Children's Legal Rights Journal

Volume 33, Number1
Spring 2013

**Civitas ChildLaw Center Loyola University Chicago School of Law
in cooperation with the ABA Center on Children and the Law and the
National Association of Counsel for Children**

Children's Legal Rights Journal

Loyola University Chicago School of Law

Civitas ChildLaw Center

Cite as 33 CHILD. LEGAL RTS. J. __ (2013)

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Spring 2013

CHILDREN'S LEGAL RIGHTS JOURNAL

About the Children's Legal Rights Journal

For over twenty- five years, the *Children's Legal Rights Journal* (CLRJ) has been a leading source of information on children's law and policy for lawyers and other child-serving professionals who are interested in legal issues affecting children and families. The CLRJ contains articles on topics such as child welfare, juvenile justice, education, immigration, domestic relations, interfamily violence, and international children rights. Each issue also contains case, legislation and news updates, as well as book reviews and descriptions of promising programs and approaches. One issue each year is devoted to articles authored in connection with a topical symposium hosted by Journal editors.
In 2013, the CLRJ moved to a free, online format published by Loyola University Chicago School of Law's Civitas ChildLaw Center, in cooperation with the ABA Center on Children and the Law and the National Association of Counsel for Children. This new format allows for more timely treatment of emerging issues in children's law and expands access to the CLRJ's content to a national and international audience. Under this new format, the *Children's Legal Rights Journal* is published three times annually.

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Correction

In the article, "Money Talks": An Assessment of the Effects of Attorney Compensation on the Representation of Children in the Child Welfare System and How States Speak through Delivery Systems," by Theresa D'Andrea, appearing in the Fall 2012 issue of the *Children's Legal Rights Journal*, the Editor made an error in the course of the editing cycle. In the article, the following sentences appeared on page 68: The biggest drawback to this model of employing private attorneys per hearing or per hour, however, is because under this model courts may have little to no standards to follow when appointing attorneys, the result may compromise attorney independence because the model employs the same attorneys on a majority of its cases with courts. The sentence should read as follows: The biggest drawback to this model of employing private attorneys per hearing or per hour, however, is such a model may allow courts to compromise attorney independence by employing the same attorneys on a majority of its cases with courts having little to no standards when appointing attorneys. The Editor deeply regrets this oversight and apologizes to the Author.

UNDOCUMENTED CHILDREN AND FAMILIES IN AMERICA: AN INTERDISCIPLINARY EXPLORATION OF CHALLENGES AND EMERGING OPPORTUNTIES

Diane Geraghty *

The United States has long been mythologized as a safe haven and land of opportunity for immigrants.[1] In truth, however, the nation has a well-documented history of ambivalence toward those who seek a better life in America.[2] Nowhere is this ambivalence more evident than in the case of children and families who enter the United States without legal immigration status. Traditionally, federal immigration laws have focused on the detection, detention, and deportation of undocumented persons without regard to their age or circumstances.[3] As a result, and in stark contrast to other legal proceedings affecting children, the "best interest of the child" standard plays a limited role in federal immigration cases at present.[4]

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[1] Nowhere is this characterization more ardently expressed than in "The New Colossus," the Emma Lazarus poem inscribed on the Statute of Liberty: "Give me your tired, your poor, Your huddled masses, yearning to breathe free, The wretched refuse of your teeming shore, Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!"

[2] *See generally* PETER SCHRAG, NOT FIT FOR OUR SOCIETY: IMMIGRATION AND NATIVISM IN AMERICA (2010) (detailing the complex history of immigration attitudes and policies in the United States over the last three centuries). *See also* David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 FORDHAM URB. L.J. 393 (2010) (challenging the myths that children receive privileged treatment under U.S. immigration law and that immigrant parents of U.S.-citizen children are afforded easier paths to citizenship).

[3] Jacqueline Hagan et al., *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799, 1800 (2010).

[4] *See* Bridgette A. Carr, *Incorporating a "Best Interests of the Child" Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 121–24 (2009); Marcia Zug, *Should I Stay or Should I Go: Why Immigrant*

Increasingly, however, federal and state laws and policies have begun to recognize immigrant children's unique needs and vulnerabilities. The beginnings of these developments can arguably be traced to the U.S. Supreme Court's 1982 decision in *Plyler v. Doe*.[5] In that case, the Court's majority held that states cannot constitutionally deny undocumented children the right to a public education solely on the basis of their immigration status.[6] In the words of Justice Brennan, "[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."[7] Adopting *Plyler*'s narrative of undocumented children as innocent victims, Congress has enacted legislation that makes special provisions for maltreated and trafficked children.[8] More recently, in June 2012, the Obama administration announced that it would temporarily halt removal proceedings against unauthorized children living in the U.S. who are able to meet certain eligibility requirements.[9] Some states are also beginning to

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Reunification Decisions Should Be Based on the Best Interest of the Child, 2011 BYU L. REV. 1139, 1182 (2011).

[5] Plyler v. Doe, 457 U.S. 202 (1982).

[6] *Id.* at 202.

[7] *Id.* at 220.

[8] *See, e.g.*, Maura M. Ooi, Note, *Unaccompanied Should Not Mean Unprotected: The Inadequacies of Relief for Unaccompanied Immigrant Minors*, 25 GEO. IMMIGR. L.J. 883, 888–92 (2011) (describing existing forms of relief for unaccompanied minors); David B. Thronson, *Thinking Small: The Need for Big Changes in Immigration Law's Treatment of Children*, 14 U.C, DAVIS J. JUV. L. & POL'Y 239, 257–61 (2010) (discussing T and U visa options for children).

[9] Known as Deferred Action for Childhood Arrivals, or DACA, the policy applies to unauthorized children under the age of sixteen who have lived in the U.S. for at least five years, who are enrolled in school, have a high school/GED degree, or who have been honorably discharged from military service, and who have not engaged in serious criminal behavior. *See Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnextchann

adopt policies that ease restrictions on undocumented children and families.[10]

The impact of the nation's immigration policies on children and families cannot be underestimated. Today, one quarter of all children in America are members of an immigrant family.[11] This group constitutes the fastest growing segment of the U.S. child population.[12] Seventy-five percent of these children are U.S.-born citizens.[13] Among Latino U.S. citizen children, 40 percent, or 3.3 million children, are living with at least one undocumented parent.[14] These children are more likely to be living in poverty than children whose immigrant parents have legal status.[15] Between 2010 and 2012, over 200,000 undocumented parents of U.S. citizen children

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el=f2ef2f19470f7310VgnVCM100000082ca60aRCRD (last updated Jan. 18. 2013).

[10] Illinois, for example, recently adopted a law authorizing undocumented residents to obtain driver's licenses. *See* Greg Botelho, *New Illinois Law Allows Undocumented Immigrants to Get Driver's Licenses*, CNN (Jan. 29, 2013), http://www.cnn.com/2013/01/28/us/illinois-immigrant-licenses/. Illinois has also enacted a safe harbor law that protects children engaged in the commercial sex trade, including undocumented children, from criminal prosecution. H.B. 6462, 96th Gen. Assemb. (Ill. 2010) (enacted as Public Act 096-1464); 325 ILL. COMP. STAT. ANN. 5/3 (West 2013); 325 ILL. COMP. STAT. ANN. 5/5 (West 2013).

[11] WENDY CERVANTES & KEVIN LINDSEY, FIRST FOCUS, PRINCIPLES FOR CHILDREN IN IMMIGRATION REFORM (2013), http://www.firstfocus.net/sites/default/files/Principles%20for%20Children%20in%20Immigration%20Reform%20with%20Organizations.pdf.

[12] *Id*.

[13] *See Children and Family Policy*, MIGRATION POL'Y INST., NAT'L CENTER ON IMMIGRANT INTEGRATION POL'Y, http://www.migrationinformation.org/integration/children.cfm (last visited May 28, 2013).

[14] RICHARD FRY & JEFFREY S. PASSEL, PEW HISPANIC CTR., LATINO CHILDREN: A MAJORITY ARE U.S.-BORN OFFSPRING OF IMMIGRANTS, at ii (2009), http://www.pewhispanic.org/files/reports/110.pdf.

[15] *Id.* at 7.

were deported.[16] These children face stark options—remain in the U.S. without their parent or move to a country that is foreign to them. At least 5,000 of these children are living in foster care, with no one to care for them after their undocumented parent's detention or deportation.[17] Over 1.5 million undocumented children currently reside in the U.S., either having been brought to this country by a parent or having traveled alone to reach American shores.[18] In 2012, 14,000 undocumented children were placed in the custody of the Office of Refugee Resettlement (ORR) after their legal status was discovered by federal, state, or local law enforcement authorities.[19]

This symposium issue of the *Children's Legal Rights Journal* offers an interdisciplinary exploration of current issues affecting child immigrants, especially undocumented children and their families. As many of the articles in this volume suggest, undocumented children and parents face a range of challenges. These include a constant fear of deportation, family separation, and futures limited by immigration laws, policies, and practices.

Several articles in this symposium issue address the nexus between immigration and child protection. The first is based on a keynote address given by Howard Davidson, Executive Director of the ABA Center on Children and the Law. In his speech, entitled *Improving*

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[16] Roque Planas, *Deportation: More than 200,000 Parents Removed Who Say They Have a U.S. Citizen Child Since 2010*, HUFFINGTON POST: LATINO POL. (Dec. 17, 2012), http://www.huffingtonpost.com/2012/12/17/deportation-more-than-200000-parents-removed-citizen-child_n_2316692.html.

[17] Seth Freed Wessler, *Thousands of Kids Lost From Parents in U.S. Deportation System*, COLORLINES (Nov. 2, 2011), http://colorlines.com/archives/2011/11/thousands_of_kids_lost_in_foster_homes_after_parents_deportation.html.

[18] JEFFREY S. PASSEL ET AL., URBAN INST., UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES (2004), http://www.urban.org/UploadedPDF/1000587_undoc_immigrants_facts.pdf.

[19] *Unaccompanied Alien Children (UAC)*, REFUGEE COUNCIL USA, http://www.rcusa.org/index.php?page=uac (last visited May 28, 2013).

How Our Child Welfare System Addresses Children, Youth and Families Involved in the U.S. Immigration Process, Davidson sets forth a number of recommendations for state and county child welfare agencies to consider when responding to the needs of immigrant children. He argues that these agencies have an obligation to serve both abused and neglected child immigrants, as well as their undocumented family members. These services should be culturally and linguistically appropriate. Davidson also urges child-serving agencies to develop written protocols for working with immigrant families and to provide specialized training to line staff and supervisors. Lastly, he suggests that a parent or legal guardian's immigration status should never be the sole basis for termination of parental rights and that those parents who are subject to termination proceedings should have full participation rights in such cases.

In their article, *Child Maltreatment and Immigration Enforcement: Considerations for Child Welfare and Legal Systems Working with Immigrant Families*, academic social workers Alan J. Dettlaff and Megan Vinno-Velasquez explore the link between immigration status and a child's risk for abuse or neglect. Despite a longstanding assumption that the children of immigrant families are more likely to experience maltreatment, a major empirical study finds the opposite to be true—that children of immigrants are underrepresented in the child welfare population—although the authors acknowledge that further study is required to better understand the reasons for this finding. They also note that some children enter the foster care system not because they are abused, but because increased immigration enforcement efforts mean that some children are left without family members to care for them. The authors end their article with recommendations for child welfare practice and with a proposed agenda for researchers and policy makers going forward.

Meghan Johnson and Yasmin Yavar's article, *Uneven Access to Special Immigration Juvenile Status: How Recent State-Court Precedent Denies Relief to Children in Need*, addresses the challenges children face in using SIJS, or Special Immigration Juvenile Status, as a pathway to lawful immigration and permanent resident status. In her article, Johnson, an attorney, describes how in 1990, Congress adopted SIJS as a method for undocumented children who were victimized by parental abuse, neglect, or abandonment to achieve legal status. She goes on to outline the complicated and lengthy process involved in securing this form of relief for a child client. She also illustrates, through case law and examples, the challenges of involving states in the implementation of federal immigration policies. One memorable example is that, even though children are technically eligible to seek SIJS up until the age of twenty-one, juvenile courts in some states lose jurisdiction over maltreated children at the age of eighteen. In Johnson's judgment, this patchwork of state juvenile court laws leads to disparities in the treatment of youth who are eligible for the type of relief envisioned by Congress when it adopted the SIJS legislation.

In her contribution to the symposium issue, *A Path to Citizenship Through Higher Education for Undocumented Students in the U.S.: Examining the Implications of Martinez v. Regents of the University of California*, attorney Diana Moreno advocates for increased access to higher education for undocumented students, not just as a gateway of opportunity for immigrant youth, but also for the benefit of a society increasingly in need of a college-educated workforce. As she notes, however, differing interpretations of federal law by state courts has meant that some students in one state are eligible for educational benefits, while similar students in other states are denied these same benefits. Moreno uses a recent California Supreme Court case, *Martinez v. Regents of the University of California*, to illustrate her

point. At issue in that case was whether federal immigration law preempts a California law that allows undocumented students to pay in-state tuition for higher education.[20] Although Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 bars students from receiving a postsecondary benefit on the basis of residency, the Act does not define "benefit" or "residency," thereby leaving it to individual states to determine whether the provisions of their in-state tuition policies comport with federal law. Reversing a lower court opinion, the California Supreme Court in *Martinez* held that the requirement under state law, that a student must have attended a California high school for at least three years to qualify for in-state tuition, is not a residency requirement and does not, therefore, conflict with federal immigration law. Although Moreno agrees with the holding in *Martinez*, her broader point is that federal immigration reform is the ultimate assurance that all youth, without regard to their status, have a meaningful opportunity to receive a college education. In particular, she suggests that passage of the proposed Development, Relief, and Education of Alien Minors Act ("Dream Act") is the key to equal access to higher education for all students. Her article ends with a discussion of possible changes to the current language of the bill that would, in her view, make ultimate passage of the Dream Act more likely.

Finally, anthropologist Lauren Heidbrink, in her article, *Criminal Alien or Humanitarian Refugee?: The Social Agency of Migrant*

[20] The federal provision at issue in *Martinez* is Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). That provision contains the following language: "[N]ot withstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit . . . without regard to whether the citizen or national is such a resident." Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009; 8 U.S.C.A. § 1623 (West 2012).

Youth, explores the legal system's ambivalent treatment of unaccompanied minors—children who are in the United States without a parent or legal guardian and who lack lawful immigration status. Does the law treat these children as vulnerable victims in need of special protections, or are they instead considered criminal wrongdoers, subject to the same penalties as their adult counterparts? Heidbrink's article catalogues recent changes in federal policy that suggest a more "humanitarian" approach to unaccompanied children than existed in the past. While noting that children can now seek potential relief under special visas and asylum procedures, she also recognizes that these options are "difficult to obtain and easy to lose." Heidbrink aconcludes her article with the observation that undocumented children themselves may hold the key to breaking through the stereotypes of "criminal alien" or "powerless victim." She hails the growing willingness of young people to refuse to accept immigration policies based on labeling and to advocate for their own rights. She analogizes the growing DREAMers movement to the gay rights movement, in which visible activism by those most directly impacted by traditional norms became the catalyst for social change.

As the articles in this volume suggest, although comprehensive immigration reform is once again on the nation's agenda, at present it is unclear what shape it will take or the degree to which it will address issues affecting children and youth. It is our hope that the articles in this symposium issue, and the reactions and commentary they generate, will help inform the debate in a way that serves the needs of children, families and, ultimately, the nation.

Adapted from a presentation at Loyola University Chicago School of Law
Children's Legal Rights Journal Symposium: Growing Up Undocumented in America
October 12, 2012

IMPROVING HOW OUR CHILD WELFARE SYSTEM ADDRESSES CHILDREN, YOUTH, AND FAMILIES AFFECTED BY THE U.S. IMMIGRATION PROCESS

Howard Davidson[*]

I want to first thank Loyola University School of Social Work, which hosted, just six years ago, the first national meeting on connections between immigrants and government child welfare intervention into the lives of their families.[1] As a result, I became aware of an area of law that had somehow mostly escaped me for almost 35 years of child welfare legal system involvement. My general unfamiliarity with the impact of immigration on the work of the child welfare system extended over three decades as director of

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[*] Howard Davidson, J.D., is the Director of the ABA Center on Children and the Law in Washington, D.C. This Keynote speech was given on October 12, 2012, at the *Children's Legal Rights Journal's* 2012 Annual Symposium at Loyola University of Chicago School of Law, the subject of which was "Growing Up Undocumented in America." Mr. Davidson also became the first recipient of the *Civitas* ChildLaw Center's Leadership in Child Advocacy award, which was presented in conjunction with the Symposium.

[1] In July 2006, the Loyola University Chicago School of Social Work and the American Humane Association convened a policy forum in Chicago, Ill., which resulted in the creation of the Migration and Child Welfare National Network (MCWNN). *See e.g.*, *Migration: A Critical Issue for Child Welfare*, 21 PROTECTING CHILD., no. 2, 2006, http://www.americanhumane.org/assets/pdfs/children/protecting-children-journal/pc-pc-21_2pdf.pdf.

the ABA Center on Children and the Law[2] and five years representing children while directing the Children's Law Project at Greater Boston Legal Services.[3] In fact, the only time prior to 2006 that I examined any issue related to an unaccompanied and undocumented immigrant child on American soil was when seven-year-old Elián Gonzales managed to get from Cuba to Florida on a raft, and media inquiries came into the ABA during 2000 about his rights and those of his father living in Cuba.[4]

Although I was among those who had personally failed to look at child and family immigration issues through the lens of child welfare law and policy, we did present workshops on immigrant children at several biannual *ABA National Conferences on Children and the Law*,[5] and our monthly *ABA Child Law Practice* journal[6] has published several articles on immigration relief for children and parents (most recently in June 2012, *An Advocate's Guide to Protecting Unaccompanied Minors*;[7] and November 2012, *Meeting*

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[2] ABA CENTER ON CHILDREN & THE LAW, http://www.americanbar.org/groups/child_law.html (last visited Feb. 13, 2013).

[3] *Children's Disability Project*, GREATER BOS. LEGAL SERVICES, http://www.gbls.org/our-work/childrens-disability-project (last visited Feb. 21, 2013). Although GBLS no longer has a Children's Law Project, it does have a Children's Disability Project.

[4] *See* Clyde Haberman, *NYC; A Tug of War as Complex as War*, N.Y. TIMES, Jan. 14, 2000, http://www.nytimes.com/2000/01/14/nyregion/nyc-a-tug-of-war-as-complex-as-war.html.

[5] A 2007 conference hosted by Harvard Law School and the ABA include sessions on undocumented youth, *See e.g.*, News Release, ABA, Harvard Law School Sponsor National Conference on Children and the Law (Apr. 2, 2007), *available at* http://apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=109; *see also 2013 Conferences*, A.B.A. CENTER ON CHILD. & L., http://www.americanbar.org/groups/child_law/conference2013.html (last visited Mar. 20, 2013) (describing upcoming conferences that will include related sessions).

[6] *ABA Child Law Practice*, A.B.A. CENTER ON CHILD. & L., http://www.americanbar.org/groups/child_law/publications/child_law_practiceonline.html (last visited Feb. 15, 2013).

[7] Priya Konings, *An Advocate's Guide to Protecting Unaccompanied Minors*, 31 CHILD L. PRAC. 81 (2012).

the Citizenship and Immigration Needs of Foster Children).[8] Yet immigration law and policy have for too long remained a topic that my Center colleagues and fellow child advocacy attorneys knew far too little about.

We were not alone. It was not until the 2010 second edition of what I consider the "Bible" of child welfare legal representation, *Child Welfare Law and Practice*, published by the National Association of Counsel for Children,[9] that there was an added chapter on representing children who are not U.S. citizens, authored by Katherine Brady and David Thronson.[10] That chapter described the process of obtaining for an undocumented child the form of immigration relief known as Special Immigrant Juvenile Status, described several other applicable types of immigration relief, and discussed how immigration issues related to child custody disputes.

I. The Climate of Change: A Shifting Legal Landscape for Undocumented Youth

Although there was a lack of legal focus on child and family immigration issues for several decades, this did not mean the American Bar Association had not been addressing immigrant child and family issues for many years. In 1995, the ABA Commission on Immigration[11] sponsored an ABA-approved resolution[12] that noted

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[8] Pamela Kemp Parker, *Meeting the Citizenship and Immigration Needs of Foster Children*, 31 CHILD L. PRAC. 129 (2012).

[9] CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES (Donald N. Duquette & Ann M. Haralambie eds., 2d ed. 2010). This NACC publication is commonly referred to as the "Red Book." *See, e.g.*, Felix Ortiz, *Red Book 2nd Ed: News Release*, NAT'L ASS'N COUNS. FOR CHILD. (Dec. 15, 2010), http://www.naccchildlaw.org/news/54865/.

[10] Katherine Brady & David B. Thronson, *Immigration Issues—Representing Children Who Are Not United States Citizens*, *in* CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 415, 415-27 (Donald N. Duquette & Ann M. Haralambie eds., 2d ed. 2010).

[11] *Commission on Immigration*, A.B.A., http://www.americanbar.org/groups/public_services/immigration.html (last visited Feb. 15, 2013).

the rights of immigrant children as articulated in the United Nations Convention on the Rights of the Child,[13] and called for governments to not discriminate against any child based on that child's citizenship or immigration status, or the status of his parents.[14] That resolution put the ABA on record as opposing efforts to restrict or deny any child in the U.S. equal access to education, health care, foster care, or social services.[15]

Before the federal care and custody of apprehended unaccompanied and undocumented immigrant minors was transferred to the U.S. Department of Health and Human Services (Office of Refugee Resettlement),[16] the ABA Immigration Commission developed, and the ABA approved, humane standards for children's immigration detention. In over 100 pages the ABA addressed the needs of immigrant minors and called for their legal representation at government expense.[17]

For many years, that ABA Commission has sponsored pro bono legal projects providing representation and other assistance to unaccompanied immigrant minors.[18] The ProBar Children's Rights

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[12] 1995 A.B.A. SEC. LITIG. & INT'L L. & PRAC. REP. 110 [hereinafter 1995 A.B.A. SEC. REP.] *available at* http://www.americanbar.org/content/dam/aba/directories/policy/1995_my_110.authcheckdam.pdf.

[13] Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

[14] 1995 A.B.A. SEC. REP., *supra* note 12; *see also* Convention on the Rights of the Child, *supra* note 13, at arts. 2, 7, 8, and 22 (provisions that address citizenship or nationality status).

[15] *See* 1995 A.B.A. SEC. REP., *supra* note 12.

[16] *Office of Refugee Resettlement*, ADMIN. FOR CHILD. & FAMILIES, http://www.acf.hhs.gov/programs/orr (last visited Feb. 15, 2013). Today, the ACF's Office of Refugee Resettlement's role is billed as helping Asylees Determine Eligibility for Assistance and Services.

[17] ABA COMM'N ON IMMIGRATION, ABA CIVIL IMMIGRATION DETENTION STANDARDS (2012), http://www.americanbar.org/content/dam/aba/administrative/immigration/abaimmdetstds.pdf.

[18] *See* Immigrant Children: Pro Bono or Pro Se?: Representing Unaccompanied Immigrant and Refugee Minors in Removal Proceedings (Feb. 7, 2004), *available at* http://www.americanbar.org/content/dam/aba/migrated/publicserv/immigration/Im

Project in South Texas[19] serves more than 700 detained minors at shelters, providing "Know Your Rights" presentations and coordinating their legal representation.[20] ProBar recruits volunteer attorneys, law students, and legal assistants to help identify and secure appropriate immigration relief for many undocumented children.[21] Another ABA-supported program is Volunteer Advocates for Immigrant Justice in Seattle,[22] the first pro bono legal aid program supported by Microsoft.[23] It is now affiliated with a larger, nationwide volunteer legal services program for unaccompanied immigrant minors called Kids in Need of Defense ("KIND"). The Seattle program's Children's Legal Orientation Program also provides "Know Your Rights" presentations for detained immigrant youth in Washington State, and I am pleased that their work is

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migrant_Children_Pro_Bono_or_Pro_Se.authcheckdam.pdf; *Projects & Initiatives*, A.B.A. COMMISSION ON IMMIGR., http://www.americanbar.org/groups/public_services/immigration/projects_initiatives.html (last visited Feb. 15, 2013).

[19] *See South Texas Pro Bono Asylum Representation Project (ProBAR)*, A.B.A. COMMISSION ON IMMIGR., http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/south_texas_pro_bono_asylum_representation_project_probar.html (last visited Feb. 15, 2013); *South Texas Pro Bono Asylum Representation Project (ProBAR)*, PROBONO.NET, http://www.probono.net/oppsguide/organization.441349-South_Texas_Pro_Bono_Asylum_Representation_Project_ProBAR (last visited Feb. 15, 2013) [hereinafter *South Texas ProBAR*].

[20] *See Immigrant Children's Assistance Project (ICAP)*, A.B.A. COMMISSION ON IMMIGR., http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/south_texas_pro_bono_asylum_representation_project_probar/immigrant_childrensassistanceprojecticap.html (last visited Feb. 21, 2013).

[21] *See South Texas ProBAR*, *supra* note 19.

[22] *See Volunteer Advocates for Immigrant Justice (VAIJ)*, A.B.A. COMMISSION ON IMMIGR., http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/volunteer_advocates_for_immigrant_justice_vaij.html (last visited Feb. 15, 2013).

[23] *Id.*; *See also Brad Smith*, KIND: KIDS IN NEED DEF., http://www.supportkind.org/about-us/board-members/136-brad-smith (last visited Feb. 15, 2013) (detailing some of the activities performed in partnership with Microsoft in support of immigration issues).

funded by the HHS Office of Refugee Resettlement.[24]

Given all the work surrounding immigration and children, I think it was inevitable that I would have to become familiar with the immigration-child welfare nexus. The statistics alone illustrate the significance of this connection. Of the total undocumented population in the U.S., approximately sixteen percent, or 1.8 million, are estimated to be children.[25] In 2008, one in four children in the U.S. lived in an immigrant family,[26] and 5.5 million children had at least one undocumented parent.[27]

According to an August 25, 2012 story in the *New York Times*, more than 11,000 unaccompanied minors were placed in deportation proceedings in 2012, nearly double the number in 2011.[28] The Women's Refugee Commission interviewed 150 of such youths in June 2012, youths who had crossed the border in Texas.[29] Most said they were seeking to escape increasingly violent gangs and drug traffickers aggressively recruiting them at home.[30] Those dangers suggest another important area of legal reconsideration and greater advocacy: addressing these children's unique plight through a more

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[24] *See About VAIJ*, A.B.A. COMMISSION ON IMMIGR., http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/volunteer_advocates_for_immigrant_justice_vaij/about_us.html (last visited Feb. 15, 2013).

[25] Angie Junck, *Special Immigrant Juvenile Status: Relief for Neglected, Abused, and Abandoned Undocumented Children*, 63 JUV. & FAM. CT. J. 48, 49 (2012), http://www.throughtheeyes.org/files/2012_ncs_materials/B3_handout18.pdf.

[26] Donald J. Hernandez et al., *Children in Immigrant Families: Looking to America's Future*, 22 SOC. POL'Y REP., no. 3, 2008 at 3, 5, http://srcd.org/sites/default/files/documents/22_3_hernandez_final.pdf.

[27] Julia Preston, *Risks Seen for Children of Illegal Immigrants*, N.Y. TIMES, Sept. 20, 2011, http://www.nytimes.com/2011/09/21/us/illegal-immigrant-parents-pass-a-burden-study-says.html?_r=0.

[28] Julia Preston, *Young and Alone, Facing Court and Deportation*, N.Y. TIMES, Aug. 25, 2012, http://www.nytimes.com/2012/08/26/us/more-young-illegal-immigrants-face-deportation.html?pagewanted=all.

[29] Jessica Jones, *Fleeing Life-Threatening Violence, Children Risk Their Lives to Come to the United States*, WOMEN'S REFUGEE COMMISSION BLOG (Oct. 18, 2012), http://womensrefugeecommission.org/blog/1502-fleeing-life-threatening-violence-children-risk-their-lives-to-come-to-the-united-states.

[30] *Id.*

youth-sensitive asylum process.

For me, and also many of my child welfare law colleagues, the legal challenges facing these children and families were, until just a few years ago, largely unknown to us. Thanks to the 2006 and follow-up 2008 Loyola University conferences, I met stellar Chicago-area legal advocates for these children, including Maria Woltjen,[31] Jeannie Ortega-Peron,[32] and Julie Sollinger.[33] I learned that the Illinois Department of Children and Family Services takes seriously its role as an advocate for immigration relief for children in its custody, and that immigration advocates in Chicago helped create one of the country's first Memoranda of Understanding ("MOU") between a state child welfare agency and the Mexican Consulate,[34] which I first read about in the Summer 2005 issue of our quarterly *Children's Legal Rights Journal*, a Loyola University Chicago School of Law publication produced in partnership with our Center.[35] The MOU, in the child welfare context, formally establishes relationships and expectations when a child welfare agency takes custody of a child who is a citizen of

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[31] Maria Woltjen, J.D., is Director of The Young Center for Immigrant Children's Rights and a Lecturer in Law at the University of Chicago Law School. *Maria Woltjen*, U. CHI. L. SCH., http://www.law.uchicago.edu/faculty/woltjen (last visited Feb. 15, 2013).

[32] Jeannie Ortega-Piron, J.D., is Deputy Director of the Illinois Department of Children and Family Services Office of the Guardian, Guardian and Advocacy Department. ILL. DEP'T CHILD. & FAM. SERVICES MGMT. BIOS (Mar. 2013), http://www.state.il.us/dcfs/library/management_bio.htm.

[33] Julie Sollinger, J.D., is a Supervising Attorney with the Office of the Cook County Public Guardian in Chicago, Illinois.

[34] *See* CHILD WELFARE INFO. GATEWAY, SITE VISIT REPORT: CULTURALLY RESPONSIVE CHILD WELFARE PRACTICE WITH LATINO CHILDREN AND FAMILIES: A CHILD WELFARE STAFF TRAINING MODEL (2008), https://www.childwelfare.gov/pubs/site_visit/illinoisfinal.pdf. This Memorandum has been hailed as an exemplary model for other jurisdictions. *See also Sample Forms from Public Child Welfare Agencies, Including MOUs with the Mexican Consulate*, FAM. TO FAM. CAL., http://www.f2f.ca.gov/sampleMOUs.htm (last visited Feb. 15, 2013) (providing sample forms and MOUs used by various California counties for working with the Mexican Consulate on appropriate child welfare cases).

[35] *Children's Legal Rights Journal*, LOY. U. CHI., http://www.luc.edu/law/student/publications/clrj/ (last visited Mar. 20, 2013).

another country, or whose parents are citizens of another country.[36] The MOU also delineate the assistance that a foreign consulate can provide to the child welfare agency, including assistance in locating parents or relatives abroad.[37]

Even though Congress created the *Special Immigrant Juvenile Status*, or SIJS, immigration relief option in 1990,[38] as an amendment to the federal *Immigration and Nationality Act*,[39] until 2006, I probably would not have been able to describe its provisions to my fellow child welfare attorneys. As I look back, that is amazing considering that this 1990 law specifically provided legal relief for abused, neglected, and abandoned children.[40]

In 2011, I first learned about the magnitude of the problem faced by children born in the U.S. whose undocumented parents, often their sole caretakers, were detained by immigration authorities or deported. In the first six months of federal fiscal year 2011, the U.S. deported a record number of 397,000 individuals, of whom 46,000 were parents of U.S. citizen children.[41]

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[36] *A Social Worker's Tool Kit for Working with Immigrant Families: A Child Welfare Flowchart*, MIGRATION AND CHILD WELFARE NATIONAL NETWORK 6 (2009), *available at* http://www.americanhumane.org/assets/pdfs/children/pc-migration-sw-toolkit-flowchart.pdf (last visited Mar. 24, 2013).

[37] *Id.*

[38] *Special Immigrant Juveniles (SIJ) Status*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=3d8008d1c67e0310VgnVCM100000082ca60aRCRD&vgnextchannel=3d8008d1c67e0310VgnVCM100000082ca60aRCRD (last visited Feb. 15, 2013).

[39] 8 U.S.C.A. § 1158 (West 2012); *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextchannel=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnextoid=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD (last visited Feb. 15, 2013).

[40] *Special Immigrant Juveniles (SIJ) Status*, *supra* note 38; *see also Remedies for Immigrant Children and Youth*, IMMIGRANT LEGAL RESOURCE CENTER, http://www.ilrc.org/info-on-immigration-law/remedies-for-immigrant-children-and-youth (last visited Feb. 15, 2013) (providing information about how abused and neglected immigrant children or their lawyers may access SIJS benefits).

