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The Psychology Surrounding Legal Standards of Competency and Representation for Children in U.S. Immigration Court

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Claremont McKenna College

The Psychology Surrounding Legal Standards of Competency and Representation for Children in
U.S. Immigration Court

Submitted to
Professor Mark Costanzo

By
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Abstract

In recent years, immigration detentions have spiked. Further, the Zero Tolerance Policy enacted by President Trump has separated thousands of children from their families. Because many children are without their parents, and immigration court is civil in nature, thousands of children are placed in deportation hearings without representation each year. Child psychological research is at odds with the current deportation practices as psychological research deems children unable to understand the complexities of the court system or the impacts of deportation proceedings. A minimum competency to stand trial must be enacted to protect young children's due process rights, regardless of citizenship. Further, children should be protected through a guardian ad litem or other legal representatives as they are a vulnerable class. This paper examines the relationship between the current legal standards for immigration court, relevant child psychological research, and explores policy recommendations for immigration competency standards and representation requirements.

Keywords: immigration, law, child psychology, legal representation, competency

Table of Contents

Acknowledgments..... 2

Abstract..... 3

I. Introduction..... 5

II. Courts, Legal Standards, and Current Laws.....10

 II. 1. Best Interest of the Child and Appointed Guardians or Advocates.....10

 II. 2. Constitutional and Federal Law..... 11

 II. 3. State Law.....12

 II. 4. Immigration Law.....17

III. Psychological Theories Affecting Child Competency to Stand Trial.....20

 III. 1. Language Development.....20

 III. 2. Emotional Development and Perspective Taking.....22

 III. 3. Cognitive Development and Judgment.....24

 III. 4. Developmental Immaturity.....26

 III. 5. Other Developmental Impairments.....28

IV. Recommendations for Child Immigration Law and Practice.....30

 IV. 1. Competency Definition, Evaluation and Requirements.....30

 IV. 1. 1. Language.....30

 IV. 1. 2. Emotional Development.....31

 IV. 1. 3. Cognitive Development.....32

 IV. 1. 3. Developmental Maturity.....32

 IV. 2. Right to Guardian and Counsel.....32

 IV. 3. Specific Training Requirements for Counsel.....33

 IV. 4. Best Practices for Competency and Advocacy.....34

V. Conclusion.....35

References.....36

CHAPTER 1

Introduction

Deportation practices have existed within the United States for centuries. However, the policies, the number of people detained, and separation practices among families have differed substantially and are currently being scrutinized. The 1798 Alien and Sedition Acts, established deportation for those considered “dangerous to the safety and security of the United States,” immigration law has evolved (“Alien and Sedition Acts,” 1798). However, the first immigration department was not created until the 1891 Immigration Act, which developed border enforcement and excluded certain classes of people from entering the country. The United States pioneered immigration enforcement and detention of individuals by creating Ellis Island in 1892, the first immigration detention facility in the world (H., 2009).

As seen through both media and policy, society began to scrutinize immigrants as a whole, and specifically Mexican and Latin American immigrants in the eighteenth century. In 1904, US Department of Commerce and Labor began patrolling the U.S. – Mexico border (“Historical Timeline,” 2017). By 1910, the United States had opened a second immigration detention facility, Angel Island, in California, in an attempt to control the flow of Chinese immigrants into the country (A History of Immigration Detention, n.d.). After the targeting of Chinese immigrants, the Mexican “Repatriation Act” targeted Mexicans, forcing many immigrants to return and creating criminal punishment for those entering the US illegally (“Historical Timeline,” 2017). Although the societal shift in immigration policy and perspective led to mass rates of deportation during the Great Depression, the shortages of laborers after World War II led to temporary agricultural visas to Mexican immigrants, who later were

gathered and sent back to Mexico in operation “wetback.” Reagan’s “war on drugs” campaign continued to spread societal fear and dislike towards immigrants and entry into the United States.

Most recently, immigration policies have become much more controversial due to their dehumanization and lack of respect towards individuals. In 2005, “operation streamline” began the criminal prosecution of people apprehended at the border and to be held in privately operated Criminal Alien Requirement prisons (A History of Immigration Detention, n.d.). Private prisons have been scrutinized for their slavery-like conditions and extreme disregard for the health and well-being of inmates (“Private Prisons in the United States,” 2018). In particular, private immigration detention facilities allow for harsher conditions due to the limited avenues available to immigrants to make formal complaints. Throughout the Bush administration, detention of immigrants continued to increase, and the Department of Homeland Security increased their number of minimum detention beds to 34,000 on any given day (A History of Immigration Detention, n.d.).

Once Obama’s administration began, family detention and the Deferred Action for Childhood Arrivals programs attempted to aid in relief from deportation and to increase humanitarian efforts to keep families together. When families are together in court, children and their parents are represented together. Particularly, the Deferred Action for Childhood Arrivals program gave temporary work status to illegal immigrants who had arrived in the United States and met certain requirements. Further, to decrease the number of unaccompanied minors and women entering from Central America, family detention allowed for families to stay united throughout the immigration process. Under the Obama administration, the Family Case Management Program, piloted in 2016, aimed to keep families together and prioritized families with certain vulnerabilities, including pregnant or nursing family members, very young children,

immigrants with medical and mental health concerns, those only speaking indigenous languages (Timm, 2018). This policy had a high rate of compliance until it ended when the Trump administration began.

