MORE THAN ONE ACHILLES' HEEL: EXPLORING THE WEAKNESSES OF SIJS'S PROTECTION OF ABUSED, NEGLECTED, AND ABANDONED IMMIGRANT YOUTH

Michelle Anne Paznokas[*]

ABSTRACT

For the past few decades, undocumented children have arrived at the United States border in growing numbers. While many have been eligible for asylum and other forms of legal status, those fleeing parental violence and neglect have fallen into a gaping hole in our immigration system's options for relief. Therefore, in 1990, Congress created "Special Immigrant Juvenile Status" – or "SIJS" – to provide a pathway to Lawful Permanent Residence for children who have been abused, abandoned, or neglected by one or both of their biological parents. While the federal government typically holds the exclusive power to rule on immigration-related matters, SIJS is unique. An SIJS applicant must first attend state court and request the judge make special "child welfare findings" to support her application. A federal agency then reviews the state court's findings and decides whether to grant or deny the petition. Unfortunately, many state court judges, ill-informed and confused about their role in the process as well as what factors to consider when making their "best interests" determinations, are reluctant to make findings in favor of SIJS applicants. Some judges rule on the merits of the application – which is the federal government's role – instead of limiting their considerations to what is in the child's best interest – which is their actual role. In effect, the success of an SIJS applicant depends not on the merits of her claim, but rather on the jurisdiction she happens to land in. This produces inequitable results and derails Congress's intent in creating the statute. This Note suggests the process be amended by working toward two long-term goals: (1) creating a nation-wide "best interest" standard based largely on current U.S. family law statutes and the United Nation's Convention on the Rights of the Child, and (2) creating a standard SIJS order that all state court judges must complete when deciding SIJS matters.

[*] J.D. Candidate, 2017, Drexel University, Thomas R. Kline School of Law; B.A. Anthropology and Spanish, Temple University. I would like to thank my friends and family for their constant support of my academic and professional careers, as well as my fellow *Drexel Law Review* staff members who have made this publication possible. "Happiness lies . . . in the joy of achievement, in the thrill of creative effort." President Franklin D. Roosevelt, First Inauguration Address (Mar. 4, 1933), *in* DAVIS W. HOUCK, FDR AND FEAR ITSELF 4 (Martin J. Medhurst ed., 2002).

TABLE OF CONTENTS

INTRODUCTION

Special Immigrant Juvenile Status—often called "SIJS"—is a unique form of immigration relief that caters specifically to undocumented youth who have suffered abuse, neglect, or abandonment at the hands of one or both parents.[1] First, the statute requires a state-

1. 8 U.S.C. § 1101(27)(J) (2012).

level juvenile court[2] to make "factual findings based on state law about the abuse, neglect, or abandonment; family reunification; and best interests of the child."[3] Second, U.S. Citizenship and Immigration Services ("USCIS"), a federal agency, determines whether the child is eligible for the SIJS visa by reviewing the juvenile court order and any supporting documentation.[4] Although this system is meant to provide a pathway to green cards for children in need of humanitarian aid,[5] there has been a disturbing trend in the results of SIJS cases.[6] Consider the following stories of two fictional SIJS applicants; both narratives reflect an amalgamation of real-life scenarios based upon research of the country conditions of Guatemala.[7]

Isabella: Victim of Economic Neglect

Isabella lived in a rural Guatemalan village with her parents, uncle, and two younger sisters. At age ten, Isabella's parents withdrew her from school and charged her with the care of her siblings.[8] When Isabella's uncle lost his job in the coffee fields, the family, desperate for

2. A "juvenile court" is "a court located in the United States having jurisdiction under state law to make judicial determinations about the custody and care of juveniles." *History of SIJ Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/green-card/special-immigrant-juveniles/history-sij-status (last updated July 12, 2011); *see also Eligibility Status for SIJ*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/green-card/special-immigrant-juveniles/eligibility-sij-status/eligibility-status-sij (last updated July 12, 2017) ("The state court may be called 'juvenile court,' 'family court,' 'orphan's court,' or some other name, depending on which state it is in.").

3. *Special Immigrant Juvenile Status: Information for Juvenile Courts*, U.S. CITIZENSHIP & IMMIGR. SERVS. 1, http://www.uscis.gov/sites/default/files/USCIS/Green Card/Green Card Through a Job/Information_for_Juvenile_Courts_-FINAL.pdf (last visited Apr. 5, 2017).

4. *Id.*

5. *See Special Immigrant Juveniles (SIJ) Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/green-card/special-immigrant-juveniles/special-immigrant-juveniles-sij-status (last updated Oct. 12, 2016) ("The purpose of the SIJ[S] program is to help foreign children in the United States who have been abused, abandoned, or neglected.").

6. See *infra* Part II for a detailed analysis of the SIJS statute's inability to protect child victims of parental harm.

7. Guatemala is a primary origin of SIJS applicants. *See* JACQUELINE BHABHA & SUSAN SCHMIDT, SEEKING ASYLUM ALONE: UNACCOMPANIED AND SEPARATED CHILDREN AND REFUGEE PROTECTION IN THE U.S. 19 (2006) (estimating that 86% of unaccompanied alien children in U.S. custody hail from Guatemala, Honduras, El Salvador, and Mexico); OLGA BYRNE & ELISE MILLER, THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICY MAKERS, AND RESEARCHERS 31 (2012) [hereinafter VERA GUIDELINES], http://archive.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf (showing that between October 1, 2008 and September 30, 2010, 70% of UACs in federal custody were from El Salvador, Guatemala, and Honduras).

8. *See, e.g.*, U.S. DEP'T OF STATE, GUATEMALA 2015 HUMAN RIGHTS REPORT 18 (2015) [hereinafter GUATEMALA HUMAN RIGHTS REPORT], https://www.state.gov/documents/

another source of income, sent Isabella to work on a sugar plantation.[9] Unfortunately, Isabella's weekly wages were still not enough to provide enough clothes and clean water for six people.[10] Feeling responsible for the survival of her family, she wrote to her grandmother, a Lawful Permanent Resident of the United States, and asked if she could join her in New York to work and send money back home.[11] Her grandmother agreed, provided Isabella's parents financed her journey through Mexico.[12]

The family saved money for a few months to pay a "coyote" to escort Isabella to the border.[13] A few weeks later, immigration officials apprehended her as she crossed the Rio Grande.[14] After a short stay in a children's shelter in Texas, federal authorities released Isabella to

organization/253229.pdf ("[G]irls [are] significantly less likely than boys to be educated to the secondary school level."); *Guatemala*, GLOBAL EDUC. FUND, http://www.globaleducationfund.org/guatemala (last visited Apr. 5, 2017) (showing that only 59.2% of students complete ninth grade, and that "[g]irls particularly are expected to take care of siblings, leave school to help support their family or get married early").

9. *See, e.g.*, Megan McAdams, *Tackling Violence in Guatemala City through Equal Access to Education and Employment*, COUNCIL ON HEMISPHERIC AFFAIRS (Sept. 16, 2013), http://www.coha.org/tackling-violence-in-guatemala-city-through-equal-access-to-education-and-employment (discussing unemployment in urban and rural Guatemala); GUATEMALA HUMAN RIGHTS REPORT, *supra* note 8, at 29 ("The informal and agricultural sectors regularly employed children below 14, usually in small family enterprises, including in the production of broccoli, coffee, corn, fireworks, gravel, and sugar.").

10. *See generally Guatemala Poverty Assessment: Good Performance at Low Levels*, WORLD BANK (Mar. 18, 2009), http://siteresources.worldbank.org/INTLACREGTOPPOVANA/Resources/GuatemalaPovertyAssessmentEnglish.pdf (analyzing the poverty levels within Guatemalan society).

11. *See, e.g.*, WILLIAM A. KANDEL ET AL., CONG. RESEARCH SERV., R43628, UNACCOMPANIED ALIEN CHILDREN: POTENTIAL FACTORS CONTRIBUTING TO RECENT IMMIGRATION 3–4 (2014) (noting that 51% of UACs cite economic opportunity as a key reason for migrating).

12. *See, e.g.*, John Burnett, *Who Is Smuggling Immigrant Children Across the Border?*, NPR (July 15, 2014, 8:03 AM), http://www.npr.org/sections/parallels/2014/07/15/331477447/who-is-smuggling-immigrant-children-across- the-border (discussing how human smugglers facilitate the travels of many unaccompanied immigrant children through Mexico to the U.S. border).

13. *See, e.g.*, *id.* (noting that a "coyote" is a guide who will smuggle immigrants across the United States border in exchange for payment); Devin Dwyer, *Smuggled by 'Coyotes': An Immigrant's Journey to Arizona*, ABC NEWS (July 29, 2010), http://abcnews.go.com/Politics/arizona-immigration-smuggled-coyotes-search-life/story?id=10759682 (illustrating the danger of enlisting "'coyotes,' who navigate chains of 'customers' through dangerous desert terrain shared by drug and gun traffickers to a series of hideouts inside the U.S").

14. *See, e.g.*, VERA GUIDELINES, *supra* note 7, at 11 ("[I]n fiscal year 2010 the majority of children were apprehended within [twenty-four] hours of entering the United States. These immediate apprehensions happen most often at the Mexican border or at an airport of other port of entry."); Burnett, *supra* note 12 (demonstrating the Rio Grande's role in many immigrants' journeys to the U.S.).

her grandmother in New York, where USCIS initiated proceedings to determine whether they would return her to Guatemala.[15]

Valeria: Victim of Physical Abuse

Valeria's father was an unemployed drunkard.[16] He would come home from the cantina[17] every night and beat Valeria and her mother with a rope, a broomstick, or his open hand.[18] One evening, his blows forced Valeria to the floor and broke her arm.[19] Valeria begged the doctor treating her arm to submit a report of her father's abuse to the local police, but the doctor refused, maintaining that whatever had caused her injuries was her father's affair.[20]

A few months later, Valeria's mother moved to a different town with her two youngest children, leaving Valeria behind. Valeria considered running away, but she knew she would quickly become homeless and destitute.[21] Soon after her mother's departure, Valeria's father started coming into her bed, threatening or beating her until she finally succumbed to his advances.[22] Valeria eventually became

15. Although used often by laymen, "deportation" is an outdated term and has largely been replaced by the terms "removal" or "return." *Deportation*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/tools/glossary/deportation (last visited Mar. 3, 2017). See *infra* Part I.C for a more detailed description of the flow of unaccompanied alien children through the U.S. immigration system.

16. *See, e.g.*, McAdams, *supra* note 9 (discussing unemployment in Guatemala as a cause of violence); Charles C. Branas et al., *An Exploration of Violence, Mental Health and Substance Abuse in Post-Conflict Guatemala*, 5 HEALTH 825, 828 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5095616/pdf/nihms825848.pdf (discussing the general prevalence of alcoholism in Guatemala).

17. A "cantina" is a type of bar. 1 ICONIC MEXICO, AN ENCYCLOPEDIA FROM ACAPULCO TO ZÓCALO 82 (Eric Zolov ed. 2015) ("The word 'cantina' is commonly used to refer to any place that mainly serves alcohol . . . .").

