



6-2023

## Adolescent brain development: Research, law, and policy for consideration in immigration proceedings

Sarah J. Diaz JD, LL.M.

*Loyola University Chicago, School of Law, [sdiaz10@luc.edu](mailto:sdiaz10@luc.edu)*

Peggy Frazier

*Loyola University Chicago, [vfrazier@luc.edu](mailto:vfrazier@luc.edu)*

Xiaorong Jajah Wu

Follow this and additional works at: <https://ecommons.luc.edu/chrc>

---

### Recommended Citation

Diaz, S., Frazier, P., & Jajah Wu, X. (2023). Adolescent brain development: Research, law, and policy for consideration in immigration proceedings.

This Report is brought to you for free and open access by the Centers at Loyola eCommons. It has been accepted for inclusion in Center for the Human Rights of Children by an authorized administrator of Loyola eCommons. For more information, please contact [ecommons@luc.edu](mailto:ecommons@luc.edu).



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 License](https://creativecommons.org/licenses/by-nc-nd/3.0/).

**JUNE 2023**

**ISSUE BRIEF**

**ADOLESCENT BRAIN DEVELOPMENT:  
RESEARCH, LAW, AND POLICY FOR  
CONSIDERATION IN IMMIGRATION  
PROCEEDINGS**

BY SARAH J. DIAZ, PEGGY FRAZIER, AND XIAORONG JAJAH WU



Center for the Human Rights of Children | Loyola University Chicago School of Law |  
[chrc@luc.edu](mailto:chrc@luc.edu) | [www.luc.edu/chrc](http://www.luc.edu/chrc)

## ACKNOWLEDGEMENTS

The authors of this brief and the **Center for the Human Rights of Children at Loyola School of Law** would to thank the following subject matter experts who served as an interdisciplinary Advisory Board in the development of this brief and its application to immigration law and immigration proceedings:

**Mari Dorn Lopez**, JD, Program Director, the Young Center for Immigrant Children's Rights

**Dr. Rebecca Ford-Paz**, PhD, Associate Director of Psychiatry and Behavior Sciences,  
Northwestern University

**Dr. Antoinette Kavanagh**, PhD, ABPP, Northwestern University Feinberg School of  
Medicine

**Honorable Eliza Klein**, Immigration Judge (Ret.)

**Dr. Breeda McGrath**, PhD, Associate Dean for the Chicago School of Professional  
Psychology

Editors and researchers in the development of this brief included **Carolyn Frazier, Sarah Galvin, Lisa Jacobs, Gavin Martin, and Katherine K. Walts.**

This brief was developed as part of a larger initiative to advance due process for migrant children and families in immigration law proceedings in collaboration with the **National Association of Immigration Judges**, and with generous support by the **John & Kathleen Schreiber Foundation**. Each written brief accompanies a companion live and recorded webinar conducted by the Center for the Human Rights of Children, Loyola University Chicago, School of Law and its partners. The content of this brief does not reflect the view points of the National Association of Immigration Judges (NAIJ), and is an independent product of the Center for the Human Rights of Children, Loyola University Chicago, School of Law.

## **TABLE OF CONTENTS**

<b>INTRODUCTION.....</b>	<b>3</b>
<b>THE ISSUE DEFINED.....</b>	<b>3</b>
<b>INTERDISCIPLINARY RESEARCH ON BRAINS, BODIES, AND BEHAVIOR IN ADOLESCENCE.....</b>	<b>4</b>
<b>LEGAL SYSTEMS ADAPTATIONS TO INTERDISCIPLINARY RESEARCH.....</b>	<b>9</b>
<b>CRITICAL IMPLICATIONS FOR IMMIGRATION PRACTICE .....</b>	<b>12</b>

# ADOLESCENT BRAIN DEVELOPMENT: RESEARCH, LAW, AND POLICY FOR CONSIDERATION IN IMMIGRATION PROCEEDINGS

## INTRODUCTION

Adolescents are not adults in miniature. This proposition has long been confirmed by science and supported by decisions of the United States Supreme Court.<sup>1</sup> As a result, child- and youth-serving legal systems have increasingly adapted to recognize the unique characteristics and needs of children and adolescents, as well as to ensure that laws and processes are designed to safeguard the rights and well-being of young people. Yet immigration law does not yet recognize the basic differences inherent in children and adolescents. As a result, judges and other adjudicators are left to apply a legal system designed exclusively for adults to the youth who appear before them. This mismatch fundamentally prevents fair and judicious proceedings and increases the likelihood that children and adolescents are harmed by the process.

“Our history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults.”

U.S. Supreme Court

This brief is intended to assist adjudicators as they consider the cases of adolescents, to help shed light on how to equitably treat adolescents in the immigration context and reduce unintended harm to these young people as they navigate the system. The brief is comprised of two main sections: (1) a primer on adolescent development, examining the research and social science around adolescent brains, bodies, and behaviors; and (2) documenting how other child- and youth-serving legal systems have adapted to these findings, and identifying critical implications for immigration law and practice.

## THE ISSUE DEFINED

### “ADOLESCENCE” DEFINED

While the term “child” is legally defined as anyone under the age of eighteen, there is no precise or consistent definition of “adolescence.” Historically, adolescence was considered to bridge the time between pubertal onset and independence, or roughly the ages of 12-18. However, research in the past few decades has reframed and expanded our understanding of adolescence to encompass a more accurate chronology, taking into account an earlier average pubertal onset and the timeline for brain development. Experts now consider adolescence to span the ages of 10-25. Strikingly, while brain systems that support cognitive processes, or intelligence, may mature by mid-adolescence, the part of the brain responsible for impulse control, consequential thinking, planning, and abstract reasoning does not fully mature until a person reaches their mid-twenties.<sup>2</sup> This asynchronous development explains why teenagers who exhibit a high level of intelligence in some areas may still do “surprisingly dumb things”.<sup>3</sup> Understanding how to interact and engage with teenagers in developmentally appropriate and respectful ways is crucial for judges to fairly

---

<sup>1</sup> J.D.B. v. North Carolina, 564 US 261 (2011). (“[T]he legal disqualifications placed on children as a class . . . exhibit the settled understanding that the differentiating characteristics of youth are universal.”).

<sup>2</sup> *Id.*; See also Laurence Steinberg, *Should The Science Of Adolescent Brain Development Inform Public Policy?*, Issues In Science And Technology (2012)<https://issues.org/steinberg-science-adolescent-teenage-brain-policy/>.

<sup>3</sup> Laurence Steinberg, *Should The Science Of Adolescent Brain Development Inform Public Policy?*, Issues In Science And Technology (2012)<https://issues.org/steinberg-science-adolescent-teenage-brain-policy/>.

carry out decisions in these cases and to ensure that the teenagers have a positive experience with the legal system.