[41] APPLIED RESEARCH CTR., SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 5 (2011)

It was estimated, in the recent *Shattered Families* report, that at least 5,100 children were then living in state foster care because their parents had either been detained or deported.[42] It has also been estimated that children living with a foreign born parent comprise as much as 9.6 percent of all children who come to the attention of the child welfare system, many of them who have been living in mixed status families, where at least one family member is undocumented.[43] Four out of five of these children are U.S. citizens; two-thirds are Hispanic.[44]

The significance of this report to child welfare agencies is that it highlighted a generally hidden problem: large numbers of children were entering foster care because of their parent or caretaker's immigration-related detention or deportation. It also led several state child welfare agencies to request assistance in educating their attorneys and others about immigration issues.

II. Recommendations for Addressing the Immigration-Child Welfare Nexus

As I studied the implications for child welfare agencies handling the influx of cases involving immigrant children and families, I noted that, other than in a few states, there is a complete absence of child welfare agency policy and law on the immigration-child welfare nexus.

A. Critical Areas of Child Welfare Law

In one of my first conference presentations on this topic, I suggested seven critical areas of child welfare law and policy reform: (1) serving child immigrant abuse and neglect victims; (2) placing children with undocumented family members; (3) developing written

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[hereinafter SHATTERED FAMILIES], *available at* http://arc.org/shatteredfamilies; *see also* Ray Sanchez, *Deportations Leave Behind Thousands of Children in Foster Care*, HUFFINGTON POST: LATINO VOICES, Nov. 3, 2011, http://www.huffingtonpost.com/2011/11/02/deportation-immigrant-children-foster-care_n_1072553.html.

[42] SHATTERED FAMILIES, *supra* note 41, at 6.

[43] *Id.* at 64 n.50.

[44] *Id.*

protocols related to immigration; (4) using culturally sensitive approaches; (5) applying the Vienna Convention on Consular Relations; (6) addressing repatriation considerations; and (7) providing protections in termination of parental rights proceedings. These are still relevant principles.

1. ***Serving child immigrant abuse and neglect victims***

Child welfare agencies should be required to serve child immigrants victimized by abuse, neglect, or abandonment, or otherwise fleeing violence in their families, as a child protection case. This should be done without constraints on the state or county agency, the private agencies they work with, or their caseworkers' ability to provide all services and referrals a child needs that would otherwise be available to U.S. citizen children. Lack of a child or parent's eligibility for federally-supported programs or services should not be a bar to providing what the family requires to adequately protect its child, and should also help facilitate family reunification.

2. ***Placing children with undocumented family members***

State and county child welfare agencies should not have barriers, unrelated to child safety, to the placement of children with undocumented family members and relatives, regardless of their immigration status. When children need to be placed, agencies should accept prompt custody for the purposes of facilitating foster and kinship placement of unaccompanied or separated children. They should also give the same attention to the child's safety, permanency, and well-being that is supposed to be afforded to U.S. citizen children, and provide the same "reasonable efforts" to reunify families.[45] Unfortunately, we have learned of situations where undocumented adults are passed over as possible placements for a child, or children are removed from the home of an undocumented caretaker.[46]

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[45] *See, e.g.*, CHILD WELFARE INFO. GATEWAY, REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN: SUMMARY OF STATE LAWS (2009), http://www.childwelfare.gov/systemwide/laws_policies/statutes/reunifyall.pdf.

[46] *See* Dep't of Soc. & Health Servs. v. Paulos, 270 P.3d 607, 616 (Wash. Ct. App. 2012).

3. ***Developing written protocols related to immigration***

The work of child welfare agency attorneys, in cases involving undocumented immigrant children, should be guided by written agency legal protocols that instruct and direct them to promptly institute legal actions related to the immigration status of children in agency custody. This includes juvenile court proceedings that provide the predicate for Special Immigrant Juvenile Status ("SIJS"), or otherwise helping assure that if a child is a victim of crime such as sexual abuse, has suffered family violence, or has been a trafficking victim, then he is aided in appropriate immigration applications that can help him remain in-country on a path towards citizenship. Ideally, this work should be coordinated through an agency Immigration Issues Liaison, a position every state and county child welfare agency should establish.[47] I have met several individuals who have this responsibility, and they have been able to help caseworkers, agency lawyers, and judges with immigration-related issues, and foster relationships with foreign consulates.

4. ***Using culturally sensitive approaches***

Child welfare agencies should, pursuant to clearly stated policy, always provide culturally sensitive support and language-appropriate services to immigrant children and families. They should do this through establishment and maintenance of collaborative partnerships using the resources of grass roots immigrant community agencies. One example of a child welfare agency policy that reflects the diversity of families that they serve, including immigrant families, is in New York City. The Administration for Children's Services has *Immigration and Language Guidelines for Child Welfare Staff*, which are intended to maximize child welfare services to meet the diverse needs of New York City's immigrant communities.[48]

5. ***Applying the Vienna Convention on Consular Relations***

Child welfare agencies should have clear written policy

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[47] *See* Yali Lincroft, *Helping Immigrant Families: Interviews with Four California Social Workers*, CHILD. VOICE, Sept.–Oct. 2008, *available at* http://www.cwla.org/voice/0809immigrantfamilies.htm.

[48] NYC ADMIN. FOR CHILDREN'S SERVS., IMMIGRATION AND LANGUAGE GUIDELINES FOR CHILD WELFARE STAFF 1 (2d ed.), http://www.nyc.gov/html/acs/downloads/pdf/immigration_language_guide.pdf.

mandating that they promptly follow the consular notice requirements of the *Vienna Convention on Consular Relations.*[49] This is a treaty the U.S. has long been a party to, which mandates that as soon as a government agency takes a foreign national child into child protective custody, and when it institutes a state court action that could affect the parental rights of a non-citizen mother or father, that it follow the *Convention's* requirements.[50] The *Convention* also provides a framework through which foreign consulates can provide a range of assistance to states in child custody-related cases affecting foreign national children or parents.

6. ***Addressing repatriation considerations***

Since some children leave foster care for placement with, or a return to, a parent or relative in another country, child welfare agencies should have policies guiding prompt inquiries and decisions on the safety of repatriation, including—after diligent family-finding efforts—expeditious checks on the suitability of a child's parents and relatives as placements. In certain cases involving both citizen and non-citizen children who have parents, or relatives, residing in other countries, it may be in a child's best interests to be sent to live with that parent or relative. If a state or county child welfare agency decision is made to repatriate a child, it should only be done through written protocols that mandate close coordination with child welfare authorities in the country of return, with special attention given to the child's safety.

7. ***Providing protections in termination of parental rights proceedings***

Child welfare agencies should not institute termination of parental rights proceedings against deported or immigration-detained parents without giving them full opportunity to be present and participate actively in such proceedings, through competent counsel. Deportation or detention, or the possibility of such, should never in itself be used as a basis for terminating parental rights.

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[49] Vienna Convention on Consular Relations, *done* Apr. 24 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (entered into force Mar. 19, 1967).

[50] Pamela Kemp Parker, *When a Foreign Child Comes into Care, Ask:* Has the Consul Been Notified?, 19 CHILD L. PRAC. 177, 177 (2001).

B. ABA Commission on Youth At Risk Policy Reforms

In 2011, through my work with the American Bar Association's Commission on Youth at Risk, we developed several resolutions, approved by the ABA House of Delegates, calling for several additional law and policy reforms.[51] These proposed policy reforms are summarized below. In part they elaborate on the seven general principles listed above.

1. **Screen for immigration status**

Whenever an undocumented child is apprehended by immigration authorities, placed in foster care, or otherwise made the subject of a case opened by a child welfare agency, that child should be promptly screened for the wide range of possible immigration relief options by the public agency that encounters the child.

2. **Assure access to birth certificates**

U.S. citizen children who may have undocumented parents should be entitled to full access to their U.S. birth certificates, paternity documents, and other vital records, such as state-issued identification cards and school and health records, without regard to the immigration status of their parent or guardian. In examining this issue, we learned that some undocumented parents have difficulty obtaining such records for their children or are fearful of seeking them. Before any child in the custody of a child welfare agency leaves the United States, he should be assisted in obtaining appropriate U.S. or foreign passports, other legal forms of identification, and his complete education and medical records.

3. **Provide detained parents access to counsel**

When parents are in immigration detention, they should have access to an attorney who can help them understand legal issues related to the care and custody of children who were in their care prior to apprehension. They also should be referred to an attorney who can represent them in state court custody, dependency, or other state court actions related to their children. This, of course, will require the family law and juvenile dependency bar to step up to the

[51] ABA SUMMARY OF RESOLUTIONS, Resolutions 103A – 103D (2011), http://www.abanow.org/wordpress/wp-content/files_flutter/13105754842011_hod_annual_meeting_summary_of_resolutions.authcheckdam.pdf.

plate to be better informed about how they can help. Related to this, in 2010, the ABA approved a policy calling for the establishment of programs to provide *criminal defendants and prisoners* with no cost or low cost legal assistance on family law issues, including the avoidance of their child being placed in foster care, through private kinship care and guardianship arrangements.[52] This aid should also be provided to parents detained for immigration violations, since they risk being permanently separated from their children because of federal immigration law enforcement.

4. **Permit detained parents to participate in child welfare-related court proceedings**

In state court proceedings related to the care and custody of their children, detained parents should have an opportunity for meaningful participation as well as access to services related to their parenting, when mandated by a state court as part of a case plan. Because of the potential impact of these state court cases, parents who are in federal detention due to alleged immigration law violations should either be granted release in order to attend relevant child welfare court hearings, or to participate in such hearings through telephone or video conferencing. Also, when children enter foster care, the child welfare agency's case plan will often specify what a parent must do to regain custody of his child. If detained, or deported to another country, parents should still be provided with the services needed to fulfill their case plan requirements.

5. **Obtain information regarding location and placement of family members**

State child welfare agencies and juvenile courts should have ready access to Immigration and Customs Enforcement information on the location of, and any transfer of, detained immigrant parents. These detained parents should also receive information on the location of, or any changes of placement for, their minor children.

6. **Clarify detention and removal laws and polices**

Laws and policies should be clarified to *explicitly prohibit* a parent's immigration detention, or removal from the U.S., from being the sole basis for failing to provide legally mandated reasonable

[52] *Id.* at 103C.

efforts to reunify the family. It is critical that such parents, if they have child welfare agency case plans, have plans that set realistic goals that recognize the need for linguistic and culturally competent social services. A parent's immigration status alone should never disqualify him from accessing the support services that he so desperately needs.

C. Significant Immigration Bills and Reports

There are several bills that were introduced in the last session of Congress to address some of these issues. They included Representative Roybal-Allard's *Help Separated Families Act*[53] and the *Humane Enforcement and Legal Protections for Separated Children Act*[54] sponsored by Senator Al Franken and Representative Lynn Woolsey. California Governor Jerry Brown recently signed into law two landmark state laws addressing these issues, which may become models for other states.[55] In August 2012, the Center for American Progress issued a report, *How Today's Immigration Enforcement Policies Impact Children, Families, and Communities*, that recommended Presidential Executive Action to allow undocumented parents who are supporting U.S. citizen children to

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[53] Help Separated Families Act of 2012, H.R. 6128, 112th Cong. (2d Sess. 2012). The Help Separated Families Act addresses the growing number of U.S. citizen children placed in the child welfare system as a result of immigration enforcement actions, with the intent to keep children of detained or removed parents united with their families. *See also Rep. Roybal-Allard Introduces Help Separated Families Act to Keep Immigrant Families Together*, ROYBAL-ALLARD (July 16, 2012), http://roybal-allard.house.gov/news/documentsingle.aspx?DocumentID=303274 (describing Rep. Roybal-Allard's growing awareness of the issues and intentions behind introducing the Act)..

[54] HELP Separated Children Act, S. 1399, 112th Cong. (1st Sess. 2011); Wendy Cervantes, *Humane Enforcement and Legal Protections (HELP) for Separated Children Act*, FIRST FOCUS CAMPAIGN FOR CHILD. (Sept. 15, 2011), http://www.ffcampaignforchildren.org/resources/documents-and-publications/fact-sheets/humane-enforcement-legal-protections-help-for-sepa-0; *see also Franken, Kohl Introduce HELP Separated Children Act*, AL FRANKEN: U.S. SENATOR FOR MINN. (June 22, 2010), http://www.franken.senate.gov/?p=hot_topic&id=877 (recounting some of the humanitarian protections extended by the Act).

[55] Patrick McGreevy & Anthony York, *Gov. Acts on Deportation, License Bills*, L.A. TIMES, Oct. 1, 2012, http://articles.latimes.com/2012/oct/01/local/la-me-brown-bills-20121001.

stay in this country if they have not committed any crimes and are only guilty of being in the country without legal status.[56]

Probably the most-cited report about the impact on children of immigration enforcement against their parents has been the November 2011 *Shattered Families* report referred to earlier,[57] which was produced from a study conducted by the Applied Research Center.[58] As the report's subtitle suggests, there is a "perilous intersection between immigration enforcement and the child welfare system."[59] I think the most important thing in the report is that it includes over thirty individual stories of how parents and children have suffered greatly because of the mishandling of their cases, and why these problems should be addressed to better protect the rights and interests of parents and children.[60] These stories paint a horrific picture far better than mere statistics would.

III. Roadblocks and Progress: Addressing the Nexus Between Undocumented Relatives, Parental Unavailability, Permanency Decisions, and SIJS

In cases where minor children have been left behind by immigration enforcement actions and placed in state foster care or even when unaccompanied minors are in federal custody, another barrier to family integrity occurs when child welfare caseworkers are reluctant to place those children with relatives living in the U.S. who happen to be undocumented. I have heard that some states will not conduct a home study, or license or approve a relative as a foster placement, or not even place the child there at all, if the relative does

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[56] Joanna Dreby, *How Today's Immigration Enforcement Policies Impact Children, Families, and Communities*, CENTER FOR AM. PROGRESS (Aug. 20, 2012), http://www.americanprogress.org/issues/immigration/report/2012/08/20/27082/how-todays-immigration-enforcement-policies-impact-children-families-and-communities/.

[57] SHATTERED FAMILIES, *supra* note 41.

[58] *See* APPLIED RES. CENTER, http://www.arc.org (last visited Feb. 15, 2013). The Applied Research Center (ARC) is a 30-year-old racial justice think tank that uses media, research, and activism to promote solutions.

[59] SHATTERED FAMILIES, *supra* note 41.

[60] *Id.* .

not have a Social Security number. There is a remedy for that: private home studies can be arranged; criminal background checks and fingerprint clearance letters provided, with consulate assistance, from the relative's home country; and even alternative taxpayer identification numbers can be secured.

The Washington State Court of Appeals has issued a decision, *In re Dependency of M.R.*,[61] reversing a trial court's order to remove a child from her paternal grandparents' home because they were undocumented immigrants.[62] The court found she had a strong emotional and psychological bond with her grandparents, they had fostered her relationship with other family members, and that removal from their care would be detrimental to the child.[63] In contrast, Illinois child welfare agency policy explicitly states that the immigration status of a relative caregiver should not hinder the placement of a relative child in his home.[64]

I want to share some other state appellate case law establishing a variety of legal concepts worthy of following broadly throughout the country. Almost ten years ago, a Georgia appellate court in *In re M.M.*,[65] overturned termination of a father's parental rights by clearly stating what should be a universally inviolate principle: that if termination is essentially based on the mere possibility of a father being deported someday, and the child possibly either having to be returned to state custody or sent to another country, that such a termination cannot be based simply on "speculation on the vagaries or vicissitudes that beset every family on its journey through the thicket of life."[66]

In 2009, the Nebraska Supreme Court, in *In re Angelica L.*,[67]

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[61] Dep't of Soc. & Health Servs. v. Paulos, 270 P.3d 607, 616 (Wash. Ct. App. 2012).
[62] *Id.*
[63] *Id.* at 614-15.
[64] Policy Guide from Erwin McEwen to Ill. DCFS and POS Staff, Policy Guide 2008.01: Licensing, Payment and Placement of Children with Undocumented Relatives 1 (May 16, 2008), http://www.state.il.us/dcfs/docs/ocfp/policy/Policy_Guide_2008.01.pdf.
[65] *In re* M.M., 587 S.E.2d 825 (Ga. Ct. App. 2003).
[66] *Id.* at 832.
[67] *In re* Angelica L., 767 N.W.2d 74 (Neb. 2009).

issued an opinion that should be discussed in any attorney training on children in foster care who have detained or deported immigrant parents. In this case, children entered foster care, and their mother was deported.[68] The appellate court criticized the agency for frustrating her efforts to be reunified with her children, and overturned the termination of her parental rights, holding that it was never established that she was unfit or that termination of parental rights ("TPR") was in the children's best interests.[69] The trial court seemed to be oblivious that the mother, upon her return to Guatemala, had secured a stable living environment and could provide for her children's basic needs.[70]

In 2011, in *In re C.M.B.R.*,[71] the Supreme Court of Missouri also reversed a TPR of a Guatemalan mother, whose children had been placed in a pre-adoptive home.[72] The mother had been incarcerated as a result of a workplace raid, but had arranged for alternative care of her son. However, that placement fell through and he was placed in a home with a couple who wanted to adopt him.[73] The high court judges called the case a "manifest injustice" and a travesty in its egregious procedural errors, its long duration, and its impact, and the court stated that at retrial the mother would finally have an opportunity to present evidence on her behalf.[74]

Also in 2011, the Supreme Court of Vermont, in *In re R.W.*,[75] reversed a TPR, finding that a father, residing in Sri Lanka, had not been given an opportunity to participate in hearings through telephone participation, interpreter services, or assignment of counsel, and that there were no facts constituting grounds to terminate his parental rights.[76] The court noted a failure to notify the Sri Lankan consulate of the proceedings.[77]

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[68] *Id.* at 80.
[69] *Id.* at 93.
[70] *Id.*
[71] *In re* Adoption of C.M.B.R., 332 S.W.3d 793 (Mo. 2011).
[72] *Id.* at 823.
[73] *Id.* at 802.
[74] *Id.* at 824 n.25.
[75] *In re* R.W., 39 A.3d 682 (Vt. 2011).
[76] *Id.* at 699-700.
[77] *Id.* at 699.

In 2012, the Supreme Court of Idaho, in *In re Doe*,[78] also overturned a TPR against a Mexican father who had made it clear to the agency he wanted his daughter to live with him in Mexico. But the girl had been in foster care for several years with foster parents, one of whom was a child welfare agency employee who wanted to adopt her.[79] The father had a favorable home study done in Mexico, but it was never presented at trial.[80] Additionally, he never received proper notice of the TPR hearing.[81] In significant language, the court stated, "the fact that a child may enjoy a higher standard of living in the United States than in the country where the child's parent resides is not a reason to terminate the parental rights of a foreign national."[82] The court instructed the trial court to "order the Department to take all reasonable steps to promptly place the daughter with her father in Mexico."[83]

Finally, in a 2012 unaccompanied minor case, a California Court of Appeals, in *In re Y.M.*,[84] ordered a juvenile court dependency proceeding reinstated, after it had been dismissed because the girl had been placed in federal Health and Human Services Office of Refugee Resettlement custody.[85] She had been designated a sex trafficking victim, and the court found her entitled to protections provided by *both* state and federal systems, "guided by concurrent jurisdiction principles" including prompt court consideration of the girl's request for SIJS findings made by the state court.[86] Holding the facts of her case did not pre-empt state dependency law, the court observed that the state process provides counsel for the child, while the federal process does not.[87]

According to ORR,[88] and the Department of Homeland

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[78] *In re* Doe, 281 P.3d 95 (Idaho 2012).
[79] *Id.* at 100.
[80] *Id.*
[81] *Id.*
[82] *Id.* at 102.
[83] *Id.* at 103.
[84] *In re* Y.M., 144 Cal. Rptr. 3d 54 (Ct. App. 2012).
[85] *Id.* at 64.
[86] *Id.* at 77-78.
[87] *Id.* at 66-67.
[88] *See Office of Refugee Resettlement*, *supra* note 16.

Security, the number of unaccompanied immigrant minors taken into federal custody has more than doubled in 2012.[89] Fortunately, in the 2008 federal *Trafficking Victims Protection Reauthorization Act*,[90] Congress mandated that unaccompanied children in ORR custody be promptly placed in the least restrictive setting that is in their best interests.[91] My understanding is that ORR seeks to place these children with parents, relatives, or family friends.

A project the VERA Institute of Justice has subcontracted with legal organizations to provide pro bono legal assistance to these released children, who are no longer considered by ORR to be under their direct responsibility.[92] One of those legal programs, the Immigrant Child Advocacy Project, based at the University of Chicago, appointed child advocates in 169 new cases in 2010, mostly for children in the Chicago area.[93] Notably, also in 2010, forty percent of the children served through VERA's national child advocacy program were identified as potentially eligible for some form of immigration relief that would protect them from removal.[94]

Because the 2008 federal trafficking law amendment also

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[89] *Office of Refugee Resettlement: The Year in Review – 2012*, OFF. REFUGEE RESETTLEMENT (Dec. 20, 2012), http://www.acf.hhs.gov/programs/orr/resource/orr-year-in-review-2012.

[90] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464; Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875; Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044. These four Acts represent the United State's governments' approach to combating the trafficking in persons both worldwide and domestically and are available at http://www.state.gov/j/tip/laws/.

[91] Wilberforce Trafficking Victims Protection Reauthorization Act § 235(c)(2).

[92] *See Unaccompanied Children Program*, VERA INST. JUST., http://www.vera.org/project/unaccompanied-children-program (last visited Feb. 15, 2013).

[93] THE YOUNG CENTER FOR IMMIGRANT CHILD. RTS., http://www.immigrantchildadvocacy.org/ (last visited Feb. 15, 2013).

[94] OLGA BYRNE & ELISE MILLER, VERA INST. OF JUSTICE, CTR. ON IMMIGR. & JUSTICE, THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICYMAKERS, AND RESEARCHERS 4 (2012), http://www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf.

changed SIJS law,[95] it has been estimated that *many more* children are now eligible for SIJS than previously.[96] Those amendments had a provision, unfortunately never funded by Congress, to permit state or county child welfare agency recovery from HHS for the costs of foster care provided to unaccompanied minors later granted SIJS status.[97] That provision would have provided an important financial incentive for states to provide foster care for these children.

SIJS is still sought and granted in relatively small numbers. For example, in 2010 there were a total of only 1,492 youth granted SIJS.[98] This is compared with 265,808 immigrants under twenty-one who obtained some form of lawful permanent residency that year.[99]

I do have a specific concern about the use of SIJS. Because it inevitably leads to separation of parent and child, frequently without affordable, prompt, unbiased, and quality home studies in other countries, we may never know for sure whether what is alleged as abuse, neglect, or abandonment truly is such, or that it really is in a child's best interests not to be reunified with a parent. The *Shattered Families* report noted that SIJS poses concerns about parental rights because, in certain instances that were reported to them, child welfare agencies were confronted with a difficult choice: help an undocumented child gain authorized immigration status and essentially end parental rights and responsibilities, or reunify children with their parents in another country.[100] The report states that a Child Protective Services ("CPS") bias against placing children in other countries can sway its SIJS decision-making, even when those parents are fit and willing caretakers.[101]

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[95] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044.

[96] Junck, *supra* note 25, at 50 (emphasis added).

[97] N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., ADMINISTRATIVE DIRECTIVE: SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) 4 (2011), http://www.ocfs.state.ny.us/main/policies/external/OCFS_2011/ADMs/11-OCFS-ADM-01%20Special%20Immigrant%20Juvenile%20Status%20(SIJS).pdf.

[98] Junck, *supra* note 25, at 51.

[99] *Id.* at 52.

[100] SHATTERED FAMILIES, *supra* note 41.

[101] *Id.*

One reason for the relatively small number of SIJS petitions is that far too many child welfare and juvenile justice attorneys, caseworkers, and probation officers involved in their cases, do not know that SIJS exists. There are tragic cases of undocumented immigrant youth who grew up in U.S. foster care, but never obtained this protected status prior to leaving the system.

The U.S. Supreme Court, in the 2010 case of *Padilla v. Kentucky*,[102] held that the failure of defense counsel to advise their client about the immigration consequences of a guilty plea constitutes ineffective assistance of counsel. I would suggest that, under that same reasoning, lawyers for children in any juvenile court proceeding must become aware of the immigration status of their clients, and also about the process of securing legal status for their clients to remain in the U.S. if their client wishes.

To do that, we need new partnerships between immigration law experts and lawyers who practice in juvenile court. For this to happen, I believe we need funding from both private foundations and federal agencies, to support demonstration projects pairing children's law centers, juvenile defender agencies, law school child advocacy clinics, and CASA programs, with immigration lawyers. [103]

Judges in juvenile and family courts should have bench cards that list and describe the various forms of immigration relief a child before them may be eligible for, as well as what findings of fact a judge must make to establish the predicate for that relief. The ABA Center on Children and the Law has developed bench cards for judges on other topics, such as education issues for children in foster care and father involvement in child welfare cases. Judges should be holding appointed counsel and the guardian *ad litem* ("GAL") accountable for assisting their clients in obtaining appropriate immigration relief, in partnership with immigration law experts.

Angie Junck from the Immigrant Legal Resource Center in San

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[102] Padilla v. Kentucky, 559 U.S. 356 (2010).

[103] CASA stands for Court Appointed Special Advocates (CASA). *See* COURT APPOINTED SPECIAL ADVOCATES FOR CHILDREN, http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5301295/k.BE9A/Home.htm (last visited Feb. 15, 2013).

Francisco[104] has recently written an excellent article on SIJS in an issue of the *Juvenile and Family Court Journal*. She recommends some practices that I was unaware of. For example, she encourages judges to sign orders establishing in writing the birth details for undocumented children before the court who lack formal birth certificates, because proof of age is one essential SIJS requirement.[105] She also suggests that judges help assure that a children under their jurisdiction are transported from their placement for immigration hearing processes.[106] In some cases, a judge can do even more. For example, in a case of a sexually abused immigrant child, the juvenile court judge can formally certify a child as eligible for U Visa relief as a victim of crime, which in some cases may be a preferable alternative to SIJS since it can potentially aid in also providing what is called "derivative" immigration relief to the child's parents, which SIJS cannot.

Judges can also assist immigrant parent and child victims of domestic violence. One of the first things I ever wrote about children and domestic violence was a 1994 ABA publication entitled *The Impact of Domestic Violence on Children.*[107] I stated there that:

> [O]ffering battered immigrant parents and their children a way out of violent homes requires that attorneys, judges, police, child protective service workers, and advocates develop an understanding of immigrant parents' life experience, so that they may craft legal relief that will be effective in stopping violence while being respectful of their cultural experiences.[108]

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[104] IMMIGRANT LEGAL RESOURCE CENTER, http://www.ilrc.org/ (last visited Feb. 15, 2013).
[105] *Id.*
[106] *Id.*
[107] HOWARD DAVIDSON, ABA CTR. ON CHILDREN & THE LAW, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION (1994), http://iwp.legalmomentum.org/reference/additional-materials/research-reports-and-data/inimate-partner-violence-government-research/The-Impact-of-Domestic-Violence-on-Children.pdf.
[108] *Id.*

Today, when an undocumented child and mother have been victims of domestic violence committed by a U.S. citizen or lawful permanent resident offender, they both may benefit from a juvenile court judge establishing in a court order the facts that would become the predicate for what is called a VAWA visa, which may provide authority for immigration relief to both the child and her mother.[109]

If an undocumented immigrant youth is before the court because he or she were arrested for prostitution, once again the juvenile court judge and the youth's attorney should be aware of the youth's potential eligibility for another form of immigration relief, a T Visa for a sexually trafficked child. In 2010, the HHS Office of Refugee Resettlement determined that only 92 children in its care were eligible victims of human trafficking.[110] Clearly, there are far more that 92 non-citizen children a year identified by law enforcement authorities and the courts as victims of sex trafficking. Worse, in the ten-year period between 2001 and 2011, only 212 children were formally determined as eligible for T visa benefits.[111]

There is an acute need to better identify children qualified for T visas,[112] as well as for help in obtaining them. Given how many child sexual abuse victims come to the attention of both juvenile and criminal courts, and given how many sixteen and seventeen-year-old youth are arrested for prostitution or soliciting, when that youth is an undocumented immigrant I believe that there should be far more common inquiries as to whether the U or T visas should be pursued.

There is also an important role to be played by State Court Improvement Programs that are well funded by HHS to improve local judicial handling of child abuse and neglect cases. We need to

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[109] *See, e.g., Violence Against Women Act (VAWA)*, IMMIGR. CENTER FOR WOMEN & CHILD., http://icwclaw.org/services-available/violence-against-women-act-vawa/ (last visited Feb. 15, 2013).

[110] DEP'T HEALTH & HUMAN SERVS. ADMIN. FOR CHILDREN & FAMILIES, REFUGEE AND ENTRANT ASSISTANCE 239 (2012), www.acf.hhs.gov/sites/default/files/assets/ORR%20final.pdf.

[111] Jacqueline Bhabha & Susan Schmidt, *From Kafka to Wilberforce: Is the U.S. Government's Approach to Child Migrants Improving?*, IMMIGR. BRIEFINGS, No. 11-02, Feb. 2011, at 5.

[112] *Visas for Victims of Human Trafficking*, TRAVEL.STATE.GOV., http://travel.state.gov/visa/temp/types/types_5186.html (last visited Feb. 15, 2013).

identify and report on which Programs have helped improve the judicial handling of cases involving undocumented children or family members. Models for official juvenile court forms used in making SIJS findings, and for making requisite findings for other forms of immigration relief, need to be developed and shared. Ways that detained or deported parents can be effectively involved in their state child welfare court cases should, in my opinion, be shared.

Child welfare lawyers, family law practitioners, and juvenile defense counsel should educate themselves, and their judges, on common misconceptions about who is eligible for SIJS status. Predicate findings for SIJS eligibility can be made not just in dependency proceedings, but also in family and probate court cases. These findings can be made when a child is placed into a guardianship, as well as in juvenile delinquency cases, even though those cases do not directly adjudicate parental abuse or neglect.

We must greatly increase and expand legal resources and attorney expertise to encompass and integrate both immigration and family law. There also needs to be greater practical and comprehensive immigration-related resources for state and county child welfare stakeholders.

I hope the ABA Center on Children and the Law, in collaboration with the ABA Commission on Immigration and other partners, can be involved with both efforts.

National child welfare-immigration link expert Yali Lincroft[113] and I recently put together, at the request of the South Carolina Department of Social Services, a full day of Continuing Legal Education training for the state's child welfare agency lawyers. We created a model for attorney training, including sessions on Immigration 101, various forms of immigration relief for children, what a child welfare agency should do when a parent is detained and his child comes into foster care, and immigration-related adoption issues, including children leaving the U.S. foster care system for

[113] Yali Lincroft, MBA, is a policy consultant for First Focus/First Focus Campaign for Children located in Washington D.C. Yali helped develop several federal and state legislation assisting immigrant families in the foster care system, including California's Senate Bill 1064 "Reuniting Immigrant Families" signed into law in California in 2012 and is currently being replicated by many states.

placement in another country. We also covered consular notification requirements and how foreign consulates can aid child welfare agencies, parents, and children, such as the excellent work done by the Consulate of Mexico in the Chicago area, and we addressed notice and service of process issues when parents and relatives reside outside the United States. We are hoping to produce similar full-day CLE trainings in other states.

IV. Change on the Horizon?

Someday, a more family-centered Congress may decide to give U.S. citizen minor children and undocumented children who are granted lawful resident status the legal right to petition, through a guardian *ad litem*, or next friend, for extension of family-centered immigration benefits to their undocumented parents and legal guardians. That same family-centered Congress may hopefully also compel U.S. immigration authorities to make decisions that are guided by best interests of children principles and that prioritize family unity.

Until then, one way for all of us to be kept apprised of developments in this field is to participate in the Migration and Child Welfare National Network.[114] I continually encourage both lawyers and law students to join the Network.

The Network adopted, at its formation in 2006, seven guiding principles that, in conclusion, are important to share:

1. Migration of children and families to the U.S. is a very important, but largely unaddressed, issue affecting the child welfare system, and child welfare system professionals should be educated on this issue.

[114] MIGRATION AND CHILD WELFARE NATIONAL NETWORK, http://research.jacsw.uic.edu/icwnn/ (last visited Mar. 16, 2013). The Migration and Child Welfare National Network is a coalition of individuals and organizations focused on the intersection of immigration and child welfare issues. Housed at the Jane Addams College of Social Work at the University of Illinois, the Network has four main areas of focus - policy/advocacy, promising practices, research/evaluation, and international issues. Howard Davidson and Yali Lincroft are founding members of the Network.

2. Immigrant children who are involved in programs that provide child protection and child welfare services should be afforded services that will address their needs for safety, permanency, and well-being.
3. Child welfare services should be available to all children, regardless of their immigration status.
4. Federal, state, and local policies should encourage full integration of immigrant families into U.S. society through an expanded delivery of child welfare services where necessary.
5. All child welfare agencies and courts, and the professionals who work within those settings, should individually, and through their membership organizations, become better informed about immigration laws and best practices affecting the immigrant children and families they are serving.
6. Delivering services to migrating children and families should be a focus at major national child welfare conferences, in the work of the federal child welfare resource centers, and in new research and demonstration projects.
7. The roots and causes of migration issues impacting child welfare cannot begin to be resolved unless collaboration with other countries exists, since the issues that impact U.S. systems do not start and stop at our borders, but rather are the result of larger, more complex problems that should involve transnational activities and a global approach.

