
NOTES

YOU'RE ON YOUR OWN, KID: THE PLIGHT OF UNACCOMPANIED MINORS WITHOUT REPRESENTATION IN IMMIGRATION COURT

CATHERINE KANNAM*

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ABSTRACT

Immigration courts have long expected unaccompanied noncitizen children to represent themselves, regardless of their age. This Note argues that this practice needs to end. U.S. law must provide noncitizen children with counsel throughout immigration proceedings, as the current standard is at odds with child brain development findings, due process rights, Supreme Court precedent on juvenile issues, and the administrative realities of the backlogged immigration system. The United States' immigration infrastructure requires deep change, but the immediate reform of guaranteeing representation for unaccompanied noncitizen children can still coexist with broader abolitionist goals. By redistributing immigration budget allocations, we can avoid further investing and entrenching the immigration system, while still providing representation for the thousands of noncitizen children in current need of counsel. While the abolition of detention and deportation practices is unlikely to occur in the short term, guaranteed counsel for unaccompanied noncitizen children garners broad, bipartisan public support. This Note proposes that prioritizing this immigration issue and implementing juvenile immigration dockets nationally could not only help tailor legal proceedings to unaccompanied noncitizen children, but could simultaneously bring together a Congress that is often staunchly divided on immigration matters.

INTRODUCTION

The Trump administration was notorious for its nativist immigration stance, with anti-immigrant rhetoric at the heart of the former President's campaign platform. While efforts to end Deferred Action for Childhood Arrivals (DACA) and to promote former President Donald Trump's self-proclaimed Muslim ban were divisive parts of the agenda, perhaps the most controversial step for immigration regulation taken by Trump was the 2018 "zero tolerance" policy.¹ The policy directed the Department of Justice (DOJ) to prosecute all adult immigrants apprehended while crossing the border unlawfully, including individuals seeking asylum and those traveling with children.² Zero tolerance protocols separated children from their families in detention centers in an

¹ This is also commonly known as the "family separation" policy. See Maya Rhodan, *Here Are the Facts About President Trump's Family Separation Policy*, TIME (June 18, 2018), <https://time.com/5314769/family-separation-policy-donald-trump/>.

² Press Release, U.S. Dep't of Just., Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>; see also WILLIAM A. KANDEL, CONG. RSCH. SERV., R45266, THE TRUMP ADMINISTRATION'S "ZERO TOLERANCE" IMMIGRATION ENFORCEMENT POLICY 2 (2021).

attempt to dissuade families from crossing the border.³ As a result, border agents forcibly separated more than 5,500 children from their families.⁴ Heart-wrenching visuals and stories of children and parents being separated at the border proliferated in news outlets.⁵

Unaccompanied minors representing themselves in immigration court is the reality that transpires one step after family separation at the border. In 2018, stories of unaccompanied children representing themselves pro se in immigration court garnered significant media attention, typified by images of toddlers sitting alone before a judge, peering over the defendant table in courtrooms.⁶ Former Assistant Chief Immigration Judge Jack Weil went viral when he announced that he could teach immigration law to three- and four-year-old children.⁷ In response, an immigration attorney recorded attempts to explain the litigation process in immigration courts to children of that age.⁸ The videos that resulted captured one toddler replying “Yeah, I like my balloon!” in response to “Is English your native language?”⁹ In another snippet, a different child requested that their country of removal be designated as “pizza.”¹⁰ In a segment for *Last Week Tonight*, John Oliver unpacked how, throughout the country, a two-year-old cannot go into a bouncy castle unsupervised, but these children were somehow required to represent themselves in immigration court.¹¹ The punch line for the bouncy castle comparison landed, with Oliver’s studio audience erupting in laughter.¹² Even though the notion of toddlers representing themselves seems so obviously absurd, this has been, and continues to be, the reality.

³ See Miriam Jordan, *Migrants Separated From Their Children Will Be Allowed Into U.S.*, N.Y. TIMES (May 3, 2021), <https://www.nytimes.com/2021/05/03/us/migrant-family-separation.html>.

⁴ *Id.*

⁵ See *The Guardian at the Border: US Family Separation Crisis—In Pictures*, GUARDIAN (June 22, 2018), <https://www.theguardian.com/us-news/gallery/2018/jun/22/us-family-separation-crisis-in-pictures>.

⁶ See Benjamin Fearnow, *Watch: Video Shows What Immigrant Children Face Alone in Court Using Real Transcripts*, NEWSWEEK (July 4, 2018, 12:28 PM), <https://www.newsweek.com/unaccompanied-minors-immigration-court-children-william-snouffer-judge-1008472>.

⁷ See Jessica Roy, *A Judge Thinks 3-Year-Olds Can Defend Themselves, So Immigration Lawyers Tried It on Their Own Kids*, L.A. TIMES (Mar. 12, 2016, 4:59 AM), <https://www.latimes.com/nation/la-na-immigration-toddler-lawyers-videos-snap-html-story.html>.

⁸ *See id.*

⁹ Last Week Tonight, *Immigration Courts: Last Week Tonight with John Oliver (HBO)* (Apr 2, 2018), <https://www.youtube.com/watch?v=9fB0GBwJ2QA>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *See id.*

While the Trump administration brought to the forefront certain immigration policies impacting noncitizen children, it has been a longstanding norm for unaccompanied noncitizen children to represent themselves in immigration court, regardless of their age.¹³ This norm, however, is in conflict with due process rights articulated by the Supreme Court.¹⁴ The Supreme Court has affirmed that (1) U.S. citizen children have a right to counsel because of neurological underdevelopment and (2) the Constitution's Due Process Clause affords a "full and fair hearing" to noncitizens.¹⁵ Despite the reasoning behind these established rights, the U.S. government and the courts hide behind the rationale that noncitizens are not entitled to representation in an effort to avoid addressing the real problems at play. Not only is the current practice fundamentally unfair, but data also underscores how much legal representation matters for unaccompanied noncitizen children.¹⁶ Nine out of ten children who represent themselves pro se in immigration court are ultimately deported.¹⁷ In contrast, when unaccompanied children have representation for at least some portion of their immigration court case, they are seven times more likely to receive relief that allows them to stay in the United States.¹⁸

This Note argues that under U.S. law, unaccompanied noncitizen children are entitled to legal representation as they navigate immigration court. Immediate reform should be prioritized because unlike the partisan divide that typically stalls immigration issues, widespread support exists for a policy providing counsel to noncitizen children.¹⁹ Even though the complexity of immigration law arguably calls for all noncitizens in removal proceedings to have guaranteed

¹³ Laila Hlass, *The Adultification of Immigrant Children*, 34 GEO. IMMIGR. L.J. 199, 212–13 (2020) [hereinafter Hlass, *Adultification*] (“[T]here is no age limit on who is subject to immigration court jurisdiction. Even babies may be ordered deported. . . . [T]here is no statutory right to an appointed attorney under immigration law. Children in removal proceedings, like adults, must represent themselves against a government prosecutor if they cannot otherwise obtain counsel.”).

¹⁴ See U.S. CONST. amend. V; *Graham v. Florida*, 560 U.S. 48, 68–69, 76 (2010); *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005); *Bellotti v. Baird*, 443 U.S. 622, 634, 641 (1979); *In re Gault*, 387 U.S. 1, 36 (1967).

¹⁵ See Shani M. King & Nicole Silvestri Hall, *Unaccompanied Minors, Statutory Interpretation, and Due Process*, 108 CALIF. L. REV. 1, 8 (2020); see also U.S. CONST. amend. V; *Graham*, 560 U.S. at 68–69, 76; *Roper*, 543 U.S. at 569–70; *Bellotti*, 443 U.S. at 634, 641; *In re Gault*, 387 U.S. at 36.

¹⁶ Fearnow, *supra* note 6.

¹⁷ *Id.*

¹⁸ ALYSSA SNIDER & REBECCA DiBENARDI, VERA INST. OF JUST., REPRESENTATION MATTERS: NO CHILD SHOULD APPEAR IN IMMIGRATION PROCEEDINGS ALONE 3, (2021), <https://www.vera.org/downloads/publications/representation-matters.pdf>.

¹⁹ VERA INST. OF JUST., PUBLIC SUPPORT IN THE UNITED STATES FOR GOVERNMENT-FUNDED ATTORNEYS IN IMMIGRATION COURT 1 (2021), [hereinafter VERA INST. OF JUST., PUBLIC SUPPORT], <https://www.vera.org/downloads/publications/taking-the-pulse-national-polling-v2.pdf>.

access to counsel, this Note asserts that providing lawyers to unaccompanied children in immigration proceedings is the most strategic place to start when tackling the current representation crisis. Not only is there a broad consensus that unaccompanied noncitizen children should have legal support, but the fundamental unfairness and absurdity of children representing themselves in complicated removal proceedings demands change. Forcing minors to represent themselves pro se is at odds with child brain development findings, basic due process rights, Supreme Court precedent on juvenile issues, and the administrative realities of a backlogged immigration system.

This Note acknowledges that the current immigration system is inherently problematic, dehumanizing, and outdated, thus requiring big-picture changes. Such long-term goals include passing a sweeping immigration reform bill and, more broadly, working towards abolishing the immigration system as it stands. This Note argues that immediate reform guaranteeing legal representation for unaccompanied noncitizen children can coexist with abolitionist goals. By redistributing government funds, currently used to inflict violence upon noncitizens in detention, we can avoid further investing in and entrenching the immigration system, while still providing representation for the thousands of noncitizen children in immediate need of counsel.

While the current Congress seems unlikely to unite on these overdue updates or the abolition of detention and deportation practices, this Note proposes the following immigration reforms as feasible, necessary, and meaningful steps in the right direction: (1) prioritizing the issue of unaccompanied minor children receiving legal representation among immigration reforms; and (2) creating juvenile dockets in immigration courts across the country.

This Note is divided into four parts. Part I provides historical background that reveals the inaccuracy in immigration data, describes how unaccompanied noncitizen children are expected to navigate the immigration system, examines the disparities between juvenile court and immigration court for minors, and recounts how Presidents Trump and Biden have engaged in immigration matters pertaining to unaccompanied noncitizen children. Part II argues that unaccompanied noncitizen children require legal representation when their rights are challenged in immigration proceedings. Part III anticipates how skeptics may respond and unpacks the ways opposing arguments fall short. Lastly, Part IV provides both long-term and short-term proposals for how to rectify the current immigration system as it functions for unaccompanied noncitizen children.