Assessing adolescent development is complex. Individuals mature and develop at different rates and ages. Each adolescent's individual development is unique because development is influenced not only by intrinsic factors (e.g. genetics, disabilities), but also extrinsic factors (e.g. environment, culture, lifestyle).<sup>4</sup> Immigrant teenagers undergo acculturation stress, which means they are challenged to create an integrated bicultural identity, while also going through the process of adolescent development.<sup>5</sup>

In an effort so simplify this complex process, this brief uses the more inclusive and scientifically backed definition of adolescence that is not strictly demarcated by ages, but is based on levels of development, while the term “child” is employed more loosely to cover that broad spectrum of ages before adulthood.

## INTERDISCIPLINARY RESEARCH ON BRAINS, BODIES, AND BEHAVIOR IN ADOLESCENCE

### ADOLESCENT BRAIN DEVELOPMENT

Adolescent brain development, which can span from ages 10-25, is influenced by a multiplicity of factors, including chronic stress or trauma during infancy/childhood, heredity, environment, nutrition, sleep, hormones, physical/mental disability, genetics, economic and social stress.<sup>6</sup> As a result, children and adolescents do not develop at a uniform rate.<sup>7</sup>

Neuroscience and developmental research indicate that traumatic and stressful experiences—particularly those that are prolonged or repeated—can have a significant impact on the structure and function of the developing brain.<sup>8</sup> Structural brain development may be delayed or stunted.<sup>9</sup>

Functional brain development—including managing responses to fear, anxiety and environmental stressors—can be compromised in both the short and long terms. Learning, memory, and impulse control may be affected, as well as physical and mental. And, while some effects of trauma may be lifelong, some can be mitigated with supports, including maintaining connections with caregivers and caring adults and participating in evidence-based trauma-focused therapeutic interventions.<sup>10</sup>

---

<sup>4</sup> Gin S. Malhi et al., *Modelling Resilience in Adolescence and Adversity: A Novel Framework to Inform Research and Practice*, 9 TRANSLATIONAL PSYCHIATRY (2019), <https://www.nature.com/articles/s41398-019-0651-y#Sec26>.

<sup>5</sup> Shiyu Wu, et al., *Familial Acculturative Stress and Adolescent Internalizing and Externalizing Behaviors in Latinx Immigrant Families of the Southwest*, 22 J. of Immigrant and Minority Health 1193, 1193-99 (2020).

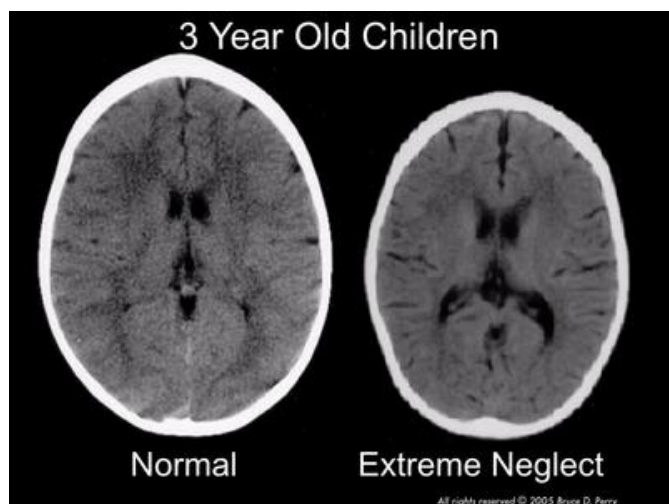
<sup>6</sup> Mariam Arain et al., *Maturation of the Adolescent Brain*, 450 Neuropsychiatr. Dis. Treat. 449, 450 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3621648/>.

<sup>7</sup> Ezequiel Mercurio et al., *Adolescent Brain Development and Progressive Legal Responsibility in the Latin American Context*, 11 FRONTIERS IN PSYCH. 627, 628 (2020), <https://www.frontiersin.org/articles/10.3389/fpsyg.2020.00627/full>.

<sup>8</sup> National Scientific Council on the Developing Child, Harvard University, *Excessive Stress Disrupts the Architecture of the Developing Brain* (Center on the Developing Child Working Paper No. 3, 2014).

<sup>9</sup> *Understanding the Effects of Maltreatment on Early Brain Development*, Child Welfare Information Gateway (Oct. 2001), <https://www.childwelfare.gov/pubPDFs/earlybrain.pdf>.

<sup>10</sup> For more information on how trauma affects development, refer to our forthcoming action brief *Child Trauma: Research, Law, And Policy for Consideration in Immigration Proceedings*. See also, Child Welfare Information Gateway at <https://www.childwelfare.gov/topics/systemwide/youth/understanding/trauma/>.



“These images illustrate the negative impact of neglect on the developing brain. In the CT scan on the left is an image from a healthy three year old with an average head size. The image on the right is from a three year old child suffering from severe sensory-deprivation neglect. This child’s brain is significantly smaller than average and has abnormal development of cortex.”

*Images from studies conducted by a team of researchers from the Child Trauma Academy led by Bruce D. Perry, M.D., Ph.D. Source: Child Welfare Information Gateway.*

In order to better understand the presentation of brain development in each child, this brief divides adolescent development into three categories: biological development (cognitive and physical), social development (how a child engages with the people around them), and responsivity (how a child responds to an environment or situation).

#### ***A. Biological Development: Physical Maturity Does Not Indicate Developmental Maturity***

The adolescent brain does not develop in parallel with the physical markers of maturation.<sup>11</sup> Some teenagers experience early rapid pubertal development, which makes them appear physically older than their peers. However, this physical development does not mirror a teenager’s emotional or cognitive development. But cognitive changes do not occur in lockstep with physiological changes. Instead, physical and hormonal changes affect and are affected by brain growth, and impact development up through the early 20s.<sup>12</sup>

This asynchronous development has crucial and wide-ranging implications for working with adolescents. A teen who is mature in physical appearance may still be in the early stages of developing their emotional development. Being treated as an older adolescent or even as an adult based on their physical appearance is not only be harmful to a teen’s sense of identity and security, but may also lead to difficulties in communicating with that teen.

#### ***B. Adolescents engage in a different level of risk analysis than adults***

Adolescence can be characterized as a time in which children begin to think in new ways, but are not yet able to fully and appropriately make use of the new skills and abilities. While some cognitive abilities are developed by age 16, psychosocial maturity (i.e. self-control and the ability to think about the future), and social and emotional maturity do not fully develop until

<sup>11</sup> Renata Arrington Sanders, *Adolescent Psychosocial, Social, and Cognitive Development*, 34 PEDIATRICS IN REVIEW 354, 356 (2013), <https://siecus.org/wp-content/uploads/2018/07/1.8-Adolescent-Cognitive-Development.pdf>.

<sup>12</sup> Mercurio et al., *supra* note 7, at 629.

one's mid-20s.<sup>13</sup> Until age 25, an individual does not enjoy a fully mature prefrontal cortex—a crucial region of the brain that helps us strategize, plan and foresee long-term consequences.<sup>14</sup>

Throughout adolescence, the “brain system that supports self-control” develops slowly, while “brain system that influences pleasure-seeking and emotional reactivity” comes online more rapidly, meaning adolescents are more prone to rely on rewards and reward-seeking to make decisions, especially between the ages of 13-17, when this sensitivity to rewards is at its peak.<sup>15</sup> The consequence is that adolescents are less capable of controlling their impulses and more susceptible to reward-seeking (especially immediate rewards) and risk-taking behaviors. While adolescents may understand that there are long-term consequences of an action, they are more likely to underestimate the consequences<sup>16</sup> given their focus on rewards.<sup>17</sup>

### ***C. Adolescent Risk Taking is Developmentally Healthy and Does Not Predict Adult Behavior***

Adolescence is a period of significant social and emotional development. It is important to note that these changes are natural and indicate the adolescent brain is growing and developing—risk-taking and social changes in teens are by no means “negative” traits nor indicative of how an adolescent will behave in adulthood.