President Donald Trump took office January 20, 2017. Before and immediately after taking office, President Trump promised to strengthen the United States' immigration policies, and dehumanized immigrants through negative rhetoric (Staff, 2016). While in office, he has taken a strong stance on preventing illegal immigration through harsh policies focusing on detaining and deporting. As early as March of 2017, John Kelly, then secretary of Homeland Security, confirmed that the Trump administration was separating families at the border in a pilot project attempting to decrease the number of families trying to immigrate illegally into the United States (Diaz, 2017).

Despite calls to action and complaints filed by immigration advocacy organizations, Attorney General Jeff Sessions announced the introduction of a "zero tolerance" policy on April 6, 2018 (Burkitt, 2018). The policy aimed to prosecute all illegal immigrants by sending adults immediately to jail and placing children in the custody of Homeland Security. Inherent in this policy, infants and children are separated from parents, relatives, and/or any other accompanying adults upon detention. The Zero Tolerance Policy has been met with extreme criticism due to its inhumane treatment of families and children. The director of the National Immigration Law Center considers the policy "state-sanctioned violence against children, against families that are coming to the United States to seek safety," ("Advocate: DHS Proposal to Split Children," 2017). Further, the American Academy of Pediatrics, American College of Physicians and American Psychiatric Association issued a statement explaining that the policy has caused "irreparable harm to children" (Shoicet, 2018).

Not only does this policy separate children from their parents, but it further disincentivized family members to sponsor children detained at the border. In the past, family members, friends and others were able to apply to sponsor a child who had been detained through an application process. The Zero Tolerance Policy altered this by requiring applicants to submit fingerprints. With many of the sponsors being illegal immigrants, fingerprinting would result in their own deportation hearings (Hesson, 2018). Due to the new policy, the number of children detained increased as the number of sponsors quickly dropped.

The Zero Tolerance Policy has caused thousands of children, many of whom are fleeing devastating, terrorizing situations in their home countries, to be removed from the only familiarity they have in a new country, their families. In the first report issued by the Department of Homeland Security in June of 2018, the department reported that around 2,000 children were separated from their families from April 19, 2018 to May 31, 2018 as a result of the Zero Tolerance Policy and later reported upwards of 2,400 children in the month of May 2018 to June 2018 (Dickerson, 2018). Not only does this increase of detained, separated children result in a prolonged and unnecessary trauma for the child, but it also has economic costs to the United States. Shelter capacity has remained close to 90 percent since at least May 2018. With capacity being at an all-time high, large overflow facilities have been opened in which conditions are harsher and costs are higher. The estimated cost of a child in an overflow facility is \$750 per day whereas the cost of a child held in a family detention center is only \$298 per day (Dickerson, 2018).

As public knowledge of child separations increased, President Trump was pushed to sign an executive order meant to end the separation of the families at the U.S.-Mexico border. The order began a process of reunification of many detained children with their families, but

continued the detention of children at the border through the Zero Tolerance Policy practice of criminally charging parents. Even after the order was enacted, many children remained in the custody of the Department of Homeland Security, with about one fifth of children having not been reunited in August of 2018 (Board, 2018).

Although the Executive Order will hopefully aid in keeping children with their families at the border, many children still face deportation hearings alone. Further, because deportation cases are in civil court, there are still many children who immigrate without family members or who are in detention and must face deportation hearings alone, and without any form of representation. Children placed in deportation court alone cannot be expected to understand the court system or advocate for themselves without any form of advocacy. A study conducted at Syracuse University revealed that more than 80 percent of children who did not have lawyers were deported compared to only about 25 percent who had representation (“Representation for Unaccompanied Children,” 2014). This paper aims to explore policy recommendations for child competency standards and legal representation for children within these deportation proceedings.

CHAPTER 2

COURTS, LEGAL STANDARDS, AND CURRENT LAWS

The United States of America's legal system is overwhelming for children. Federal and state laws attempt to protect children by appointing legal representatives and other forms of guardians. Yet, the law in the United States does not protect some of the most vulnerable and abused children as it does not provide legal representation in its immigration court.

2.1 Best Interest of the Child and Appointed Guardians or Advocates

Since the 18th Century, representatives have been appointed for children in select cases where fathers were able to appoint guardians who had decision-making power over their children. Further, courts had authority to oversee these guardians for the benefit of the child. Currently, the best interest of the child standard is used to resolve disputes about children, yet it has never had a consistent method to determine this interest. Within this standard, judges can appoint different forms of representatives such as attorneys, guardian ad litem, and professionals from several disciplines.

Children facing judicial proceedings can be appointed a best interest attorney or a client-directed attorney. A best interest attorney must make recommendations to the court based on his or her determination of what is in the child's best interest, even if that recommendation is not the child's expressed position, (Samuelson, et.al., 2009). A client-directed attorney must advocate for their client's expressed preferences and positions. In cases in which the client cannot convey their wishes to a client-directed attorney, the lawyer may take action through seeking an advocate for the child or an independent recommendation to determine best interest. (Samuelson, et.al., 2009). Although client-directed attorneys owe more duty to their client's personal wishes,

there are times where children are unaware of the laws and consequences of their behavior or pleas. However, in both cases, children are able to use resources to improve their ability to advocate for themselves and their best interests in a court of law.

A Guardian ad Litem is an individual appointed to investigate what solutions would be in the best interests of the child. Overall, the GAL's recommendation should take into account the child's wishes, the child's situation and support system, and any other factors affecting their current state. GAL's are often lawyers or mental health professionals who have received special training, ("What is a Guardian ad Litem," 2018).

Attorneys and Guardian ad Litem's who are appointed for child cases are often, but not always, required to go through multidisciplinary training. Training includes information regarding the juvenile court system, laws, and information on child development, child psychology and educational issues. Without such training specific to children, advocates do not have the knowledge necessary to consider all aspects of a child's life or to accurately weigh the pros and cons of a situation.