I. LEGAL BACKGROUND

A. *The Data: Unaccompanied Minors in Uncharted Territory*

The volume of outstanding cases within the U.S. immigration system is hard to comprehend, even after taking a close look at the numbers. That said, an evaluation of this data is essential for understanding why allowing unaccompanied children to represent themselves in life-altering proceedings

continues to be the status-quo. Across the United States, there are approximately 2,097,244 cases pending in immigration court.²⁰ In 2020, approximately 683,693 of immigration cases were for juvenile respondents.²¹ These massive numbers have caused the workloads in immigration courts to surge, resulting in dockets of approximately 1,400 cases per year—roughly double the number of cases that judges in other courts adjudicate.²² In 2019, the number of cases per immigration judge was a staggering average of 2,500 cases per judge.²³ A long docket corresponds to an agonizingly long wait time for noncitizens, with the average wait in a non-detained immigration court case currently estimated at 4.3 years.²⁴

In this world, time is money, and the U.S. immigration system is no exception. For 2023, it is projected that each noncitizen adult in detention will cost taxpayers \$148.62 per day.²⁵ The annual budget for custody operations through Immigration and Customs Enforcement (ICE) hovers around \$2.4 billion, which means that it costs approximately \$6.6 million per day to detain noncitizens in detention centers.²⁶ While there are safeguards against how long noncitizen children can stay in detention, if children are separated from their parents for an extended period of time or permanently, they become part of the foster care system.²⁷ By providing noncitizens with representation and keeping family units intact, economists estimate that the federal government would save

²⁰ *Immigration Court Backlog Tool*, TRAC IMMIGR. (Jan. 2023), https://trac.syr.edu/phptools/immigration/court_backlog/.

²¹ Dalia Castillo-Granados et al., *Time to Rebuild and Reimagine: Reflecting on Four Hard Years in Children's Immigration Law*, A.B.A. (Jan. 11, 2021), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2021/reflecting-on-four-hard-years-in-childrens-immigration-law/>.

²² McKayla M. Smith, Comment, *Scared, But No Longer Alone: Using Louisiana to Build a Nationwide System of Representation for Unaccompanied Children*, 63 LOY. L. REV. 111, 124 (2017).

²³ Daniel Buteyn, *The Immigration Judiciary's Need for Independence: Breaking Free from the Shackles of the Attorney General and the Powers of the Executive Branch*, 46 HAMLINE L. REV. 958, 970 (2020).

²⁴ *A Sober Assessment of the Growing U.S. Asylum Backlog*, TRAC IMMIGR. (Dec. 22, 2022), <https://trac.syr.edu/reports/705/>.

²⁵ DEP'T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT BUDGET OVERVIEW: FISCAL YEAR 2023, at 24, [hereinafter DEP'T OF HOMELAND SEC., BUDGET OVERVIEW], https://www.dhs.gov/sites/default/files/2022-03/U.S.%20Immigration%20and%20Customs%20Enforcement_Remediated.pdf.

²⁶ See *id.* at 5 (reasoning that annual custody budget of \$2.4 billion divided by 365 equates the monetary amount spent on custody for each day of 2023).

²⁷ See CTR. FOR POPULAR DEMOCRACY ET AL., THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT 1, 5, 14 (2015), https://populardemocracy.org/sites/default/files/immigrant_family_unity_project_print_layout.pdf.

approximately \$13,378,850 per year in funds that are typically allocated to the foster care of noncitizen children.²⁸

When considering data for unrepresented and unaccompanied immigrant children specifically, it is worth noting that the current numbers may not truly capture the scope of the noncitizen unaccompanied minors crisis in the United States. Transactional Records Access Clearinghouse (TRAC), a leading immigration data collector affiliated with Syracuse University, concluded that the lack of government transparency put them in a position where they could no longer track information about minors in the immigration system.²⁹ When provided with reports about the current immigration court backlog, TRAC discovered many errors in the Executive Office of Immigration Review (EOIR)'s calculations, including the omission of 50,000 additional asylum cases and a systemic failure to correctly count and categorize which cases involved unrepresented children: "Nearly three out of ten (29%) of the individuals whose cases were pending at hearing locations that have been set up to handle cases for unaccompanied children were not included at all in the juvenile history file or were misclassified (not classified as unaccompanied children)."³⁰ Government agencies have not responded to inquiries for the most up-to-date data on unaccompanied minors in the immigration system.³¹ TRAC has urged the EOIR to act to ensure transparency and accountability across immigration agencies, particularly because of "the highly sensitive nature of children facing deportation."³²

It is unclear whether the government's responses and insufficient answers simply reflect bureaucratic inefficiency, or represents a conscious effort from the EOIR to avoid bringing attention to the true scope of this issue. In any case, TRAC highlights that the EOIR has significantly underreported data about how many unaccompanied noncitizen children are currently in the United States.³³ From what we know, the scale of this immigration crisis is already devastating, yet research shows that it is much worse.³⁴

²⁸ JOHN D. MONTGOMERY, NERA ECON. CONSULTING, COST OF COUNSEL IN IMMIGRATION: ECONOMIC ANALYSIS OF PROPOSAL PROVIDING PUBLIC COUNSEL TO INDIGENT PERSONS SUBJECT TO IMMIGRATION REMOVAL PROCEEDINGS 36 (2014), https://www.nera.com/content/dam/nera/publications/archive2/NERA_Immigration_Report_5.28.2014.pdf.

²⁹ See Daniel M. Kowalski, *Immigration Court's Data on Minors Facing Deportation is Too Faulty to Be Trusted: TRAC*, LEXISNEXIS LEGAL NEWSROOM (Dec. 2, 2021), https://www.lexisnexis.com/LegalNewsRoom/immigration/b/outsidenews/posts/immigration-court-s-data-on-minors-facing-deportation-is-too-faulty-to-be-trusted-trac?utm_source=LexisNexis&utm_medium=Corporate_site&utm_campaign=USHOMEPAGE.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *See id.*

³⁴ *See id.*

B. *How the Immigration System Works in Reality for Unaccompanied Minors*

While the data helps capture many problematic practices in immigration court, unpacking how the immigration system processes cases reveals many contradictions embedded within. A fundamental paradox is that immigration courts are not under the authority of the Judicial Branch.³⁵ The EOIR encompasses the entire immigration court system and rests in the Department of Justice, under the executive branch's power.³⁶ Despite being built upon courts and laws, the current immigration system is siloed away from the Article III Judiciary and other Article I specialty courts. Immigration courts only cross over to Courts of Appeal for review after a case has first been reviewed by an immigration judge and the Board of Immigration Appeals (BIA).³⁷ Because immigration courts operate under the power of the executive branch, they remain vulnerable to the whims and opinions of the sitting President.³⁸ Hypothetically, if a President entered office and sought to prioritize the removal of unaccompanied noncitizen children, the President could execute such a change because the executive branch dictates the EOIR's budget and immigration priorities.³⁹

When considering how the immigration process currently functions for unaccompanied noncitizen children, the system is not any more intuitive. For example, as foundational and clear-cut as it may seem, simply classifying *who* is an unaccompanied minor brings to light numerous inconsistencies. Laila Hlass, a leading scholar on the plight of noncitizen children, highlights such

³⁵ See Buteyn, *supra* note 23, at 965–66.

³⁶ *Id.*

³⁷ See Fact Sheet: Immigration Courts, NAT'L IMMIGR. F. (Aug. 7, 2018), <https://immigrationforum.org/article/fact-sheet-immigration-courts/>. As noted by the Administrative Office of the U.S. Courts:

Specialized subject-matter courts and boards, and numerous federal administrative agencies adjudicate disputes involving specific federal laws and benefits programs. These non-judiciary courts and tribunals include the United States Tax Court, the United States Court of Appeals for the Armed Forces, and the United States Court of Appeals for Veterans Claims. While these courts, also known as Article I courts, are not part of the judicial branch, Congress created them to maintain a certain degree of independence and to operate impartially and without political influence. The decisions of these agencies and courts are in some cases appealable to the Article III courts.

ADMIN. OFF. OF THE U.S. CTS., UNDERSTANDING THE FEDERAL COURTS 3, <https://www.uscourts.gov/sites/default/files/understanding-federal-courts.pdf> (last visited Apr. 22, 2023).

³⁸ See Editorial Board, *Immigration Courts Aren't Real Courts. Time to Change That.*, N.Y. TIMES (May 8, 2021), <https://www.nytimes.com/2021/05/08/opinion/sunday/immigration-courts-trump-biden.html>; see also 8 C.F.R. § 1003.10 (granting the Attorney General the power to appoint and oversee immigration judges); *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (“[W]e have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context . . .”).

³⁹ See *id.*

discrepancies throughout the Immigration and Nationality Act (INA): “A ‘minor’ could indicate a youth under the age of twenty-one, eighteen, or fourteen, depending on the context in the statute. . . . Even more confusing, the INA interchangeably uses ‘minor’ and ‘juvenile,’ even within the same provision.”⁴⁰ The measures for children navigating the immigration system are ill-defined and fraught at their core.

Even though unaccompanied noncitizen children are not guaranteed representation, other immigration protocols do include adjustments for when the party is a child on their own. For example, immigration officers must serve notices to appear when children are under fourteen, and officers are also required to read certain statements to children about their rights in a language they can understand, including the right to make phone calls and to find an attorney.⁴¹ Immigration courts today can provide some leniency for minors, such as allowing unaccompanied children to have booster seats and stuffed animals in the courtroom.⁴² However, numerous immigration agencies are silent on whether their conventions differ for all children or only for unaccompanied minor noncitizens.⁴³ For example, the BIA does not outline protocols for cases with a child as the party.⁴⁴ Other agencies only include broad phrases about child cases warranting careful consideration, like juvenile protocols from ICE, which state that working with minors requires “dignity, respect, and special concern for their vulnerability,” but do not detail what said special concern looks like in practice.⁴⁵ These shallow and inconsistent accommodations pale in comparison to the impact legal representation would provide, and highlight how the legal needs of unaccompanied noncitizen children have been overlooked for years.

C. *The Treatment of Minors in Immigration Court vs. Juvenile Court:
The Undeniable Disparity*

While little attention has been directed towards remedying the current system for minors navigating immigration court, courts have had occasion to grapple with the rights of noncitizen minors.⁴⁶ In *Reno v. Flores*, the Supreme Court discussed due process rights for both noncitizens broadly and migrant minors specifically.⁴⁷ Although the case was about juvenile detention for noncitizen children rather than representation in immigration court, language in the opinion

⁴⁰ Hlass, *Adultification*, *supra* note 13, at 206–07.

⁴¹ *See id.* at 210–11.

⁴² *Id.* at 215–16.

⁴³ *See id.* at 216, 240.

⁴⁴ *See id.* at 239–40.

⁴⁵ *Id.* at 210.

⁴⁶ *See, e.g., Reno v. Flores*, 507 U.S. 292 (1993); *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016); *C.J.L.G. v. Barr*, 923 F.3d 622 (9th Cir. 2019).