Social development allows teenagers learn to engage with others and become more aware of their own feelings and the feelings of those around them.<sup>18</sup> As children enter into early adolescence, they begin to esteem peer group validation over parental and familial favor.<sup>19</sup> During adolescence, an individual's peer group assumes a primary social role.<sup>20</sup> Adolescents also become more attuned to the reactions of peers<sup>21</sup> and become better at reading social cues of others and adapting to these cues.<sup>22</sup>

Adolescents are more willing to engage in risky behavior when peers are around because of their greater concern with how their peers view them, a phenomenon known as the peer effect.<sup>23</sup> Teenagers tend to behave more impulsively in situations that tap into their emotional awareness

---

<sup>13</sup> Mercurio et al., *supra* note 7.

<sup>14</sup> Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 *Neuropsychiatr. Dis. Treat.* 449, 453 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3621648/>; Duke University, *Content: Brain Maturation is Complete at About 24 Years of Age*, The Alcohol Pharmacology Education Partnership, <https://sites.duke.edu/apec/module-3-alcohol-cell-suicide-and-the-adolescent-brain/content-brain-maturation-is-complete-at-about-24-years-of-age/> (last visited Aug. 4, 2021); *Brain Maturity Extends Well Beyond Teen Years*, NPR (Oct. 10, 2011), <https://www.npr.org/templates/story/story.php?storyId=141164708>.

<sup>15</sup> COMMITTEE ON ASSESSING JUVENILE JUSTICE REFORM, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH (2013) 93, 97 <https://www.nap.edu/read/14685/chapter/6#97>; Mercurio et al., *supra* note 7, at 455.

<sup>16</sup> *Module 3: Juvenile Justice and Adolescent Development*, FAIR TRIALS (Mar. 24, 2018), <https://www.fairtrials.org/module-3-juvenile-justice-and-adolescent-development>.

<sup>17</sup> Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 *Ann. Rev. of Clinical Psych.* 459, (2009).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Elizabeth S. Scott et al., *Brain Development, Social Context and Justice Policy*, 57 *WASHINGTON U. J. L. & POL'Y* 13, 15 (2018), [https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3088&context=faculty\\_scholarship](https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3088&context=faculty_scholarship).

<sup>22</sup> Deborah Yurgelun-Todd, *Emotional and Cognitive Changes During Adolescence*, 17 *Current Opinion in Neurobiology* 251, 255 (2007), <https://www.sciencedirect.com/science/article/pii/S0959438807000414>.

<sup>23</sup> Scott et al., *supra* note 21, at 3521.



by being either more rewarding (e.g. peer approval) or threatening (e.g. punishment), than when they are met with a more “neutral” setting.<sup>24</sup>

#### ***D. The Effects of Positive and Negative Environmental Influences on the Adolescent Brain***

Often, adolescence is portrayed as a difficult time—fraught with risks and demanding correction. However, current research conveys a different picture of adolescence, as a series of carefully orchestrated, exquisitely sensitive neurodevelopmental changes that make adolescence a period of both vulnerability and opportunity.”<sup>25</sup> Adolescence is when the human brain is “at its most malleable and [is] receptive to both *positive* and *negative* influences.”<sup>26</sup> (emphasis original).

#### **Negative Experiences Have Lasting and Cumulative Consequences on Development**

Adolescents and children who are exposed to negative experiences and environments suffer short and long-term adverse effects. For example, traumatic experiences can cause chronic health conditions (physical and mental health),<sup>27</sup> impact a child’s development of social skills,<sup>28</sup> and result in changes to a child’s behavior, such as “social withdrawal, loss of trust, . . . and feelings of guilt and shame.”<sup>29</sup> Additionally, children who are exposed to violence often suffer from symptoms of post-traumatic stress disorder, which presents very differently in children than it does in adults, and includes difficulty regulating intense emotions, forming and maintaining health relationships, and developmental regression in functioning.<sup>30</sup>

Toxic stress—the state of constant or repeated exposure to stressful situations (e.g., exposure to domestic or community violence, child abuse/neglect)—can also wreak severe consequences on adolescents’ mental and physical health and behavior. One known toxic stressor for children of all ages, infants to adolescents, is parent-child separation, even if the family is eventually reunified.<sup>31</sup> Toxic stress enacts negative, long-term consequences for development, “chang[ing] how the body responds to stress in the long-term, disrupting higher-order cognitive and affective processes as well as negatively altering brain structures and functioning.”<sup>32</sup> These shifts in development can

---

<sup>24</sup> *Id.*

<sup>25</sup> STEPHANIE BURNETT HEYES & CHII FEN HIU, THE ADOLESCENT BRAIN: VULNERABILITY AND OPPORTUNITY (Apr. 20, 2015), <https://www.unicef-irc.org/article/1149-the-adolescent-brain-vulnerability-and-opportunity.html#:~:text=In%20humans%2C%20adolescence%20is%20often%20characterised%20as%20a,adolescence%20a%20period%20of%20both%20vulnerability%20and%20opportunity.>

<sup>26</sup> Malhi et al., *supra* note 4, at 14.

<sup>27</sup> ELISABETH SCHAUER & THOMAS ELBERT, THE PSYCHOLOGICAL IMPACT OF CHILD SOLDIERING, 311, 321-23 (2010), <https://www.usip.org/sites/default/files/missing-peace/The%20psychological%20impact%20of%20child%20soldiering%20-%20Schauer.pdf>.

<sup>28</sup> *Id.* at 311-12.

<sup>29</sup> *Id.* at 332.

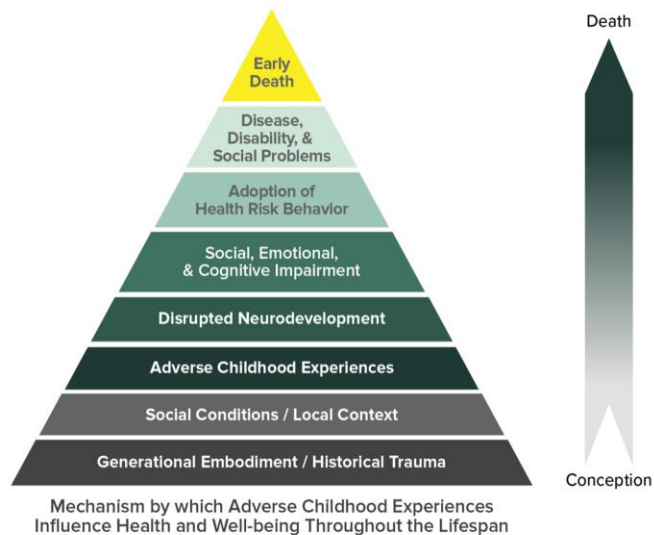
<sup>30</sup> United Nations, Office of the High Commissioner for Human Rights, Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, No. 8, Rev. 2 (2022).

