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Few Paths after a Long Journey: The Need for a Juvenile Immigration System

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Abstract: Thousands of unaccompanied children arrive at the U.S. border each year. In many cases, these children are fleeing harsh conditions in their home country in search for safety and family. The U.S. immigration system lacks an adequate response for these children, providing only two exceedingly difficult paths: asylum and the Special Immigrant Juvenile Status designation. While providing access to a path to citizenship over time, the system is arcane and adversarial. Moreover, through it all, these children lack a right to an advocate who can protect their interest or at a minimum advise the immigration court of how to serve the child's best interests. This article explores issues surrounding unaccompanied children in the U.S. immigration system and suggests the need for an independent juvenile immigration justice system similar to the Federal Juvenile Criminal Justice System.

Keywords: immigration; unaccompanied children; immigration court

1. Introduction

With the large number of unaccompanied alien children[1] who arrive at the United States border each year, it would be expected that the U.S. would have a coherent, humane system for protecting these vulnerable refugees and asylum seekers. The scale and longevity of the issue is apparent. In March 2021, for example, 18,663 unaccompanied children were apprehended by border patrol attempting to enter the United States (Spagat and Jaffe 2021). This represented a 60% increase from March 2020.[2] Yet, upon arrival, these children encounter a confusing and complex system of laws and agencies that require expertise to navigate. This is the case even though unaccompanied children comprise more than one-third of all migrants and asylum seekers.[3] The legal and administrative systems are seen as a failure by many (Bier 2018; Bahar 2020),[4] particularly so for the children who wind through them, most of whom are fleeing brutal conditions in their home countries. Providing expanded access to counsel for unaccompanied children would partially address such criticisms.

The majority of unaccompanied children who arrive at the United States border are fleeing the three countries that make up the "Northern Triangle," El Salvador, Honduras, and Guatemala. These three countries account for nearly 80% of the children who arrive at

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[1] An "unaccompanied alien child" is a child who "(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody." 6 U.S.C. § 279(g)(2).

[2] *Facts and Figures: Deportations of Unaccompanied Migrant Children by the USA and Mexico*, AMNESTY INT'L. (11 June 2021), https://www.amnesty.org/en/latest/news/2021/06/facts-figures-deportations-children-usa-mexico/ (accessed on 2 June 2022).

[3] *Id.*

[4] Immigration policy is among the few policies that are widely criticized regardless of the political point of view. Both the Cato Institute, seen as a conservative thinktank, and the Brookings Institute, equally liberal in view, have described the system as "broken" and suggested wide overhauls across all aspects. See Bier (2018); Bahar (2020).

the U.S. southern border (Human Rts. Watch 2019; Ghitis 2018).[5] The majority of children fleeing the North Triangle have experienced trauma of some sort. These children are among the most vulnerable immigrants to the United States. They arrive with few if any possessions after journeys that take weeks or months across incredibly difficult country.[6] They are alone, separated from family, and face language and cultural barriers that are disorienting at best and horrifying for many to experience. Consistency with United States treaty obligations and concern for procedural fairness would suggest that these children encounter an immigration system that protects their best interests as it responds to their refugee status. This is not the case.

Children who arrive at a U.S. border alone are known as "Unaccompanied Alien Children" ("UACs")[7]. Once they arrive, UACs most often have only two paths to staying safely in the United States: asylum and Special Immigrant Juvenile Status ("SIJS"). Neither of these paths provide UACs with procedural fairness adequate to protect their interests or offer much of a real chance to stay in the relative safety of the United States. Moreover, neither path is implemented in a way that respects the United States' commitment to fundamental notions of fairness for individuals facing loss of personal liberty.

While applying for and beginning an asylum application may provide short-term relief from the threat of immediate removal, for most UACs, the possibility of being awarded asylum is slight.[8] SIJS provides UACs with a higher probability of success and is generally a favored approach for advocates. Nonetheless, the SIJS path is widely inconsistent across states, leading to starkly different outcomes based on which state the child has been relocated to. Such differences result in inconsistent outcomes for similarly situated UACs. Finally, U.S. treatment of UACs is starkly inadequate when compared with international treatment of UACs and the U.S.'s international obligations.[9] The U.S.'s current response to UACs is inadequate and suggests the need for new approaches to serve UACs once they arrive and to protect these most vulnerable immigrants. This article makes the argument for such a system.

Part one provides an overview of the current state of migration of unaccompanied children to the U.S. Once at the border, most UACs seek long term stability in the United States through either asylum or SIJS. Each of these paths is discussed, and a short discussion of UAC migration as managed by other states is also provided. Part two examines the adequacy of the two paths and how neither the asylum process nor SIJS provides a clear path to safety for these children. The argument for a separate juvenile immigration system follows in Part three and draws upon the federal juvenile justice system to suggest a framework for what such a system would look like.

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[5] The so-called "Northern Triangle." The widespread violence and lack of a functional police system in these states is well documented. Honduras has two cities, Tegucigalpa and San Pedro Sula, which have ranked as the cities with the highest and second highest murder rates of all cities in the world. The murder rate in San Pedro Sula, Honduras, the country's second largest city, is the highest of any city in the world. See Human Rts. Watch (2019). El Salvador experiences significant gang-related crime and political instability and has been described as a "failed state." Ghitis (2018).

[6] The journey has been movingly described in *Enrique's Journey*, which tells the story of a Honduran boy looking for his mother in the United States. The mother left her home in Honduras to find work in the U.S. in order to provide food and shelter for her starving family. See generally SONIA NAZARIO, *Enrique's Journey* (2006).

[7] " . . . (2) the term "unaccompanied alien child" means a child who—(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody." 6 U.S.C. § 279(g)(2).

[8] See infra at I.a.

[9] Inconsistencies among the United States' international obligations to UACs are beyond the scope of this paper, which focuses on the internal processes available to UACs once they arrive under the U.S. immigration system. It may indeed be the case that the United States practices are inconsistent with international obligations; see e.g., "The U.S. Approach to Asylum: Examining the Disconnection Between Domestic Law Policy and International Law", 36 (4) Jrn'l of Immigration, Asylum, and Nationality Law 300–328, which this paper only pays passing attention to for context.

2. When an Unaccompanied Child Arrives at the U.S. Border

When a UAC arrives at the U.S. border, he or she is greeted by a complex network of administrative agencies and legal distinctions that is difficult for even lawyers to decipher. To start, at least eight separate administrative agencies have some responsibility regarding what will happen to the child. They include the Department of Homeland Security ("DHS"), Customs and Border Patrol ("CBP"), the Department of Health and Human Services ("HHS"), Immigration and Customs Enforcement ("ICE"), the Office of Refugee Resettlement ("ORR"), United States Citizenship and Immigration Services ("USCIS") and the Department of Justice's Executive Office of Immigration Review ("EOIR") (U.S. Dep't. Homeland Sec n.d.). The Department of Homeland Security serves as the administrative office to oversee CBP, ICE, and USCIS.[10]

The DHS, mostly through CBP and ICE, and the HHS share responsibility for UACs. As a result of litigation brought against these agencies for their failure to treat children humanely, both the DHS and the HHS are required to follow the requirements of the *Flores Settlement* (1997), which outlines standards for the care of unaccompanied children once they are taken into custody.[11] These standards apply to both unaccompanied children and those who are accompanied and end up in custody. Under the *Flores Settlement*, children in custody must be provided with access to food, water, medical services, bathroom facilities, and housing in a ventilated, temperature-controlled facility.[12]

Between 2015 and 2018, an average of roughly 45,000 UACs arrived at a U.S. border each year and began their journey through an arcane network of agencies (Zak 2020). The majority of these children—-more than 68%—-arrive at the U.S.–Mexico border, where they either present themselves at a port of entry or come in contact with CBP along the border soon after entering the United States (U.S. Customs & Border Prot 2018a). What happens next to these children depends on where they are from.

UACs arriving from a "contiguous country" (Smith 2021)[13], including those who transit through Mexico from the Northern Triangle or elsewhere, are screened by CBP for assertions of credible fear of persecution or trafficking and are questioned about their willingness to return to their country of origin.[14] A child arriving from Mexico or Canada would be subject to expedited removal, but a child arriving from a non-contiguous country would be processed with formal removal proceedings. Credible fear screenings and an inquiry into whether the child would like to return to their country of origin must take place within 48 h of the child's first contact with CBP for children arriving from a contiguous country.[15] Once completed, CBP provides those UACs who do not agree to return to their country of origin with a Notice to Appear, and the UAC is placed into immigration removal proceedings.[16] During this initial screening process, the UAC is held in a short-

[10] *Id.*

[11] See *Reno v. Flores*, 507 U.S. 292, 315 (1993) (holding that unaccompanied children retained on suspicion of being deportable may be released only to a parent, legal guardian, or other related adult). The following settlement in the case is known as the Flores Settlement and governs the treatment of unaccompanied children detained by the DHS and related agencies.

[12] Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997).

[13] The INA provides a separate removal process for certain arriving aliens that substantially differ from formal removal proceedings. Known as expedited removal, an arriving alien may be removed from the United States without formal proceedings if the alien does not have lawful entry documents or has attempted to enter the U.S. by committing fraud. INA § 235(b)(1). In 2019, the DHS exercised its authority to implement expedited removal to include all aliens physically present in the United States for less than two years, when those aliens lacked entry documents or procured entry by committing fraud or misrepresentation. See Smith (2021).

[14] Pursuant to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), arriving aliens subject to expedited removal must be given a "credible fear" screening by Custom and Board Protection. During this screening, the officer determines if the alien has credible fear of persecution or harm if returned to their country of nationality. INA § 235(b)(1)(B).

[15] See INA § 235(b)(1)(B)(iii)(III).

[16] The Notice to Appear (NTA) is a document that instructs an individual to appear before an immigration judge and serves as the first step in starting removal proceedings. The NTA is also known as Form I-862 and is the official charging document filed by the DHS.

term detention facility (Office of Inspector General 2021).[17] Conditions in these short-term detention centers have been widely described in the media, including stories of placing children in "cages," (see BBC 2021) overcrowding (see Montoya-Galves 2021), and housing children in rooms with extremely low air-conditioned temperatures (see Miroff 2018). On average, a child spends 48 to 72 h in one of these facilities before being moved to another facility where they may stay for several months.[18]

Once the screening is completed and the child has received a Notice to Appear, the child is transferred to the ORR.[19] Transfer to the ORR must take place within 72 h of first contact with CBP.[20] Once the ORR receives custody of the UAC, the ORR takes on the work of finding an appropriate placement for the child. The child is placed, in order of preference, with a parent or parents, other relatives, a sponsor, a shelter, or a foster home.[21]

In contrast to other immigrants who are placed into proceedings, USCIS has jurisdiction to review affirmative asylum claims asserted by UACs.[22] If the claims are successful, the immigration proceedings are subject to closure. If the asylum claim is not successful, removal proceedings continue in EOIR.[23] If an order of removal is entered by the immigration court, then ICE is responsible for removing the UAC to his or her country of origin.[24]

All of these processes are abrupt, with short-term stays followed by quick relocations. A child may expect to be relocated three or more times after contact with a CBP agent. Despite this complexity and lack of control over when and where a UAC will be held, the present situation provides more security than what existed before the passage of the Trafficking Victims Protection Reauthorization Act[25] ("TVPRA") in 2008.