⁴⁷ *See Reno*, 507 U.S. at 292.

sheds light on the Court's position regarding the rights of noncitizen children.⁴⁸ The Court acknowledged that noncitizens possess due process rights in deportation proceedings, but it also reinforced a clear line between the privileges granted to citizens as opposed to noncitizens, bluntly stating that "Congress regularly makes rules that would be unacceptable if applied to citizens."⁴⁹ When considering how unaccompanied minors interact with immigration courts, the majority in *Reno* did not believe there were any significant barriers to address, asserting that minors had sufficient due process with the opportunity to appear in court:

At least insofar as this facial challenge is concerned, due process is satisfied by giving the detained [unauthorized immigrant] juveniles the right to a hearing before an immigration judge. It has not been shown that all of them are too young or too ignorant to exercise that right when the form asking them to assert or waive it is presented. Most are 16 or 17 years old and will have been in telephone contact with a responsible adult outside the [Immigration and Naturalization Service]—sometimes a legal services attorney.⁵⁰

While the Supreme Court has not decided whether minors have the right to representation in immigration court specifically, Courts of Appeal have issued decisions in cases that posed this question.⁵¹ In particular, the Ninth Circuit has questioned the longstanding practice of noncitizen children representing themselves.⁵² In *J.E.F.M. v. Lynch*, the American Civil Liberties Union (ACLU) worked with other civil rights groups and law firms to organize a class action targeted at the specific issue of representation for noncitizen children.⁵³ The court briefly discussed that pro bono attorneys are "already more than stretched" to compensate for the lack of representation.⁵⁴ However, the Ninth Circuit ultimately dodged the question put forth by the class action because of jurisdictional technicalities.⁵⁵ In *C.J.L.G. v. Barr*, concurring judges sitting en banc wrote separately to emphasize that the failure to provide noncitizen children with representation in immigration court is a "mockery of judicial and administrative processes."⁵⁶ The concurrence raised many points to analyze this right, including statistics of unaccompanied children in immigration proceedings, the loss of liberty, the risk for error, the complexity of immigration

⁴⁸ *See id.*

⁴⁹ *Id.* at 305–06.

⁵⁰ *Id.* at 309.

⁵¹ *See J.E.F.M.*, 837 F.3d 1026; *C.J.L.G.*, 923 F.3d 622.

⁵² *See J.E.F.M.*, 837 F.3d at 1033.

⁵³ *See id.*

⁵⁴ *Id.* at 1038.

⁵⁵ *See id.*

⁵⁶ *C.J.L.G.*, 923 F.3d at 632.

law, the shortcomings of current protocols, and the burden on the government.⁵⁷ While many of these factors will be unpacked at length within this Note, the following quote captures an irony that persists in today's immigration system:

The importance of counsel, particularly in asylum cases where the law is complex and developing, can neither be overemphasized nor ignored. . . . If an attorney's failure to investigate and research her child client's case can be a Fifth Amendment violation, then how can a child without any counsel have a proceeding that comports with due process?⁵⁸

On the whole, there has been a lack of attention directed towards remedying the current system for minors navigating immigration courts. However, juvenile courts for U.S. citizens are a very different story.

The existence of juvenile courts within the U.S. criminal legal system demonstrates a recognition that cases involving children require special care and tailored protocols.⁵⁹ In contrast, immigration courts adjudicate cases for both adults and children.⁶⁰ Some immigration courts have created "juvenile dockets," which separate cases that involve unaccompanied minors from the broader docket in a way that loosely simulates how the judiciary splits juvenile court and adult legal proceedings.⁶¹ The rationale behind juvenile dockets in immigration court is to "encourage child-friendly courtroom practices" and "promote consistency."⁶² Advocates have praised juvenile dockets as an effective way to improve immigration courts for noncitizen children, but this system is not currently built into the fundamental structure of immigration courts.⁶³

Turning to legal representation for minors, the Supreme Court formally gave U.S. citizen minors the Constitutional right to counsel in the landmark case *In re Gault*.⁶⁴ When explaining the importance of this Constitutional protection, the Court acknowledged that children need such legal aid:

The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child "requires the guiding hand of counsel at every step in the proceedings against him."⁶⁵

⁵⁷ See *id.* at 629–41.

⁵⁸ *Id.* at 631 (citations omitted).

⁵⁹ See *Youth in the Justice System: An Overview*, JUV. L. CTR., <https://jlc.org/youth-justice-system-overview> (last visited Apr. 22, 2023) ("Since the establishment of the first juvenile court in Cook County, Illinois in 1899, states have recognized that children who commit crimes are different from adults.").

⁶⁰ See Hlass, *Adultification*, *supra* note 13, at 212–13.

⁶¹ See *id.* at 221–22.

⁶² *Id.* at 222.

⁶³ See *id.* at 221–22.

⁶⁴ See *In re Gault*, 387 U.S. 1, 41 (1967).

⁶⁵ *Id.* at 36 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

In *In re Gault*, the Court recognized that children navigating the legal system require a “guiding hand” of support.⁶⁶ Yet, when the Court decided the fate of noncitizen children’s rights to counsel in *Reno*, it downplayed the legal system’s complexities, saying that children are not “too young or too ignorant to exercise that right.”⁶⁷ As a result of these decisions, U.S. citizen children are entitled to legal representation for all civil delinquency cases under the due process clause, while noncitizen children do not have the right to an attorney in immigration court.⁶⁸

When analyzing the rights of minors within the abortion context in *Bellotti v. Baird*, the Court stressed that because of “the peculiar vulnerability of children” and “their inability to make critical decisions in an informed, mature manner,” children must be treated differently from adults in a legal setting, as a child “in their tender years, under emotional stress, may be ill-equipped to make [a decision] without mature advice and emotional support.”⁶⁹ As juvenile protections continued to evolve in the early 2000s, the Court increasingly cited scientific data about brain development to bolster legal arguments.⁷⁰ The Court explained that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.”⁷¹ Using such logic, in *Roper v. Simmons* the Court abolished the death penalty for minors.⁷² The Court cited similar sociological studies reporting that “the comparative immaturity and irresponsibility of juveniles” warrants treating juveniles differently in the eyes of the law until they reach eighteen.⁷³

Comparing juvenile court to immigration court reveals the power of citizenship status in dictating the court structure and legal treatment for cases involving children. Because of how different the immigration legal system is from other courts in the United States, it is important to understand the recent

⁶⁶ *Id.*

⁶⁷ *Reno v. Flores*, 507 U.S. 292, 309 (1993).

⁶⁸ See Benjamin Good, Note, *A Child’s Right to Counsel in Removal Proceedings*, 10 STAN. J.C.R. & C.L. 109, 110 (2014) (“Despite expansion of the right in various contexts over the past decades, the right to appointed counsel in immigration proceedings is still nothing more than an unrealized possibility . . .”).

⁶⁹ *Bellotti v. Baird*, 443 U.S. 622, 634, 641 (1979).

⁷⁰ See *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) (citing sociological and psychological studies on differences between juvenile and adult offenders, which “render suspect any conclusion that a juvenile falls among the worst offenders”); *Graham v. Florida*, 560 U.S. 48, 68 (2010) (building on *Roper*’s observations about juvenile brain development); *Miller v. Alabama*, 567 U.S. 460, 473–74 n.5 (2012) (“The evidence presented to us in these cases indicates that the science and social science supporting *Roper*’s and *Graham*’s conclusions have become even stronger.”).

⁷¹ *Graham*, 560 U.S. at 68.

⁷² See *Roper*, 543 U.S. at 573–74.

⁷³ *Id.* at 569.

history and current climate surrounding immigration issues. Such context is vital to grasping why immigration courts operate the way they do with cases involving unaccompanied noncitizen children.

D. *Where We Were: The Trump Administration*

The unaccompanied noncitizen children crisis did not begin or end with the Trump administration.⁷⁴ That said, Trump halted the progress from the Obama administration by ending the Justice AmeriCorps program, an initiative that provided government stipends for attorneys and paralegals to represent unaccompanied noncitizen children.⁷⁵ Additionally, Trump's rhetoric toward unaccompanied noncitizen children was particularly flagrant, as demonstrated by the following quote from his public remarks: “[I]n the three years before I took office, more than 150,000 unaccompanied [unauthorized immigrant] minors arrived at the border and were released all throughout our country into United States communities—at a tremendous monetary cost to local taxpayers and also a great cost to life and safety.”⁷⁶ Even though only fifty-six unaccompanied noncitizen children out of thousands were suspected of having ties to the street gang MS-13 between 2012 and 2018,⁷⁷ Trump harnessed this small-scale concern to cast doubt on all unaccompanied noncitizen children, stating that MS-13 members “exploited the loopholes in our laws to enter the country as unaccompanied [unauthorized immigrant] minors. They look so innocent; they’re not innocent.”⁷⁸ Trump officials attempted to justify harsh tactics inflicted upon noncitizen children, with one official testifying before Congress that immigration detention was like “summer camp” for minors.⁷⁹

These sentiments from public statements carried through in memorandums sent by the EOIR during the Trump administration, which stressed that while cases with noncitizen children “may present sympathetic allegations,” immigration judges must remain impartial and vigilant.⁸⁰ This same guidance

⁷⁴ See generally Sabrina Rodriguez, *Immigrant Advocates to Biden: Be Better Than Obama*, POLITICO (Nov. 25, 2020), <https://www.politico.com/news/2020/11/25/biden-immigration-policies-440480> (noting immigration policy mistakes under President Obama and that “Biden . . . will have to rebuild trust with immigrant communities and do more than just end the harm caused by the Trump administration”).

⁷⁵ Michael Kagan, *Toward Universal Deportation Defense: An Optimistic View*, 2018 WIS. L. REV. 305, 310.

⁷⁶ Hlass, *Adultification*, *supra* note 13, at 224–25; President Donald Trump, Remarks by President Trump to Law Enforcement Officials on MS-13 (July 28, 2017), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-law-enforcement-officials-ms-13/>.

⁷⁷ Hannah Dreier, *I’ve Been Reporting on MS-13 for a Year. Here are the 5 Things Trump Gets Most Wrong*, PROPUBLICA (June 25, 2018), <https://www.propublica.org/article/ms-13-immigration-facts-what-trump-administration-gets-wrong>.

⁷⁸ Hlass, *Adultification*, *supra* note 13, at 224.

⁷⁹ *Id.* at 230.

⁸⁰ *Id.* at 240–41 (citations omitted).

on adjudicating child migrant cases also stripped all previous references about the importance of considering “issues of age development, experience, and self-determination.”⁸¹

Throughout his presidency, Trump villainized all noncitizens, including children. After enduring the anti-immigrant bias that pervaded the Trump administration’s immigration policies, advocates yearned for the Biden administration to make positive change.⁸²

E. *Where We Are Now: The Biden Administration*

President Biden campaigned with the promise of humanizing Trump’s callous immigration policies, and he followed through on some of these assurances shortly after assuming the presidency.⁸³ Within his first three days in office, President Biden signed thirty executive orders to immediately roll back some of Trump’s most notorious policies and turn the page to his own legacy.⁸⁴ Of these executive orders, five were immigration policy measures: three repealed Trump-era protocols and two strengthened existing immigration supports.⁸⁵ These immediate steps gave immigration advocates hope for the administration’s stance on immigration.⁸⁶ However, President Biden’s subsequent action, and inaction, in pursuit of immigration reform has disappointed many advocates.⁸⁷

President Biden appointed Vice President Kamala Harris to handle policy regarding the volume of noncitizens coming across the southern border.⁸⁸

⁸¹ *Id.* at 240 (citations omitted).