<sup>31</sup> Johayra Bouza et al., *The Science is Clear: Separating Families has Long-term Damaging Psychological and Health Consequences for Children, Families, and Communities*, Society for Research in Child Development (2018), <https://www.srcd.org/briefs-fact-sheets/the-science-is-clear>.

<sup>32</sup> *Id.*

lead to “mental health problems, poor social functioning, insecure attachment, disrupted stress reactivity, and mortality,” which affect individuals well into adulthood.”<sup>33</sup>

Moreover, the effects of adverse childhood experiences are “cumulative”: those with multiple adverse childhood experiences are likely to have substantially increased risk for alcoholism, drug abuse, risky sexual behavior, depression, and suicide attempts in adulthood.<sup>34</sup> These children may suffer from behavioral difficulties, inattention, memory and learning problems, and difficulty managing impulses.<sup>35</sup> As adolescents, these challenges may lead to them to develop unhealthy coping behaviors (e.g., drug use, overeating, risky sexual behaviors, aggression, self-harm) that then expose them to increased physical health problems.<sup>36</sup>



Source: Centers for Disease Control and Prevention

### **Positive Experiences Can Reverse the Effects of Adversity**

An adolescent who is given support and care can flourish despite prior adversity. “The brain itself can be altered . . . with appropriately timed, intensive interventions.”<sup>37</sup> The term “resilience” is generally used to describe how individuals “bounce back”<sup>38</sup> or overcome exposure to risk and adversity.<sup>39</sup> For children and adolescents, the relationship with a primary caregiver is of utmost

<sup>33</sup> *Id.* (internal citations omitted).

<sup>34</sup> SR Dube, et al., *Childhood Abuse, Household Dysfunction, and the Risk of Attempted Suicide Throughout the Life Span: Findings from the Adverse Childhood Experiences Study*, 286 J. of the Am. Med. Assoc. 3089, 3089-3096 (2001).

<sup>35</sup> Mary Boullier & Mitch Blair, *Adverse Childhood Experiences*, 28 Paediatrics and Child Health 132, 132-37 (2018).

<sup>36</sup> Vincent Felitti, *Adverse Childhood Experiences and Adult Health*, 9 Acad. Pediatrics, 131, 132 (2009).

<sup>37</sup> RIMA SHORE, *Rethinking the Brain: New Insights into Early Development*, FAMILIES AND WORK INSTITUTE 36 (1997).

<sup>38</sup> *Resilience in Pre-Teens and Teenagers*, Raising Children (Dec. 7, 2021), <https://raisingchildren.net.au/pre-teens/development/social-emotional-development/resilience-in-teens>.

<sup>39</sup> Marc Zimmerman et al., *Adolescent Resilience: Promotive Factors that Inform Prevention*, 7 CHILD DEV. PERSPECTIVE (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3839856>.

importance to their resiliency and development.<sup>40</sup> But resilience is influenced by “interdependent systems” and “emerges from *ordinary adaptive systems* such as close relationships with competent and caring adults and peers, effective schools and communities, opportunities to succeed, and beliefs in the self.”<sup>41</sup> The courtroom itself can be a platform for such positive experiences, if a teenager feels they have been heard and supported during a hearing.<sup>42</sup>

Adolescents are better able to overcome adversity when they have the ability to problem solve, engage with other people, and regulate their own behavior.<sup>43</sup> Additionally, engagement in prosocial activities such as extracurricular, church, or community activities “enhanced youths’ resilience by providing the circumstances to develop cognitive and behavioral assets that help overcome adversity.”<sup>44</sup> Adolescents’ development of positive cultural identity also can promote a sense of social belonging, encourage the use of adaptive coping strategies, and buffer against the deleterious effects of experiences with racism, discrimination, and xenophobia.<sup>45</sup>

## **LEGAL SYSTEMS ADAPTATIONS TO INTERDISCIPLINARY RESEARCH**

### **LEGAL IMPLICATIONS OF ADOLESCENT DEVELOPMENT RESEARCH**

The research discussed above has had—and continues to have—tremendous implications for our domestic child-serving legal systems. The Supreme Court has long held the view that children and adolescents are different than adults, and that the rights conferred by the Constitution oblige the state to treat them differently and to confer additional protections when their life or liberty are at

---

<sup>40</sup> Kirsten Weir, *Maximizing Children’s Resilience*, 48 Am. Psych. Ass’n Monitor on Psych. (2017), <https://www.apa.org/monitor/2017/09/cover-resilience>; *Resilience in Pre-Teens and Teenagers*, RAISING CHILDREN (Dec. 7, 2021), <https://raisingchildren.net.au/pre-teens/development/social-emotional-development/resilience-in-teens>.

<sup>41</sup> Melissa Dvorsky et al., *Finding Ordinary Magic in Extraordinary Times: Child and Adolescent Resilience During the COVID-19 Pandemic*, European Child & Adolescent Psychiatry (2020) (emphasis original).

<sup>42</sup> *Positive Youth Development Framework*, YOUTH POWER2, <https://www.youthpower.org/positive-youth-development-pyd-framework> (last visited Jul. 13, 2023).

<sup>43</sup> Ann S. Masten et al., *Resilience and Development: Contributions from the Study of Children who Overcome Adversity*, Cambridge U. Press (Oct. 31, 2008), <https://www.cambridge.org/core/journals/development-and-psychopathology/article/abs/resilience-and-development-contributions-from-the-study-of-children-who-overcome-adversity/9D84A6A2339F9B66E7B0B0D910F841CC>.

<sup>44</sup> Zimmerman et al., *supra* note 40, at 43.

<sup>45</sup> Adriana Umaña-Taylor et al., *Mexican-Origin Adolescent Mothers’ Stressors and Psychosocial Functioning: Examining Ethnic Identity Affirmation and Familism as Moderators*, 40 J. of Youth and Adolescence 140, 140–57 (2011).

stake.<sup>46</sup> In recent years, the Court has expanded procedural protections for youth, relying increasingly on science and research in their decisions.<sup>47</sup>

In 1948, the Supreme Court first recognized that children require the appointment of counsel in criminal proceedings under the due process clause of the Fourteenth Amendment.<sup>48</sup> In doing so, the Court remarked that “[t]here are some individuals who, by reason of age, ignorance or mental capacity are incapable of representing themselves adequately in a prosecution of a relatively simple nature”.<sup>49</sup> Over the ensuing years, the Court expanded on this line of reasoning, finding that the Constitution also protected the unequivocal right to counsel in felony proceedings,<sup>50</sup> and the right to assistance of counsel and due process for children whenever their freedom is at stake<sup>51</sup>.