The TVPRA has provided greater protection to UACs than what was available before 2008. Prior to the TVPRA, UACs who arrived at a U.S. border from Mexico were simply turned away and returned to Mexico.[26] Pursuant to the TVPRA, all UACs who arrive at the U.S. border must be screened by the DHS to determine if they are victims or potential victims of trafficking or if the child has a well-founded fear of persecution in their country of origin.[27] If CBP reasonably suspects that the UAC is a victim of trafficking or if CBP has information indicating the child has a well-founded fear of persecution in their home country, CBP may not repatriate the child to their home country.[28] Instead, the child must be placed in the care of the ORR and is then to be provided with the same care a child from a non-contiguous country would receive (Kandel 2021).[29]

To determine whether immediate repatriation is appropriate under the TVPRA, the CBP officer conducting the initial screening must determine to following:

1. Whether the UAC has not "been a victim of a severe form of trafficking, and there is no credible evidence" that the child will be in danger of being trafficked if returned to Mexico;
2. Whether the UAC is not afraid to return to Mexico due to a "credible fear of persecution;"

[17] There are more than 200 short-term detention facilities that are used to detain unaccompanied children until an appropriate placement is found. Under the Flores Settlement, detained children are to be released from detention as expeditiously as possible and placed in an order of preferences beginning with a family member, an acceptable guardian, or foster home. See Office of Inspector General (2021).

[18] *Id.*

[19] The ORR is designated to take physical custody of unaccompanied children, although ICE is responsible transferring detained children from CBP to the ORR. See 8 U.S.C. § 1232(B)(1)(a), (b), (c)(3).

[20] See 8 U.S.C. § 1232 (b)(2).

[21] See 8 U.S.C. § 1232 ©(2).

[22] See 8 U.S.C. § 1158. This statute recognizes the original jurisdiction of USCIS.

[23] See 8 U.S.C. § 1229.

[24] See 8 U.S.C. § 1231.

[25] See 22 U.S.C. § 7102 et seq.

[26] See Zak, *supra* note 14.

[27] See 8 U.S.C. § 1232.

[28] *Id.*

[29] See 45 CFR § 410.100; Kandel (2021).

3. Whether or not the UAC can independently decide to "withdraw [his or her] application for admission" to the United States.[30]

The UAC may only be returned to Mexico if he or she answers each of these three questions affirmatively. If the child does not, then the CBP must refer the child to the ORR.[31]

Regardless of whether a child is released to a sponsor, parent, family member, foster home, or shelter, their immigration case proceeds following transfer by the ORR. Two options are available for UACs as their immigration case proceeds. They may seek a defensive asylum claim,[32] heard first by USCIS, or they may pursue Special Immigrant Juvenile Status, which requires a state court proceeding followed by filing with USCIS and the immigration court.[33] Both options involve complicated factual, administrative, and legal requirements, and in either, the child faces formidable challenges to establishing a right to stay in the United States.[34]

2.1. Unaccompanied Children and the Asylum Process

Asylum is pursued by many of the UACs who arrive in the United States, particularly those from the Northern Triangle. Seeking asylum is a long and difficult process under the best of circumstances,[35] and for children without an advocate, the process offers slight chance of success (Wu 2018).[36] The reason for this may be due both to the complexity of the system, particularly the exacting circumstances under which asylum may be granted,

[30] Accurately assessing whether a child can independently withdraw their application for admission to the U.S. requires specialized training. UACs encounter CBP agents after weeks or months of traumatic travel. Interviews often face language barriers and are shaped by the UAC's trauma experience. Yet, CBP agents are not trained in trauma-informed interview techniques.

[31] CBP's role in the process of screening UACs for repatriation is replete with conflict, as has been noted. With a core mission to serve as "guardians of our Nation's borders," CBP's focus is first to return arriving aliens away from the United States. In the case of UACs, this leads to expedited removal for nearly all arriving Mexican UACs, according to Appleseed. The TVPRA's provisions that allow a UAC from a contiguous country to remain in the United States, yet subject to normal removal procedures, are seemingly ignored. In addition, Appleseed found that CBP officers regularly misstated the rights of UACs under the TVPRA and intimidated children to return to Mexico. See BETSY CAVENDISH AND MARU CRAZAR, CHILDREN AT THE BORDER: THE SCREENING, PROTECTION AND REPATRIATION OF UNACCOMPANIED MEXICAN MINORS (2011).

[32] A person who is in removal proceedings may apply for asylum defensively by filing an application with the immigration judge, at Executive Office for Immigration Review (EOIR) in the U.S. Department of Justice. This is referred to as "Defensive asylum."

[33] See section I.b. infra.

[34] Asylum application approval rates by the immigration court vary from as low as 10% to as high as 80% (Judge-by-Judge Asylum Decisions in Immigration Courts FY 2013–2019, TRAC IMMIG., https://trac.syr.edu/immigration/reports/judge2018/denialrates.html (last visited 20 March 2022)). Affirmative asylum claims have a 10% approval rating. If filed as either a defensive or affirmative claim for asylum, the likelihood of success on the asylum claim is very limited.

[35] The difficulties and challenges of this process are only made worse by the fact that asylees, including children, seeking asylum in the United States have no right to an attorney as they move through the process. UACs, the most vulnerable group of asylum seekers, have no right to have an attorney appointed to represent them, no matter their age or the circumstances of their claim. See infra, Section II. The Inadequacy of Available Relief for Unaccompanied Children.

[36] In 2016, the approval rate for asylum petitions overall in the United States was approximately 28%. Zak, *supra* note 14. For UACs, one example showed a Houston (Texas) asylum division granting asylum to only 10.9% of UACs in 2018. Wu (2018). The low success rate of asylum claims in the United States can be influenced by several factors, including the strict legal standards for granting asylum. To receive a grant of asylum, petitioners must demonstrate a well-founded fear of persecution based on specific grounds. Meeting these standards requires strong and compelling evidence, which can be challenging for many asylum seekers to obtain. In addition, the U.S. immigration system faces significant backlogs, resulting in delays in processing asylum claims. This backlog can be attributed to a combination of factors, including limited resources, understaffing, and a high volume of asylum applications. The prolonged wait times can impact the efficiency and effectiveness of the asylum process. Finally, asylum officers and immigration judges assess the credibility of an asylum claimant's testimony and evidence. If there are inconsistencies or doubts regarding the credibility of the applicant, it can negatively impact the chances of a successful asylum claim, thus implicating the discretionary decision-making role of immigration officers and judges. Such judges have the authority to exercise judgment based on their evaluation of the facts and circumstances of each case, resulting in varying outcomes, and decisions may be influenced by individual perspectives, biases, or interpretation of the law. See generally *Refugee Roulette: Disparities in Asylum Adjudication*, Ramji-Nogales et al. (2007); see also *Immigration Judges and U.S. Asylum Policy*, Miller et al. (2014).

and the lack of a clear rubric to assess a child's asylum claim (Goldberg and Sanders 2010; UNHCR 1951; Sharma-Crawford 2018).[37]

U.S. law provides protection for refugees and asylum seekers that provides, on application for those who qualify, a path to permanent residence and then to U.S. citizenship.[38] To obtain either refugee or asylum status,[39] a person who has fled their home country must demonstrate to U.S. officials that they have a well-founded fear of persecution on the basis of race, religion, nationality, political opinion, or membership in a particular social group (U.S. Citizenship and Immigr. Servs n.d.). The basis for establishing asylum in the United States tracks (Farenblum 2011)[40] that found in the two universal documents defining the status of refugees under international law—-the United Nations 1951 Convention Relating to the Status of Refugees ("Convention") and the 1967 Protocol Relating to the Status of Refugees ("Protocol"). The Convention defines a refugee as a person who:

> As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not have a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it (UN General Assembly 1951).

The Protocol makes a temporal revision to this definition, dropping the January 1, 1951, date and omitting the words "as a result of such events." The Refugee Act of 1980 further indicates that the United States has adopted the Convention's definition. The Refugee Act of 1980 essentially copies the Protocols' language for its uses and applies this language to asylum seekers in the United States.[41] The Refugee Act of 1980 was incorporated into the Immigration and Nationality Act ("INA") of 1985 at Section 101(a)(42)(A), which provides the current definition of refugee status and asylum, as reported below.

The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided and who is unable or unwilling to return to and is unable or unwilling to avail himself or herself of the protection of that country because of

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[37] Children present an interesting situation in asylum because they largely derive the circumstances of the refugee status from their parents and families. For example, most children have yet to engage in the kinds of activities that result in being politically persecuted. Goldberg and Sanders (2010); see also UNHCR (1951); see also Sharma-Crawford (2018).

[38] The United States is a signatory to the United Nations 1951 Convention and the 1967 Protocol defining a refugee and created a legal obligation to provide protection to those who qualify as refugees. *The 1951 Refugee Convention*, *supra* note 41.

[39] The difference between refugee and asylum seeker is where and how the determination that an individual faces a well-founded fear is made. In each case, the individual has endured persecution in their home country, and a refugee and an asylee are both individuals who have left their home countries due to fear of persecution or harm, but they differ in terms of their legal status and the process by which they seek protection in another country. A refugee is a person who has fled their home country due to a well-founded fear of persecution based on factors such as their race, religion, nationality, political opinion, or membership in a particular social group. They are typically outside their home country and unable or unwilling to return due to the fear of persecution. Refugees are protected under international law, specifically the 1951 United Nations Convention Relating to the Status of Refugees. An asylee, on the other hand, is a person who meets the definition of a refugee but has already reached the territory of the country where they seek protection. They apply for asylum within that country and undergo a legal process to prove their eligibility for protection. If their application is approved, they are granted asylum and become recognized as asylees. Refugees typically apply for protection from outside their home country through designated processes established by international organizations or countries. They may register with the United Nations High Commissioner for Refugees (UNHCR) or go through the resettlement process facilitated by countries that have agreed to accept refugees. Asylees, already present in the country where they seek protection, apply for asylum by submitting an application to the respective government authorities. They must demonstrate a well-founded fear of persecution and meet the specific legal criteria established by the country's laws for granting asylum. See 8 U.S.C. § 1101.

[40] While the U.S. requirements for establishing right to asylum track international definitions, U.S. asylum law has in many respects diverged from international standards. See, e.g., Farenblum (2011).

[41] *Martinez-Perez v. Sessions*, 897 F.3d 33, 39 (1st Cir. 2018).

persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

To establish that one qualifies for asylum or refugee status, a person must prove that he or she satisfies the definition of refugee under 8 U.S.C. § 1101. This means that the person must show that they are either the victim of past persecution or have a well-founded fear of future persecution, in either case based on one of five protected grounds: race, ethnicity, nationality, membership in a particular social group, or political opinion. For many UACs arriving at the U.S. border, persecution is based on membership in a particular social group,[42] which can be exceedingly difficult to establish.

A person seeking asylum in the United States has the burden of proof as to the elements of 8 U.S.C. § 1101(a)(42).[43] "Persecution" is determined by an objective standard and amounts to "objectively" serious harm.[44] Evidence of past occurrences where serious harm has occurred provide prima facie evidence of a "well-founded fear" of future persecution.[45] If there have been no past occurrences, it falls on the applicant to demonstrate, based on a totality of the circumstances, that a reasonable person in the applicant's position would fear future persecution. Evidence of past threats, attempted assaults or harm to the applicant or family members, and harassment that rises to a level of serious threat can provide adequate evidence.[46]

Determining that an applicant's fear is "well-founded" accordingly contains two elements: the subjective fear on the applicant's part and the objective facts and circumstances that justify that fear.[47] To this, another element is added, state involvement. To succeed in an asylum application, a person must establish that his or her country of origin has played a role, either directly or indirectly, in the applicant's persecution.[48] Obvious examples of direct involvement include actions that are taken by agents of the home country. Examples of indirect involvement include acquiesce in the actions of private actors, or an unwillingness or inability to protect the applicant.

Presenting evidence of well-founded fear of persecution in itself is difficult for many UACs. For many children, articulating the basis of their fear in itself is a significant challenge, notwithstanding that such fear be connected to a government agent. Establishing that this fear is "on account of" one of the five protected grounds presents an entirely different and in many cases more problematic challenge. INA § 208(b)(1)(B)(i) requires that a refugee show that "race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for" his or her persecution.[49] Accordingly, an applicant may meet his or her burden by establishing a "mixed motive" within their persecutors (UNHCR n.d.a; Wright 2014).[50] This is a particularly challenging obstacle for UACs fleeing gang violence and recruitment.[51]

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42 *Id.*

43 There are two types of asylum claims, depending on where and when the claim is filed. First is the "affirmative claim," which requires an applicant to seek asylum either at a port of entry or within one-year of entry in the United States while maintaining legal status in the United States. Second is the "defensive claim", which may be brought before the immigration court during removal proceedings. The TVPRA enabled UACs to file an affirmative claim even when a UAC is in proceedings, thereby providing the child with a non-adversarial hearing with a USCIS asylum officer. See *Saleh v. Garland*, 857 F. App'x 933, 935 (9th Cir. 2021); *Chen v. Gonzales*, 470 F.3d 1131, 1135 (5th Cir. 2006).