To make this nation of immigrants do the right thing for these kids and families, we have a lot of work to do. I truly hope all of us will bring our own knowledge and passion to addressing these critically important issues. I hope state and local bar associations and Continuing Legal Education programs will educate lawyers about the family-related aspects of federal immigration law and its intersection with state child welfare court proceedings.

Judicial training should also address the issue. Law school courses and clinics that address immigration should include a focus

on the child welfare related aspects of immigration enforcement. Child welfare agencies should be training their attorneys, caseworkers, and others on immigration issues that affect their cases. Programs, such as the ABA Center on Children and the Law, should be training children's attorneys, guardian *ad litems*, and parents' attorneys on immigration issues.

As we look into the future, the issues I've discussed hopefully will be addressed as part of comprehensive immigration reform. Even if they are, the legal profession will still have a continuing responsibility to help assure that implementation of such reform achieves the intended result of helping keep families together.

Child Maltreatment and Immigration Enforcement: Considerations for Child Welfare and Legal Systems Working with Immigrant Families

Alan J. Dettlaff & Megan Finno-Velasquez[*]

I. Introduction

Changes in immigration patterns and trends over the past two decades have shifted considerably the demographic profile of the United States.[1] Not only have the numbers of foreign-born immigrants living in the United States increased, but also a larger proportion of this foreign-born population consists of children and families.[2] In 2010, foreign-born immigrants represented 12.9 percent of the total U.S. population.[3] As a result of these changing trends, Hispanic children and families are the largest growing population in the United States, as well as in the child welfare system.[4]

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[1] *See* ELIZABETH M. GRIECO ET AL., U.S. CENSUS BUREAU, THE FOREIGN BORN POPULATION IN THE UNITED STATES: 2010, at 10 (2012), http://www.census.gov/prod/2012pubs/acs-19.pdf.

[2] *Id.* at 14.

[3] *Id.* at 2.

[4] Michelle Johnson-Motoyama et al., *Parental Nativity and the Decision to Substantiate: Findings from a Study of Latino Children in the Second National Survey of Child and Adolescent Well-Being (NSCAW II)*, 34 CHILD. & YOUTH SERVICES REV. 2229, 2229 (2012).

Most adult immigrants are not U.S. citizens and many are undocumented.[5] As of 2010, nearly 12 million undocumented immigrants lived in the United States, representing approximately 30 percent of the total foreign-born population.[6] Approximately one million of these undocumented immigrants were children, most of Hispanic origin.[7] The majority of the foreign-born population is split between legal permanent residents and naturalized U.S. citizens, while another 4 percent of the foreign-born population is composed of legal temporary residents, consisting of students and temporary workers.[8]

Children with at least one foreign-born parent represent nearly one-fourth (26 percent) of all children in the United States.[9] Over half (56 percent) of these children are of Hispanic origin,[10] followed by 18 percent non-Hispanic White, 18 percent non-Hispanic Asian, and 8 percent non-Hispanic Black.[11] Most children of immigrants (87 percent) are born in the United States and are U.S. citizens.[12] However, 44 percent of all children of immigrants live in families where neither parent is a U.S. citizen, and nearly one-third (32 percent) live in mixed-status families, or families in which the children are citizens, but at least one parent is not.[13] Children with non-citizen parents may have an increased vulnerability for contact

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[5] JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 5, 10 (2011), http://www.pewhispanic.org/files/reports/133.pdf.

[6] *Id.* at 9.

[7] *Id.* at 13.

[8] *Id.* at 10.

[9] KARINA FORTUNY ET AL., THE URBAN INST., CHILDREN OF IMMIGRANTS: NATIONAL AND STATE CHARACTERISTICS 1 (2009), http://www.urban.org/UploadedPDF/411939_childrenofimmigrants.pdf.

[10] In the context of these data, the terms "Hispanic origin" and "Hispanic" are used to identify individuals of Hispanic origin as defined by the United States Census Bureau. This includes individuals who self-identify as being of Hispanic, Latino, or Spanish origin.

[11] KARINA FORTUNY & AJAY CHAUDRY, THE URBAN INST., CHILDREN OF IMMIGRANTS: IMMIGRATION TRENDS, FACT SHEET NO. 1, at 3 (2009), http://www.urban.org/UploadedPDF/901292_immigrationtrends.pdf.

[12] *Id.*

[13] *Id.* at 4.

with child welfare systems if one or both parents are detained or deported as a result of immigration enforcement efforts.[14] Additionally, once children become involved in this system, they may face considerable barriers to reunification with their parents as a result of their parents' citizenship status.[15]

This Article reviews the current knowledge regarding children in immigrant families and their involvement in the child welfare system. Part II examines research findings that describe patterns of child maltreatment among immigrant families, risks associated with child welfare involvement, and child placement issues for immigrant families. Part III discusses immigration enforcement activities[16] as risk factors for child maltreatment and involvement in the child welfare system. Part IV then presents challenges that child welfare and legal systems face when immigrant families come to the attention of the child welfare system as a result of either maltreatment or immigration enforcement. Part V concludes with recommendations for child welfare and legal systems to work collaboratively, as well as with other child and immigrant serving systems, to facilitate positive outcomes for children.

II. Children in Immigrant Families and Involvement in the Child Welfare System

Children in immigrant families have historically been considered at increased risk for maltreatment as a result of the challenges experienced by their families following immigration to the United States.[17] The process of migration to the United States is often a difficult and arduous one, characterized by loss, trauma, fear, and

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[14] APPLIED RESEARCH CTR., SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 6 (2011) [hereinafter SHATTERED FAMILIES], *available at* http://arc.org/shatteredfamilies.

[15] *Id.*

[16] Immigration enforcement activities as discussed in this Article include any efforts by U.S. Immigration and Customs Enforcement ("ICE") or relationships between ICE and local law enforcement agencies to enforce federal laws governing border control and immigration.

[17] Ilze Earner, *Immigrant Families and Public Child Welfare: Barriers to Services and Approaches for Change*, CHILD WELFARE, July–Aug. 2007, at 63, 69-70.

isolation.[18] Immigration experiences vary depending on country of origin, type of migration, and individual motivations;[19] however, the decision to migrate is often driven by financial necessity or dangerous political climates that pose a risk of exposure to robbery, violence, physical persecution, and sexual assault.[20] Many challenges that immigrants face—financial distress, personal dissatisfaction, depression, social isolation, and stressful life events—are factors associated with child maltreatment.[21] Additional pressures resulting from acculturation and acculturative stress[22] can lead to further strains and conflict within families, as parents and children negotiate language barriers and face unfamiliar customs and loss of previously established support systems.[23] Combined with possible cultural differences in parenting styles and expectations,[24] as well as in child

[18] *See* Uma A. Segal & Nazneen S. Mayadas, *Assessment of Issues Facing Immigrant and Refugee Families*, 84 CHILD WELFARE 563, 564-66 (2005) (describing the "Framework for the Immigrant Experience" as including factors such as unique family experiences, and conditions and status in one's home country that contribute to unique experiences among immigrants in their process of migration, and highlighting that most immigrants feel little choice regarding the necessity of migration).

[19] *Id.* at 564.

[20] *Id.* at 566.

[21] Child maltreatment literature has consistently identified factors such as poverty, parental depression, social isolation, and stress as risk factors for maltreatment. *See, e.g.*, Susan P. Cadzow et al., *Stressed Parents with Infants: Reassessing Physical Abuse Risk Factors*, 23 CHILD ABUSE & NEGLECT 845, 846 (1999).

[22] Acculturation refers to the internal process of change experienced by all immigrants upon exposure to a new culture. Acculturative stress is a distinct concept from acculturation, referring to the stress that results from the acculturative process. Upon immigration, individuals are faced with a multitude of challenges as they attempt to navigate the new culture. Acculturative stress results when individuals lack the necessary skill or means to interact and be successful in the new environment. *See* J.W. Berry et al., *Comparative Studies of Acculturative Stress*, 21 INT'L MIGRATION REV. 491, 492 (1987).

[23] Segal & Mayadas, *supra* note 18, at 567.

[24] Saigeetha Jambunathan et al., *Comparisons of Parenting Attitudes Among Five Ethnic Groups in the United States*, 31 J. COMP. FAM. STUD. 395, 400 (2000).

discipline,[25] these factors can affect the safety and wellbeing of children in immigrant families, and lead to involvement in the child welfare system. For example, while norms concerning acceptable child rearing and punishment vary by culture, a number of studies have documented the use of authoritarian parenting styles and corporal punishment as a disciplinary strategy prevalent among immigrant parents.[26] When combined with other stressors such as poverty and acculturative stress, this parenting style may result in harsh physical discipline that can lead to child welfare involvement.[27]

Curiously, although speculation of increased immigrant risk of maltreatment has existed for years,[28] very little empirical data has been available to determine the extent to which these perceptions of increased risk are accurate. This lack of evidence is largely due to the fact that information on the nativity and immigration status of children and families is not routinely collected by child welfare agencies. This results in the inability to determine the extent of immigrant involvement with child welfare systems and to characterize their risk exposure and experience of maltreatment.[29]

Thus, although children in immigrant families have been viewed as a population that may be at increased risk for maltreatment due to the stressors associated with immigration and acculturation experiences, empirical data to support these views has largely been

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[25] Lisa Aronson Fontes, *Child Discipline and Physical Abuse in Immigrant Latino Families: Reducing Violence and Misunderstandings*, 80 J. COUNSELING & DEV. 31, 33 (2002).

[26] *See* Martha Frías-Armenta & Laura Ann McCloskey, *Determinants of Harsh Parenting in Mexico*, 26 J. ABNORMAL CHILD PSYCHOL. 129, 135 (1998); Emiko A. Tajima & Tracy W. Harachi, *Parenting Beliefs and Physical Discipline Practices Among Southeast Asian Immigrants: Parenting in the Context of Cultural Adaptation to the United States*, 41 J. CROSS-CULTURAL PSYCHOL. 212, 223 (2010).

[27] Earner, *supra* note 17, at 79.

[28] Dorit Roer-Strier, *Reducing Risk for Children in Changing Cultural Contexts: Recommendations for Intervention and Training*, 25 CHILD ABUSE & NEGLECT 231, 232 (2001); Earner, *supra* note 17, at 65.

[29] Alan J. Dettlaff et al., *Emerging Issues at the Intersection of Immigration and Child Welfare: Results from a Transnational Research and Policy Forum*, 88 CHILD WELFARE 47, 48 (2009) [hereinafter Dettlaff et al., *Emerging Issues at the Intersection of Immigration and Child Welfare*].

absent through the middle of the last decade. The availability of empirical data began to increase following completion of the National Survey of Child and Adolescent Well-Being ("NSCAW"), the first national survey of families investigated by the child welfare system, which shed some light on immigrant experiences with the child welfare system.

A. Maltreatment Patterns

A seminal study using data from NSCAW[30] concluded that children living with a foreign-born parent comprise 8.6 percent of all children who came to the attention of the child welfare system in the United States, despite representing 23 percent of the overall population. [31] The finding suggested that children of immigrants are considerably underrepresented among children who become involved with child welfare,[32] contradicting the prevailing view that children in immigrant families were at increased risk for child welfare involvement.[33]

Two reasons could explain the findings of this study. First, although immigrant families indeed face a number of risks resulting from their immigration experience,[34] the strengths embedded within many immigrant families may serve as buffers against some of these

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[30] ALAN J. DETTLAFF & ILZE EARNER, MIGRATION & CHILD WELFARE NAT'L NETWORK, CHILDREN OF IMMIGRANTS IN THE CHILD WELFARE SYSTEM: FINDINGS FROM THE NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING 1 (2009) [hereinafter DETTLAFF & EARNER, CHILDREN OF IMMIGRANTS IN THE CHILD WELFARE SYSTEM], http://www.americanhumane.org/assets/pdfs/children/pc-childofimmigrantpdf.pdf.

[31] *Id.* at 2. This number includes children who were involved in an investigated report of child maltreatment by a child welfare agency.

[32] *Id.* at 1-2.

[33] *Id.* at 1-2. Data from NSCAW showed that children in immigrant families were underrepresented among children involved in the child welfare system compared to their proportion in the general population, suggesting that prior speculation about their increased risk for maltreatment and involvement in this system is not supported empirically.

[34] Examples of stressors include increased stress, poverty, social isolation, and changing cultural contexts. For a review see Alan J. Dettlaff & Ilze Earner, *Children of Immigrants in the Child Welfare System: Characteristics, Risk, and Maltreatment*, 93 FAMILIES IN SOC'Y 295, 295 (2012) [hereinafter Dettlaff & Earner, *Characteristics, Risk, and Maltreatment*].

risks. Primary among these strengths might be immigrants' reasons for migration.[35] For many immigrant families, the desire for a better life for their children can be a strong motivating factor.[36] Research has also shown that immigrant families' cultural values and connections to their countries of origin serve as important strengths that may protect them from experiencing certain negative outcomes.[37] This phenomenon, often referred to as an "immigrant paradox," suggests that despite more challenges, immigrants fare better than their native U.S.-born counterparts.[38]

The second reason is that immigrants have remained under the radar of the child welfare system because of their low rates of contact with social services systems. This makes immigrants less likely to come to the attention of agencies and professionals considered "mandated reporters" who are required to identify and report potential maltreatment.[39] Thus, although underrepresentation in the child welfare system may indicate lower rates of maltreatment in immigrant families, it may also suggest that immigrant families who are in need of intervention are not being identified by child welfare systems; this lack of identification may be due to social isolation, avoidance of social service systems due to concern over immigration status, lack of enrollment in school, or lack of access to service providers.[40] While both of these explanations may be plausible, additional research is needed to more fully understand the factors that contribute to the observed underrepresentation of children in immigrant families in the child welfare system.

Findings from this study further showed that among families referred to the child welfare system, no significant differences were found in overall rates of maltreatment between children with

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[35] *Id.* at 301.
[36] *Id.*
[37] Lori K. Holleran & Margaret A. Waller, *Sources of Resilience Among Chicano/a Youth: Forging Identities in the Borderlands*, 20 CHILD & ADOLESCENT SOC. WORK J. 335, 340, 346 (2003).
[38] Fernando S. Mendoza, *Health Disparities and Children in Immigrant Families: A Research Agenda*, 124 PEDIATRICS S187, S188 (2009).
[39] DETTLAFF & EARNER, CHILDREN OF IMMIGRANTS IN THE CHILD WELFARE SYSTEM, *supra* note 30, at 5, 7.
[40] *Id.* at 8.

immigrant parents and children with U.S.-born parents.[41] Children of immigrants, however, were found to be more likely than children of U.S.-born parents to experience emotional abuse.[42] Though definitions of emotional abuse vary widely across states,[43] the disproportionate number of children of immigrants identified as experiencing emotional abuse could be the result of cultural differences in parenting styles, or parenting expectations among some immigrants that may be considered inappropriate by child welfare caseworkers unfamiliar with diverse cultures.[44] For example, research indicates that children in Mexican immigrant families hold significant responsibilities, including conducting basic household tasks, caring for younger siblings, and providing financial support.[45] Further, a 2000 study found that immigrant mothers were identified as being more likely than non-immigrant mothers to have inappropriate developmental expectations of their children when rated on a measure of parenting attitudes used to identify risk for abuse or neglect.[46]

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[41] *Id.* at 4.
[42] *Id.*
[43] As with all forms of maltreatment, statutory definitions of emotional abuse are defined by state law. Although there are national guidelines that identify the categories of psychological maltreatment (*e.g.*, AM. PROF'L SOC'Y ON THE ABUSE OF CHILDREN, PRACTICE GUIDELINES: PSYCHOSOCIAL EVALUATION OF SUSPECTED PSYCHOLOGICAL MALTREATMENT IN CHILDREN AND ADOLESCENTS (1995)), variation often exists in the level of inclusiveness of parental behaviors that fall into these categories. For a more thorough discussion of this variation, see Stephanie Hamarman et al., *Emotional Abuse in Children: Variations in Legal Definitions and Rates Across the United States*, 7 CHILD MALTREATMENT 303, 303 (2002).
[44] The lack of understanding of the influence of culture has been cited as a significant barrier to adequate assessment and intervention in cases of child maltreatment among immigrant families. *See, e.g.*, Ron Shor, *Inappropriate Child Rearing Practices as Perceived by Jewish Immigrant Parents from the Former Soviet Union*, 23 CHILD ABUSE & NEGLECT 487, 487 (1999).
[45] Marjorie Faulstich Orellana, *The Work Kids Do: Mexican and Central American Immigrant Children's Contributions to Households and Schools in California*, 71 HARV. EDUC. REV. 366, 374 (2001).
[46] Jambunathan et al., *supra* note 24, at 402.

Additional studies have suggested that children of immigrants from specific racial or ethnic backgrounds may be vulnerable to specific forms of maltreatment. For example, one study using data from NSCAW showed that Latino children of immigrants were over five times more likely to experience sexual abuse than Latino children of U.S.-born parents, although overall rates of maltreatment were the same between the two sub-groups.[47] Other studies have found that children in various Asian immigrant families were more likely to come to the attention of the child welfare system for physical abuse than children in other ethnic groups.[48] These studies have begun to shed light on the unique maltreatment experiences among children in immigrant families, although much additional research is needed to fully understand the role that cultural differences might play in these patterns in order to draw accurate conclusions.

B. Risk Factors Associated with Child Welfare Involvement

Apart from identifying patterns of maltreatment in immigrant families, some studies have examined the risk factors associated with child maltreatment in immigrant families involved in the child welfare system.[49] These studies have consistently found that such factors are more likely to be present in families with U.S.-born parents than in those with immigrant parents.[50] For example, in a

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[47] Alan J. Dettlaff et al., *Latino Children of Immigrants in the Child Welfare System: Prevalence, Characteristics, and Risk*, 31 CHILD. & YOUTH SERVICES REV. 775, 779 (2009) [hereinafter Dettlaff et al., *Latino Children of Immigrants in the Child Welfare System*].

[48] Janet Chang et al., *Characteristics of Child Abuse in Immigrant Korean Families and Correlates of Placement Decisions*, 30 CHILD ABUSE & NEGLECT 881, 888 (2006); *see also* Siyon Rhee et al., *Child Maltreatment Among Immigrant Chinese Families: Characteristics and Patterns of Placement*, 13 CHILD MALTREATMENT 269, 275 (2008).

[49] *See, e.g.*, DETTLAFF & EARNER, CHILDREN OF IMMIGRANTS IN THE CHILD WELFARE SYSTEM, *supra* note 30, at 5; Dettlaff et al., *Latino Children of Immigrants in the Child Welfare System*, *supra* note 47, at 779; Johnson-Motoyama et al., *supra* note 4, at 2229.

[50] DETTLAFF & EARNER, CHILDREN OF IMMIGRANTS IN THE CHILD WELFARE SYSTEM, *supra* note 30, at 5; Dettlaff et al., *Latino Children of Immigrants in the Child Welfare System*, *supra* note 47, at 779; Johnson-Motoyama et al., *supra* note 4, at 2229; Shawna J. Lee et al., *Hispanic Fathers and Risk for Maltreatment in*

nationally representative sample, U.S.-born parents were three times more likely to be actively abusing alcohol or drugs than immigrant parents, and were also more likely to have a physical or cognitive impairment or recent history of arrests.[51] Notably, immigrant families involved in the child welfare system were not found to have a higher prevalence of risk factors typically associated with immigrants, such as the use of excessive discipline, active domestic violence, low social support, and difficulty meeting their family's basic needs.[52] The research suggests that families who immigrate to the United States may bring with them several strengths and protective factors that are associated with their reasons for migration and their desire to achieve a better life for their children that may mitigate risk and are less present in U.S.-born families.[53]

Among Latino families involved with the child welfare system, U.S.-born parents were five times as likely to be actively abusing drugs when compared to immigrant Latino parents.[54] U.S.-born Latino parents were also significantly more likely to have a cognitive impairment, recent history of arrests, or to be assessed as having poor parenting skills and high family stress.[55] Latino immigrant families, in comparison to all types of immigrant families, were not found to have higher rates of domestic violence, lower social support, or excessive discipline, again contradicting prevailing views regarding risk exposure for maltreatment among immigrant families.[56]

Thus, although differences in the types and patterns of maltreatment exist between children in immigrant families and children in U.S.-born families, available empirical evidence indicates that children in immigrant families are likely at a lesser risk of

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Father-Involved Families of Young Children, 2 J. SOC'Y FOR SOC. WORK & RES. 125, 132 (2011).

[51] DETTLAFF & EARNER, CHILDREN OF IMMIGRANTS IN THE CHILD WELFARE SYSTEM, *supra* note 30, at 5.

[52] *Id.*

[53] *Id.* at 7.

[54] Dettlaff et al., *Latino Children of Immigrants in the Child Welfare System*, *supra* note 47, at 779.

[55] *Id.*

[56] *Id.*

maltreatment and of involvement in the child welfare system than children in U.S.-born families. Yet, once children in immigrant families become involved in this system, emerging evidence shows that they may experience different outcomes than their U.S.-born counterparts.

C. Child Placement

Very little information is available about the placement patterns of children in immigrant families and how they may differ from children in U.S.-born families. A 2007 study using data from the Texas child welfare system on Latino children, found that immigrant children and children of immigrants were less likely to be placed with relatives than children of U.S.-born parents.[57] Immigrant children were also more likely than other children to be placed in group homes and institutions.[58] Additionally, immigrant children were less likely to have case goals of reunification or relative adoption than U.S.-born children, and were more likely to have goals of long-term foster care or independent living.[59] These discoveries are troubling, given the research findings identifying lower rates of risk exposure among immigrant families.[60] The findings suggest that despite these lower rates of risk, children in immigrant families may be vulnerable to poorer outcomes than children in U.S.-born families. One explanation may be that factors associated with parents' immigration status may be interfering with decisions regarding the child's best interest.[61] Additional research is needed to identify the sources of these disparities and to determine whether these findings are consistent in other states.

In sum, currently available data indicates that although children in immigrant families are likely exposed to a number of risk

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[57] TRACY VERICKER ET AL., THE URBAN INST., FOSTER CARE PLACEMENT SETTINGS AND PERMANENCY PLANNING: PATTERNS BY CHILD GENERATION AND ETHNICITY 2 (2007), http://www.urban.org/UploadedPDF/311459_foster_care.pdf.

[58] *Id.*

[59] *Id.* at 3.

[60] DETTLAFF & EARNER, CHILDREN OF IMMIGRANTS IN THE CHILD WELFARE SYSTEM, *supra* note 30, at 5.

[61] Qingwen Xu, *In the "Best Interest" of Immigrant and Refugee Children: Deliberating on Their Unique Circumstances*, 84 CHILD WELFARE 747, 759 (2005).

factors as a result of their families' experiences with immigration and acculturation, they are considerably underrepresented among children involved in the child welfare system. This data further suggests that children in immigrant families are at no greater risk of maltreatment than children in U.S.-born families, and are less likely to experience many of the risks often associated with child maltreatment and child welfare system involvement. Yet, once children in immigrant families become involved in this system, emerging evidence suggests that they may be vulnerable to less favorable outcomes than their U.S.-born counterparts. As a result, immigration enforcement impacts children's experience in the system.

III. Immigration Enforcement as a Risk for Child Welfare Involvement

Although an expanding body of research has begun to emphasize immigrant family involvement in the child welfare system,[62] the extent to which immigration enforcement has affected this involvement is unknown. As of 2010 in the United States, an estimated 5.5 million children had undocumented immigrant parents who were at risk for deportation, and about three-quarters of these children were U.S. citizens.[63] This statistic is, in part, due to federal legislation passed in 1996 that created barriers for obtaining legal status and expanded the grounds under which to deport immigrants charged with crimes.[64] Thus, although children in immigrant families may be less vulnerable to entering the child welfare system through the traditional pathway of a maltreatment investigation, they may be at an increased risk of entering this system as a result of expanded immigration enforcement activities.

Deportations and enforcement activities conducted by Immigration and Customs Enforcement ("ICE") have increased

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[62] *See, e.g.*, Dettlaff et al., *Latino Children of Immigrants in the Child Welfare System*, *supra* note 47, at 775; Dettlaff & Earner, *Characteristics, Risk, and Maltreatment*, *supra* note 34; Earner, *supra* note 17, at 65.

[63] PASSEL & COHN, *supra* note 5.

[64] Earner, *supra* note 17, at 69 (discussing the expantion of the grounds for deportation to include non-violent offenses).

considerably over the past two decades.[65] A particularly notable increase in enforcement efforts between 2005 and 2008 included several large, highly publicized worksite enforcement operations.[66] Child advocates criticized these operations based upon the failure of ICE to address the needs of vulnerable children that were displaced following the apprehension of their parents.[67] As a result, humanitarian guidelines were put into place that delineated terms for parental release during worksite raids in sites with more than 25 arrests.[68] These guidelines include a plan to identify individuals who are the sole caregivers of minor children or who have other humanitarian concerns, including individuals with serious medical conditions, nursing mothers, pregnant women, or caregivers of spouses or relatives with serious medical conditions.[69] To implement this plan, ICE coordinates enforcement actions with the U.S. Department of Health and Human Service's Division of Immigration Health Services, or with an appropriate state or local social service agency such as the state's child welfare agency, to assist in identifying those with special concerns and in providing appropriate responses.[70]

Recent evidence suggests that when administered appropriately, these guidelines have been effective in preventing or minimizing parent-child separations because the guidelines mandate release of single parents and those with special needs children.[71] The guidelines do not, however, apply to enforcement actions targeting

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[65] WENDY CERVANTES & YALI LINCROFT, FIRST FOCUS, THE IMPACT OF IMMIGRATION ENFORCEMENT ON CHILD WELFARE 1 (2010), http://www.firstfocus.net/sites/default/files/r.2010-4.7.cervantes.pdf.

[66] *Id.*

[67] AJAY CHAUDRY ET AL., THE URBAN INST., FACING OUR FUTURE: CHILDREN IN THE AFTERMATH OF IMMIGRATION ENFORCEMENT 13 (2010) [hereinafter CHAUDRY ET AL., FACING OUR FUTURE], http://www.urban.org/UploadedPDF/412020_FacingOurFuture_final.pdf.

[68] CERVANTES & LINCROFT, *supra* note 65, at 3.

[69] *Id.*

[70] *Id.*

[71] *Id.* Guidelines call for the release of parents who are needed to support their spouses in caring for sick or special needs children. *Id.* Special needs children may refer to those with physical or mental health concerns.

individuals or small groups, including home raids and other small criminal justice operations. This leaves children vulnerable to experiencing separation from their parents[72] and subsequent child welfare intervention when alternative caregivers are not immediately available.[73]

Although worksite raids conducted by ICE for the purpose of apprehending undocumented immigrants were suspended under the first Obama administration, this same administration oversaw the highest number of deportations in the United States in recent history.[74] In 2009, over 600,000 immigrants were arrested, and ICE detained a record total of 383,524 immigrants.[75] In large part, these record numbers can be attributed to federal programs that increased cooperation between local law enforcement and the Department of Homeland Security.[76] Throughout the first Obama administration, ICE expanded operations to arrest and deport immigrants with serious criminal records, classified as "Level 1 Offenders," defined as those immigrants convicted of aggravated felonies or two or more felonies.[77] However, recent data has demonstrated that this program, called "Secure Communities," has resulted in the deportation of

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[72] Although ICE does not collect data on the number of children impacted by immigration enforcement efforts, statistics made available from ICE in late 2012 showed that between July 1, 2010, and September 30, 2012, ICE removed 204,816 parents of U.S. citizen children from the United States. Seth Freed Wessler, *Nearly 205K Deportations of Parents of U.S. Citizens in Just Over Two Years*, COLORLINES (Dec. 17, 2012), http://colorlines.com/archives/2012/12/us_deports_more_than_200k_parents.html.

[73] CHAUDRY ET AL., FACING OUR FUTURE, *supra* note 67, at 63.

[74] *Id*.

[75] U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2009, at 3 (2010), http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_2009.pdf .

[76] CHAUDRY ET AL., FACING OUR FUTURE, *supra* note 67.

[77] MICHELE WASLIN, IMMIGRATION POLICY CTR., THE SECURE COMMUNITIES PROGRAM: UNANSWERED QUESTIONS AND CONTINUING CONCERNS 3 (2011), http://www.immigrationpolicy.org/sites/default/files/docs/SComm_Exec_Summary_112911.pdf.

thousands of immigrants who are not within this classification.[78] Over one-quarter of immigrants who are deported through Secure Communities have no criminal conviction and another 30 percent only have minor charges, including misdemeanors such as driving without a license.[79] In fact, data from ICE indicate that less than 30 percent of individuals who have been deported since the implementation of Secure Communities have been Level 1 Offenders.[80] Nevertheless, Secure Communities operates as a partnership between local law enforcement and ICE throughout the country and is scheduled for full implementation by 2013.[81]

Although the exact number of children who have become involved in the child welfare system as a result of immigration enforcement is unknown, children clearly have been impacted by these efforts. The Department of Homeland Security ("DHS") estimates that between 1998 and 2007, over 100,000 parents with U.S. citizen children were deported.[82] This is most likely an underestimate because many deported parents do not divulge that they have children.[83] Additionally, a study of worksite raids found that for every two adults apprehended during a raid, at least one child experienced a threat to their safety or wellbeing.[84] Some children separated from their parents experienced not only emotional trauma, but also housing instability and food insecurity due to the loss of

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[78] U.S. DEP'T OF HOMELAND SEC., U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, SECURE COMMUNITIES: MONTHLY STATISTICS THROUGH APRIL 30, 2012, IDENT/IAFIS INTEROPERABILITY 1-2 (2012) [hereinafter UDHS, SECURE COMMUNITIES], http://www.ice.gov/doclib/foia/sc-stats/nationwide_interop_stats-fy2012-to-date.pdf.

[79] *Id.*

[80] UDHS, SECURE COMMUNITIES, *supra* note 78, at 1-2.

[81] CERVANTES & LINCROFT, *supra* note 65.

[82] U.S. DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., REMOVALS INVOLVING ILLEGAL ALIEN PARENTS OF UNITED STATES CITIZEN CHILDREN 5 (2009), http://www.oig.dhs.gov/assets/Mgmt/OIG_09-15_Jan09.pdf.

[83] Many families may not divulge to immigration authorities that they have children because they fear that ICE will take their children into custody as well. RANDY CAPPS ET AL., THE URBAN INST., PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN 29 (2007), http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf.

[84] *Id.* at 68.

parental income.[85] Children also faced considerable behavioral changes, including more frequent crying and increased fear and anxiety.[86] These behavioral fluctuations were particularly prevalent among children who witnessed a parent's arrest in their home.[87] Unlike other children in the United States, children of immigrants live under the constant threat that their parents might be arrested and deported, making them even more vulnerable to family separation, instability, economic hardship, and other dramatic changes in their lives.[88] These changes may result in potentially severe and lasting psychological and behavioral impacts.[89]

Additionally, advocates express concern that children who are not maltreated may be entering foster care solely because the detention of their parents left the children without anyone responsible for their care.[90] One recent study estimates that as many as 5,100 children currently in foster care have parents who have been detained or deported.[91] Statutes require juvenile and family courts to consider the child's best interests in decisions regarding their custody and placement.[92] In contrast, immigration courts do not recognize child's best interests as a mitigating factor in their parents' immigration proceedings.[93] This can lead to profound implications for families with mixed immigration statuses.[94] These repercussions can include permanent separation of parents and children, termination of parental rights, and ultimately adoption of those children, all due to the

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[85] *Id.* at 47.
[86] *Id.* at 52.
[87] *Id.* at 50.
[88] CHAUDRY ET AL., FACING OUR FUTURE, *supra* note 67, at vii.
[89] *Id.* Long-term effects reported in this study included withdrawn and angry or aggressive behaviors, disruptions to eating and sleeping patterns, behavior problems in school, and declining school performance. *Id.* at ix.
[90] SHATTERED FAMILIES, *supra* note 14.
[91] *Id.*
[92] *See generally* CHILD WELFARE INFO. GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD: SUMMARY OF STATE LAWS (2010), https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf (summarizing best interest standards nationwide).
[93] Angela D. Morrison & David B. Thronson, *Beyond Status: Seeing the Whole Child*, 33 EVALUATION & PROGRAM PLAN. 281, 282 (2010).
[94] *Id.*

detention and deportation of a non-citizen parent combined with the failure of immigration courts to consider the best interests and wellbeing of the parents' American children.

