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Yearning to Be Free: Advancing the Rights of Undocumented Children through the Improvement of the Special Immigrant Juvenile (SIJ) Status Procedure.

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**YEARNING TO BE FREE: ADVANCING THE RIGHTS OF
UNDOCUMENTED CHILDREN THROUGH THE IMPROVEMENT
OF THE SPECIAL IMMIGRANT JUVENILE (SIJ)
STATUS PROCEDURE**

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I. INTRODUCTION

Maria was only a few months old when her parents brought her to the United States.¹ Neither of her parents possessed immigration documentation, rendering Maria an undocumented child.² Since her birth, Maria never returned to Mexico. Submerged in American culture, she grew up speaking English and knew no other home.³ Deportation meant sending her to a foreign land—back to the dangers from which her parents fled. Yet a tragic ending for her mother changed both her life and legal status; Maria's father fatally shot her mother and fled to Mexico.⁴ Maria was then able to apply for Special Immigrant Juvenile (SIJ) status.⁵ SIJ status provides a pathway to citizenship for undocumented youths like Maria who have been abused, neglected, or abandoned.⁶

Although Maria considered herself American, petitioning for immigration status in court was not an option until her father brutally murdered her mother.⁷ Maria's citizenship was defined by the actions of her parents—she had no legal recourse until she lost her mother. There are many undocumented children in the United States like Maria who are reared with no concrete ties to their parent's country of origin. Unfortunately, there are many particular impediments for juveniles in an immigration system not designed to accommodate children.⁸ Although SIJ status provides a pathway through the system for certain children, its hurdles are no less significant than any others in the immigration system.

1. *SIJS, HUM. RTS. INITIATIVE*, <http://www.hrionline.org/about-hri/client-stories/sijs> (last visited, Feb. 15, 2014).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. See INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (2012) (defining a special immigrant juvenile as a dependent of the state in some capacity who cannot be reunited with one of more parent due to “abuse, neglect, abandonment, or a similar basis found under State law”); see *HUM. RTS. INITIATIVE*, *supra* note 1 (illustrating SIJ status through Maria's story).

7. See *HUM. RTS. INITIATIVE*, *supra* note 1 (“Maria . . . was able to get a family court order declaring that she had been abandoned and neglected by her parents. . . . [S]he was then able to apply for and receive special immigrant juvenile status [SIJ status] and eventually permanent resident status (Green Card).”).

8. See David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 *FORDHAM URB. L.J.* 393, 399 (2010) (“[E]xamination reveals that U.S. immigration law fails to fully recognize children as individuals with independent rights and interests.”).

Such obstructions often prevent many undocumented children from benefiting from its existence.⁹

This Comment explores the SIJ status procedure and how it can more adequately address the needs of vulnerable children through proper modification. Part II describes various ways in which undocumented children are vulnerable and exposed to risk. Part III discusses aspects of SIJ status, its legal history, and SIJ status's impact on immigration law. Part IV addresses myriad problems facing children in petitioning for SIJ status and argues for a unified national standard addressing the sheer vulnerability and trauma experienced by these children.

II. THE VULNERABILITY OF UNDOCUMENTED YOUTH

A. *Trauma Experienced by Undocumented Children*

Many undocumented juveniles hail from families unable to provide for their basic needs of food, shelter, and security.¹⁰ Their undocumented status further prolongs their safety and security concerns.¹¹

Humanistic psychologist Abraham Maslow posited a hierarchy of human needs.¹² According to Maslow, certain basic needs must be met before a human can experience individual growth.¹³ These needs are divided into levels, with each successive level supported by the previous.¹⁴ The most basic level includes physiological needs such as air, food, and water; the second level addresses safety and security concerns; the third level requires love and a sense of belonging; and the fourth involves one's "self-esteem as reflected by others."¹⁵ Accordingly, children require the

9. See generally OLGA BYRNE, VERA INST. OF JUSTICE, UNACCOMPANIED CHILDREN IN THE UNITED STATES: A LITERATURE REVIEW 7 (2008) (explaining different ways an undocumented child may seek residency status and problems unique to each avenue).

10. Bogusia Molina & Michael Tlanusta Garrett, *Communities of Courage: Caring for Immigrant Children and Families Through Creative Multicultural Counseling Interventions*, in MIGRATION: A CRITICAL ISSUE FOR CHILD WELFARE, PROTECTING CHILDREN, Nov. 2, 2006, at 62, 63, available at http://www.americanhumane.org/assets/pdfs/children/protecting-children-journal/pc-pc-21_2pdf.pdf.

11. See Alan J. Dettlaff & Joan R. Rycraft, *The Impact of Migration and Acculturation on Latino Children and Families: Implications for Child Welfare Practice*, in MIGRATION: A CRITICAL ISSUE FOR CHILD WELFARE, PROTECTING CHILDREN, Nov. 2, 2006, at 6, 8, available at http://www.americanhumane.org/assets/pdfs/children/protecting-children-journal/pc-pc-21_2pdf.pdf (acknowledging undocumented immigrants experience fear due to possible detection and deportation).

12. *The Needs of Abused and Neglected Children*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/pubs/usermanuals/subscare/subscareb.cfm> (last visited Feb. 15, 2014).

13. *Id.*

14. *Id.*

15. *Id.*

most basic necessities before reaching a requisite level of stability for meaningfully contributing to society.

Until these basic needs are met, a child cannot begin to heal from the trauma they've experienced; unfortunately, due in part to their undocumented status, many children's needs are never met. Undocumented children often leave their homes or are forced to leave their homes, because their first and second levels of basic needs—food, water, and safety—are not being met.¹⁶ As a result, these children are stunted in physical, emotional, and social development.¹⁷ Due to their status, parents and children often cannot adequately fulfill their safety and security concerns while living as undocumented persons in the United States,¹⁸ further hindering undocumented children's emotional development.¹⁹

B. *Dangers in Home Country and Crossing the U.S. Border*

Afforded little legal protection, more than one million undocumented children reside in the United States.²⁰ Thousands more come into the United States each year, escaping volatile political regimes, civil wars, and poverty.²¹ As a result, officials experienced difficulty in providing ample housing for undocumented children while their immigration statuses were pending.²²

16. Molina & Garrett, *supra* note 10.

17. See CHILD WELFARE INFO. GATEWAY, *supra* note 12 (tracing effects of basic needs deficiency).

18. See Dettlaff & Rycraft, *supra* note 11 (avowing fear of detection and deportation is commonly experienced by undocumented immigrants); Megan Finno, et al., *Risk of Affective Disorders in the Migration and Acculturation Experience of Mexican Migrants, in* MIGRATION: A CRITICAL ISSUE FOR CHILD WELFARE, PROTECTING CHILDREN, Nov. 2, 2006, at 22, 27, available at http://www.americanhumane.org/assets/pdfs/children/protecting-children-journal/pc-pc-21_2pdf.pdf (indicating security and stability concerns always exist in migration).

19. See CHILD WELFARE INFO. GATEWAY, *supra* note 12 (identifying security needs as a primary concern for all children and the deleterious development effects abuse and neglect have on children).

20. JEFFERY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 13 (2011), available at <http://www.pewhispanic.org/files/reports/133.pdf> (estimating around one million unauthorized children resided in the United States in 2010).

21. See Dettlaff & Rycraft, *supra* note 11, at 6, 8 (describing numerous life threatening situations causing Latino migration from their origin country).

22. See Ian Gordon, *The U.S. Is Locking Up Undocumented Kids with Adults*, MOTHER JONES (June 6, 2013 2:00 AM), available at <http://www.motherjones.com/politics/2013/06/undocumented-immigrant-kids-locked-up-adult-detention> (reporting overcrowding in the immigrant detention system leads to numerous, flagrant violations of the prescription against detaining children with unrelated adults).

Undocumented children confront numerous dangers associated with migration while entering the country.²³ Common migration dangers include violence, rape, and even death.²⁴ One particularly dangerous migration practice entails jumping on and off a moving cargo train, referred to as the “train of death,” and riding upon the train car’s top and sides.²⁵ Other Central and South American immigrants simply start walking north, traversing mountains and deserts—usually without food, water, or supplies.²⁶ Immigrants must often evade kidnapping by drug cartels, often carried-out with corrupt police officer assistance.²⁷ Many immigrants succumb to these dangers and never reach the United States.²⁸ Children, of course, are more acutely susceptible to these dangers.

Many children risk everything in coming to the United States, only to be repatriated as soon as they cross the border.²⁹ However, if a child is willing to face such horrors in migrating, repatriation is not the best solution.³⁰ Returning exposes them to the same life-threatening situations

23. See Dettlaff & Rycraft, *supra* note 11, at 6, 8 (enumerating violence, robbery, sexual assault, and family separation as common migration experiences); Finno et al., *supra* note 18 (“Reports of successful and unsuccessful migration by undocumented migrants almost always recount traumatic experiences of robbery, starvation, illness, violence, or, in some cases, rape or death.”).

24. Dettlaff & Rycraft, *supra* note 11, at 6, 8.

25. Karl Penhaul, ‘Train of Death’ Drives American Dreamers, CNN (June 25, 2010, 3:00 PM), <http://www.cnn.com/2010/WORLD/americas/06/23/mexico.train.death>; see M. Beth Morales Singh, *To Rescue, Not Return: An International Human Rights Approach to Protecting Child Economic Migrants Seeking Refuge in the United States*, 41 COLUM. J.L. & SOC. PROBS. 511, 515 (2008) (specifying bodily dangers associated with this practice); Jason Beaubien, *Atop A Train, Migrants Begin Dangerous Trek To U.S.*, NPR (July 6, 2011, 3:44 PM), <http://www.npr.org/2011/07/06/137528534/atop-a-train-migrants-begin-dangerous-trek-to-u-s> (following two men’s migration atop trains).

26. See Jason Beaubien, *Brutal Cartels Make Crossing U.S. Border Even Riskier*, CNN (July 8, 2011, 12:46 PM), <http://www.npr.org/2011/07/08/137647286/brutal-cartels-make-crossing-u-s-border-even-riskier> (depicting perils of crossing the Mexican border with the assistance of “coyotes”).

27. See *id.* (chronicling the drug cartel practice of kidnapping would-be U.S. immigrants and ransoming them back to their families); Beaubien, *supra* note 25 (noting police involvement in cartel kidnapping scheme).

28. Beaubien, *supra* note 25 (“[M]any of these migrants won’t even make it to the border. . . . Some will fall under the freight train or collapse in the desert or get killed by the Mexican drug cartels.”).

29. See OLGA BYRNE & ELISE MILLER, VERA INST. OF JUSTICE, *THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICY MAKERS, AND RESEARCHERS* 11, 27 (2012) (“[I]n fiscal year 2010 the majority of children were apprehended within [twenty-four] hours of entering the United States.”).

30. See CTR. FOR PUB. POLICY PRIORITIES, *UNDOCUMENTED AND ABUSED: A TEXAS CASE STUDY OF CHILDREN IN THE CHILD PROTECTIVE SERVICES SYSTEM 1–2* (2010), available at http://library.cppp.org/files/4/SIJS_UndocAbusedChildren_final.pdf (exploring

from which they risked everything to escape. The deplorable conditions causing child migration in the first place have not been resolved; therefore, it is likely they will continually attempt migration until they are successful.³¹ A vicious cycle then begins, requiring children to encounter dangers while migrating to the United States, and then forcing their return to situations originally causing their illegal migration.