18. *See, e.g.*, GUATEMALA HUMAN RIGHTS REPORT, *supra* note 8, at 18 (recognizing child abuse as a serious problem in Guatemala).

19. *See, e.g.*, *id.*

20. *See, e.g.*, Danilo Valladares, *Guatemala: Child Abuse Starts at Home*, INTER PRESS SERV. NEWS AGENCY (July 8, 2011), http://www.ipsnews.net/2011/07/guatemala-child-abuse-starts-at-home ("The problem is that [child] abuse is rarely reported. In hospitals, for example, when one of these cases turns up, the doctors try to get out of it as soon as possible, to avoid becoming embroiled in a legal conflict." (citations omitted)).

21. *See, e.g.*, GUATEMALA HUMAN RIGHTS REPORT, *supra* note 8, at 19 (exploring the problem of Guatemalan "street children").

22. *See, e.g.*, Ilene S. Speizer et al., *Dimensions of Child Sexual Abuse Before Age 15 in Three Central American Countries: Honduras, El Salvador, and Guatemala*, 32 CHILD ABUSE & NEGLECT 455, 459 (2008) (estimating 33.8% of Guatemalan women who experienced child sexual abuse suffered at the hands of a male family member, including uncles, cousins, and brothers); GUATEMALA HUMAN RIGHTS REPORT, *supra* note 8, at 19 (showing the drastic difference between the sexual assault and rape complaints of minors—2,639—and the actual number of convictions—111—in 2013).

pregnant, which caused her father to lash out in even more frequent acts of violence.[23] Fearing for her life as well as the life of her unborn child, Valeria used all of the money she had been saving from her job on the plantation to hire a guide through Mexico.[24]

Valeria was only fifteen years old when she arrived at the U.S. border with her two-month-old son.[25] She spent a few weeks in a children's shelter, then was released into the custody of her aunt in Colorado where the federal government began removal proceedings.

The Illogical Result

Which of these girls has a stronger—and potentially more successful—SIJS claim? While the financial hardships faced by Isabella were far from trivial, it seems logical that Valeria, a victim of physical and sexual violence perpetrated by her father, would have a homerun case. After all, Congress enacted the SIJS statute to protect child victims *exactly* like her.[26] The potential success of each application, however, depends not on the child's factual eligibility, but rather the state in which the child's removal proceedings take place.[27] Isabella was placed in New York, an SIJS-friendly state that maintains "explicit

23. *See, e.g.*, GUATEMALA HUMAN RIGHTS REPORT, *supra* note 8, at 16 (recognizing femicide as a serious problem in Guatemala).

24. *See, e.g.*, Burnett, *supra* note 12 (noting that one smuggler in Mexico charges three to four thousand dollars per child); GUATEMALA HUMAN RIGHTS REPORT, *supra* note 8, at 17 (explaining that Guatemalan women primarily find work in low-paying positions in the agriculture, retail, services, textiles, or government sectors).

25. *See, e.g.*, Nicole Crowder, *Child Victims of Sexual Abuse in Guatemala Are Giving Birth at an Alarming Rate. These Are Some of the Young Mothers.*, WASH. POST (Aug. 19, 2015), https://www.washingtonpost.com/news/in-sight/wp/2015/08/19/child-victims-of-sexual-abuse-in-guatemala-are-giving-birth-at-an-alarming-rate-these-are-some-of-the-young-mothers/?utm_term=.0aea5284d34f ("In 2013, 4,354 Guatemalan girls between the ages of [ten] and [fourteen] gave birth as a result of rape, according to UNICEF.").

26. *See* 105 CONG. REC. H26615 (daily ed. Nov. 13, 1997); *Special Immigrant Juveniles (SIJ) Status*, *supra* note 5.

27. *See* Laila L. Hlass, *States and Status: A Study of Geographical Disparities for Immigrant Youth*, 46 COLUM. HUM. RTS. L. REV. 266, 302 (2014) ("There appears to be a relationship between how states perform with SIJS applicants and the existence and quality of their child welfare policies and practices."); Jessica R. Pulitzer, Note, *Fear and Failing in Family Court: Special Immigrant Juvenile Status and the State Court Problem*, 21 CARDOZO J.L. & GENDER 201, 203 (2014) ("[T]he SIJS process continues to be plagued with procedural and substantive inconsistencies, most of which stem from the varying way in which state courts understand and adjudicate cases involving request for SIJS special findings."); *cf.* Jared Ryan Anderson, Comment, *Yearning to Be Free: Advancing the Rights of Undocumented Children Through the Improvement of the Special Immigrant Juvenile (SIJ) Status Procedure*, 16 SCHOLAR 659, 691 ("Although two children may have suffered the same traumatic experiences, under the current system their ability to obtain SIJ[S] status has a lot to do with chance.").

policies regarding serving immigrant children in [its] care."[28] Conversely, Valeria was placed in Colorado, a state that does not have policies tailored to immigrant youth and "does not offer any requirement or encouragement that SIJS-eligible children should be screened and assisted with immigration needs."[29] Considering these factors, Isabella would have a better chance of receiving SIJS, while Valeria and her baby would face a greater risk of being sent back to Guatemala and the dangers they sought to escape.

The sad truth is, the success of an SIJS applicant relies not on the merits of her claim but rather on which jurisdiction she happens to land in, derailing Congress's intent when drafting this statute.[30] To provide a background on this issue, this Note opens with a brief history of the international treatment of refugees and undocumented youth. Then, this Note explains the creation and evolution of SIJS, followed by the treatment of unaccompanied alien children in the United States. Next, this Note discusses the current state of SIJS and addresses concerns with the SIJS statute's ability to protect applicants with viable claims. Finally, this Note offers a two-step solution for repairing the "Achilles' heels" of SIJS: establishing a federal standard for "best interests of the child," and creating a template SIJS order for state judges to employ when making their determinations.

I. HISTORICAL TREATMENT OF REFUGEES

For nearly a century, war and international conflicts have been shaping immigration policies across the globe.[31] After World War II forced millions to flee Eastern Europe, the United Nations adopted the 1951 Convention Relating to the Status of Refugees ("1951 Convention"), which consolidated and codified existing international

28. Hlass, *supra* note 27, at 302. New York (especially New York City) has a "history of serving immigrant children," and the child welfare division has a separate program for unaccompanied refugee children, the largest demographic of SIJS applicants. *Id.* at 308; *see* NEW YORK COUNTY LAWYERS' ASSOCIATION, IMMIGRANT YOUTH IN FAMILY COURT: SPECIAL IMMIGRANT JUVENILE STATUS 11 (2013), http://www.nycla.org/PDF/BOOK%20Special%20Immigrant%20Juvenile%20Status.pdf.

29. Hlass, *supra* note 27, at 315–16 ("Colorado's Division of Child Welfare does not have a specific immigration division . . . .").

30. H.R. Rep. No. 105-405 (1997), 105 H. Rpt. 405 (LEXIS) ("The language [of the SIJS provision] has been modified in order to limit the beneficiaries of this provision to . . . abandoned, neglected, or abused children."); *see supra* note 27 and accompanying text.

31. *See* U.N. High Commissioner for Refugees, The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol 1 (Sept. 2011) [hereinafter 1951 Convention Facts], http://www.unhcr.org/4ec262df9.pdf.

protections for forced migrants.[32] It described the qualifications of a "refugee" and provided a framework for how participating countries should treat refugees within their borders.[33]

Although many countries have altered some of the provisions during the process of adoption, the 1951 Convention remains "the centerpiece of international refugee protection today."[34] Central to the treaty was the principle of "non-refoulment," advocating that no country should return a refugee to a place where she would face persecution.[35] Moreover, the 1951 Convention stated that participating nations should not punish refugees for illegally entering a country, "provided [the refugees] present themselves without delay to the authorities and show good cause for their illegal entry or presence."[36] These provisions, among many others, function to provide humanitarian relief for persecuted aliens in need of protection.[37]

---

32. *Id.* at 1–2; U.N. High Commissioner for Refugees, *Introductory Note* to U.N. Convention and Protocol Relating to the Status of Refugees 2–3 (Dec. 2010) [hereinafter *UNHCR Introductory Note*], http://www.unhcr.org/3b66c2aa10.pdf. While the original 1951 Convention was exclusive to European refugees, the U.N. later drafted the 1967 Protocol to include refugees from around the world. 1951 Convention Facts, *supra* note 31, at 1; *see also* Arthur C. Helton & Eliana Jacobs, *What is Forced Migration?*, 13 GEO. IMMIGR. L.J. 521, 521 (1999) (defining forced migration as including those "forced to move on account of a variety of artificial disasters, including armed conflict, persecution, severe economic insecurity, environmental degradation, or other grave failures of governance").

33. *UNHCR Introductory Note*, *supra* note 32, at 3; *see, e.g.*, United Nations Convention and Protocol Relating to the Status of Refugees art. 3, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Convention] ("The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."); *id.* art. 16(1) ("A refugee shall have free access to the courts of law on the territory of all Contracting States."); *id.* art. 17(1) ("The Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.").

34. *UNHCR Introductory Note*, *supra* note 32, at 2 ("[The Convention] has since been supplemented by refugee and subsidiary protection regimes in several regions, as well as via the progressive development of international human rights law.").

35. 1951 Convention, *supra* note 33, at art. 33(1) (stating that "[n]o Contracting State shall expel or return . . . a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion"); Ellen F. D'Angelo, Note, *Non-Refoulement: The Search for a Consistent Interpretation of Article 33*, 42 VAND. J. TRANSNAT'L L. 279, 282 (2009) (recognizing the 1951 Convention's address of non-refoulement as "a foundational principle in the protection of refugee rights and customary international law"); *see also* Gretchen Borchelt, Note, *The Safe Third Country Practice in the European Union: A Misguided Approach to Asylum Law and a Violation of International Human Rights Standards*, 33 COLUM. HUM. RTS. L. REV. 473, 477 (2002) ("The term non-refoulement comes from the French refouler, which means to drive back or repel.").

36. 1951 Convention, *supra* note 33, at art. 31.

37. *UNHCR Introductory Note*, *supra* note 32, at 3.

Echoing the principles stated in the 1951 Convention, Congress passed the Immigration and Nationality Act ("INA") in 1952.[38] Congress later amended the INA to include the Refugee Act of 1980,[39] which used the U.N.'s language to set a new national standard for the term "refugee:"

> The term "refugee" means . . . any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution *on account of* race, religion, nationality, membership in a particular social group, or political opinion . . . .[40]

Refugee and asylum litigation in the United States has focused on clarifying the central elements of this definition,[41] questioning what level of harm amounts to "persecution,"[42] and interpreting the meaning of the phrase "on account of."[43]

Undoubtedly, the statutory language that has proved the most difficult to interpret is the term, "membership in a particular social group."[44] The other protected grounds of persecution—race, religion, nationality, and political opinion—are all relatively straightforward

---

38. *See* Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.). The United States never became a party to the 1951 Convention, but became a party to its amendment, the 1967 Protocol Relating to the Status of Refugees. U.N. High Commissioner for Refugees, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol 4, http://www.unhcr.org/3b73b0d63.pdf (last updated Apr. 2015).