IV. Challenges for Child Welfare and Legal Systems

Although some children of immigrants are entering the child welfare system as a result of immigration enforcement actions, most children of immigrants who become involved in this system likely do so through traditional means—the result of a maltreatment report.[95] Once the children become involved, immigrants face unique challenges that threaten the system's ability to facilitate family reunification and positive outcomes for children related to their health and wellbeing.[96] Most child welfare systems lack expertise in immigration policies and are ill-equipped to assist children or parents in addressing these issues.[97] Many social workers and legal professionals are unfamiliar with challenges resulting from immigrant families' experiences with immigration and acculturation.[98] Considerable efforts have been made over the past two decades to increase cultural competence of child welfare agency staff, but these efforts have largely focused on U.S.-born racial and ethnic groups.[99] A lack of cultural sensitivity to immigration related issues can lead to inaccurate assessments that fail to consider these underlying issues or provide needed services to immigrant families.[100]

A. Access to Child Welfare Services

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[95] *See, e.g.*, DETTLAFF & EARNER, CHILDREN OF IMMIGRANTS IN THE CHILD WELFARE SYSTEM, *supra* note 30, at 5 (documenting the various reasons by which children of immigrants come to the attention of the child welfare system).

[96] Dettlaff et al., *Emerging Issues at the Intersection of Immigration and Child Welfare*, *supra* note 29, at 48.

[97] *Id.* at 59.

[98] *Id.*

[99] Alan J. Dettlaff & Yali Lincroft, *Issues in Program Planning and Evaluation with Immigrant Children and Families Involved in the Child Welfare System*, 33 EVALUATION & PROGRAM PLAN. 278, 278 (2010).

[100] Dettlaff et al., *Emerging Issues at the Intersection of Immigration and Child Welfare*, *supra* note 29, at 59.

A related concern for child welfare agencies serving immigrant children and families is the ability to access culturally and linguistically sensitive services.[101] For parents, language and cultural barriers can result in miscommunication and misunderstandings, which can considerably affect families' engagement in interventions.[102] A lack of available services in an immigrant's preferred language can also result in delays in receiving services.[103] Beyond language, undocumented immigration status can create additional barriers to reunification, as parents may be unable to obtain employment or participate in certain mandated or supportive services due to legal restriction of benefits.[104] This can affect parents' abilities to comply with child welfare service mandates in a timely manner, placing them at risk for termination of parental rights under federal law.[105]

The Adoption and Safe Families Act ("ASFA") of 1997 calls for permanency decisions to be made within twelve months, and requires that the state file for termination of parental rights for children who have been in substitute care for fifteen of the previous twenty-two months.[106] Given the barriers that may delay the receipt of services or otherwise prevent immigrant families from meaningfully participating in services, the expedited process required by the ASFA may place immigrant families at a further disadvantage for meeting case requirements.[107] Although the presiding judge may grant extensions to this twelve-month period, this initial disadvantage is compounded by possible biases against immigrant families and continued language barriers. These factors may contribute to inequitable outcomes for immigrant families that result in longer periods of separation and increased likelihood of termination of

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[101] *Id.* at 60.
[102] *Id.*
[103] *Id.*
[104] Cecilia Ayón, *Shorter Time-Lines, Yet Higher Hurdles: Mexican Families' Access to Child Welfare Mandated Services*, 31 CHILD. & YOUTH SERVICES REV. 609, 609 (2009).
[105] *Id.*
[106] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.
[107] Ayón, *supra* note 104, at 609.

parental rights and parents' permanent separation from their children.[108]

Furthermore, immigrant families often have non-custodial parents and relatives residing in other countries. The federal Fostering Connections to Success and Increasing Adoptions Act of 2008[109] places added emphasis on locating biological family members and requires that all adult relatives be identified and notified of their options to participate in the care and placement of the child.[110] Child welfare agencies, however, often encounter many barriers to locating family members outside the United States.[111] If family members are identified, additional barriers include conducting home studies of that family member, facilitating placement of children in other countries, and complying with court and case requirements for monitoring those placements.[112]

A lack of culturally or linguistically appropriate services can limit the ability of immigrant children in foster care to receive services needed to address physical and mental health needs.[113] Additionally, funding for services for immigrant children may be limited due to restrictions within Title IV-E of the Social Security Act, the primary source of federal child welfare funding to states.[114] The state's receipt of Title IV-E funds is restricted to children who meet eligibility requirements, one of which is U.S. citizenship.[115] Undocumented immigrant children do not meet this eligibility

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[108] *Id.* at 613.
[109] Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110–351, 122 Stat. 3949.
[110] *Id.* Note that the Fostering Connections to Success and Increasing Adoptions Act of 2008 does not provide any specific guidance or requirements concerning the identification of relatives that do not live in the United States.
[111] Dettlaff et al., *Emerging Issues at the Intersection of Immigration and Child Welfare*, *supra* note 29, at 62.
[112] *Id.*
[113] Alan J. Dettlaff & Jodi Berger Cardoso, *Mental Health Need and Service Use Among Latino Children of Immigrants in the Child Welfare System*, 32 CHILD. & YOUTH SERVICES REV. 1373, 1377 (2010).
[114] YALI LINCROFT & KEN BORELLI, FIRST FOCUS, PUBLIC BENEFITS & CHILD WELFARE FINANCING 5 (2010), http://www.firstfocus.net/sites/default/files/PublicBenefits_0.pdf.
[115] *Id.*

requirement, thus states must bear the full cost of foster care and other services for these children.[116] In an era of shrinking resources for child welfare systems, this burden may limit states' abilities to adequately care for Title IV-E ineligible immigrant children.[117]

B. Options for Immigration Relief

Undocumented children have options for immigration relief.[118] Although these options may not increase the quality of service provision while children are in the custody of the state, the services can benefit children by providing a pathway to citizenship upon their exit from care.[119] Some of these options, however, only become available once a judicial decision has been made that parental reunification is not in a child's best interests.[120] For example, Special Immigrant Juvenile Status ("SIJS") is a legal remedy for undocumented children in the United States who are dependents of a juvenile court and the court has found that the children cannot be reunited with one or both parents because of abuse, neglect, abandonment, or a similar basis under state law.[121] Another relief option that can serve undocumented parents and children is the U-Visa, which provides residence and work authorization to victims of serious crimes, including forms of child maltreatment.[122]

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[116] *Id.*

[117] *Id.*

[118] IMMIGRANT LEGAL RES. CTR., IMMIGRATION OPTIONS FOR UNDOCUMENTED IMMIGRANT CHILDREN 1-8 (2010), http://www.ilrc.org/files/factsheets_immigrant_children.pdf.

[119] *Id.*

[120] *Id.* at 1.

[121] *Id.*

[122] *Id.* at 3. U nonimmigrant status, commonly known as the U Visa, is available for noncitizens who are victims of serious crimes. *Id.* The noncitizen who is a victim of the crime must be certified by law enforcement or a child protective services agency as being helpful in the investigation or prosecution of the crime. *Id.* If the noncitizen is a child under sixteen years of age, a parent or guardian may fill this role. *Id.* U.S. Citizenship and Immigration Services can issue the U Visa to the eligible child and to certain family members, including the child's siblings and parents. *Id.* If a parent is the perpetrator of the crime, the child and the non-offending parent remain eligible for the U Visa, although the requirement to help in the investigation and prosecution of the crime remains. *Id.* A potential benefit to

C. Challenges Resulting From Parental Detention

For children who enter the child welfare system solely due to an immigrant parent's detention or deportation, many complexities arise. Parents detained in immigration facilities clearly face considerable challenges that could prevent them from meaningfully participating in a reunification plan. In some cases, child welfare staff cannot locate parents who have been deported, making their participation in court proceedings and other decisions concerning their children unlikely.[123] Parents lingering in detention are also unlikely to be able to participate in court proceedings related to their children's care and custody.[124] Deportation proceedings may last longer than the timeframes under which child welfare agencies must make decisions, further complicating child welfare agencies' ability to act in a child's best interest.[125]

When children of immigrants are U.S. citizens, the prospect of parental deportation poses a uniquely difficult situation for families and child welfare systems.[126] The options available for families in this situation are that children may remain in the United States and be permanently separated from their parents; alternatively, children can leave their home and everything they know to move to an unfamiliar country and remain with their parent. Although this conundrum has been described as a "choiceless choice" for immigrant parents,[127] it seems clear that best practices would call for both the child welfare and legal professionals involved to honor deported parents' decisions regarding their children when maltreatment is absent. However, no empirical data exists on whether parents' and children's preferences are considered in these situations.

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the U Visa versus SIJS is that the child does not need to be a dependent of the court, meaning that children who are victims of abuse may be eligible for the U Visa even if they do not enter state custody as a result of that abuse. *Id.* at 1, 3.

[123] CERVANTES & LINCROFT, *supra* note 65, at 6.

[124] *Id.*

[125] *Id.*

[126] David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1165 (2006).

[127] *Id.*

V. Recommendations for Child Welfare and Legal Systems

When children enter foster care, child welfare workers have considerable influence concerning the outcomes of these cases as they develop service plans specifying the steps necessary for reunification or for an alternative form of permanency.[128] Working with immigrant families requires a multidisciplinary approach that involves coordination and collaboration across local, state, federal, and international agencies.[129] Child welfare agencies are in a unique position to advocate for immigrant families and can be instrumental in coordinating not only with juvenile courts but also with other systems to help facilitate positive outcomes for immigrant families.[130]

First, child welfare agencies should work to ensure that all children, including those who are undocumented, receive appropriate and comprehensive child welfare services.[131] The majority of children from immigrant families who enter the child welfare system are U.S. citizens,[132] but a small number of children may be undocumented and particularly vulnerable to receiving inadequate services as a result of their immigration status. Child welfare agencies should support policies and practices that ensure that the immigration status of a child is not a barrier to receiving needed services. Further, courts should monitor these cases to confirm that appropriate and necessary services are provided.

Second, child welfare agencies should make certain that children in foster care are placed, whenever possible, with relatives or other kin caregivers to preserve cultural and familial ties, thereby

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[128] DIANE DEPANFILIS & MARSHA K. SALUS, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, CHILD PROTECTIVE SERVICES: A GUIDE FOR CASEWORKERS 26 (2003), https://www.childwelfare.gov/pubs/usermanuals/cps/cps.pdf.

[129] CERVANTES & LINCROFT, *supra* note 65.

[130] *Id.*

[131] Dettlaff et al., *Emerging Issues at the Intersection of Immigration and Child Welfare*, *supra* note 29, at 57.

[132] *See* FORTUNY ET AL., *supra* note 9 (discussing the prevalence of immigrant parents with children who are citizens).

reducing trauma.[133] This outcome has become particularly challenging for child welfare systems when a child's relatives in the U.S. are undocumented, due to state and local policies requiring Social Security numbers or other licensing requirements that undocumented relatives may not be able to meet.[134] Undocumented relatives may also be particularly fearful of child welfare policies that require fingerprinting due to the potential immigration consequences.[135] Yet, these barriers should not prevent relative or kinship placements from occurring when well-intended and appropriate relatives are available to act as the child's caregiver.

Child welfare agencies should also search for relatives in other countries that may be appropriate for permanent placement. Several local child welfare jurisdictions, including Illinois, Texas, New Mexico, and several California counties, have developed formal relationships with foreign consulates and foreign child welfare agencies through Memoranda of Understanding ("MOUs") to coordinate the location of relatives, home studies, psychological assessments, background checks, placement, and monitoring of children with parents or relatives in other countries when appropriate.[136] These MOUs require that the child welfare agency notify the consulate when a foreign national child is taken into state custody.[137] The MOUs further provide that the equivalent child welfare agency or another governmental agency assist in locating relatives, obtaining necessary documentation, and other tasks to facilitate permanency for the child.[138] It is the child welfare agency's responsibility to ensure that the consideration of suitable relative placements for immigrant children is not limited to the United States.[139]

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[133] Earner, *supra* note 17, at 65.
[134] VERICKER ET AL., *supra* note 57.
[135] *Id.*
[136] *See* Megan Finno & Maryellen Bearzi, *Child Welfare and Immigration in New Mexico: Challenges, Achievements, and the Future*, 4 J. PUB. CHILD WELFARE 306, 317 (2010).
[137] *Id.*
[138] *Id.*
[139] *Id.*

Third, courts should establish procedures to ensure that immigrant parents can meaningfully participate in all juvenile court cases related to their child's care and custody. This may require collaboration with federal immigration officials and immigration courts, as the serious and often permanent nature of these decisions requires cooperation between child welfare and immigration systems. Child welfare workers can petition the State Department for temporary humanitarian visas for parents to return to the U.S. to participate in court hearings.[140] Parents may also participate in hearings via telephone, and attorneys can be appointed to represent parents who are in detention or in another country.[141] Most importantly, parents' wishes concerning their child's placement and country of residence should be heard and respected. If parents choose to have their children reunified with them in their country of origin, efforts should be made to assist parents in making necessary arrangements, regardless of the child's U.S. citizenship status.

Similarly, when children of immigrants enter into state custody, child welfare agencies should make diligent efforts to locate non-custodial parents and relatives in the immigrant family's country of origin that could potentially serve as a permanent placement for the child. The child welfare agency is legally bound by international convention to notify the appropriate foreign consulate when taking custody of an immigrant child.[142] Beyond notification, child welfare agencies should make efforts to establish strong working relationships with their corresponding local foreign consulates. In increasing numbers of jurisdictions, foreign consulates and, in some circumstances, U.S. Embassies in foreign countries are able to assist in a range of caseworker activities.[143] These include locating parents or relatives, obtaining birth records and criminal background checks, serving parents with necessary court documents, coordinating home studies, conducting psychological evaluations, connecting parents with attorneys, facilitating parent participation in court hearings, and

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[140] *Id.*
[141] *Id.*
[142] Vienna Convention on Consular Relations, *done* Apr. 24 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (entered into force Mar. 19, 1967).
[143] *See* Finno & Bearzi, *supra* note 136, at 317-18.

transporting children to foreign countries when it is in the best interest of the child.[144]

In light of increased immigration enforcement activities over the past decade,[145] child welfare and court systems should establish procedures for immigrant parents who have been separated from their children due to immigration enforcement activities to ensure that parents have access to immigration attorneys and appropriate legal counsel related to their immigration case. Parents and children receive legal defense as part of a child welfare case, but these attorneys are usually not experts in immigration law and cannot well-represent parents in an immigration case. Yet this counsel is essential for parents who must manage not only the complexities of their child's welfare case, but also the implications of their immigration case on the decisions concerning their children.

Additionally, child welfare agencies should be screening children for eligibility for Special Immigrant Juvenile Status ("SIJS"). The agencies should move forward with applying for such status after all efforts at reunification have been made and the court has determined that reunification with at least one parent is not possible. In assessing the appropriateness of SIJS, child welfare agencies need to carefully consider whether possible biases favoring legal permanent residency are not overriding or interfering with the wishes of immigrant parents or their children. Potential SIJS eligibility for undocumented children should not be a primary reason for discontinuing efforts at parental reunification. SIJS can provide many undocumented children with a path toward citizenship, but the consequences of SIJS in severing the legal relationship between parents and children can be permanent.

Furthermore, SIJS was established largely to ensure that undocumented children who had been abused or neglected by their parents could remain in the United States.[146] This is in contrast with children who have been separated from their parents solely due to immigration enforcement actions, but who have not been abused or

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[144] *Id.* at 318.

[145] CERVANTES & LINCROFT, *supra* note 65.

[146] ANGIE JUNCK ET AL., SPECIAL IMMIGRANT JUVENILE STATUS AND OTHER IMMIGRATION OPTIONS FOR CHILDREN AND YOUTH 3-3 (3d ed. 2010).

neglected. In such instances, every effort should be made to reunify children with their parents. Even in cases involving abuse or neglect, reunification with one or both parents is often possible and appropriate.[147] In circumstances where reunification with the sole parent or both parents is possible, an alternative immigration relief option may be to seek out a U-Visa, which can offer a path to citizenship for victims of certain serious crimes, including forms of child maltreatment and domestic violence.

Finally, child welfare agencies should advocate for legislation and court rulings that allow exceptions to the short ASFA timelines when parents are also involved in complex immigration proceedings. Parent involvement in immigration proceedings can create several inherent barriers to reunification. These include, but are not limited to, an inability to ensure a physically stable home, and limited parental ability to participate in court proceedings and comply with all mandated service requirements within the predetermined time frame. While courts need to make timely decisions regarding reunification in the interest of moving towards a permanent home for a child, it is difficult to make such decisions when the status of their parents' immigration case is uncertain. Such cases warrant a time extension to provide families with a fair chance at reunification and ensure that the child's best interests are considered. Where such extensions are not pursued or granted, child welfare agency staff should make appropriate inquiries to confirm that such decisions are warranted.

VI. Conclusion

Although children in immigrant families enter the child welfare system in large part due to abuse or neglect, in recent years,

[147] CHILD WELFARE INFO. GATEWAY, SUPPORTING REUNIFICATION AND PREVENTING REENTRY INTO OUT-OF-HOME CARE 1 (2012), https://www.childwelfare.gov/pubs/issue_briefs/srpr.pdf (stating that except in the most severe cases of abuse or neglect, reunification with one or both parents is most often the first goal of child welfare agencies, and is accomplished when parents satisfactorily comply with court-mandated activities that address the reasons for child welfare involvement and reduce risk of future maltreatment).

parent involvement with immigration enforcement activities is increasing the risk for child welfare involvement in this population. Once involved with the child welfare system, immigrant children and their parents can experience significant language, cultural, and legal barriers to receiving services and achieving reunification. Child welfare agencies play a principal role in this process, and child welfare workers bear significant responsibility for making certain that children in immigrant families receive appropriate treatment. Similarly, it is the responsibility of the child welfare agency to ensure that decisions made regarding children's needs and best interests are reached in the most cautious and thoughtful manner, given the lifelong consequences of those decisions. While the child welfare system holds much of the responsibility for decision-making, other entities, such as courts and foreign consulates, may also provide considerable influence and oversight in this process. Efforts should be made to facilitate cooperation and collaboration from all stakeholders, including parents, children, child welfare professionals, legal professionals, foreign consulates, and federal immigration systems, to ensure that a child's best interests remain at the forefront of decision-making.

Uneven Access to Special Immigration Juvenile Status: How the Nebraska Supreme Court Became an Immigration Gatekeeper

Meghan Johnson & Yasmin Yavar*

I. Introduction

Children unlawfully present in the United States who have been abused, neglected, or abandoned by a parent are among the most vulnerable members of society. In the Immigration Act of 1990, which was in line with humanitarian and practical concerns, Congress introduced a path for such children to attain lawful immigration statuses, which would allow them to be classified as "special immigrant juveniles" and subsequently obtain Special Immigrant Juvenile Status ("SIJS"). Years later, eligibility for SIJS continues to be an open and evolving concept. This Article explores recent changes to SIJS eligibility, highlighting a state court decision that limits this important form of relief beyond what was provided for in the statute and in a way that threatens to deny relief to children in need.

Eligibility for SIJS has changed and expanded over the years.[1] The original statute provided relief to children declared dependent on a U.S. juvenile court who had been deemed eligible for long-term foster care and for whom the court had determined it was

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[1] For a brief background on the purpose and evolution of SIJS relief, see generally Section II of the Department of Homeland Security's proposed regulations implementing 2008 amendments to the SIJS statute, Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54,978 (proposed Sept. 6, 2011) (to be codified at 8 C.F.R. pts. 204, 205, 245).

not in their best interest to return to their respective home countries.[2] The language was amended in 1997 to clarify that SIJS relief was only intended to benefit those children who could demonstrate that they had suffered abuse, neglect, and abandonment.[3] In late 2008, eligibility for SIJS expanded in various ways, including the replacement of the requirement of eligibility for long-term foster care with a requirement that a juvenile's reunification with one or both parents is not viable due to abuse, abandonment, neglect, or a similar basis under state law.[4] With the 2008 revisions, the number of individuals submitting petitions to the immigration authorities for SIJS relief nearly doubled.[5]

Applying for SIJS involves a complicated and time-consuming three-step process and requires legal resources that many children in need are unable to access. The first step in the application process is to request that a state court,[6] acting in its family or juvenile capacity, enter certain findings regarding the child's family situation.[7] Use of local courts in this manner allows federal immigration authorities to rely on the special expertise of juvenile and family courts in making determinations about proper parental

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[2] Immigration Act of 1990, Pub. L. No. 101-649, § 153(a), 104 Stat. 4978 (1990).
[3] Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 113, 111 Stat. 2440 (1997).
[4] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(1), 122 Stat. 5044 (codified at 8 U.S.C. § 1232).
[5] In fiscal year 2009, U.S. Citizenship and Immigration Services ("USCIS") received 1,484 SIJS petitions; in 2008, USCIS received 1,361 petitions; in 2007, USCIS received 739 petitions. Special Immigrant Juvenile Petitions, 76 Fed. Reg. at 54,984.
[6] Steps 2 and 3 involve applications filed with the immigration authorities, including USCIS and are detailed below.
[7] The required findings are that (1) the immigrant has been declared dependent on a juvenile court located in the U.S. or, by such a court, have been 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; (2) the immigrant's reunification with one or both parent's not be viable due to abuse, neglect, abandonment, or a similar basis under State law; and (3) it would not be in the immigrant's best interest to be returned to his or his parents' previous country of nationality or country of last habitual residence. *See* 8 U.S.C.A. § 1101(a)(27)(J) (West 2012).

care and a child's best interest. The reliance on local courts, however, also allows for the introduction of differing interpretations and applications of federal law among and between the states.[8]

This Article examines one state court's interpretation of the law, demonstrating how it limits access to federal immigration relief in a way that is out of line both with other states and with the apparent intent of Congress in providing for SIJS relief. Part II of this Article offers a sample case of a child who appears to be an intended candidate for SIJS. Part III provides a background on SIJS, briefly exploring its origin and practical effects and outlining the process of applying for this form of relief. Part III also explains a state court's involvement in making the factual findings necessary for applying for SIJS and discusses the potential for disparate interpretations of federal immigration laws across the nation. Part IV analyzes a recent Nebraska Supreme Court opinion that interprets the SIJS statute to foreclose SIJS relief for certain children and also reviews the impact of this precedent on the availability of SIJS relief in Part II's sample case and more generally. This Article ultimately concludes that the Nebraska precedent institutes an unnecessary and improper limitation on this important form of relief.

II. Sample case

The stories of undocumented children who enter the United States alone are many and varied. Such children may journey here because they long to be with a parent whom they barely know, to escape gang violence in their home countries, to pursue the opportunities they believe are available in the United States, and so forth.[9] Some of the children satisfy the qualifications for SIJS, and

[8] The differing interpretations and applications of the law arise when a state court in State A, for example, issues an opinion binding in that state that applies federal law in one way. Courts in another state, State B, unbound by the precedent in State A, may adopt a completely different interpretation of the same federal law.

[9] For in-depth reporting on the dangerous journey north that increasing numbers of children hazard alone to join their parents in the United States, see generally SONIA NAZARIO, ENRIQUE'S JOURNEY (2006). *See also* JESSICA JONES & JENNIFER PODKUL, WOMEN'S REFUGEE COMM'N, FORCED FROM HOME: THE LOST BOYS AND

others do not. Norman's story is one of a child who appears to be eligible for SIJS, based on having suffered abuse and neglect from his custodial parent, and for lacking a suitable home back in his home country.

Norman is a fifteen-year-old boy from Honduras.[10] Recently, he decided to leave his home in Honduras to live with his father who has resided without documentation in the United States since Norman was eight-months-old. Norman began his journey alone, riding buses from his hometown through Honduras and Guatemala. Norman's father paid $3,000 to a network of "guides" who specialize in providing safe passage through Mexico en route to the United States. Once in Mexico, Norman was moved from one migrant "safe house" to another, sometimes waiting for days without food before he arrived safely at the Mexico-U.S. border.[11] In Reynosa, Mexico, he waited another ten days to cross the Rio Grande River into Hidalgo, Texas. While in Reynosa, Norman stayed in a safe house with fifteen other individuals, where three armed men fed them and coordinated their crossings. After five days in the safe house, the armed guides told Norman that they would be unable to cross him unless his family paid an additional $1,500. Norman's father had no choice but to pay the additional amount when Norman called him from the safe house in Reynosa. A few days later, near midnight, one of the guides took Norman and three others to the river, where all five of them climbed aboard a small inflatable raft and quietly crossed the dark water. Minutes after they crossed, they were caught in the flashlight beams of two U.S. Border Patrol agents.

The agents detained each person in Norman's crossing group. They were taken to a small processing center, where the agents collected identification information and issued each of them charging

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GIRLS OF CENTRAL AMERICA (Diana Quick & Fred Hamerman eds., 2012) (describing recent surges in unaccompanied minors fleeing their homes in Central America and entering the United States unaccompanied by a parent or guardian).

[10] Though the facts of Norman's case track those of a real one, names and other identifying information have been changed to protect attorney-client confidentiality.

[11] A "safe house" is a shelter for migrants like Norman, where the migrants rest during their journey and wait for the next leg of their trip.

documents that the government would present to an immigration court in order to initiate removal proceedings in the United States.[12] Because Norman was under eighteen years of age and traveling without a parent or legal guardian, he was transferred to the custody of the U.S. Office of Refugee Resettlement ("ORR"), which began the process of finding a trusted adult in the United States to whom Norman could be released.[13] Meanwhile, Norman lived in an ORR detention facility for minors in Harlingen, Texas. ORR assigned him a caseworker, who began communicating with Norman's father to collect documents that would allow Norman to live with his father while he went through removal proceedings.[14]

While in ORR detention, Norman was visited by a paralegal from a local legal services organization that offers children a short legal orientation and screens each newly detained child for potential legal relief. Norman is a particularly intelligent and capable boy. During the legal orientation presentation he learned that sometimes children who have suffered abuse, neglect, or abandonment by a parent are eligible to apply for relief from removal. He realized that

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[12] Removal proceedings are the process by which immigration enforcement authorities request that an immigration judge order individuals charged as unlawfully present in the United States to be removed from the United States. *See* 8 U.S.C.A. § 1229(a) (West 2012).

[13] For background on how the U.S. government processes and provides for unaccompanied minors charged as unlawfully present in the United States, see generally OLGA BYRNE & ELISE MILLER, VERA INST. OF JUSTICE, CTR. ON IMMIGRATION & JUSTICE, THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICYMAKERS, AND RESEARCHERS (2012), http://www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf.

[14] ORR caseworkers work to reunite children quickly (so as to avoid lengthy periods of detention for children) and safely if reunification in the United States is possible. Children are released from custody to an eligible sponsor (often a parent, relative, or family friend) after completion of a reunification packet and background check. The sponsor is not required to have lawful immigration status in the United States. The forms required and more information about the reunification process can be found at the ORR website, at http://www.acf.hhs.gov/programs/orr/resource/unaccompanied-childrens-services.

he might fit that definition, so during his legal screening he told his story.

When Norman was eight-months-old, his parents took him to the United States. His parents were unable to find work in Honduras, so they decided to journey north, hoping to be able to provide for their son and for other members of their family struggling to survive in Honduras. After two years, Norman's parents separated because Norman's mother wanted to return to Honduras while his father wished to remain in the United States. Norman's father pleaded with his wife, asking that she leave their son with him in the United States, but Norman's mother refused. One day, while her husband was at work, she left with Norman.

Back in Honduras, Norman's mother found them a place to live near her parents' house. Her parents gave them money to pay rent and buy groceries, and Norman's father also sent them money from the United States. Norman's mother did not work and instead went out to parties with her friends. She occasionally had friends over to drink and use drugs. From an early age, Norman recalls seeing his mother's friends using marijuana and cocaine in his home. Eventually, Norman's mother started a relationship with one of these friends, a man who later became Norman's stepfather. When Norman was six, Norman's stepfather moved in with Norman and his mom, who was by then pregnant with Norman's sister. Norman described his stepfather as an angry man. Norman does not remember ever seeing his stepfather work; rather, he spent his days at home, drinking and using drugs.

Norman's stepfather lived in Norman's home until Norman was thirteen. He beat Norman most days using sticks, ropes, and even belts. One time, he beat Norman so severely that Norman had to wear a cast on his leg for six months. Norman's stepfather also beat Norman's mother. Norman describes how he frequently tried to protect his mother from his stepfather's beatings. First, Norman would take his baby sister over to his grandparents' house. Then he would ride his bicycle to the police station and ask someone to go with him back to his house. The police would arrive to interrupt Norman's stepfather beating Norman's mother, and they would take

his stepfather to the local jailhouse for a couple of days. When Norman's stepfather was released, he returned to Norman's home.

Whenever Norman's stepfather was gone for days at a time, Norman's mother became aggressive with Norman and his sister. She hit them and insulted them, telling them that she wished they were never born and that they were a burden and needed to buy their own food. Norman always worried about his sister who had asthma. When his sister had asthma attacks, Norman took her to the nearby hospital. On more than one occasion, Norman's grandparents offered to let him and his sister live with them; though they were elderly and not fully capable of raising two young children, they did not like how their daughter treated her children. But Norman's mother would not let the children leave her home. Norman did not understand why his mother insisted on keeping Norman and his sister in her home. To Norman, it seemed that his mother did not love him and wished him dead. More times than Norman can recall, his mother locked him out of the house at night, forcing him to sleep in the alley next to their house.

About two years ago, Norman's stepfather finally left Norman's mother and did not return. After his departure, Norman's mother became increasingly angry and depressed. Norman thought that she took her anger out on him and his sister. She would hit them and call them names on almost a daily basis. As her insults and abuse worsened, Norman finally told his father about what had been going on in their home. Though Norman's father had called him once a month for as long as Norman can remember, often Norman's mother did not let Norman speak with him. When Norman's father finally heard of the abuse Norman had long suffered, he offered to help Norman travel to the United States to live with him.

Norman describes his father as a hardworking and extremely religious man, who he remembers sent him school supplies and toy trucks on his birthdays. Norman does not really know his father, but he desperately wants to go live with him. Norman thinks his father loves him while his mother does not. Norman decided to go to the United States, despite his deep concern about his sister's well-being while he is away. Norman cried as he explained that he called his house in Honduras from the detention center and learned that his

sister, now eight-years-old, was home alone while his mother was out with her friends.

From what Norman disclosed in the legal screening, the paralegal understood that Norman appears to have suffered from abuse and neglect at the hands of his mother. The paralegal also noted that Norman does not appear to have a safe place to live in Honduras and that it therefore may not be in his best interest to return. While it is difficult to tell from what little information Norman knows about his father, it seems Norman would have a safe and loving place to live in the United States.[15] The question now is whether U.S. immigration law, and specifically SIJS, provides a way for Norman to remain in the United States, rather than return home to his abusive mother. The answer surprisingly, depends on where in the United States Norman will fight his case. And this differing availability of federal immigration relief stems not from applicable state law but from divergent interpretations of the governing federal statute.

III. SIJS Relief and Application Process

For a child in Norman's situation, SIJS might provide an independent means of safety and self-reliance when the child is at the mercy of parents' decisions about where to reside. SIJS is a form of relief available to certain non-citizen children present in the United

[15] The statute does not require that the individual have a safe and loving place to live in the United States, only that it not be in his or her best interest to return to the home country. Indeed, given the changes to the law in 2008, a child granted special immigrant juvenile status while in ORR custody and before he or she reaches eighteen is eligible for housing and other assistance via the government's Unaccompanied Refugee Minors ("URM") program. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(4), 122 Stat. 5044. For more information, see Letter from Eskinder Negash, Dir., Office of Refugee Resettlement to State Refugee Coordinators, Refugee Health Coordinators, Nat'l Volunteer Agencies & Other Interested Parties, Eligibility for the Unaccompanied Refugee Minor Program for Children Granted Special Immigrant Juvenile Status by the Department of Homeland Security (Sept. 27, 2010), *available at* http://www.acf.hhs.gov/programs/orr/resource/state-letter-10-11.

States who have suffered abuse, neglect, or abandonment by a parent.[16] This important source of humanitarian relief takes into account the special vulnerabilities of this population and infuses immigration law with child protection and welfare principles.[17] Being adjudicated a "special immigrant juvenile" ("SIJ") allows the child to apply to become a lawful permanent resident ("LPR") and reside in the United States indefinitely.[18] As an LPR, a child has access to important resources unavailable to undocumented persons present in the United States, including financial aid for higher education, free or low-cost health insurance, work permits, and driver's licenses.[19] More generally, humanitarian sources of lawful immigration status in the United States help to integrate those who would escape dangerous and unsustainable circumstances and otherwise remain in the shadows of society. Integration of desperate populations fleeing dangerous conditions thereby serves the practical purpose of fortifying safety and rule of law in the United States.[20]

SIJS targets individuals who are arguably the *most vulnerable* among those seeking relief from dangerous conditions. As previously stated, those eligible for SIJS are non-citizens present in the United States, under the age of twenty-one, whose return to one or more parent is not viable due to abuse, abandonment, neglect, or some similar basis under state law. Furthermore, those eligible must demonstrate that it is not in his or her best interest to return to the

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[16] *See* 8 U.S.C.A. § 1101(a)(27)(J) (West 2012).