2.2 Constitutional and Federal Law

The Fifth and Sixth Amendments of the United States Constitution jointly project the right for protection through counsel in trials. The Fifth Amendment states,

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived

THE PSYCHOLOGY SURROUNDING LEGAL STANDARDS OF COMPETENCY AND REPRESENTATION FOR CHILDREN IN U.S. IMMIGRATION COURT 12

of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. V

The Sixth Amendment states,

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.” U.S. Const. amend. VI

As such, the Fifth Amendment protects the right to due process, and the Sixth Amendment requires that courts provide counsel for the defense.

Not only do the Fifth and Sixth Amendments protect rights of an individual in court proceedings, but the Child Abuse Prevention and Treatment Act of 1974 passed by Congress further gave all abused and neglected children in dependency proceedings the right to representation in the form of a Guardian ad Litem, therefore further protecting a particular group of minors in specified circumstances (Shapiro, 2013).

2.3 State Law

Although federal and constitutional laws require a legal representative for a child, states vary widely in their requirements and policies regarding child advocacy and representation. Most generally, these laws pertain to abuse and divorce cases to determine the best course of action for children and families.

THE PSYCHOLOGY SURROUNDING LEGAL STANDARDS OF COMPETENCY AND REPRESENTATION FOR CHILDREN IN U.S. IMMIGRATION COURT 13

For adults in federal criminal court, competency to stand trial is determined by US Code 4241. This code allows for any defendant to file a motion for a hearing to determine the mental competency to stand trial in which it is reasonable to believe that “the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.” Competency to stand trial is determined by a psychiatric or psychological examination and a pursuant hearing. Although it is deemed to be something rendering one mentally incompetent, one can be incompetent to stand trial solely through lack of education or knowledge of the functioning of the United States court system. Because the U.S. Court system is so complex, many immigrants will not be able to understand the nature and consequences of their proceedings, especially without representation. Further, if a defendant is deemed incompetent to stand trial, they are placed in a hospital for treatment until they are deemed competent to stand trial. Throughout this hospitalization, they are expected to receive mental health treatment and courses pertaining to judicial proceedings US Code 4241. In order to be convicted of a crime, defendants are expected to be deemed competent to stand trial in order to preserve due process rights (“Competency to Stand Trial,” 2015).

In regards to competency to stand trial, certain states, such as Massachusetts and Washington, use the same standard and test to determine understanding of the law as they do with adults (Samuelson, et.al., 2009). Florida similarly has a juvenile competency standard where age can be considered, yet it is not required (Samuelson, et.al., 2009). By not distinguishing between children and adults, these states fail to acknowledge the stark differences among children and adults in terms of brain development, capacity, and executive functioning, which have extreme impact when considering consequences, behavior and communication.

Despite these laws, most states recognize that differences exist in maturity and ability to communicate with a lawyer and to understand the law due to age of a child. For example, Vermont's Rules for Family Proceedings Rule 1(2)(A) explicitly states that the developmental maturity and age of a child must be considered when determining competency to stand trial in criminal proceedings. Further, California law recognizes lack of competency due to developmental immaturity (Samuelson, et.al., 2009).

Apart from competency to stand trial, state laws widely vary in their requirements for appointed representatives and their role in court, particularly in dependency hearings. Dependency proceedings involve juveniles who are often in cases of abuse or minors who have been left without a parent or guardian. Although these children are especially vulnerable because they already lack the relationships and support of parents, not all states support or require representatives. In many states, the appointment of an attorney in dependency proceedings is discretionary, not mandatory. For example, Delaware law states, "In the event that the Family Court Judge determines [...] that an attorney guardian ad litem should be appointed, the Family Court Judge shall sign an order appointing an attorney guardian ad litem," 29 Del. C. 9007 A(b)(1). As such, the appointment of an attorney relies on the judge's personal decision, without a clear standard or requirement for assessment. Children in these cases who are not appointed an attorney or representative may be unable to communicate their desires and experiences accurately in the courtroom. Similarly, Arizona law states, "In all juvenile court proceedings in which the dependency petition includes an allegation that the juvenile is abused or neglected, the court shall appoint a guardian ad litem to protect the juvenile's best interests. This guardian may be an attorney or a court appointed special advocate," A.R.S. 8-221(I). Unlike Delaware,

THE PSYCHOLOGY SURROUNDING LEGAL STANDARDS OF COMPETENCY AND REPRESENTATION FOR CHILDREN IN U.S. IMMIGRATION COURT 15

Arizona's law requires representatives for specific cases, yet does not extend to all children or require the representative to be an attorney.

Due to the increased vulnerability and diminished understanding of children, representatives require extensive training in order to understand and advise a child correctly. Children may or may not be able to communicate correctly to their representative, which means that their input can be overlooked in the legal process and by their representative without the proper information and experience. Further, the professional code of conduct required of attorneys is not required of guardian ad litem or other representatives who do not practice law (Samuelson, et.al., 2009). Delaware law even exempts attorney guardians ad litem from the duty of confidentiality with a child client, and generally immunizes attorneys from acts or omissions within the scope of their appointment (DL R. of Prof. Conduct 1.14). By exempting these professionals from standard requirements, children are put at risk because of the possibility of omission of their statements and an expression of different desires than they had articulated to the attorney.