44 *Chen v. Gonzales*, 470 F.3d 1131, 1135 (5th Cir. 2006); *Martinez-Perez v. Sessions*, 897 F.3d 33 (1st Cir. 2018).

45 *Carvalho-Frois v. Holder*, 667 F.3d 69, 71 (1st Cir. 2012)

46 See Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109–13, 119 Stat. 231 (2005).

47 24 I&N Dec. 208, 211, 214 (BIA 2007).

48 In addition to establishing state action, the applicant must further show that he or she will not be able to avoid persecution by relocating to another part of his or her home country, essentially moving within the borders of the home country to a safer location. See *In re J-B-N- and S-M-*, 24 I&N Dec. 208, 208 (BIA 2007).

49 The Real ID Act of 2005, Pub.L. 109–13, 119 Stat. 302 (2005); *In re J-B-N- and S-M-*, 24 I&N Dec. 208, 208 (BIA 2007).

50 For purposes of establishing a ground for asylum, an applicant must show that they are someone who has been "forced to flee his or her country because of persecution, war, or violence. A refugee has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion, or membership in a particular social group." See UNHCR (n.d.a). Furthermore, fear "cannot be incidental, tangential, superficial, or subordinate to other reasons for the harm," and must be proven by substantial evidence. See, e.g., *Carvalho-Frois v. Holder*, 667 F.3d 69, 73 (1st Cir. 2012); Wright (2014).

51 See *Larios v. Holder*, 608 F.3d 105 (1st Cir. 2010).

By definition, "eligibility" for asylum is based upon one of the five protected grounds.[52] Membership in a "particular social group" is the ground most often argued by UACs seeking asylum (Children's Asylum Claims 2015). What delineates a "particular social group" ("PSG") is not clearly defined, and the DOJ and BIA have each issued numerous guidance documents and decisions attempting to define the boundaries of this class. The BIA has stated that the PSG in context with the other classification in 8 U.S.C. § 1101 requires a showing of an "immutable characteristic," that is "beyond the power of the individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed."[53] The BIA has gone further to require that the applicant prove that they are a member of a particular social group that possesses social visibility.[54] Such membership may be proved by showing the following:

1. All members of the applicant's group possess an immutable characteristic, or possess a characteristic they should not be required to change;
2. The social group is particularized and perceived by the broader community as a distinct group in the applicant's society;
3. The applicant's group does in fact have social distinction—beyond persecution in itself.[55]

The requirement to define with particularity the PSG that is subject to persecution mandates a showing of clear and active persecution because of membership in the defined group—-not simply an amorphous or generalized treatment leveled at some members of a society.[56]

For most UACs, navigating this entire system likely seems an impossible task. The average UAC, a 15-year-old male from Central America with minimal education, limited literacy, and zero English, cannot reasonably be expected to understand how to move through the complicated maze of law, administrative agencies, and immigration court to present an effective case supporting a claim to asylum. Even if an applicant has a colorable claim for asylum, the forum hearing that claim is decidedly tilted against the UAC. Should the UAC lose his or her defensive case in immigration court, the only forum for appeal is to the BIA, which does not hear the case under what may be considered a normal review process. Instead of having his or her case heard by a panel of judges on appellate review, only a single judge can hear the appeal, unless it involves a matter of law of substantial

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[52] 8 C.F.R. 1208.13. "*Eligibility*. The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution. (1) *Past persecution.* An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded". *Id.*

[53] *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985). In addition to an immutable characteristic, asylum applicants are required to show whether the particular social group may be described particularly and whether the group is sufficiently distinct to be socially recognized. See *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008); *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014).

[54] *Id.*

[55] *In re R.A.*, Interim Decision #3403; Appeals Process After a Denied Asylum Application, ALLLAW, https://www.alllaw.com/articles/nolo/us-immigration/appeals-process-denied-asylum-application.html (last visited 20 March 2022).

[56] See *Zelaya v. Holder*, 668 F.3d 159 (4th Cir. 2012) This case considered BIA denial of an asylum claim filed by a Honduran man who claimed to be a member of a particular social group of young men who did not want to join criminal gangs. The court rejected the claimed social group of "young Honduran males who refused to join gangs, had notified the authority of gang harassment tactics, and had an identifiable tormentor within the gang." *Id.*

importance.[57] Any appeal from there is to the federal appeals court, a forum that requires substantial expertise and resources to navigate.[58]

2.2. Special Immigrant Juvenile Status

A UAC's second path to relief is SIJS, a visa classification that was designed to serve the most vulnerable immigrants arriving to the United States—-unaccompanied children.

SIJS provides UACs with a path to long-term stability, allowing such vulnerable children to attend school and grow up with a reasonable expectation of remaining in the United States permanently. This is indeed the outcome that was intended by Congress and the INS when the SIJS was created in 1990 (Krogstad and Gonzalez-Barrera 2014).[59] Unlike other classifications or the asylum process, which rely upon the USCIS making factual findings, SIJS relies on factual findings made by state courts (U.S. Customs & Border Prot n.d.).[60] This reliance on state courts to make factual findings concerning SIJS petitions has been an element of the SIJS process since its adoption in 1990, and the lack of access to counsel in state court proceedings when these proceedings are central to securing legal permanent residency is inconsistent with congressional intent, as well as with international law.

2.2.1. Special Immigrant Juvenile Status in Numbers

When an unaccompanied child arrives in the United States, generally, their best option to not only stop removal proceedings but secure lawful permanent residency is to pursue SIJS.

The number of unaccompanied children arriving at the United States border has been consistently high since 2014, when 57,000 children attempted to enter the United States without a visa (U.S. Customs & Border Prot 2018b), which was more than two times the number that attempted to enter in 2013.[61] Between 2015 and 2018, an average of 45,000 children attempted entry,[62] a number soon eclipsed by the more than 76,000 unaccompanied children that attempted entry to the United States in 2019. The vast majority of these children (90%) traveled from the three countries of Guatemala (54%), Honduras (26%), and El Salvador (14%).[63] Nearly three- fourths (73%) of these children were over the age of fourteen,[64] and about the same portion (71%) were boys.[65]

While the number of unaccompanied children entering the United States grew from only 57,496 to 69,488 between 2014 and 2019 (Facts and Data n.d.), the number of SIJS applications increased from 5815 to 20,721.[66] Even with such substantial numbers of SIJS petitions, the success rate for SIJS petitions is remarkably high. SIJS has an overall approval rate of more than 90%, with annual approval rates between 90% and 95% each

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[57] Congress passed significant immigration reforms post 9/11 that reduced the likelihood of many qualified applicants receiving asylum. In addition, the BIA's standard of review for asylum claims was amended in 2002 to allow higher deference to be given to immigration court findings, make affirmances without opinion possible, and limiting de novo review. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,888 (26 August 2002) (codified at 8 C.F.R. pt. 3).

[58] Matters before the Federal Circuit Courts of Appeal are typically appealed from decisions of the BIA. An appeal to a U.S. Court of Appeal must follow strict deadlines and procedures. Currently, there are 13 U.S. Courts of Appeal across the country. Section 242 of the Immigration and Nationality Act (INA) governs judicial review of exclusion, deportation, and removal proceedings. According to this statute, a petition for review is to be filed within 30 days of the date of the final order. See 8 U.S.C. § 1252(e)(4).

[59] SIJS was original created by Congress in 1990 as part of the Immigration and Nationality Act. The Act created this category as a way to assist foreign born children who have been abused, neglected, or abandoned. See Krogstad and Gonzalez-Barrera (2014).

[60] Difficulties created by such reliance are discussed in section I.b.i. infra; U.S. Customs & Border Prot (n.d.).

[61] Kandel, *supra* note 35.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] Number of I 360 Petitions for Special Immigrant with a Classification of Special Immigrant Juvenile (SJV) by Fiscal Year, Quarter and Case Status, U.S. Citizenship and Immigr. Servs., https://www.uscis.gov/sites/default/files/document/reports/I360_sij_performancedata_fy2020_qtr4.pdf (accessed on 2 June 2022).

year between 2010 and 2019,[67] with the exception being 2018, when the approval rate dropped to 75%.[68] This level of success is simply stunning when compared to alternatives, such as defensive asylum applications, which have approval rates as low as 5% (UNHCR n.d.b; U.S. Dep't. Just 2018).[69] In practice, SIJS is an exceptionally effective policy for protecting unaccompanied children who arrive at the United States border, but to access this relief, the UAC must obtain an attorney in the jurisdiction where they or one of their parents reside who is willing to pursue a piece of family law litigation on a *pro bono* basis with, in most cases, no support from the UAC, the UAC's family, the courts, or others. Here, efficacy faces the limitations of practicality, and an unknown number of UACs never access what may be a viable path to long-term security in the United States.

2.2.2. The Special Immigrant Juvenile Status Petition Process

SIJS is a federal immigration classification that provides certain arriving alien children with a pathway to lawful permanent resident status. The SIJS program is implemented by USCIS, within the U.S. Department of Homeland Security, and USCIS has sole authority to implement the SIJS program.[70] Each year, a percentage of immigrant visas are allocated under the INA to individuals who USCIS considers to be "special immigrants,"[71] a group which includes "special immigrant juveniles", as well as others.[72] Qualification under the SIJS statute requires the petitioner to submit state court findings establishing elements under the INA criteria. A state court order finding, under state law, that the child has been abandoned, neglected, or abused by one or more of his or her parents is required to be considered for SIJS.[73] The state court order is a required component of the SIJS application.

In order to qualify for SIJ Status, the child must be subject to a state court (Porter 2001)[74] order that makes the following findings, under applicable state law:

1. The child must have been declared dependent on a juvenile court located in the U.S.
2. Reunification with one or both of the child's parents is not viable due to abuse, abandonment, neglect, or similar basis under state law.
3. It is found, either in administrative or judicial proceedings, that it would not be in the child's best interests to be returned to the child's parents' previous country of nationality or last habitual residence.[75]

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[67] Special Immigrant Juvenile Petitions, 80 Fed. Reg. 13066, 13101 (8 March 2022) (to be codified at 8 C.F.R. 204, 205, and 245), https://www.govinfo.gov/content/pkg/FR-2022-03-08/pdf/2022-04698.pdf (accessed on 2 June 2022).

[68] Id.; 8 U.S.C. § 1101(a)(27)(J); see, e.g., *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 362 (S.D.N.Y. 2019).

[69] An asylum applicant is said to have pursued asylum "defensively" when he or she began his or her asylum application after deportation proceedings had already begun. In contrast, applicants who apply for asylum before being placed in deportation proceedings are considered to have pursued asylum "affirmatively." UNHCR (n.d.b). Approval rates for defensive asylees were 7% in 2018, compared with affirmative asylees' 22% approval rate. Q2 Immigration Court Statistics for Fiscal Year 2018 (FY18), U.S. Dep't. Just (2018) (hereinafter Defensive Asylum Statistics 2018).

[70] Homeland Security Act of 2002, sections 471(a), 451(b), 462(c), Pub L. No 107–296, 116 Stat 2135 (25 November 2002); 8 U.S.C. § 204(a)(1)(G)(i).

[71] See 8 U.S.C. § 1101(a)(27)(A)-(M). The classification of "special immigrant" includes thirteen sub-groups, including "an immigrant who has been declared dependent on a juvenile court". *Id.* at § 1101(a)(27)(J)(i).

[72] "Special Immigrant Juveniles" is defined at 8 U.S.C. § 1101(a)(27)(J), as clarified by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110–457, 122 Stat 5044 (2008).