[17] *See* ANGIE JUNCK ET AL., SPECIAL IMMIGRANT JUVENILE STATUS AND OTHER IMMIGRATION OPTIONS FOR CHILDREN AND YOUTH § 3.2 (3d ed. 2010) [hereinafter JUNCK ET AL., IMMIGRATION OPTIONS]; *see also* Angie Junck, *Special Immigrant Juvenile Status: Relief for Neglected, Abused, and Abandoned Undocumented Children*, 6 JUV. & FAM. CT. J. 48 (2012) [hereinafter Junck, *Special Immigrant Juvenile Status*], http://www.throughtheeyes.org/files/2012_ncs_materials/B3_handout18.pdf (elaborating on special vulnerabilities of individuals eligible for SIJS relief).

[18] *See* JUNCK ET AL., IMMIGRATION OPTIONS, *supra* note 17, at 1-4 to 1-6.

[19] *See id.*

[20] *See, e.g.*, MARC R. ROSENBLUM, MIGRATION POLICY INST., IMMIGRANT LEGALIZATION IN THE UNITED STATES AND EUROPEAN UNION: POLICY GOALS AND PROGRAM DESIGN 2 (2010) (discussing societal benefits of bringing persons with unauthorized presence in the United States into lawful immigration status).

country of birth or last habitual residence.[21] The fact that these individuals are undocumented, young, and lacking the support of one or more parents bears heavily on their ability to help themselves, in both a personal and a legal context. Children are less able than adults to access financial resources or free legal services that could help relieve them of dangerous circumstances, and they also often lack the necessary cognitive skills to make decisions in their own best interest.[22] Their incapacity is compounded when a parent mistreats them, as bonds of trust are broken and feelings of love or shame can overwhelm a child's natural sense of self-protection.[23] In addition, unauthorized presence in the United States raises significant obstacles to self-sufficiency even for adults. Undocumented persons are often marginalized economically, politically, and socially and further subjected to a higher rate of poverty and crime.[24]

A. Explaining the Steps of the SIJS Process

As previously mentioned, to obtain protection via SIJS, applicants must embark on what is essentially a three-step process that involves state and federal authorities. The first step is to obtain the predicate findings, those required by the federal definition of "special immigrant juvenile," from a state court. Next, with those findings in hand in the form of a certified court order, the applicant can file an application for SIJS with United States Citizenship and Immigration Services ("USCIS"). Finally, once SIJS status is approved, the applicant can seek lawful permanent residence in the U.S., either before USCIS or an immigration judge. The details of these processes are provided below.

Step 1: Obtain Predicate Findings from State Court

A child must ask a state court, acting as a juvenile court, for certain predicate findings in order to begin the SIJS process. The federal regulations define "juvenile court" as one having jurisdiction under state law to make judicial determinations about the custody and care of juveniles.[25] The findings may be obtained in the context of a

[21] *See* 8 U.S.C.A. § 1101(a)(27)(J) (West 2012).
[22] *See, e.g.*, JUNCK ET AL., IMMIGRATION OPTIONS, *supra* note 17, at 2-3 to 2-4
[23] *Id.* at 2-11.
[24] *Id.* at 1-4.
[25] *See* 8 C.F.R. § 204.11(a) (2013).

variety of proceedings that might include custody, child welfare, guardianship, adoption, delinquency, or declaratory actions. The petitioner bringing the proceedings may be the child or an adult caregiver or agency seeking responsibility over the child. The court presiding over the proceedings must find: (1) that the child is dependent on a juvenile court or has been 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;[26] (2) that reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under State law; and (3) that it would not be in the child's best interest to be returned to the child's or parent's previous country of nationality or country of last habitual residence.[27]

Step 2: File Application for Visa with Immigration Agency

Next, the child must complete a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360), and submit it to USCIS, which is required by law to adjudicate the petition within 180 days.[28] The child must include with his or her application a certified copy of the court order obtained in Step 1 mentioned above. If the I-360 is approved, the child has attained SIJ status and is immediately

[26] SIJS does not necessarily affect custody. The court must find the child "dependent" on the court, which might simply mean the court asserts jurisdiction over the child. *See, e.g.*, JUNCK ET AL., IMMIGRATION OPTIONS, *supra* note 17, § 4.3.

[27] *See* 8 U.S.C.A. § 1101(a)(27)(J) (West 2012).

[28] For a description of this SIJS application process, see generally Interoffice Memorandum from William R. Yates, Assoc. Dir. for Operations, U.S. Citizenship & Immigration Servs., to Reg'l Dirs. & Dist. Dirs., Memorandum 3—Field Guidance on Special Immigrant Juvenile Status Petitions (May 27, 2004) [hereinafter Memorandum, Field Guidance on Special Immigrant Juvenile Status Petitions], *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/sij_memo_052704.pdf; *see also SIJ: After You File*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=2b798b6ee9af0310VgnVCM100000082ca60aRCRD&vgnextchannel=2b798b6ee9af0310VgnVCM100000082ca60aRCRD (last updated July 12, 2011) (describing the time period in which the courts will act after receiving an application).

eligible to adjust status to an LPR.[29] To do so, the child must complete an Application to Adjust Status (Form I-485).[30]

Step 3: Apply for Lawful Permanent Residency with Immigration Authorities

Adjudication of the Form I-485 involves a background check, medical exam, lengthy questionnaire, and in most cases, an interview with an immigration official exploring the child's past behavior and activities.[31] This process is designed to screen for any grounds for inadmissibility that would foreclose one's ability to become an LPR, such as a history of certain criminal activities or membership in a terrorist organization.[32] The process for becoming an LPR for a child already eligible for SIJS can take many months or even years, and additionally requires the help of immigration attorneys who are both knowledgeable about working with traumatized children and willing to handle these work-intensive cases at little or no cost.[33]

B. *Delegation to and Deference for State Courts*

As previously stated, this Article focuses on the first step of the SIJS application process which is the request to a state court for a predicate order making the required SIJS findings. The SIJS statute requires the use of family or juvenile courts to enter findings as to whether the child meets the criteria for SIJS. The statute contemplates use of local entities for those findings because of their special expertise in making determinations as to family situations, evaluating best-interest factors, and understanding other child welfare issues.[34] Choosing to use the courts for this purpose is an indication of Congress's interest in protecting these children and providing for their safety and welfare. Using state entities to help administer

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[29] Memorandum, Field Guidance on Special Immigrant Juvenile Status Petitions, *supra* note 28.
[30] *Id.*
[31] *Id.*; *SIJ: After You File*, *supra* note 28.
[32] Memorandum, Field Guidance on Special Immigrant Juvenile Status Petitions, *supra* note 28; *SIJ: After You File*, *supra* note 28.
[33] *See, e.g.*, Junck, *Special Immigrant Juvenile Status*, *supra* note 17, at 52.
[34] *See Special Immigrant Juvenile Status (SIJS)*, IMMIGR. CENTER FOR WOMEN & CHILD., http://icwclaw.org/services-available/special-immigrant-juvenile-status-sils/ (last visited Feb. 23, 2013) (describing the role of state juvenile courts in making best interest determinations for children as part of their eligibility for SIJS).

federal law, however, always involves a risk of variance between localities in the enforcement of the federal law. For example, judges in State A could interpret and apply the requirements for SIJS differently from judges in State B, so that the same child might be eligible for the protection in State A but unable to obtain it in State B. Congress must take this potential for non-uniformity and arbitrariness in the application of the law into account when allowing local officials to participate in federal law administration and enforcement.

Such interstate variance presents special problems in the context of immigration law. Immigration policymaking is delegated to the federal government, as it involves the treatment of foreign nationals who should be treated uniformly nationwide. In areas of immigration law that use local officials to enter predicate orders and make findings necessary for a foreign national to obtain immigration relief, the local officials are often wary of the implications of their actions and nervous about what they perceive as making decisions about whether a person will obtain an immigration benefit.[35] Some may not want to participate in what they perceive as a process that condones or further encourages illegal immigration. This apprehension can be addressed by reference to the congressional intent, which purposefully relies on the special expertise of local officials that is not available to federal immigration authorities.[36] In

[35] For example, in the area of U Visas, which are available to victims of crimes in the United States who are subsequently helpful in the investigation or prosecution of that crime, the local law enforcement agency must certify the fact that the victims have been or are likely to be helpful. *See, e.g.*, U.S. DEP'T OF HOMELAND SEC., U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT 2, 16, http://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf; Cindy V. Culp, *Waco Judge Grants U-Visa to Girl After DA Denied Paperwork*, WACO TRIB., Dec. 14, 2012 (on file with the author) (describing a recent report from Waco, Texas, that explains the reasons that local officials are wary of providing this certification).

[36] A 1997 House of Representatives Conference Report indicates that "[t]he conferees intend that the involvement of the Attorney General is for the purposes of determining special immigrant juvenile status and not for making determinations of dependency status." H.R. REP. NO. 105-405, at 130 (1997) (Conf. Rep.). In line with this expressed intent, a March 24, 2009 USCIS policy memorandum instructs immigration officers adjudicating SIJS petitions "to avoid questioning a child about

addition, variances can be minimized by careful attention to the limited role of the local officials, who are often asked, and permitted, only to enter discrete factual findings that will be reviewed by federal officials in the context of a greater inquiry as to the eligibility of an applicant for the immigration relief sought. In the case of SIJS, once the factual findings are obtained from the state court, the applicant still must apply for SIJ status with the immigration authorities and, contemporaneously or subsequently, apply for lawful permanent residence in order to legalize his or her status. The role of local officials is limited to the first step and does not itself bestow upon the applicant any immigration status or benefit.

C. *Variance Among the State Courts*

In the SIJS context, recent developments in state court handling of predicate orders have created a situation in which access to SIJS relief meaningfully differs across and even within states. First is the issue of post-eighteen-year-old SIJs: the SIJ statute holds an individual eligible for SIJS until the age of twenty-one, but courts that are asked to enter findings in SIJS cases generally do not take cases for children over the age of eighteen.[37] Courts across state lines differ as to whether they are willing to continue jurisdiction. The Department of Homeland Security, including its Ombudsman office, is taking up this issue in favor of allowing continuing jurisdiction for

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the details of the abuse, abandonment or neglect suffered, as those matters were handled by juvenile court, applying state law." Interoffice Memorandum from Donald Neufeld, Acting Assoc. Dir. Domestic Operations & Pearl Chang, Acting Chief, Office of Policy & Strategy, U.S. Citizenship & Immigration Servs., to Field Leadership, Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions 3 (Mar. 24, 2009) [hereinafter Memorandum, Trafficking Victims Protection Reauthorization Act of 2008], *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf. A separate but relevant point is that, as Angela Lloyd put it, "the dual role of guardian and border enforcer are incongruous and cannot mimic the environment of a state juvenile court in which parties are expressly driven by the custodial and best interests of children." 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, 258 (2006).

[37] For an overview of this issue, see generally JUNCK ET AL., IMMIGRATION OPTIONS, *supra* note 17, § 3.2, at 3-8 to 3-10.

children until age twenty-one.[38] The second area of disparity is with "one-parent SIJ," in which, as explained below, means one parent has been the source of abuse, neglect, or abandonment and is not a suitable parent to whom the child can return. To determine whether the child qualifies for "one-parent SIJ," the state court must interpret the federal statutory language, which requires that a court find reunification with "one or both parents" is not viable due to abuse, neglect, or abandonment.

Norman's case, described above, involves this latter issue of one-parent SIJS. In one-parent SIJS cases, one parent has been the source of abuse, neglect, or abandonment and is not a suitable parent to whom the child can return. For Norman however, there is another parent with whom reunification seems viable. While Norman appears eligible for SIJS predicate findings under the plain language of the statute, a recent opinion of the Nebraska Supreme Court would likely lead to the conclusion that Norman is excluded from SIJS relief. The next Part explores the basis of this recent opinion and its impact, both on Norman's case and more generally.

IV: Recent Nebraska Supreme Court Precedent

A recent decision from the Nebraska Supreme Court has caused great concern among non-profit legal service providers and immigration advocates who serve children like Norman. The decision is alarming because it introduces a novel interpretation of the SIJ definition that, if followed in other states, would foreclose SIJS relief for many children previously thought to be eligible. The Nebraska case is significant because Nebraska's is the only highest court in the country that has weighed in on this issue. Because of that, despite it not being binding outside Nebraska, the decision might be used as persuasive precedent by courts around the country. A summary of the case facts, procedural history, and the appellate court's reasoning are provided below.

A. *In re Erick M.*

[38] *See CIS Ombudsman*, U.S. DEPARTMENT HOMELAND SECURITY, www.dhs.gov/cisombudsman (last visited Feb. 1, 2013).

Uneven Access to Special Immigration Juvenile Status

In *In re Erick M.*, a juvenile Erick, was committed to the care and custody of a Nebraska state agency, the Office of Juvenile Services ("OJS"), after he was twice charged with being a minor in possession of alcohol.[39] While in state custody, "Erick had continually disappeared from the residential center, used alcohol and drugs, committed law violations, and threatened the staff."[40] Investigation into his family situation revealed that his father had long abandoned Erick but that his mother was active in his life and waiting for Erick to return to her following his time in OJS custody. During a hearing, his attorney stated "Erick's goal was to 'get back home' and work on a rehabilitation program from there."[41] After nearly a year in state custody, Erick brought a motion for SIJS findings.[42] Erick sought SIJS based on the fact that he was under state custody, his father had long abandoned him, and it was not in his best interest to return to Mexico, his country of birth.[43]

The juvenile court held a hearing on the motion for SIJS findings and heard evidence as to whether reunification with one or both parents was not viable due to abuse, neglect, or abandonment. A family permanency specialist testified that she had no contact information for Erick's father and that she did not know whether paternity had ever been established.[44] She also testified that Erick did not know his father's whereabouts.[45] The family permanency specialist further testified that she knew of no reports or investigations of abuse or neglect by Erick's mother and that she intended to continue to work with the mother once Erick was released back into his mother's care.[46] The juvenile court, having heard this evidence, denied Erick's motion on the basis that "the facts

[39] *In re* Erick M., 820 N.W.2d 639, 642 (Neb. 2012).
[40] *Id.*
[41] *Id.*
[42] It is unclear who brought the motion for SIJS findings on Erick's behalf. The authors speculate that Erick's counsel in his delinquency proceedings may have brought the motion, though an immigration attorney not otherwise involved in his delinquency proceedings could instead have brought the motion.
[43] *In re* Erick M., 820 N.W.2d at 642.
[44] *Id.*
[45] *Id.* at 643.
[46] *Id.* at 642-43.

failed to show that reunification with Erick's mother was not viable because of abuse, neglect, or abandonment."[47] Specifically, the court found that:

> (1) it had removed Erick from his home because of his alcohol abuse and he had never been removed from his mother's home because of abuse, neglect, or abandonment; (2) Erick's mother had been present at almost every hearing; (3) Erick had lived with her before the court committed him to OJS; and (4) no evidence showed that he would not be returned to his mother when he was paroled or discharged . . . .[48]

The court made no finding as to whether Erick's father had abandoned Erick, essentially ending the inquiry once it found that there was one parent with whom reunification was feasible.[49]

Erick appealed, arguing that the court erred in finding that he did not satisfy the reunification prong.[50] He argued that the plain language of the statute required that he show no more than that reunification with his father was not viable due to abandonment.[51] He pointed out that the use of the disjunctive "or" in the term "1 or both" in the statute meant that so long as he had satisfied the first, i.e., shown that reunification with one parent was not viable due to abuse, neglect, or abandonment, he need not show more to satisfy the reunification prong.[52] The state, in turn, argued that the plain language precluded Erick's interpretation, asserting that his interpretation rendered the words "or both" superfluous.[53] The state further argued that "Congress did not intend for courts to ignore the presence of a parent with whom reunification is feasible" and that

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[47] *Id.* at 643. The court also found that there was "no evidence that Erick's father had ever abused or neglected Erick," though it made no findings as to whether the father had abandoned Erick. *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*

"under Erick's interpretation, a juvenile court would be required to find that the reunification component was satisfied every time the State could not identify or find a juvenile's parent, even when reunification with the other parent was appropriate."[54]

The case turned on this contested meaning of "one or both." To resolve the dispute, the Nebraska Supreme Court looked first to the statute's plain language, which it found ambiguous given the language's susceptibility to more than one reasonable interpretation.[55] Though it conceded that Erick's was a reasonable reading of the language, the court introduced an alternative reasonable reading and explanation for the use of the disjunctive "or":

> Because "or" describes what a juvenile court must determine in the alternative, we could also reasonably interpret the phrase "1 or both" parents to mean that a juvenile court must find, depending on the circumstances, that *either* reunification with one parent is not feasible *or* reunification with both parents is not feasible.[56]

Under the court's formulation, the disjunctive functions to set up the two types of cases that might be at issue—that the child has either one parent for whom reunification is at issue or that the child has two parents for whom reunification is at issue, depending on whether the child lived with one or both around the time of the determination.[57]

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[54] *Id.*

[55] *Id.* at 644-46.

[56] *Id.* at 644.

[57] *See id.* at 647 ("[I]f a juvenile lives with only one parent when a juvenile court enters a guardianship or dependency order, the reunification component under §1101(a)(27)(J) is not satisfied if a petitioner fails to show that it is not feasible to return the juvenile to the parent who had custody. . . . In contrast, if the juvenile was living with both parents before a guardianship or dependency order was issued, reunification with both parents is usually at issue."). Confusingly, however, the court simultaneously determines that the issues of reunification with both parents will always be at issue. *See id.* That is, the court must decide whether reunification with either parent is viable. While this complicates the suggestion that the disjunctive can be explained in the way the court suggests, the court merely uses its

This formulation deals, albeit indirectly, with the state's concern of the superfluity of the term "or both."

Having found the language susceptible to more than one reasonable interpretation, the court deemed it ambiguous and turned to sources outside the statute to interpret it.[58] Focusing first on legislative history, the court noted the progression of SIJS language over time.[59] The court pointed out that originally SIJS findings consisted only of "a judicial or administrative order determining . . . that the juvenile alien was dependent on a juvenile court and that it would not be in the juvenile's best interest to be returned to the juvenile's or parent's home country."[60] The court then noted that in a 1997 amendment, Congress restricted SIJS eligibility, requiring a court determination that the juvenile is "eligible for long-term foster care due to abuse, neglect, or abandonment."[61] The court found legislative history indicating, "Congress intended that the [1997] amendment would prevent youths from using this remedy for the purpose of obtaining legal permanent resident status, rather than for the purpose of obtaining relief from abuse or neglect."[62] In

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reformulation to explain that it finds the language ambiguous and open to outside sources of interpretation. *See id.* at 644.

[58] *Id.* at 644. The court correctly points out that it is confined to the statute's language unless it has found that language ambiguous: "We will not look beyond the statute to determine the legislative intent when the words are plain, direct, or unambiguous." *Id.* After explaining the two separate functions of the disjunctive "or," the court explains that no other language in the statute helps to clarify the meaning: "Unfortunately, there are no related provisions in the act from which we can discern Congress' intent." *Id.* In an apparent misstep, however, the court next turns to agency guidance *during* this ambiguity determination, stating, "*Absent any statutory or regulatory guidance*, we conclude that the statute is ambiguous because the parties have both presented reasonable, but conflicting, interpretations of its language." *Id.* (emphasis added) (citing Project Extra Mile v. Neb. Liquor Control Comm'n, 810 N.W.2d 149, 163 (Neb. 2012) ("[D]eference to an agency's interpretation of its governing statutes is improper when the statutes are unambiguous . . . ."). This erroneous searching for agency guidance during the ambiguity determination is ultimately inconsequential, however, since the court finds that there are no agency guidelines shedding light on the issue at hand. *Id.*

[59] *Id.* at 644-46.

[60] *Id.* at 645.

[61] *Id.*

[62] *Id.*

regulations following the 1997 amendment, "immigration authorities interpreted the 'eligible for long-term foster care' requirement to mean that 'a determination has been made by the juvenile court that family reunification is no longer a viable option.'"[63]

The court then considered the 2008 amendment to the statutory definition of a special immigrant juvenile, which introduced the "1 or both" language at issue in Erick's case. The court noted that the "2008 changes expanded the pool of juvenile aliens who could apply for SIJ status" and recognized that Congress removed the requirement that a state juvenile court find that a juvenile is eligible for long-term foster care.[64] Although the court did not say so, this revelation seems to have triggered the following question for the court: when Congress eliminated the requirement that a court find "family reunification is no longer a viable option due to abuse, neglect, or abandonment" and replaced it with the requirement that a court find that "reunification with 1 or both parents is not viable due to abuse, neglect, or abandonment," did Congress intend that a court no longer consider reunification with both parents? That is, would the inquiry end once a court found that, for example, a child could not be reunified with a father because that father had abandoned the child? If so, Erick's argument would prevail. And therefore, courts could ignore the question of whether there was nevertheless a parent with whom reunification was viable.

In exploring this question of Congress's intent, the court looked to whether agency officials and judges considered reunification with both parents when one parent was found to have abandoned the child.[65] The court concluded that "even 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."[66] In support, the court cited three opinions in which USCIS or a court made findings as to both parents, even though there was a determination that one

[63] *Id.* at 645-46.
[64] *Id.* at 645.
[65] *Id.* at 646-47.
[66] *Id.* at 646.

parent had abandoned the child.[67] None of these cases however, include a discussion as to whether all the findings were required; they include the findings without more discussion.[68] The court nevertheless seemed satisfied that "USCIS does not consider proof of one absent parent to be the end of its inquiry . . . . A petitioner must normally show that reunification with the other parent is also not feasible."[69] In Erick's case, this meant that "[b]ecause Erick was living with . . . his mother when the juvenile court adjudicated him, he could not satisfy the reunification component without showing that reunification with his mother was not feasible."[70]

B. *The Nebraska Supreme Court's Novel Interpretation of SIJS Law*

In interpreting "one or both" to mean that Erick had to demonstrate that reunification with *both* parents was not feasible, the court seems not only to have departed from the plain language of the statute, but also improperly to have imbued its decision with concerns as to opening the floodgates of immigration relief to children abandoned by one parent. On its face, the statute requires an inquiry as to whether reunification with one or both parents "*is not feasible* because of abuse, neglect, or abandonment."[71] The court's application of the language instead asks whether reunification with either parent is viable; if "the juvenile has a safe parent to whose custody a court can return the juvenile," the child will not qualify for SIJS.[72] This seems to nullify the 2008 amendment written, as the court noted, in the spirit of expanding SIJS eligibility. That is, the court's application reverts to the pre-2008 requirement that a child show that family reunification is no longer an option.[73]

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[67] *Id.* at 646 nn.31 & 35.

[68] *See In re* Trudy-Ann W. v. Joan W., 901 N.Y.S.2d 296, 298 (App. Div. 2010); *In re* [Male Juvenile From Mexico], 2011 WL 7790423, at *3 (U.S. Dep't of Justice, Immigration & Naturalization Servs., Office of Admin. Appeals Mar. 15, 2011); *In re* O.Y., 2009 WL 5196007, at *2 (N.Y. Fam. Ct. Sept. 22, 2009).

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

[70] *Id.*

[71] *Id.* at 643 (emphasis added) (citing 8 U.S.C. § 1101(a)(27)(J)(i) (2012)).

[72] *Id.* at 647.

[73] "[W]e disagree that when a court determines that a juvenile should not be reunited with the parent with whom he or she has been living, it can disregard

It seems that the court was preoccupied primarily with the expansion of the SIJS relief beyond those for whom it believes the relief was intended. The court repeatedly referred to the notion that "protecting the juvenile from parental abuse, neglect, or abandonment must be the petitioner's primary purpose" in pursuing SIJS relief.[74] The court also seemed to believe that children abandoned by one parent but in the custody of the other parent do not fall under the SIJS statute, despite having conceded that this is a reasonable interpretation of the current SIJS language. While this sensitivity to the function and purpose of SIJS is not inappropriate for a court interpreting the SIJS language, it does appear at odds with the purpose of state court involvement in SIJS findings: to enter limited, discrete factual findings as to the child's family situation based on the court's expertise in child welfare and best interest considerations. Indeed, the court's considerable effort in nailing down a definition of the "1 parent" language contradicts even the court's own recognition 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."[75]

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whether reunification with an absent parent is not feasible because of abuse, neglect, or abandonment." *Id.* at 648. While earlier the court suggested that the relevance of the fitness of one parent or the other would depend on the parent with whom the child was living at the time of the determination, this statement suggests that the court expects no such distinction to be drawn. Under any circumstance, the fitness of *both* parents is at issue. *See id.* ("[W]hen ruling on a petitioner's motion for an eligibility order under [the SIJS statute], a court should generally consider whether reunification with either parent is feasible."). This essentially nullifies the introduction of the one-parent language and the elimination of the long-term foster care eligibility requirement.

[74] *See id.* at 645-48.

[75] *Id.* at 642. This statement of congressional intent is in line with the fact that there is no legislative history on the one-parent language, and the fact that the administering agency's proposed regulations also fail to clarify the meaning of the term. The absence of federal guidance may indicate an intent to allow state officials ample space to apply the law in line with general principles, in this case, of child welfare and protection.

A New York family court considering *In re Erick M.* commented that the Nebraska court seemed to go too far, and held in favor of immigration gatekeeping rather than child welfare:[76]

> 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 need not determine any other issues, such as what the motivation of the juvenile in making application for the required findings might be . . . . Whether or not a juvenile's application constitutes a potential abuse or misuse of the SIJ provisions of the immigration law is an issue to be determined by the USCIS. That issue is beyond the scope of what a state juvenile court is required to decide upon. . . .[77]

The New York court therefore refused to apply Nebraska's approach, though it felt compelled to address it. The New York court demonstrates how a family court could apply the plain language of the statute in favor of a child like Erick, whose reading was, after all, deemed reasonable by the Nebraska court. It also directly acknowledges and executes the state court's limited role in SIJS proceedings: to enter factual findings *permitted* under the statutory language in light of child welfare and best interest considerations. Thus limiting its reach, the New York court shows how family courts across the country can enter predicate findings without delving into immigration policy considerations and thereby encroaching on determinations reserved for federal immigration authorities.

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[76] *In re* Mario S., 954 N.Y.S.2d 843, 853 (Fam. Ct. 2012). While Nebraska state law is not binding outside its borders, the New York court seemed compelled to comment on the recent opinion. *Id.* at 852. ("This Court would be remiss in not setting forth why it declines to follow the recent opinion of the Supreme Court of Nebraska in *Erick M.* . . . ."). This might be because, as previously stated, Nebraska's is the only high court to have weighed in on the issue, which arguably adds persuasive weight to the decision.

[77] *Id.*

Unfortunately it so happens that Norman, introduced above in Part II, is not headed to New York but instead plans to live with his father in Omaha, Nebraska. Once reunified there with his father, *In Re Erick M.* will likely operate to preclude Norman's access to SIJS relief.[78] This situation highlights an obstacle for the legal services providers screening Norman: in order to assess his eligibility for relief, the advocates must know where Norman will fight his case and keep abreast of how SIJS language is being applied in that jurisdiction. This kind of logistical burden could be avoided if state courts limited their involvement in defining statutory language and instead applied the language in any permissible way that allows them to serve the best interest of the particular child at issue. As it stands however, Norman will likely be deemed ineligible for SIJS relief and left without means to lawfully remain with his one suitable caretaker—ineligible based solely on where in the United States he fights the case.

C. *A Lack of Guidance for the State Courts*

The Nebraska Supreme Court struggled with what it deemed ambiguous language, and it did so without any real guidance from Congress or USCIS. There is no legislative history illuminating Congress's intent in introducing the disjunctive phrase at issue in *In re Erick M.* Current regulations have yet to be amended to reflect the 2008 changes to the SIJS definition. Indeed, current regulations are particularly confusing to state court judges who reference them, as they still contain the outdated requirement that the child qualify for

[78] Of course there are creative ways for advocates to argue that the Nebraska court's holding should not apply to Norman. For instance, one could argue that the true "custodial" parent in Norman's case is his mother, who was the custodial parent at the time when Norman sought SIJS relief. One might also argue that Norman's reunification with his father is not "viable" because his father is unlawfully present in the United States. *See, e.g.*, *In re* Welfare of D.A.M., No. A12–0427, 2012 WL 6097225, at *6 (Minn. Ct. App. Dec. 10, 2012) ("Planning for the return of appellant to his mother after his placement does not answer the question of whether appellant will be able to successfully live in her care. The viability of appellant's reunification with his mother for SIJS purposes requires the district court to consider her present living conditions, her willingness and ability to care for appellant, and all other relevant circumstances, so as to make a conclusion about whether that reunification is 'practicable' or 'capable of succeeding.'").

long-term foster care.[79] Though new regulations are in the works, the proposed draft revealed that they do not explicitly address the issue of one-parent SIJS. In its commentary to the proposed regulations, USCIS seems to recognize the "one or both parents" language to mean "expanded eligibility" for SIJS.[80] But without an explicit recognition of the validity of one-parent SIJS cases, advocates are at a loss when briefing unfamiliar state court judges on the availability of one-parent SIJS relief. Finally, USCIS has issued no official public legal memoranda articulating its policy on the validity of SIJS petitions based on one-parent facts.

D. *Working Toward Uniformity*

If Congress meant for SIJS not to apply to a child who had been abandoned by one parent, it can so clarify by once again amending the definition of "special immigrant juvenile." Further amendment by Congress could also clarify that SIJS *was* intended to apply to children abandoned by a single parent, even if residing with or able to reunify with the second parent. An amendment could be a step toward uniformity in helping avoid Norman's situation, so that protection under the law is triggered not by a child's circumstances and needs but by his geographical location.

Any further legislation should take into account a child like Norman. Although one might argue that the feasibility of Norman's reunification with his father can fairly preclude Norman from relief because he can return with his father to Honduras, this argument disregards the independent protection of Norman, who has been unable to control the residence choices of his parents. Child welfare and protection require that vulnerable children like Norman have independent access to legal relief. Norman is a child in need of safe custody, and that is not an option for him in his home country. Now that he is in the United States, safe repatriation is an issue immigration officials must consider under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008

[79] *See* 8 C.F.R. § 204.11(a) (2013).

[80] *See* Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54,978, 54,979 (proposed Sept. 6, 2011) (to be codified at 8 C.F.R. pts. 204, 205, 245).

("TVPRA"). A child like Norman, involuntarily at the mercy of his parents' relocation decisions, needs an outlet for relief and safety. This is in line with international child protection and humanitarian principles. This should be the driving force for developing relief for immigrant children as it was in introducing SIJS.

Of course, new legislation takes a substantial amount of time and resources for enactment and is therefore not the simplest fix to the "one-parent" dilemma. A more practical solution may actually come from USCIS. The agency could recognize the validity of one-parent claims in its new regulations, thereby giving advocates a concrete provision in the Federal Register to which they can refer a state court judge. Alternatively, the agency could issue a public legal memorandum directing USCIS officers adjudicating SIJS claims and the public on the agency's interpretation of the "one or both" requirement. As an example, USCIS issued an initial memorandum regarding the TVPRA on March 24, 2009[81] and although that memorandum clearly indicates that it is meant to be guidance created "solely for the purpose of USCIS personnel in performing their duties," it still carries substantial weight and can offer guidance for more than just USCIS adjudicators as to the agency's application of the statute.[82] Four years after that initial memorandum, and with the current ability to reflect on how the law has been utilized across states, an update is necessary.

E. ***Advocacy After Nebraska's Decision***

Advocates do not have the luxury of simply awaiting clarification from Congress or USCIS, of course, as they continue to encounter children eligible for one-parent SIJS on a daily basis. Those advocates must continue to act quickly to try to discern where a child may ultimately be headed in the United States and to strategize about the child's options for legal relief on that basis. If a child is destined for an unfriendly jurisdiction like Nebraska, it may be a reason to prioritize his or her case and obtain the predicate order in any other jurisdiction that might be appropriate. Otherwise, justice

[81] Memorandum, Trafficking Victims Protection Reauthorization Act of 2008, *supra* note 36.

[82] *Id.* at 5. State court judges with little or no knowledge of immigration law might find such memoranda particularly helpful.

delayed will be justice denied. This sort of strategizing is not something advocates are unfamiliar with, of course. They often must consider the availability of free or low cost legal services in the child's destination area; where those services are not available, advocates do their best to make sure a child obtains legal assistance before he or she departs. But the type of strategizing involved with analyzing the one-parent dilemma is different. Advocates will need to keep abreast of state law on SIJS claims as it develops across the country. To do so, advocates across organizations and state lines will need to continue to collaborate and effectively share information.

It may also be time for advocates to reach across practice lines, to their brethren in state family and juvenile law for assistance. Those practitioners are more familiar with state law as it applies to youth and with the challenges faced and concerns held by state court judges. Additionally, they share with immigration advocates a common interest—looking out and seeking justice for our vulnerable youths. Partnerships with local family law practitioners could help unveil the mystery of, and demonstrate the credibility of, SIJS before hesitant state court judges. With family and juvenile lawyers bridging both worlds, immigration advocates could participate in state judicial conference trainings and could provide explanatory materials about SIJS.