39. *See* Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

40. 8 U.S.C. § 1101(a)(42)(A) (2012) (emphasis added).

41. *See* DAVID A. MARTIN ET AL., FORCED MIGRATION: LAW AND POLICY 131 (West Academic Publ'g ed., 2nd ed. 2013).

42. *See* Stanojkova v. Holder, 645 F.3d 943, 948 (7th Cir. 2011) ("The line between harassment and persecution is the line between the nasty and the barbaric, or alternatively between wishing you were living in another country and being so desperate that you flee without any assurance of being given refuge in any other country.").

43. *See* Wang v. Gonzales, 445 F.3d 993, 998 (7th Cir. 2006) ("[E]ven if Wang could demonstrate a well-founded fear of persecution, her claim would still falter at the 'on account of' inquiry. Although we are sympathetic to the fact that Wang's life may indeed be in danger, she is still obligated to demonstrate the required nexus between her fear of harm and the grounds enumerated in the [Immigration and Nationality Act].").

44. *See* Matter of Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) ("[W]e interpret the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.").

and easy to recognize because of their inherent visibility in every society.[45] Groups of people who lack such an obvious social distinction, such as children fleeing gang recruitment or victims of familial violence, often try to categorize themselves as part of a "particular social group."[46] Because the success of these cases has varied,[47] many vulnerable populations (including the population that is the focus of this Note: abandoned, abused, and neglected youth) are forced to turn to other forms of immigration relief,[48] all of which have their own procedural and administrative issues.[49]

A. Convention on the Rights of the Child

Due to the universally-held belief that children are a particularly vulnerable population, the United Nations created the Convention on

45. *See* Adreanna Orlang, Note, *Clearly Amorphous: Finding a Particular Social Group for Children Resisting Gang Recruitment*, 61 CATH. U. L. REV. 621, 622 n.6 (2012) (providing examples of efficient adjudication of such claims).

46. *See* MARTIN ET AL., *supra* note 41, at 331 (emphasizing two issues in discovering a "particular social group"—"whether the general population views this collection of people as a group" and "whether an objective observer of society would say that the general population treats this group as undesirable"); Orlang, *supra* note 45, at 622; *see also* Al-Ghorbani v. Holder, 585 F.3d 980, 994–97 (6th Cir. 2009) (examining the difficulty of stating a cognizable particular social group within the context of family violence).

47. Courts presiding over matters of asylum have difficulty identifying and adhering to a precedent of "particular social group." *See generally* MARTIN ET AL., *supra* note 41. For example, the Ninth Circuit found that witnesses who testify against gang members may constitute a particular social group, despite an apparent lack of social visibility. Henriquez-Rivas v. Holder, 707 F.3d 1081, 1083 (9th Cir. 2013). During the same year, the Sixth Circuit held that Salvadoran boys who resist gang recruitment by a specifically-named gang could not constitute a particular social group because of its lack of social visibility. Umaña-Ramos v. Holder, 724 F.3d 667, 669 (6th Cir. 2013).

48. Other forms of immigration relief include, but are not limited to, T-visas, which protect trafficking victims, and U-visas, which protect immigrant victims of crime in the United States. 8 U.S.C. § 1101(a)(15)(T)–(U) (2012). Another option is Deferred Action for Childhood Arrivals, which offers a two-year work authorization as well as protection from deportation for immigrants who arrived in the United States before their sixteenth birthday and have resided here since 2007. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca (last updated Dec. 22, 2016).

49. *See* Erin Bistricer, Note, *"U" Stands for Underutilization: The U Visa's Vulnerability for Underuse in the Sex Trafficking Context*, 18 CARDOZO J.L. & GENDER 449, 477 (2012) ("The T Visa—which was designed solely to aid trafficking victims within the United States—has proven to be an ineffective remedy, as evidence by the low number of T Visas that have been granted and applied for . . . ."); Cristina Costantini, *The Problem With the 'Victim Visa'*, ABC NEWS (Jan. 31, 2013), http://abcnews.go.com/ABC_Univision/visas-problem-victim-visa/story?id=18357347 ("U visa law is mandated federally, but implemented inconsistently by local law enforcement . . . . [A]nother big problem with the visa, according to advocates, is that there simply aren't enough to go around."); *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 48 (addressing the injunction on DACA).

the Rights of the Child ("CRC") in 1989.[50] Spurred by the reality that "people under eighteen years of age often need special care and protection separate from that provided for adults," this Act was the first international recognition of the human rights of children.[51] The CRC calls for a higher standard of care of all youth, including those seeking refugee status, holding that "in all actions concerning children . . . the *best interests* of the child shall be a primary consideration."[52] But despite the fact that the CRC has more countries' signatures than any other human rights treaty in history, two countries still have not ratified it: Somalia and the United States.[53] Somalia remains politically and economically incapable of ratification, while the United States, a seat-holder in the General Assembly of the U.N., is considered a world leader in human rights.[54]

What are the implications of the U.S. government's decision to sign but not ratify this globally-recognized human rights treaty? In short, "[the United States] is not legally required to enforce [the CRC's] provisions in full in its domestic law."[55] The U.S. government does not have to take the best interests of a child into account in most, if not all, procedural matters or substantive decisions involving a child, but rather may settle for a lower standard of care or put other considerations, such as state-based immigration policies and financial incentives, above the health and safety of the child.[56]

There is, however, one specific form of immigration relief—SIJS—that requires the court to consider the best interests of an immigrant child when determining whether she should be "returned to [her]

50. United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter Convention on the Rights of the Child].

51. Emily Rose Gonzalez, *Battered Immigrant Youth Take the Beat: Special Immigrant Juveniles Permitted to Age-Out of Status*, 8 SEATTLE J. SOC. JUST. 409, 432 (2009).

52. Convention on the Rights of the Child, *supra* note 50, art. 3 (emphasis added); *see also id.* art. 22 (addressing appropriate measures for dealing with refugee children).

53. Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INT'L J. REFUGEE L. 84, 89 (1999).

54. *See id.*; Gonzalez, *supra* note 51, at 432.

55. BHABHA & SCHMIDT, *supra* note 7, at 34; *see also Signature, ratification and accession*, UNICEF, http://www.unicef.org/crc/index_30207.html (last updated May 19, 2014) ("Signature constitutes a preliminary endorsement of the Convention or Protocol. Signing the instrument does not create a binding legal obligation but does demonstrate the State's intent to examine the treaty domestically and consider ratifying it. While signing does not commit a State to ratification, it does oblige the State to refrain from acts that would defeat or undermine the treaty's objective and purpose.").

56. *See* BHABHA & SCHMIDT, *supra* note 7, at 33–34.

previous country of nationality or country of last habitual residence."[57] This heightened standard of care makes SIJS absolutely critical to our current immigration framework. Nevertheless, because the "best interests" language feels alien to judges who preside over matters of immigration, and because there is a basic misunderstanding of the procedural and substantive qualifications of the SIJS visa, this standard of care is not always upheld.[58]

B. Creation and Evolution of Special Immigrant Juvenile Status

The United States experienced an influx of unaccompanied alien children ("UACs") in the early eighties.[59] Spurred by the poor domestic circumstances from which many UACs fled, Congress amended the INA in 1990 to provide special relief to immigrant children who were victims of abuse, neglect, or abandonment.[60] Under this new Special Immigrant Juvenile visa, Congress created a conduit for eligible children to become Lawful Permanent Residents, obtain green cards, and remain in the United States free from parental harm.[61] Immigration legislation and various judicial holdings have influenced SIJS since its creation, causing it to evolve into its current state.[62]

1. Flores v. Reno *settlement agreement*

The first notable influence on SIJS was *Flores v. Reno*, a 1997 case in California federal court.[63] A class of alien juveniles brought action

57. 8 U.S.C. § 1101(a)(27)(J)(i)–(iii) (2012).

58. SIJS matters are partially adjudicated by state family court judges, often unfamiliar with immigration law, which leads many to deny viable applications. See *infra* Part II for support of this argument.

59. VERA GUIDELINES, *supra* note 7, at 6. At this time, the Immigration and Naturalization Service acted as both prosecutor and caretaker, charged with the responsibility of detaining and deporting UACs as well as caring for UACs within U.S. borders. *Id.*

60. *History of SIJ Status*, *supra* note 2.

61. *Id.*

62. *See generally* Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, tit. II, § 235, 122 Stat. 5044 (codified as amended at 8 U.S.C. § 1232) (amending SIJS eligibility requirements); Homeland Security Act of 2002, Pub. L. No. 107-296, tit. IV, § 462(b)(1)(B), 116 Stat. 2135 (codified as amended at 6 U.S.C. § 279) (ensuring "the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child"); Reno v. Flores, 507 U.S. 292, 303 (1993) (holding that in cases where juvenile aliens have no available legal guardian and the government does not intend punishment, custody of the juvenile does not violate the Constitution as it is rationally related to promoting the child's welfare).

63. *See* NAT'L IMMIGRANT JUSTICE CTR., FACT SHEET: CHILDREN DETAINED BY THE DEPARTMENT OF HOMELAND SECURITY IN ADULT DETENTION FACILITIES 1–2 (2013) [hereinafter NIJC FACT SHEET], https://www.immigrantjustice.org/sites/immigrantjustice.org/files/NIJC

against the Immigration and Naturalization Service ("INS"), alleging that "the Constitution and immigration laws require them to be released into the custody of 'responsible adults'" while awaiting their verdicts from removal proceedings.[64] The settlement from this case helped structure the country's treatment of SIJS applicants, and unaccompanied alien children in general, by establishing a national policy requiring immigrant children to be held in the "least restrictive setting appropriate to the minor's age and special needs, provided that such setting is consistent with its interest[in] . . . protect[ing] the minor's well-being," thereby abandoning the adult detention model for a child welfare-based model.[65] More importantly, the settlement defined "minor" as a person under the age of eighteen, neither emancipated by a state court nor convicted as an adult of a criminal offense.[66] Because the settlement dictated that its requirements apply to every child apprehended by the federal government, this definition of "minor" eventually became a national standard for immigrant children as well.[67]

2. Policy repercussions of Gonzales

In 1999, a five-year-old named Elián Gonzáles was taken from Cuba by his mother.[68] The two attempted an ocean voyage to Florida, but Elián's mother tragically drowned before reaching land.[69] In November 1999, two fishermen rescued Elián off the coast of Florida, and federal authorities placed him in the care of his great-uncle, a legal resident of Miami.[70] Upon realizing what had happened, Elián's father contacted the Cuban government and asked for the return his

---

%20Fact%20Sheet%20Minors%20in%20ICE%20Custody%202013%2005%2030%20FINAL_0.pdf; *Reno*, 507 U.S. at 296.

64. *Reno*, 507 U.S. at 294.