[73] Special immigrant status; certain aliens declared dependent on a juvenile court; revocation of approval of petitions; bona fide marriage exemption to marriage fraud amendments; adjustment of status. 58 Fed. Reg. 42839 (12 August 1993).

[74] The statute requires that findings be made by a "juvenile court." A "juvenile court" for purposes of SIJS classification is a "court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles". 8 C.F.R. § 204.11(a); Porter (2001); Immigration Act of 1990, Pub. L. 101–649, 104 Stat. 4978 (1990) (the 1990 SIJ statute); 8 U.S.C. § 1151 (green card numerical limits statute, with full list and description of amendments, including the 1990 amendment).

[75] See 8 U.S.C. 1101(a)(27(J))(I), (II).

With an appropriate order in place, the child may submit Form I-360, along with other supporting documents, to petition USCIS for recognition under SIJS.[76] USCIS reviews the child's petition along with the state court order and any supporting evidence, deferring in nearly all instances to the state court's determinations.[77] SIJS reflects the United States' long-term commitment to providing the vulnerable UACs with a path to legal permanent residency.

2.2.3. A History of Serving Unaccompanied Children

Unaccompanied children arriving in the United States presented a significant challenge to state and federal government agencies prior to Congress creating SIJS in 1990. Although Congress significantly expanded pathways to permanent residency with the passage of the Immigrant Reform and Control Act of 1986, Congress failed to take steps as part of that legislation to address the needs of unaccompanied children. Unaccompanied children who did arrive in the United States were subject to state family law jurisdiction and could be placed into foster care, removed from harmful placements, and provided with the range of supportive and protective services available to all vulnerable children. While such interventions were meaningful and necessary, state family law jurisdiction ultimately ended when the child reached the age of majority (18 in most states), at which time the now adult immigrant lost state supportive services and also found themselves without many pathways to working or staying in the United States. These young adults were also subject to removal. While the Immigration Reform and Control Act of 1986 ("IRCA") regularized some types of relief of undocumented people present in the United States, the IRCA required petitioners seeking such relief to have been present in the United States since 1982 and to file their application to adjust status within 180 days of the IRCA's passage. These requirements presented a practical barrier to many unaccompanied children, including those who arrived after 1982, along with those who arrived before 1982 yet lacked access to information about the IRCA's provisions.

Soon after the IRCA's passage, Congress passed the 1990 Immigration Act (1990 Act) containing specific provisions targeting unaccompanied children and establishing SIJS classification. As adopted in the 1990 Act, SIJS created a pathway to legal permanent residency for unaccompanied children who had been abandoned, abused, or neglected by one or both of their parents. The 1990 Act defined a Special Immigrant Juvenile as follows:

> (J) an immigrant (i) who has been declared dependent on a juvenile court located in the United States and has been deemed eligible by that court for long-term foster care, and (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interests to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; except that no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act.

The INS saw the SIJS as a way to "alleviate hardships" faced by unaccompanied children by providing an opportunity for lawful permanent resident status and potential for U.S. citizenship,[78] and the provision seems to have enjoyed broad support (Joseph et al. 2020).[79] Congress took further steps to protect unaccompanied children by provid-

[76] See 67 No. 48 INTERPRETER RELEASES 1469 (1990); Miguel Lawson and Marianne Grin, *The Immigration Act of 1990*, 33 HARV. INT'L. L. J. 255, n. 105 (1992); https://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-B-SIJS-Legislative-History.pdf; 8 C.F.R. § 204.11(a).

[77] See 8 C.F.R. § 204.11(d); USCIS generally defers to the state court's determination on matters of state law and does no reweigh evidence or make independent factual determinations regarding abuse, abandonment, or neglect. *USCIS Policy Manual*, vol. 6 p.t. J ch.2 (A).

[78] "alleviate[d] hardships experienced by some dependents of the United States juvenile courts by providing qualified aliens with the opportunity to apply for ... lawful permanent resident status, with the possibility of becoming citizens of the United States in the future." 58 Fed. Reg. 42843, 42844 (12 August 1993).

[79] Although lawmakers debated "numerical limits as to the worldwide level of immigration, limits for family-based immigration, and limits for employment-based immigrants," Congress set no numerical limits for SIJS at the time it was passed. Amy Joseph et al. (2020).

ing "Waiver of Grounds for Deportation," which protected UACs from normal removal proceedings.[80] At the same time, the 1990 Act prevented additional abuse by precluding the possibility of an abusive or neglectful parent sending their child to the United States to seek SIJS, then filing for their own benefits under the 1990 Act or IRCA.[81]

SIJS operated efficiently immediately following the passage of the 1990 Act. Unaccompanied children petitioned for SIJS by submitting Form I-360, along with supporting documents,[82] as is currently performed. Approval rates were consistently high,[83] providing a fairly certain and clear path to long-term stability for unaccompanied children. Efficient administration of the SIJS was short-lived, however, and in 1991, the INS asked Congress to address apparently unintended aspects of SIJS within the 1990 Act. In its May 21, 1991 "Interim rule with requests for comments," the INS identified errors that it saw in the SIJS statute.[84] The amendments to SIJS that soon followed expanded eligibility and eliminated excludability grounds that had continued to block unaccompanied children from legal permanent residency following the 1990 Act.[85] Such expansion plainly displayed that the Congressional and administrative intent behind SIJS was to expand pathways for long-term stability and ultimately legal permanent residency for unaccompanied children who qualified under the SIJS statute.

In 1993, the INS issued its first final rule implementing the SIJS classification in light of the 1991 Amendments. The final rule further clarifies both the process for petitioners seeking SIJS as well as the intent that SIJS be a reasonable pathway to legal permanent status. Pursuant to the 1993 Rule, an unaccompanied child is eligible to receive SIJS if the following apply:

- They are under twenty-one years of age;
- They are unmarried;
- They have been declared dependent on a U.S. juvenile court system, according to state law;
- They are eligible for long-term foster care;

It is found not to be in the child's best interests to be returned to their country of origin or that of their parents.

The 1993 Act emphasizes that SIJS is intended to be a readily available pathway to long-term stability in the United States for unaccompanied children, as shown by the

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[80] Section 153(b) of the Act, entitled "Waiver of Grounds for Deportation," providing that certain specified deportation grounds "shall not apply to a special immigrant described in section 101(a)(27)(J) based upon circumstances that exist[ed] before the date the alien was provided such special immigrant status." *Id.*; Immigration Act of 1990, Pub. L. 101–649, § 153, 104 Stat. 4978 5005–06 (codified at 8 U.S.C. § 1101(a)(27)(J) (1991)).

[81] "[N]o natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act." Immigration Act of 1990, Pub. L. 101–649, § 153(a)(3), 104 Stat. 4978 5005–06 (codified at 8 U.S.C. § 1101(a)(27)(J) (1991)).

[82] "The undocumented alien child had to obtain three things from a state court with competent jurisdiction: a dependency order, a finding that the applicant is deemed eligible for long-term foster care, and a ruling that it is not in the child's best interests to be returned to the home country." Porter, *supra* note 81, at 444.

[83] "There has been a tenfold increase in the number of children requesting SIJS status between FY 2005 and FY 2013. In terms of approvals, the numbers have gone from 73 in FY2005 to 3432 in FY 2013. While the data do not differentiate among those unauthorized children who arrived unaccompanied by their parents and those who were removed from their parents because of abuse, abandonment, or neglect, many observers point to the similarity in the spiking trends of both categories." RUTH ELLEN WASEM, CONG. RSCH. SERV., R43703, SPECIAL IMMIGRANT JUVENILES: IN BRIEF CONGRESSIONAL RESEARCH SERVICE 2 (2014), https://sgp.fas.org/crs/homesec/R43703.pdf (accessed on 2 June 2023).

[84] Identified errors included, inter alia, concern that the program did not reach the youth it was intended to benefit and that many potential beneficiaries could not access SIJS' benefits due to alternative basis for excludability, leaving many youths subject to removal even though they seemingly qualified for an SIJS Visa. Special immigrant status; certain aliens declared dependent on a juvenile court; bona fide marriage exemption to marriage fraud amendments. 56 Fed. Reg. 23207 (proposed 21 May 1991) (to be codified at 8 C.F.R. §§ 101, 103).

[85] See The Miscellaneous and Technical Immigration and Nationality Amendments of 1991, Public Law 102–232, 105 Stat 1733 (1991). Congressional purpose for passing the 1991 Amendments to the SIJS program was prompted by the unintended barriers to SIJS serving as a way to "grant legal permanent resident status" to UACs. Joseph, *supra* note 86, at 278.

expansion of eligibility to children under twenty-one and the deference to determinations at the state level. That SIJS intended to offer expansive access to legal permanent residency was underscored again with the Immigration and Nationality Technical Corrections Act of 1994.[86] Despite this clear intent, seeking SIJS retracted in the years following the 1993 Act, largely due to administrative decisions that reduced the group of eligible unaccompanied children.[87] The INS pursued further restrictions on SIJS through two field memoranda, announced in 1998 and 1999, that together expanded what is known as the "consent requirement" (Cook 1999)[88] and clarified what the INS required as a showing of abuse, abandonment, and neglect.[89] The 1998 INS Memorandum clarified the definitions of abuse, abandonment, and neglect. Abuse refers to any physical, emotional, or sexual mistreatment or harm inflicted upon a child. It can include acts of violence, threats, intimidation, neglect of basic needs, or any behavior that poses a risk to the child's well-being. Abandonment refers to a situation in which a child's parent or legal guardian has willfully and intentionally deserted or forsaken their responsibilities to care for the child. It involves a failure to provide the necessary support, guidance, and supervision required for the child's physical and emotional well-being. Neglect refers to a pattern of inadequate care or the failure to meet a child's basic needs, such as providing food, shelter, clothing, medical care, and education. It can also include a lack of emotional support or attention, which may impair the child's development and well-being. Neglect can be a result of a caregiver's inability or unwillingness to fulfill their responsibilities.

The insertion of these new definitions makes the intent of Congress that relief is reserved for children who are victims of those particular circumstances and conditions clear. In the past, individuals who did not suffer abuse, abandonment, or neglect were known to have merely sought the court's protection to avail themselves of legal permanent resident status. This amendment ensures that this is no longer possible. To request the Attorney General's consent, the court, state agency, or other party acting on behalf of the juvenile must provide the Service with documentation that establishes abuse, neglect, or abandonment as the underlying cause for the court's dependency order.[90]

Accordingly, the INS Memorandum clearly states that their concern regards fraudulent SIJS applications and serving children who have been subjected to abuse, abandonment, and neglect when presented with an SIJS petition.

2.2.4. Special Immigrant Juvenile Status Practice

Lawyers representing unaccompanied children in SIJS proceedings face two complex and in most cases disconnected systems. As previously discussed, SIJS is available to children who have been abused, neglected, or abandoned by one or both parents,[91] all of which must be shown by an appropriate court order.[92] Even when the unaccompanied child is in removal proceedings, however, neither the immigration court nor USCIS makes

[86] Following the 1993 Rule, the Immigration and Nationality Technical Corrections Act of 1994 further expanded SIJS eligibility from simply those youth who had been declared dependent on a juvenile court (and deemed eligible for long-term foster care) to those "whom such a court has legally committed to, or placed under the custody of, an agency or department of a State" (and deemed eligible for long-term foster care). Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103–416, 108 Stat. 4305 (1994).

[87] A great deal of confusion related to the question of whether UACs who had been detained by INS could be subject to state court jurisdiction during custody proceedings. Ultimately, clarification was provided as part of the 1998 Appropriations Act, confirming that a UAC in INS custody would be treated as paroled for purposes of state court dependency determinations. See Joseph, *supra* note 86, at 284.

[88] Memorandum by Thomas E. Cook, Acting Asst. Comm'r., Adjudications Div., Immigration and Naturalization Serv., U.S. Dep't. of Justice (7 August 1998) (hereinafter 1998 Memo).