V. Conclusion

SIJS is an important benefit for children unlawfully present in the United States who have suffered parental abuse, neglect, or abandonment. Through recent precedent, the Nebraska Supreme Court restricted access to SIJS relief, apparently acting out of concern over immigration policy and thereby taking on the federal role of immigration gatekeeper. The current statutory definition of "special immigrant juvenile" allows for USCIS to approve applications for SIJS in one-parent cases like those of Erick and Norman. For a state court to fail to issue factual findings requested by a child, especially when the necessary evidence supporting those findings is in the record, due to principles of immigration policy—

and perhaps fears of overextension of immigration benefits—is inappropriate. The state courts ought to be focused on principles of child welfare and best interest analysis because that is their limited and prescribed role in the SIJS scheme. Whether a child is ultimately eligible for SIJS involves analysis that should, and does, belong to federal immigration authorities alone. Admittedly, the Nebraska Supreme Court's decision was made in the absence of real guidance from federal authorities. Congress, USCIS, or both must clarify for the states what the 2008 amendments to the statutory definition of "special immigrant juvenile" mean and how the "one or both" language was intended to be applied.

In the meantime, though it is within a state court's delegated authority and expertise to decide whether parental reunification is possible and what is in the child's best interest, it is not the state court's role within the SIJS scheme to close the door on protection from deportation for these vulnerable children. Children for whom SIJS relief was arguably intended will be denied relief if they are so unlucky as to fight their cases in Nebraska. If other states rely on Nebraska's decision as persuasive authority, then immigration advocates will be forced into a costly game of forum shopping in order to protect clients from deportation. Clearly, justice dictates that relief for the children served depends on their real needs, not their latitude and longitude measured at a particular point in time.

A Path to Citizenship Through Higher Education for Undocumented Students In The United States: Examining the Implications of *Martinez v. The Regents of the University of California*

Diana Moreno*

I. Introduction

The discussion surrounding undocumented immigrant children and public education is not a new phenomenon. Due to an outdated and deficient immigration system, millions of people have immigrated to the United States illegally, many of whom do so with children.[1] These children are often so young that they may have little or no memory of their birth country, and thus may have had no voice in the decision to leave their home country.[2] When these children arrive in the United States, they are enrolled in U.S. public schools, study English, learn American history, culture, and traditions, and consider America their "home."[3] Although undocumented parents bring their children to the United States with plans to stay permanently, and the children consider themselves American, there are advocates for stricter immigration control who have argued that providing these undocumented immigrant children a free public

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[1] UCLA CTR. FOR LABOR RES. & EDUC., UNDOCUMENTED STUDENTS: UNFULFILLED DREAMS… 3 (2007) [hereinafter UNDOCUMENTED STUDENTS], http://www.labor.ucla.edu/publications/reports/Undocumented-Students.pdf.

[2] *Id.*

[3] *Id.*

education is a burden on society.[4] More liberal and progressive Americans argue that these undocumented children need to be educated, and that choosing not to educate these youth will eventually become an even larger burden on society.[5]

The Supreme Court in *Plyler v. Doe*, a landmark case decided almost thirty years ago, addressed this very issue of providing a free public education to undocumented children. In *Plyler*, the United States Supreme Court ruled that a state could not deny undocumented immigrant children a public education.[6] The *Plyler* decision, however, is only applicable for primary and secondary school children.[7] Once an undocumented student graduates from high school, new issues arise, such as access to higher education, which must also be addressed.[8]

Undocumented immigrants are individuals who either entered the United States without authorization,[9] or who entered legally, but remained in the U.S. beyond the permitted authorization period.[10] Since the 1980s, there has been an influx of immigrants into the

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[4] Plyler v. Doe, 457 U.S. 202, 227 (1982) (generalizing one of appellant's arguments which states an interest in the "preservation of the state's limited resources for the education of its lawful residents").

[5] *Id.* at 221 (arguing that "we cannot ignore the significant costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests").

[6] *Id.* at 230.

[7] *See id.*

[8] *See generally* CATHERINE EUSEBIO & FERMÍN MENDOZA, EDUCATORS FOR FAIR CONSIDERATION, THE CASE FOR UNDOCUMENTED STUDENTS IN HIGHER EDUCATION (2013), http://www.e4fc.org/images/E4FC_TheCase.pdf (describing the social and economic advantages of a policy that assists undocumented students seeking higher education).

[9] This is also commonly known as "EWI," or "entering without inspection."

[10] UNDOCUMENTED STUDENTS, *supra* note 1. The authorization period is the period on a visa, for which the bearer is allowed entry into the U.S. for a specific purpose. The date granted on the visa governs how long a person may stay in the U.S, and if the requirements are not followed, the person violates status and is considered be "out of status." *Glossary of Visa Terms: Out of Status*, TRAVEL.STATE.GOV, http://travel.state.gov/visa/frvi/glossary/glossary_1363.html#O (last visited Mar. 26, 2013).

United States.[11] In 1980, there were 14 million foreign-born residents in the United States.[12] That number increased to approximately 19 million by 1990, and it further rose to about 31 million by the year 2000.[13] In 2010, the number of foreign-born residents[14] had reached 40 million, or about 13 percent, of the total U.S. population.[15] This influx was followed by a number of restrictions and policy changes for undocumented immigrants, such as policies that restricted their access to health care[16] and that denied welfare benefits[17] and

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[11] *See* Jeanne Batalova & Alicia Lee, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION INFO. SOURCE (Mar. 12, 2012), http://www.migrationinformation.org/usfocus/display.cfm?ID=886. Reasons for the influx during these years is a combination of many factors: The Refugee Act of 1980, which granted refugee status to many people after the Vietnam War, and the Haitian and Mariel boatlifts; The Immigration Act of 1965, which eliminated country-specific quotas and emphasized family-reunification, which allowed many residents already present in the U.S. to bring family members, and thus giving incentives for others family members to join family already present in the U.S., whether through legal means or not; and last, many Latin American countries were experiencing economic and civil unrest, which pushed many to immigrate, especially those that already had family present in the United States. ELIZABETH S. ROLPH, IMMIGRATION POLICIES: LEGACY FROM THE 1980S AND ISSUES FOR THE 1990S (1992), http://www.rand.org/content/dam/rand/pubs/reports/2007/R4184.pdf.

[12] Batalova & Lee, *supra* note 11.

[13] *Id.*

[14] "Foreign Born" refers to people that do not have U.S. citizenship from birth. It includes people who have entered legally, through visas, refugees, asylees, and permanent residents, and additionally those who entered illegally. Batalova & Lee, *supra* note 11.

[15] *Id.*

[16] María Pabón López, *Reflections on Educating Latino and Latina Undocumented Children: Beyond* Plyler v. Doe, 35 SETON HALL L. REV. 1373, 1374 (2005) (discussing the Undocumented Alien Emergency Medical Assistance Amendment of 2004). *See generally* Undocumented Alien Emergency Medical Assistance Amendments of 2004, H.R. 3722, 108th Cong. (2d Sess. 2004). This bill, which never passed into law, would have mandated that hospitals check their patients' citizenship. *Id.*

[17] López, *supra* note 16 (mentioning the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, tit. IV, Pub. L. No. 104-193, 110 Stat. 2105 (codified at 8 U.S.C. §§ 1601-46 (2005)).

workplace protection.[18] Additionally, through new regulations, California,[19] Arizona,[20] and Massachusetts,[21] have eliminated bilingual education opportunities in primary schools. In particular, in 1994, California experienced a large increase of illegal immigration and a downturn in the state's economy, prompting voters to enact Proposition 187, which denied public education and other benefits to undocumented children.[22]

Children who were brought to the U.S. during the 1990s were part of the movement that led to this spike in immigration. These children are now finishing high school and have few options for higher education; alternatively, some have already completed college,[23] but face bleak employment opportunities as a result of their undocumented status.[24] Undocumented students inherently face more challenges in comparison to their American citizen peers.[25] These students often live in constant fear that they, or their parents, will be discovered as undocumented and subsequently be deported.[26] In

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[18] *Id.* (mentioning Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 149 (2002), which held that undocumented workers are not entitled to back pay, despite employer's engagement in unfair labor practice).
[19] *Id.* at 1375 (mentioning California's Proposition 227 from 1998).
[20] *Id.* at 1374 (mentioning Arizona's Proposition 203 from 2000, codified in title 15, sections 751-755 of Arizona Revised Statutes).
[21] *Id.* (mentioning Massachusetts's Question 2 from 2002).
[22] 1994 Cal. Legis. Serv. Prop. 187 § 7 (West 2012) (preempted by federal law).
[23] Federal law does not prohibit undocumented students from attending college. Undocumented students that want to go to college are told to leave "country of citizenship" blank and not provide a Social Security number on their applications. KAREN HERNANDEZ, EDUCATORS FOR FAIR CONSIDERATION, HOW TO SUPPORT COLLEGE-BOUND UNDOCUMENTED STUDENTS: ADVICE FOR PARENTS 9-10, http://www.e4fc.org/images/E4FC_ParentGuide.pdf.
[24] *See* Erika Niedowski, *Undocumented Students Face Obstacles Even After College*, HUFFINGTON POST, Oct. 3, 2011, http://www.huffingtonpost.com/2011/10/03/undocumented-students-face-obstacles-even-after-college_n_991832.html (students may graduate college, some with honors, but are unable to join the U.S. workforce); UNDOCUMENTED STUDENTS, *supra* note 1.
[25] *See* EUSEBIO & MENDOZA, *supra* note 8, at 2.
[26] *Id.*

addition, many face social and economic challenges, as nearly forty percent of undocumented students live below the poverty level.[27] In comparison, the poverty rate for children with U.S.-citizen parents is eighteen percent.[28] This presents challenges not only throughout elementary and high school, but may also inhibit these students from applying to college[29] because they have limited access to financial resources.

Unlike students who are American citizens, undocumented students cannot apply for federal financial aid to help pay for higher education. Further, many states do not even allow these students to qualify for in-state tuition, which is typically much lower than out-of-state tuition.[30] In-state tuition for undocumented students has become a complex issue.[31] There are thirteen states that permit undocumented students who meet specific requirements to receive in-state tuition; however, six states prohibit undocumented students from being eligible for in-state tuition.[32] In 2008, South Carolina enacted

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[27] *Id.*

[28] JEFFREY S. PASSEL & D' VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES iv (2009), http://www.pewhispanic.org/files/reports/107.pdf.

[29] *Id.* at 11.

[30] *Financial Aid and Scholarships for Undocumented Students*, FINAID.ORG, http://www.finaid.org/otheraid/undocumented.phtml (last visited Jan. 22, 2013).

[31] *Id.*

[32] States that enacted legislation to allow in-state tuition are California, Connecticut, Illinois, Kansas, Maryland, Nebraska, New Mexico, New York, Texas, Utah, and Washington, with Oklahoma allowing it under a state Board of Regents Policy and Rhode Island allowing it through a Board of Governors approval. Legislation in these states generally requires students to have: 1. Attended high school in that state for a specified number of years (e.g., three or four years), and 2. Graduated from a high school in the state. *See Undocumented Student Tuition: State Action*, NAT'L CONF. ST. LEGISLATURES (July 2012), http://www.ncsl.org/issues-research/educ/undocumented-student-tuition-state-action.aspx. Arizona, Colorado, Georgia, Indiana, Ohio, and South Carolina ban undocumented students from in-state tuition. Richard Pérez-Peña, *Immigrants to Pay Tuition at Rate Set for Residents*, N.Y. TIMES, Nov. 19, 2012, http://www.nytimes.com/2012/11/20/us/illegal-immigrants-to-pay-in-state-tuition-at-mass-state-colleges.html?_r=0.

legislation that prohibited undocumented students from enrolling in its state colleges or universities, which was followed, in 2010, by a similar prohibition at "selective" universities in Georgia, and in 2011 by another ban at two-year colleges in Alabama.[33] Furthermore, federal law restricts employers from hiring people who cannot provide documentation of legal immigration status, which for undocumented students would make employment nearly impossible to find, even with a college degree.[34] Thus, when an undocumented student completes a higher education, that student is precluded from utilizing that degree because of an immigration status the student did not choose. As undocumented youth grow up in America and graduate from high school, it begs the question: "Where do they go from here?"

Education is a gateway to success, and while it is not a fundamental right granted in the U.S. Constitution,[35] it is not a mere governmental benefit either.[36] This Article argues that students who excel in primary and secondary school should have the opportunity to pursue and utilize higher education, regardless of his immigration status or the state in which he lives. By examining *Martinez v. Regents of the University of California*, this Article will address the issue of granting undocumented students access to in-state tuition rates and the lingering issues of the educational and employment options for undocumented students upon graduation from high school. Part II examines the history of opposition toward undocumented students by reviewing the *Plyler v. Doe* decision. Part

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[33] *See* ALENE RUSSELL, AM. ASS'N OF STATE COLLS. & UNIVS., STATE POLICIES REGARDING UNDOCUMENTED COLLEGE STUDENTS: A NARRATIVE OF UNRESOLVED ISSUES, ONGOING DEBATE AND MISSED OPPORTUNITIES (2011), http://www.aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/PM_UndocumentedStudents-March2011.pdf; *Undocumented Student Tuition: State Action*, *supra* note 32.

[34] 8 U.S.C.A. § 1324(a) (West 2012); Niedowski, *supra* note 24.

[35] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

[36] Plyler v. Doe, 457 U.S. 202, 221 (1982) (stating that education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation").

III then explores current data on immigrant students and federal provisions that have an impact on undocumented students. Part IV introduces *Martinez* first by discussing illegal immigration in California, and then by comparing and contrasting lawsuits in other states regarding in-state college tuition. Part V analyzes what the future looks like for undocumented students, particularly in regard to the Development, Relief, and Education for Alien Minors Act ("DREAM Act") and the new Deferred Action program. Part VI concludes with recent developments and some recommendations for Congress to pass the DREAM Act.

II. A History of Opposition Against Undocumented Students: The *Plyler* Decision

In the early 1980s, the United States Supreme Court decided *Plyler v. Doe*, a landmark case regarding undocumented youth and public education.[37] In this case, the Court used the Equal Protection Clause of the Fourteenth Amendment to strike down a Texas statute that denied public education to undocumented immigrant children from Mexico.[38] This momentous decision was the first time the Court stated that undocumented immigrants could claim the protection of the Equal Protection Clause, therefore not allowing a state to withhold benefits to immigrants if those same benefits were provided to lawful U.S. residents.[39]

Plyer was brought on the behalf of school-aged children from Mexico, who could not establish legal permanence in the U.S., and was filed against the Tyler Independent School District, until the

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[37] *Id.* at 202.

[38] *Id.* at 210, 230. The Fourteenth Amendment provides that "no State . . . shall deprive any person life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[39] *Plyler*, 457 U.S. at 221-22. The Equal Protection Clause prohibits a state from denying any person within its jurisdiction the equal protection of the laws (i.e., a state cannot treat two similarly situated persons differently). U.S. CONST. amend. XIV, § 1.

state of Texas intervened as a defendant.[40] Texas mainly argued that undocumented persons, because of their immigrant status, were not "persons within the jurisdiction"[41] of the state of Texas, despite their physical presence within the state's boundaries.[42] Therefore, the argument followed that these individuals had no right to equal protection under Texas law because in order to claim protection under the Equal Protection Clause, the person must be within that specific jurisdiction, or area.[43] The Court rejected this argument.[44] In its reasoning, the Court stated that protection under the Equal Protection Clause of the Fourteenth Amendment "extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State's territory."[45]

Upon finding that undocumented immigrants are entitled to equal protection, the Court then determined the appropriate standard of scrutiny for evaluating the Texas statute.[46] The *Plyler* Court denied a strict scrutiny test[47] because education is not a fundamental right.[48] The Court also found that an individual's undocumented

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[40] *Plyler*, 457 U.S. at 206.
[41] This term, used in the Fourteenth Amendment, defines the individuals that can assert unequal treatment under the Equal Protection Clause. U.S. CONST. amend. XIV, § 1.
[42] *Plyler*, 457 U.S. at 210.
[43] *Id.*
[44] *Id.*
[45] *Id.* at 215.
[46] *Id.* at 218-20. The level of scrutiny is important when deciding the constitutionality of a state statute. Equal protection means that legislation that discriminates must bear a reasonable relationship to the attainment of a *legitimate* governmental objective. BLACK'S LAW DICTIONARY 616-17, 1376 (9th ed. 2009).
[47] A strict scrutiny test is used when examining a state action that impinges a fundamental right, or if a suspect class (national origin, race, alienage) is involved. The test is the most difficult to pass, as it requires a statute to be narrowly tailored to achieve a compelling state interest. BLACK'S LAW DICTIONARY 1558 (9th ed. 2009).
[48] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973). Fundamental rights are those that encompass a significant amount of liberty, such as voting or privacy, and trigger a strict scrutiny test. BLACK'S LAW DICTIONARY 744 (9th ed. 2009).

status is not an immutable characteristic as necessary to apply strict scrutiny review because it is the "product of conscious, indeed unlawful, action.[49]" Instead, the Court applied a heightened rational basis test[50] to examine the state's purported interest in upholding the Texas statute that denied public education to undocumented youth.[51]

The Court noted that the "inability or lax enforcement" of U.S. immigration laws created a difficult issue in trying to serve this "shadow population" of immigrants, particularly, children.[52] The Court acknowledged that while immigrant adults make the conscious, willful choice to enter the United States illegally, their children do not.[53] Therefore, penalizing the child by withholding an education is "ineffectual and unjust" because there is no significant relationship between the child and the wrongdoing.[54]

Plyler was significant for the immigrant community because the decision effectively required public education to be provided to all students, regardless of their immigration status. Also important was the Court's acknowledgment of how there are many factors leading families to unlawfully enter the U.S., and additionally how the U.S. is far from having perfect immigration policy.[55] The Court ultimately stated that because the undocumented minors do not actively partake in the decision-making process to unlawfully enter the U.S., they therefore should not be punished for their parents' willful wrongdoing by being barred from access to a public education.[56]

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[49] *Plyler*, 457 U.S. at 221, 223.
[50] A heightened rational basis test is a standard that is between rational basis and strict scrutiny, where the government must show that a statute that discriminates against a quasi-suspect classification (gender or legitimacy) is substantially related to an important government interest. BLACK'S LAW DICTIONARY 833 (9th ed. 2009).
[51] *Plyler*, 457 U.S. at 224.
[52] *Id.* at 218-19.
[53] *Id.* at 219-20.
[54] *Id.* at 220.
[55] *Id.* at 218.
[56] *Id.*

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Education is not specifically granted as a constitutional right;[57] however, it is so valued in the United States that the idea of denying children a public education is unfathomable.[58] The *Plyler* decision represents a victory for the undocumented community, as it provides a means for undocumented immigrant parents to enroll their children in a public school without fear that their children will be denied admission due to their immigration status. *Plyler*'s impact has been limited, however, because states are not required to provide education for undocumented students past the high school level.[59] Undocumented students who are able to attend public school because of the *Plyler* decision will eventually complete high school, and some of those students will desire to continue their education at a college or university. Attending college not only requires being admitted, but also having the resources available to pay the cost of tuition or to qualify for financial aid.[60] Some states acknowledge this financial obstacle and have policies that grant undocumented students equal access to higher education opportunities and tuition rates as those provided to American citizens.[61] Other states, however, specifically preclude undocumented students from paying reduced in-state tuition

[57] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (holding that education is not a fundamental right).
[58] *Plyler*, 457 U.S. at 223, 230 (stating "it is doubtful that any child may be reasonably expected to succeed in life if he is denied the opportunity of an education" and "whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation"); Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483, 493 (1954) ("[Education] is the very foundation of good citizenship.").
[59] *Plyler*, 457 U.S. at 230.
[60] *See generally* Kim Clark, *How to Get In-State Tuition*, U.S. NEWS & WORLD REP. (Dec. 23, 2009), http://www.usnews.com/education/best-colleges/paying-for-college/savings/articles/2009/12/23/how-to-get-in-state-tuition (article updated Oct. 31, 2011).
[61] *Table: Laws & Policies Improving Access to Higher Education for Immigrants*, NAT'L IMMIGR. L. CENTER, http://www.nilc.org/eduaccesstoolkit2a.html (last visited Jan. 31, 2013).

or enrolling in higher education altogether, even if they would otherwise qualify for admission.[62]

III. An Immigration Reality

Immigration, especially illegal immigration, is an area that the U.S. government is currently struggling to address. There is bi-partisan acknowledgement that comprehensive policy reform is needed; however, there is no agreement as to what that reform should entail.[63] As a result of the federal government's inability to address issues regarding undocumented immigrants, many states have taken matters into their own hands. This has had a particularly strong impact on undocumented students.[64]

A. Data on Immigrant Students

Millions of immigrant children call the United States "home."[65] In 2010, there were approximately 11.1 million school-aged children from immigrant households,[66] more than half a million increase since 2000.[67] Of those 11.1 million school-aged children from immigrant households, it is estimated that 10.5 million currently attend public schools.[68] The numbers of undocumented students are not as concrete as are those for documented immigrants; since there are no questions on national and state surveys that directly inquire about legal status. Therefore, researchers must apply scientific methods to calculate an estimated number of undocumented

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[62] *See id.*
[63] *See* Michael Hernandez, Opinion, *For Immigration Reform to Happen, Bipartisanship Must Make a Comeback*, VOXXI NEWS, Dec. 10, 2012, http://www.voxxi.com/immigration-reform-bipartisanship/ (demonstrating how there has been bi-partisan efforts for immigration reform in the past and how that mindset is once again critical).
[64] *Id.*
[65] STEVEN A. CAMAROTA, CTR. FOR IMMIGRATION STUDIES, IMMIGRANTS IN THE UNITED STATES: A PROFILE OF AMERICA'S FOREIGN-BORN POPULATION 2 (2012), http://www.cis.org/articles/2012/immigrants-in-the-united-states-2012.pdf.
[66] *Id.* at 40-41.
[67] López, *supra* note 16, at 1377.
[68] CAMAROTA, *supra* note 66, at 40-41.

immigrants.[69] Using such methods, it is estimated that there are 1.1 million undocumented children under the age of eighteen in the United States.[70] Additionally, it is approximated that 65,000 undocumented students graduate from U.S. high schools each year,[71] and of those, only 10 to 20 percent enroll in higher education.[72] Many undocumented high school students are successful in high school and are active in athletics, student government, and other organizations, but because of their undocumented status, pursuing higher education is not a realistic option.[73]

B. Obstacles to Higher Education

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[69] HANS JOHNSON & LAURA HILL, PUB. POLICY INST. OF CAL., AT ISSUE: ILLEGAL IMMIGRATION 5 (2011), http://www.ppic.org/content/pubs/atissue/AI_711HJAI.pdf.

[70] EDUCATORS FOR FAIR CONSIDERATION, FACT SHEET: AN OVERVIEW OF COLLEGE-BOUND UNDOCUMENTED STUDENTS (2012) [hereinafter AN OVERVIEW OF COLLEGE-BOUND UNDOCUMENTED STUDENTS], http://dsa.csupomona.edu/ab540/files/Fact_Sheet_8073.pdf.

[71] UNDOCUMENTED STUDENTS, *supra* note 1.

[72] AN OVERVIEW OF COLLEGE-BOUND UNDOCUMENTED STUDENTS, *supra* note 71.

[73] *See* Stephanie Chen, *For Family of High-Achieving Kids, Only One Holds the Keys to College*, CNN LIVING (Oct. 19, 2011), http://articles.cnn.com/2010-10-19/living/illegal.immigration.siblings.divided.dreamact_1_emily-undocumented-students-mixed-status-families?_s=PM:LIVING (explaining the story of Javier, a seventeen-year-old student from Georgia, who took AP classes, was junior class president, captain of his swim and cross-country teams, but says "making good grades? Anybody can do it if you apply yourself. You want to live the dream and do better, but the reality is if you don't have legal status, [going to college is] like winning the lottery."); *see also* April Corbin, *Citizen of Nowhere: The Story of One Undocumented Student*, LAS VEGAS SUN, Jan. 3, 2011, http://www.lasvegassun.com/news/2011/jan/03/citizen-nowhere/ (describing the story of Jessica, a Nevada student who found out she was undocumented upon receiving "Student of the Year" award. Realizing what the status meant for her higher education goals, she felt hopeless and lost, not sure of what to do after high school. "She simply didn't see the point of excelling when all roads seemingly led to a dead end."); *see also Georgia Capitol Coming Out Stories*, CREATIVE LOAFING ATLANTA (June 29, 2011), http://clatl.com/images/blogimages/2011/06/29/1309369463-georgia_capitol_coming_out_stories.pdf (documenting stories of Georgian students who have realized their status stands in their way of accomplishing dreams of higher education).

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For many undocumented students, education after high school is not a practical option, even if they have the academic potential to be accepted into colleges and universities.[74] Not all states grant undocumented students access to higher education, and some will only do so by requiring that they pay out-of-state tuition.[75] In-state tuition is often a crucial consideration for high school students aspiring to continue their education.[76] Students who reside and attend high school within the state where their desired college is located will generally be eligible to pay in-state tuition, which is usually significantly lower than the tuition out-of-state students must pay.[77]

For example, residents of Texas who attend the University of Texas as an undergraduate student pay $4,908 per semester, while students from out of state pay $16,639 per semester to attend the same school.[78] Similarly, California residents who attend a University of California school as an undergraduate pay $12,192 per year in tuition fees, while students from out of state pay an estimated $22,879 more, totaling $36,078.[79] These numbers reflect only tuition fees and do not account for additional expenses such as books, housing, and other living expenses.[80] Given the difference in cost, it is apparent why in-state tuition may be a critical factor in a student's ability to afford higher education.

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[74] *See* EUSEBIO & MENDOZA, *supra* note 8, at 2 (describing how undocumented students must rely on private scholarships and pay out-of-state tuition because of their status).
[75] RUSSELL, *supra* note 33, at 4.
[76] Clark, *supra* note 61.
[77] *Id.*
[78] *Tuition Costs*, U. TEX. AUSTIN, http://www.utexas.edu/tuition/costs.html (last updated Dec. 3, 2012).
[79] *Nonresident Tuition & Fees*, U. CAL., http://www.universityofcalifornia.edu/admissions/paying-for-uc/cost/out-of-state/index.html (last visited Jan. 31, 2013).
[80] *Id.*

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There are currently only thirteen states that specifically grant undocumented students access to in-state tuition.[81] Three of these states—California, New Mexico, and Texas—take this policy one step further and allow for undocumented students to apply for state-funded financial aid.[82] States and legislatures against granting in-state tuition to undocumented students argue that this practice rewards illegal immigration, and takes away the opportunity for higher education from U.S. citizens.[83] In fact, there are three states—Alabama, Georgia, and South Carolina—that prohibit undocumented students from attending some, if not all, public colleges and universities.[84] Other states, such as Arizona, Colorado, Georgia, and Indiana, make higher education more difficult to obtain and do not grant undocumented students the opportunity to access in-state tuition.[85]

States that allow undocumented students access to in-state tuition demonstrate greater equality for students, because all students who meet the admission requirements have access to higher education, regardless of immigration status. Granting undocumented students access to in-state tuition and eligibility for state financial aid provides a realistic opportunity for these students to pursue higher

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[81] The thirteen states are: California, Connecticut, Illinois, Kansas, Maryland, Nebraska, New Mexico, New York, Oklahoma, Rhode Island, Texas, and Utah. *See Undocumented Student Tuition: State Action*, *supra* note 32.

[82] CAL. EDUC. CODE § 69508.5 (West 2012) (California's law went into effect Jan 1, 2013); *see Table: Laws & Policies Improving Access To Higher Education for Immigrants*, *supra* note 62; *see also* Kelsey Sheehy, *States' DREAM Acts Could Deter High School Dropouts*, U.S. NEWS & WORLD REP. (July 27, 2012), http://www.usnews.com/education/high-schools/articles/2012/07/27/states-dream-acts-could-deter-high-school-dropouts explaining that in 2012, New York attempted to pass a bill that would do the same, however, that bill failed to pass in the Senate) (article updated Aug. 6, 2012 "to clarify details of the Maryland DREAM Act").

[83] RUSSELL, *supra* note 33, at 5.

[84] *Id.* at 4.

[85] *Id.*

education.[86] Thus, a student's dreams should not be limited by the state in which they live.

C. Federal Provisions Affecting Undocumented Students

In the mid 1990s, the U.S. saw a large influx of unlawful immigration.[87] As a result, a Republican-controlled Congress enacted two laws in 1996 imposing new restrictions on immigrants: The Personal Responsibility and Work Opportunities Reconciliation Act ("PRWORA")[88] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").[89] Congress' intent for these laws was to deter future illegal immigration, reduce immigrant reliance on public benefits, and to make immigrants self reliant, or promote use of their "own capabilities."[90] The IIRIRA made a significant impact on U.S. immigration laws and created an additional obstacle for undocumented students attempting to obtain a higher education.[91]

Specifically, Section 1623 of the IIRIRA states that "notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis

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[86] EUSEBIO & MENDOZA, *supra* note 8, at 2.

[87] *See* Batalova & Lee, *supra* note 11 (describing immigration patterns and statistics over the last several decades).

[88] PRWORA's provisions essentially prevented undocumented immigrants from being eligible for any state or local public benefit. For the purposes of this article PRWORA will not be discussed. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

[89] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L No. 104-208, 110 Stat. 3009.

[90] 8 U.S.C.A. § 1601 (West 2012) ("The Congress makes the following statements concerning national policy with respect to welfare and immigration: (1) Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes. (2) It continues to be the immigration policy of the United States that-- (A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and (B) the availability of public benefits not constitute an incentive for immigration to the United States.").

[91] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L No. 104-208, 110 Stat. 3009; 8 U.S.C.A. § 1623 (West 2012).

of residence for any postsecondary education benefit without regard to whether the citizen is such a resident."[92] The ambiguous usage of the word "benefit" leaves the interpretation open to each state, as the law does not have any formal regulations.[93] This ambiguity in the legislation is especially relevant for undocumented high school students looking to qualify for in-state tuition at an institution of higher education.[94] Some states use Section 1623 of the IIRIRA as a basis to permit undocumented students to qualify for in-state tuition, while others use it to justify withholding access to in-state tuition.[95] These competing interpretations and applications of Section 1623 have resulted in lawsuits in some states that have granted undocumented students in-state tuition.[96] The most recent litigation is a 2010 California case.[97]

IV. Undocumented Immigrants in California

As a result of its direct border with Mexico, California has become home to an estimated forty percent of the undocumented immigrant population in the United States.[98] Thus, the tension of the American public toward the undocumented immigrant community in California is palpable, especially in times of financial hardship.[99] In

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[92] 8 U.S.C.A. § 1623.
[93] *Id.*
[94] *Id.*
[95] *Id.*; *Compare* ARIZ. REV. STAT. ANN. § 15-1803 (2012) ("In accordance with the illegal immigration reform and immigrant responsibility act of 1996 (P.L. 104-208; 110 Stat. 3009), a person who was not a citizen or legal resident of the United States or who is without lawful immigration status is not entitled to classification as an in-state student pursuant to § 15-1802 . . . ."), *with* CAL. EDUC. CODE § 68130.5 (West 2012) ("In the case of a person without lawful immigration status, the filing of an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status . . . .").
[96] RUSSELL, *supra* note 33, at 6.
[97] *See* Martinez v. Regents of the Univ. of Cal., 241 P.3d 855 (Cal. 2010).
[98] UNDOCUMENTED STUDENTS, *supra* note 1.
[99] Michael A. Olivas, *IIRIRA, The Dream Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 448 (2004).

1994, almost 60 percent of California voters approved the passage of Proposition 187 ("Prop 187"), a ballot measure that would have eliminated almost all benefits, except essential medical services, for undocumented immigrants.[100] Under Prop 187, undocumented children would be denied the benefit of public education.[101] This measure illustrates a state's residents taking drastic action in an attempt to resolve a very complicated issue.

