has the power to afford many individuals an opportunity to contribute and improve our society, and with the right lawyer, those individuals will...

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518. Supra, Section II; cf. Goldberg, supra note 5 (providing current and previous presidents’ actions that define an “improbable presidency”).

519. See Fetters, supra note 5 (signifying the irreversible horrors of family separation).

520. ARNOLD & PORTER, supra note 22 at 6.

521. See Miriam Jordan & Caitlin Dickerson, More Than 450 Migrant Parents May Have Been Deported Without Their Children, N.Y. TIMES (July 24, 2018), https://www.nytimes.com/2018/07/24/us/migrant-parents-deported-children.html [https://perma.cc/4YBW-PRG7] (reporting that one-fifth of the migrants whose children were taken from them after crossing the southwest border were either removed or somehow left the country without their children).

522. See U.S. CONST. amend. XIV § 1 (“[N]o State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”).

523. Id.; see McDonald v. Chicago, 561 U.S. 742, 754 (2010) (discussing due process rights and making these rights applicable to the states); see also ARNOLD & PORTER, supra note 22 (“[T]he stakes for many noncitizens are high: they face loss of livelihood, permanent separation from U.S. family members or even persecution or death if deported to their native countries”).

524. See ARNOLD & PORTER, supra note 22 (highlighting the critical need for representation for asylum seekers).

525. See TRAC IMMIGR., supra note 200 (showing data on the past, current, and future backlogs of immigration courts); see generally BOSTON BAR ASS’N TASK FORCE ON UNREPRESENTED LITIGANTS, supra note 460 (noting the specific issues that both judges and court staff observe with pro se litigants).

526. See ARNOLD & PORTER, supra note 22 at 22 (describing the importance of immigrants to have counsel and not represent themselves pro se).
have one less barrier in their way.\textsuperscript{527} At a minimum, the United States can ensure everyone has an opportunity to explore their options for relief, even if they do not ultimately qualify.\textsuperscript{528} Justice lies in the hands of a lawyer.

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\begin{itemize}
\item \textsuperscript{527} See id. (foreseeing the immigration system’s flaws alleviating once there is adequate representation).
\item \textsuperscript{528} See id. (mentioning how an individual cannot fully litigate his or her case without representation).
\end{itemize}