Unlike adults who have much more flexibility and ability to communicate their wishes and desires, children rely more on their attorneys and representatives. However, in many states, lawyers are not required to advocate for the desire of children, but instead for what they believe to be the child's best interest. California law states, "The counsel for the child shall be charged in general with the representation of the child's interests," Cal. We. & B Inst. Code 317(e). As such, the law authorizes the child's attorney to articulate, but does not require the counsel to advocate for the child's expressed wishes. Arkansas law similarly states "An attorney ad litem shall represent the best interest of the juvenile," therefore not requiring the attorney to express what the child's personal wants are A.C.A. 9-27-316(f)(5)(A). Although children may not be

THE PSYCHOLOGY SURROUNDING LEGAL STANDARDS OF COMPETENCY AND REPRESENTATION FOR CHILDREN IN U.S. IMMIGRATION COURT 16

able to understand all aspects of the law or risks and consequences of their decisions, at a minimum their feelings and desires should be heard and considered.

Further, certain states don't even require children to be present for proceedings and hearings. Arizona law states, "a child, through the child's guardian ad litem or attorney, has the right to be informed of, to be present at and to be heard in any proceeding involving dependency or termination of parental rights," A.R.S. 8-522(A). Therefore, the representative must communicate that the proceedings are occurring, but the child does not need to attend. Idaho law similarly does not require child attendance and solely gives party rights to the guardian ad litem or representative, not to the child Idaho Code 16-1634(1). When children are not present in hearings or considered a part of the case, they are much less likely to be able to communicate their feelings, desires and expressions to the judge. Further, without a child present, the judge may lose the personal and individual nature of the case.

Despite some states not requiring attorneys or protecting the interests of the child, other states require trainings and enforce case number limits to help ensure the welfare and best interest of the child is satisfied. For example, Arkansas requires that a "full-time attorney shall not have more than 75 dependency-neglect cases, and a part-time attorney shall not have more than 25 dependency-neglect cases." AR Sup. Ct. Adm. Order No. 15 2(n). Further, New York law states, "The number of children represented at any given time by an attorney appointed pursuant to section 249 of the Family Court Act shall not exceed 150," (22 NYCRR 127.5). By having a maximum case load requirement, lawyers are able to dedicate enough time to understanding the individual aspects and decisions in each case, allowing for comprehensive legal representation for children in need.

2.4 Immigration Law

Despite the legal representation required within the United States for US citizens, immigration court does not require representation for adults or children. Because immigration court and deportation hearings are civil proceedings, immigrants facing removal are not afforded the constitutional protections that are provided to criminal defendants. However, judges in immigration court must “inquire whether the petitioner wishes counsel, determine a reasonable period for obtaining counsel, and assess whether any waiver of counsel is knowing and voluntary,” (*Biwot v. Gonzalez*, 2005). For adolescents in particular, immigration judges factor “the minor’s age, intelligence, education, information, and understanding and ability to comprehend” into their analysis, (*Jie Lin v. Ashcroft*, 2004). Further, though legal representation can be sought and individuals have a right to representation, there is no requirement that the court provide one if the defendant cannot afford it. Not only is legal representation difficult to find and afford for many immigrants and immigrant children, but the process to make a claim alleging violations to rights are even more complicated, lengthy and difficult to access.

Although no current protections are offered to adults and children in immigration court, several cases have attempted to shed light on the necessity of representation, particularly for children. In the case of *J.E.F.M. v. Holder*, tried in 2015, nine minor non-citizens were subjected to removal proceedings. None of the children were able to find pro bono representation, nor were they able to afford representation (Samuelson, et.al., 2009). As such, the children sued the U.S. Government alleging violations of due process and statutory rights to appointed counsel at government expense in immigration proceedings. In the 9th circuit Court of Appeals, Judge McKeown authored the majority opinion dismissing the cases due to ripeness and lack of jurisdiction. Because some of the individuals in the class had not yet had their removal

THE PSYCHOLOGY SURROUNDING LEGAL STANDARDS OF COMPETENCY AND REPRESENTATION FOR CHILDREN IN U.S. IMMIGRATION COURT 18

proceedings completed or had already completed them, their cases were considered unripe.

Further, children and adults can challenge proceedings using exhaustive administrative remedies and filing a petition for review in a federal court of appeals, thus falling outside of the jurisdiction of the court of appeals. This decision ultimately held the current practices and laws governing immigration proceedings, thus continuing to allow for thousands of children to lack representation during removal, (*J.E.F.M. v. Holder*, 2016).

In 2016, the case of *F.L.B. et al v. Lynch et al* involved eight immigrant children, aged between ten and seventeen. Each of these children had begun removal proceedings and were soon to appear before an Immigration Judge. On similar grounds as *J.E.F.M. v. Holder*, *F.L.B. et al v. Lynch* claimed that due process rights are violated when children do not have access to legal counsel in immigration court. However, the case was similarly dismissed due to moot, thus again holding the standard that children are not required to have access to legal counsel in immigration court.

Unlike *J.E.F.M. v. Holder* and *F.L.B. et al v. Lynch*, the case of *C.J.L.G. v. Sessions* involves a parent being involved and asylum claims. C.J., a native and citizen of Honduras, had repeatedly denied joining the Mara gang who had threatened him at gunpoint. C.J. and his mother fled to the United States and were soon apprehended by the Department of Homeland Security. C.J.'s mother was served with a notice to appear for C.J. and signed on behalf of her son. She was given a list of organizations that provide pro bono legal services. Throughout the legal removal proceedings, C.J.'s mother attempted to find legal representation, but was unable to do so. Further, both her and her son did not speak English. When C.J.'s mother attempted to file an asylum claim, much of her writing was illegible and confusing. C.J. stated to the judge that he was in fear, and could not go to the police for aid due to the gang violence and corruption.