Soon after its passage, a lawsuit was filed to invalidate the measure.[102] Upon examining Prop 187, a California district court held that many of the provisions either conflicted with or were preempted by federal law.[103] Specifically, the court found that Section 7's denial of public education directly conflicted with the Supreme Court's decision in *Plyler*.[104] Although the court ultimately struck down the denial of public education to undocumented youth, California and other states are now addressing issues regarding the ability of undocumented youth to access a postsecondary education.[105] In 2010, the California Supreme Court heard *Martinez v. The Regents of the University of California*, which involved undocumented students' access to in-state tuition.[106] This decision has been used by numerous other states to justify both granting and denying in-state tuition for postsecondary education to undocumented students.[107]

A. *Martinez v. The Regents of the University of California*

Currently, California law allows qualified students, including undocumented students, to pay in-state tuition at California's public

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[100] *Id.*
[101] 1994 Cal. Legis. Serv. Prop. 187 § 7 (West 2012) (preempted by federal law).
[102] Olivas, *supra* note 100, at 449.
[103] Jose C. Villarreal, *District Court Holds Provisions of California's Proposition 187 Concerning Classification, Notification and Cooperation of State and Federal Agencies and Denial of Primary and Secondary Education to Illegal Immigrants Preempted by Federal Law*, 10 GEO. IMMIGR. L.J. 545, 547-48 (1996).
[104] *Id.* at 548.
[105] *See Undocumented Student Tuition: State Action*, *supra* note 32.
[106] *See* Martinez v. Regents of the Univ. of Cal., 241 P.3d 855, 855 (Cal. 2010).
[107] Olivas, *supra* note 100, at 449, 453.

universities and colleges if they meet certain criteria.[108] To qualify for in-state tuition, Section 68130.5 of California's Education Code (commonly referred to as, and hereinafter, "AB 540") states that students must: 1) attend a high school in California for three or more years; 2) have a high school diploma, or the equivalent, from a California high school; and 3) if undocumented, file an affidavit with the college or university stating that the student is in the process of adjusting his or her immigration status, or will begin the process as soon as the student is eligible.[109] Since California and Texas[110] first implemented these laws in 2001, eleven other states have enacted laws of a similar nature.[111]

In 2005, non-California resident plaintiffs filed a lawsuit against the Regents of the University of California in a California court alleging, among other claims, that AB 540 conflicted with federal law, specifically with Section 1623 of IIRIRA.[112] The plaintiffs claimed AB 540's requirement for a student to attend a California high school for at least three years is a *de facto* residency requirement, which is preempted by Section 1623.[113] In other words, the plaintiffs argued that AB 540 should be struck down as

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[108] CAL. EDUC. CODE § 68130.5 (West 2012).
[109] *Id.*
[110] Current Texas law requires a person to have lived in Texas the three years leading up to high school graduation or the receipt of a GED and have resided in Texas the year prior to enrollment in an institution of higher education. Alternatively, the person can be a dependent whose parent established and maintained domicile in Texas no later than one year before the academic term in which the dependent is enrolled in an institution of higher education. *See* TEX. EDUC. CODE ANN. § 54.052 (West 2011).
[111] *See Undocumented Student Tuition: State Action*, *supra* note 32.
[112] Section 1623 states "notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a state (or a political subdivision) for any postsecondary education benefit . . . without regard to whether the citizen or national is such a resident." *See* 8 U.S.C.A. §1623(a) (West 2012); Martinez v. Regents of the Univ. of Cal., 241 P.3d 855, 859 (Cal. 2010); Josh Bernstein, *Court Upholds California In-State Tuition Law (AB 540)*, NAT'L IMMIGR. L. CENTER (Oct. 10, 2006), http://www.nilc.org/ab540c.html.
[113] *Martinez*, 241 P.3d at 859.

unconstitutional because it conflicts with federal law.[114] Further, plaintiffs claimed that AB 540 illegally discriminated against them because it denied the plaintiffs and other U.S. citizens, who are non-residents of California, the benefit of in-state tuition while that same benefit was provided to undocumented students.[115]

The main legal issue in *Martinez* was whether the AB 540 tuition exemption was based on residency, in violation of Section 1623.[116] A California district court dismissed the plaintiffs' complaint, finding that AB 540 did not conflict with Section 1623 because it was not based upon being a resident of California.[117] Plaintiffs appealed, and the California Court of Appeals found that allowing undocumented students to pay in-state tuition at public colleges was a post-secondary "benefit" conferred within the meaning of Section 1623; therefore, federal law preempted AB 540.[118] The Regents then petitioned the California Supreme Court for review, which was granted.[119] Five years after the initial complaint was filed, on November 15, 2010, the Supreme Court of California found that the exemptions of AB 540 were not based on residency in California, but are instead based on mandatory criteria that did not necessarily have anything to do with residency.[120]

The court found that attending a California high school for at least three years was not the same as being a California resident because of the number of other ways a student could qualify for in-state tuition despite not being an actual resident of California.[121] For example, a student could live in a city right outside of California's border but still attend a California high school.[122] Alternatively, a student could have lived in the state while attending a California high

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[114] *Id.*
[115] *Id.* at 862-63.
[116] *Id.* at 859.
[117] *Id.* at 860.
[118] *Id.* at 860-61, 862-63.
[119] *Id.* at 861.
[120] *Id.* at 859.
[121] *Id.* at 862-63.
[122] *Id.* at 864.

school for the first three years, but then moved outside of California for his final year.[123] Just as some students may be eligible for in-state tuition without living in California, some may conversely be ineligible for in-state tuition, despite living in California.[124] As a result of the requirement that a student attend high school in California for at least three years, even if a California resident graduated from a California high school by solely attending that school for his final year, the resident may still not be eligible unless he also attended a high school within the state for two other years.[125] The court used such examples to dispute the plaintiffs argument that this statute created a *de facto* residency requirement, and further, the court exemplified how in addition to undocumented students, other persons who are not residents of California could also qualify for the exemption.[126]

The court concluded that the AB 540 exemption was not based on residency because the exemption was given to all individuals who attended high school in California for at least three years, and not everyone who qualified was necessarily a California resident.[127] Therefore, AB 540 did not violate Section 1623.[128]

The plaintiffs also argued that California granted undocumented students a "benefit" (i.e., in-state tuition) that was not granted to other U.S. citizens, which was yet another practice prohibited by Section 1623.[129] The court disagreed, however, and responded that if Congress intended to forbid states from allowing undocumented students to have access to in-state tuition, it could have easily added a clause in the federal statute reflecting that intention, or could have just left the statute to state "an alien who is not lawfully present in the United States shall not be eligible."[130]

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[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.* at 859.
[129] *Id.* at 863.
[130] *Id.* at 864.

Instead, Congress added the qualifying clause "on the basis of residence," and as the court decided, AB 540 was not based on residence.[131] Accordingly, Section 1623 was created in response to high volumes of illegal immigration, and Congress likely considered the possibility that undocumented immigrants might meet the requirements in the statute.[132] Nonetheless, instead of making it a definitive rule, Congress opted to let the states make their own decisions.[133]

The plaintiffs further argued that the Privileges and Immunities Clause[134] did not apply to people who are not citizens of the United States and any state that gives a public benefit to unlawful aliens within the state's borders violates the clause unless that benefit is given to all American citizens.[135] Therefore, granting undocumented students access to in-state tuition, when some U.S. citizens did not themselves have access to it, would be unconstitutional.[136] The court responded by stating that while the clause does not go so far as to protect undocumented immigrants (meaning an alien cannot invoke protection or claim benefits under the clause), it allows states to treat undocumented immigrants, who qualified, more favorably than nonresident citizens.[137] The court used *Plyler* to show that it cannot be the case that a state may never give a benefit (i.e., free public education) to an unlawful alien without giving that same benefit to all American citizens,[138] and further stated that AB 540 does not treat undocumented students any better or

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[131] *Id.*
[132] *Id.* at 864-65.
[133] *Id.* at 867-68.
[134] The Privileges and Immunities Clause provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1.
[135] *Martinez*, 241 P.3d at 869.
[136] *Id.*
[137] *Id.* at 869-70. ("It cannot be the case that states may never give a benefit to unlawful aliens without giving the same benefit to all American citizens.").
[138] *Id.* at 870.

worse than U.S. citizens, as it applies *to all* individuals who meet the requirements.[139]

AB 540 is an exemption based on certain qualifications that a person must meet in order to be deemed eligible for in-state tuition.[140] It grants the same exemption to anyone who qualifies, regardless of his or her residency or immigration status.[141] If a person can prove that he or she went to high school in California for three or more years, and has a high school diploma from a California school, then he or she will be eligible for in-state tuition.[142]

When enacting AB 540, the California Legislature recognized that these students, regardless of their citizenship status, have attended elementary and high school in the state, have proven their academic ability by being accepted to a college or university, and are likely to remain in the state upon graduation.[143] Therefore, undocumented students should be eligible for in-state tuition so they can afford the education that they have worked so hard to attain.[144] The California Supreme Court's decision reaffirms this recognition, as the decision permits *any* qualified student to continue his or her education at a California institute of higher education. Instead of a student working hard only to find out that he is unable to pay for tuition to attend a public institute of higher education because he is not eligible for the lower in-state costs, the *Martinez* decision grants undocumented students in California a realistic opportunity to achieve higher education. There is no longer an educational "cutoff" after high school.[145]

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[139] *Id.* at 869.
[140] *Id.* at 863-64.
[141] *Id.*
[142] *Id.*
[143] LEGISLATIVE COUNSEL'S DIGEST (Feb. 21, 2001), http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0501-0550/ab_540_bill_20010914_enrolled.html; CAL. EDUC. CODE § 68130.5 (West 2012).
[144] LEGISLATIVE COUNSEL'S DIGEST, *supra* note 144; CAL. EDUC. CODE § 68130.5.
[145] Chen, *supra* note 74, at 4.

As a result, all California students, including undocumented students, can now be assured that if they are accepted into a college or university, it will be more affordable. According to University of California ("UC") statistics, since the implementation of AB 540, there has been a steady increase in the number of undocumented[146] undergraduate students using the exemption.[147] The May 2012 UC Annual Report on the AB 540 Exemption found that from the implantation of AB 540 to the 2010-11 academic year the total number of potentially undocumented recipients who qualified more than quadrupled, from 89 students in 2002-03 to 501 students in 2010-11.[148] Moreover, there was a large spike of students between 2006 and 2007, where between 2002-03 and 2006-07 there was an average of 219 AB 540 students, and then in 2007-08 the number increased to 402 students, which has since been the average.[149] The growth disparity from the 2002-2006 average to the 2007-08 numbers could be attributed to a couple of different reasons. First, there simply could have been more eligible students in the first few years of implementation.[150] Second, and more likely, is that the large initial increases could have reflected the number of students beginning to realize their eligibility for lower tuition.[151] Therefore, the rate of students using the exemption to enroll in college has now steadied because information about AB 540 has spread and students are sufficiently aware of the option.[152] While this amount is relatively low considering the large number of students who attend a UC school, this report is solely for the UC campuses, as the California

[146] There is no data that clearly identifies every student's documentation status, so the report uses the category "potentially undocumented," which consists of students who have no identifiable documentation status and no other indication that they may be documented. UNIV. OF CAL. OFFICE OF THE PRESIDENT, ANNUAL REPORT ON AB 540 TUITION EXEMPTIONS 2010-2011 ACADEMIC YEAR 3-4 (2012), http://ucop.edu/student-affairs/_files/ab540_annualrpt_2011.pdf.
[147] *Id.* at 3.
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*

State University and California Community College systems do not track data on undocumented students.[153]

B. Lawsuits in Other States

California is not the only state with a law that grants undocumented students in-state tuition. Twelve other states have implemented comparable laws.[154] The laws in these states are similar to that of California, in that they require students to have lived within the state for a certain number of years, and to have graduated from a high school within that state.[155] For example, Kansas allows students who have attended a Kansas high school for three years and graduated from a Kansas high school to be eligible for in-state tuition, regardless of their immigration status.[156] In 2004, a group of out-of-state Kansas college students challenged this law in *Day v. Sebelius*, when they claimed that the law was in violation of federal law, specifically Section 1623 of IIRIRA and the Equal Protection Clause.[157] The merits of the case were never heard, however, as a district court judge dismissed the case in its entirety.[158] The court found that the plaintiffs lacked standing to challenge the law on the equal protection claim, and that Section 1623 did not create a private right of action for these plaintiffs because they had failed to demonstrate that they suffered any actual harm.[159] The Kansas law is still intact today.[160]

In addition to the Kansas and California cases, there have been only two other lawsuits filed in states that grant undocumented

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[153] CAL. STATE UNIV., LONG BEACH, AB 540 ALLY HANDBOOK 3 (2009), http://www.csulb.edu/president/government-community/ab540/handbook/ab_540_handbook.pdf.
[154] *Undocumented Student Tuition: State Action*, *supra* note 32.
[155] *Id.*
[156] Linton Joaquin, *District Court Dismisses Challenge to Kansas In-State Tuition Law*, IMMIGRANTS' RTS. UPDATE (Oct. 2005), *available at* http://www.nilc.org/kansas-instate.html.
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] KAN. STAT. ANN. § 76-731a (West 2012).

students access to in-state tuition: Nebraska and Texas.[161] In 2009, both states saw lawsuits, but neither made it to trial.[162] The lawsuit in Nebraska was dismissed for what amounted to a lack of standing,[163] and the Texas suit was dropped by the plaintiffs in 2011 when the Mexican American Legal Defense and Education Fund ("MALDEF") filed a motion on behalf of the defendants.[164] Both laws are currently effective, granting undocumented students eligibility for in-state tuition rates.[165]

To date, the only court decision on the issue is *Martinez*, and while it is not controlling in other states, this case helps to validate the legality of in-state tuition laws for undocumented students.[166] One state court ruling that an in-state tuition law does not conflict with federal law sets the stage for other states to defend similar laws using the *Martinez* logic.[167] Additionally, the fact that the U.S. Supreme Court refused to hear *Martinez* on appeal provides states with the argument that California's decision was sufficient for the Supreme Court.[168]

In-state tuition laws are beneficial to the students that live in those states; however, there are many undocumented students that

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[161] RUSSELL, *supra* note 33, at 5-6.
[162] *Id.* at 6; *MALDEF Forces Withdrawal of Legal Challenge to Texas' Instate Tuition Law, HB 1403*, MALDEF, http://www.maldef.org/news/releases/hb1403/ (last visited Mar. 3, 2013).
[163] Nebraska requires plaintiffs to seek remedies from the proper authority before taking a claim to court, and in this case a court found that the plaintiffs should have first sought relief from the Department of Homeland Security. RUSSELL, *supra* note 33, at 6.
[164] *MALDEF Forces Withdrawal of Legal Challenge to Texas' Instate Tuition Law, HB 1403*, *supra* note 163.
[165] TEX. EDUC. CODE ANN. § 54.052 (West 2011); NEB. REV. ST. ANN. § 85-502 (LexisNexis 2012).
[166] The U.S. Supreme Court has rejected challenges to the validity of these state laws, making *Martinez* the most relevant decision. *See* Day v. Bond, 500 F.3d 1127 (10th Cir. 2007), *cert. denied*, 554 U.S. 918 (2008).
[167] David G. Savage, *Supreme Court Allows California to Grant In-State Tuition to Illegal Immigrants*, L.A. TIMES, June 6, 2011, http://articles.latimes.com/2011/jun/06/news/sc-dc-0607-court-tuition-20110607.
[168] *Id.*

live in states without these laws, making the dream of college almost unattainable.[169] Until all states pass legislation like AB 540, there will be many undocumented students potentially without the motivation or incentive to excel in high school.[170] However, it may be unrealistic to depend on every state passing similar legislation, given many states' restrictive views on immigration, specifically illegal immigration. Therefore, federal legislation is the only way to create uniform opportunities for access to affordable higher education for undocumented students. This opportunity comes in the form of a piece of legislation called The Development, Relief, and Education of Alien Minors Act ("DREAM Act"),[171] which Congress should enact.

V. The Next Step: The DREAM Act and Deferred Action

Martinez was a victory for undocumented students who wish to attend an affordable college or university; however, these students still face an uphill battle once they graduate from higher education.[172] Without lawful citizenship, the chances of undocumented students legally obtaining a job upon graduation from a college or university, other than manual labor or service, remain bleak because federal law prohibits employers from hiring them.[173] Nevertheless, this fact does not stop many undocumented students from striving to obtain higher education. There are countless stories about undocumented students who came to the United States at a very young age and worked extremely hard in school to be accepted into colleges, universities, and graduate or professional schools.[174] Their will, determination,

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[169] *See* EUSEBIO & MENDOZA, *supra* note 8, at 2.
[170] Sheehy, *supra* note 83.
[171] *Basic Information About the DREAM Act Legislation*, DREAM ACT PORTAL, http://dreamact.info/students (last modified July 16, 2010).
[172] *See* Niedowski, *supra* note 24.
[173] 8 U.S.C.A. § 1324(a) (West 2012); UNDOCUMENTED STUDENTS, *supra* note 1, at 3.
[174] The following are stories of smart and talented undocumented students who excel in high school and succeed in college, but must constantly cope with feelings

and hard work are admirable. But upon graduation, the lingering question remains: "what is next?"

A. The DREAM Act

The answer to that question comes in the form of the DREAM Act.[175] The DREAM Act is a bill that, if passed, would grant a path to citizenship for undocumented youth who graduate from college or serve in the military.[176] The Act lists specific requirements that a person must meet in order to qualify.[177] The requirements from the most recent version of the Act state that a person must: 1) have entered the U.S. before age sixteen; 2) have been present in the U.S. for at least five consecutive years prior to the bill's enactment; 3) have graduated from a U.S. high school or have been accepted into a U.S. institution of higher education; 4) be between the ages of twelve and thirty-five at the time of application; and 5) have good moral character.[178] Once it is determined that a person has qualified, he or she must either enroll in an institution of higher education, show that he or she is already enrolled in an institution of higher education, or enlist in one of the branches of the military.[179] Upon completion of school or military service, or after a five and a half year waiting period, the individual will be eligible to apply for Legal Permanent Residency, which would allow the individual to eventually apply for U.S. citizenship.[180]

Republican Senator Orrin Hatch of Utah and Democrat Senator Richard Durbin of Illinois first introduced the DREAM Act

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of frustration and despair due to their future job prospects. *See* UNDOCUMENTED STUDENTS, *supra* note 1, at 6-14; *see also* Hector Tobar, *Undocumented UCLA Law Grad Is in a Legal Bind*, L.A. TIMES, Nov. 26, 2010, http://articles.latimes.com/2010/nov/26/local/la-me-tobar-20101126 (describing the story of Luis Perez).

[175] *Basic Information About the DREAM Act Legislation*, *supra* note 172.

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.*

in 2001.[181] Since its introduction, the Act has gained bi-partisan Congressional support and has been reintroduced in different forms, with the most recent version introduced in December 2010.[182] The 2010 form of the bill was passed by the House of Representatives, but failed in the Senate.[183] At the end of the 2010 cloture vote, Senator Chuck Grassley of Iowa expressed his thoughts on the bill and provided reasons for his "Nay" vote.[184] He stated that he voted against the bill because of its inability to solve the underlying problem of illegal immigration.[185] Senator Grassley continued to assert that he believed "we should take a hard look at protecting the youth who are forced to come here illegally, unaware of the consequences," but that the proposed legislation would not be fair to people "all around the world who follow the law and wait their turn to come here legally."[186]

Senator Grassley, alongside many DREAM Act challengers, argued that the proposed DREAM Act leaves too much discretion in the hands of the U.S. Secretary of Homeland Security, which would allow unlawful aliens, or "lawbreakers," to "jump the line" ahead of immigrants who "played by the rules."[187] The Act, in their opinion, makes it "too easy" for unlawful aliens to gain citizenship, and would incentivize people to unlawfully cross the border with their

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[181] Eduardo Garcia, *Federal DREAM Act Would Add $329 Billion to Economy, Create 1.4 Million New Jobs*, CAMPUS PROGRESS (Oct. 1, 2012), http://campusprogress.org/articles/federal_dream_act_would_add_329_billion_to_economy_create_1.4_million_/.

[182] *Id.*

[183] Once presented in the Senate, the bill was just five votes short of receiving cloture, a procedure that which, if sixty votes are received, will end debates on a bill and invoke a vote on the bill. *See Cloture*, U.S. SENATE, http://www.senate.gov/reference/glossary_term/cloture.htm (last visited Jan. 31, 2013); 156 CONG. REC. S10,665-66 (daily ed. Dec. 18, 2010).

[184] 156 CONG. REC. S10,665-66 (daily ed. Dec. 18, 2010).

[185] *Id.*

[186] *Id.* (statement of Sen. Chuck Grassley).

[187] Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2087 (2008).

children.[188] Challengers have every right to be concerned about the underlying problems of immigration; however, that is not what the Act is being proposed to solve.[189]

Instead, the DREAM Act proposes to aid the children of immigrants, who had no part in their parents' decision to enter the country illegally, and who have excelled in school and want to contribute to the country that has provided for their education.[190] As for giving the Department of Homeland Security and its constituents too much discretion, the legislation lists specific requirements that must be met by applicants, and officers must ensure that each individual meets those requirements. If the applicant does not meet the necessary requirements, the person will be denied qualification for the DREAM Act.[191] Regarding the concern that the Act will incentivize more people to unlawfully cross the border, it seems rather disingenuous to claim the passage of an act that includes mandatory requirements would singlehandedly entice illegal immigration. Although the Act sets a path to citizenship once a person enrolls in higher education or the military, it is not automatic, and therefore, it is highly unlikely a person would decide to unlawfully enter the U.S. with a child solely as a result of the Act.

As for the claim that the Dream Act is an "easy" way to gain citizenship, a 2011 study conducted by the Census Bureau reported that thirty percent of American adults hold at least a bachelor's degree,[192] indicating that completing college is no easy feat, regardless of one's immigration status. One must put in a significant

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[188] 156 CONG. REC. S10,665-66 (daily ed. Dec. 18, 2010) (statement of Sen. Chuck Grassley); *see also* Motomura, *supra* note 188, at 2087 (explaining criticisms and worries of those against The DREAM Act).

[189] *See The DREAM Act*, IMMIGR. POL'Y CENTER (Nov. 18, 2010), http://www.immigrationpolicy.org/just-facts/dream-act (stating the DREAM Act's proposed goals and identifying the persons who would benefit if the DREAM Act were enacted).

[190] *Basic Information About the DREAM Act Legislation*, *supra* note 172.

[191] *Id.*

[192] Richard Pérez-Peña, *U.S. Bachelor Degree Rate Passes Milestone*, N.Y. TIMES, Feb. 23, 2012, http://www.nytimes.com/2012/02/24/education/census-finds-bachelors-degrees-at-record-level.html?_r=0.

amount of hard work and determination to complete that goal, and undocumented students usually endure twice the amount of struggle as documented students because of their status.[193] From a young age, undocumented students must fight to beat the odds if they want to go to college.[194] These students face challenges like traveling far distances to go to a good high school, working to help make ends meet while in high school and often during college, all while dealing with feelings of being an outsider in a place where they live and have come to call "home."[195]

The DREAM Act provides undocumented students with the best opportunity to succeed because it presents the ultimate incentive for hard work.[196] The Act would reward undocumented students for working diligently through high school, being admitted into college, and obtaining a college degree.[197] It would allow students to have realistic career prospects once they graduate college, and will provide them with the opportunity to gain citizenship in the country they call home.[198] Additionally, it could also reward those who decide to serve the U.S., *their* country, in the military service.[199] The DREAM Act might even serve as an incentive for other undocumented children to

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[193] *See generally* UNDOCUMENTED STUDENTS, *supra* note 1 (discussing testimonials from students who had to endure unique obstacles at a young age because they were undocumented and in a new country).

[194] An example from Luis Perez, who was brought to the U.S. at the age of eight, and despite hearing many people ask, "Why go to college if you can't get a real job when you graduate?," he pursued a dream of becoming educated, to prove that he belonged here by attending and graduating from UCLA with both a Bachelor's degree and Juris Doctor. Tobar, *supra* note 175.

[195] Luis Perez said he threw himself into his studies to feel less like an outcast and describes waking up at 5:30 every morning to go a high school in an area far from his house, where he would be more likely to succeed and go to college. *Id.*

[196] *See Basic Information About the DREAM Act Legislation*, *supra* note 172.

[197] *Id.*

[198] *Id.*; *see also* Sheehy, *supra* note 83 (explaining how the DREAM Act could encourage students to stay in high school, instead of dropping out for lack of motivation to succeed and go to college).

[199] *Basic Information About the DREAM Act Legislation*, *supra* note 172.

stay out of trouble and work hard in school by providing the opportunity to eventually become a U.S. citizen.[200]

Some individuals who were formerly opposed to the DREAM Act, including former president George W. Bush, [201] are now reconsidering their position, as potential benefits of passing the DREAM Act are being brought to light.[202] In 2007, the Bush Administration opposed the Act because of its failure to address the nation's broken immigration system.[203] Specifically, the administration felt that stronger border enforcement, a temporary worker program, and assistance for new immigrants were more important than consideration of the DREAM Act.[204] However, in 2012, former President Bush stated that he hoped policymakers would "revamp" immigration law with a "benevolent spirit and keep in mind the contributions of immigrants."[205] Having former leaders who once were opposed, especially a former President, come out in support, is an indicator, even if slight, that the need to address undocumented students is obvious and has risen to a top priority.

During his re-election campaign, President Barack Obama stated that, if re-elected, he would aim to pass the DREAM Act in the next four years.[206] One thing is unfortunately certain: there are

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[200] *Id.*; *see also supra* note 199 and accompanying text.

[201] Julia Preston, *Praising Immigrants, Bush Leads Conservative Appeal for G.O.P. to Soften Tone*, N.Y. TIMES, Dec. 4, 2012, http://www.nytimes.com/2012/12/05/us/praising-immigrants-george-w-bush-leads-conservative-appeal-for-gop-to-soften-tone.html?nl=todaysheadlines&emc=edit_th_20121205&_r=1&.

[202] *See infra* Part V.B.

[203] Elisha Barron, Recent Development, *The Development, Relief, and Education For Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 647 (2011).

[204] *Id.*

[205] Preston, *supra* note 202.

[206] "[F]or young people who come here, brought here often times by their parents. Had gone to school here, pledged allegiance to the flag. Think of this as their country. Understand themselves as Americans in every way except having papers. And we should make sure that we give them a pathway to citizenship." *Second Presidential Debate Full Transcript*, ABC NEWS (Oct. 17. 2012), http://abcnews.go.com/Politics/OTUS/2012-presidential-debate-full-transcript-oct-

currently too many youth living in the U.S. who were educated with U.S. tax dollars and who hold degrees from U.S. colleges and universities, but are unable to put those degrees to use and contribute to society because of their immigration status.[207] This must be changed, not only for the sake of hardworking undocumented students, but also for the benefit of the American economy.

B. Benefits of the DREAM Act

Instead of sending undocumented youth back to their birth country, a place that many have little connection to and may know nothing about, the U.S. should allow them to stay in the U.S. and include them in the nation's workforce.[208] These students have worked hard to earn advanced degrees, yet are precluded from putting those degrees to use because of their immigration status.[209] In addition, some professions are experiencing a lack of qualified individuals to fill needed positions, which has resulted in the U.S. recruiting from other countries.[210] This employee shortage problem might be alleviated if undocumented students who studied these professions were employable upon graduation.[211] There has already been an educational investment made in each undocumented student who attends primary or secondary school in the U.S., and it would ultimately benefit not only the student, but also the U.S., if the student were eligible to legally work in the United States.[212] If these

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16/story?id=17493848&page=7#.UMJ9QY5em0V (statement by President Barack Obama).

[207] *See* Niedowski, *supra* note 24.

[208] *See* EUSEBIO & MENDOZA, *supra* note 8, at 10 (providing statistics about immigrants' share of the fastest growing occupations).

[209] *See* Niedowski, *supra* note 24.

[210] One such profession is nursing, and because there is a shortage of American nurses, thousands of nurses are often recruited from Korea. *Comprehensive Immigration Reform: The Future of Undocumented Immigrant Students: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., & Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. 37 (2007) (statement of Allan Cameron, Ph.D., Retired High School Computer Science Teacher, Carl Hayden High School, Phx., Ariz.).

[211] *Id.*

[212] RUSSELL, *supra* note 33, at 4.

students are not allowed to stay and work in the United States, the country runs the risk of these students taking their American education to another country, thereby costing thousands of dollars in educational investment per student.[213]

A report published by California's colleges claimed that if another two percent of Californians had associates degrees, and another one percent earned bachelor's degrees and could be legally employed, "174,000 jobs would be created, which would help state and local tax revenues increase by $1.2 billion per year."[214] Overall, the report estimated that California's economy would grow by $20 billion.[215] This report demonstrates how a slight increase in the amount of people who pursued higher degrees could positively impact a state's economy. Passing the DREAM Act could potentially benefit every state in a similar manner. In addition to allowing undocumented students to use their degrees in a productive career, the U.S. would gain residents who would contribute to society not only in their fields of employment, but also financially in terms of taxes and Social Security.[216]

A recent study estimated the potential impact the DREAM Act could have on the U.S. The Center of American Progress found that an estimated 2.1 million undocumented youth live in the United States and providing them with the ability to join the U.S. workforce by granting them a path to citizenship, through the DREAM Act, could significantly stimulate the U.S. economy.[217] The study estimated that by giving these youths an incentive to pursue a higher education with the passage of the DREAM Act, 1.4 million new jobs and $329 billion would be added to the U.S. economy.[218] If the 2.1 million youth decided to take advantage of the opportunities

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[213] *Id.*
[214] Beverly N. Rich, *Tracking AB 540's Potential Resilience: An Analysis of In-State Tuition for Undocumented Students in Light of* Martinez v. Regents of the University of California, 19 S. CAL. REV. L & SOC. JUST. 297, 323 (2010).
[215] *Id.*
[216] Garcia, *supra* note 182.
[217] *Id.*
[218] *Id.*

presented by the DREAM Act, not only would they be on a path to citizenship, they would also be eligible for higher paying jobs within the U.S. workforce.[219] Higher earning potential could translate to higher spending potential and more tax revenue, which in turn could create more jobs in the economy.[220] This study has caused some economists and politicians to realize and accept the notion that passing the DREAM Act could boost the economy.[221] In fact, when the former governor of Arkansas, Republican Mike Huckabee, was asked about his thoughts on the issue, he stated that he felt "the economy will be better when that kid [an undocumented student] is able to fully realize his potential and break the pattern of his parent's illegal activity."[222] The DREAM Act will grant undocumented students a path to citizenship, reward them for their hard work, and will provide the United States with a more educated and employable population, ultimately benefiting the nation as a whole.

C. Deferred Action

In June 2012, President Obama announced a new policy created for undocumented students.[223] This new policy, Deferred Action for Childhood Arrivals (commonly referred to as "DACA" or "Deferred Action"), temporarily defers removal proceedings of young people residing in the United States who meet certain requirements.[224] To be eligible for Deferred Action, a person must:

> 1) Have come to the U.S. before age sixteen; 2) Have continuously resided in the U.S for the past five years; 3) Be currently in school, have graduated from high school, obtained a GED or have been honorably

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[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] Andrea Nill Sanchez, *Huckabee Defends DREAM Act Students as Coulter Compares Legalization to Subsidizing 'Illegitimacy'*, THINK PROGRESS SECURITY (Oct. 12, 2010, 1:05 PM), http://thinkprogress.org/security/2010/10/12/176318/huckabee-dream-act/.
[223] *See Eligibility for Deferred Action*, U.S. DEP'T HOMELAND SECURITY, http://www.dhs.gov/eligibility-deferred-action (last visited Jan. 31, 2013).
[224] *Id.*

> discharged from the armed forces; 4) Have not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose a threat to national security or public safety; and 5) Be under the age of thirty.[225]

Deferred action is not a path to citizenship, but rather a form of prosecutorial discretion that allows a person to remain in the U.S. for a two-year period and apply for employment authorization.[226]

The provisions of Deferred Action are very similar to the provisions of the DREAM Act. Many have speculated that this policy came about as a result of the DREAM Act's inability to pass through Congress, as well as in anticipation of the November 2012 presidential election.[227] As of January 2013, the government reportedly received almost 408,000 applications and out of this number, had approved 154,404.[228] Even though Deferred Action does not grant residency or provide a path to citizenship, many undocumented youth are praising President Obama for this new policy.[229] Eligibility to apply for work authorization will allow these undocumented youth to get a job and earn money so that they can

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[225] *Id.*

[226] Policy Ctr., *A Breakdown of DHS's Deferred Action for DREAMers*, IMMIGR. IMPACT (June 18, 2012), http://immigrationimpact.com/2012/06/18/a-breakdown-of-dhss-deferred-action-for-dreamers/.

[227] Janell Ross, *How the Deferred Action Immigration Program Went from Dream to Reality*, HUFFINGTON POST, Aug. 19, 2012, http://www.huffingtonpost.com/2012/08/19/deferred-action-immigration-program_n_1786099.html.

[228] U.S. CITIZENSHIP & IMMIGRATION SERVS. OFFICE OF PERFORMANCE & QUALITY, DEFERRED ACTION FOR CHILDHOOD ARRIVALS PROCESS (2012-13), http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA%20Monthly%20Report%20AVer%20II%20PDF.pdf.

[229] *See Undocumented Youth Describe What Deferred Action Means to Them*, HUFFINGTON POST: LATINO VOICES, Aug. 16, 2012, http://www.huffingtonpost.com/2012/08/16/undocumented-youth-deferred-action_n_1791305.html.

afford college tuition and simultaneously give back to society by paying taxes.[230] While not as comprehensive as the DREAM Act, Deferred Action is a significant step along the path of an undocumented youth seeking to accomplish his or her dreams.