⁸² Rodriguez, *supra* note 74 (quoting a director of an advocacy group stating “Hell yeah, I’m optimistic. I don’t know what the hell we were going to do if Trump won again[.]”).

⁸³ See *The Biden Plan for Securing Our Values as a Nation of Immigrants*, BIDEN HARRIS DEMOCRATS, <https://joebiden.com/immigration/> (last visited Apr. 22, 2023); Kate Sullivan et al., *Here are the 30 Executive Orders and Actions Biden Signed in his First Three Days*, CNN (Jan. 24, 2021) [hereinafter Sullivan et al., *30 Executive Orders*], <https://www.cnn.com/2021/01/22/politics/joe-biden-executive-orders-first-week/index.html>.

⁸⁴ Sullivan et al., *30 Executive Orders*, *supra* note 83.

⁸⁵ *Id.*

⁸⁶ See Rafael Bernal & Rebecca Beitsch, *Rift Grows Between Biden and Immigration Advocates*, HILL (Jan. 20, 2022), <https://thehill.com/latino/590492-rift-grows-between-biden-and-immigration-advocates/> (“‘The administration started very strong and announced a lot of things as [sic] on Inauguration Day or shortly thereafter that many of us took as a positive signal of things to come,’ said Jorge Loweree, policy director with the American Immigration Council, pointing to Biden’s reversal of the so-called Muslim travel ban.”).

⁸⁷ See *id.* (“‘I never would have predicted this White House, within Year One, would be expelling Haitians to a failed state,’ said Frank Sharry, executive director of America’s Voice, a progressive immigration policy organization. ‘In December of 2020 we’re talking about a transformative vision. And in 2022, expelling Haitians without a meaningful asylum process. Wow.’”).

⁸⁸ See Sean Sullivan & Cleve R. Wootson Jr., *With New Immigration Role, Harris Gets a Politically Perilous Assignment*, WASH. POST (Apr. 2, 2021),

However, Vice President Harris quickly found herself in hot water with the following statement: “I want to be clear to folks in this region who are thinking about making that dangerous trek to the United States-Mexico border: Do not come. Do not come.”⁸⁹ As the new leader in U.S. immigration initiatives, Harris’ statement received criticism for being ignorant of refugees’ plights and dismissive of their asylum claims.⁹⁰

Broadly, President Biden has struggled to address immigration issues in an effective and humanitarian way.⁹¹ When looking at President Biden’s efforts for unaccompanied minors specifically, his response has continued to generate controversy.

President Biden spearheaded a Family Reunification Task Force on February 2, 2021, through an executive order to address this snowballing issue, and appointed Alejandro Mayorkas, Secretary of Homeland Security, to lead the charge.⁹² As of November 2022, 546 children have been reunited because of the task force and 2,291 were reunited prior to the creation of the task force, through court orders and non-governmental organization efforts.⁹³ However, the government acknowledges that there are at least 780 children who have not yet been reunited with their parents or whose reunification status remains unknown.⁹⁴ There have been mixed messages as to whether these families will receive damages as compensation for the harm they experienced at the hands of the U.S. immigration system.⁹⁵ The ACLU filed a class action suit on behalf of the separated families for monetary damages, and news outlets reported that the

https://www.washingtonpost.com/politics/kamala-harris-border/2021/04/02/7651b488-9325-11eb-bb49-5cb2a95f4cec_story.html.

⁸⁹ Brian Naylor & Tamara Keith, *Kamala Harris Tells Guatemalans Not to Migrate to the United States*, NPR (June 7, 2021), <https://www.npr.org/2021/06/07/1004074139/harris-tells-guatemalans-not-to-migrate-to-the-united-states>.

⁹⁰ *See id.*

⁹¹ *See* Priscilla Alvarez, ‘Hail Mary after Hail Mary’: Biden Administration Struggles with Border Policy, Fueling Frustration, CNN (Oct. 20, 2022), <https://www.cnn.com/2022/10/20/politics/immigration-migrants-biden-border-policy/index.html> (“It has been an endless cycle since President Joe Biden took office, according to multiple administration officials and sources close to the White House. Agency officials dream up a plan but then struggle to get White House approval, even as the problem compounds and Republicans step up their criticism.”).

⁹² *See* DEP’T OF HOMELAND SEC., INTERIM PROGRESS REPORT: INTRAGENCY TASK FORCE ON THE REUNIFICATION OF FAMILIES (Nov. 29, 2022) [hereinafter DEP’T OF HOMELAND SEC., PROGRESS REPORT], https://www.dhs.gov/sites/default/files/2022-12/22_1219_sec-frtf-interim-progress-report-november-2022-cleared.pdf; Priscilla Alvarez, *Biden Administration’s Handling of Pay Outs for Separated Families Put a Tense Relationship Under Further Strain*, CNN (Nov. 18, 2021) [hereinafter Alvarez, *Pay Outs*], <https://www.cnn.com/2021/11/18/politics/family-separation-biden-relationship/index.html>.

⁹³ *See* DEP’T OF HOMELAND SEC., PROGRESS REPORT, *supra* note 92.

⁹⁴ *See id.*

⁹⁵ *See* Alvarez, *Pay Outs*, *supra* note 92.

government was considering reparations of \$450,000 to each impacted family.⁹⁶ However, the Department of Justice pulled out of these settlement negotiations at the end of 2021.⁹⁷

While many feel unsatisfied with President Biden's immigration reforms thus far, hope may be on the horizon for unrepresented minors in immigration court. On September 28, 2021, the EOIR announced the Counsel for Children Initiative (CCI) as part of a broader "Access EOIR" effort, aimed at increasing representation for noncitizen children across the country.⁹⁸ When unveiling Access EOIR, EOIR Director David Neal explained that with this project, he hopes the agency "can better ensure that respondents understand immigration court proceedings, that legal representation before EOIR will increase, and that the public will grow more confident in the due process our Immigration Judges provide."⁹⁹ The information that has been provided about CCI specifically is as follows:

CCI works to provide legal representation to certain unaccompanied children who are in immigration proceedings in the eight immigration courts in which Government-funded counsel for children will have the greatest impact: Atlanta, Houston, Los Angeles, New York, San Diego, San Francisco, Seattle, and Portland. Through this initiative, EOIR will also help to identify children who have been victims of human trafficking or abuse and refer them to appropriate support services.¹⁰⁰

Following this press release, an "Access EOIR" website page has been created, but the platform only directs visitors to materials that overview how immigration courts function and does not provide any additional information about unaccompanied noncitizen children obtaining counsel or the CCI specifically.¹⁰¹

⁹⁶ See *id.*; Michelle Hackman et al., *U.S. in Talks to Pay Hundreds of Millions to Families Separated at Border*, WALL ST. J. (Oct. 28, 2021), <https://www.wsj.com/articles/biden-administration-in-talks-to-pay-hundreds-of-millions-to-immigrant-families-separated-at-border-11635447591>; Press Release, ACLU, *New Lawsuit Seeks Damages for Traumatized Children and Parents Torn Apart by Family Separations* (Oct. 3, 2019), <https://www.aclu.org/press-releases/new-lawsuit-seeks-damages-traumatized-children-and-parents-torn-apart-family>.

⁹⁷ See Vanessa Romo & Joel Rose, *Justice Department Breaks Off Talks on Compensation for Separated Families*, NPR (Dec. 16, 2021), <https://www.npr.org/2021/12/16/1065044185/justice-department-breaks-off-talks-on-compensation-for-separated-families>.

⁹⁸ Press Release, U.S. Dep't of Just. Exec. Off. for Immigr. Rev., *EOIR Announces "Access EOIR" Initiative* (Sept. 28, 2021), <https://www.justice.gov/eoir/pr/eoir-announces-access-eoir-initiative>.

⁹⁹ See *id.*

¹⁰⁰ *Id.*

¹⁰¹ See *Access EOIR*, U.S. DEP'T OF JUST. (Oct. 10, 2022), https://www.justice.gov/eoir/Access_EOIR.

A Congressional Research Service report from July 2022 mentioned the CCI in one sentence, but it did not unveil new details about the initiative.¹⁰²

While there are no updates on the implementation of CCI, members of the previous Congress took action on this issue.¹⁰³ Twenty senators and forty-seven House members sent letters to their respective leaders in 2022, urging that funding be earmarked in 2023 government budget allocations for noncitizens to receive legal counsel throughout immigration proceedings.¹⁰⁴ In addition, Senator Kirsten Gillibrand introduced the Funding Attorneys for Indigent Removal (FAIR) Proceedings Act, which aims to “guarantee[] access to legal counsel during removal proceedings for children, individuals with disabilities, victims of abuse, torture, and violence, and those living at or below 200 percent of the federal poverty line.”¹⁰⁵ In August 2019, and again in November 2022, Representatives Donald McEachin and Zoe Lofgren introduced the same bill in the House of Representatives, but the legislation did not gain momentum.¹⁰⁶ It remains to be seen whether the 118th Congress will grapple with the representation crisis in immigration court.

The lack of federal action on this issue has prompted nine states to publicly fund deportation defense programs: California, Colorado, Illinois, Maryland, Nevada, New Jersey, New York, Oregon, and Washington.¹⁰⁷ In New York,

¹⁰² CONG. RSCH. SERV., U.S. IMMIGRATION COURTS: ACCESS TO COUNSEL IN REMOVAL PROCEEDINGS AND LEGAL ACCESS PROGRAMS 2 (Jul. 6, 2022), <https://sgp.fas.org/crs/homesecc/IF12158.pdf>.

¹⁰³ See *Senators Request Funding for Legal Services for People in Immigration Court Proceedings*, AM. IMMIGR. LAWS. ASS'N (May 6, 2022), <https://www.aila.org/infonet/senators-request-funding-for-legal-services>; *House Members Urge Funding for Legal Representation to Indigent Adults in Removal Proceedings*, AM. IMMIGR. LAWS. ASS'N (Apr. 29, 2022), <https://www.aila.org/infonet/house-members-urge-funding-for-legal-representatio>.

¹⁰⁴ See *Senators Request Funding for Legal Services for People in Immigration Court Proceedings*, *supra* note 103; see also *House Members Urge Funding for Legal Representation to Indigent Adults in Removal Proceedings*, *supra* note 103.