[89] The 1999 Memorandum specified the following: "Evidence that a dependency order was issued on account of abuse, neglect, or abandonment, and that it would not be in the juvenile's best interests to be removed from the United States is crucial to obtaining the Attorney General's consent to the dependency order." See Memorandum by Cook (1999).

[90] 1998 Memo, *supra* note 95.

[91] See infra section I.b.iii.

[92] The state court order containing these findings, obtained in a family law court, is referred to here as the "predicate order."

these findings. It is the state court where the unaccompanied child resides that makes the finding needed for SIJS, and the unusual aspects of such cases can result in practical challenges for the lawyer.

Several types of proceedings may be used to secure an SIJS order,[93] although one to establish custody is most likely. In many jurisdictions, custody proceedings are subject to local rules of procedure and a specialized bar usually handles the majority of these proceedings. For the attorney who does not regularly work in the family law practice area, a custody proceeding presents a potential challenge as they encounter new filing, notice, mediation, and other requirements.[94] In most cases, the UAC, as well as the custodial parent or guardian, needs an interpreter for all proceedings. While interpreter services are often readily available to parties, limited availability can increase scheduling difficulty and delay hearings. In addition, when a parent is located living outside the state or country, service and notice requirements make representation even more complicated and expensive.[95]

State court judges in some jurisdictions infrequently see SIJS cases and may be reluctant to extend their review of a custody petition to what they see as a "federal issue" involving immigration law. Even though the question of whether a child qualifies for SIJS is only determined by USCIS, and not the state court, state court judges may nevertheless struggle with these proceedings. Lawyers representing UACs or their guardians may also feel uncomfortable and concerned with appearing to use the custody proceeding for an ulterior purpose. It can be helpful to brief the court on the SIJS process and required specificity in court orders. Some jurisdictions have taken the lead in preparing case management guides for judges hearing SIJS cases.[96]

The INA requires that the SIJS predicate order be issued by a state "juvenile court."[97] Most state court systems have numerous divisions that satisfy the definition of a "juvenile court," including the court of general jurisdiction (U.S. State Cts n.d.).[98] The lawyer must be familiar with state court practice and procedural rules when seeking the SIJS predicate order, as delays when initiating the proceeding at the state court level in turn delay USCIS determination. Proceedings are often further delayed due to challenges in perfecting service. Under the requirements of the SIJS statute, one or both parents must no longer be involved in the child's life.[99] In many cases, the absent parent is not in the United States or, if in the country, his or her whereabouts are not known. If a parent lives outside the United States and their location is known, international service under the state rules must be attempted. This is a time-consuming and expensive process,[100] and it may expose the UAC or their parent to retribution. Consistent with most rules of civil procedure, a party must make reasonable efforts to locate an adverse party for service. These include inquiring about the party's whereabouts and searching publicly available information, such as phone

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93 See, e.g., Immigr. Leg. Res. Ctr., Special Immigrant Juvenile Status (SIJS) Primer: How to Seek SIJS Findings in California Superior Courts 5 (such proceedings may be dependency, delinquency, guardianship, etc.).

94 See Joseph, *supra* note 86, at 313.

95 Using the Fed. R. Civ Proc, for example, a party may be served by any means reasonably calculated to give notice to the defendant. Fed R. Civ. Proc. 4(f)(1). For a respondent in another country, this might include perfecting service in the manner permitted by the other country's laws, requesting "Letters rogatory", obtaining personal service in the other country, or by "other means" if not precluded by court order or international agreement. See Fed. R. Civ. Proc. 4.

96 See, e.g., Nat'l Ctr. State Cts. et al., Guide for State Courts in Cases Involving Unaccompanied Immigrant Children 11 (2015), https://www.sji.gov/wp/wp-content/uploads/15-167_NCSC_UICGuide_FULL-web1.pdf (accessed on 2 June 2023). Several states have taken steps to address the challenges faced by immigrant youth as they seek SIJS predicate orders. For example, Maryland extended jurisdiction in custody cases to the age of 21 when SIJS is sought (Md. Code. Fam. Law 1-201(a) and (b)(10); California has authorized probate court to appoint guardians for immigrant youth up to the age of 20 when an SIJS predicate order is sought (Cal. Prob. 1501.1); see also N.Y. Fam Ct. Act § 661(a). State courts have found jurisdiction to hear SIJS proceedings up to the age of 21. See *Recinos v. Escobar*, 46 .E. 3d 60, 65 (Mass. 2016).

97 A juvenile court for SIJS purposes is defined as "a court located in the United States having jurisdiction under state law to make judicial decisions about the custody and care of juvenile." 8 C.F.R. § 204.11(a).

98 These include divisions such as juvenile, family, probate, domestic relations, etc. U.S. State Cts (n.d.).

99 8 U.S.C. § 1101(a)(27)(J).

100 See Porter, *supra* note 81, at 452.

directories and social media (see Hartman 2021). If after these efforts the party's location is still unknown, then service by an alternative method, including publication, may be pursued.[101] The process of perfecting service under such circumstances may take weeks or months, all while state jurisdiction may be ending. While USCIS recognizes SIJS predicate orders issued before a child reaches the age of 21, state court jurisdiction over the UAC ends by his or her 18th or 19th birthday.

Once scheduled, the hearing on the SIJS order proceeds as any other hearing before the court. The court requires evidence to support the findings that are being requested. This means that witness testimony is to be taken, including that of the UAC when appropriate, and other evidence should be submitted. The SIJS predicate order requires specific findings of abuse, neglect, or abandonment. Police reports, statements, birth certificates, and other records should be offered into evidence as relevant to establish the SIJS findings.[102] In many cases, the only evidence available to establish the SIJS findings is that of an adult familiar with the UAC's situation, usually a parent, or the child themselves.

Once the matter is heard, the state court is asked to issue the SIJS predicate order. Most often drafted by the moving party, the SIJS order must contain specific language and findings that align with the INA, and in doing so, the SIJS order may not seem consistent with the state court's regular practice. The state court order must find the following:

- That the child is dependent on the court or grant custody to a particular person, state agency, or entity;[103]
- That reunification with one or both parents is not viable due to abuse, neglect, or abandonment;[104]
- That it is not in the UAC's best interests to be returned to his or her country of nationality or that of his or her parents.[105]

State courts are familiar with how to assess what is in a child's best interests when considering custody. In a proceeding seeking an SIJS predicate order, evidence of country conditions in the country of nationality may be useful to help the court assess a country's stability, safety, and violence.

Once the SIJS predicate order is obtained, it becomes a central part of the UAC's application for humanitarian relief under the INA. The order is submitted to USCIS along with supporting documentation and Form I -360.

3. The Inadequacy of Available Relief for Unaccompanied Children

Despite being the most vulnerable class of immigrants to the United States and given the long-standing interest in providing UACs with protection through SIJS, unaccompanied children have weak avenues of relief for securing long-term stability within the country where they seek safety. Asylum is not well suited to the claims made by UACs because SIJS is fractured, inconsistent, and dependent on local counsel, underscoring the fact that lack of access to counsel diminishes meaningful relief from either asylum or the SIJS processes.[106] Taken together, the United States does not currently provide UACs with access to long-

[101] Fed. R. Civ. Proc. 4(e).

[102] Obtaining police reports and other government records from many countries can be very difficult or even impossible. Many areas do not issue birth records at the time of birth, for example, or police departments do not retain accurate records or make the records that are maintained publicly available. When records are available, they often need to be translated. In addition, public records from foreign jurisdictions require authentication, usually in the form of an apostille, which can take many weeks to obtain. See CTR. FOR GENDER AND REFUGEE STUD., *supra* note 58, at 9.

[103] INA § 101(a)(27)(J)(i).

[104] *Id.* Despite requiring that "abuse, neglect or abandonment" be established, the INA does not define these terms. Instead, it relies on state law, which varies. State courts are to use the statutory, common law and other "similar basis under state law" to make the determination. *Id.* The abuse, neglect, and abandonment that prevents reunification may have occurred in either another country or the United States. *Id.*

[105] The "best interests" determination is made under existing state law and, in most instances, is supported by the testimony, statement, and records regarding the UAC's situation in their country of nationality and in the United States. INA § 101(a)(27)(J)(ii).

[106] Zak, *supra* note 14.

term stability that is consistent with the stated intentions regarding these children and the nation's commitments under international law.

This part explores these shortcomings, first discussing the fact that UACs do not presently hold a due process right to appointed counsel in immigration proceedings where asylum is sought or in state court proceedings that are necessary to secure relief under SIJS. Ultimately, the children who arrive at the U.S. border are left alone without the resources needed to secure rights promised under U.S. law.

3.1. Unaccompanied Children Do Not Have a Recognized Due Process Right to Appointed Counsel Despite the Circumstances

At present, unaccompanied children are not recognized to have a due process right to appointed counsel either in their immigration proceedings or in related state family law proceedings where the orders leading to SIJS relief are obtained. Given the significant interest at stake in these proceedings, namely, forced removal from the United States and return of the child to a dangerous and potentially fatal situation in their country of origin, well-established due process standards suggest support for finding a right to appointed counsel. Several cases at the court of appeals levels, however, have not found such a right to exist, holding that UACs seeking safety in the United States do not have a right to appointed counsel in immigration court or state court, even as they face the threat of imminent harm upon removal and as they face the well-funded prosecutorial power of ICE.[107] Such a failure to appoint counsel in immigration proceedings as well as adjacent state court proceedings is seemingly inconsistent with well-established due process right to counsel and frustrates Congressional intent as expressed in the SIJS classification.

The Supreme Court has recognized that the standard for determining whether an indigent defendant has a right to counsel is not based on whether a hearing is titled "civil" or "criminal," but instead whether the defendant's personal liberty interest is at stake.[108] In criminal proceedings, the right to counsel is well established, "where the accused shall enjoy the right to have the Assistance of Counsel for his defense, a right that is recognized as a fundamental right of life and liberty under the Due Process clause of the Fourteenth Amendment."[109] Under this standard, no proceeding that threatens a defendant's liberty satisfies due process guarantees unless counsel is provided for the defendant.[110] Proceedings in juvenile court that place a respondent in jeopardy of commitment in an institution short of a jail or prison also demand access to counsel if they are to satisfy due process guarantees. The Supreme Court has held that due process requires a right to counsel for juveniles facing commitment to state alternative schools in delinquency proceedings, when "coercive action is a possibility without requiring an affirmative choice by child or parent."[111]

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107 See *id*.

108 This standard is stated in *Lassiter v. Department of Social Services*, wherein the Court ruled that it is "the defendant's interest in personal freedom, *and not simply the special Sixth and Fourteenth Amendment right to counsel in criminal* cases, which triggers the right to appointed counsel." 452 U.S. 18, 26 (1981) (establishing that "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel") (emphasis added). More recently, the Court emphasized that "no person may be imprisoned for *any offense* . . . unless he was represented by counsel at his trial." *Alabama v. Shelton*, 535 U.S. 654, 664–65 (2002) (emphasis in original) (citing *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972); see also *Glover v. U.S.*, 531 U.S. 198, 203 (2001) (recognizing that "any amount of actual jail time has Sixth Amendment significance"). "The presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Lassiter*, 452 U.S. at 26–27.

109 *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963).

110 *Gideon*, 372 U.S. at 344. No indigent defendant whose liberty is at stake can be "assured a fair trial unless counsel is provided." *Id.*; see also *Shelton*, 535 U.S. at 644–45 (recognizing right to counsel before a suspended sentence may be imposed); *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979) (recognizing right to counsel if trial actually leads to imprisonment); *Argersinger*, 407 U.S. at 37 (1979) (recognizing right to counsel in any proceeding whether classified as a "petty, misdemeanor or felony" that results in imprisonment); see also *Vitek v. Jones*, 445 U.S. 480, 493–94 (1980) (right to counsel before being involuntarily committed).

111 "In order to assure "procedural justice for the child," it is necessary that counsel be appointed as a matter of course whenever coercive action is a possibility, without requiring any affirmative choice by child or parent."