THE PSYCHOLOGY SURROUNDING LEGAL STANDARDS OF COMPETENCY AND REPRESENTATION FOR CHILDREN IN U.S. IMMIGRATION COURT 19

Despite the gang violence faced by C.J., his asylum claim was denied as he did not show he had suffered harm due to persecution, credible evidence of the future persecution or show that the government did not attempt to protect him. C.J. then filed an appeal and retained counsel, arguing that the hearing was procedurally defective and violated his due process rights. More specifically, he asserts that the Immigration Court failed to advise him of available forms of relief, in particular SIJ status, failed to develop the record and erred in not appointing counsel for him, *C.J.L.G. v. Sessions*. The Board originally dismissed the appeal and rejected the due process arguments, but his case will be tried in San Francisco again in December (*C.J.L.G. v. Sessions*, 2018).

The current laws governing immigration courts fails to understand the complexity of the proceedings and the diminished intellectual and emotional capacities. Further, children who are escaping violence and fleeing countries are likely to be persecuted upon return, increasing the need for representation and understanding of the legal system in order to file for protections and asylum when needed. The lack of accessibility in the appeals process further limits access to representation and poses substantive barriers to changing laws for those being deported and forced to stand trial without counsel.

CHAPTER 3

Psychological Theories Affecting Child Competency to Stand Trial

To understand the implication of policies placing children in court without representation, one must first understand the development of children's language skills, emotional development, perspective taking, cognitive development, and judgment.

3.1 Language Development

In order to understand what is occurring in a court of law and to be able to communicate personal beliefs and values, a basic level of language must exist. Within days of birth, babies tend to prefer the phonemes of their native tongue, a tendency which already disadvantages children who are not from native English-speaking families in immigration court (Shaffer & Kipp, 2014). Further, it is not until about 4 months that a baby will begin babbling and putting vowels together (Stoel-Gammon, et. al., 1998). At the age of one, children tend to speak their first word, defined as a word in which the term matches the meaning. Not until around the age of two do children tend to begin putting two separate words together. Expecting children under the age of two to be able to communicate in a court is unreasonable as they will barely be able to speak their native language at that time, let alone a second language.

Further, children at this age tend to over or under extend the usage of words by encompassing more than they mean to say. For example, children may call all men "dad" when the term is only meant to refer to their parent. The opposite, under extension of a word, occurs when a child uses a word too narrowly. For example, a child only considering their dog a "dog." Both overextension and under extension strongly depend on culture and context as parents and environment provide vocabulary and corrections of language (Shaffer & Kipp, 2014).

THE PSYCHOLOGY SURROUNDING LEGAL STANDARDS OF COMPETENCY AND REPRESENTATION FOR CHILDREN IN U.S. IMMIGRATION COURT 21

Consequently, children in immigration court may be unable to understand the correct usages of words in the United States and will likely face more difficulty learning language than those born and raised in the United States.

Not only does over and under extension of word usage tend to rely highly on culture, but so does syntax, the rules for combining words into sentences. Initial two-word combinations and telegraphic noun-verb speech tend not to occur until around two years. Further, it isn't until around age three when children begin using a subject, verb, predicate combination (Shaffer & Kipp, 2014). At this point in time, children tend to over regularize words and sentences, meaning that they have trouble with irregular verbs and tenses. Further, when children are raised in bilingual homes, they are statistically slower in language development (Horwitz, et. al., 2003; Kohnert, 2010). Because many children in immigration court learn English as a second language or are placed in situations with multiple languages during development, it is likely that they will also experience significantly slower development in understanding and using language. Further, Chomsky has shown that the early childhood is a critical period in learning grammar, which requires parents or surroundings that foster grammatical correctness and communication (Chomsky, 2000). In many immigration cases, such surroundings may not be present, resulting in delayed language understanding and production. When language is lacking, children cannot be expected to self-advocate for themselves in a court of law or properly communicate with judges and attorneys.

Culture further influences pragmatics, the rules that govern effective and appropriate communication with others (Yueguo, 1992). In a courtroom, pragmatics are vital in interpreting language and situation. Children tend to be able to learn about eye-contact and certain vocal exchange rules such as stopping to speak for someone else around the age of one. However, it is

not until around the age of five that children adapt language to different social expectations and their audience. Because children raised in different cultures or contexts may not have adapted to American behaviors, they may seem to act inappropriately in a courtroom without the intention of doing so.

In order to have fully efficient communication, Grice has determined that quantity, quality, relation and manner must exist and be in agreement on both sides of communication (Grice, 1975). Quantity refers to the amount of communication that occurs whereas quality references the truth and validity of the statements that are being made. Relation requires that the communication is relevant to the topic and issues being discussed. Lastly, manner references the clarity of the discussion and nonverbal cues used. As can be expected from the development of language in children, it is unlikely all four of these conditions can exist until around the age of five. Even at this age, it may be difficult for children in immigration court due to cultural barriers, differences and potentially delayed development. Children appearing in court under the age of five cannot be expected to hold an effective and productive conversation with opposing counsel or judges as they will be unable to fulfill all four conditions.