C. *Continued Trauma Experienced in the United States*

Even if undocumented children successfully arrive in the United States, the combined stress and trauma of life in dangerous or poverty-stricken regions, the migration experience, and adjusting to life in the United States can often be overwhelming for a child.³² Even as undocumented children transition into their new lives in the United States, they never feel safe and secure because they live with the constant threat of being repatriated.³³ Many of them never develop a true sense of belonging, remaining emotionally and socially underdeveloped; unable to cultivate meaningful social relationships.³⁴

This emotional and social stunting of undocumented children is more than just the result of their cultural acclimatization—it is also a result of their adjusting to the constant fear of deportation and hostile documentation status.³⁵ Despite the fact most undocumented children have only

problems with sending children back to their origin country, including: inadequate child welfare systems, sub-par treatment for psychological and physical injuries, and family separation).

31. See Singh, *supra* note 25, at 516 (“Return to their home countries is such an impractical option that despite the tremendous hardships of the journey, about 40% of removed children will attempt entering the U.S. again.”).

32. See CAROLA SUÁREZ-OROZCO & MARCELO M. SUÁREZ-OROZCO, CHILDREN OF IMMIGRATION 88 (2001) (exploring immigrant children’s pressures and stresses in trying to “fit” into U.S. culture); SHARON VANDIVERE ET AL., CHILD TRENDS, CHILDREN IN FOSTER HOMES: HOW ARE THEY FARING? 1 (2003) (explaining nearly half of all children in foster care exhibit clinically diagnosed medical issues); Dettlaff & Rycraft, *supra* note 11, at 6, 8 (enumerating migration and assimilation stresses felt by immigrants including, depression, anxiety, and even post-traumatic stress disorder).

33. See Dettlaff & Rycraft, *supra* note 11, at 6, 8 (recognizing undocumented immigrants’ pervasive fears of discovery and deportation once in the United States).

34. See Finno et al., *supra* note 18, at 22, 31 (“Many immigrants feel vulnerable from the loss of social supports when moving to communities in the United States Self-esteem suffers and the individual loses the sense of belonging to a social network and the sense of support that comes from mutual obligation.”).

35. Dettlaff & Rycraft, *supra* note 11, at 6, 8, 10 (recognizing fear of discovery, deportation, and stigmatization). “Research indicates that Latino immigrants are aware of the negative connotations associated with their group and believe that non-Latinos hold negative views of them.” *Id.* at 10.

ever known the United States as home, they are often stigmatized as a sub-class of citizens.³⁶

Additionally, these children are often unable to seek the medical help they require to in dealing with the trauma to which they were exposed.³⁷ Children exhibit symptoms of trauma almost indistinguishable from Attention Deficit and Hyperactivity Disorder (ADHD).³⁸ Healing the effects of trauma upon children requires intense therapeutic assistance and family cohesiveness,³⁹ both of which are typically untenable for undocumented children.⁴⁰ The inability to receive help for trauma, coupled with the added stress of a hyperactive child, potentially renders a more violent and traumatic family life.⁴¹

Unable to find legal work as they mature into youths, these undocumented children are vulnerable to predators seeking gain from their un-

36. See SUÁREZ-OROZCO & SUÁREZ-OROZCO, *supra* note 32, at 87 (describing the high level of social acculturation experienced by immigrant children).

37. See Lisette Austin, *Immigrant Children and Families in the Foster Care System*, CONNECTION: NEWS AND INFO. FROM NAT'L CT. APPOINTED SPECIAL ADVOC. ASS'N, SUMMER 2006, at 6, 7, available at http://nc.casaforchildren.org/files/public/site/publications/theconnection/Connection_Summer2006.pdf (outlining the welfare system's difficulty in providing basic services—such as health care—due to undocumented children's status); Kathryn Pitkin Derose et al., *Immigrants And Health Care: Sources Of Vulnerability*, 26 HEALTH AFF. 1258, 1260 (2007), available at <http://content.healthaffairs.org/content/26/5/1258.full.pdf> (“[Sixty-five] percent of undocumented immigrants lack health insurance, compared with [thirty-five] percent of permanent residence.”).

38. See ELLEN B. LITTMAN, TOWARD AN UNDERSTANDING OF THE ADHD-TRAUMA CONNECTION (2009), available at <http://drellenlittman.com/adhdtraumaconnection.pdf> (highlighting similarities between ADHD symptoms and trauma symptoms). Specifically, trauma can lead to hypervigilance:

In response to repeated trauma, the child's developing brain, in an effort to protect itself, becomes attuned to which adult behaviors may lead to violence. Hypervigilance allows this child to scan their environment for threats. This hypervigilance can mimic hyperactivity or inattentiveness in school because the child is more focused on “distractions” like the teacher's face or another child's movements than their schoolwork.

Id.

39. NICOLE TAYLOR & CHRISTINE B. SIEGFRIED, NAT'L CHILD TRAUMATIC STRESS NETWORK: SYS. INTEGRATION WORKING GRP., HELPING CHILDREN IN THE CHILD WELFARE SYSTEM HEAL FROM TRAUMA: A SYSTEMS INTEGRATION APPROACH 22 (2005), available at http://www.nctsn.org/nctsn_assets/pdfs/promising_practices/A_Systems_Integration_Approach.pdf (identifying practices that facilitate work with traumatized children).

40. Derose et al., *supra* note 37 (describing limited healthcare access for undocumented immigrant children).

41. See CHILD WELFARE INFO. GATEWAY, *supra* note 12 (“Most children with histories of abuse and neglect enter foster care at regressed developmental levels. . . . Although society sees the separation of a child from abusing or seriously neglectful parents as an act of protection that is clearly in the best interests of the child involved, the child may perceive the placement as just one more traumatic event in his/her sad life.”).

documented status.⁴² Due to the trauma and additional stress experienced as children, immigrant children are at a higher risk for involvement in criminal activity, drugs, and alcohol at a young age.⁴³ Additionally, if they have an altercation with U.S. authorities, it is highly likely they will be turned over to the Department of Homeland Security (DHS) to face deportation proceedings.⁴⁴

Meeting a traumatized immigrant child's basic needs through early intervention, before they find unhealthy ways of coping with the trauma associated with their undocumented status, is imperative.

D. *Inadequacies of the U.S. Immigration System's Treatment of Juveniles*

After juveniles reach the United States, those seeking lawful immigration status are subjected to an immigration system not designed for accommodating children.⁴⁵ Undocumented immigrant children are afforded few rights in U.S. immigration law.⁴⁶ Immigration law defines a child only in relation to a parent; many times, the parent's actions determine the fate of a child's immigration status petition.⁴⁷

Current U.S. immigration law does not adequately address scenarios in which undocumented immigrant children are involved in legal proceedings without a parent.⁴⁸ These scenarios have become commonplace.⁴⁹ Immigration law focuses on adults, and provisions providing for chil-

42. See Maura M. Ooi, Comment, *Unaccompanied Should Not Mean Unprotected: The Inadequacies of Relief for Unaccompanied Immigrant Minors*, 25 GEO. IMMIGR. L.J. 883, 884 (2011) ("Continued neglect of this gap in immigration law leaves many of these already burdened children in legal limbo, making them vulnerable to exploitation, mistreatment, and coercion, and allows others to be returned to dire circumstances in their home countries, and sometimes, even leads to their death.").

43. See Cathy Spatz Widom & Susanne Hiller-Sturmhöfel, *Alcohol Abuse as a Risk Factor for and Consequence of Child Abuse*, NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, <http://pubs.niaaa.nih.gov/publications/arh25-1/52-57.htm> (last visited Jan. 5, 2014) (surveying studies on the relationship between childhood trauma and increased drug or alcohol abuse).

44. BYRNE & MILLER, *supra* note 29, at 10.

45. See generally David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979 (2002) (uncovering the inherently limited scope of children's rights in the immigration system).

46. See *id.* at 991 (recognizing children are treated as either an object of their parents or an adult).

47. See *id.* at 991–92 ("Immigration law never employs the term 'child' except in relationship to a parent and, therefore, does not conceive of a 'child' existing outside this relationship. . . . Immigration law recognizes a 'child' only through parental action. . . . Parents are rights holders who may take action to recognize a 'child' for immigration purposes. Children, in contrast, are by definition passive objects subject to parental control.").

48. *Id.* at 1000.

dren's needs have been afterthoughts.⁵⁰ This omission is the "biggest void in all of Immigration law."⁵¹

The solution is allowing these children to become contributing members of our society. Policymakers attempted to address this problem through Deferred Action for Childhood Arrivals (DACA).⁵² Initiated by the Obama Administration in 2012, DACA provides many undocumented children an opportunity for legal employment.⁵³ However, this is simply a temporary relief, a proverbial Band-Aid to covering a meteoric hole in immigration law, which fails in adequately addressing the underlying problem.⁵⁴ DACA is non-legislative relief requiring continuous reapplication and may not be given in circumstances,⁵⁵ such as when the

49. See Olga Byrne, *supra* note 9 (explaining thousands of unaccompanied children undergo removal proceedings every year).

50. See Thronson, *supra* note 8 ("By focusing on the adults in children's lives rather than children themselves, U.S. immigration law fails to recognize children as individuals."); Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.-C.L. L. REV. 247, 252 (2010) ("For the most part, these immigration programs continue to treat immigrant children and adults identically under U.S. law.").

51. JACQUELINE BHABHA & SUSAN SCHMIDT, SEEKING ASYLUM ALONE: UNACCOMPANIED AND SEPARATED CHILDREN AND REFUGEE PROTECTION IN THE U.S. 7 (2006) ("Children are thrust into a system that was designed for adults, often without legal counsel or the emotional support of families to help them manage. In the words of a former immigration judge, children are the biggest void in all of immigration law.").

52. See Memorandum from Janet Napolitano, Sec'y, DHS, to David V. Aguilar, Acting Comm'r, CBP, Alejandro Mayorkas, Dir., USCIS, and John Morton, Dir., ICE, on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (outlining DACA's initiative).

53. ROBERTO G. GONZALES & VERONICA TERRIQUEZ, HOW DACA IS IMPACTING THE LIVES OF THOSE WHO ARE NOW DACAMENTED: PRELIMINARY FINDINGS FROM THE NATIONAL UNDACAMENTED RESEARCH PROJECT 1 (2013), available at http://www.immigrationpolicy.org/sites/default/files/docs/daca_final_ipc_csii_1.pdf ("While not granting a path to legalization and citizenship, DACA provides an opportunity for a segment of the undocumented immigrant population to remain in the country without fear of deportation, allows them to apply for work permits, and increases their opportunities for economic and social incorporation.").

54. See Naomi Cobb, Comment, *Deferred Action for Childhood Arrivals (DACA): A Non-Legislative Means to an End That Misses the Bull's-Eye*, 15 SCHOLAR 651, 654-55 (2012) ("[M]any Republicans view that the unilateral directive as a hasty, Band-Aid type solution that fails to address the intricacies and complexities that immigration reform requires.").