¹⁰⁵ *Senate Bill: Funding Attorneys for Indigent Removal (FAIR) Proceedings Act*, AM. IMMIGR. LAWS. ASS'N (Mar. 23, 2021), <https://www.aila.org/infonet/senate-bill-funding-attorneys-for-indigent-removal>; see *Funding Attorneys for Indigent Removal Proceedings Act*, S.901, 117th Cong. (2021); 167 CONG. REC. S1706 (daily ed. Mar. 23, 2021).

¹⁰⁶ See *Funding Attorneys for Indigent Removal (FAIR) Proceedings Act*, H.R. 4155, 116th Cong. (2019); 165 CONG. REC. H7588 (daily ed. Aug. 2, 2019); *Funding Attorneys for Indigent Removal (FAIR) Proceedings Act*, H.R. 9304, 117th Cong. (2022); 168 CONG. REC. H8507 (daily ed. Nov. 15, 2022); see also *AILA Applauds House Access-to-Counsel Legislation*, AM. IMMIGR. LAWS. ASS'N (Nov. 15, 2022), <https://www.aila.org/advocacy-media/press-releases/2022/aila-applauds-house-access-to-counsel-legislation>.

¹⁰⁷ *Advancing Universal Representation Initiative: Publicly Funded Deportation Defense Programs*, VERA INST. OF JUST., <https://www.vera.org/ending-mass-incarceration/reducing-incarceration/detention-of-immigrants/advancing-universal-representation-initiative> (last visited Apr. 22, 2023).

State Senator Brad Hoylman-Sigal has sponsored the Access to Representation Act, which would make New York the first state to guarantee the right to an attorney for immigration court proceedings.¹⁰⁸ Whether the bill will take hold remains unknown—it is currently in committee.¹⁰⁹

II. ARGUMENT

The reality of unaccompanied noncitizen children representing themselves pro se in immigration court has always been a farce. However, the surge of unaccompanied minors seeking safety at the border, blatant discrepancy between the treatment of U.S. citizen children and noncitizen children, and contentious political decisions, such as the family separation policy, have made it all the more clear that change is so desperately needed. Public opinion, basic observations about a child's capabilities, and constitutional principles all point to the need for unaccompanied minor children to have legal representation in immigration court.

A. *Analysis of Public Opinion: Does Anyone Think It Should Be This Way?*

Immigration is notorious for being a partisan issue, with opinions about the immigration system typically aligning with political party platforms. However, even in the midst of political party polarization, a majority of U.S. citizens oppose separating minor children from their families: nearly two-thirds of Americans oppose family separation immigration policies.¹¹⁰ While studies show that 55% of “strong Republicans” typically favor a family separation immigration agenda, research findings indicate overall support across party lines for abandoning such a policy.¹¹¹

This same public approval remains steadfast when analyzing whether noncitizens should have guarantees for representation in immigration court proceedings. The following data from the Vera Institute of Justice (Vera) reveals clear bipartisan agreement for noncitizens broadly to receive representation in deportation proceedings:

Two in three people in the United States, or 67 percent, support government-funded attorneys for immigrants facing deportation. This

¹⁰⁸ S. Res. S999, 2023–24 Sess. (N.Y. 2023), <https://www.nysenate.gov/legislation/bills/2019/S7261>; Nicholas Turner & Erica Bryant, *New York Could Become the First State to Provide the Right to Legal Representation*, VERA INST. OF JUST. (Nov. 30, 2022), <https://www.vera.org/news/new-york-could-become-the-first-state-to-provide-the-right-to-legal-representation-in-immigration-court>.

¹⁰⁹ S. Res. S999.

¹¹⁰ SHIBLEY TELHAMI & STELLA ROUSE, *STUDY OF AMERICAN ATTITUDES ON IMMIGRATION AND REFUGEES 1* (2019), <https://criticalissues.umd.edu/sites/criticalissues.umd.edu/files/UMCIP%20Suevey%20Study%20July%202019.pdf>.

¹¹¹ *See id.*

support is widespread, existing among: 67 percent of likely voters; 80 percent of people who self-identify as Democrats, 53 percent of self-identified Republicans, and 66 percent of people who do not identify with either party; and 82 percent of Joe Biden supporters and nearly half (45 percent) of Donald Trump supporters (among those who expressed an intention to vote and had a preferred candidate in the 2020 preelection survey).¹¹²

In addition to the data above, after modifying their questions about representation in immigration court, Vera reports: “Sixty-nine percent [of survey respondents] support attorneys for people in immigration court. . . . Seventy-six percent support attorneys for everyone, including immigrants facing deportation. . . . Eighty-three percent support attorneys for everyone, including people in immigration court.”¹¹³

While Trump supporters exhibit more hesitancy to endorse such a policy, Vera’s data on the whole shows widespread support for legal representation of noncitizens.¹¹⁴ When polling specifically about whether unaccompanied minor children should have attorney access for immigration court cases, strong numbers again favor legal representation:

An overwhelming bipartisan and demographically diverse majority (75%) say the country should extend legal representation to children as they go through the legal immigration process, while only 25% voice opposition. Again, we find that support crosses ideological and partisan lines, with solid majorities of both conservatives (58% approve, 42% disapprove) and Republicans (54% approve, 46% disapprove) in favor of the policy. Similarly, voters in every region of the country—and in both urban and rural communities—overwhelmingly favor providing representation to these children. In fact, support is just as high in states carried by Donald Trump (75%) as in those carried by Joe Biden (75%).¹¹⁵

This data similarly shows that both Democrats and Republicans endorse appointing lawyers for unaccompanied minor children, but the study goes even further by demonstrating that this support for legal representation remains strong when analyzing different regions and communities.¹¹⁶ These data sets, combined with the public outcry of disapproval in response to family separation at the border, point to the same conclusion: there is substantial public agreement

¹¹² See VERA INST. OF JUST., PUBLIC SUPPORT, *supra* note 19, at 1.

¹¹³ *Id.* at 4.

¹¹⁴ See generally *id.*

¹¹⁵ GUY MOLYNEUX & AILEEN CARDONA, HART RSCH. ASSOCS., PUBLIC SUPPORT FOR LEGAL REPRESENTATION FOR UNACCOMPANIED CHILDREN 1 (2021), <https://supportkind.org/wp-content/uploads/2021/11/Hart-Polling-on-UC-Counsel.pdf>.

¹¹⁶ See *id.*

that children should not be forced to represent themselves pro se in immigration court.¹¹⁷

B. *Common Sense Consensus: Children are Not Capable of Facing Deportation Proceedings on Their Own*

The shocking scenarios facing unaccompanied minors may be driving public opinion to support providing these children with lawyers. Current policies are disconnected from common sense—it seems obvious that children should not have to face federal officers in court on their own: “A child’s age is far more than a chronological fact. It is a fact that generates commonsense conclusions about behavior and perception”¹¹⁸ For example, an immigration attorney told a reporter about a trial where the judge asked if a crying baby could be taken out during the proceedings.¹¹⁹ The lawyer had to tell the judge that the infant was the respondent for the next case.¹²⁰ The judge understandably assumed that the crying child was not needed in court, but on the contrary, the child’s presence was required because they would be representing themselves momentarily.¹²¹ The backward nature of immigration laws for unrepresented minors made this scenario a reality.

In the example above, the child cannot even communicate, let alone advocate for their rights in pro se proceedings.¹²² Yet, the Supreme Court’s opinions pertaining to juveniles rather than infants still affirm what we all know to be true: minors have not developed physically, mentally, socially, or emotionally in the way adults have.¹²³ If anything, the necessity of representation is only greater for unaccompanied minor children, with the undeniable language and cultural barriers at play. Even when children do have a grasp of language, there is no reason they would understand what “their country of removal” means, for instance.¹²⁴ While older children and juveniles may be more mature and capable, the complexity and demands of immigration litigation still inherently

¹¹⁷ See *id.*; VERA INST. OF JUST., PUBLIC SUPPORT, *supra* note 19.

¹¹⁸ Amended Complaint—Class Action at 11, *J.E.F.M. v. Holder*, 107 F. Supp. 3d 1119 (W.D. Wash. 2015) (No. 2:14-cv-01026-TSZ) (quoting *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011)) (internal quotations omitted), *aff’d in part, rev’d in part sub nom.* *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016).

¹¹⁹ Christina Jewett & Shefali Luthra, *From Crib To Court: Trump Administration Summons Immigrant Infants*, WASH. POST (July 18, 2018, 3:45 PM), https://www.washingtonpost.com/national/health-science/from-crib-to-court-trump-administration-summons-immigrant-infants/2018/07/18/179235e8-8ac3-11e8-9d59-dccc2c0cabcf_story.html.

¹²⁰ *Id.*

¹²¹ See *id.*

¹²² See *id.*

¹²³ See *Graham v. Florida*, 560 U.S. 48, 68 (2010); *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005).

¹²⁴ See Last Week Tonight, *supra* note 9, at 07:40.

leave them at a complete disadvantage against an experienced government agent.¹²⁵

The rationales for establishing capability of understanding legal concepts based upon brain development certainly apply to all juveniles, rather than just minors who happen to be U.S. citizens.¹²⁶ The only distinction between the children in juvenile court and children in immigration court is their citizenship—a status that boils down to an accident of birth, completely outside of a minor's control. Therefore, the right to counsel and additional juvenile protections should apply analogously to all children in the U.S. court system, regardless of citizenship status.

C. The Immigration System Sets Noncitizen Children Up to Fail, Even if They Try to Find Representation on Their Own

Even if a minor is capable of contacting attorneys in an effort to secure representation, they are unlikely to be successful in retaining a lawyer because advocacy groups with immigration attorneys are stretched incredibly thin as they try to compensate for the government's failures.¹²⁷ For example, a noncitizen minor named Jessica found herself without representation, explaining that she called every lawyer on a list of pro bono attorneys provided by the Department of Homeland Security (DHS).¹²⁸ She tried to find an attorney for eight months, with lawyers continuing to explain that they did not have the bandwidth to take her case.¹²⁹ Anecdotes from immigration attorneys shed light on the workload the lawyers on the other side of Jessica's phone calls may have faced.¹³⁰ An immigration attorney in California explained that she often receives seventy to eighty phone calls per day with people desperately seeking representation.¹³¹ The demand for legal services in immigration court significantly overwhelms the number of immigration lawyers with capacity.¹³² No matter the circumstance, it is incredibly difficult to secure an affordable immigration attorney, but it is even harder to find one with a background in child-immigration law.¹³³ Regardless of an unaccompanied minor's abilities, the current immigration infrastructure and lack of available representation sets them up for failure.

¹²⁵ See Smith, *supra* note 22, at 114–15.

¹²⁶ See *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569–70.

¹²⁷ See Misyrlena Egkolfopoulou, *The Thousands of Children Who Go to Immigration Court Alone*, ATLANTIC (Aug. 21, 2018), <https://www.theatlantic.com/politics/archive/2018/08/children-immigration-court/567490/>.

¹²⁸ See Smith, *supra* note 22, at 129.