Then, in *Roper v. Simmons* (2005), the Court concluded that the juvenile death penalty was “cruel and unusual punishment” prohibited by the Eighth Amendment.<sup>52</sup> Drawing from common sense, law, and social science research, the Court enumerated three factors that distinguished adolescent offenders from adults, “render[ing] suspect any conclusion that a juvenile falls among the worst offenders.”<sup>53</sup> First, that youth, by their very nature, lack the maturity and responsibility developed in adults. Second, that “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure” because they have little control over their lives and environments, compared to adults. Third, that young people are still forming their identities, and thus, it would be suspect “to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.”

In *Graham v. Florida* (2010), the Court relied even more heavily on newer scientific research when it decided that life without parole for juvenile offenders was “cruel and unusual” punishment. The Court acknowledged that young people’s characters and personalities are still malleable, have “capacity for change,” and that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,” including the “parts of the brain involved in behavior control [which] continue to mature through late adolescence.”<sup>54</sup>

The culmination of this line of cases demonstrates that differences between youth and adults are always relevant to consider when a youth is in court, that “children cannot be viewed simply as miniature adults,” because they are “generally less mature and responsible than adults,” “lack the

---

<sup>46</sup> *Wade v. Mayo*, 334 U.S. 672 (1948) (the young and mentally incompetent require appointment of counsel under the Fourteenth Amendment); *Gideon v. Wainwright*, 372 U.S. 335, 338 (1963) (holding that the anyone accused of a crime is has the right to counsel under the Sixth and Fourteenth Amendments); *In re Gault*, 387 U.S. 1, 34 (1967) (holding that under the due process clause, individuals in juvenile proceedings have a right to counsel and adequate notice against self-incrimination under); *Roper v. Simmons*, 542 U.S. 551, 560 (2005) (finding unconstitutional the juvenile death penalty); *Graham v. Florida*, 560 U.S. 48, (2011) (finding unconstitutional life without parole for a non-homicidal crime committed by a juvenile); *J.D.B. v. North Carolina*, 564 U.S. 261, 273 (2011) (that age must be considered in determining whether a child is in police custody for Miranda purposes).

<sup>47</sup> Angelica M. Mercado, *Child Competency and a Science-Based Approach to a Right to Counsel for Children in the Immigration Proceedings*, Seton Hall Law School Student Scholarship, 19-26 (2020), [https://scholarship.shu.edu/cgi/viewcontent.cgi?article=2059&context=student\\_scholarship](https://scholarship.shu.edu/cgi/viewcontent.cgi?article=2059&context=student_scholarship)

<sup>48</sup> *Wade v. Mayo*, *supra* note 47, at 674.

<sup>49</sup> *Id.*

<sup>50</sup> *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

<sup>51</sup> *In re Gault*, 387 U.S. 1, 34 (1967).

<sup>52</sup> *Roper v. Simmons*, 542 U.S. 551, 551(2005).

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

<sup>54</sup> *Graham v. Florida*, 560 U.S. 48, 67 (2010) (citing *amicus* briefs submitted by the American Medical Association and American Psychological Association).

experience, perspective, and judgement to recognize and avoid choices that could be detrimental to them,” and are “more vulnerable ... [to] outside pressures.”<sup>55</sup> And in particular, the consequences of loss of life and liberty (life without parole) are so severe that it would be unconstitutional to for a court to impose those punishments on a youth whose culpability cannot be equated to that of an adult.

The Supreme Court has identified three features of adolescence that distinguish youth from adults—“lack of maturity,” vulnerability to outside influences, and a “less fixed” character, which we explore below.<sup>56</sup>

### ***A. Adolescent Maturity Lags Behind Cognitive Development***

The Supreme Court has identified that children display a “lack of maturity and an underdeveloped sense of responsibility. . . [which] often result in impetuous and ill-considered actions and decisions.”<sup>57</sup> This proposition is supported by interdisciplinary research, as indicated above, showing that the cognitive development of an adolescent is not uniform, resulting in youth who may be able to conceptually think like an adult, but still act in a way that is understood as immature. Adolescent decisions are driven more by impulses and rewards than risks and consequences.

### ***B. Adolescents are Vulnerable to Peer Pressure***

The Supreme Court has identified that “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.”<sup>58</sup> Research again supports the Court’s statement, establishing that the “peer effect” does not influence adults, but heavily influences youth decisions. Research also indicates that peer opinions become more important and influential to youth and youth begin to read and adapt to social cues.

### ***C. Adolescent Character Is Not Fully Formed***

According to the Court, “the third broad difference [between adolescents and adults] is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.”<sup>59</sup> As noted above, research the malleability of youth and the susceptibility to influenced by both positive and negative experiences. When given the opportunity to grow in an environment that is safe and nurturing, youth, even those who have faced prior adversity, can develop into mature and responsible adults. *Graham* continues this reasoning, noting that “[t]o justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable . . . [because] incorrigibility is inconsistent with youth.”<sup>60</sup> *Miller* copies the language in *Graham* adding that mandatory life without parole “reflects an irrevocable judgment about [a youth’s] value and place in society, at

---

<sup>55</sup> *J.D.B. v. North Carolina*, 564 U.S. 261, 273 (2011) (that age must be considered in determining whether a child is in police custody for Miranda purposes).

<sup>56</sup> *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005).

<sup>57</sup> *Id.*

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

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

<sup>60</sup> *Graham v. Florida*, 560 U.S. 48, 73 (2010), *as modified* (July 6, 2010) (internal citations omitted).

odds with a child’s capacity for change.”<sup>61</sup> Thus, a youth’s capacity for self-improvement and continued development is not only heavily supported both by case law, but also by research.

## **CRITICAL IMPLICATIONS FOR IMMIGRATION PRACTICE**

Children and adolescents are fundamentally different than adults. They are treated differently in the criminal law / juvenile law context, as well as in civil and common law, where “the differentiating characteristics of youth” allow for the law to treat them differently than adults in the realm of contracts, property, voting, marriage, drinking and smoking ages, and negligence suits.<sup>62</sup> How might the science of adolescent development impact the immigration process, especially where there is no discernable distinction under immigration law?

### ***A. Adult-appearing Adolescents***

Adolescents develop different facets at different times, meaning that adolescents may appear like adults, physically, but may still be undergoing significant functional brain development and lack decision-making and/or presentation abilities that are commensurate with their physical appearance. *The following practice tips may be useful for respondents that are older adolescents who may appear like adults.*<sup>63</sup>

The adolescent brain does not develop in parallel with the physical markers of maturation. Some teenagers experience early rapid pubertal development, which makes them appear physically older than their peers. However, this physical development does not mirror a teenager’s emotional or cognitive development. This proposition is supported by interdisciplinary research, as indicated above, showing that the cognitive development of an adolescent is not uniform, resulting in youth who may be able to conceptually think like an adult, but still act in a way that is understood as immature.

***TIP:*** While some adolescents may “act” or “look” like adults, adolescents are still children. Immigration Judges should treat adolescents distinctly from adults.