65. Stipulated Settlement Agreement at 7, Flores v. Reno, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997) [hereinafter Reno Settlement Agreement], http://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf. Before this, the INS placed apprehended children in jail-like conditions, side-by-side with unrelated adults. *Id.*; *see also* 8 C.F.R. §§ 236.3(d), 1236.3(d) ("In the case of a juvenile for whom detention is determined to be necessary . . . the juvenile may be temporarily held by [INS] authorities or placed in any [INS] detention facility having separate accommodations for juveniles.").

66. Reno Settlement Agreement, *supra* note 65, at 4.

67. *Id.* at 2. See also *infra* Part II.A for a discussion of the problems stemming from interpretations of SIJS that vary by state.

68. Gonzales v. Reno, 86 F. Supp. 2d 1167, 1171 (S.D. Fla. 2000).

69. *Id.*

70. *Id.*

son, claiming that Elián's mother illegally abducted the child by attempting her trek to the United States.[71] International tempers flared as the world watched the United States government battle with Elián's great-uncle over which course of action was in the child's best interests—asylum in the U.S. or repatriation to Cuba.[72] The court eventually concluded that Elián's father held the right to custody, "relying heavily upon U.S. family law principles regarding the importance of parental rights, family reunification, and the *child's best interest*."[73]

Despite the rather succinct conclusion of Elián's case, the decision sparked a significant legislative reaction.[74] Elián returned to a loving home, but his story ignited a growing concern for other unaccompanied immigrant children who might not be so lucky.[75] The question of *who* was best equipped to consider the fate of unaccompanied immigrant children came within the purview of federal law-making for the first time.[76]

California Senator Dianne Feinstein was particularly inspired by Elián's story; starting in 2000, she introduced a series of bills called the "Unaccompanied Alien Child Protection Acts."[77] These bills proposed to amend the INA to create special provisions for unaccompanied alien children, including the appointment of legal counsel, special detention exceptions, considerations for adjustment of status, and more.[78] The bills failed to become law after seven attempts at enactment, but their provisions heavily influenced a portion of the forthcoming Homeland Security Act.[79]

---

71. *Id.*

72. *See id.* at 1171–72; Gregory Zhong Tian Chen, *Elian or Alien? The Contradictions of Protecting Undocumented Children under the Special Immigrant Juvenile Statute*, 27 HASTINGS CONST. L.Q. 597, 597–98 (2000).

73. Chen, *supra* note 72, at 598 (emphasis added).

74. *See id.* at 598–99.

75. *Id.* at 599 ("Elián was fortunate since he had a father and extended relatives willing to care for him and there was no indication that he suffered from family abuse, neglect, or abandonment. Many other undocumented children, however, are not so fortunate.") (citations omitted).

76. *Id.* at 598–99.

77. VERA GUIDELINES, *supra* note 7, at 7.

78. *See* Alien Children Protection Act, S. 2383, 106th Cong. (2000); Alien Unaccompanied Minor Adjustment and Protection Act, H.R. 4354, 106th Cong. (2000); Young Immigrant Protection Act, H.R. 4590, 106th Cong. (2000).

79. VERA GUIDELINES, *supra* note 7, at 7.

3. Homeland Security Act of 2002

The tragic events at the World Trade Center in 2001 spurred an overhaul of governmental agencies and changed the face of U.S. immigration regulation forever.[80] Congress passed the Homeland Security Act in 2002 ("HSA"), replacing the Immigration and Naturalization Service with the U.S. Department of Homeland Security ("DHS").[81] Congress delegated the care, placement, and release of unaccompanied children to the Department of Health and Human Services—more specifically, to its subdivision, the Office of Refugee Resettlement ("ORR").[82] The HSA then divided the responsibility of regulating and enforcing immigration policies among three branches of the DHS: (1) Immigration and Customs Enforcement, (2) Customs and Border Protection, and (3) Citizenship and Immigration Services ("USCIS").[83] Since the HSA's enactment, USCIS has been the federal agency responsible for the final review of all SIJS applications.[84]

4. Trafficking Victims Protection Reauthorization Act of 2008

In 2008, Congress reauthorized the William Wilberforce Trafficking Victims Protection Reauthorization Act ("TVPRA").[85] The TVPRA attempted to make the immigration system more kid-friendly by mandating that UACs have "access to legal services through pro-bono legal representatives" and "safe repatriation . . . to their countries of origin," as well as the appointment of guardians *ad litem* for "trafficking victims and other vulnerable unaccompanied children."[86] The TVPRA also "broadened eligibility requirements such that these state

80. *See id.* at 6.

81. *See generally* Homeland Security Act of 2002, Pub. L. No. 107-296, tit. IV, § 471, 116 Stat. 2135 (codified as amended at 6 U.S.C. § 291).

82. Under the HSA, the ORR was responsible for "coordinating and implementing the care and placement of unaccompanied alien children in Federal custody[,] . . . ensuring that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child[,] . . . implementing policies with respect to the care and placement of unaccompanied alien children," and more. *Id.* § 462(b)(1)(A).

83. VERA GUIDELINES, *supra* note 7, at 6.

84. *Id.* at 8, 25. The Homeland Security Act also modified the *Reno* definition of "juvenile" to include undocumented youth, holding that an "'unaccompanied alien child' is a child who has no lawful immigration status in the United States, is under 18 years of age, and has no parent or legal guardian in the country present or available to provide care and physical custody." § 462(g), 116 Stat. 2205. The ORR and DHS have both since adopted this definition. VERA GUIDELINES, *supra* note 7, at 8.

85. *See generally* Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, tit. II, 122 Stat. 5044 (codified as amended in scattered sections of 8 U.S.C.).

86. VERA GUIDELINES, *supra* note 7, at 8 (emphasis added).

law findings based on slightly different vocabulary meet the SIJS statutory requirements."[87] In theory, this meant that if an SIJS applicant resided in a state which used terms "other than abuse and neglect, to describe the basis for refusing to reunify a child with his or her parents," she now had a chance for relief under the visa.[88]

C. Treatment of Unaccompanied Alien Children in the United States

Between October 2008 and September 2010, DHS apprehended over 13,000 UACs.[89] The large majority of these children journeyed from Guatemala, Honduras, and El Salvador,[90] three of the most dangerous countries on Earth.[91] To this day, these children flee country-related conditions such as gang recruitment and generalized armed conflict, as well as conditions starting at home, including neglect, abandonment, trafficking, forced labor, familial rape, physical abuse, and much more.[92]

Upon arrival at the border, most UACs are thrust into a complex legal process that determines whether they can stay in the United States or must return to their home country and, in some cases, face further exploitation.[93] The Department of Health and Human Services contracted with the Vera Institute of Justice, a nonprofit organization with the broad goal of justice reform, to gather data on UACs in a report entitled "The Flow of Unaccompanied Children Through the Immigration System."[94] This report was meant to inform policy

87. Katherine Brady & David Thronson, *Immigration Issues Representing Children Who Are Not United States Citizens*, *in* CHILD WELFARE LAW AND PRACTICE MANUAL: REPRESENTING CHILDREN, PARENTS AND STATE AGENCIES IN ABUSE, NEGLECT AND DEPENDENCY CASES 6 (Nat'l Ass'n of Counsel for Children, 2d ed. 2004), http://www.ilrc.org/files/2010_sijs-chapter_03-sijs_overview.pdf.

88. *Id.*

89. VERA GUIDELINES, *supra* note 7, at 13.

90. *See supra* note 7 and accompanying text.

91. As of April 2014, the homicide rate in Honduras earned the country the title, "World's Murder Capital," while El Salvador and Guatemala were ranked fourth and fifth, respectively. *Which countries have the world's highest murder rates? Honduras tops the list,* CNN (Apr. 11, 2014, 12:48 PM), http://www.cnn.com/2014/04/10/world/ un-world-murder-rates/.

92. *See* BHABHA & SCHMIDT, *supra* note 7, at 20–22; *see also* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 162–63, 184–86, 192–93 (2016), https://www.state.gov/documents/organization/258876.pdf (portraying current oppressive humanitarian issues by country, including El Salvador, Guatemala, and Honduras).

93. VERA GUIDELINES, *supra* note 7, at 5.

94. *Id.* at 4. "Vera's Center on Immigration and Justice was created to address the challenges of converging criminal justice and immigration system . . . . Our work focuses on improving access to legal services for immigrants—in particular, for detained adults and unaccompanied children." *Id.* at 2.

makers and practitioners of the intricate and "labyrinthine" process that UACs must navigate.[95] For the purposes of this Note, this Part will focus on the experience of a typical SIJS applicant: a Central American child arriving at the U.S.-Mexico border.[96]

1. Apprehension at the border[97]

To reach the United States, a child from Central America will likely enlist the help of a "guía" (Spanish for "guide") or "coyote."[98] As of 2010, federal authorities from Customs and Border Patrol apprehend most children at the border within twenty-four hours of their crossing.[99] Once in custody, officials place the child in a temporary detention facility.[100] Recent developments in immigration policy prohibit officials from placing the child with unrelated adults or from holding the child for longer than seventy-two hours, although these requirements are sometimes disregarded because of institutional inefficiency.[101] Once federal officials determine that a child is under eighteen years of age[102] and is unaccompanied—that is, without a parent or other legal guardian in geographical proximity—an immigration officer interviews the child, fills out a series of forms, and reports the child to the Office of Refugee Resettlement.[103]

---

95. *See id.* at 1–2, 5. "Trained practitioners, researchers, and policy makers struggle to understand the ins and outs of the complex, disjointed system for unaccompanied immigrant children. The difficulty of navigating this system is greatest for the children themselves. They often interact with a daunting number of government agencies, and each one has its own policy goals and objectives." *Id.* at 30.

96. *See supra* note 7 and accompanying text. Not all UACs in the U.S. are from this region, however. *See* VERA GUIDELINES, *supra* note 7, at 31 (noting that the largest population of UACs travel from Mexico, Brazil, China, Ecuador, Nicaragua, and Costa Rica, in descending order).

97. Please remember that the following four sections encompass a general view of the pathway taken by UACs through the immigration system. Further detail into the intricacies of this process is irrelevant for the purposes of this Note.

98. Burnett, *supra* note 12.

99. VERA GUIDELINES, *supra* note 7, at 12; *see also* Burnett, *supra* note 12 ("[C]hildren just give themselves up [to Border Patrol].").

100. VERA GUIDELINES, *supra* note 7, at 10.

101. *Id.*; *see* NIJC FACT SHEET, *supra* note 63, at 1–2; *see generally* Areti Georgopoulos, *Beyond the Reach of Juvenile Justice: The Crisis of Unaccompanied Immigrant Children Detained by the United States*, 23 LAW & INEQ. 117 (2005).

102. VERA GUIDELINES, *supra* note 7, at 10 ("In cases of doubt about age, [the Department of Homeland Security] sometimes requests a dental or skeletal radiograph, though radiographs have been criticized as unreliable in determining age.").