¹²⁹ *Id.*

¹³⁰ See Egkolfopoulou, *supra* note 127.

¹³¹ *Id.*

¹³² See *id.*

¹³³ *Id.*

D. *Grave Due Process Violations*

Migrants on United States soil do not have the right to representation, but they are all entitled to a “full and fair hearing.”¹³⁴ Yet, this “right” is fundamentally flawed: how can noncitizens have a truly “fair” hearing when they are navigating an unfamiliar country, culture, language, and legal system while their liberties are jeopardized by threats of deportation?¹³⁵ These procedural due process concerns only intensify when grappling with how unaccompanied noncitizen children can possibly have fair hearings without any support.¹³⁶

[The] task [facing unaccompanied noncitizen children] is daunting. First, they must identify their options for legal relief. Next, they must prepare and timely present evidence, witnesses, submissions, and pleadings to further complex legal arguments. To make matters worse, the proceeding is adversarial. A child’s case is refuted by a trained government lawyer who acts as a prosecutor, advocating for the child’s removal back to their home country. The results are devastating; as one reporter wrote, “It is almost impossible for children to receive relief in immigration court on their own.” “The reality is they cannot comprehend the system and what is being asked of them.”¹³⁷

U.S. citizen children must have access to legal representation for the sake of due process, but trials for unrepresented and unaccompanied noncitizen children are deemed sufficient, even though “they face deprivations that are at least as severe as those that have supported recognition of the right in other contexts.”¹³⁸

Immigration officers are required to read certain statements in a language the child can understand and provide specific resources to ensure they are aware of their rights.¹³⁹ However, there are many holes that weaken these supposed safeguards.¹⁴⁰ Simply giving a child a flyer with the names of potential lawyers

¹³⁴ King & Hall, *supra* note 15, at 13–16.

¹³⁵ See Amanda Kavita Sewanan, Note, *The Right to Appointed Counsel: The Case for Unaccompanied Immigrant Children*, 41 CARDOZO L. REV. 317, 340, 352 (2019). Sewanan explains:

These children have fled from violent countries, many of them suffering from mental illnesses as a result of that violence or as a result of prolonged detention. They are forced to understand the complex set of laws that would grant them relief and communicate their entitlement for such relief in a foreign language. . . . [T]hey are apprehended at the border, and alone when they appear before an immigration judge, further increasing the risk of an erroneous deprivation of the child’s interests.

Id.

¹³⁶ See Smith, *supra* note 22, at 114–16.

¹³⁷ *Id.* at 114–15.

¹³⁸ Good, *supra* note 68, at 110–11 (explaining that “[d]espite expansion of the right in various contexts over the past decades, the right to appointed counsel in immigration proceedings is still nothing more than an unrealized possibility”).

¹³⁹ See Hlass, *Adultification*, *supra* note 13, at 210–11.

¹⁴⁰ See *id.* at 211.

does not effectuate a “full and fair” trial, particularly when the overarching system has stretched immigration attorneys so thin that many unaccompanied noncitizens will be unable to secure representation, even when they take all of the right steps.¹⁴¹ In addition, the way some protections are phrased leaves the door open for serious due process violations.¹⁴² For example, when immigration officials are required to serve notices to appear to a child respondent, they do not actually have to serve the *child* with such notice.¹⁴³ DHS can also provide the notice to a guardian, relative, or friend, which means that “a child could be charged to go to court and never be informed of it by the adult who received notice.”¹⁴⁴ Failing to provide a party with notice of a suit filed against them is the epitome of a procedural due process violation, but DHS’s policies for minors are inadequate for thwarting such infringements.¹⁴⁵

The disconnect between the promise of a “full and fair hearing” and noncitizens representing themselves in immigration court feels even more backwards when considering the underlying premise of ineffective-assistance-of-retained-counsel cases in the immigration system. Separate court hearings are regularly initiated to address ineffective assistance of retained counsel.¹⁴⁶ And yet, even though every hearing with a child representing themselves pro se in deportation proceedings is inadequate, all courts in our nation hold that due process is satisfied.¹⁴⁷

An alarming number of policies and principles require review when analyzing unaccompanied noncitizen children and procedural due process violations. While all of the nuances are not analyzed within this Note, the grave due process concerns should not be overlooked.

E. *Societal Ideals vs. The Reality: A Child’s “Tender Years”*

Aside from clear, rational reasons that indicate why a child is unable to represent themselves in court, the current system stands in stark contradiction to broader societal ideals about protecting children.¹⁴⁸ In Supreme Court opinions regarding juveniles, children are often described as “vulnerable,” particularly in their “tender years,” a time span that the Court does not define outright.¹⁴⁹ This mirrors the sentiments of many: children need to be nurtured, as they are the most innocent members of society. But the way children are treated in

¹⁴¹ See *id.*; Egkolfopoulou, *supra* note 127.

¹⁴² See Hlass, *Adultification*, *supra* note 13, at 211.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See *id.*

¹⁴⁶ See *C.J.L.G. v. Barr*, 923 F.3d 622, 631 (9th Cir. 2019) (noting that “[a] violation of the right to retained counsel is uniquely important”).

¹⁴⁷ See Sewanan, *supra* note 135, at 334, 352.

¹⁴⁸ See *Reno v. Flores*, 507 U.S. 292, 318–19 (1993); *In re Gault*, 387 U.S. 1, 34–42 (1967); *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

¹⁴⁹ See *Bellotti*, 443 U.S. at 634, 641, 647.

immigration court is so antithetical to these values, with toddlers wetting their pants as they answer a judge's questions and young children clinging to teddy bears as they face opposing counsel.¹⁵⁰ What we see instead is children stripped of the protections they would be afforded as cherished members of society if they were U.S. citizens.¹⁵¹

F. *Logistical Nightmare: The Financial and Administrative Inefficiencies When Unaccompanied Noncitizen Children Go to Court Alone*

As if arguments centered around fundamental fairness and human decency were not enough, unaccompanied minors representing themselves pro se results in tremendous administrative inefficiencies and financial costs on a system that already faces a huge backlog of immigration cases.¹⁵² With approximately 2,097,244 noncitizens waiting for their cases to be resolved as of January 2023, and studies estimating that detaining noncitizens costs 6.6 million taxpayer dollars each day, the numbers have become truly monumental.¹⁵³ But analyzing the costs at play within the immigration system reveals that stripping unaccompanied noncitizen children of the right to representation has not saved money:

Whether children appear in court with a lawyer or not, they will still cost money. The reality is that unaccompanied children are not going away. . . . Children who appear without a lawyer are often granted stays, are slow to present a cohesive case, and are less likely to agree to a voluntary departure. The process is inefficient, and court backlogs pile up. As the number of pending cases grows, judges become overburdened, and more judges need to be hired. Meanwhile, immigrants sit in detention at a high cost to both citizen taxpayers and the immigrants. . . . When children have representation, they can present their case more quickly and effectively or take voluntary departures when they have no viable form of relief. Either way, they move through the system more quickly and effectively. At the end of the day we pay for representation or we pay for inefficiency.¹⁵⁴

Once a noncitizen finally has their day in court, there is no time to waste, given the millions of people waiting in line behind them.¹⁵⁵ However, attempting to teach a child immigration law and help them navigate a hearing is neither simple

¹⁵⁰ See Sonia Nazario, *Child Migrants, Alone in Court*, N.Y. TIMES (Apr. 10, 2013), <https://www.nytimes.com/2013/04/11/opinion/give-lawyers-to-immigrant-children.html>.

¹⁵¹ See generally *In re Gault*, 387 U.S. at 34–42 (holding that a juvenile citizen has certain basic constitutional rights, including the right to counsel in juvenile delinquency proceedings); *Bellotti*, 443 U.S. at 634 (holding that a Massachusetts law unconstitutionally burdened a citizen minor's rights).

¹⁵² See *Immigration Court Backlog Tool*, *supra* note 20.

¹⁵³ See *id.*; DEP'T OF HOMELAND SEC., BUDGET OVERVIEW, *supra* note 25, at 5.

¹⁵⁴ Smith, *supra* note 22, at 150–51.

¹⁵⁵ See *Immigration Court Backlog Tool*, *supra* note 20.

nor quick. Even Judge Jack Weil, infamous for saying he can teach immigration law to three- and four-year-old children, admitted that adjudication with unrepresented minors “takes a lot of time [and] . . . a lot of patience.”¹⁵⁶ But the numbers reveal that the current immigration system does not have the capacity to spend significant time on such procedures that are unjust and illogical at their core.

G. *Immigration Judges in Cases with Unaccompanied Minors: Stuck Between a Rock and a Hard Place*

More fundamentally, the power dynamics in immigration proceedings with unrepresented minors render such trials inherently flawed from their outset. To make the hearings function when a child has no idea what is happening, judges find themselves in a position where they must guide the child through the proceedings.¹⁵⁷ However, there is a fine line between explaining the process and adopting the role of a child’s representative. Sarah Burr, a Former Assistant Chief Immigration Judge, spoke candidly about her experiences in this difficult situation, struggling with the tension between the role of a judge as an arbiter of justice and a responsibility to uphold the law:

[D]ay in and day out, immigration judges across the United States are charged by law with conducting hearings with unaccompanied and unrepresented children. Many of these judges do their best to humanize the proceedings and explain that the children have rights, but the judges are not advocates. They have no relationship with the children and often lack access to critical facts. There is simply no substitute for competent counsel standing next to these children in court.¹⁵⁸

Placing a judge in a position where it is impossible to serve as a neutral arbitrator and uphold a party’s due process rights necessarily means the notion of a fair trial is undermined from the start.¹⁵⁹ Either the power imbalance is blatant, or the judge risks becoming a pseudo-representative for a child respondent, even though they lack an intimate understanding of everything a given child has been

¹⁵⁶ See Last Week Tonight, *supra* note 9, at 05:55.

¹⁵⁷ Sarah Burr, Opinion, *Why Are Children Representing Themselves in Immigration Court?*, HILL (Oct. 24, 2021, 1:01 PM), <https://thehill.com/opinion/judiciary/578076-why-are-children-representing-themselves-in-immigration-court/>.

¹⁵⁸ *Id.*

¹⁵⁹ See Sewanan, *supra* note 135, at 352. Sewanan notes:

Most of the time, these children are eligible to qualify for some form of legal relief Yet, they are never given a sufficient opportunity to do so[,] . . . there is a scarcity of pro bono attorneys in their area, and immigration judges cannot act as both an advocate and a neutral decisionmaker. Thus, the procedural protections that UACs currently have in place are inadequate to give UACs a full and fair hearing as required under the Due Process Clause of the Fifth Amendment.

Id.

through.¹⁶⁰ In sum, judges find themselves without a truly appropriate or suitable way to conduct a trial when a child is unrepresented.¹⁶¹

Immigration remains a contentious political issue, but an analysis of the underlying inefficiencies and injustices underscores that unaccompanied noncitizen children should not have to represent themselves in immigration court. Unaccompanied minors representing themselves in immigration proceedings creates inefficiencies, raises serious constitutional concerns, and garners broad disapproval.