3.2 Emotional Development and Perspective Taking

Although language is vital for children to understand the implications and processes of the legal system, children must also have emotional maturity and the ability to understand multiple perspectives to fully comprehend what is occurring in court. At birth, children have a temperament, or emotional reaction, activity, attention and recognition, but this is likely hereditary and changes over time (Shaffer, 2014). Global emotions of attraction and withdrawal, present at birth, indicate immediate senses of distress or comfort. Between the ages of six week

and six months, universal emotions of happiness, sadness, anger, fear and surprise tend to emerge (Shaffer, 2014). Not until the age of two do secondary emotions begin to develop. Community, environment and culture shape secondary emotions, which includes guilt, shame, embarrassment and pride. Guilt and shame are particularly important within the legal system due to the sense of responsibility and feeling of violation associated with these emotions (Saarni, et. al., 1998). Further, aggression and external misbehavior tend to result from these emotions, which are amplified when children are forced to be separated from their support system and are placed in unfamiliar situations. When children stand trial at young ages, delayed emotional maturity can result in misinterpreted responses, and an inability to accurately display feelings.

Perspective taking, the process of viewing a situation from a different point of view, is an emotional ability that requires knowledge and age. In particular, perspective taking influences legal outcomes and decisions of children as they may or may not be aware of how their actions affect others or what else may be impacting an outcome. For children, undifferentiated perspective taking, which is the failure to distinguish between perspectives, begins around age three and ends around age six (Selman, 1971). This means that children facing legal prosecution before age six cannot determine how others perceive their situation, and cannot distinguish others' perspectives from their own. Further, from six to eight years, subjective role taking, or the recognition that others may have different information than them, still does not result in an ability to integrate the perspectives of others into their own. Not until the age of fourteen years and above are adolescents able to consider others' perspectives with reference to social environment and culture. Only after age 14 are children able to assume what the other person will believe and how they will act in accordance with societal norms and values (Selman, 1971). At this stage, adolescents understand the implications of actions and how others may perceive

them. However, children in immigration court are coming from differing backgrounds and cultures, resulting in a decreased ability to take perspectives outside of their own.

3.3 Cognitive Development and Judgment

The leading theories from Piaget, Vygotsky, and Kohlberg, explain how children develop cognitively and create judgments. Piaget's theory of cognitive development consists of four stages, revolving around movement and sensation. At birth, children enter into the sensori-motor stage where they begin to understand physical actions and language. Object permanence, the understanding that objects continue to exist even when they cannot be seen, occurs around age two (Piaget, 2013). Children standing trial before this age would not even be able to comprehend where a gavel went if it were moved out of sight. In the second, pre-operational stage from the ages of two to seven, children think symbolically and learn to use words and pictures to represent objects (Piaget, 2013). Children improve language and thinking skills as well, causing in an increased competency for understanding laws. Yet, at the pre-operational stage, children are too young to properly communicate due to their limited capacity of understanding words and objects. From age seven to eleven, children begin to think more logically about concrete events and understand the concept of conservation. Organized thought allows for children in immigration court to better understand the sequence of events and implications of sentencing. After the age of eleven, adolescent or young adults begin to think abstractly about hypothetical problems, and can grapple with moral, philosophical, ethical, social and political issues (Piaget, 2013). Not until this age are children prepared to go from a general principle to specific information. In court, being able to understand the specific details of a case is vital in comprehending what is at stake.

THE PSYCHOLOGY SURROUNDING LEGAL STANDARDS OF COMPETENCY AND REPRESENTATION FOR CHILDREN IN U.S. IMMIGRATION COURT 25

Apart from these stages, schemas are used to determine the set of rules that organize and interpret an individual's information (Shaffer, 2014). In order to remain in a state of understanding, people assimilate by modifying information to fit into pre-existing schemas or by accommodating their information by altering existing schemas in light of new information. Children in immigration court use assimilation and accommodation to better understand their surroundings, though they are likely to have difficulty creating an accurate schema due to their unfamiliarity with the United States.

Unlike Piaget, Vygotsky emphasizes the role of language and social interactions in cognitive development. Rather than a set of stages, Vygotsky believes in scaffolding and intersubjective learning (Vygotsky, 1978). Relationships and verbal engagement are essential in making jumps in knowledge and skills. Further, make believe play develops cognitive and social skills (Shaffer, 2014). When children are limited in their interactions through separation from parents are held in isolated centers with minimal education, they are less likely to be cognitively engaged and more likely to have diminished social skills.

Kohlberg further extended Piaget's theories and levels of cognitive development by expanding into three levels that determine moral maturity and reasoning. Moral maturity refers to the justification for a chosen action, not just the action itself (Shaffer, 2014). During the pre-conventional stage, children follow laws and rules without much question or defiance. When children reach the conventional stage, they understand social order and that rules are not cut and dry, rather there are situational elements that can impact and change an outcome. After the conventional stage, children understand universal rights, morals, and ethics, which are essential to decision making. Without having strong personal values and understandings of rights, children cannot be expected to advocate for their best interest in court.

Prosocial moral judgment alters Kohlberg's initial theory through the integration of dilemmas in which the needs of one individual conflict with those of another in a context in which the effects of laws, rules, punishment, authorities and formal obligations are minimized or relevant (Eisenberg-Berg, 1979). In immigration cases, defendants require prosocial moral judgment to understand how their individual needs and aspirations conflict with the laws and policies of the United States. In multiple studies conducted on preschool to adolescent children, it has been shown that young children have diminished responses to prosocial moral dilemmas and different responses about prohibition and moral conflicts (Eisenberg-Berg, 1979). Further, none of the children in these studies verbalized punishment and authority-oriented considerations in their prosocial moral reasoning. Because of the inability to understand their situation itself, children facing deportation and separation from their families in court cannot distinguish the conflicts of their own interests with those of the United States.