103. *Id.* The process for children from contiguous countries (Mexico and Canada) is somewhat different:

> When [an immigration officer] apprehends Mexican or Canadian children at the border or another port of entry . . . they provide them with a notice of rights and request for disposition . . . which allows them to request a hearing before an immigration

2. Referral to the Office of Refugee Resettlement

Once the Office of Refugee Resettlement (the "ORR") receives notice of a UAC, it gathers information about the child to determine the child's "category of placement."[104] The categories of initial placement range from minimally restrictive settings to extremely secure settings for children with a violent history who pose a threat to themselves and others.[105] The ORR automatically places most children in shelter care, the least restrictive of the categories, where they enjoy some education, healthcare, and outdoor recreation as they await family placement.[106] While many UACs spend time in only one shelter, many are moved from place to place, resulting in more time in federal custody before finally connecting with a legal guardian.[107]

3. Reunification with a sponsor

One of the ORR's most important duties is to release the children in its care to an approved sponsor living in the United States, a process known as "reunification."[108] Where a parent is unavailable, the ORR may approve a legal guardian, another adult relative (such as a sibling or grandparent), or any licensed program willing to accept legal custody of the child (such as a shelter for homeless youth).[109] Once a potential sponsor is located, an ORR staff member conducts a home study to verify that the sponsor is able to address the child's needs, and the potential sponsor completes a fingerprint background check

---

> judge in the United States or elect to return immediately to their home country through a process called voluntary return. If a child chooses the latter option, [an immigration officer] must first conduct a screening to verify that the child is not a victim of trafficking or at risk of being trafficked upon return to the home country, that the child does not have a credible fear of persecution in that country, and that he or she is capable of making an independent decision to withdraw an application for the admission into the United States . . . . The vast majority of unaccompanied Mexican children apprehended at the southern border elect to go back to Mexico through the voluntary return process.

Id. at 10–11.

104. *Id.* at 14 (listing the information that the ORR finds important, "including gender, age, country of origin, date and location of apprehension, medical and psychological condition, and previous contact with the juvenile or criminal justice system").

105. See *id.* for a detailed list of the four categories of placement: shelter care, staff-secure care, secure care, and transitional (short-term) foster care.

106. *Id.*

107. *See id.* at 21 for a charted example of one UAC's shelter visits.

108. *Id.* at 17 ("The process of release to a sponsor is called reunification, even if the child did not previously live with this individual, family, or program.").

109. *Id.* at 18.

to uncover any history of child abuse or other criminal behavior.[110] Because of the thoroughness required of the ORR staff, "the [reunification] process may still take several months from the time the custody is ordered until the final release decision."[111] When the ORR finally grants release, the child must file a change of address form with the Department of Homeland Security to receive her summons to immigration court for her removal proceedings.[112] If the child fails to file the change of address form, or if the child's guardian fails to file it on her behalf, she may face immediate removal charges and become forever ineligible to file for a visa in the U.S.[113]

4. Removal proceedings and repatriation

After the ORR places a child with her sponsor, the child will receive notice that she must attend her local immigration court.[114] Successful SIJS applicants typically request a continuance to obtain counsel, rather than plead to the charges.[115] Then, to remain in the United States, the child must seek some form of legal relief, the most common being asylum, a U-visa or T-visa,[116] a family-based petition for permanent residence, or, of course, SIJS.[117]

The Vera Institute and other child advocacy organizations have tried piecing together what happens to all demographics of UACs (not just SIJS applicants) after the ORR discharges them from its custody.[118] Vera's data shows that amongst all children discharged between October 1, 2008, and September 30, 2010, about 65% reunified with a sponsor, 17% returned willingly or unwillingly to their home country (in a process known as "repatriation"), 10% reached adult status by turning eighteen, and 4% were still awaiting results from court.[119] Of all of these outcomes, the greatest mystery is what happens to a child upon returning to her previous country of habitual residence; some advocates go so far as to describe repatriation as a "black hole where unaccompanied children easily fall through the

110. *Id.*

111. *Id.* at 19.

112. *Id.* at 20.

113. *See Change of Address Information*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/addresschange (last updated Feb. 23, 2017).

114. VERA GUIDELINES, *supra* note 7, at 22.

115. *Id.*

116. BHABHA & SCHMIDT, *supra* note 7, at 56–60; *see supra* note 48 and accompanying text (describing U and T visas).

117. VERA GUIDELINES, *supra* note 7, at 22.

118. *See id.* at 27.

119. For a breakdown of the remaining percentages, see *id.*

cracks."[120] This should seem especially troubling for advocates of SIJS, as forcibly returning a child to her home country might expose her to further abuse or neglect by her parents.[121]

D. Applying for SIJS Today

The procedural and substantive requirements of SIJS are complex, and therefore rife with misinterpretation. For example, an applicant must typically submit four USCIS forms, which can be found online, including an Application to Register Permanent Residence or Adjust Status.[122] Each of these forms has its own set of fees and detailed questions that could seem disconcerting and strange to *any* alien unfamiliar with U.S. law, especially a child.[123] Because of the intricacy of these forms, an immigration attorney is essentially required for a successful application.[124]

Surprisingly, however, most of the complexity of the SIJS application process does not emanate from its myriad of forms, but rather from its procedural and substantive requirements. Procedurally, the process is bifurcated, and an applicant must entreat both the state and federal government at different stages.[125] Substantively, the statute lays out a multi-prong test that an applicant must satisfy to be eligible for relief, although some of the statute's language leaves wide berth for judicial discretion.[126]

1. Navigating a bifurcated process

Congress decided to give state-level juvenile courts a role in SIJS because "youth in need of protection would benefit from the chance

120. Christopher Nugent, *Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 BOSTON U. PUB. INT. L.J. 219, 234 (2006).

121. *See id*.

122. *SIJ: Forms You May Need*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/green-card/special-immigrant-juveniles/sij-forms-you-may-need (last updated July 12, 2011) (explaining an Application to Register Permanent Residence or Adjust Status is a way to adjust one's status to Lawful Permanent Resident of the United States).

123. *See id.*; Illona Bray, *Petitioning for a "Special Immigrant Juvenile Status" Green Card*, ALLLAW, http://www.alllaw.com/articles/nolo/us-immigration/petitioning-special-immigrant-juvenile-status-green-card.html (last visited Apr. 5, 2017).

124. *See* Bray, *supra* note 123.

125. *See* U.S. CITIZENSHIP AND IMMIGRATION SERVICES, SPECIAL IMMIGRANT JUVENILE STATUS: INFORMATION FOR JUVENILE COURTS [hereinafter INFORMATION FOR JUVENILE COURTS], https://www.uscis.gov/sites/default/files/USCIS/Green%20Card/Green%20Card%20Through%20a%20Job/Information_for_Juvenile_Courts_-FINAL.pdf (last visited Mar. 3, 2017).

126. 8 U.S.C. § 1101(a)(27)(J) (2012); *see generally* Pulitzer, *supra* note 27.

to appear before a 'neutral' entity that had expertise in adjudicating children's cases."[127] With the addition of the state court's role, the basic procedure for applying for SIJS is twofold.[128] First, a child asks USCIS to postpone removal proceedings while she brings a dependency or custody case to the juvenile court in her local jurisdiction.[129] There, a state judge decides whether to sign the child's SIJS order, a court document detailing the "factual basis for the findings on parental reunification, dependency or custody, and best interests" of the child.[130] Some states, like New York, provide form-type orders for SIJS cases, while in other states, attorneys representing applicants are forced to create their own.[131] The judge will question the child on the stand, analyze relevant documents (such as birth certificates or passports), read affidavits from the child's relatives attesting to her abuse or neglect, and conduct whatever other fact-finding the judge believes is pertinent.[132] Some judges justify their holding with a brief judicial opinion on the circumstances of the case pertaining to the "best interests" determination, but there is no such requirement.[133]

If the judge chooses to sign the order, the child then brings the signed order, her SIJS forms, and any supporting documentation back to USCIS.[134] USCIS officers interview the child, review the documentation, and make a decision by applying the state court's findings to the merits of the application.[135] If USCIS grants the application, the federal government terminates removal proceedings against the

127. Pulitzer, *supra* note 27, at 223.

128. For the purposes of this Note, this Part assumes that the child is applying defensively as opposed to affirmatively, meaning the application is occurring "while [the child is] in removal proceedings as a defense to deportation." Brady & Thronson, *supra* note 87, at 15.

129. INFORMATION FOR JUVENILE COURTS, *supra* note 125. In a dependency case, the juvenile court decides whether to declare "the child dependent on the court" or it "legally commits or places the child under the custody of either a state agency or department or an individual or entity appointed by a juvenile court." *Id.* at 2.

130. *Id.*

131. *See, e.g.*, N.Y. FAM. CT., SPECIAL IMMIGRANT JUVENILE STATUS ORDER (2017) [hereinafter SPECIAL IMMIGRANT JUVENILE STATUS ORDER], https://www.nycourts.gov/forms/familycourt/pdfs/gf-42.pdf.

132. *See* INFORMATION FOR JUVENILE COURTS, *supra* note 125.

133. *See id.* ("The court order need not be overly detailed, and need not recount all of the circumstances of the abuse, abandonment or neglect, but must show the factual basis for the court's findings.").

134. *See id.*

135. *See Eligibility Status for SIJ*, *supra* note 2.

child, and she receives protection from deportation, as well as the opportunity to become a Lawful Permanent Resident.[136] Conversely, if the state court judge chooses not to sign the order, USCIS will likely deny the application.[137] This disturbing phenomenon will be further discussed in Part II.[138]

2. Substantive eligibility requirements

The SIJS statute includes a multi-prong test that a child must satisfy to be considered for relief.[139] An American Law Review annotation provides a concise explanation of the statute's eligibility requirements:

> A child may be eligible to apply . . . for special immigrant juvenile status . . . *if a juvenile court enters certain findings*. The findings must include that the child is under 21 years of age, unmarried, and declared dependent upon a court or legally committed to, or placed under the custody of, a state agency, individual, or entity appointed by a state court; that reunification with one or both of the child's parents is not viable due to parental abuse, neglect, abandonment, or similar misconduct defined under state law; and that it would not be in the child's best interest to be returned to his or her native country.[140]

Courts rarely dispute the first three prongs of the statute—the age, marriage, and dependency requirements—although different states sometimes apply them with slight variation.[141] The phrase "one or both of the child's parents" has caused some interpretive problems in the past, but many jurisdictions have since come to a consensus that

---

136. *See Special Immigrant Juveniles (SIJ) Status*, *supra* note 5; *see also Green Card*, U.S. CITIZENSHIP AND IMMIGR. SERVS., http://www.uscis.gov/greencard (last updated May 13, 2011) (explaining that a green card is proof that the holder "has been granted authorization to live and work in the United States on a permanent basis").

137. *See* NAT'L IMMIGRANT JUSTICE CTR., BASIC PROCEDURAL MANUAL FOR REPRESENTING CHILDREN AND YOUTH SEEKING SPECIAL IMMIGRANT JUVENILE STATUS 15 (2014); *see also* 8 U.S.C. § 1101(a)(27)(J)(ii) (2012).