III. RESPONDING TO SKEPTICS

While some may understand the moral and logistical rationales above, others may still cling to the distinction between citizens and noncitizens as grounds for not taking action to remedy these inequities.¹⁶² Because migrant minors are not citizens, and therefore not entitled to full constitutional protections, why should the United States invest time and effort into providing them legal representation? A deterrence mindset often goes hand in hand with such questions: if the United States provides representation, will immigration dockets multiply? Will the government thereby “incentivize” noncitizens to enter the United States illegally? This skepticism can subsequently spiral into proclamations about the importance of pursuing U.S. citizenship the above-board way.¹⁶³

However, such sentiments fail to recognize the plight of noncitizens who come to the United States for safety. Many U.S. citizens idealize America as the “land of the free, and home of the brave,” treating migrants’ decision of coming to the United States as simply a matter of preference.¹⁶⁴ But many noncitizens’ reasons for coming to the United States are rooted in extreme trauma.¹⁶⁵ The definition of a “refugee” centers around the asylum applicant’s

¹⁶⁰ See Burr, *supra* note 157.

¹⁶¹ See *id.*

¹⁶² See *Reno v. Flores*, 507 U.S. 292, 305–06 (1993) (“Congress regularly makes rules that would be unacceptable if applied to citizens.”) (citation omitted).

¹⁶³ See generally Jennifer M. Chacón, *The Dehumanizing Work of Immigration Law*, BRENNAN CTR. FOR JUST. (July 12, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/dehumanizing-work-immigration-law>; Burr, *supra* note 157.

¹⁶⁴ FRANCIS SCOTT KEY, *THE STAR-SPANGLED BANNER* (1814); see generally President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> (describing some immigrants as “flout[ing] the rules,” with an emphasis on unauthorized border crossings); Joe Chatham, *Biden Asylum Rule Does Nothing to Fix Root Causes of Border Crisis*, FAIR (Feb. 24, 2023), <https://www.fairus.org/legislation/presidential-administration/border-security/biden-asylum-rule-does-nothing-fix-root> (claiming without evidence that “the overwhelming majority of [asylum claims] are unfounded or false”).

¹⁶⁵ See Matthis Schick et al., *Challenging Future, Challenging Past: The Relationship of Social Integration and Psychological Impairment in Traumatized Refugees*, EUR. J. PSYCHOTRAUMATOLOGY 1, 1 (2016) (“The experience of war and persecution referred to in

well-founded fear of persecution that renders them unable to return to their country of origin.¹⁶⁶ Once in the United States, the experience of immigrants is often defined by culture shock, isolation, and struggles to survive financially.¹⁶⁷ Many noncitizens do not enter the United States because of the American dream; they make the treacherous journey because they have no choice for the sake of their safety.¹⁶⁸

Simply asserting that noncitizens should enter the United States in the “right way” ignores the institutional barriers and undeniable economic stratification ingrained in the pathways to citizenship.¹⁶⁹ An online United States Citizenship and Immigration Services (USCIS) portal generates approximations of how long it will take to obtain various kinds of immigration relief.¹⁷⁰ While the estimates vary widely, most wait times are well over a year, and many exceed two years.¹⁷¹ Similarly, the State Department maintains a visa bulletin to show which individuals are eligible to receive visas, based on pending applications, from specific countries.¹⁷² For example, as of January 2023, the State Department is reviewing applications from Mexican citizens that date back to 2001 or 2002 for four of the five family visa categories.¹⁷³ This means for most family visas, citizens from Mexico face a twenty-one or twenty-two year wait.¹⁷⁴ Given the

the 1951 United Nations Convention Relating to the Status of Refugees implies a high risk of sustaining potentially traumatic events. Forced displacement and the often-hazardous escape abroad are associated with additional threats and strains.”)

¹⁶⁶ See 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A).

¹⁶⁷ See Schick et al., *supra* note 165, at 2 (“Even after eventually obtaining a secure visa status, refugees are often confronted with continuing challenges,” including “[c]ommunication problems, financial austerity, poor accommodation, inability to find work, separation from family members, and discrimination experience . . .”).

¹⁶⁸ *Refugees, Asylum Seekers and Migrants*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/#:~:text=Some%20migrants%20leave%20their%20country,serious%20circumstances%20that%20exist%20there> (last visited Jan. 22, 2023).

¹⁶⁹ See generally AM. IMMIGR. COUNCIL, WHY DON’T IMMIGRANTS APPLY FOR CITIZENSHIP? THERE IS NO LINE FOR MANY UNDOCUMENTED IMMIGRANTS (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/why_dont_immigrants_apply_for_citizenship_0.pdf.

¹⁷⁰ See *Check Case Processing Times*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://egov.uscis.gov/processing-times/> (last visited Apr. 22, 2023).

¹⁷¹ See *id.*

¹⁷² See, e.g., BUREAU OF CONSULAR AFFS., U.S. DEP’T OF STATE, VISA BULLETIN NO. 73: IMMIGRANT NUMBERS FOR JANUARY 2023 (Jan. 2023), https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_January2023.pdf.

¹⁷³ *Id.* at 3.

¹⁷⁴ See *id.*

danger faced by many noncitizens, most simply do not have time to spare and have no choice but to relocate now in order to survive.¹⁷⁵

The socio-economic underpinnings of the entire immigration system also tilt in favor of the wealthy and privileged, even when placing exorbitant attorney fees aside. For example, USCIS “Premium Processing Fees” shave months off the typical wait time at a hefty price tag.¹⁷⁶ The disparities are clear, as the fast-track approach through USCIS is not feasible for vulnerable and under-resourced noncitizens.

Coming from a different vantage point are abolitionists, who question the logic of attempting to fix a system that is fundamentally racist and part of the prison industrial complex.¹⁷⁷ The violent, racialized history behind the U.S. immigration system is undeniable and must not be ignored.¹⁷⁸ With inequities that are so ingrained in the current immigration system, meaningful solutions demand reconceptualizing what reforms are worth prioritizing.¹⁷⁹ Scholars have candidly discussed how complex these considerations are when analyzing reforms centered around the right to counsel:

[I]t is important to interrogate whether a reform effort will distract from structural change. This is a particularly fraught issue within campaigns for the right to counsel. Some advocates have argued the right to counsel should be a beginning rather than an end of strategies to disrupt power structures in legal systems. For example, the Black Lives Matter movement explicitly calls for free counsel for all immigrants in immigration court in their platform, while other deportation abolitionists warn that universal representation, if tied to representing detained people, may legitimize the detention system.¹⁸⁰

It is no doubt difficult to reconcile practicing within the legal system while advocating for the end of deeply problematic legal practices, such as detention

¹⁷⁵ See *Refugees, Asylum Seekers and Migrants*, *supra* note 168 (explaining that many people seek immigration protection because the “risks to their safety and life were so great that they felt they had no choice but to leave and seek safety outside their country because their own government cannot or will not protect them from those dangers”).

¹⁷⁶ See Press Release, U.S. Citizenship & Immigr. Servs., Premium Processing Fee Increase Effective Oct. 19, 2020 (Oct. 16, 2020), <https://www.uscis.gov/news/premium-processing-fee-increase-effective-oct-19-2020>.

¹⁷⁷ See Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 CALIF. L. REV. 1597, 1598–99 (2022) [hereinafter Hlass, *Lawyering*].

¹⁷⁸ See *id.* at 1611–14 (detailing ways racism has both overtly and covertly played a role in migration policies since colonial times); see also Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1071 (2021) (“[V]iolence is not incidental to deportation—it is not an occasional, or even regular, add-on to deportation. . . . [D]eportation is violence.”).

¹⁷⁹ See Hlass, *Lawyering*, *supra* note 177, at 1652–53.

¹⁸⁰ *Id.* at 1656.

and deportation.¹⁸¹ That said, “those committed to the ultimate goal of abolition may support projects that can help ease the suffering of those caught in the [legal] system.”¹⁸² It is of the utmost importance to work toward overhauling systems that continually disenfranchise noncitizens across the nation, but such large-scale changes also take time.¹⁸³ Advancing abolitionist goals must be balanced with creating solutions for the hundreds of thousands of noncitizens seeking immediate relief, particularly given current Congressional dynamics, which this Note will analyze further below. Abolition campaigns can coexist with efforts to address current legal needs if said efforts have an anti-racist orientation, focus on promoting the agency of noncitizens, avoid further investing in problematic systems, and do not provide resources to institutions like ICE, which are responsible for policing and detaining noncitizens.¹⁸⁴

Abolitionists may feel that providing legal counsel for noncitizen unaccompanied children does not go far enough; such a measure may be seen as trying to reform a fundamentally broken system that sanctions violent practices daily.¹⁸⁵ That said, by redirecting the ways in which the U.S. government spends immigration budgets, we can shift dollars away from family separation efforts and immigration detention, and instead provide legal counsel to noncitizen migrant children. Reconfiguring immigration funds in this fashion would avoid pouring more money into the system as it stands, while helping foster some semblance of fairness and dignity for the unaccompanied noncitizen children that currently have no choice but to represent themselves in legal proceedings

¹⁸¹ *See id.* at 1636–37 (“Traditional lawyering and accounts of legal justice often neglect the chasm between the stated ideals of the law and the violent realities of the justice system. There are also particular tensions inherent in practicing within a system while also calling for abolition of some of its institutions.”).

¹⁸² *Id.* at 1657 (quoting Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL’Y 13, 39 (2011)).

¹⁸³ *Id.* at 1605–06 (“Understanding that not all change will happen overnight, carceral abolitionists also advocate for interim steps to transformational change, or non-reformists [sic] reforms. Non-reformist reforms, also called transformative or revolutionary reforms, are changes that move toward systemic change, rather than reifying and strengthening the carceral state.”).

¹⁸⁴ *See id.* at 1645–58.

¹⁸⁵ *See* Cházaro, *supra* note 178, at 1113. Cházaro highlights the “trap” of embracing the common sense of deportation:

The full embrace of the common sense of deportation by the majority of pro-immigrant lawyers, advocates, and academics means that even as the violence inherent to deportation reaches new heights, responses to this crisis remain restricted to mitigating deportation’s harm to individual noncitizens. The common sense of deportation—the idea that deportation is an inevitable and necessary practice of immigration enforcement—creates this trap for pro-immigrant advocacy efforts. . . . Advocacy for universal representation of those facing deportation proceedings falls in this category.