55. See *id.* at 667-69 (noting DACA is a continual, often uncertain application process requiring renewal every two years).

individual has a criminal record⁵⁶ or has used a bogus Social Security Number.⁵⁷

Lawmakers have sought to address this void by slowly amending immigration by piecemeal. Special Immigrant Juvenile (SIJ) status⁵⁸ is one such amendment designed specifically for children, providing a path to citizenship for some undocumented children.⁵⁹

III. SPECIAL IMMIGRANT JUVENILE (SIJ) STATUS

SIJ status provides an avenue for abused, neglected or abandoned children in eventually obtaining citizenship.⁶⁰ An unmarried child under the age of twenty-one may apply for SIJ status through the United States

56. See generally IMMIGRANT LEGAL RES. CTR. & PUB. COUNSEL L. CTR., FREQUENTLY ASKED QUESTIONS: DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) AND JUVENILE DELINQUENCY ADJUDICATIONS AND RECORDS (2013), available at http://www.ilrc.org/files/documents/ilrc-faq-daca_juv_del_adjud_records-2013-04_15.pdf (detailing juvenile record's effect in DACA proceedings).

57. See Ann Cun, DACA Questions and Answers with Attorney Cheryl R. David, LawLogix (Sept. 6, 2012), <http://www.lawlogix.com/blog/daca-questions-and-answers-attorney-cheryl-r-david> (noting use of a false Social Security Number is potentially a crime of moral turpitude).

58. Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 4978, 5005–06 (codified at 8 U.S.C. § 1101(a)(27)(J) (2012)).

59. INA § 101(a)(27)(J)(i), 8 U.S.C. § 1101(a)(27)(J)(i) (2012); see BHABHA & SCHMIDT, *supra* note 51, at 51 (explaining SIJ status provides an opportunity for unaccompanied children to obtain citizenship); Jennifer Baum et al., *Most in Need But Least Served: Legal and Practical Barriers to Special Immigrant Juvenile Status for Federally Detained Minors*, 50 FAM. CT. REV. 621, 621 (2012) (“In recognition of the special needs of abused children, Congress enacted [SIJ status] to provide a previously unavailable child welfare defense to deportation.”).

60. INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (2012). The Code states:

An immigrant who is present in the United States—

(i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with [one] or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;

(ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and

(iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that—

(I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; and

Customs and Immigration Services (USCIS).⁶¹ Once a child receives SIJ status, he or she is able to petition the government for an adjustment of immigration status to obtain legal permanent residency status.⁶²

To apply, the child must have a court order from a juvenile court of proper jurisdiction.⁶³ A “juvenile court with proper jurisdiction” is defined as “a court located in the United States having jurisdiction under state law to make judicial determinations about the custody and care of juveniles.”⁶⁴ This is usually a family or juvenile court.⁶⁵

The court must clearly announce two separate determinations in its order.⁶⁶ First, the court must determine that it is not viable to reunite the child with “[one] or both parents . . . due to abuse, neglect, [or] abandonment.”⁶⁷ Second, the court must find it in the “best interest” of the child to not be returned to the child’s country of origin.⁶⁸

(II) 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 chapter[.]

Id.

61. *Eligibility Status for SIJ*, USCIS, <http://www.uscis.gov/green-card/special-immigrant-juveniles/eligibility-sij-status/eligibility-status-sij> (last updated July 12, 2011); see Kristen Jackson, *Special Status Seekers: Through the Underused SIJS Process, Immigrant Juveniles May Obtain Legal Status*, L.A. LAWYER, Feb. 2012, at 20, 22 (2012), available at <http://www.lacba.org/Files/LAL/Vol34No11/2893.pdf> (outlining SIJ status process).

62. *Special Immigrant Juvenile (SIJ) Status*, ST. JUST. INST. (Apr. 1, 2013), <http://www.sji.gov/PDF/Special%20Immigrant%20Juvenile%204-1-13.pdf>; see Jackson, *supra* note 61 (“[SIJ status] classification alone is not enough. To reap [SIJ status]’s real benefits, a child must use it to achieve lawful permanent residency through an ‘adjustment of status.’”).

63. INA § 101(a)(27)(J)(i), 8 U.S.C. § 1101(a)(27)(J)(i) (2012); see generally DEBORAH LEE ET AL., UPDATE ON LEGAL RELIEF OPTIONS FOR UNACCOMPANIED ALIEN CHILDREN FOLLOWING THE ENACTMENT OF THE WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008, at 2–7 (2009), available at http://www.ilrc.org/files/235_tvpra_practice_advisory.infonet.pdf (discussing the landscape of SIJ status procedure after passage of the Act).

64. 8 C.F.R. § 204.11(a) (2011); Maria Virginia Martorell, *Special Immigrant Juvenile Status: Problems with Substantive Immigration Law and Guidelines for Improvement*, *Immigration Daily*, ILW.COM, <http://www.ilw.com/articles/2012,0202-martorell.shtm> (last visited Feb. 15, 2014).

65. See Martorell, *supra* note 64 (“Depending on state law, the court with jurisdiction over the juvenile may be a juvenile court or a family court, probate court, county court at law, or child welfare court.”).

66. See INA § 101(a)(27)(J)(i), 8 U.S.C. § 1101(a)(27)(J)(i) (2012) (requiring certain findings by an appropriate court); LEE ET AL., *supra* note 63, at 3 (expounding on the two statutory requirements of SIJ status).

67. INA § 101(a)(27)(J)(i), 8 U.S.C. § 1101(a)(27)(J)(i) (2012).

68. INA § 101(a)(27)(J)(ii), 8 U.S.C. § 1101(a)(27)(J)(ii) (2012).

This is one of the few areas of immigration law in which a child is afforded rights by considering what is in the best interest of the child.⁶⁹ The “best interest” standard is a crucial part of family law;⁷⁰ however, SIJ status is the only subset of immigration law utilizing such a standard.⁷¹ SIJ status potentially provides legal relief and hope to many undocumented and oppressed children by addressing this widespread void in immigration law.

A. *Evolution of the SIJ Status Statute*

The Immigration and Nationality Act (INA) of 1952⁷² did not include a provision similar to SIJ.⁷³ In 1990, Congress amended the INA in creating the SIJ status provision.⁷⁴ However, fearing SIJ status was being abused by those looking for a way to circumvent immigration procedures, Congress modified the provision in 1997.⁷⁵

69. Singh, *supra* note 25, at (recognizing SIJ status “substantively considers a child’s heightened need for protection,” unlike most of immigration law).

70. CHILD WELFARE INFO. GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD 1 (2012), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf (“All States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands have statutes requiring that the child’s best interests be considered whenever specified types of decisions are made regarding a child’s custody, placement, or other critical life issues.”).

71. BHABHA & SCHMIDT, *supra* note 51, at 35 (“U.S. immigration law does not consider the best interests of the child in decision making. The INA only mentions the concept of the child’s best interests once: when setting out the eligibility requirements for [SIJ status]”); Singh, *supra* note 25, at 539 (“The ‘best interests’ principle is not substantively applied in U.S. refugee or immigration law, with the exception of one provision that describes eligibility requirements for [SIJ status].”).

72. Immigration and Nationality Act of 1952, Pub. L. No. 82–414, 66 Stat. 163 (codified as amended at 8 U.S.C. (2012)).

73. Dennis Wepman, AMERICAN EXPERIENCE: IMMIGRATION 289 (2008).

74. Immigration Act of 1990, Pub. L. No. 101–649, § 153, 104 Stat. 4978, 5005–06 (codified at 8 U.S.C. § 1101(a)(27)(J) (2012)); Wendi J. Adelson, *The Case of the Eroding Special Immigrant Juvenile Status*, 18 J. TRANSNAT’L L. & POL’Y 65, 76 (2008).

75. Pub. L. No. 105–119, § 113, 111 Stat. 2440, 2460 (1997) (current version at 8 U.S.C. § 1101(a)(27)(J) (2012)). The House Conference Report admitted:

The language has been modified in order to limit the beneficiaries of this provision to those juveniles for whom it was created, namely abandoned, neglected, or abused children, by requiring the Attorney General to determine that neither the dependency order nor the administrative or judicial determination of the alien’s best interest was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect.

Id. See *In re Erick M.*, 820 N.W.2d 639, 645 (Neb. 2012) (affirming the amendment requirement—a finding that the child is a dependent of the court—was intended to prevent SIJ status abuse); *In re Hei Ting C.*, 969 N.Y.S.2d 150, 152 (N.Y. App. Div. 2013) (“In 1997, Congress added the further requirement that the juvenile court find the child dependent

This revision added two requirements significantly impacting the SIJ status process. The first required the child be eligible for long-term foster care.⁷⁶ The practical impact of this requirement was serious, as it required some children to navigate through the foster care system for up to eighteen months.⁷⁷ This clause also made it much more difficult for older children, who risked “aging out” of the system, as they would be ineligible at age eighteen.⁷⁸

The second change required undocumented children in INS custody to receive consent from the Attorney General before petitioning a juvenile court with proper jurisdiction for a SIJ predicate order.⁷⁹ The Perez-Orlando settlement agreement in 2005 significantly changed this requirement.⁸⁰ Currently, the consenting authority is now the Department of Health and Human Services (DHHS) and consent is only required if the child wishes to have the state court make a determination regarding placement or custody.⁸¹ Overall, consent is no longer required to pursue most SIJ status predicate orders.⁸²

Following the Perez-Orlando settlement agreement in 2005, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) formally eliminated foster care and consent requirements included in the aforementioned 1997 INA revisions.⁸³ In addition to eliminating these additional hurdles, the TVPRA improved the SIJ status process by mandating an eligibility determination be reached within 180

upon the court ‘due to abuse, neglect, or abandonment,’ which limited the beneficiaries of the provision ‘to those juveniles for whom it was created’” (citation omitted).

76. Pub. L. No. 105–119, § 113, 111 Stat. 2440, 2460 (1997) (current version at 8 U.S.C. § 1101(a)(27)(J) (2012)).

77. Martorell, *supra* note 64 (“Under the old criteria, a child needed a final order issued for long-term care of the state before applying for SIJS. Unaccompanied children sometimes had to wait up to 18 months to meet the state custody requirement.”).

78. CTR. FOR PUB. POL’Y PRIORITIES, *supra* note 30, at 7–10 (“Undocumented children are older and older children are less likely to be adopted . . . they may be more likely to run away.”).

79. Pub. L. No. 105–119, § 113, 111 Stat. 2440, 2460 (1997) (current version at 8 U.S.C. § 1101(a)(27)(J) (2012)).

80. *Special Immigrant Juvenile Status (SIJS)*, USCRI, <http://www.refugees.org/resources/for-lawyers/special-immigrant-juvenile-status/special-immigrant-juvenile-7.html> (last visited Feb. 15, 2014).

81. INA § 101(a)(27)(J)(iii)(I), 8 U.S.C. § 1101(a)(27)(J)(iii)(I) (2012); USCRI, *supra* note 80.

82. *See* INA § 101(a)(27)(J)(iii)(I), 8 U.S.C. § 1101(a)(27)(J)(iii)(I) (2012) (requiring consent for placement and custody determinations); USCRI, *supra* note 80 (recognizing changes in consent requirements).

83. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(1), 122 Stat. 5044, 5079 (codified as amended at INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (2012)); LEE ET AL., *supra* note 63, at 3–4.

days.⁸⁴ This change recognized continued vulnerability of teenagers in situations of abuse and neglect.