The fact that a proceeding is a civil proceeding does not end the inquiry. The Constitution's Due Process clause requires specific safeguards be in place to assure fundamental fairness for the civil litigant facing jail time or loss of liberty, whether in a civil or criminal proceeding.[112] Required due process safeguards are determined using the "distinct factors" provided by the Court in *Mathews v. Eldridge*.

The *Mathews* framework is well established,[113] setting out three factors to be weighed and balanced when determining what process is due to a litigant, including whether an individual has a due process right to appointed counsel in a civil proceeding. These factors are the following:

1. The private interest that will be affected by the official action;
2. The risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards;
3. The government's interest, including the function involved, and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[114]

In applying the *Mathews* factors, a "court must set [the] net weight of those three factors against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose him personal freedom."[115]

The right to counsel in immigration proceedings is more limited and not guaranteed under the U.S. Constitution to individuals in immigration proceedings. In the United States, immigration law is primarily governed by federal statutes and regulations. The Supreme Court has held that immigration proceedings are civil in nature, rather than criminal, which affects the level of constitutional protections afforded to individuals involved. Individuals facing immigration proceedings do not have a constitutional right to government-appointed counsel if they cannot afford an attorney. Immigration law falls under civil law, and the Sixth Amendment right to counsel in criminal cases does not apply. Individuals in immigration proceedings do have the right to hire their own legal representation at their expense, and they may retain an immigration attorney or be represented by a qualified representative, such as an accredited representative from a recognized organization.[116]

In *Turner v. Rodgers*, the Court provided additional insight into the *Mathews* factors. Here, the Court observed that whether the requirements of *Mathews* were met would have been influenced by the following:

1. Whether the issues involved in the civil litigation were complex or straightforward;
2. Whether the other party was represented by counsel;
3. The existence of substitute procedural safeguards.[117]

In *re Gault*, 387 U.S. 1 (1967) (holding that children have a due process right to the appointment of counsel during civil juvenile delinquency proceedings).

112 See *Turner v. Rogers*, 64 U.S. 431 (2011) (in which the Court details and applies the "distinct factors" that it "has previously found useful in deciding what specific safeguards—including a right to appointed counsel—the Constitution's Due Process Clause requires in order to make civil proceedings fundamentally fair.") (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

113 Indeed, according to Westlaw, the case has been cited more than 56,000 times for this three-prong test. *Matthews v. Eldridge, Citing References*, WESTLAW EDGE, https://1.next.westlaw.com/Document/Ic1e7189c9c1e11d991d0cc6b54f12d4d/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default) (accessed on 21 March 2022).

114 *Mathews*, 424 U.S. at 335.

115 *Lassiter v. Dep't of Soc. Servs. of Durham Cty.*, 452 u.S. 18, 27 (1981) It should be noted that the *Lassiter* presumption is itself rebuttable. See *C.J.L.G. v. Barr*, 923 F.3d 622, 632 (9th Cir. 2019) (citing *Lassiter*, 452 U.S. at 31).

116 Various nonprofit organizations and legal aid groups offer pro bono (free) legal services to individuals who cannot afford an attorney. These organizations can provide legal advice and representation to individuals in immigration proceedings.

117 *Turner*, 564 U.S. at 446–48. In *Turner*, the Court addressed whether an individual facing civil contempt charges (that carried the threat of incarceration) always has a due process right to the appointment of counsel. See id at 448. Importantly, the Court concluded that under some circumstances, an individual facing these types of civil charge *is* entitled to the appointment of counsel, including in Mr. Turner's case. *Id.* However, in the normal case, the opposing party would be a non-governmental entity, also unrepresented, i.e., the child's mother seeking child support; thus, in this situation, neither party was entitled to appointed counsel. *Id.*

The Court in *Turner* observed that not all civil litigation is the same and that in some instances, the difference in the party's sophistication as litigants would require the appointment of counsel. More directly, the Court noted that "the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, *wherein the prosecution is presented by experienced and learned counsel*."[118] In cases where two civil litigants are engaged in a non-complex matter and neither is represented, *Turner* would suggest that there is no right to appointed counsel for either litigant. On the other hand, in cases where a civil litigant is unrepresented against seasoned, well-prepared counsel for the other side, the *Turner* court suggested that the outcome may be different. The Court explained that its ruling in *Turner* did not "address what due process requires in an unusually complex case where a defendant 'can fairly be represented only by a trained advocate.'"[119] Immigration proceedings against unaccompanied children would fall into the realm of unusually complex cases that require a trained advocate for adequate representation.

The "distinct factors" from *Mathews v. Eldridge* suggest that unaccompanied children in removal proceedings do have a right to appointed counsel and given the unique dependency on state court proceedings to adjudicate SIJS claims, would also have such a right in relevant state court proceedings. Removal proceedings to return an unaccompanied child to their country of origin are the type of litigation that seems to warrant the appointment of counsel under the *Turner* analysis. First, the civil litigant has a highly sensitive personal interest at stake in the proceeding—-whether he or she will be allowed to remain in the United States living in relative stability instead of being removed to a nation where he or she will likely face identified dangers, including possible death. Second, the government is represented by highly trained counsel who specialize in the complex area of immigration law. Moreover, unlike the situation in *Turner*, the government, when prosecuting a removal case against an unaccompanied child, does not have a substitute procedure that assures a fair outcome. Some courts have found that unaccompanied children do have a right to appointed counsel in removal proceedings,[120] but these are the minority by far. Moreover, the federal government's delegation of resolution of the SIJS criteria to state courts, who are not directly involved in immigration court proceedings and lack a consistent criterion for determining custody in cases involving unaccompanied children, more clearly suggests the need for appointed counsel to assure fairness on the issue of whether an unaccompanied child meets the requirements for SIJS.

3.2. Inherent Unfairness Caused by SIJS Reliance on State Court Proceedings

It is somewhat of an anomaly that the federal immigration system relies upon state court findings to establish a petitioner's right to SIJS, but this duality is a crucial part of the process for UACs seeking SIJS. When evaluating an application for SIJS, USCIS relies upon state courts to make specific factual findings as part of a state court proceeding. This reliance offers some administrative ease to USCIS and reflects an overall deference to local family law when assessing a UAC in light of the SIJS statute. At the same time, family laws and family courts differ widely, however, and such differences inevitably lead to inconsistent results across USCIS's jurisdiction. In addition, state courts are placed in a position to make rulings that have potentially significant ancillary impact when introduced in immigration proceedings. Differences in state law and reluctance of some state courts to make factual findings that are needed in immigration filings inject a high degree of inconsistency into the SIJS process.

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118 *Id.* at 449 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462–463 (1938)) (emphasis in original).

119 *Id.* (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 788 (1978)).

120 See *CJLG*, 923 F.3d. at 632 (applying the *Mathews* factors and calling for the appointment of counsel to juveniles in deportation/removal proceedings); see also *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1150 (9th Cir. 2004) (applying *Matthews* test to determine that due process requires that the parent or legal guardian of a juvenile facing deportation/removal proceedings must be served notice of the hearing).

3.2.1. Age

UACs may petition for SIJS up to the age of twenty-one, as long as they have not married.[121] The INA was amended by the 2008 TVPRA to extend the age of eligibility in an effort to instill greater consistency across the SIJS program while addressing the needs of UACs who were not being served by SIJS.[122] The age of majority in most states, however, is eighteen. In some states it is nineteen, and yet others it is twenty-one if the child is not married and continuing in school.[123] The age of majority is jurisdictional in most cases.[124] For the many UACs who arrive near their eighteenth birthday, this means they have little chance of accessing the relief offered by SIJS.[125] With varying ages of majority across the country, the SIJS may be viewed as internally inconsistent. Varying ages of majority would prevent a UAC who is eighteen from securing the required state court order in North Carolina but allow that same child to secure the same court order while proceeding in court until the age of nineteen in Nebraska. Although courts may be unfamiliar with the consequences of the child "aging out " of the court's jurisdiction without receiving the SIJS predicate order, they do not accept petitions for SIJS findings after a child reaches the age of majority. Without the order, the opportunity to seek SIJS evaporates.[126]

3.2.2. State Court Treatment of the "Abuse, Abandonment and Neglect" Standard

As with the age of majority, there exists varying interpretations in state courts of what amounts to "abuse, abandonment and neglect."[127] In some states, for example, the death of a parent can be found to amount to abandonment,[128] while in others, it cannot.[129] Differences in interpretation allow a wide range of behaviors that generate a certain degree of uncertainty concerning what standard must be met.[130]

3.2.3. "One or Both"

The SIJS statute requires that reunification of the child seeking SIJ Status not be viable with "one or both" parents.[131] What "one or both" means has been the subject of several different interpretations by state courts. On its face, the SIJS statute permits what is known as "one-parent SIJS," that is, where an applicant lives in the United States with one of his or her parents but has been abandoned by the other.[132] The TVPRA, legislation passed in 2008 intending to clarify the treatment of UACs and others, makes it plainly clear that one-parent SIJS is indeed allowed under the INA. Yet, some state courts remain reluctant to

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121 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11(c)(1), (2).

122 Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No 110–457, § 235(d), 122 Stat. 5044 (2008).

123 See *Age of Majority*, CTR. FOR PARENT INFO. AND RES., https://www.parentcenterhub.org/age-of-majority/ (last updated November 2017).

124 *Id.*

125 The time needed to file a proceeding and secure the SIJS order means that a UAC who will turn eighteen less than six months after arriving will most likely not be able to obtain the state court order.

126 Some legislatures in states receptive to promoting SIJS have made explicit that for SIJS purposes, juvenile courts have jurisdiction over individuals until the age of twenty-one. California, for example, has amended its guardianship law to allow persons between eighteen and twenty years of age to file a petition for guardianship, a move from the previous law, which allowed a guardian to be appointed only for a child under the age of eighteen. See CAL. PROB. CODE § 1513(a) (2022). Another is Florida, whose statute addressing SIJS specifically states that if SIJS and an adjustment of status "have not been granted by the time the child reaches 18 years of age, the court may retain jurisdiction" until the child reaches twenty-two years of age. See FLA. STAT. § 39.013(2)(d) (2017).

127 Interestingly, the INA is silent on this even while depending on findings of "abuse, abandonment and neglect" to satisfy the SIJS statute.

128 See, e.g., *Bryant v. Wigley*, 269 S.E.2d 418 (Ga. 1980).

129 See, e.g., *McKinney v. Richitelli*, 586 S.E. 2d 258 (N.C. 2003).

130 KIDS IN NEED OF DEF., SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) 3 (2015).

131 8 U.S.C. § 1101(a)(27)(J)(i).

132 The 2008 anti-trafficking legislation made clear that abuse, abandonment, or neglect by one parent is all that is needed, changing language from the earlier law that said such findings were required with respect to both parents. The statute refers specifically to "an individual whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law." *Id.*

issue the SIJS predicate findings in circumstances where one parent is present, reading the requirement as conjunctive rather than disjunctive.[133]

According to one line of cases, if a child has been abused, neglected, or abandoned by one parent, but living with the other parent, an SIJS finding that reunification is not viable is not warranted.[134] These courts apply a fairly limited reading of the "one or both" language from the statute, as shown by *In re Erick M.*

In *Erick M.*, the Nebraska state court considered the case of a juvenile offender who lived with his mother but whose father's whereabouts were unknown. The Court read the reunification provision in the conjunctive, requiring both parents be absent, finding that if the minor lived with one of his or her parents, then the requirement is both as reunification with both parents is infeasible.[135] On this reading, a showing that reunification with both parents is required before the SIJS findings could be established.