### ***B. Consistency and Credibility***

An adolescent’s cognitive, physical, and social development all simultaneously impact overall development. Additionally, individual experiences and situations, such as exposure to trauma and violence, will also have an impact on development and behavior. Functional brain development—including managing responses to fear, anxiety and environmental stressors—can be varied and learning, memory, and impulse control may affect behavior and recitation of events or facts by adolescents in court. How might the science of adolescent development shed light on children’s decision-making related to testimony and general presentation? *The following practice tips may*

---

<sup>61</sup> Miller v. Alabama, 567 U.S. 460, 472 (2012) (internal citations omitted).

<sup>62</sup> J.D.B. v. North Carolina, *supra* note; *see also* Roper v. Simmons, 542 U.S. 551, 619 (2005).

<sup>63</sup> This discussion was developed as part of the NAIJ Training on Adolescent Development 6/29/2023. The discussion was guided by Maria Woltjen (founder of the Young Center for Immigrant Children’s Rights) and involved responses to these important inquiries from Immigration Judge Olivia Cassin and adolescent development expert, Dr. Elizabeth Cauffman.

***be useful for a child who inconsistently retells a story with traumatic components or who relays vague information.***

***TIP:*** Where there are inconsistencies in the retelling of stories, immigration judges should avoid drawing inferences about credibility or make adverse credibility findings. Instead, immigration judges should expect some level of inconsistency and should seek clarification where the inconsistency gets to the heart of the legal case. Where clarification in a hearing cannot be accomplished, consider utilizing experts in adolescent development and mental health to help explain the inconsistencies or discrepancies in presentation.

64

In domestic systems, child and adolescent victims of certain types of traumatic harm (victims of sexual abuse, for example) are often not required to testify in a public hearing.<sup>65</sup> Recognizing the extreme levels of stress and trauma these children and adolescents endure in retelling traumatic experiences, many courts and legislators have enacted accommodations for children who provide testimony in court.<sup>66</sup> These protections<sup>67</sup> range from allowing children to bring a comforting toy or object to being accompanied by a trusted adult while testifying.<sup>68</sup> All states have laws to minimize the impact on children and adolescents of appearing in court through allowing support people or comfort objects or provisions for excluding the press.<sup>69</sup>

---

<sup>64</sup> This is consistent with EOIR guidance which sets out that “Vague, speculative, or generalized answers by a child, especially a particularly young child, are not necessarily indicators of dishonesty.” OFFICE OF THE CHIEF IMMIGRATION JUDGE, EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, OPERATING POLICIES AND PROCEDURES MEMORANDUM 17-03: GUIDELINES FOR IMMIGRATION COURT CASES INVOLVING JUVENILES, INCLUDING UNACCOMPANIED ALIEN CHILDREN at 7 (2017) [hereinafter OPPM GUIDELINES].

<sup>65</sup> Robert H. Pantell et al., *The Child Witness in the Courtroom*, 139 AM. ACAD. OF PEDIATRICS 1, 1 (2017).

<sup>66</sup> John E. B. Myers et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony* 28 PAC. L.J. 3, 1996, at 60-61 (describing a Massachusetts Supreme Judicial Court case from 1989 and a Florida Supreme Court case from 1993 where the courts ruled that protections permitted by the trial judges that altered the courtroom setting and procedures to accommodate child witnesses were permissible).

<sup>67</sup> A mitigation strategy employed in other courtrooms to prevent a child from having to face their abuser is closed-circuit televised testimony. The Supreme Court has ruled that closed-circuit televised testimony is an acceptable form of evidence in federal cases. *Maryland v. Craig*, 497 US 836, 846 (1990). Over time, many states have adopted procedures that allow children to testify through closed-circuit television or other alternative means. The National Center for Prosecution of Child Abuse has documented a list of states with such protective procedures. NAT’L CENTER FOR PROSECUTION OF CHILD ABUSE, NAT’L DISTRICT ATTORNEYS ASS’N, *Closed Circuit Television Statutes* (2012), <https://ndaa.org/wp-content/uploads/CCTV-2012.pdf>. The Department of Justice, the very same administrative body that adjudicates immigration court cases, funded the development of closed-circuit televising and videotaping of testimony for child victims of abuse in order to “reduce the trauma related to testifying at a hearing or trial by these children.” BUREAU OF JUST. ASSISTANCE, OFFICE OF JUST. PROGRAMS, U.S. DEP’T OF JUST., *Closed-Circuit Televising of Testimony of Children Who Are Victims of Abuse Grant Program 1* (1998), <https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/sl000287.pdf>. To learn more about some considerations relevant to remote hearings, consult CILA’s resource “Tips for Working with Children and Youth Remotely in a Hearing or USCIS Asylum Office Interview,” which is available on CILA’s Additional Resources webpage. Contact CILA at [cila@abacila.org](mailto:cila@abacila.org) if you need access to this resource.

<sup>68</sup> See, e.g., *People v. Adams*, 19 Cal. App.4th 412, 424 (1993); *State v. Menzies*, 603 A.2d 419, 426-427 (1992).

<sup>69</sup> Robert H. Pantell et al., *supra* note 65.

*The following practice tips may be useful to help immigration judges with consideration for protections to ensure an adolescent is comfortable, to reduce anxiety, and to facilitate more consistent testimony:*<sup>70</sup>

**Remove the robe.**

Per EOIR guidance, “the robe is a symbol of... authority... [and] may be disconcerting for younger respondents.”<sup>71</sup> Consider removing the robe to reduce anxiety of both child and adolescent respondents.

**Speak in plain language and be kind with your words.**

The science of adolescent development explains that adolescents seek out and are more responsive to rewards. Even kind words are perceived by adolescents to be rewards. Ensure that language used in the courtroom reflects a plain understanding of the law and engages positive reinforcement.

**Consider child and adolescent modifications to the courtroom.**

To further reduce stress or anxiety for adolescent respondents, consider coordinating a courtroom that postures the hearing as investigative. For example, the immigration judge seated up on a dais conveys that the respondent is literally and figuratively “sitting in judgment.” Consider modifications to the courtroom that facilitate more meaningful participation.<sup>72</sup>

**Take longer breaks.**

EOIR has already provided similar guidance indicating that judges “should recognize that, for emotional and physical reasons, children may require more frequent breaks than adults.”<sup>73</sup>

Procedural justice, or the ability to meaningfully participate in a fair hearing, matters to adolescents. In order to facilitate participation, to set adolescents at ease to encourage meaningful participation, and to foster a more procedurally appropriate court process for children and adolescents, consider that procedural justice – or the perception that the process is fair to them –

---

<sup>70</sup>OPPM GUIDELINES, *supra* note 64.

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

<sup>72</sup> Consider that immigration proceedings, while adversarial, are civil proceedings such that proceedings should not be carried out with overtones of criminal culpability. Children and adolescents caught up in the immigration system have the worst of both worlds. Immigration law is still considered as a type of public benefit law and therefore, in most cases, purely civil, though the consequences arising from deportation are severe, and can implicate one’s life, liberty, and family and community ties. Being civil in nature, youth in immigration proceedings have no right to free counsel, as they would in a criminal context. And while “criminal law has developed to reflect society’s more modern view of the criminal justice system, policymakers have failed to adjust immigration laws to reflect those changes.”