138. *See infra* Part II.

139. *See* 8 U.S.C. § 1101(a)(27)(J).

140. Karen Moulding, Annotation, *Eligibility for Special Immigrant Juvenile Status Under 8 U.S.C.A. § 1101(a)(27)(J) and 8 C.F.R. § 204.11*, 67 A.L.R. FED. 2d 299 (2015) (emphasis added); *see* 8 U.S.C. § 1101(a)(27)(J).

141. "At what age a child may be considered dependent such that a juvenile court has jurisdiction to enter the findings necessary for special immigrant juvenile status varies from state to state and depends on state laws regarding cut-off ages for minority and for juvenile court jurisdiction." Moulding, *supra* note 140.

abuse, neglect, or abandonment by only one biological parent is sufficient.[142]

The main complications lie within the statute's final two requirements: (1) an applicant must have findings stating reunification with the her parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law; and (2) it is not in the her best interests to return to her country of origin.[143] Both of these requirements share one major similarity: A state court judge must exercise discretion in an area of law that has been expressly reserved for the federal government since 1941.[144]

II. CONCERNS WITH THE SIJS STATUTE'S ABILITY TO PROTECT CHILDREN

Historically, the supreme power over immigration has rested in the hands of the federal government.[145] This power stems mainly from the Constitution, which gives the federal government the authority to "regulate Commerce with foreign Nations" and create a "uniform Rule of Naturalization."[146] There are several reasons for this delegation, including the theory that "[i]mmigration policy . . . affect[s] trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws."[147] Federal statute explicitly lists the states' few iterated powers over aliens, particularly where there is an action by the State itself against a foreign individual.[148]

---

142. The state of California, for example, has repeatedly interpreted "one or both parents" to mean that a child is still eligible for SIJS even if he has one parent with whom reunification *is* viable and one parent with whom it is *not*. *See, e.g.*, Eddie E. v. Superior Court, 183 Cal. Rptr. 3d 773, 783 (Cal. Ct. App. 2015) ("[W]e hold that [this] prerequisite is to be interpreted literally: '1 or both' means one or both. A petitioner can satisfy this requirement by showing an inability to reunify with *one* parent due to abuse, neglect, abandonment, or a similar basis under state law."); *In re* Israel O., 182 Cal. Rptr. 3d 548, 556 (Cal. Ct. App. 2015) ("An eligible minor under [SIJ] includes a juvenile for whom a safe and suitable parental home is available in the United States and reunification with a parent in his or her country is not viable due to abuse, neglect or abandonment.").

143. *See* 8 U.S.C. § 1101(a)(27)(J)(i)–(ii).

144. "[O]ver no conceivable subject is the legislative power of Congress more complete." Reno v. Flores, 507 U.S. 292, 305 (1993) (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)) (citation omitted); *see* BJ Smith, Comment, *Emma Lazarus Weeps: State-Based Anti-Immigration Initiatives and the Federalism Challenge*, 80 UMKC L. REV. 905, 917–18 (2012).

145. *See, e.g.*, Toll v. Moreno, 458 U.S. 1, 10 (1982) ("Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders.").

146. U.S. CONST. art. 1, § 8, cls. 3, 4; *see Toll*, 458 U.S. at 10.

147. Arizona v. U.S., 132 S. Ct. 2492, 2498 (2012).

148. *See* 28 U.S.C. § 1251 (2012).

With SIJS, Congress intentionally circumvented this tradition, placing limited immigration authority in the hands of state courts.[149] Congress reasoned that giving this supremacy to the states was the most fair and effective way to distribute SIJS visas since state courts often rule in similar cases concerning children who are U.S. citizens.[150] On its face, this assertion seems logical; after all, one of the state juvenile court's main duties is to rescue American youth from parental abuse and neglect.[151]

Although Congress intended this decision to benefit worthy SIJS applicants, this Part addresses two major concerns that indicate the bifurcated process regularly fails to protect immigrant youth. First, the factors surrounding a "best interests" determination vary by state due to sovereign family law statutes.[152] Second, because the procedural requirements of SIJS are so unique, there are frequent miscomprehensions of the state and federal governments' roles in the process.[153]

A. Varied Applications of "Best Interests"

Because juvenile courts are responsible for a pivotal step in the SIJS process—signing the SIJS order—the state becomes the gatekeeper of legal status for many undocumented children.[154] Whether the gate

149. H.R. Rep. No. 105-405 (1997), 105 H. Rpt. 405 (LEXIS) (revealing "that the involvement of the Attorney general is . . . not for making determinations of dependency status" about SIJS applicants); *see also* Chen, *supra* note 72, at 602 ("[C]ourts have described the federal government's power over immigration as 'plenary' and 'complete.' State and local governments, however, have historically taken principal responsibility for protecting the health, safety, and welfare of children."); Wendi J. Adelson, *The Case of the Eroding Special Immigrant Juvenile Status*, 18 J. TRANSNAT'L L. & POL'Y 65, 77 (2008) ("Congressional intent underlying the creation of SIJ Status was to create a permanent option in the U.S. for undocumented, state-dependent minors.").

150. Adelson, *supra* note 149, at 78 ("Given that a separate court system was created for juveniles, the juvenile court seems the most appropriate place to make findings as to a child's welfare in the context of his or her family situation."); *cf.* Chen, *supra* note 72, at 604 ("[T]he SIJ statute reinforce[d] the structure of the child welfare system.").

151. *See generally An Introduction to the Child Welfare System*, JUVENILE LAW CTR., http://jlc.org/news-room/media-resources/introduction-child-welfare-system (last visited Apr. 5, 2017) (summarizing the primary tasks of the child welfare system).

152. *See, e.g.*, CHILD WELFARE INFORMATION GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD 3–4 (2016), https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

153. *See, e.g.*, Pulitzer, *supra* note 27, at 216 ("Family court judges have expressed hesitancy in making findings that might impact immigration-related aspects of a child's case.").

154. *See Eligibility Status for SIJ*, *supra* note 2 ("To petition for SIJ you must have a state court order that contains certain findings, [sic] USCIS uses to determine your status."); *see also* Pulitzer, *supra* note 27, at 203 ("State courts . . . are emerging as the new gatekeepers of SIJS access.").

will remain shut to deserving candidates depends largely on the results of the state judge's "best interests" determination. Although it is commonly understood that the primary concern should be "the child's ultimate safety and well-being," the absence of a nationally-set definition of "child's best interests" leaves much ambiguity.[155] Some states attempt to provide explicit guidelines for judges to follow, iterating finite issues to be considered.[156] Most states, however, provide vague instruction and give judges broad discretion.[157]

Only twenty-two states and the District of Columbia have laws that list factors to consider when deciphering a child's best interests.[158] The Children's Bureau, a federal agency that focuses "exclusively on improving the lives of children and families,"[159] reported the most commonly required factors as of 2013:

- The emotional ties and relationships between the child and his or her parents, siblings, family and household members, or other caregivers ([fifteen] States and the District of Columbia)
- The capacity of the parents to provide a safe home and adequate food, clothing, and medical care ([ten] States)
- The mental and physical health needs of the child (nine States and the District of Columbia)
- The mental and physical health of the parents (nine States and the District of Columbia)
- The presence of domestic violence in the home (nine States).[160]

---

155. CHILD WELFARE INFORMATION GATEWAY, *supra* note 152, at 4–28. Inconsistencies exist elsewhere as well, including not-so-subtle deviations in the "types of courts and proceedings where SIJS findings can be obtained" and the "laws passed in reaction to [SIJS]." Hlass, *supra* note 27, at 321.

156. "For example, Illinois law provides a list of the factors that, within the context of the child's age and developmental needs, 'shall be considered' in determining best interests . . . Three States also list factor(s) that should not be considered in the best interests analysis. For example, Connecticut law states that the determination of the best interests of the child shall not be based on the consideration of the socioeconomic status of the birth parent or caregiver." CHILD WELFARE INFORMATION GATEWAY, *supra* note 152, at 2–3.

157. The Child Welfare Information Gateway report includes an extensive list of the factors each individual state considers when making a "best interest" determination. *Id.* at 2–28.

158. *Id.* at 2.

159. *CB Fact Sheet*, CHILDREN'S BUREAU, http://www.acf.hhs.gov/programs/cb/fact-sheet-cb (last visited Feb. 10, 2017); *see What We Do*, CHILDREN'S BUREAU, https://www.acf.hhs.gov/cb/about/what-we-do (last updated June 27, 2016).

160. CHILD WELFARE INFORMATION GATEWAY, *supra* note 152, at 2.

Although these factors may indicate common ground, each jurisdiction has its own nuanced set of rules.[161] For example, states like Florida enumerate a lengthy list of specific considerations, such as "[a]ny suitable permanent custody arrangement with a relative of the child" and "[t]he length of time that the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity."[162] Other states provide only general guidance, as in Arizona where the related statute merely reads, "[i]n reviewing the status of the child and in determining its order of disposition, the court shall consider the *health and safety* of the child as a paramount concern."[163]

State-by-state disparities of "best interests" generate endless variables that affect the state courts' findings.[164] The examples above illustrate this ambiguity. What evidence does the juvenile court judge in Arizona need to analyze the child's "health and safety?" Does it include "evidence of domestic violence," like in a Delaware statute,[165] or the "potential emotional, developmental, and educational harm to the child if moved from the child's current placement," like in a Maryland statute?[166] Or, alternatively, is the judge permitted to exercise discretion based on his own personal definition of "health and safety," which may mean the mere access to food and shelter?[167] The gaping holes left by some of these laws allow for inconsistent and often ineffective applications of SIJS that can be damaging for a meritorious applicant based solely on her location in the United States.[168]

B. Misunderstanding the State and Federal Governments' Roles

In addition to the problems addressed above, the different functions of the state and federal courts are confusing for those charged with authority in the SIJS application process. Many state judges are reluctant to make favorable findings for viable SIJS applicants, either because they are unfamiliar with the dictates of immigration law, or

161. *See id*. at 2–28 (listing the various state statutes).

162. *Id*. at 8 (citing FLA. STAT. ANN. § 39.810 (LexisNexis 2016)).

163. *Id*. at 5 (emphasis added) (citing ARIZ. REV. STAT. § 8-845(B) (LexisNexis 2016)).

164. *See* Gonzalez, *supra* note 51, at 416 (considering the "inconsistency and geographically-determined unequal treatment" of SIJS applicants).

165. CHILD WELFARE INFORMATION GATEWAY, *supra* note 152, at 7 (citing DEL. CODE ANN. tit. 13, § 722 (LexisNexis 2016)).

166. *Id*. at 13 (citing MD. CODE ANN., Fam. Law § 5-525(f)(1) (LexisNexis 2016)).

167. The possibility of such a meager interpretation of "best interests" is alarming, since the standard theoretically "requires that courts prioritize a child's general safety, permanency, and well-being by exploring multiple aspects of a child's life, including his emotional needs, the relationship he has with his parent(s), among other factors." *See* Pulitzer, *supra* note 27, at 219.