B. *Impact of SIJ Status*

SIJ status provides citizenship opportunity to many mistreated, undocumented children.⁸⁵ However, despite the growing number of children appearing to meet SIJ status requirements, the number of children who actually benefit from this option has remained relatively small.⁸⁶ In 2011, out of 1,062,040 immigrants obtaining legal permanent resident status, only 1,609 obtained legal status through the SIJ status process.⁸⁷ Although this number is higher than SIJ statistics before the 2005 and 2008 amendments,⁸⁸ when considering the number of potentially eligible children, this number is still alarmingly low. Although it is difficult to estimate precisely how many undocumented children in the United States actually qualify for SIJ status, the number of children entering the country from violent and/or abusive situations continues to rise, indicating the number of qualifying children is significantly higher than the number of those actually applying.⁸⁹

Such statistics bolster the argument that SIJ status has not lived up to its potential.⁹⁰ Despite many changes to the SIJ status provision, increas-

84. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(2), 122 Stat. 5044, 5079 (codified as amended at INA § 101(a)(27)(J)(i), 8 U.S.C. § 1232(d)(2) (2012)); LEE ET AL., *supra* note 63, at 6.

85. See Jacqueline Bhabha & Susan Schmidt, *From Kafka to Wilberforce: Is the U.S. Government's Approach to Child Migrants Improving?*, 11-02 IMMIGR. BRIEFINGS 1, *7 (2011) (noting the number of approved SIJ status applicants has increased since TVPRA's implementation).

86. See Jackson, *supra* note 61 (arguing very few children applying for SIJS actually receive it due to some SIJS-associated procedures); see also Bhabha & Schmidt, *supra* note 85 ("It is a singularly positive intersection between child welfare and immigration procedures, but precisely because it implicates both of these statutory systems, it has been beset by complexities that have had a somewhat inhibitory effect on its protective potential.").

87. U.S. DEP'T HOMELAND SEC., 2011 YEARBOOK OF IMMIGRATION STATISTICS, 20-22 tbl.7 (2012), available at http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf.

88. Compare U.S. DEP'T HOMELAND SEC., 2007 YEARBOOK OF IMMIGRATION STATISTICS, 20-22 tbl.7 (2008), available at https://www.dhs.gov/xlibrary/assets/statistics/yearbook/2007/ois_2007_yearbook.pdf (stating seven-hundred seventy-two children received permanent residency status through SIJS in 2007) with U.S. DEP'T HOMELAND SEC., 2009 YEARBOOK OF IMMIGRATION STATISTICS tbl.7 (2010), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf (stating 1,144 children received permanent residency status through SIJS in 2009).

89. See Adelson, *supra* note 74, at 67-68 (noting despite 9,000 visas being reserved for special immigrants, only 660 SIJ applications were approved in 2005).

90. See Jackson, *supra* note 61 (indicating even after twenty years in existence, SIJ status is largely unused).

ing the number of children who can obtain SIJ status,⁹¹ and despite sacrifices made by attorneys and other qualified professionals in permitting more children to apply for SIJ status, there are still a number of factors limiting its effectiveness.⁹²

Several administrative hindrances have impacted the popularity of SIJ status among those responsible for initiating the procedure. Individual state interpretations of SIJ provisions, confusion as to whom is eligible, and inherent barriers in the process⁹³ have impacted those responsible for filing and ruling on SIJ petitions.⁹⁴ Additionally, fear of SIJ status abuse has limited its use by attorneys and courts.⁹⁵

Even if the SIJ option is understood and attempted, navigating the process is extremely difficult, causing many applications to be denied along the way.⁹⁶ Although children must ultimately apply for SIJ status with the USCIS, state courts also play a role in interpreting eligibility because of the required judicial orders.⁹⁷ Ambiguous and undefined terms complicate state courts in determining SIJ status eligibility, thus resulting in inconsistent findings nationwide.⁹⁸

Courts interpret the terms “abuse,” “neglect,” and “abandonment” differently.⁹⁹ While the INA allows giving SIJ status abused, neglected, or abandoned children, it never defined those terms,¹⁰⁰ forcing interpreta-

91. See Bhabha & Schmidt, *supra* note 85 (representing an increase in successful SIJ status applications since TVPRA implementation).

92. See OLGA BYRNE, *supra* note 9, at 22–26 (describing many services VERA attorneys and similar organizations provide for undocumented children).

93. See Singh, *supra* note 25, at 519 (“[F]ederal immigration law delegates the determination of whether a child has been abused, abandoned, or neglected to state juvenile courts; but since there is no federal content to these terms, confusion may ensue for both advocates and state court adjudicators when they look to state law to provide surrogate content.”).

94. See Jackson, *supra* note 61 (“Only 1,492 children gained residency through [SIJ status] in 2010—a year in which 1,042,625 people became lawful permanent residents.”).

95. See *In re Erick M.*, 820 N.W.2d 639, 645 (Neb. 2012) (affirming the 1997 amendment to SIJ status was intended to prevent abuse of SIJ status); H.R. REP. NO. 105-405, at 130 (1997) (Conf. Rep.) (asserting the amendment’s purpose was to limit SIJ applications to a narrower group of immigrant children to prevent application abuse).

96. See generally Young & McKenna, *supra* note 50 (citing the process’s difficulty as the reason for low SIJS approval ratio).

97. See generally Randi Mandelbaum & Elissa Steglich, *Disparate Outcomes: The Quest for Uniform Treatment of Immigrant Children*, 50 FAM. CT. REV. 606, 606 (2012) (emphasizing state courts’ role in SIJ status determinations).

98. Singh, *supra* note 25, at 518–519.

99. *Id.* at 526–27.

100. INA § 101(a)(27)(J)(i), 8 U.S.C. § 1101(a)(27)(J)(i) (2012); Singh, *supra* note 25, at 526–27.

tion by individual state courts.¹⁰¹ For example, many state courts refuse extension of SIJ status to children coming to the United States due to extreme poverty, arguing parents do not “neglect” their children solely by not having the means to provide for them.¹⁰² Additionally, courts differ on the interpretation of the phrase “[one] or both parents.”¹⁰³ Some states refuse to find children who have been abused, neglected or abandoned by one parent eligible for SIJ status if they can be reunited with their other parent.¹⁰⁴

Furthermore, general state court unfamiliarity with immigration proceedings and failure to understand their proper role yields not only inconsistent findings, but also, many times, incorrect findings.¹⁰⁵ These courts sometimes erroneously decide children are ineligible for SIJ status when, in fact, they are.¹⁰⁶ States dealing with SIJ status applicants on a regular basis are more familiar with the process than those in other parts of the country.¹⁰⁷

Unsurprisingly, this leads to finding some children eligible for SIJ status in certain jurisdictions, while similarly situated children in other jurisdictions are found ineligible.

101. See Ann Laquer Estin, *Global Child Welfare: The Challenges for Family Law*, 63 OKLA. L. REV. 691, 712–13 (2011) (citing differences in court rulings as a weakness in SIJS jurisprudence); Singh, *supra* note 25, at 528–29 (discussing state court confusion and unfamiliarity).

102. See Singh, *supra* note 25, at 529 (asserting neither U.S. immigration law nor U.S. asylum law protects those experiencing “economic depredation”).

103. See Martorell, *supra* note 64 (“Although an SIJS petitioner by definition is a child without a parent or guardian, the fact that there is no parent or guardian petitioning for the child baffles family judges to inaction. This is in spite of the fact that the INA gives juvenile courts the power to assert jurisdiction to make [SIJ status] special findings . . .”).

104. Compare *In re Erick M.*, 820 N.W.2d 639, 648 (Neb. 2012) (denying SIJ eligibility because of viable reunification with one parent) with *In re Mario S.*, 954 N.Y.S.2d 843, 852 (N.Y. Fam. Ct. 2012) (granting SIJ eligibility because reunification with one parent was unviable due to abuse, neglect or abandonment, even though reunification with the parent was viable).

105. See Martorell, *supra* note 64 (identifying unfamiliarity with the system as a major hurdle for SIJ applicants); see also *In re J.J.X.C.*, 734 S.E.2d 120, 124 (Ga. Ct. App. 2012) (criticizing the lower court for not explaining its rationale in denying SIJ status).

106. See *J.J.X.C.*, 734 S.E.2d at 124 (admonishing the lower court for failing to make appropriate findings regarding appellant’s SIJ status).

107. See Jackson, *supra* note 61 at 20, 25 (“At its core, SIJS is successful in Los Angeles because attorneys and agency staff educate others to identify SIJS-eligible children, and they operate free from [federal Legal Services Corporation] restrictions. This is a luxury Los Angeles has, but one not shared nationwide.”).

IV. PROBLEMS WITH SIJ PROCEDURE

A. *Collision of Two Systems*

Not all undocumented children in the United States who have been abused, neglected, or abandoned have the same opportunity to attain SIJ status.¹⁰⁸ Much depends upon the manner in which they entered the country and what happened to them once they entered.¹⁰⁹ An undocumented child who has been abused, neglected, or abandoned must deal with the competing interests of both the federal immigration system and the state child welfare system.¹¹⁰ Immigration law is arguably the area of law in which the federal government has the most power.¹¹¹ In contrast, domestic relations are governed almost entirely by the states.¹¹²

Any undocumented child entering the country illegally is subject to federal jurisdiction. DHS, USCIS, DHHS, and the Office Refugee Resettlement (ORR) are charged with overseeing undocumented children.¹¹³ The ORR harbors undocumented children or finds a sponsor while they await deportation proceedings.¹¹⁴ USCIS is the final decision-making authority for undocumented children seeking SIJ status.¹¹⁵ Because USCIS is charged with the primary responsibility of deporting illegal immigrants, some have questioned whether USCIS is the best organization to make

108. See Mandelbaum & Steglich, *supra* note 97 (“Often children who lived through very similar abuse or neglect circumstances will have very different immigration outcomes depending on whether they were found to be in need of state care, as compared to those outside the system (residing with a relative caregiver, homeless, or simply unable to access the child welfare system). In short, a youth’s ability to access state courts and secure the necessary state court findings is often left to chance and happenstance.”).

109. See *id.* (“[C]hildren are treated differently based upon how the child came to this country, what happened once the child arrived here, and whether and when child welfare agency involvement was triggered.”).

110. See BHABHA & SCHMIDT, *supra* note 51, at 52–53 (“[SIJ status] applicants face the complication of being engaged in two legal systems simultaneously because [SIJ status] is a ‘unique hybrid’ straddling both child welfare and immigration institutions—the local juvenile court for decisions and oversight regarding dependency and care, and the federal immigration authorities for determining legal status.”) (citation omitted); CTR. FOR PUB. POL’Y PRIORITIES, *supra* note 30, at 13 (underlining tension between federal and state systems and advocating for less state court inference by immigration authorities); Jackson, *supra* note 61 (noting inconsistencies between federal and state laws pertaining to SIJS).

111. David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Children in U.S. Family Courts*, 11 TEX. HISP. J. L. & POL’Y 45, 47 (2005).

112. *Id.*

113. See BYRNE & MILLER, *supra* note 29, at 6–7 (charting the relationship between federal agencies interacting with unaccompanied children).

114. *Id.* at 13–14.