A second line of cases reads the statute's "one or both" language in a way that is more consistent with the TVPRA. In this line, the court reached an opposite conclusion. For example, in *In re Eddie E.*, the California Supreme Court directly addressed the reasoning in *Erick M.* on similar facts. In *Eddie E.*, the minor child was a citizen of Mexico who came to the United States with his mother at the age of five. He and his mother then lived with his father. The mother later left the family, leaving the child, Eddie, with the father, who was shown to be a caring and attentive parent. The California trial court read the "one or both" language consistently with *Erick M.*, but the appellate court reversed, finding that under the plain meaning of the statutory language, the mother had abandoned the child, and due to her death, reunification was no longer viable.[136]

Varying state court interpretations of "one or both" have led to an increasingly complicated and inconsistent application of the SIJS factual findings. Such inconsistency furthers the need for counsel to effectively navigate the state court proceeding and enhances the inequities that are created by wildly divergent outcomes for children in immigration proceedings.

3.2.4. State Court Inconsistency When Asked to Issue Orders Having Implications for Immigration Proceedings

When presented with a UAC seeking an SIJS predicate order, state courts are asked to make findings that have implications under federal law. Reluctance of state court judges to make findings that have implications in immigration proceedings results in divergent lines of case law and outcomes for UACs. Again, *In re Erick M.*[137] displayed one of the key barriers facing UACs in state proceedings, the reluctance of state court judges to make findings that have implications in immigration proceedings. As the Nebraska court wrote:

> At the time of the hearing, the juveniles described their living conditions in their home country prior to their arrival in the United States. Both [the juveniles' attorney] and [the attorney representing DHHS] argued persuasively it is in the best interests of the juveniles that they remain in this country. The Court is convinced that is true. However, the Court is equally convinced there are, in all probability, tens if not hundreds of thousands of people who are here illegally or who would like to come to the United States because they would be better off in this country. In addition, the record is devoid of any credible evidence that their mother abused, neglected, or abandoned the juveniles. First of all, the mother brought them here illegally presumably for a better life. Secondly, a conscious decision was made by this family to leave the children in the care and custody of

[133] Courts in Nebraska, New Jersey, and New York, for example, have declared "one or both parents" to be ambiguous, susceptible to more than one reasonable interpretation, depending upon who was involved in the child's life prior to the petition. In re *Erick M.*, 820 N.W.2d 639, 647 (Neb. 2012); In re *Marcelina M.-G.*, 112 A.D.3d 100, 100 (N.Y. 2013); *H.S.P. v. J.K.*, 121 A.3d 849, 859–60 (N.J. 2015).

[134] See *In re Erick M.*, 820 N.W.2d at 647; see also *H.S.P.*, 121 A.3d at 859–60.

[135] *In re Erick M.*, 820 N.W.2d at 647.

[136] *Eddie E. v. Superior Court*, 183 Cal Rptr. 3d. 773, 779 (Ct. App. 2015).

[137] *In re Erick M.*, 820 N.W. 2d at 639.

> [OJS] when the mother was deported. It is incongruous for the guardian ad litem or [DHHS] to argue the mother abused and neglected these children by leaving them here in the United States and at the same time argue that by doing so, they were being afforded a better life with greater opportunity.[138]

In re Erick M. is inconsistent with USCIS guidance and the plain meaning of SIJS. This inconsistency reveals another problem with relying on state court judges to make the significant findings required for the SIJS petition—-state court judges are rarely trained in immigration law and are frequently unaware of the secondary consequences to a custody order (Mackler 2021).

The reliance on state court findings to establish entitlement under federal immigration law complicates access to well-established and available paths to safety and security for unaccompanied children. It does this by requiring separate, ancillary proceedings in state court to establish pre-requisite findings of fact required under federal immigration law. Further, the perspective within some state courts that they may not make findings that are relevant to applications for SIJS, or other immigration issues, is unfortunately myopic. In these instances, the state court judge ignores the fact that a state court order is only part of the SIJS application process (Chang and Lee 2018). State courts that are reluctant to address SIJS findings ignore their unique position in the avenues of relief available to unaccompanied children. As one state court described their role, "A state court's role in the SIJS process is not to determine worthy candidates for citizenship, but simply to identify abused, neglected, or abandoned alien children under its jurisdiction who cannot reunify with a parent or be safely returned to their country of nationality."[139]

4. A Federal Juvenile Immigration System

4.1. The Federal Criminal Justice System and How to Better Serve Unaccompanied Children Who Arrive at the U.S. Border

Given that SIJS is an immigration matter and falls within the jurisdiction of the federal government, it is appropriate for SIJS cases to be adjudicated federally. The federal government has the authority and resources to handle immigration matters consistently and uniformly across the country.

Adjudicating SIJS cases federally also ensures that there is a centralized process and consistent application of the law throughout the United States. It helps prevent discrepancies or variations in decisions that could arise if SIJS cases were adjudicated at the state or local level. This uniformity is important in maintaining fairness and equity in the immigration system.

The present patchwork of jurisdictions and substantive law that apply to unaccompanied children who arrive at a U.S. border results in short comings in how well unaccompanied children are provided for by the U.S. immigration system, assures a wide range of outcomes for similarly situated children, and further fails to reflect fundamental notions of fairness. Improved consistency and coherence are needed, and the federal juvenile justice system provides a reasonable model to do this. There are significant shortcomings in available systems for serving unaccompanied children who arrive in the United States that may be addressed with a dedicated immigration system designed along the lines of the federal juvenile justice system.

The federal juvenile justice system incorporates a balancing of the best interests of the child with state juvenile justice norms and federal interests. The federal juvenile justice system performs this with a statutory framework that enables the attorney general to exercise a "comprehensive, coordinated approach" when charging and prosecuting juvenile offenders (Adams 2017). Within this framework, juvenile offenders are recognized as presenting special cases for prosecution alternatives that prioritize the offender's best interests, both during the proceedings and later in adulthood. Aspects of criminal prosecution that seem

138 *Id.* at 643.

139 *Eddie E.*, 183 Cal Rptr. 3d. at 779.

well settled and expected in proceedings involving adults, such as public proceedings before a jury, have been altered to accommodate these interests. An analogous system serving the interests of unaccompanied children can similarly be envisioned.

4.2. The Origins of a Federal Juvenile Justice System

Children in immigration proceedings face the same system as adults, even though they have significantly different interests at stake and are less likely to be able to protect their own interests while participating in the proceedings. These children sit in a position that is analogous to juvenile offenders prior to the creation of dedicated juvenile justice systems. Juvenile justice systems are a fairly contemporary construction having been first created in Chicago, Illinois, in 1899,[140] hundreds of years after the first criminal law systems. Prior to this, juveniles who were charged with crimes were treated the same as adults, imprisoned in the same jails, and subjected to the same conditions and punishment.[141] The reality that a child could be imprisoned with adults and for a very long time was seen by progressive reformers as anathema to the goal of rehabilitation and excessively punitive.[142] With a goal of rehabilitation and not punishment, the Illinois juvenile court operated with less formality and without many of the bellwether components of the larger criminal justice system, including jury trials.[143] Such informality reflected a fundamental postural shift in how and why proceedings were conducted. Instead of charges being filed "against" a juvenile defendant, they were instead filed in the child's "best interests," with the juvenile court assuming the role of determining what could be done to rehabilitate the child and prevent further criminal activity.[144] The court, in this construction, served the role of guardian empowered to make reasonable decisions on behalf of the juvenile instead of the adversarial process that is usually seen in criminal proceedings (Walling and Driver 2006). Within 20 years, nearly all states had created a separate juvenile justice system similar to that of Illinois.[145]

4.3. Juvenile Court Proceedings and the Federal Juvenile Delinquency Act

Juvenile court proceedings occurred in a context that is very similar to the more modern immigration court. Procedural rules that one might expect to see in a criminal proceeding were not required, and proceedings occurred with minimal formality.[146] Proceedings were not openly conducted, and records were not publicly available (Thomas 1972). Judges hearing juvenile proceedings held discretion over the final disposition of the case.[147] By 1925, all but two U.S. states operated independent juvenile justice systems to serve children, instead of placing young offenders in the overall criminal justice system, where they would have been prosecuted and punished along with offenders years or decades older than them.[148] The United States' Congress took note and, in 1932, authorized the U.S. Attorneys General to waive prosecution of juvenile offenders if doing so served the "best interests" of the child,[149] and in 1938, Congress established separate treatment for juvenile offenders when it passed the Federal Juvenile Delinquency Act[150] ("FJDA").

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140 The first juvenile court was established in Illinois and enabled by statute in April 1899 to reflect "As the progressive view of family and children continued to become focused, '[t]he juvenile court movement in the United States gathered momentum in the final years of the nineteenth century." MONRAD G. PAULSEN AND CHARLES H. WHITEBREAD, JUVENILE LAW AND PROCEDURE 1 (1974).

141 JAMES AUSTIN ET AL., JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT, U.S. DEP'T OF JUS., BUREAU OF JUST. ASSISTANCE, ix (October 2000).

142 *Id.*

143 *Id.*

144 PAULSEN AND WHITEBREAD, *supra* note 149, at 2.

145 *Id.* at 889.

146 PAULSEN AND WHITEBREAD, *supra* note 149, at 2.

147 See *Kent v. U.S.*, 86 S.Ct. 1045 (1966)

148 Wailing, *supra* note 154, at 889.

149 CHARLES DOYLE, CONG. RSCH. SERV., RL30822, JUVENILE DELINQUENTS AND FEDERAL CRIMINAL LAW: THE FEDERAL JUVENILE DELINQUENCY ACT AND RELATED MATTERS 1 (2018), https://sgp.fas.org/crs/misc/RL30822.pdf.

150 52 Stat. 764 (1938), 18 U.S.C. §§ 921 to 927 (1940 ed.); DOYLE, *supra* note 159, at 1.

The FJDA reflected many elements that had already been established by state juvenile justice systems. In enacting the FJDA, Congress moved juvenile offenders out of the federal system where they had been prosecuted and imprisoned like adults and acknowledged that these offenders lacked the maturity and judgment which, in many cases, was needed to appreciate the nature of their actions[151], and into a parallel juvenile state system. Congress, by enacting the FJDA, recognized that what juvenile offenders needed was the opportunity for reform and not what would amount to unnecessarily harsh punishment if treated as an adult.[152] The FJDA achieved this by giving the Attorney General the option to prosecute juvenile offenders for "juvenile delinquency" within the federal system or surrender the juvenile offender to the relevant state for state prosecution.[153]

As originally conceived, the federal juvenile justice system gave the Attorney General significant discretion and power when prosecuting juvenile offenders. The decision to select alternative prosecution methods with the federal system or to surrender the juvenile to state prosecution rested solely with the Attorney General.[154] The Attorney General also had full discretion over placing juvenile offenders in rehabilitation programs, resulting in a wide range of outcomes and uncertainty.[155] While the FJDA did improve potential outcomes for juvenile offenders facing prosecution for federal crimes, it clearly fell short of what was provided within state juvenile justice systems.

Shortcomings in the federal juvenile justice system were not addressed until the mid-1970s. In 1974, Congress passed the Juvenile Justice and Delinquency Prevention Act ("JJDPA"). The JJDPA established agencies focused on juvenile offenders, authorized funding for rehabilitation programs and prevention, and coordinated federal assistance in other agencies in order to provide a "comprehensive, coordinated approach" for juvenile justice systems at the state level. The JJDPA further provided the statutory framework for determining whether a juvenile offender was to face federal or state prosecution,[156] and automatically recognized state jurisdiction over a broad range of offenses.[157] In effect, the JJDPA established a presumption of state jurisdiction over juveniles committing federal crimes, removing the discretionary approach developed in the FJDA.[158]

The JJDPA accomplished several significant outcomes for the juvenile justice system. By providing resources to state juvenile systems, the JJDPA expanded available rehabilitation options. By establishing a presumption of state jurisdiction, the JJDPA effectively assured that juveniles would face the least punitive justice system (Shukla 2012)[159] and that one that would most likely work toward rehabilitation.[160]

In 1984, the JJDPA was revised to alter the assessment of whether a juvenile offender would face prosecution in federal or state courts when Congress passed the Comprehensive Crime Control Act of 1984 ("CCCA"). The CCCA expanded the justifications available to the Attorney

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151 DOLYE, *supra* note 159, at 1.