168. *See* Gonzalez, *supra* note 51, at 432–33.

they are simply uncomfortable with making a decision that is traditionally reserved for the federal government.[169] Then, when the application reaches USCIS, federal agents rely overwhelmingly on the state court's findings.[170] Thus, a subset of abused and neglected youth, otherwise entitled to legal relief, are deemed unworthy applicants.[171] The line between making child welfare findings regarding the child's "best interests"—the state's role—and making a final decision on the immigration-related merits of the application—the federal government's role—becomes murky.[172]

A common fallacy of the state court is to adjudicate the SIJS case on the merits of the immigration aspect of the application, which, in reality, is the federal government's responsibility. In a recent California case, the trial court refused to make a finding of abandonment because the judge had doubts about the applicant's "good faith."[173] The appellate court reversed the decision and signed the SIJS order, commenting that the trial court overstepped its role in the SIJS process.[174] The court held that "the task of weeding out such applicants lies principally with the *federal authorities*," not the state.[175]

The Supreme Court of New Jersey also recently reversed and remanded a decision where the family court applied the definition of "abused, neglected, or abandoned" from the child's country of origin rather than from its own state law.[176] The appellate court's opinion condemned the trial court for exceeding its designated authority:

> [T]here can be no legitimate argument that, as suggested by the trial court . . . [a] family court has jurisdiction to approve or deny a child's application for [SIJS] . . . . [T]he *findings made by the state court only relate to matters of child welfare*, a subject traditionally left to the jurisdiction of the states. All immigration decisions remain in the hands of [U.S. Citizenship and Immigration Services] . . . .[177]

---

169. *See* Eddie E. v. Superior Court, 183 Cal. Rptr. 3d 773, 780 (Cal. Ct. App. 2015); Pulitzer, *supra* note 27, at 203.

170. Adelson, *supra* note 149, at 68.

171. *See generally* Hlass, *supra* note 27, at 283.

172. *See Eddie E.*, 183 Cal. Rptr. 3d at 780–81.

173. The court found that, because the applicant's mother had died since abandoning him, his "inability to reunify with her was due to death, not abandonment." *Id.* at 775.

174. *Id.* at 783–84.

175. *Id.* (emphasis added).

176. H.S.P. v. J.K., 121 A.3d 849, 852–53 (N.J. 2015) ("The trial court credited testimony suggesting that [the applicant's] father was an alcoholic or a drug addict, but determined that the evidence of record was insufficient to establish that he had willfully abandoned his son.").

177. *Id.* at 859 (emphasis added).

Family court judges have also been reluctant to make favorable findings for SIJS applicants because they are unfamiliar with immigration issues, often forgoing "best interests" determinations entirely.[178] By way of example, several Florida judges have been caught summarily dismissing applications without giving them individual consideration.[179] In December 2015, a Florida court met with an SIJS applicant's counsel for only *eight minutes*, without allowing the introduction of any evidence or fact-finding, before denying the petition.[180] Notably, this issue occurs even in states with the friendliest SIJS policies; some family court judges in New York refuse to conduct "best interests" hearings, notwithstanding that the SIJS statute requires them.[181]

Due to their lack of familiarity with Congress's intent behind SIJS, some judges see the visa as a way to "cheat the system" and obtain a disproportionately easy form of relief.[182] Fordham University conducted a study on the family court's treatment of SIJS cases in New York, surveying a large group of advocates who regularly represent children applying for SIJS.[183] When asked to describe issues advocates typically face in state court, one respondent "described a case in

178. Pulitzer, *supra* note 27, at 216; *see also* Matter of Cecili M.P.S. v. Santos H.B., 116 A.D.3d 960, 960–61 (N.Y. App. Div. 2014) ("[T]he Family Court erred in dismissing the . . . petition without conducting a hearing or considering the child's best interests . . . .").

179. *See generally In re* Y.V., 160 So. 3d 576, 577 (Fla. Dist. Ct. App. 2015) (reversing a dismissal of dependency petition and holding that the petition was not preempted by federal immigration laws); L.T. v. Dep't of Children & Families, 48 So. 3d 928, 929 (Fla. Dist. Ct. App. 2010) (holding that the trial court erred, as a matter of law, in dismissing a child's dependency petition and that the child's petition was not moot); Dep't of Children & Families v. K.H., 937 So. 2d 807, 808 (Fla. Dist. Ct. App. 2006) (holding that a lower court's dismissal of a dependency petition violated the appellant's right to due process); F.L.M. v. Dep't of Children & Families, 912 So. 2d 1264, 1265 (Fla. Dist. Ct. App. 2005) (granting a motion for a rehearing because a trial judge committed a legal error by refusing to sign a child's dependency order).

180. *In re* B.R.C.M., 182 So. 3d 749, 755 (Fla. Dist. Ct. App. 2015).

181. *See* Pulitzer, *supra* note 27, at 216 (demonstrating that judges exhibit an obvious "discomfort with adjudicating cases involving immigration issues," especially where the child is already in removal proceedings); *see also* NEW YORK COUNTY LAWYERS' ASSOCIATION, *supra* note 28 ("Impressively, over the past several years, the New York Family Court has issued hundreds of [orders] for immigrant youth to help them apply for SIJS . . . recogniz[ing] how integral lawful immigration status is to a youth's greater permanency and stability in our community.").

182. *See* FEERICK CTR. FOR SOC. JUSTICE, N.Y. UNACCOMPANIED IMMIGRANT CHILDREN PROJECT FAMILY COURT WORKING GRP., FINDINGS FROM A SURVEY OF LAWYERS REPRESENTING IMMIGRANT YOUTH ELIGIBLE FOR SPECIAL IMMIGRANT JUVENILE STATUS IN NYS FAMILY COURT 7 (2014), http://law.fordham.edu/assets/Newsroom/NYUICP_Family_Court_Working_Group_Report_March_2014_FINAL.pdf.

183. *Id.* at 5 ("The Working Group undertook an information-gathering process that combined open-ended, introductory conversations with specialized legal service providers, telephone surveys involving a semi-structured questionnaire with practitioners who have represented youth in SIJS cases, and two group discussions with practitioners and other experts to review preliminary findings and analyses from the surveys.").

which a family court judge suggested that SIJS provided a 'back door' [sic] avenue to receive immigration status."[184] Another experienced attorney acknowledged that judges often believe "SIJS petitions are 'loopholes.'"[185] After analyzing all of the survey responses, the Fordham study suggested that family court judges do not properly understand Congress's intent behind SIJS or the statute's requirements, and therefore, they doubt *any* immigrant child's good faith if she applies for SIJS.[186] Consequently, even in the SIJS-amenable state of New York, judges frequently let their negative impression of SIJS affect the outcome of applications.[187]

During USCIS's review of juvenile courts' findings, the line between the state and federal government roles becomes exceedingly foggier. While the SIJS statute reserves the ultimate power to grant or deny an application for federal authorities, immigration officials are discouraged from second-guessing a state court's findings on "best interests."[188] Effectively, the state becomes the ultimate decision maker; where the state court determines that the child has not stated a *prima facie* case, the child is never given the chance to amend her application.[189] Judge Salter, author to the dissent of the December 2015 Florida case discussed above, elucidated how this "inter-district conflict" and "federal-state tension" can be damaging for SIJS applicants, stressing "the need for statewide uniformity" so that "immigrant children may obtain what other children in Florida routinely obtain in dependency cases—an investigation and individualized adjudication of their exigent circumstances."[190]

---

184. *Id.* at 15.

185. *Id.* at 15 n.100.

186. *Id.* at 15.

187. *See, e.g.*, *supra* text accompanying note 181; FEERICK CTR. FOR SOC. JUSTICE, *supra* note 182, at 15.

188. Adelson, *supra* note 149, at 68 ("[The immigration official] generally should not second-guess the [state] court's rulings or question whether the court's order was properly issued.") (quoting Memorandum from William R. Yates on Field Guidance on Special Immigrant Juvenile Status Petitions (May 27, 2004)); *see* Nina Bernstein, *Children Alone and Scared, Fighting Deportation*, N.Y. TIMES (March 28, 2004), http://www.nytimes.com/2004/03/28/nyregion/children-alone-and-scared-fighting-deportation.html?pagewanted=all (quoting an attorney's experience with immigration services under DHS, where she was "told by a supervisor [that] she wouldn't want anybody to take the risk of approving one of these [SIJ applications] and risk getting fired").

189. *Cf. In re* B.R.C.M., 182 So. 3d at 766 (Salter, J., dissenting) (arguing that petitioner should be permitted to amend their petition to allow evaluation of individual claims).

190. *See id.* at 755–56, 766; *see also* Adelson, *supra* note 149, at 80 ("When administrative [immigration] officers insert their own opinions, displacing those of juvenile court judges who are experienced in fact-finding on abuse, abandonment, and neglect regarding juveniles, the potential for accurate SIJ determinations is undermined.").

III. POTENTIAL SOLUTIONS FOR SIJS

Congress enacted SIJS over fifteen years ago, yet family courts still show a general "misunderstanding of the express purpose of SIJS to provide protection and permanency to youth who have suffered abuse, neglect, abandonment, or similar mistreatment by a parent."[191] Because of this misunderstanding, "abused, abandoned, and neglected immigrant children are treated differently than their U.S.-citizen counterparts" in several jurisdictions, as the focus of some judges "shifts away from a child's best interests and towards immigration gatekeeping."[192] While a number of appellate courts may rectify their predecessors' mistakes, sustainable applications will continue to slip through the cracks at the trial-court level, never to be appealed. But how do we change the determinative factor of these applications from the applicant's geographic boundaries to what it should be: the factual eligibility of each alleged child victim?

This Note proposes that, first and foremost, Congress create a nationwide standard for "best interests" determinations only to be used with SIJS applications.[193] In this manner, state court judges could be prevented from applying erroneous law, yet child welfare decisions would be left in the hands of those most suited to make them. Second, USCIS should create a template SIJS order requiring state court judges to briefly explain the reasoning behind their negative factual findings. This would allow federal officials familiar with immigration law to review state courts' decisions more precisely and overrule them if necessary.

A. Adopting a Standard Test for "Best Interests of the Child"

As discussed above, a major problem within the SIJS process is the inconsistent interpretation of the "best interests" requirement.[194] Unfortunately, the federal statute itself provides little guidance.[195] If the SIJS statute required all states to adopt the same "best interests" language, state court judges could be held accountable under a concrete

191. FEERICK CTR. FOR SOC. JUSTICE, *supra* note 182, at 15.

192. Pulitzer, *supra* note 27, at 223.

193. This proposal is limited to SIJS hearings rather than all U.S. family court hearings; this Note does not endeavor to propose the reconstruction of every juvenile court decision made nationwide.

194. *See supra* Part II.A.