115. *History of SIJ Status*, USCIS, <http://www.uscis.gov/green-card/special-immigrant-juveniles/history-sij-status> (last updated July 12, 2011).

final determinations on SIJ status, as granting a petition contradicts its primary purpose.¹¹⁶

If a child does avoid federal jurisdiction, he or she may be subject to a state's jurisdiction. Any child, regardless of documentation status, who is abused or neglected falls under the purview of the state's child welfare system.¹¹⁷ The state's primary goal is ensuring the child's physical and emotional needs are met and placing the child in a safe environment.¹¹⁸ Those who are not detained and enter the state child welfare system without first encountering immigration officials stand the best chance of receiving SIJ status.¹¹⁹ In these instances, the state clearly has jurisdiction in adjudicating decisions for the child. Additionally, some states have trained child welfare officers to identify children potentially qualifying for SIJ status and assist those children in navigating the SIJ status process.¹²⁰ However, very few of these undocumented children end up in the child welfare system.¹²¹

A mistreated, undocumented child falls within the purview of both systems of government; on one hand, the federal system seeks deportation and on the other hand, the state system advocates foremost for the child's

116. See BHABHA & SCHMIDT, *supra* note 51, at 54 (“Entrusting the decision about a child's abandonment, neglect or abuse to a department whose expertise and priority is detaining and removing individuals from the U.S. seems unlikely to produce a decision which adequately weighs the child's best interests.”).

117. CTR. FOR PUB. POL'Y PRIORITIES, *supra* note 30, at 15.

118. Angela Lloyd, *Regulating Consent: Protecting Undocumented Immigrant Children from Their (Evil) Step-Uncle Sam, or How to Ameliorate the Impact of the 1997 Amendments to the SIJ Law*, 15 B.U. PUB. INT. L.J. 237, 237 (2006) (“[C]ourts have recognized that the state may affirmatively intervene in the family in order to protect the well-being of a child. Later, as awareness of and sensitivity to child abuse heightened, the federal government passed a series of laws supporting state efforts to intervene in families to protect children from inadequate or dangerous caregivers. The federal government also created incentives for states to provide permanency for children on whose behalf the state had intervened to sever the family relationship.”).

119. Mandelbaum & Steglich, *supra* note 97, at 609–10); see BYRNE & MILLER, *supra* note 29, at 10, 26 (recognizing ORR detention's effect upon on a child seeking SIJ).

120. See CTR. FOR PUB. POL'Y PRIORITIES, *supra* note 30, at 11 (describing Texas's juvenile assistance program in the SIJ status application process). Cf. Mandelbaum & Steglich, *supra* note 97, at 612 (“Despite the fact that the availability of SIJS has been around since the early 1990s, many stakeholders in the child welfare system are unaware of its very existence. This may explain why service providers continue to identify youth who have aged out of eligibility, and why so few children actually apply for SIJ[] status with the federal immigration authorities.”) (citations omitted).

121. See CTR. FOR PUB. POL'Y PRIORITIES, *supra* note 30, at 1 (explaining less than one percent of children in Texas's welfare system are undocumented).

wellbeing.¹²² An undocumented child in the custody of the state child welfare system can be removed into federal custody at any time.¹²³ Sometimes, the state identifies a child qualifying for SIJ status and begins the application process only to have the child removed into federal custody before the case can be adjudicated.¹²⁴ The competition of these two systems only further aggravates the situation, whereas permitting both systems to work congruently would better serve the child's best interests.

Once a child has entered the state welfare system, the federal government should stay deportation proceedings until the child has either been reunited with his or her family or has an opportunity to petition for SIJ status.¹²⁵ By permitting a stay, mistreated children would have the opportunity to petition for SIJ status without risking subjection to federal custody by alerting authorities of their unlawful status. These children could remain within the state child welfare system, ensuring their basic needs are met while petitioning for lawful residency status—thus permitting both state and federal jurisdictions to work together for the best interests of the children.

B. *Funding for SIJ-Eligible Children in Foster Care or Placement*

Another issue arising as a result of the clash between the state and federal systems is funding.¹²⁶ Undocumented children entering the state child welfare system are ineligible for foster care reimbursement or Medicaid coverage from the federal government.¹²⁷ There is debate as to whether a child who is granted SIJ status is eligible to receive foster care reimbursement.¹²⁸ Charged with overseeing reimbursements, the Administration of Children and Families (ACF) has interpreted the eligibility statute as meaning the child must be documented at the time of removal from the detrimental family situation to be eligible for foster

122. Compare BYRNE & MILLER, *supra* note 29, at 9–11 (2012) (detailing the process for undocumented children in federal custody) with CTR. FOR PUB. POL'Y PRIORITIES, *supra* note 30, at 13–15 (explaining the state's duty to care for maltreated children).

123. CTR. FOR PUB. POL'Y PRIORITIES, *supra* note 30, at 13.

124. *Id.*

125. *Id.* at 13, 15.

126. See Bhabha & Schmidt, *supra* note 85 (noting systemic SIJS flaws including state versus federal funding disputes).

127. See Phil Galewitz & Kaiser Health News, *How Undocumented Immigrants Sometimes Receive Medicaid Treatment*, PBS (Feb. 13, 2013, 11:00 AM) (“[W]hile federal law generally bars illegal immigrants from being covered by Medicaid, a little-known part of the state-federal health insurance program for the poor pays about \$2 billion a year for emergency treatment for a group of patients who, according to hospitals, mostly comprise illegal immigrants.”).

128. See CTR. FOR PUB. POL'Y PRIORITIES, *supra* note 30, at 14 (indicating reimbursement is uncertain).

care reimbursement.¹²⁹ This interpretation prohibits state welfare programs from ever receiving funding for previously undocumented children, even after they become legal permanent residents, if they were initially brought into the foster care system as undocumented children.¹³⁰

The TVPRA attempted to resolve this issue by allowing state reimbursement for money spent on undocumented children after they obtain SIJ status.¹³¹ However, such reimbursement continues to be problematic.¹³² Additionally, states are banned from receiving federal funds five years after adjusting a child's status.¹³³ This five-year ban affects a child's ability to receive Medicaid and other federal benefits after a SIJ status application is approved; indeed, many children age out of the system before the five-year ban is lifted.¹³⁴

Although this ban has been waived for asylum applicants, it has not been waived for SIJ status applicants.¹³⁵ Therefore, a child fortunate enough to receive SIJ status is still ineligible for medical care or treatment of potential medical problems caused by years of isolation, neglect, or abuse. This leaves traumatized children untreated, without access to medical care as they leave the foster care system and begin their new, independent lives in the United States as legal permanent residents.

In May 2013, the Foster Children Opportunity Act was introduced to the House of Representatives,¹³⁶ addressing both funding and aging-out of federal benefits eligibility.¹³⁷ The Act aims at improving opportunities for undocumented youth after ageing out of the foster care system. The bill requires federal oversight of the state's efforts in screening for SIJ status eligible children and would increase efforts aimed at educating

129. *Id.*

130. *Id.*

131. *Id.*

132. See Bhabha & Schmidt, *supra* note 51, at 55 (discussing issues surrounding reimbursements of expenditures on undocumented children).

133. 8 U.S.C. § 1613 (2012).

134. See *CTR. FOR PUB. POL'Y PRIORITIES*, *supra* note 30, at 14 (addressing the problem of "aging out" of foster care before the end of the five-year ban).

135. See 8 U.S.C. § 1613(b)(1) (2012) (establishing exception to the five-year benefits ban for asylees).

136. Foster Children Opportunity Act, H.R. 2036, 113th Cong. (2013).

137. See H.R. 2036 (creating an exception to the five-year ban on federal benefits eligibility for SIJ status juveniles and bolstering state reimbursements); see generally *FIRST FOCUS CAMPAIGN FOR CHILD, THE FOSTER CHILDREN OPPORTUNITY ACT: GUARANTEEING A BRIGHT FUTURE FOR FOSTER YOUTH* (2013), available at <http://www.ffcampaignforchildren.org/sites/default/files/FCOA%20Fact%20Sheet.pdf> (outlining the bill and its impact). The Foster Children Opportunity Act was introduced by Congressman O'Rourke of Texas on May 16, 2013 and is currently in Committee. *H.R.2036 – Foster Children Opportunity Act*, CONGRESS.GOV, <http://beta.congress.gov/bill/113th-congress/house-bill/2036/actions> (last visited Feb. 15, 2014).

judges, lawyers, social workers, and court staff about SIJ status procedure.¹³⁸ The bill would also reimburse states for foster care costs after a child receives SIJ status and would lift the five-year ban, potentially extending eligibility for continued Medicaid benefits.¹³⁹ If passed, the bill would do much in solving the funding issue for SIJ status children in foster care and would also increase awareness of SIJ status, so more eligible children may have the opportunity to gain lawful permanent resident status independently.

C. *Undocumented Children Residing in Detention Facilities*

The vast majority of unaccompanied children are detained within one week of crossing the border into the United States.¹⁴⁰ Some are detained by DHS and turned over to ORR to await their repatriation hearings.¹⁴¹ ORR usually holds children in a shelter-type detention center¹⁴² until ORR is able to find a sponsor for the child, usually a relative.¹⁴³ The relative may be undocumented, though many undocumented relatives are hesitant to volunteer for fear of deportation.¹⁴⁴

The majority of children taken into ORR custody “voluntarily opt” to be returned to their country of origin rather than face removal proceed-

138. See H.R. 2036, §§ 2–6.

139. H.R. 2036, § 7.

140. BYRNE & MILLER, *supra* note 29, at 11.

141. *Id.* at 10, 27.

After a person who appears to be an unaccompanied child is taken into DHS custody The DHS officer then determines whether the person is younger than [eighteen] and unaccompanied. . . . If neither a parent nor a legal guardian is with the child at the time of apprehension—or within geographical proximity—DHS classifies the child as unaccompanied. Once DHS makes this determination, an ICE [Immigration and Customs Enforcement] or CBP [Customs and Border Protection] officer interviews the child and fills out a series of immigration forms. The CBP or ICE officer then refers the case to the ICE juvenile coordinator for that district, who reports to a national juvenile coordinator in Washington, DC, contacts ORR, and arranges for the child’s transfer to the ORR/DUCS facility designated by the ORR intake team.

Under the TVPRA, special rules apply to children who come from the “contiguous countries” of Mexico and Canada. When CBP or ICE apprehends Mexican or Canadian children at the border or another port of entry (such as an airport), they provide them with a notice of rights and request for disposition (Form I-770), which allows them to request a hearing before an immigration judge in the United States or elect to return immediately to their home country through a process called voluntary return. *Id.* (citations omitted).

142. A shelter-type detention center is “the least restrictive type of placement available within the ORR system.” *Id.* at 4.

143. See *id.* (noting at least sixty-five percent of detained juveniles are ultimately released to sponsored living in the United States, preferably to a relative).

144. *Id.* at 10.

ings.¹⁴⁵ However, many of the children who are deported immediately or who opt to be “voluntarily” removed are likely eligible for SIJ status or another immigration visa.¹⁴⁶

Several organizations have gone to great lengths in educating immigrant children about their rights; however, many children greet this information with skepticism.¹⁴⁷ They naturally compare these volunteers, immigration officers, and police officers to the corrupt officials from their home countries.¹⁴⁸ From this perspective, it is not surprising to find most children opt to “voluntarily” return home. By refusing to address the underlying problem the federal government is only perpetuating the problem of illegal immigration.¹⁴⁹

Many non-profit organizations have sought to cure this by educating the children in detention centers about their legal options.¹⁵⁰ This is a step in the right direction, however, more should be done by the federal government in ensuring all children eligible for SIJ status are identified and assisted if detained in federal custody.

D. *Definitions of “Abuse,” “Neglect,” and “Abandonment”*

Although SIJ status is federally administered, state courts must interpret the law when issuing court orders from their family or juvenile courts. Some of the terms in the provision are ambiguous and are not well defined, forcing state courts to rely on their individual definitions of the terms.¹⁵¹ This produces dramatically different results depending on the state courts’ definitional interpretation and the state legislatures’ own definitions prescribed by family or juvenile codes.