152 *Id.* at 2.

153 *Id.*

154 *Id.* at 2–3.

155 *Id.* at 2.

156 *Id.* at 2–3.

157 *Id.*

158 The presumption of state jurisdiction may be only overcome by the Attorney General certifying that the state either (1) refused or lacked jurisdiction over the juvenile or (2) lacked programs sufficient to meet the juvenile's needs. 18 U.S.C. § 5032. Once certified, however, a juvenile offender appears before federal district court where the juvenile is charged with "juvenile delinquency" or transferred to adult status. Id. Transfer to adult status requires additional procedural requirements be met and a finding by the district court judge that prosecution as an adult serves the "interest of justice." Id.

159 Unfortunately, this presumption has been eroded in many states by the prevalence of seeking a waiver from juvenile proceedings. See Prateek Shukla (2012).

160 In *Kent v. U.S.*, 383 U.S. 541, 567 (1966), the Supreme Court outlined a series of "determinative factors" available to district court judges considering discretionary waiver. These included "(1) the seriousness of the alleged offense in relation to protecting the community's safety; (2) whether the nature of the alleged offense was aggressive, violent, or willful manner premeditated; (3) whether the alleged offense was against persons or property; (4) the merits of the complaint; (5) the need to try the entire case in one court; (6) maturity of the charged; (7) record and previous history; and (8) the prospect of rehabilitation." Id.

General when certifying that a juvenile offender should face federal prosecution by including "the offense charged is a crime of violence that is a felony[,]. and that there is substantial federal interest in the case or the offense to warrant exercise of federal jurisdiction."[161]

Juveniles charged with federal offenses encounter a federal juvenile justice system that has not significantly changed since 1984. Under this system, there is a presumption in favor of state jurisdiction, and three routes by which a federal prosecutor can overcome that presumption. If this is accomplished, the Attorney General may seek to transfer a juvenile to adult status for prosecution only with a certification process that considers the "best interests" of the child.[162]

The federal juvenile justice system prioritizes rehabilitation and the juvenile offender's "best interests," while it de-emphasizes punishment and retribution. Whether in the state or federal system, juvenile offenders encounter a criminal justice system that observes reduced procedural requirements and expanded discretionary powers, usually exercised outside of a public trial and without a jury, to accomplish these goals. These powers include the court's ability to intervene in such fundamental considerations as to whether the juvenile should continue to live with their family, if doing so is found to be in the juvenile's best interests. Although expansive, state and federal court power is not without limits and must comport with essential due process guarantees.[163] Consequently, the federal juvenile justice system may be seen as placing the "best interests" of the child before other interests or outcomes while bound by due process guarantees.

5. Elements of a Federal Juvenile Immigration System

The United States needs a more cohesive strategy for serving unaccompanied children who arrive at the U.S. border. The federal juvenile justice system provides a possible model for such a strategy. What would a federal juvenile immigration system look like?

5.1. Establishing Immigration Court Proceedings That Recognize the Best Interests of Unaccompanied Children

Unaccompanied children in immigration proceedings are not afforded treatment different from that provided to adults. No matter the age of the child, an unaccompanied child who has been detained and given a Notice to Appear in immigration court must do so just as an adult would.[164] As a procedural matter, there is no difference between a six-year-old respondent facing removal and a 36-year-old respondent facing removal. Accordingly, the same law is applied, regardless of the respondent's age, and the same outcome, removal to the country of nationality or another country, is at issue.[165]

The uniformity of treatment regardless of the respondent's age ignores significant interests in the child's well-being and best interests. The federal juvenile justice system is organized to prioritize and protect the best interests of juvenile offenders and achieves this by adjusting prosecution procedures and requiring the trial judge to assess the question of how a child's best interests will be protected during prosecution and in the impending sentencing.

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161 See DOYLE, *supra* note 159, at 3.

162 18 U.S.C. § 5032.

163 In *Kent*, 383 U.S. at 562, the Supreme Court held that juvenile offenders are entitled to the "essentials of due process" even though juvenile courts have "considerable latitude within which to determine whether it should retain jurisdiction over a child." *Id.* Subsequently, in application of *Gault*, the Court recognized further protections for juveniles facing loss of liberty in juvenile justice proceedings. Here, the Court held that juveniles are entitled to "(1) notice of the charges; (2) a right to counsel, (3) right to confrontation and cross examination; (4) privilege against self-incrimination; (5) right to a transcript of the proceedings, and (6) right to appellate review." 387 U.S. 1, 10 (1967).

164 See 8 U.S.C. § 1101(a)(15)(Q).

165 See generally 8 U.S.C. § 1101.

Right to Counsel

Unaccompanied children should be provided with appointed counsel in order to meet the standards of due process.[166] Although immigrants in United States immigration court proceedings do not have a right to appointed counsel,[167] lack of access to counsel is inconsistent with due process guarantees and fundamental notions of procedural fairness.[168] Unaccompanied children, however, present a separate set of considerations that warrant extension of a right to counsel throughout proceedings. Just as in juvenile justice proceedings, these children face lifelong harm if subjected to a court order that does not consider their best interests. Removal to a country of origin for nearly all of these children is fraught with danger.[169] Accordingly, the concerns that motivate the juvenile justice system can also be found in immigration proceedings.

Providing unaccompanied children with access to counsel during immigration court proceedings may be accomplished with legislative or regulatory action. Congress may clearly legislate access to counsel, but the immigration court system and the Dept of Justice could also accomplish the same goal through regulations. As a first step, the DOJ could adopt regulations for the appointment of guardians ad litem similar to those used in state courts in custody or abuse cases. In such cases, guardians ad litem serve in a voluntary capacity to assess and protect the best interests of the child. This step alone would go very far in assuring unaccompanied children have access to the expertise needed to secure the predicate family court order necessary to secure SIJ Status.

Providing right to counsel would further bring the United States in line with practices in other countries, many of which also experience large numbers of unaccompanied children. Numerous countries provide access to counsel to unaccompanied children in immigration proceedings. Several countries, including Finland, Norway, Sweden, Switzerland, and the Netherlands, appoint counsel as well as a *guardian ad litem* who is appointed once the child arrives at the border and serves to independently investigate and advocate for the child's best interests (See, e.g., Eur. Union Agency for Fundamental Rights 2022). In these countries, the guardian is empowered to address an expansive range of a child's best interests, which includes determining living arrangement, financial, educational, and social aspects of the child's life.[170] Such guardians ad litem receive training on their role and are compensated for their work.[171] In a number of countries,[172] counsel is appointed once the unaccompanied child has been placed into immigration proceedings.

5.2. Establishing a Uniform Criterion for Determining SIJS Eligibility

Reliance on state court proceedings to establish an unaccompanied child's eligibility under SIJS results in inconsistent outcomes and prolonged proceedings, which require competent legal counsel to navigate. A better process would be to apply a uniform criterion, applicable to all unaccompanied children, to establish the underlying findings supporting

166 The fact that UACs are not U.S. citizens does not limit their rights to certain procedural guarantees. Non-citizens in the United States, including both legal and undocumented immigrants, are entitled to certain due process rights under the U.S. Constitution. The Fifth Amendment of the U.S. Constitution states that no person shall be deprived of "life, liberty, or property, without due process of law." The Fourteenth Amendment further extends this protection to all persons, regardless of their citizenship status, by stating that no state shall "deprive any person of life, liberty, or property, without due process of law." Due process rights include various procedural protections, such as the right to a fair and impartial hearing, notice of charges, the right to present evidence, the right to legal representation, and the right to appeal a decision. These rights ensure that individuals have a fair opportunity to defend themselves and challenge any actions taken against them by the government.

167 Richard F. Storrow, Unaccompanied Minors at the U.S.-Mexico Border: The Shifting Sands of Special Immigrant Juvenile Status, 33 GEO. IMMIG. L. J. 1, 20 (2019).

168 See *id.* at 6.

169 *Id.* at 17.

170 *Id.* at 33.

171 *Id.* at 1.

172 These include Austria, Australia, Canada, Denmark, Finland, France, the Netherlands, the United Kingdom, and New Zealand. In these countries, children have the right to free representation once preliminary processing has begun. Id. at 60–63.

the SIJS predicate order and to have this accomplished within immigration proceedings that are designed to serve the unique interests of children. Juvenile immigration proceedings can readily be offered under existing enabling statutes for the immigration court system, although the criteria to be applied would need to be developed. The development of new criteria to determine the best interests of a child would be aided by relying on established case law, including the choice of law rules.

5.2.1. Providing Intentional Review of the Child's Best Interests as Part of the Immigration Proceeding

The best interests of unaccompanied children in removal proceedings are left to state court judges, which creates problems of consistency and fairness across a national immigration system. Consequently, immigration courts do not intentionally consider or review the best interests of immigrant children when making decisions. This is a wide departure from the way state and federal courts treat juveniles in both criminal and civil proceedings. Instead of passing consideration of the child's best interests to state courts, immigration proceedings involving unaccompanied children should incorporate a process of intentional review of what is in the child's best interests when making removal determinations. The federal juvenile justice system provides a compelling example for such a review. In this system, there exists a preference for state prosecution and a reluctance to treat juveniles as if they were adults. The prosecuting attorney must establish a basis to try a juvenile as an adult, against the court's interest in protecting the best interests of the child. In the immigration context, the DOJ may be asked to do something similar.

The intentional consideration of the child's best interests is consistent with the history and development of SIJS, which has shown a multi-decade commitment to protecting the vulnerable children who arrive at a U.S. border.

5.2.2. Guardian Ad Litem

Unaccompanied children who find themselves in proceedings often lack any real understanding of what is taking place. Language barriers create significant impediments to understanding, and the system itself is filled with procedures and timelines that may seem arcane even for lawyers who practice within it. For children seeking either asylum or SIJS, there is also an underlying claim of abuse, neglect, and/or abandonment and, with it, potential conflicts between the child and his or her parents. Given the complexity of the system and the conflicting positions of the child and parents, there is a need for a court-appointed advocate tasked with assessing the child's best interests and advising the court on how best to serve these interests.

A guardian ad litem ("GAL") should be appointed in all immigration proceedings where SIJS eligibility is at issue. A guardian ad litem is an officer of the court who is appointed in cases to protect the interest of a minor (Cong. Rsch. Serv 2009). Federal law has long recognized the importance of GALs in the administration of justice when claims of abuse or neglect are involved. The Child Abuse Prevention and Treatment Act of 1974 requires that a state court provide a guardian ad litem to any child involved in a state court proceeding where abuse or neglect has been pled.[173] The GAL serves to protect the child's interest during the proceeding, thereby improving the proceeding's ultimate outcome.

GALs are not appointed in immigration proceedings, even when SIJS eligibility may be at issue.[174] Failure to provide unaccompanied children with GALs is inconsistent with the policies and concerns that drove the passage of the Child Abuse Prevention and Treatment Act of 1974. Moreover, the lack of GALs seemingly ignores the situation of all unaccompanied children in immigration proceedings. It is undoubtedly the case that a child arriving at the United States border unaccompanied by an adult caregiver has been subjected to neglect or abandonment, as understood under most state laws.[175]

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[173] 42 U.S.C. § 5106.

[174] See KIDS IN NEED OF DEF., *supra* note 135, at 15.

[175] *Id.* at 1.

Appointment of GALs in such cases is consistent with the requirement in other contexts and should be required in immigration proceedings.

6. Conclusions

The thousands of unaccompanied children who arrive at the United States border each year encounter an inhospitable and confusing system of law enforcement that fails to serve and protect the best interests of the most vulnerable immigrants who reach the country. The existing asylum and special visa programs that are most readily applicable to these children are not well suited to address their situation and further fail to comport with the United States' obligations under international law, as well as protections afforded under the U.S. Constitution. New approaches to serving unaccompanied children are required. The creation of a juvenile immigration system would meet the needs of both unaccompanied children and the administration of justice and could be built based upon the model of the existing federal juvenile justice system.

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