<sup>73</sup> OPPM GUIDELINES, *supra* note 64.



is as important to an adolescent as it is to an adult or even the adjudicator.<sup>74</sup> Ensuring procedural justice can lead to better outcomes for adjudicators with respect to consistency and credibility.

### ***C. Competency***

Despite the presumption of competency in all cases<sup>75</sup>.... We know adolescent development impacts a child's understanding of basic legal concepts, particularly abstract concepts. Research indicates that children under the age of 16 will have limited ability to understand everything at play in a trial.<sup>76</sup> Research suggests that "supportive systems with competent and caring adults can foster resiliency in adolescents."<sup>77</sup> The following tips may help immigration judges approach cases involving adolescents with an eye to bolstering their resiliency through procedures that allow them to trust and engage with the system.

In other child-serving systems, children and adolescents must first be screened for competency before they can take an oath.<sup>78</sup> As a result, state laws are rapidly changing to account for youth and adolescence in witness testimony. EOIR has noted that "immigration judges should be confident that the child is competent to testify... including whether the child is of sufficient mental capacity to understand the oath and to give sworn testimony."<sup>79</sup>

***The following practice tips may be useful to help immigration judges consider some of the following safeguards to ensure an adolescent understands the nature of the proceedings and is otherwise able to meaningfully participate in the hearing:***<sup>80</sup>

**Explain the proceedings in plain language and repeat the purpose and nature of proceedings often.**

Take time to explain roles, ensure children and adolescents understand that they are not "in trouble" in these civil proceedings.<sup>81</sup>

---

<sup>74</sup> During a training with immigration judges, one judge remarked that the most salient point she had taken away from the training was that "procedural justice is important for adolescents, as it is for adults from my experience."

<sup>75</sup> Matter of MAM, 25 I&N Dec, 474, 478-480 (2011).

<sup>76</sup> Courtney Lloyd & Lisa J. Berlin, *Research on Adolescent Development, Competence, and Character*, Center for Child and Family Policy 1, 2 (2015), [https://www.purdue.edu/hhs/hdfs/fii/wp-content/uploads/2015/07/s\\_ncfis03c02.pdf](https://www.purdue.edu/hhs/hdfs/fii/wp-content/uploads/2015/07/s_ncfis03c02.pdf).

<sup>77</sup> Although an adolescent subjected to terrible situations may suffer short and long-term effects, the reverse is also true. An adolescent who is given support and care can flourish despite prior adversity. A youth's resilience is influenced by "interdependent systems" and "emerges from ordinary adaptive systems such as close relationships with competent and caring adults and peers, effective schools and communities, opportunities to succeed, and beliefs in the self." Marc Zimmerman et al., *Adolescent Resilience: Promotive Factors that Inform Prevention*, 7 CHILD DEV. PERSPECTIVE (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3839856>.

<sup>78</sup> Under New Jersey law, for example, under the age of 14, child witnesses are admitted only if they are adjudged by a trial court to possess the requisite mental capacity and moral responsibility. *See* Juvenile Witness in Criminal Trials – Standards for Determining Competency and the Applicability of the Traditional Oath, 7 Criminal Justice Quarterly, 17-27 (1979). "Other State laws provide that children are incompetent unless they understand the nature of an oath. Still other States hold that children below certain ages, usually 10, 12, or 14, are presumptively incompetent unless determined otherwise." *See* 25 Journal of Family Law, 287-356 (1986-87).

<sup>79</sup> *See* OPPM GUIDELINES, *supra* note 64.

<sup>80</sup> RAIO Directorate, USCIS, *RAIO Combined Training Program Children's Claims Training Module*, (Dec. 20, 2019), [https://www.uscis.gov/sites/default/files/document/foia/Childrens\\_Claims\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Childrens_Claims_LP_RAIO.pdf).

<sup>81</sup> This is consistent with OPPM guidance <https://www.justice.gov/eoir/file/oppm17-03/download>

**Ask the adolescent to explain their understanding.**

Adolescent development impacts a child's understanding of basic legal concepts, particularly abstract concepts (e.g. "rights"), such that while the child may superficially know he has a "right," he may not fully understand what is meant by the concept or grasp its significance. For emphasis, one example arose when a 12-year-old was asked what the "right to remain silent" meant, and the boy answered, "It means that you don't have to say anything until the police ask you a question."<sup>82</sup>

**Ensure the adolescent and interpreter are also communicating in an age- and culturally-appropriate manner.**

EOIR guidance addresses this component: "Immigration Judges should also watch for any indication that the child and the interpreter are having difficulty communicating. Any statement to be translated should be made at an age-appropriate level and translated at that level for the child respondent."<sup>83</sup>

**If necessary, consider MAM safeguards to ensure the adolescent can meaningfully participate.**

Consider the MAM procedural safeguards<sup>84</sup> when an adolescent's competency comes into question:

- Legal Representation;
- Identification of parent, guardian or next friend to assist legal representation;
- Referral for appointment of a child advocate;
- Grant continuances;<sup>85</sup>
- Closed hearing;
- Waive adolescent's appearance;
- Assistance with development of the record (including child/adolescent-appropriate questioning for direct exam and cross exam);
- Request prosecutorial discretion;
- Terminate the proceedings where appropriate.

<sup>82</sup> Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANNUAL REVIEW OF CLINICAL PSYCHOLOGY 474 (2009).

<sup>83</sup> See OPPM GUIDELINES, *supra* note 64.

<sup>84</sup> Cite MAM and AIC practice advisory Matter of M-A-M, 25 I&N Dec. 474 (BIA 2011); LEGAL ACTION CENTER, AMERICAN IMMIGRATION COUNCIL AND THE UNIVERSITY OF HOUSTON LAW CENTER IMMIGRATION CLINIC, REPRESENTING CLIENTS WITH MENTAL COMPETENCY ISSUES UNDER MATTER OF M-A-M (2011), [https://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/Mental-Competency-Issues.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/Mental-Competency-Issues.pdf).

<sup>85</sup> EOIR guidance already suggests that "stress and fatigue can adversely impact the ability of a younger child to participate in his or her removal proceedings. Therefore, where appropriate, Immigration Judges should seek not only to limit the number of times that children must be brought to court but also to resolve issues of removability and relief without undue delay." See OPPM GUIDELINES, *supra* note 64.

The topic of trauma in childhood and adolescence is more thoroughly addressed in a separate brief, but it is important to understand and introduce the concept of the “layering effect” of trauma in adolescent development.