The terms “abused,” “neglected,” and “abandoned” are not defined in federal immigration law, forcing individual state interpretation of who qualifies for SIJ status.¹⁵² Some courts argue this obscurity empowers

145. *Id.* at 11, 26.

146. *See* BYRNE & MILLER, *supra* note 29, at 4 (“Approximately [forty] percent of children admitted into ORR custody are identified as eligible for a form of legal relief from removal (such as asylum, special immigrant juvenile status, or visas for victims of crime or trafficking).”).

147. *See id.* at 22–23 (describing organizations’ efforts in educating immigrant children about their rights).

148. *See* Beaubien, *supra* note 25 (explaining kidnapping by corrupt police officers is one of the migrants’ biggest fears).

149. *See* Singh, *supra* note 25, at 516 (explaining almost half of all deported children try crossing the border again).

150. BYRNE & MILLER, *supra* note 29, at 22–23.

151. *See* Mandelbaum & Steglich, *supra* note 97, at 614 (illuminating specific state laws defining these terms).

152. *See* Singh, *supra* note 25, at 518–19 (“These children fall through the gap in protections afforded by U.S. refugee and immigration laws This gap in protection for

each state to control who they want to qualify under these provisions.¹⁵³ In practice, allowing individual state interpretation of who qualifies unreasonably restricts otherwise qualified children from receiving SIJ status.¹⁵⁴

For instance, a particularly divisive issue in defining “neglect” involves economic deprivation. Some state courts hold children whose basic needs are not met are still not neglected if the only reason the parents are not able to provide for those needs is economic deprivation.¹⁵⁵ This disqualifies children migrating to the United States out of economic necessity from receiving SIJ status.

The reason behind narrow interpretation of these terms may be preventing abuse of the SIJ status system.¹⁵⁶ This ignores the fact that many children did not choose to migrate to the United States, and merely punishes children for their parent’s choices. If a child is neglected, it should not matter whether or not the parents made a conscious decision in neglecting the child or did so due to lack of resources.¹⁵⁷

children arises from . . . the operation of the [SIJ status] requirements that protect only those children who are able to obtain orders from juvenile courts making special findings that they have been abused, abandoned, or neglected. These terms have not been defined in the immigration statute or regulations, which may cause confusion and apprehension in state juvenile courts.”); Jackson, *supra* note 61 (“State law provides the content for ‘abuse, neglect, [and] abandonment.’ The SIJS statute and regulations do not de?ne the terms; instead, these factual determinations are left to the juvenile court applying state standards.”).

153. *See In re Erick M.*, 820 N.W.2d 639, 642 (Neb. 2012) (“We conclude that Congress wanted to give state courts and federal authorities flexibility to consider a juvenile’s family circumstances in determining whether reunification with the juvenile’s parent or parents is feasible.”).

154. Singh, *supra* note 25, at 528-29 (“Although [SIJ status] was created to address the unique vulnerability of unaccompanied alien children, it fails to prevent many children from being returned to situations of severe deprivation in their countries of origin. Because these children are so infrequently able to obtain special findings orders from state juvenile courts, they will not even be given the chance to apply for legal immigration status.”).

155. *See id.* at 527 (“Most problematic is the situation in which a state child welfare law precludes a finding of neglect where the parents failed to provide for their child because they were financially unable to do so.”).

156. SIJ status abuse has long been a concern of legislators. *See In re Hei Ting C.*, 969 N.Y.S.2d 150, 152 (N.Y. App. Div. 2013) (explaining Congress passed the 1997 amendment to SIJS to prevent unintended persons from taking advantage of the special immigration status); *Erick M.*, 820 N.W.2d at 645 (affirming the 1997 amendment to SIJ status was intended to prevent abuse of SIJ status); H.R. REP. NO. 105-405, at 130 (1997) (Conf. Rep.) (asserting the amendment’s purpose was to limit SIJ applications to a narrower group of immigrant children to stymie application abuse).

157. *See Singh*, *supra* note 25, at 523 (identifying parental intentions as a prerequisite for neglect).

Furthermore, it is unnecessary for state courts to make determinations based upon whether or not they believe an individual is abusing the system, because there are already mechanisms in place to prevent abuse of SIJ status at the federal level. In approving SIJ status, the USCIS has authority to interview a child if it suspects the child is merely trying to abuse the system.¹⁵⁸ Additionally, a child receiving legal permanent residency status through the SIJ status process is prohibited from sponsoring their parents for immigration status.¹⁵⁹ Based on these limitations, a child attempting to circumvent United States immigration laws is unlikely to do so through the SIJ status procedure.

For state courts to merely be gatekeepers rather than roadblocks in the SIJ status process, the federal government should modify the SIJ status statute, clearly defining the terms “abuse,” “neglect,” and “abandonment.” Clarifying these definitions would provide coherent state guidelines, leading to greater consistency among the states and greater security for undocumented youth petitioning for SIJ status. Furthermore, definitions for these terms should encompass and protect all children who are not receiving their basic needs, regardless of whether or not their parents intended the result, by including neglect through economic deprivation as a viable form of actionable neglect. This would allow for the maximum number of undocumented children to receive critical childhood care and create essential community ties.

E. *Interpretation of “One or Both Parents”*

As discussed above, TVPRA modified SIJ status by eliminating the need for a court finding of long-term foster care eligibility as a condition precedent to SIJ status eligibility.¹⁶⁰ The long-term foster care provision made the SIJ status process unnecessarily cumbersome.¹⁶¹ “Eligible for long-term foster care means that a determination has been made by the

158. See *SIJ: After You File*, USCIS, <http://www.uscis.gov/green-card/special-immigrant-juveniles/sij-after-you-file> (last updated July 12, 2011) (reviewing the authority, process, and reasoning for USCIS interviews of SIJS applicants).

159. I.N.A. § 101(a)(27)(J)(iii)(II); 8 U.S.C. § 1101(a)(27)(J)(iii)(II) (2012); see ANGIE JUNCK ET AL., IMMIGRANT LEGAL RES. CTR., SPECIAL IMMIGRANT JUVENILE STATUS AND OTHER IMMIGRATION OPTIONS FOR CHILDREN & YOUTH § 3.9 (3rd ed. 2010), available at www.ilrc.org/files/2010_sijs-chapter_03-sijs_overview.pdf (discussing limitations placed upon special immigrant juveniles regarding their ability to help their parents in the immigration process).

160. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(1), 122 Stat. 5044, 5079 (codified as amended at INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (2012)); Bhabha & Schmidt, *supra* note 85, at *8.

161. See Bhabha & Schmidt, *supra* note 85, at *8 (explaining the term “long-term foster care” became obsolete in most juvenile courts before TVPRA’s passage).

juvenile court that family reunification is no longer a viable option.”¹⁶² Sometimes one parent has abused, neglected, or abandoned the child, while the other parent has attempted to provide a stable environment so the child may heal from the trauma.¹⁶³ Courts have struggled over what to do in these situations.¹⁶⁴

TVPRA replaced the long-term foster care condition with a requirement courts issue an order declaring “reunification [of the child] with [one] or both parents is not viable due to abuse, neglect, [or] abandonment”¹⁶⁵ Many thought these modifications would clarify the matter, because a plain reading of the TVPRA seems to be clear—it establishes eligibility if reunification with *at least one* of the parents is not viable due to abuse, neglect, or abandonment.¹⁶⁶ However, states have disagreed on the meaning of this phrase.¹⁶⁷

For example, in *In re Erick M.*,¹⁶⁸ even though evidence showed the undocumented child’s father abandoned him, the Nebraska Supreme Court denied opportunity to apply for SIJ status, finding reunification with his mother was a viable option.¹⁶⁹ Erick was an undocumented youth living with his mother.¹⁷⁰ Neither he nor his mother heard from his father in several years.¹⁷¹ Erick was removed from his mother’s house to receive treatment for his drug and alcohol abuse.¹⁷² Neither Erick’s mother nor his father was ever accused of abuse or neglect.¹⁷³

162. 8 C.F.R. § 204.11(a) (2011).

163. See *In re Erick M.*, 820 N.W.2d 639, 642–643 (Neb. 2012) (holding notwithstanding paternal abandonment, Erick was ineligible for SIJ status because his mother provided a stable home and he could reunite with her).

164. Compare *Erick M.*, 820 N.W.2d at 648 (denying SIJ eligibility because reunification with one parent was viable) with *In re Mario S.*, 954 N.Y.S.2d 843, 852 (N.Y. Fam. Ct. 2012) (granting SIJ eligibility because reunification with one parent was unviable due to abuse, neglect or abandonment, even though reunification with the parent was viable).

165. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(1), 122 Stat. 5044, 5079 (codified as amended at INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (2012)). See, e.g., LEE ET AL., *supra* note 63, at 3 (describing changes made by the TVPRA).

166. LEE ET AL., *supra* note 63, at 3–4.

167. See Jackson, *supra* note 61 (recognizing state responsibility in determining when a child should not be reunited with one or both of their parents because of abandonment, abuse, or neglect).

168. *Erick M.*, 820 N.W.2d at 639.

169. *Id.* at 642, 648. The court stated, “USCIS does not consider proof of one absent parent to be the end of its inquiry under the reunification component.” *Id.* at 642.

170. *Id.* at 643.

171. *Id.* at 642–643.

172. *Id.* at 643.

173. *Id.*

The court relied on Congressional intent, declaring Congress purposefully gave state courts flexibility in determining whether reunification with just one or both parents is a viable option.¹⁷⁴ The Nebraska Supreme Court reasoned as long as reunification with one parent is a viable option, the child is not eligible for SIJ status.¹⁷⁵ For Erick to be eligible for SIJ status under this interpretation, he would have to show reunification with his mother was not viable because she was the parent with whom he was living when taken into state custody.¹⁷⁶ The court did not determine whether Erick was abandoned or whether returning to his country of origin was in his best interest.¹⁷⁷

The court's decision was influenced by the fact Erick was removed from his mother's house due to his own actions and the lack of apparent abuse or neglect from either of Erick's parents.¹⁷⁸ The court overlooked the trauma and abandonment Erick already experienced because of his father's departure. Erick was unable to seek the medical treatment he desperately needed due to his documentation status. Instead, the court focused on Erick's mother's attempt at providing a nurturing home for Erick.¹⁷⁹ However, a mother attempting to provide security to her child should not disqualify Erick from SIJ status at the state court level.

In contrast, the court in *In re Mario S.*¹⁸⁰ granted a child opportunity to apply to the federal immigration court for SIJ status under very similar circumstances.¹⁸¹ The court found Mario's father abandoned him and it was not in his best interest to return to his father in Mexico.¹⁸² Returning Mario back to Mexico was not in his best interest because he had not

174. *In re Erick M.*, 820 N.W.2d at 648.

175. *Id.* at 646–48. According to this court:

[E]ven when reunification with an absent parent is not feasible because the juvenile has never known the parent or the parent has abandoned the child, USCIS and juvenile courts generally still consider whether reunification with the known parent is an option. . . . We believe that this result shows that the “[one] or both” parents rule is consistent with Congress’ intent to expand the pool of potential applicants. That is, under the “[one] or both” parents rule, a juvenile is not disqualified from SIJ status solely because one parent is unknown or cannot be found and, thus, cannot be excluded from the possibility of reunification.

Id. at 646–47.