3.4 Developmental Immaturity

Cognitive maturity encompasses cognitive development theories, and labels the stage at which one can understand multiple perspectives, construct and evaluate judgments, and the ability to use multiple frames of reference. According to functional magnetic resonance imaging, or fMRI studies, the average person will achieve full developmental function around the age of twenty-two years (Dosenbach, et. al., 2010). Further, children's capacity for knowledge acquisition appears to vary widely based on maturational factors such as learning and experience (Dempster, 1981). Processing speed, voluntary response suppression, and spatial working memory have all been used to further characterize cognitive maturation in adolescents. Although children tend to have a steep increase in ability at a young age, it is not until around age nineteen that adult-level mature performance begins to be seen, (Luna, et. al., 2004). Expectations of

children to have the same composure and understanding of law as adults is flawed when there are such variable degrees of maturity.

Neurologically, executive functioning-- the series of inter-related processes responsible for purposeful and goal-directed behavior-- is used to determine whether someone has the competence and understanding for strategy, preparation and action. Studies of young populations show that the skills of executive functioning are extremely vulnerable to brain damage (Mateer & Williams, 1991), and depend on academic and social environments supporting cognitive development. Children in immigration court are more likely to have been abused and isolated, decreasing their executive functioning power. Further, children below the age of four require simple strategies as their executive functioning skills struggle to plan and organize actions, and have difficulty in generating new concepts (Anderson, 2002). Even when children reach a higher level of functioning and maturity, studies have found developmental regressions in adolescents between the ages of eleven and thirteen, particularly surrounding self-regulation and decision making (Anderson et. al., 1996, 2001). Not until after the age of thirteen can adolescents make fully reasoned decisions with a complete understanding of their future impact.

Because of the immense fluctuation in executive functioning measures and abilities among children, the full understanding of an individual situation is unlikely to occur until maturity around the age of nineteen or twenty. Further, low levels of cognitive maturity among children means that criminal behavior is likely to be caused by an increased vulnerability to coercive circumstances rather than character (Steinberg & Scott, 2003). In a legal setting, children are less likely to carefully make decisions and plan less for the future, which could result in longer sentences and impulsivity in the courtroom.

3.5 Other Developmental Impairments

Language, emotional and cognitive development in children aids in understanding their ability to comprehend what is occurring in a case and how to handle it, yet other psychological factors such as mental illness also alter a person's ability to stand trial. Mental illness results in considerable impairment for one in five people in the United States. Further, rates of children and adolescents receiving treatment for mental disorders are extremely low, especially in minority groups, (Yeh, McCabe, Hough, Pupuis & Hazen, 2003). For children in immigration court, it is unlikely that they have had access to mental health treatment in the past, even if they suffer from mental illness. Mental illness in children has further been shown to cause deficiencies in all areas of development. The ability to focus on school curricula and educational material for children suffering from disruptive behavior disorders is much lower than children without mental illness. Further, the stigmatization of mental illness among adolescents can be particularly devastating for one's self-esteem and independence (Hinshaw, 2002). Mental illness must be carefully examined and accounted for when determining someone's capacity to stand and comprehend trial without representation.

Other than mental illness and theories of development, children with developmental or neuropsychiatric disorders such as autism, schizophrenia, depression, and attention-deficit hyperactivity disorder tend to achieve cognitive maturity later than the average person (Dosenbach, et. al., 2010). Further, studies have shown that children have less reasoning with the concept of time and duration, which has significant impacts in the understanding of outcomes in any court. Studies have found that adults view their future self in a significantly longer time frame than do adolescents (Greene, 1986; Nurmi, 1991). In addition, adolescents are less risk averse and fail to take into account less pros and cons of risk taking than adults when making

THE PSYCHOLOGY SURROUNDING LEGAL STANDARDS OF COMPETENCY AND 29
REPRESENTATION FOR CHILDREN IN U.S. IMMIGRATION COURT

decisions, (Steinberg & Scott, 2003). Although cognitive and language development lie at the forefront of competency to stand trial, mental illness and other psychological factors play a key role in decision making and understanding of situations for adolescents.

CHAPTER 4

Recommendations for Child Immigration Law and Practice

Current immigration law and practice fails to account for child psychological development. Children cannot be expected to have the same capacity as adults in a court of law and thus should have more protections, regardless of their citizenship.

4.1 Competency Definition, Evaluation and Requirements

Similarly to adults in criminal court, children's intellectual disability, mental health status and developmental maturity must be taken into consideration when determining whether or not a youth is competent to stand trial in immigration court. As mentioned previously, children in immigration court are often lacking severely in general language and specific English skills. Further, young children who have grown up in another culture and have been exposed to different emotional expressions are at an extreme disadvantage when trying to comprehend the format of our legal system. At a basic level, children who are developmentally immature cannot be expected to understand and reason at the same level as adults, and must be protected through improved laws and statutes. When determined incompetent to stand trial in criminal court, trials are postponed until the defendant is considered competent. Immigration law must define children under the age of 13 as incompetent to stand trial due to their underdeveloped linguistic, emotional, cognitive, and perspective-taking skills.

4.1.1 Language. First, statutes must protect children with impaired language development. With no current age restrictions, children who are unable to speak a full sentence are being placed in court alone. Instead, there must be a high level of language and understanding in order for children to be considered competent in court. At the bare minimum, a

statute should not allow children under the age of five to be considered competent in court solely on the basis of limited linguistic ability. Because children are unable to form sentences until around the age of three and bilingual children are statistically slower in language development, it is wrong to consider a child in immigration court to be competent in a courtroom when they are unable to effectively communicate with words. Further, in order to account for over and under extension of words and the influence of pragmatics, children should not be regarded as competent in court until the age of five, when they are able to understand social expectations and able to vary social cues based on their audience. However, an age limit of five would not account for the different cultures and educational backgrounds of the majority of children in immigration court. A bare minimum level of language proficiency that cannot be achieved before the age of 5 would be an improvement over the current nonexistent standard. Further, a general test should be implemented requiring children to demonstrate a base level of language understanding, specifically in relation to the proceeding and the court of law.