The term “layering” refers to the concept that a child’s development cannot be viewed in a vacuum, looking at only one piece of the puzzle at a time. A child’s cognitive, physical, and social development all simultaneously impact a child’s overall development. Additionally, the child’s individual experiences and situation, such as exposure to trauma and violence, will also have an impact on development and behavior. All of these experiences are “layered” on to the base development of the child. These layers can be either positive or negative, but are generally considered in the negative context, specifically with traumatic experiences. The cumulative effect of trauma is well established in research.<sup>86</sup> This concept is particularly important regarding migrant children who have been exposed to more traumatic experiences and more violent situations than the average U.S. citizen child (who likely form the majority of children studied in the aforementioned research studies). These traumatic experiences may also include mistreatment by law enforcement and authority figures in the child’s country of origin or during their migration to the U.S., thus negatively impacting their sense of security and ability to participate in court proceedings.<sup>87</sup>

**Q:** Why should I be concerned if an adolescent in my courtroom is anxious or nervous?

**A:** Stress and anxiety exacerbate existing trauma and can cause lasting harm to adolescents. Cultivating a positive courtroom experience provides teen respondents with a better sense of safety and agency, which contribute positively to their sense of justice and fairness

#### ***D. Culture and Adolescence***

Lastly, consider the cultural lens through which adolescents develop, experience trauma, and present themselves in a courtroom. It is not uncommon for these as well as cultural reasons, for child and adolescent migrants to avoid eye contact, keep responses brief and void of detail, and to provide inconsistent testimony to attempt to appease authority figures.<sup>88</sup> Many non-Western cultures socialize children to avert their gaze as a sign of respect for elders and authority figures. There is substantial evidence that children are subject to suggestibility by authority figures and intimidation by law enforcement and courtroom procedures.<sup>89</sup> Individuals from non-Western

---

<sup>86</sup> Bouza et al., *supra* note 31, at (“[T]he effects of traumatic experiences are cumulative; children and adolescents who have already faced previous adversity are particularly susceptible to long term further negative consequences.”).

<sup>87</sup> BARTON EVANS & GISELLE HAAS, FORENSIC PSYCHOLOGICAL ASSESSMENT IN IMMIGRATION COURT: A GUIDEBOOK FOR EVIDENCE-BASED AND ETHICAL PRACTICE (2018).

<sup>88</sup> Estrada. (2008). Misperceived child testimony: why credibility should be presumed for unaccompanied and separated children seeking asylum. *Thomas Jefferson Law Review*, 31(1), 121–. J. Bhabha & Susan Schmidt *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the US*, *The Journal of the History of Childhood and Youth*, 126-38 (Mar. 19, 2008).

<sup>89</sup> Robert H. Pantell, *supra* note 69 at 2.

cultures may struggle to provide a clear, direct account of events and “have difficulty answering simple questions with concrete information”.<sup>90</sup>

### ***E. Discretionary Determination***

*“Just because you know the offense, doesn’t mean you know the offender.”*  
—Dr. Elizabeth Cauffman, PhD<sup>91</sup>

Adolescents cannot engage in the same level of risk analysis as adults with fully mature prefrontal cortexes. The consequence is that adolescents are less capable of controlling their impulses and more susceptible to reward-seeking and risk-taking behaviors. The US Supreme Court refers to the “lesser culpability” of children and notes that due to the lesser culpability, the children should be unable to receive the more extreme punishments given to adults for the same crimes – stating that “we cannot claim that adolescents ‘ought to know better’ if, in fact, the evidence indicates that they do not know better, or more accurately, cannot know better, because they lack the abilities needed to exercise mature judgment.”<sup>92</sup> How might the science of adolescent development impact immigration adjudications? In fact, in many ways, the Supreme Court has already answered that question.

The United States Supreme Court has made the critical observation “that the character of a juvenile is not as well formed as that of an adult[;] the personality traits of juveniles are more transitory, less fixed.”<sup>93</sup> As a result, the Supreme Court has found that “incorrigibility is inconsistent with youth,” and that assessing the youth’s character as fixed “reflects an irrevocable judgment about [a youth’s] value and place in society, at odds with a child’s capacity for change.”<sup>94</sup> Immigration judges should consider placing less weight on negative discretionary factors in adjudications. Criminal culpability here refers to how responsible or blameworthy a child is for their actions. In a number of the Supreme Court cases mentioned above, the Court refers to the “lesser culpability” of children and notes that due to the lesser culpability, the children should be unable to receive the more extreme punishments given to adults for the same crimes. Additionally, the Court in *Roper* references the lesser culpability of an individual with a mental illness, who cannot receive the death penalty due to their illness,<sup>95</sup> and states “[t]he same conclusions follow from the lesser culpability of the juvenile offender.”<sup>96</sup> *Graham* and *Miller* continue this rationale: “Because the heart of the retribution rationale relates to an offender’s blameworthiness, the case for retribution is not as strong with a minor as with an adult.”<sup>97</sup> In sum, “we cannot claim that adolescents ‘ought to know better’ if, in fact, the evidence indicates that they do not know better, or more accurately, cannot know better, because they lack the abilities needed to exercise mature judgment.”<sup>98</sup>

---

<sup>90</sup> Evans, *supra* note 87.

<sup>91</sup> Webinar on Adolescent Development for NAIJ, June 20, 2023, organized by the Center for the Human Rights of Children, Loyola University Chicago School of Law.

<sup>92</sup> *Miller v. Alabama*, 567 U.S. 460, 472 (2012) (internal citations omitted).

<sup>93</sup> *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005).

<sup>94</sup> *Graham v. Florida*, 560 U.S. 48, 73 (2010), *modified on July 6, 2010* (internal citations omitted).

<sup>95</sup> *Roper v. Simmons*, 543 U.S. 551, 571 (referring to *Atkins v. Virginia*, 536 U.S. 304, 319).

<sup>96</sup> *Id.*

<sup>97</sup> *Miller v. Alabama*, 567 U.S. 460, 472 (2012) (citing *Graham*) (internal citations omitted).

<sup>98</sup> Steinberg, *supra* note at 471. (emphasis added).

***The following information may be useful for immigration judges grappling with adolescents with adverse discretionary factors in their immigration case.*** Since 1978, the BIA has relied on “a framework for an equitable application of discretionary relief.”<sup>99</sup> The seminal framework laid out in *Marin* involves a balancing of equities against adverse factors which are limited to “the nature and underlying circumstances of the exclusion (inadmissibility) ground at issue, the presence of additional significant violations of this country’s immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent’s bad character.”<sup>100</sup> The relevant *Marin* adverse factors at issue in this case can thus be summarized as falling under the rubric of “criminal history” or “other evidence of respondent’s bad character/moral character (or both).” Yet a juvenile’s adverse factors, including encounters with law enforcement and juvenile delinquency adjudications, are neither criminal matters (per state laws and policy) nor evidence of incorrigible bad character (per the Supreme Court guidance above). Recognizing the role of adolescent development in individual accountability has led nearly all states to create juvenile systems for working with children and adolescents. In most cases, those paradigms do not permit children or youth involved in juvenile systems to be considered to engaged in “criminal” conduct<sup>101</sup> The third brief in this series will further explore the issue of discretion in cases where the adverse factors involve children and adolescent respondents.

---

<sup>99</sup> Matter of Marin, 13 I&N Dec. 581 (BIA 1978)

<sup>100</sup> *Id.*

<sup>101</sup> Sarah J. Diaz & Lisa Jacobs, *The Inappropriate Use of Juvenile Records In Immigration Discretion*, The Center for the Human Rights of Children, <https://www.luc.edu/media/lucedu/law/centers/chrc/pdfs/The-Inappropriate-Use-of-Juvenile-Records-in-Immigration-Discretion.pdf>.