176. *Id.* at 648.

177. *Id.* at 643.

178. *See id.* at 642–43 (stressing Erick's removal from his home was because of his own delinquency and not due to his mother's neglect or abuse).

179. *See id.* at 648 (comparing lack of information regarding one mother's efforts in supporting her child to Erick's mother's availability in caring for him).

180. *In re Mario S.*, 954 N.Y.S.2d 843 (N.Y. Fam. Ct. 2012).

181. *Id.* at 845.

182. *Id.* at 852.

lived there since he was six months old.¹⁸³ Even though reunification with Mario's mother was a viable option, Mario was still eligible for SIJ status because of his father's abandonment.¹⁸⁴

Unlike the court in *In re Erick M.*, this court considered the documentation status of Mario's mother in deciding whether or not Mario was eligible for SIJ status.¹⁸⁵ Since she was also in the United States illegally, if she were deported, Mario would be left without care and would likely become dependent on the state; thus reunification was not viable under the circumstances.¹⁸⁶

Many courts, like the Nebraska Supreme Court in *In re Erik M.*, seem hesitant in finding an applicant eligible for SIJ status because they presume so doing would grant the child legal permanent residency status.¹⁸⁷ This hesitancy highlights a misunderstanding some jurisdictions have regarding SIJ status cases, especially in jurisdictions not handling many immigration related cases. Courts sometimes confuse their function in the SIJ status process, erroneously believing their role is to pre-screen applicants for SIJ status.¹⁸⁸ In other words, these courts will not grant a predicate order for children they believe USCIS will not approve for SIJ status.

However, state court is not the approval authority in an SIJ status application.¹⁸⁹ SIJ status was designed as a bifurcated process: the state court's role is simply to determine whether the child meets the qualifications to apply for SIJ status, not whether USCIS will ultimately grant the child's SIJ status application.¹⁹⁰ The state court is utilized because it is in

183. *Id.*

184. *Id.* The court elaborated, “[t]he fact that respondent was returned to the care of his mother should not be determinative of his application for SIJ [status] findings.” *Id.* at 851.

185. *Id.* at 851–52.

186. *Mario S.*, 954 N.Y.S.2d at 851–52.

187. See generally *In re Erick M.*, 820 N.W.2d 639, 648 (Neb. 2012) (fearing use of SIJ as a method of obtaining permanent legal residency status in denying Erick's petition for a SIJ predicate order).

188. See *Mario S.*, 954 N.Y.S.2d at 852–53 (identifying a child's motivations in filing for SIJ status, possible threats a child may someday pose, and USCIS's likely decision regarding SIJ status are not a juvenile court's concern when adjudicating preliminary requests).

189. *Id.*; see 8 USC § 1101 (a)(27)(J) (limiting juvenile court authority to only preliminary issues).

190. See *Mario S.*, 954 N.Y.S.2d at 852 (“The function of the juvenile court in deciding an application for special findings which would permit a juvenile to file an application for adjustment of status as a special immigrant juvenile is limited in scope. The juvenile court is simply called upon to determine whether, under state law, the juvenile is under the age of [twenty-one], unmarried, dependent upon the court through an order of placement or other court order, whether reunification with one or both of the juvenile's parents is not

the best position in considering what is in the child's best interest. This focus on the interests of the children makes SIJ status a radical departure from the way children are treated in the rest of immigration law.¹⁹¹

The interpretation of the terms "abuse," "neglect," "abandoned" and "[one] or both parents," should not be a device used by courts to prevent abuse of SIJ status.¹⁹² Determining final SIJ status eligibility is USCIS's role. If the applicant is merely trying to find a loophole in immigration law rather than finding relief due to abuse, neglect, or abandonment, USCIS has authority to deny the application.¹⁹³ Family and juvenile courts are best suited to determine the best interest of the child; however, rather than interpreting ambiguous terms in making their determination, they should be given clear definitions by Congress.

The SIJ status process would be more efficient if there were clear standards and qualifications for SIJ status. Local courts are required to use state laws because federal immigration law is either silent or unclear on these matters.¹⁹⁴ Federal immigration law should be revised to define the terms "abuse," "neglect," and "abandoned" and clarify whether a child is eligible, even if reunification with one parent is viable.

F. "Aging Out"

Another issue facing SIJ status applicants is the inconsistent "aging out" standard applied by states.¹⁹⁵ An undocumented child seeking SIJ status must apply before their twenty-first birthday—otherwise, he or she is no longer eligible.¹⁹⁶ Even if the child timely files the application

possible due to abuse, neglect, or abandonment of the child, and whether it would be contrary to the juvenile's best interest to be returned to his or her previous country of nationality.").

191. See Singh, *supra* note 25, at 539 ("The 'best interests' principle is not substantively applied in U.S. refugee or immigration law, with the exception of one provision that describes eligibility requirements for [SIJ status].").

192. See *Mario S.*, 954 N.Y.S.2d 843, 853 ("Whether or not a juvenile's application constitutes a potential abuse or misuse of the SIJ [status] provisions of the immigration law is an issue to be determined by the USCIS.").

193. See *id.* at 856 ("Nothing in 8 USC § 1101(a)(27)(J) or the regulation indicates that the Congress intended that state juvenile courts pre-screen potential SIJ [status] applications for possible abuse on behalf of the USCIS.").

194. Jackson, *supra* note 61.

195. Darryl L. Hamm, *Special Immigrant Juvenile Status: A Life Jacket for Immigrant Youth*, 38 CLEARINGHOUSE REV. 323, 324–25 (2004) (relating some children become ineligible for SIJ status due to turning twenty-one while waiting to have their status adjudicated); see generally Emily Rose Gonzalez, *Battered Immigrant Youth Take the Beat: Special Immigrant Juveniles Permitted to Age-Out of Status*, 8 SEATTLE J. SOC. JUST. 409 (2009) (exploring different ways children "age-out" of SIJ status eligibility).

196. See 8 C.F.R. § 204.11(c)(1) (2011) ("An alien is eligible for classification as a special immigrant under section 101(a)(27)(J) of the Act if the alien: (1) Is under twenty-

before turning twenty-one, the child can still “age out” if USCIS fails to adjudicate the request and grant SIJ status before he or she turns twenty-one.¹⁹⁷ Congress partially addressed this problem in 2008 with the TV-PRA, mandating all petitions be adjudicated in 180 days and stating SIJ status cannot be denied based on age as long as the minor filed before turning twenty-one.¹⁹⁸

However, many states define “child” as an individual under eighteen years old and therefore will not grant a court order stating the child is a dependent of the court if the child is over eighteen.¹⁹⁹ Again, such conflicts between state courts and federal law prevent SIJ status from helping those it is intended to protect.

Some states have addressed this issue. For instance, Texas legislators have changed the Texas Family Code, extending court jurisdiction if such jurisdiction was present before the child’s eighteenth birthday.²⁰⁰ Additionally, Texas legislators have proposed a bill allowing jurisdiction over those applying for SIJ status as long as they have not turned twenty-one.²⁰¹ More states must adopt similar provisions so conflicting laws will not prevent a child from taking advantage of the SIJ status option.

one years of age”); Gonzalez, *supra* note 195, at 414 (“[SIJ status applicants] are allowed to age-out of their eligibility because there is nothing in the current SIJ [status] statute that obligates the courts to expedite or hear SIJ [status] cases before the children age-out.”).

197. See Gonzalez, *supra* note 195, at 414–16 (listing many ways in which an application could be delayed, causing an applicant to “age-out”); Hamm, *supra* note 195, at 324 (reporting varied wait times experienced by practitioners assisting with SIJ status requests).

198. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(2), (4), 122 Stat. 5044, 5080 (codified as amended at 8 U.S.C. § 1232(d)(2), (4) (2012)); see Jackson, *supra* note 61 (“The juvenile must be under the age of [twenty-one] on the date of ?ling and subject to juvenile court jurisdiction when ?ling—and this jurisdiction must remain until USCIS grants the child [SIJ status], unless the child’s age causes the loss of jurisdiction.”).

199. See, e.g., *A.C. v. In re E.C.N.*, 89 So.3d 777, 779 (Ala. Civ. App. 2012) (holding the lower court lacked jurisdiction in ruling upon an undocumented youth’s SIJ status related petition because he was over age eighteen at the time of the ruling); see also Estin, *supra* note 101, at 713 n.128 (describing challenges family court judges face in changing status between the ages of eighteen and twenty-one); Jackson, *supra* note 61 (explaining how age affects an SIJ status petition in California).

200. See TEX. FAM. CODE § 263.601(4) (West 2014) (“‘Young adult’ means a person who was in the conservatorship of the department on the day before the person’s [eighteen]th birthday.”).

201. Tex. H.B. 1705, 83rd Leg., R.S. (2013). This bill was filed and left pending in committee. *Actions, TEX. LEGISLATURE ONLINE*, <http://www.legis.state.tx.us/billlookup/Actions.aspx?LegSess=83R&Bill=HB1705> (last visited Feb. 15, 2014).

G. *Unfamiliarity with SIJ Status*

Often courts deciding critical SIJ status-related issues are unfamiliar with immigration law and SIJ status itself.²⁰² They neither fully understand the process nor their role in the process.²⁰³ Some courts hesitate in determining eligibility for SIJ status related orders because they mistakenly believe it will grant legal permanent residency status to undocumented children.²⁰⁴ Other courts are unclear what determinations they must make, often resulting in vague, unacceptable orders for USCIS purposes.²⁰⁵

In *In re J.J.X.C.*²⁰⁶ a juvenile court found a Guatemalan boy, who left his home due to threats of gang violence and his parents' inability to protect him, was a dependent of the court.²⁰⁷ However, the juvenile court only entered an order on the child's custody and failed to address other requisite SIJ status determinations.²⁰⁸ On appeal, the court held any time an undocumented youth is found to be a dependent of the state, it is necessary to further determine: (1) whether, by clearly articulating whether reunification with one or both parents is viable, the child meets

202. Misty Wilson Borkowski, *Battered, Broken, Bruised, or Abandoned: Domestic Strife Presents Foreign Nationals Access to Immigration Relief*, 31 U. ARK. LITTLE ROCK L. REV. 567, 574 (2009) ("One of the main challenges in obtaining SIJ status is not the Department of Homeland Security (DHS) obstacles but improving awareness of this immigration relief by those who come in contact with the alien juvenile, such as the juvenile court system, foster care agencies, and other shelter programs."); Martorell, *supra* note 64 (explaining immigration law unfamiliarity is a common hurdle for those seeking SIJS status).

203. Theo Liebmann, *Family Court and the Unique Needs of Children and Families Who Lack Immigration Status*, 40 COLUM. J.L. & SOC. PROBS. 583, 601 (2007) (advocating for court understanding of their role in the SIJ status process).

204. See *In re J.J.X.C.*, 734 S.E.2d 120 (Ga. Ct. App. 2012) (reiterating it is not the role of courts to determine if the child qualifies for SIJ status); see also BHABHA & SCHMIDT, *supra* note 51, at 54 ("Juvenile court judges must issue dependency orders that include information of interest to immigration officers; however, some juvenile court judges are not used to concerning themselves with immigration matters and are reluctant to take such matters into account.").