Id.

with inconceivably high stakes.¹⁸⁶ The sheer amount of money coursing through the United States' immigration infrastructure is hard to conceptualize, meaning that significant reform can take place without funneling additional money into the United States immigration complex. By disengaging from destructive and harmful family separation policies, studies estimate the foster care system would save \$13 million annually.¹⁸⁷ More than \$2 billion has been set aside for ICE custody operations, yet as of March 2020, 61.2% of detainees do not have any criminal history.¹⁸⁸ Millions of dollars being used to put noncitizens without criminal records behind bars could instead provide lawyers to children so that they have a voice in high-stakes legal proceedings. These monetary shifts would still take place within a deeply problematic framework that demands deeper change, but these changes would provide legal counsel to noncitizen children in desperate need of representation while simultaneously remaining mindful of broader abolition goals.

It is essential to question longstanding systems and move forward with long-term goals while also pursuing solutions for unaccompanied noncitizen children that seek immediate help in immigration proceedings. Such an approach is not perfect, but it allows for advocates to disrupt violent patterns while practicing within the legal system.

IV. LOOKING AHEAD

The sheer number of deeply problematic immigration practices call for reforms that go beyond providing representation for unaccompanied noncitizen children in court, and that reconfigure the existing immigration infrastructure. Such large-scale changes include, but are not limited to, passing a comprehensive immigration bill that establishes the right to counsel for unaccompanied noncitizen children as a key reform, and working to abolish the current system as it stands. Conceptualizing these long overdue changes is crucial for understanding underlying immigration reform goals, but putting such plans into action is not necessarily realistic given the current tensions in

¹⁸⁶ See Kagan, *supra* note 75, at 316. In contrast to Cházaro, Kagan argues for more moderate reforms:

Even when deportations cannot be prevented, one of the purposes of universal legal aid should also be to demonstrate that American justice respects the dignity of a person, even in the course of process that deports them against their will. A lawyer's counsel and advocacy, even in a losing cause, is a material way to show that the respondent is a person, and that she is not forgotten or alone.

Id.

¹⁸⁷ MONTGOMERY, *supra* note 28, at 36.

¹⁸⁸ DEP'T OF HOMELAND SEC., BUDGET OVERVIEW *supra* note 25, at 5; *Decline in ICE Detainees with Criminal Records Could Shape Agency's Response to COVID-19 Pandemic*, TRAC IMMIGR. (Apr. 3, 2020), <https://trac.syr.edu/immigration/reports/601/>.

Congress.¹⁸⁹ However, there are other concrete steps the U.S. government should take in the meantime to make the immigration system more just, such as prioritizing enacting measures that make legal representation for unaccompanied minors a reality and implementing juvenile dockets across the board in U.S. immigration courts.

A. *Priority Big-Picture Changes and Solutions: Creating and Passing Updated Immigration Reform Policies*

Contributing to the problematic structure and power dynamics within the immigration courts, no legislation has targeted widespread immigration reform since the INA passed in 1952, with the last substantial revisions made in 1990.¹⁹⁰ Since the previous meaningful update, immigration dynamics across the world have changed drastically. For example, in 2002, the immigration backlog in the United States was “only” 166,061 cases.¹⁹¹ While this is a significant backlog, the number of cases waiting for trial in the United States has surged exponentially.¹⁹² The systems in place were created when the volume of immigration cases was significantly lower.

The current provisions have proven insufficient for the way immigration matters have evolved, and revised policies need to reflect the current state of affairs. Such legislation should guarantee legal counsel for unaccompanied noncitizen children throughout immigration court proceedings.

B. *What is Feasible with Today’s Gridlocked Congress?*

1. *Prioritizing Policies that Provide Representation for Noncitizen Children*

The sheer number of problems within the immigration system that demand reform is intimidating. Today’s political climate makes the goal of meaningful immigration legislation even more daunting, when a near-even split between Senate Republicans and Democrats results in a deadlock on most bills before

¹⁸⁹ See Rodriguez, *supra* note 74 (explaining that “Biden already has a long to-do list to rebuild the U.S. immigration system. But he could be hamstrung by a divided Congress that’s never managed to pass comprehensive immigration reform”).

¹⁹⁰ See Expert Q & A, *World of Migration: U.S. Immigration Reform Denied: Destined to Repeat the Cycle of Failure? Multimedia*, MIGRATION POL’Y INST., at 03:14 (Oct. 29, 2021), <https://www.migrationpolicy.org/multimedia/world-migration-us-legislative-reform-immigration>; Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163 (amended by Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978).

¹⁹¹ *Backlog of Pending Cases in Immigration Court as of Jan 2023*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php (last visited Apr. 22, 2023).

¹⁹² See *id.*

Congress.¹⁹³ The staunch political divide on immigration issues has resulted in presidents invoking executive action as a primary means of fulfilling immigration agendas.¹⁹⁴ These actions are vulnerable to repeal when the next President takes hold of the Oval Office, but recent presidents have been left with no other avenue to fulfill at least some of their campaign promises for immigration reform.¹⁹⁵

While heated debates typically ensue over immigration policies, changing the adjudication processes for cases with unaccompanied noncitizen children is an immigration issue with potential for common ground.¹⁹⁶ Studies show that there is robust support for all noncitizens to receive legal counsel in immigration proceedings, but the numbers are even stronger when looking at children specifically, with “[a]n overwhelming bipartisan and demographically diverse majority” supporting policies for noncitizen minors to have lawyers guide them through immigration court.¹⁹⁷ These numbers, combined with conventional wisdom about the innocence and vulnerability of children, indicates that a representation policy for minors could be a particularly valuable place to start immigration reforms.¹⁹⁸ Additionally, the absurdities and inefficiencies of pro se representation in immigration court will likely prove even easier for members of Congress to recognize when children are the policy subjects. In a political landscape where immigration issues are more polarizing than ever, legislation guaranteeing counsel to noncitizen children may represent an opportunity for congressional colleagues to reach across the aisle.

2. Implementing Juvenile Dockets in All United States Immigration Courts

Just as juvenile courts became a subset of U.S. courts, immigration courts should strive to create a juvenile division that does not just cater to the needs of noncitizen children when necessary, but is centered around their needs. The undeniable developmental differences of children demand an adjudicatory

¹⁹³ See Rodriguez, *supra* note 74; *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> (last visited Apr. 22, 2023).

¹⁹⁴ See Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 349 (2017).

¹⁹⁵ See Melina T. Oliverio, Comment, *The Role of the Executive in Rulemaking: An Exploration of Executive Action in United States Immigration Law*, 70 ADMIN. L. REV. 715, 738 (2018) (asserting that “[p]residents since the turn of the twenty-first century have increasingly used executive action in the field of immigration to pass policies and laws that Congress could not achieve”).

¹⁹⁶ See MOLYNEUX & CARDONA, *supra* note 115, at 1.

¹⁹⁷ See *id.*

¹⁹⁸ See *Bellotti v. Baird*, 443 U.S. 622, 634, 641 (1979); see also Kagan, *supra* note 75, at 311 (explaining that initiatives centered around representation for noncitizen children are an “attractive place to start” reforms, as “[s]uch cases illustrate the absurdity of asking respondents to represent themselves in Immigration Court”).

system with substantial support.¹⁹⁹ Such changes would require a significant administrative overhaul and cannot happen overnight. These long-term goals can coexist with a short-term modification: implementing juvenile dockets in immigration courts throughout the country.²⁰⁰ Separating the cases of unaccompanied noncitizen children from the broader docket is a surface level solution, but it is a step that advocates support for making immigration courts more conscious of the fact that cases involving child respondents call for different courtroom practices.²⁰¹ Separate juvenile dockets represent meaningful progress and should not be challenging to integrate into immigration courts at large, as they are already functional in certain locations.²⁰²

3. Potential Reform Through CCI

In addition, President Biden's CCI plan should not be forgotten. Given the description, CCI appears to be a step in the right direction to resolve the glaring inequity for unrepresented minors.²⁰³ Unfortunately, the program's current status is uncertain because many details have not yet been announced.²⁰⁴ The geographic scope is also narrow, with only eight immigration courts in specified cities receiving this government funding.²⁰⁵ In addition, the CCI press release indicates that only "certain" unaccompanied children within the eight courts will have an attorney provided on their behalf.²⁰⁶ This raises numerous questions about how CCI will work in practice: how many lawyers will the EOIR fund for this project? How many unaccompanied minors will benefit? What criteria or considerations will the EOIR utilize for selecting the "certain" children who will benefit from this program? While the DOJ has uploaded online resources and videos to provide an "introduction to immigration court" as part of the broader "Access EOIR" effort, no further details or dates have been provided about CCI specifically since the initial unveiling of the program in September 2021.²⁰⁷

Hopefully, the CCI is a meaningful improvement and represents the beginning of widespread access to legal aid for unaccompanied minors in immigration court. Ultimately, it remains to be seen if this is another empty promise to address the issue. Former presidents have spearheaded similar

¹⁹⁹ See *Graham v. Florida*, 560 U.S. 48, 68 (2010) (asserting that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence").

²⁰⁰ See Hlass, *Adultification*, *supra* note 13, at 221–22.

²⁰¹ See *id.*

²⁰² See *id.*

²⁰³ See EOIR Announces "Access EOIR" Initiative, *supra* note 98.

²⁰⁴ See *id.*

²⁰⁵ See *id.*

²⁰⁶ See *id.*

²⁰⁷ See *id.*

initiatives and failed to follow through with concrete reforms.²⁰⁸ While CCI provides some hope, the immigration system calls for deep solutions; providing unaccompanied minors with representation may just be the perfect start.

CONCLUSION

The lack of representation for unaccompanied minors in immigration court is an undoubtedly complex problem. To create thoughtful, lasting solutions, the many facets of the issue cannot be analyzed in isolation. We cannot think about unaccompanied children without analyzing family separation in tandem, as family separation too often creates a domino effect that leaves unaccompanied noncitizen children in need of representation. We cannot think about the rights noncitizen children should receive without remembering why certain rights are afforded to U.S. citizen children generally. We cannot think about the perspectives of the Supreme Court Justices, the President, and Congress without turning to public opinion. And we cannot question why certain noncitizens cross the border illegally without acknowledging the systemic economic and logistical barriers they face.

All of these tensions are compounded by the broader dysfunction of the entire immigration system, resulting in the current state of affairs: a system that denies noncitizen children rights in a way that is illogical, inefficient, and inhumane. This has become a country where young children cannot go into bouncy houses unsupervised, but their peers are required to represent themselves in court even if they developmentally lack the ability to walk or talk. Such practices for unaccompanied noncitizen children must change.

No immigration reforms come without pushback. However, the plethora of arguments favoring representation for noncitizen children provide many perspectives that people can latch onto, making it more likely that policymakers might come to a consensus. The broader immigration system needs a widespread overhaul, starting with a comprehensive immigration reform bill and working toward abolitionist goals. These ambitions are lofty, but providing noncitizen children representation presents a valuable starting point, and implementing juvenile dockets is a straightforward way to focus on the unique hurdles minors face in immigration court. President Biden's CCI plan is a symbolic start, but concrete change outside of executive action is needed, once and for all.

²⁰⁸ See Rodriguez, *supra* note 74.