195. 8 U.S.C. § 1101(a)(27)(J)(ii) (2012) (defining a "Special Immigrant Juvenile" as someone "for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence").

definition, which, ideally, would mitigate further disparities.[196] There are many existing sources from which this definition could be derived, namely statutes currently in force in the United States (particularly family law statutes that consider violence in the home and parental neglect) as well as provisions from the Convention on the Rights of the Child.[197]

Although there has been a push in recent years to create such a standard, many legal scholars and practitioners simply recognize the issue without proposing any explicit solutions.[198] Others attempt to create a "best interests of the child" definition for immigration or family law as a whole, rather than limiting it to SIJS cases;[199] this widespread solution is a noble endeavor, albeit an impractical one, as the political backlash would be insurmountable.[200] For these reasons, this Note proposes a standard that is to be exercised only if certain conditions—i.e., a UAC is applying for SIJS—are met.

1. Family law statutes in the United States

Many states have legislation listing factors to consider in family law matters, particularly regarding issues of custody and visitation.[201] While many of these factors would have little bearing on an SIJS case, such as those pertaining to the parents' constitutional rights, some of them are perfectly tailored to meet the needs of the abused, neglected, and abandoned children that the visa is meant to protect.

One such factor can be found in Delaware law.[202] The statute dictates that a child's "father and mother are . . . charged with the child's support, care, nurture, welfare and education."[203] Therefore, in making a "best interests" determination, Delaware juvenile court judges must consider "[p]ast and present compliance by both parents with

196. *See* Pulitzer, *supra* note 27, at 226 ("By mandating uniformity, the risk of unfair or biased adjudication of the best interests of the child might be mitigated, especially for those judges who might be susceptible to personal biases that impact adjudication.").

197. *See, e.g.*, DEL. CODE ANN. tit. 13, §§ 701(a), 722 (2016); N.D. CENT. CODE § 14-09-06.2(1)(f) (2016); VA. CODE ANN. § 20-124.3 (2016); *supra* Part I.A.

198. *See, e.g.*, Anderson, *supra* note 27, at 691.

199. *See, e.g.*, Becky Wolozin, *Doing What's Best: Determining Best Interests for Children Impacted by Immigration Proceedings*, 64 DRAKE L. REV. 141 (2016).

200. *See* Shannon Aimée Daugherty, Note, *Special Immigrant Juvenile Status: The Need to Expand Relief*, 80 BROOK. L. REV. 1087, 1112–15 (2015) (anticipating strong resistance to an expansion of the definition of "dependency").

201. *See generally* CHILD WELFARE INFORMATION GATEWAY, *supra* note 152.

202. *See* DEL. CODE ANN. tit. 13, §§ 701(a), 722 (2016).

203. *Id.* § 701(a).

their rights and responsibilities to their child."[204] This statute echoes SIJS by considering all three types of child victims: abused, neglected, and abandoned. In an abuse case where the parents did not agree upon appropriate methods of discipline, the Family Court of Delaware found the mother had not complied with her responsibility to the child because she resorted to brutal beatings, rather than putting the child in a "time-out" as the father did.[205] In two other cases, the court found removal from the home in the child's best interests where a father "disobeyed the doctor's order regarding treatment . . . which resulted in burns to [the child's] skin,"[206] and where the mother "received no help or support from Father"; clearly, these rulings reflect notions of neglect and abandonment.[207]

Informative "neglect" and "abandonment" language exists in North Dakota and Virginia law, as well. In North Dakota, a custody statute provides for the "moral fitness of the parent, as that fitness impacts the child."[208] The moral fitness analysis often considers the parent's past crimes or drug use, presuming that such behavior negatively impacts the moral growth and mental health of the child.[209] In Virginia, courts must consider the "relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child."[210]

The statutes listed in this Part are just a few examples of how the SIJS statute can be supplemented to provide explicit factors for state court judges to consider when making their determinations of "best interests of the child." This guiding law would come from pre-existing U.S. legislation and family law policy, mitigating state judges'

204. *Id.* § 722(a)(6); *see, e.g.*, C.K. v. T.K.M., No. CK90-3404, 2004 WL 1146696, at *1, *4–5 (Del. Fam. Ct. Mar. 9, 2004) (giving primary custody to the father after analyzing past and present contributions made to the children by either parent in the form of child support payments, structured and disciplined living style, and provision of support, care, welfare, and education to the children).

205. E.A. v. D.F., No. CN01-06256, 2002 Del. Fam. Ct. LEXIS 11, at *15 (Del. Fam. Ct. Jan. 3, 2002).

206. B.A. v. L.H., No. CN05-05842, 2007 Del. Fam. Ct. LEXIS 157, at *13–14 (Del. Fam. Ct. July 10, 2007).

207. G.G. v. D.M., No. CK05-02278, 2007 Del. Fam. Ct. LEXIS 98, at *11–12 (Del. Fam. Ct. Feb. 27, 2007).

208. N.D. CENT. CODE § 14-09-06.2(1)(f) (2016).

209. *E.g.*, Morris v. Moller, 815 N.W.2d 266, 270–71 (N.D. 2012) (holding that the mother would have been morally unfit had the evidence of her drug use during pregnancy been substantiated); Klein v. Larson, 724 N.W.2d 565, 571–72 (N.D. 2006) (finding the father morally unfit because he "has a lengthy criminal record and continued to flaunt the law and associate with drug dealers after [the child] was born and while he was living with her").

210. VA. CODE ANN. § 20-124.3 (2016).

varying interpretations when applying the federal immigration legislation in its current form.

2. Convention on the Rights of the Child

Another potential source for a new "best interests" standard is the Convention on the Rights of the Child ("CRC"). Because many of the principles which inspired Congress also inspired the United Nations, the intent behind the SIJS statute already echoes that of the CRC.[211] The CRC grants immigrant youth "the right to be shielded from harmful acts or practices—for example, to be protected from . . . physical or mental abuse,"[212] while SIJS specifically provides for abused, neglected, and abandoned undocumented children.[213] The CRC holds that "the prerogative . . . to exclude non-citizens from crossing its borders cannot take precedence over what is in the best interest of an individual child,"[214] while the SIJS statute protects a child "for whom . . . it would not be in [her] best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence."[215] Because of these obvious similarities, the CRC is a logical tool for repairing SIJS.

B. Adopting a Standard SIJS Order

As it stands, USCIS offers little guidance on how to structure an SIJS order, except that "[t]o petition for SIJ[S] you must have a state

211. *See* H.R. Rep. No. 105-405 (1997), 105 H. Rpt. 405 (LEXIS) ("The language [of the SIJS provision] has been modified in order to limit the beneficiaries of this provision to . . . abandoned, neglected, or abused children."); *cf.* Gonzalez, *supra* note 51, at 433 ("[Former] President Barack Obama has described the failure to ratify the CRC as 'embarrassing' and has promised to review the U.S. decision.").

212. Thomas Hammarberg, *The UN Convention on the Rights of the Child—and How to Make it Work*, 12 HUM. RTS. Q. 97, 100 (1990); *see also* Convention on the Rights of the Child, *supra* note 50, at art. 19.1 ("States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.").

213. 8 U.S.C. § 1101(a)(27)(J)(i) (2012).

214. Erin B. Corcoran, *Deconstructing and Reconstructing Rights for Immigrant Children*, 18 HARV. LATINO L. REV. 53, 73 (2015); *see also* Convention on the Rights of the Child, *supra* note 50, at art. 20.1 ("A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.").

215. 8 U.S.C. § 1101(a)(27)(J)(ii).

court order that contains certain findings [that] USCIS uses to determine your status."[216] Due to this vagueness, orders currently take many shapes, including form-like checklists or brief opinions.[217] If a state-level judge makes his "best interests" findings and decides *not* to sign an SIJS candidate's order, federal interviewers may automatically deny the application without reviewing the state judge's reasoning, especially if it is not in writing.[218] So how do we allow the different levels of government to retain power over their respective areas of expertise (state courts with "best interests of the child" determinations, and federal agents with immigration determinations) while eliminating the risk of overlooking worthy SIJS candidates?

To prevent this type of omission, USCIS should issue a standard SIJS order for state judges to complete.[219] These orders would include a checklist in which the state court judge would mark off each eligibility requirement: (1) the child is under twenty-one years old and unmarried;[220] (2) the child has been declared dependent or placed in the custody of an individual; (3) reunification with one or both of the child's parents is not viable due to abuse, neglect, or abandonment;[221] and (4) it is not in the child's best interest to be returned to her home country.[222] Should a judge choose *not* to check off a requirement, the form would also require an opinion explaining the judge's reasoning in light of the unique circumstances of the child's claim. Then, when USCIS receives the form, the federal interviewer would review the state judge's opinion and decide whether to affirm it. To protect worthy SIJS applicants from federal immigration prerogatives, however, the discretion to overturn a state judge's opinion would only occur where the judge made negative findings.

With a standard SIJS order, state courts would still exercise authority over child welfare matters, for which they are theoretically suited, but the federal government, which has much more experience adjudicating matters of immigration, would have the discretion to overturn negative "best interests of the child" determinations. More simply, the order would act as a fail-safe in the event a state judge

---

216. *Eligibility Status for SIJ*, *supra* note 2.

217. *See* SPECIAL IMMIGRANT JUVENILE STATUS ORDER, *supra* note 131.

218. This does not consider the case of an appeal, which is sometimes impossible due to the child "aging out" of possible relief. *See* Gonzalez, *supra* note 51, at 414–16.

219. This Note proposes that the order can be available for download on the same website that hosts the other requisite SIJS forms. *See, e.g.*, *Eligibility Status for SIJ*, *supra* note 2.

220. *See* 8 U.S.C. § 1101(b)(1) (2012).

221. *See id.* § 1101(a)(27)(J)(i).

222. *See id.* § 1101(a)(27)(J)(ii).

makes an ill-informed or incorrect decision resulting in the denial of a viable SIJS petition.

CONCLUSION

The purpose of this Note is not to demonize state court judges for egregious miscarriages of justice, nor is it meant to imply that *every* SIJS petition should succeed. (Of course, many judges correctly apply the statute, and fraudulent applications—claiming abuse, neglect, or abandonment where none has occurred—are inevitable.) Instead, this Note proposes to correct a system that denies relief to deserving victims, like "Valeria" from the Introduction, yet grants legal status to children who have not suffered to nearly the same degree, like "Isabella." [223] Immigrant youth fleeing from legitimate persecution at the hands of their parents deserve at least a passing chance at refuge in the U.S.; that is why Congress created SIJS in the first place. But since procedural and substantive misinterpretations of the law regularly deny worthy applicants a fair chance at relief, we must take steps to correct those misinterpretations. First, we should set a nationwide "best interests" standard for juvenile court judges to follow when they review SIJS matters. Then, we should implement a standard SIJS order that requires state court judges to explain their reasons for denying an application. In this way, Congress can uphold its initial decision to impart these unique child welfare findings on the State, while USCIS can exercise its immigration expertise by overturning the state court's denial of a SIJS claim where the applicant is ultimately worthy of humanitarian aid.

223. *See supra* text accompanying notes 8–25.