205. See, e.g., *E.C.D. v. P.D.R.D.*, 114 So.3d 33, 36 (Ala. Civ. App. 2012) (finding although the lower court made a custody determination in the best interests of the child, the court failed to make a determination of whether it would be in the best interest of the child to be returned to the child's home country); *J.J.X.C.*, 734 S.E.2d at 124 (ordering a lower court to clearly state the child is a ward of the court because the child was deprived); *In re Luis G.*, 764 N.W.2d 648, 651, 656 (Neb. Ct. App. 2009) (holding that the court must enter a determination whether it is in the child's best interest to be returned to the child's country of origin); see also BHABHA & SCHMIDT, *supra* note 51, at 54 (citing inadequate court findings as possibly hindering an USCIS officer's ability to make favorable findings for the child).

206. *J.J.X.C.*, 734 S.E.2d at 123.

207. *Id.*

208. *Id.*

other SIJ status predicate requirements, and (2) whether returning the child to his or her country of origin is the best interest of the child.²⁰⁹

Even if a court issues an order with the necessary determinations, there is no guarantee USCIS will agree with the court.²¹⁰ USCIS will ultimately determine whether the child is eligible for SIJ status and is not required to abide by the state court's determination,²¹¹ causing state court hesitation in making their decisions. Some state courts have even theorized what USCIS may or may not find acceptable.²¹² Whether USCIS will ultimately approve the application should have no bearing on a court's findings in SIJ-related orders.²¹³

As proposed by the Foster Children Opportunity Act, a robust system of educating those involved on the SIJ status process would help cure this problem.²¹⁴ At minimum, states should have a resource containing current statutes and guidelines regarding SIJ status available for judge and attorney reference in SIJ status case preparation.²¹⁵

H. Requirement to be a "Dependent of the Court"

Children frequently run into difficulty obtaining SIJ status predicate orders by family or juvenile courts because they are not considered dependents of the state.²¹⁶ Most state courts are courts of limited jurisdiction, disallowing an independent cause of action for a SIJ status predicate

209. *Id.* at 123–24.

210. See Memorandum from William R. Yates, Assoc. Dir. for Operations, to Regional Directors and District Directors, U.S. Citizenship and Immigrations Servs. 4–5 (May 27, 2004), available at http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/sij_memo_052704.pdf (explaining USCIS agents may decide whether to consent to the court's findings); see also Adelson, *supra* note 74, at 70 ("Such language indicates that while 'generally' USCIS will support the findings of juvenile court judges who are statutorily granted the authority to make specific findings of fact in relation to the juveniles in question, exceptions could exist where an adjudicator would have the freedom to substitute his/her opinion for that of a juvenile court judge.") (citation omitted).

211. Jackson, *supra* note 61.

212. See *In re Erick M.*, 820 N.W.2d 639, 646 (Neb. 2012) (factoring the USCIS's position on fraudulent filing in upholding denial of requested SIJ status-related orders).

213. *In re Mario S.*, 954 N.Y.S.2d 843, 852–53 (N.Y. Fam. Ct. 2012).

214. See Foster Children Opportunity Act, H.R. 2036, §§ 2–6, 113th Cong. (2013) (providing support for increased education for practitioners in the area of child protection).

215. CTR. FOR PUB. POL'Y PRIORITIES, *supra* note 30, at 12.

216. See Mandelbaum & Steglich, *supra* note 97, at 615–16 (citing confusion over the SIJ status statute's "dependency" requirement where the state has a different, specific meaning of dependency).

order.²¹⁷ Instead, most courts require the child to request a SIJ status determination in conjunction with another cause of action.²¹⁸ Some argue this requirement prevents SIJ status abuse by children not currently in harm's way or have other means of pursuing permanent residency.²¹⁹ Others fear a "back door route to naturalization" by allowing independent actions for SIJ status predicate orders.²²⁰

Forcing additional dealings with the U.S. judicial system upon a child in determining whether he or she is eligible to apply for SIJ status is unnecessary. Paradoxically, such barriers perversely incentivize committing the very acts SIJ status was created to prevent—abandonment, neglect, and even abuse.²²¹ For example, if custodial relatives perceive a child has a better chance of citizenship if they no longer cared for the child, abandoning the child into state custody becomes a means for legal immigration status—a chance at a better life.²²²

The requirement forcing a child to be a dependent of the court is interpreted differently depending on the jurisdiction, with some commentators positing whether this requirement is simply an excuse courts can use in satisfying their own agendas rather than considering the best interest of the child.²²³ Sometimes even when the child meets the state's requirement to be a dependent of the court, the child has been found ineligible for a SIJ predicate order due to the manner in which the child became a

217. See Baum et al., *supra* note 59, at 623 (delineating New York state's limited family court jurisdiction).

218. See *id.* (recognizing need for preexisting New York state proceedings to initiate SIJ consideration).

219. See *In re Hei Ting C.*, 969 N.Y.S.2d 150, 154 (N.Y. App. Div. 2013) ("The requirement that a child be dependent upon the juvenile court or, alternatively, committed to the custody of an individual appointed by a State or juvenile court, ensures that the process is not employed inappropriately by children who have sufficient family support and stability to pursue permanent residency in the United States through other, albeit more protracted, procedures.").

220. See *In re T.J.*, 59 So.3d 1187, 1194 (Fla. Dist. Ct. App. 2011) (Wells J., concurring) (internal quotation marks omitted) (expressing concern in recognizing independent cause of action for SIJ status orders).

221. See *id.* at 1191 (arguing legitimate SIJ status claim denial might encourage a care taker of the undocumented child to abandon the child so that he may be granted citizenship).

222. See *id.* ("A summary denial, on the other hand, might incent T.J.'s aunt to truly 'abandon' T.J. at a police station or Department office in a misguided effort to obtain a dependency ruling.").

223. See BHABHA & SCHMIDT, *supra* note 51, at 7 ("The willingness of juvenile courts to establish dependency can vary greatly between jurisdictions, and even between judges within the same jurisdiction. These variations suggest that some local jurisdictions are placing local interests over the needs of unaccompanied and separated children.").

dependent of the court.²²⁴ For instance, in the case of *In re Erick M.*, additional dealings with the American judicial system before Erick was allowed to seek an SIJ predicate order.²²⁵ Although his father abandoned him, it was not until the state forced Erick to receive help for his alcohol abuse that he became a “dependent of the court” and therefore able to petition the court for an SIJ predicate order.²²⁶ However, the court ultimately held Erick was not a dependent of the court due to “abuse, neglect or abandonment,” as he was removed from the home for alcohol abuse.²²⁷ Therefore, according to this court, Erick was ineligible for SIJ status.²²⁸

V. CONCLUSION

SIJ status was established to protect all undocumented immigrant children currently residing in the United States from abuse, neglect, and abandonment.²²⁹ Although two children may have suffered the same traumatic experiences, under the current system their ability to obtain SIJ status has a lot to do with chance. On a basic needs level, non-profit organizations and caring individuals in the child welfare system have greatly assisted children in obtaining SIJ status. However, the U.S. immigration system is broken and until legislatures fix these issues, children growing-up as a sub-class of citizens—unnecessarily exposed to greater vulnerability and risk—will continue facing dire legal consequences.

Although TVPRA legislation and the DACA program have improved the quality of undocumented children’s lives, the immigration system remains crippled by endemic problems. Many children came to the United States traumatized, and due to their undocumented status, have been unable to receive the help they so desperately need. They are either deported to the same deplorable situations from which they fled, or continue suffering from neglect, abuse, or abandonment in the United States as a subclass population unable to gain lawful employment or quality educations.

224. See *In re Erick M.*, 820 N.W.2d 639, 643 (Neb. 2012) (noting although the lower court found Erick was a dependent of the court, he could not petition for an SIJ predicate order because he was removed from the home because of his own actions and not due to abuse, neglect or abandonment).

225. *Id.* at 642–43.

226. *Id.* at 643.

227. INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (2013); BHABHA & SCHMIDT, *supra* note 51, at 51.

228. *In re Erick M.*, 820 N.W.2d at 643.

229. INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (2013); BHABHA & SCHMIDT, *supra* note 51, at 51.

SIJ status can potentially protect many more children than it currently does.²³⁰ When Maria entered the country when she was only two months old, her parents were likely most worried about feeding and clothing her and meeting the family's most basic needs.²³¹ Maria was ineligible for any relief from immigration law until her father killed her mother. Erick also entered the country before the age of one. Abandoned by his father, he found some modicum of stability with his mother.²³² In the end, this "stability" rendered Erick ineligible for SIJ status.

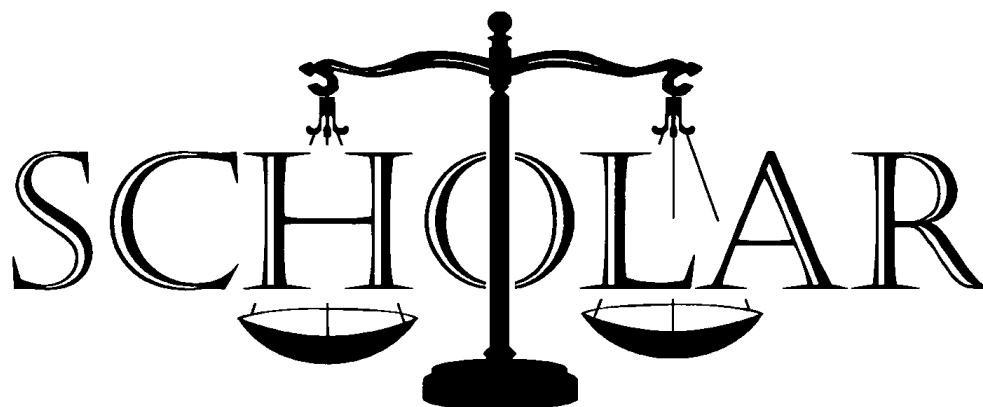
These two children hail from similar, tragic backgrounds. Both families risked everything in bringing them to the United States. Both children were helpless in the matter and only remembered growing up as Americans. However, the system delivered two entirely different outcomes. Maria has a bright future because her father brutally shot and killed her mother. Erick faces more court battles and a likely return to a country he does not remember because his mother tried to fulfill her parental responsibilities to the extent she could.

If SIJ status is not the solution, then some other remedy must be fashioned in providing relief to these thousands of traumatized children who, by no fault of their own, have been placed in dangerous situations here in the United States. The SIJ status procedure should be reformed in addressing problems raised by this Comment. In so doing, the United States can do its part in protecting those most vulnerable: children neglected, abused, or abandoned by parents who chose entry into the United States for them. Both state and federal agents should not frustrate the process or place additional roadblocks in their way—there are certainly enough hurdles to overcome without further assistance.

230. See Singh, *supra* note 25, at 527–28 (citing confusion and unfamiliarity as reasons courts are reluctant—and therefore less likely—in granting SIJS).

231. See HUM. RTS. INITIATIVE, *supra* note 1 (describing Maria's story).

232. *Erick M.*, 820 N.W.2d at 643.



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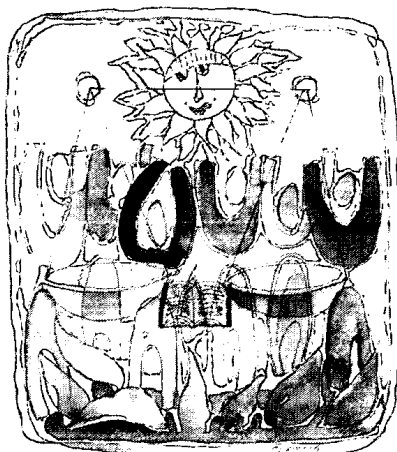
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