4.1.2 Emotional Development. Although language is one important factor in determining competency, immigration court must further consider the emotional development of a child. First and foremost, children should be able to experience secondary emotions such as shame and guilt before they are able to stand trial. Since these do not emerge until the age of two and are highly dependent on the environment, two would be a minimum age purely from an emotional perspective. However, perspective taking is in some ways a more vital aspect of emotional development as it allows for one to view a situation from outside of their point of view. Children should be at a minimum at the subjective role taking stage, or around six to eight years of age, so that they are able to recognize that others may have different information than their own. Without this possibility, children will not be able to understand why they are being

deported or the consequences of the actions of deportation court. Immigration courts considering emotional development in children should automatically judge children under the age of six as incompetent to stand trial, or at least implement a standardized test, similar to Selman's, to determine which perspective taking stage a child is at.

4.1.3 Cognitive Development. Cognitive development complements language and emotional development in determining competency to stand trial because it determines the basis of judgments and conceptual understanding. In immigration court, children should be able to demonstrate organized thought and to think abstractly about moral, philosophical, ethical, social and political issues before they are deemed competent to stand trial. According to Piaget, such abilities would not develop until around the age of eleven. Further, in court, children should be able to verbalize punishment and authority-oriented considerations. Competency standards determined by child cognitive development should be limited to children above the age of eleven who are also able to show prosocial moral judgment in court.

4.1.4 Developmental Maturity. Based on executive functioning, which is responsible for purposeful and goal-directed behavior, children and young adults tend to have developmental regressions around the ages of eleven to thirteen, particularly surrounding self-regulation and decision making. As such, children under the age of thirteen can not be expected to make fully rational decisions while also taking into account their future impact. Further, mental illness, which is much more prevalent in immigrant children, powerfully impacts development and maturity. Consequently, developmental and neuropsychiatric disorders must also be considered when determining child competency.

4.2 Right to Guardian and Counsel

Whether or not a child is determined competent to stand trial, they should be provided the right to counsel prior and during the evaluation. Under the Sixth Amendment guaranteeing defendants assistance of counsel, US citizens are entitled to lawyers in criminal court. Although immigration court does not involve criminal proceedings or US citizens, children should be a protected class due to their increased vulnerability and diminished understanding of proceedings. It would be difficult to implement a policy where all children are appointed attorneys due to the current shortage in representation, though it would be possible, at a minimum, to require advocates and guardian ad litem who have completed specified training to work with all children facing deportation.

Not only should children be appointed counsel throughout their deportation proceedings and evaluations, but they should further be protected against the use of self-incriminating statements made in competency evaluations. Ultimately, children may make statements without knowing the full extent of the repercussions or without an understanding of what they are saying. Further, children can be manipulated easily and may recount false memories that should not be held against them in later hearings.

4.3 Specific Training Requirements for Representatives

Not only should children be appointed representatives to aid in their understanding and ability to communicate their best interest, but the representatives and competency evaluators should be familiar with child psychology and experiences. With many children in immigration court facing abuse, separation from their families, and dangerous situations in their home countries, it is important to create a welcoming and healthy relationship. Advocates, guardian ad litem and attorneys for these children must receive specialized training in not only

understanding child development and limitations, but also in understanding how to deal with trauma victims and children who have extremely differing educational, social and familial backgrounds.

Further, the mental health professionals conducting juvenile competency evaluations should recognize that youth have differing psychological needs than adults and a much more limited attention span, thus requiring evaluations to be performed within a reasonable time. Further, these professionals should not recommend hospitalization to children who are not found competent to stand trial unless there are clear signs of mental illness.

4.4 Best Practices for Competency and Advocacy

Taking all of this into account, I would recommend that children below the age of 13 should be deemed incompetent to stand trial in immigration court. It is not until the age of 13 that one can expect a child to understand the legal proceedings or be able to communicate their beliefs effectively. When deemed incompetent, deportation proceedings should be postponed until the age of 13 and children should be allowed to live with guardians, parents, or other third parties who are willing to take sponsorship, without the need for fingerprints. Beyond this age, and without any extreme mental impairments that would deem a child incompetent, children may be deemed competent to stand trial. Yet, all children should be appointed a court representative, either an advocate or guardian ad litem, to aid in the understanding of the court system and their particular deportation proceedings. Further, the advocates should be trained to deal with the particular needs of immigrant children, such as assault, mental health and cultural conflict.

CHAPTER 5

Conclusion

As discussed throughout this paper, decisions about competency standards and representation for children in immigration court should be informed by the best available psychological research. I have attempted to review that research within this paper, and it is clear that the findings of psychological research on children and treatment of children in U.S. immigration court are at conflict. These courts should adapt current policies immediately. The competency standard for children in immigration court should be altered so that all persons in immigration court under the age of 18 have a right to representation. Further, children under the age of 13 should be deemed incompetent to stand trial and be tried once they become competent. As policies adapt, representatives must be trained in the specific issues facing children immigrants such as trauma, English as a second language, and violence in their home country. These policies would diminish the trauma and suffering of thousands of children attempting to enter the United States each year.

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THE PSYCHOLOGY SURROUNDING LEGAL STANDARDS OF COMPETENCY AND 39
REPRESENTATION FOR CHILDREN IN U.S. IMMIGRATION COURT

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