D. A Call to Action by Undocumented Students

In the past few years, many undocumented students have come out of the shadows to tell their stories with hopes that they will convince legislators to vote in favor of the DREAM Act. Additionally, these students want to assure the nation that they are not "criminals" or "lawbreakers," as they are often portrayed.[231] These students are extremely courageous for doing this because admitting that they are in the U.S. without documentation puts them at the mercy of the U.S. Citizenship and Immigration Services and in possible danger of deportation.[232] Their bravery and activism has not gone unnoticed.[233] Some individuals attribute recent undocumented-friendly state legislation and Deferred Action to the efforts made by these students who have taken political action and "come out."[234] In fact, TIME Magazine nominated undocumented students, as a whole, for the 2012 "Person of the Year" award.[235]

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[230] *Id.*

[231] Leslie Berestein Rojas, *Coming Out Undocumented: How Much of a Political Effect Has the Movement Had?*, S. CAL. PUB. RADIO (Mar. 14, 2012, 7:35 PM), http://www.scpr.org/blogs/multiamerican/2012/03/14/8223/coming-out-undocumented-how-much-of-a-political-ef/.

[232] *See id.*

[233] *Id.*

[234] *See id.* (statement of Frank Sharry of America's Voice) ("The moral power of the undocumented coming out, telling their stories and demanding to be recognized for the full Americans they feel they already are moved the Congress to action in taking up the Dream Act in 2010, moved the White House to adopt new policies in 2011 . . . .").

[235] *See* Howard Chua-Eoan, *Who Should Be TIME's Person of the Year 2012?*, TIME (Nov. 26, 2012), http://www.time.com/time/specials/packages/article/0,28804,2128881_2128882_2129191,00.html. President Obama won the award in 2012. Michael Scherer, *2012 Person of the Year: Barack Obama, the President*, TIME (Dec. 19, 2012), http://poy.time.com/2012/12/19/person-of-the-year-barack-obama/.

It has been said that "the law is not static," but ever changing.[236] The law should be a reflection upon the changing circumstances of the nation.[237] While there are some tenets that will remain constant, there are other areas of law that lend themselves to adaptation. One of those areas is immigration. America is a nation that prides itself on giving people the opportunity to dream about becoming anything they want to be. Undocumented students *are*, culturally and socially, American.[238] They should not be afraid to stand up and tell society how they have fought to beat the odds stacked against them in order to receive college or post-graduate degrees. Most importantly, their dreams should not be limited because of a decision made by their parents. As the *Plyler* Court stated, penalizing the child is "ineffectual and unjust" as there is no significant relationship between the child and the wrongdoing.[239]

VI. Developments from the 113th Congress and Recommendations

The DREAM Act is imperative to the future of undocumented students and the nation as a whole. President Obama pledged to get the Act passed in his second term, however, in order for the DREAM Act to become a reality, there will need to be bipartisan compromise.

A. Legislative and Executive Actions

Before the 113th Congressional session even began, a group of eight bipartisan senators worked on constructing an immigration

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[236] Benjamin B. Ferencz, *Will We Finally Apply Nuremberg's Lessons?*, BENFERENCZ.ORG (Sept. 2010), http://www.benferencz.org/index.php?id=4&article=102.

[237] *Comprehensive Immigration Reform: The Future of Undocumented Immigrant Students: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., & Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. 27 (2007) (statement of Rep. William D. Delahunt, Mass., H. Comm. on the Judiciary).

[238] *See* UNDOCUMENTED STUDENTS, *supra* note 1.

[239] Plyler v. Doe, 457 U.S. 202, 220 (1982).

reform initiative.[240] Part of the initiative included a pathway to citizenship for children brought to the U.S. by their parents, although it was contingent upon other reforms, such as tightening border enforcement.[241] One day after the group announced its report, President Obama held a press conference where he unveiled his own immigration reform proposal, which also included a pathway to citizenship for children brought to the U.S. by their parents. His proposal, however, made the process much speedier and not contingent upon securing the borders.[242] This press conference was likely a tool used to urge Congressional action, as the President stated "if Congress did not move forward 'in a timely fashion' on its own legislation, he would send up a specific measure — something the White House has put off for now — and demand a vote."[243]

The time for action is now. Congress is aware that the American people support not only immigration reform, but also a pathway to citizenship for undocumented youth.[244] Republican Senator John McCain of Arizona, who is a member of the eight-person bipartisan group that worked on the immigration reform initiative, articulated the motives for acting: "Look at the last election. We [the Republican party] are losing dramatically the

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[240] *See* SENATOR CHARLES E. SCHUMER ET AL., BIPARTISAN FRAMEWORK FOR COMPREHENSIVE IMMIGRATION REFORM, http://apps.washingtonpost.com/g/page/politics/bipartisan-framework-for-immigration-reform-report/27/. .

[241] *Id.* at 1.

[242] Mark Landler, *Obama Urges Speed on Immigration Plan, But Exposes Conflicts*, N.Y. TIMES, Jan. 29, 2013, http://www.nytimes.com/2013/01/30/us/politics/obama-issues-call-for-immigration-overhaul.html?pagewanted=1; The White House Office of Press Sec'y, *FACT SHEET: Fixing Our Broken Immigration System So Everyone Plays by the Rules*, THE WHITE HOUSE (Jan. 29, 2013), http://www.whitehouse.gov/the-press-office/2013/01/29/fact-sheet-fixing-our-broken-immigration-system-so-everyone-plays-rules (laying out the exact plans of the President's proposal).

[243] Landler, *supra* note 243.

[244] Terence Burlij & Christina Bellantoni, *Bipartisan Group of Senators Offers Outline of Immigration Reform*, PBS NEWSHOUR (Jan. 28, 2013, 9:07 AM), http://www.pbs.org/newshour/rundown/2013/01/bipartisan-group-of-senators-launch-immigration-push.html.

Hispanic vote . . . . We cannot forever have children who were born here—who were brought here by their parents when they were small children to live in the shadows, as well. So I think the time is right."[245]

B. Suggestions to facilitate the passage of the DREAM Act.

Now that both Congress and the President have made immigration reform and a pathway to citizenship a priority, the following suggestions can be utilized to gain bipartisan appeal and, perhaps, facilitate a quicker passage to citizenship. Because talks regarding a comprehensive immigration bill that includes DREAM Act have already begun, this Article will only offer general recommendations.

i. Lower the age of The DREAM Act from sixteen to thirteen.

Lowering the age of qualification for the DREAM Act from sixteen to thirteen may bolster proponents' argument that these children were brought to the U.S. against their will. At sixteen, while a person is still not an adult, that individual has developed a conscience and typically knows right from wrong.[246] A person coming to the U.S. at age sixteen without documentation should be aware that his act is against U.S. immigration policy and, therefore, may not be "blameless." Lowering the age to thirteen, an age where most states do not even allow a juvenile transfer into adult criminal court,[247] further validates the argument that these youth were without fault and were brought here without a choice in the matter.

ii. Define the "good moral character" standard.

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[245] *Id.*

[246] Many states consider a person under the age of eighteen to be a juvenile, and not have the requisite mental culpability to be tried as an adult. However, some states consider a person to be a juvenile at seventeen or sixteen. Further, the average age of a person that many states allow a judge to transfer a person from juvenile to criminal court is fourteen, depending on the crime. PATRICK GRIFFIN ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 2, 4 (2011), https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf.

[247] *Id.*

One criticism of the Act in its most recent form is that the qualification of "moral character" is undefined, and gives too much discretion to the Department of Homeland Security when processing applications. Therefore, clearly listing provisions of moral character would work to temper abuse of discretion, whether actual or projected.

VII. Conclusion

Many of the parents of undocumented students originally came to the United States because they wanted to give their children an opportunity for a better life. These students often must cope with economic challenges, language barriers, and feelings of inferiority to their native-born, English-speaking classmates. Despite these challenges, some have accomplished what many Americans have not, such as obtaining a bachelor's or graduate degree. Nevertheless, upon achieving these triumphs, they are told that they are prohibited from using their education in an employment setting. This is not right. President Roosevelt once said, "No country, however rich, can afford the waste of its human resources,"[248] and a waste of human resources is exactly the effect that restrictive immigration legislation has on American society. The United States has made an investment in each and every student enrolled in a public school, including undocumented students. Consequently, unless every student is eligible to work and give back to society, the U.S. will have wasted valuable money and time.

Undocumented minor students did not choose to unlawfully enter the country; their parents did. The only choice these students made was to push themselves to work hard, to obtain an education, and to grasp onto the array of opportunities associated with living in America. While education may not be a fundamental right,[249] it is extremely valued in the U.S. because of the idea that through hard work, an education will lead to the opportunity for a prosperous and

[248] Franklin Delano Roosevelt, 32nd President of the U.S., Second Fireside Chat on Government and Modern Capitalism, Wash. D.C., (Sept. 30, 1934).
[249] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

successful life. This is the "American Dream"[250] that is taught to students from a young age, but more importantly, it is what young students *learn* to aspire to. Undocumented students know that unlike their U.S. citizen classmates, they must fight an uphill battle to attain the "American Dream," yet many choose to fight.

Undocumented students, like all students, deserve the *opportunity* to make the most of themselves and work toward the life they have dreamed about. Their dreams should not be limited by a citizenship status and should not be defined by a state's borders. After all, the torch of opportunity is what brought many to the United States in the first place; it lit the way for the tired and poor to find their way to the golden door.[251]

[250] First coined by James Trustlow Adams in 1933, he defined "the American Dream" as "that dream of a land in which life should be better and richer and fuller for everyone, with opportunity for each according to ability or achievement . . . a dream of social order in which each man and each woman shall be able to attain to the fullest stature of which they are innately capable, and be recognized by others for what they are, regardless of the fortuitous circumstances of birth or position." JAMES TRUSLOW ADAMS, THE EPIC OF AMERICA xvi (1938).

[251] Emma Lazarus, *The New Colossus* (part of the inscription written on the plaque from the Statue of Liberty, New York Harbor, 1886).

Criminal Alien or Humanitarian Refugee?: The Social Agency of Migrant Youth[1]

Lauren Heidbrink[*]

"Sueños Rotos" (Broken Dreams)

Sometimes, we young people get
together to talk about our unrealized

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[1] Research was generously funded by The Wenner Gren Foundation and the National Science Foundation Law and Social Science Program. This Article is part of a three-year (2006-2009) ethnography that questions the idealized notion of stability and the pathologization of mobility among Central American and Mexican migrant children as they navigate a convoluted network of institutions and actors involved in their care and custody as unaccompanied immigrant children. The author interviewed over 250 stakeholders and 80 unauthorized migrant children and youth and their families. Research spanned from Maryland to the sister cities of El Paso, Texas and Ciudad Juarez, Mexico to El Salvador and to Illinois with intermittent trips to Pennsylvania, Michigan, and Washington, D.C. Since the completion of the study, the author visited five additional facilities in Arizona, Texas, and Illinois and maintained communication with individual children and staff of fourteen facilities and seven foster care programs in Arizona, California, Florida, Michigan, New York, Texas, Virginia, Utah, and Washington.

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dreams. It is easy at times for others to assume why we are here.

The answer is easy: for a better tomorrow. Nobody understands that even though we are young, we have the necessary maturity to confront reality. Here is a country with so many opportunities for everyone but I find myself along a road with no exit–I have only thoughts of my loved ones and of the possibility of moving forward. Yet, my worst enemy is always by my side. I am Latino and an immigrant.

Today I find myself locked up by the laws of the USA as a criminal wearing a prison uniform. I live like a criminal with sadness in my heart. I look at American kids going to school and think, I too am an American child. I should go to school. Is being Latino so different? Is coming here for our family such a bad thing? Is this so difficult to understand?

You will never understand that for my family, I am capable of so much more.

Mario, 15 year old Salvadoran youth[2]

[2] Under the confidentiality provisions of the Johns Hopkins Institutional Review Board and consistent with disciplinary custom, the author enlists pseudonyms for participants in the study. All translations from Spanish are the author's. *Sueños Rotos* is a poem written by Mario, a detained unaccompanied child who participated in research conducted by this author from 2006-2009. As part of the author's research, she conducted a writing and journaling group with youth in

I. Introduction

A review of migration literature reveals that researchers have shifted their gaze from an exclusively quantitative analysis of change in population-level demographics to a more sustained inquiry on the mobility of humans against a backdrop of dynamic social, economic, political, and environmental change. As an inter-disciplinary field, migration studies is not a discipline with a set of well-defined methodological procedures, but is a topic of great interest to scholars of sociology, geography, anthropology, political science, history, and law.[3] As such, a myriad of approaches to children and migration have merged under the rubric of migration studies. Most quantitative methods that have historically defined the field avoid the complexities of child migration as a dynamic process in which children and their families circulate through time and space with great flexibility and uncertainty. Rather than examine the complexities and variations in child migration, quantitative and qualitative methods instead have located the child within the social and legal categories of the family by which they infer the conditions of the child from those of the household.[4] Feminist scholars have worked diligently to expand the unit of analysis from the male head-of-household to include the feminization of migration and a growing recognition of young migrants.[5] The emergent attention from scholars of childhood studies has only bolstered this effort.[6]

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which they were asked to write about a range of topics. Mario crafted this poem in response to the prompt: "What does it mean to hope?"

[3] *See* CAROLINE BRETTELL, ANTHROPOLOGY AND MIGRATION: ESSAYS ON TRANSNATIONALISM, ETHNICITY AND IDENTITY 1 (2003).

[4] AIHWA ONG, FLEXIBLE CITIZENSHIP: THE CULTURAL LOGICS OF TRANSNATIONALITY 10 (1999).

[5] *See* Katharine M. Donato et al., *A Glass Half Full? Gender in Migration Studies*, 40 INT'L MIGRATION REV. 3, 10 (2006) (tracing the ways feminist research in the 1970s and 1980s on female migration was summarily "dismissed as marginal" in contrast to the study of male migration). *See generally* Pierrette Hondagneu-Sotelo, *Gender and Migration Scholarship: An Overview from a 21st Century Perspective*, 6 MIGRACIONES INTERNACIONALES 219, 219, 227 (2011) (arguing that while historically migration scholarship "shows continuing

Although the family as a unit of analysis in migration studies is defined by the presence of dependent children,[7] few studies consider children to be serious contributors to household decision-making processes.[8] The presumption that adults are the decision-makers and providers for children is woven throughout migration literature and immigration law.[9] Children are consistently framed as variables or liminal figures, and not as contributors to migration decisions.[10] The courts do not view children as autonomous

androcentric blindness to feminist issues and gender," there is a growing attention to how migration is gendered).

[6] *See* Sharon Stephens, *Introduction* to CHILDREN AND THE POLITICS OF CULTURE 3, 3 (Sharon Stephens ed., 1995). *See generally* Myra Bluebond-Langner & Jill E. Korbin, *Challenges and Opportunities in the Anthropology of Childhoods: An Introduction to "Children, Childhoods, and Childhood Studies"*, 109 AM. ANTHROPOLOGIST 241 (2007); *see generally* EVERYDAY RUPTURES: CHILDREN, YOUTH, AND MIGRATION IN GLOBAL PERSPECTIVE 65 (Cati Coe et al. eds., 2011).

[7] Victoria Degtyareva, *Defining Family in Immigration Law: Accounting for Nontraditional Families in Citizenship by Descent*, 120 YALE L.J. 862, 864-65 (2011).

[8] *See* JACQUELINE KNÖRR, CHILDHOOD AND MIGRATION: HOW CHILDREN EXPERIENCE AND MANAGE MIGRATION 14-16 (Jacqueline Knörr ed., 2005) (arguing that in order to examine the influence migration has on children and the impact children have on migration, scholars must first recognize childhood as a social space. Often analogized to the advent of women's studies, childhood studies has emerged as a critical opening through which to consider children as social actors in their own right. Increasingly, scholars are recognizing youth's role, contribution, influence, and power in familial decision-making processes).

[9] *See generally* David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 981-82 (2002) [hereinafter Thronson, *Kids Will Be Kids?*] (examining the shifts of children from property and chattel in early American law to wards during the Progressive era to rights holders in recent discussions of children). *See also* Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1051-52 (1992) (noting "[h]istorically, children's rights have been severely limited in practice because they depend upon adults for articulation, assertion, and enforcement"); *see, e.g.*, MiaLisa McFarland & Evon M. Spangler, *A Parent's Undocumented Immigration Status Should Not Be Considered Under the Best Interest of the Child Standard*, 35 WM. MITCHELL L. REV. 247, 250-51 (2008).

[10] VICTOR TURNER, THE FOREST OF SYMBOLS: ASPECTS OF NDEMBU RITUAL 93 (1967); *see* ARNOLD VAN GENNEP, THE RITES OF PASSAGE 11 (Monika B. Vizedom & Gabrielle L. Caffee trans., 1960). From the author's research with child migrants

individuals from birth, but rather as beings that families must socialize into mature adults.[11] The social position of the child as inferior or somehow exclusively dependent stands in marked contrast to the integral roles children often assume in familial decision-making processes as well as the decisions they make as individual social actors.[12]

This Article argues that the figure of the "unaccompanied alien child" complicates the legal personhood of a child as necessarily bound to the nuclear family within U.S. immigration law. The U.S. legal code defines "unaccompanied alien children" as those under the age of eighteen who have no lawful immigration status in the United States and who are without a parent or legal guardian in the United States who is available to provide care and physical

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and their families, the decision to migrate is often a collective one. Children contribute to the discussion on whether to migrate, the destination and the timing of migration. Children may spark adult migration through a change in the number of household members due to birth, death, adoption, fostering, the departure of older children, or a change in the needs of household members, such as education or illness. *See* John H. McKendrick, *Coming of Age: Rethinking the Role of Children in Population Studies*, 7 INT'L J. POPULATION GEOGRAPHY 461, 464 (2001) (explaining that children may be the reason for postponing migration, waiting until they are older, or perhaps they catalyze migration given a desire for improved living conditions or education); *see* Lorraine Young, *Journeys to the Street: The Complex Migration Geographies of Ugandan Street Children*, 35 GEOFORUM 471, 474 (2004) (tracing the ways children's migration to the street is informed by broader historical, local and national processes); *see* PAUL BOYLE ET AL., EXPLORING CONTEMPORARY MIGRATION 119 (1998); *see also* Naomi Tyrrell, *Children's Agency in Family Migration Decision Making in Britain*, *in* EVERYDAY RUPTURES: CHILDREN, YOUTH, AND MIGRATION IN GLOBAL PERSPECTIVE 23, 23-28 (Cati Coe et al. eds., 2011) (discussing the ways children participate in familial migration decisions to Britain and advocating for a more child-centric approach to migration research). At times, adults pursue additional resources for their children, correlating a perceived increase in opportunity with a child's educational attainment or future economic opportunity. Children may shape migration decisions in terms of the completion of their school year and program of study or in the violence or instability they experience in their everyday lives (e.g., pressure to join a gang).

[11] *See, e.g.*, Pia Christensen & Alan Prout, *Anthropological and Sociological Perspectives on the Study of Children*, *in* RESEARCHING CHILDREN'S EXPERIENCE: APPROACHES AND METHODS 42, 49 (Sheila Greene & Diane Hogan eds., 2005).

[12] *See supra* note 10.

custody.[13] Without a legally recognized caregiver, the law views unaccompanied children as existing alone, though paradoxically still dependent.[14] Without a recognizable parent, the child cannot meaningfully access the state to petition for legal relief.[15] At the same time, the legal identity of unaccompanied children is contingent

[13] 6 U.S.C.A. § 279(g)(2) (West 2012). Although many children outside of their country of origin are without their parents or legal guardians, they may be accompanied by customary care providers, extended family, family friends, community members, or entrusted to smugglers throughout the duration of their journey. *See* LAUREN HEIDBRINK, IN WHOSE BEST INTERESTS: MIGRANT CHILDREN, FAMILIES AND THE STATE (forthcoming 2013) [hereinafter HEIDBRINK, IN WHOSE BEST INTERESTS]. Several youth informants in this research study state that they have parents or immediate family members who have resided in the United States for many years. Some informants who are parents reported that due to their own unlawful status in the United States, they are apprehensive to come forward to claim their child from federal authorities. Parents must provide information regarding their status, employment, housing, and finances when seeking custody of their child. DIVISION OF UNACCOMPANIED CHILDREN'S SERVICES FAMILY REUNIFICATION PACKET, OFFICE REFUGEE RESETTLEMENT, http://www.acf.hhs.gov/sites/default/files/orr/family_reunification_packet_english.pdf. Internationally, the more prevalent term is "separated children" which, in many ways, more accurately reflects the temporary or contingent nature of travel or living arrangements of many children. EVERETT M. RESSLER ET AL., UNACCOMPANIED CHILDREN: CARE AND PROTECTION IN WARS, NATURAL DISASTERS, AND REFUGEE MOVEMENTS 3 (1988). *See* JACQUELINE BHABHA & SUSAN SCHMIDT, SEEKING ASYLUM ALONE (2006). In this Article, the author recognizes this problematic and shifting definition, but chooses to enlist the juridical term "unaccompanied child" because it is a critical intersection between migrant youth, their families, and U.S. law. The legal category, constructed though it may be, becomes a useful site of inquiry into the ways the law attempts to identify and to shape the capabilities and rights of children and their relationships to extended kinship networks both in the U.S. and abroad.

[14] *See* Thronson, *Kids Will Be Kids?*, *supra* note 9; *see* Woodhouse, *supra* note 9; *see* HEIDBRINK, IN WHOSE BEST INTERESTS, *supra* note 13.

[15] The author conducted one-on-one structured and semi-structured interviews with over 250 "stakeholders"– individuals engaged in the apprehension and detention of migrant children, including government bureaucrats, non-profit facility staff, attorneys, guardians *ad litem*, judges, members of Congress, community leaders, border patrol agents, ICE agents, consular officials, foster families, teachers, researchers, and policymakers across multiple sites, including in El Salvador and Mexico. The author bases her analysis regarding a child's access to legal relief both in practice and in policy on this three year study.

because of their unlawful presence in the United States.[16] To enlist American historian Mae Ngai's term, unaccompanied children are "impossible subjects" because their presence is "simultaneously a social reality and a legal impossibility–a subject barred from citizenship and without rights."[17] Yet, as social actors, migrant children challenge conceptualizations of child dependence and passivity, explicitly through their unauthorized and independent presence in the United States, and implicitly in the ways they move through multiple geographic and institutional sites in search of care, education, or employment.[18] By failing to recognize the legal personhood and social agency of unaccompanied children, the state undermines the rights of children and compromises their pursuit of justice.[19]

To these ends, this Article details the development of two competing regimes integrally involved in the lives of migrant children—the humanitarian regime and the law enforcement regime. This Article describes the ways their approaches shape the interventions of law enforcement, legal advocates, government bureaucrats, and non-profit staff involved in the lives of both detained and non-detained migrant children. From divergent imaginaries of the migrant child and his social agency emerges the enduring question: Are unaccompanied children humanitarian refugees or criminal aliens? Part II traces the advocacy and policy efforts of the historic transfer of care and custody of unaccompanied alien children from Immigration and Naturalization Services ("INS") to the Office of Refugee Resettlement ("ORR"). While laudable, the transfer has not ameliorated concerns for the United States' ongoing detention of children.[20] Part III identifies three overlapping

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[16] For a useful discussion of the ways a child's legal identity is contingent and respect for his or her rights unenforceable, see Jacqueline Bhabha, *Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?*, 31 HUM. RTS. Q. 410, 411 (2009).

[17] MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 4 (2004) [hereinafter NGAI, IMPOSSIBLE SUBJECTS].

[18] HEIDBRINK, IN WHOSE BEST INTERESTS, *supra* note 13.

[19] *Id.*

[20] *See also* WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, HALFWAY HOME: UNACCOMPANIED CHILDREN IN IMMIGRATION CUSTODY 3-

sensibilities within the law enforcement approach that contribute to an overwhelmingly punitive framing of child migrants: the illegal alien, the criminal, and the enemy within.

Part IV turns to the humanitarian approach, chronicling the ways advocates have cast migrant children as deserving victims, which simultaneously ignores and conceals their social agency. To illustrate this approach, Part V traces the circulation of a youth, Mario, from his home in El Salvador to an immigration detention in the United States to his uncle's home in Maryland. Classified as an "unaccompanied alien minor," Mario faces critical legal decisions that shape not only his fate but also his family's future.[21] The law acts as a blunt tool compelling Mario along prefigured trajectories intended either to protect him as a vulnerable child or to expel him as a criminal alien.

Part VI examines the activism of unauthorized youth known as DREAMers, young migrants who might have benefitted from the now stalled Development, Relief, and Education of Alien Minors ("DREAM") Act, to highlight the imperative to recognize the social agency of children and youth within the law and institutional practices.[22] Part VII concludes by arguing that the law is not a disembodied, independent force, but is culturally constructed. While children are not traditionally considered contributors to the law and legal discourses that determine their fate, the narrative of Mario and the political organizing of DREAMers prove otherwise.

II. Seeking Recognition

The Refugee Act of 1980 recognized the needs of refugee children who are unaccompanied, creating special legal provisions for their acceptance into the United States via formal refugee

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4 (2009) [hereinafter HALFWAY HOME] (noting both the significant improvements in the care of unaccompanied children under ORR and the need for ongoing reform).

[21] *See supra* note 1.

[22] The Development, Relief, and Education for Alien Minors Act of 2010, S. 3827, 111th Cong. (2d Sess. 2010); The Development, Relief, and Education for Alien Minors Act of 2011, S. 952, 112th Cong. (1st Sess. 2011).

resettlement processes.[23] The Act established and funded specialized programs through the Department of Health and Human Services' Office of Refugee Resettlement for minors who are identified as refugees prior to entry in the United States.[24] The State Department identifies refugee children as those living in United Nations refugee camps who do not have a parent or legal guardian.[25] Upon arrival in the United States, refugee children are placed in ORR's Unaccompanied Refugee Minor ("URM") Program and relocated by refugee resettlement agencies.[26]

A. Reclassification

The Refugee Act of 1980, however, did not include "unaccompanied alien children," because they are neither recognized prior to entry nor do they maintain legal status in the United States as their refugee counterparts do.[27] The specialized provisions and procedures for refugee children excluded unauthorized migrant children despite their shared experiences of war, violence, and deprivation in many of the same countries of origin because of the absence of approval prior to entry.[28]

"Unaccompanied alien children" can be reclassified as "unaccompanied refugee minors" and enter into the URM programs once they are granted a qualifying legal status, such as political asylum or specialized visas.[29] In the early 1980s the rates of reclassification were quite low because to be reclassified, a child must first be granted political asylum or prove that she was trafficked

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[23] Refugee Act of 1980, Pub. L. No. 96-212, §§ 412(a)(4)(A)(6)(A)(iv), (d)(2)(B), 94 Stat. 102 (codified as amended and dispersed throughout 8 U.S.C.A).
[24] *Id.*
[25] *Refugee Admissions*, U.S. DEP'T ST., http://www.state.gov/j/prm/ra/index.htm (last visited Jan. 16, 2013).
[26] 45 C.F.R. §§ 400.110–400.120 (2013).
[27] *See* Refugee Act of 1980.
[28] *See* Micaela Guthrie & Angelica Rubio, *Immigration Law and Unaccompanied Minors: An Imperfect Fit*, TEX. LAW., Mar. 22, 2004, at 3, *available at* LexisNexis, doc-id(#900005403798#).
[29] *State Letters-Policy Issuance: Re-classification to Unaccompanied Minor Program*, ADMIN. FOR CHILD. & FAMILIES, OFF. REFUGEE RESETTLEMENT (Aug. 16, 2012), http://www.acf.hhs.gov/programs/orr/resource/state-letters-policy-issuance-re-classification-to-unaccompanied-minor.

into the United States.[30] Given the absence of court-appointed legal counsel in immigration proceedings, the lack of recognition of persecution on account of being a child, and no specialized procedures distinguishing children from adults, such feats were rare.[31] With key revisions to legislation for abused, abandoned, and neglected children in the 1990s[32] and legislation on trafficking in the early 2000s, these reclassification rates have increased, though they still remain low.[33] Instead, the state continues to incorporate unaccompanied alien children into the same social imaginary as the unauthorized adult population who remain under the custody of the Immigration and Customs Enforcement ("ICE", formerly the INS),

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[30] CHAD C. HADDAL, CONG. RESEARCH SERV., RL 34414, UNACCOMPANIED REFUGEE MINORS 5, 7 (2008), http://www.hsdl.org/?view&did=484672. To petition for immigration relief, unaccompanied children have a few forms of legal relief available to them, including petitioning for political asylum, trafficking visa, victim of crime U-visa, Violence Against Women Act ("VAWA"), and the Special Immigrant Juvenile Status ("SIJS"). With the exception of SIJS, there are no binding distinctions or procedures that take children's differing capacities and competencies into account in the administrative process, immigration office, or in front of the immigration judge. Further, with neither a court-appointed attorney nor a guardian *ad litem*, children must navigate complex immigration proceedings and procedures on their own. A number of under-funded legal assistance organizations are available to assist migrant youth, but the organizational capacities are overwhelmed by the demand and geographic distribution of children in need of assistance.

[31] For a useful discussion on the absence of tailored provisions in the political asylum process, see generally Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INT'L J. REFUGEE L. 84 (1999). For a discussion of more recent guidelines, see generally BHABHA & SCHMIDT, *supra* note 13.

[32] From 1965 to 1968, the U.S. Senate Judiciary Subcommittee on Immigration, Refugees and Border Security initiated hearings on the creation of a uniform refugee policy to replace the case-by-case approach that emerged following World War II. It was not until 1979 that Senator Edward Kennedy introduced the Refugee Act to Congress in response to an influx of refugees from the Eastern Europe and the Middle East. For the legislative history of the Refugee Act of 1980, see also Edward M. Kennedy, *Refugee Act of 1980*, 15 INT'L MIGRATION REV. 141, 141-44 (1981).

[33] *Id.*

subject to expedited deportation or prolonged detention.[34]

For nearly twenty years since the Refugee Act of 1980, advocates vied for an analogous transfer of care and custody of unaccompanied, unauthorized children from INS detention to the ORR, similar to the practice for unaccompanied refugee children.[35] Advocates highlighted the INS' irreconcilable conflict of interest in which the INS simultaneously served as guardian, jailer, and prosecutor of unaccompanied children.[36] While the INS was responsible for housing, feeding, and providing medical care for detained children, it was also charged with "the departure from the United States of all removable aliens" including the children entrusted in its care.[37] Prior to 2003, the INS held one-third of unaccompanied children in subcontracted bed space within existing state and county juvenile detention facilities.[38] Although the INS claimed that unaccompanied children were housed in separate cells, in practice, unauthorized children were commingled with juvenile

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[34] Irene Scharf & Christine Hess, *What Process is Due? Unaccompanied Minors' Rights to Deportation Hearings*, 1988 DUKE L.J. 114, 114-15 (1988).

[35] The author assembled a comprehensive history of early advocacy efforts on behalf of unaccompanied alien children through her interviews with advocates and policymakers involved in early reform efforts and with stakeholders involved in the care and custody of unaccompanied children in INS custody prior to 2003 and in ORR care since that time, *supra* note 1. For a discussion of the conditions of care under the INS, see WOMEN'S COMM'N FOR REFUGEE WOMEN & CHILDREN, PRISON GUARD OR PARENT?: INS TREATMENT OF UNACCOMPANIED REFUGEE CHILDREN 4 (2002) [hereinafter PRISON GUARD OR PARENT?]. *See* HALFWAY HOME, *supra* note 20.

[36] *See, e.g.*, Christopher Nugent, *Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT. L.J. 219, 222 (2006).

[37] BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003-2012, at 3 (2003).

[38] Michael A. Olivas, *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL'Y REV. 159, 160 (1990); *see* Julianne Duncan, *Joint Testimony of Migration and Refugee Services/U.S. Conference of Catholic Bishops and Lutheran Immigration and Refugee Service Before the Senate Subcommittee on Immigration*, U.S. CONF. CATH. BISHOPS (Feb. 28, 2002), http://nccbuscc.org/mrs/duncantestimony.shtml; *see* HALFWAY HOME, *supra* note 20, at 17.

offenders, some of whom had committed violent crimes.[39] In these facilities, there were limited opportunities for education, access to interpreters, and recreation.[40] While in the INS custody, children lacking the requisite documents to remain in the United States were detained for extended periods of time, sometimes up to two years while awaiting a ruling on their petitions for legal relief.[41]

B. From the INS to ORR

It was not until the reorganization of the Department of Homeland Security ("DHS") in 2003 that the federal government conceded to decades of advocacy from attorneys and civil society, and the care and placement of unaccompanied children was transferred to the Office of Refugee Resettlement.[42] If apprehended by the Immigration and Customs Enforcement, unaccompanied children now enter into a network of ORR sub-contracted facilities, euphemistically called "shelters," in which non-profit organizations provide for the everyday needs of unauthorized children.[43] While

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[39] HALFWAY HOME, *supra* note 20, at 3.

[40] Duncan, *supra* note 38.

[41] *Id*.; Olivas, *supra* note 38.

[42] *See DHS, HHS Reach Agreement on Improved Care for Unaccompanied Children*, 81 No. 15 INTERPRETER RELEASES 494 (2004). Following the September 11, 2001 attacks on the World Trade Center, the United States Congress passed the Homeland Security Act of 2002. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. The Act would prove to be the largest reorganization of federal government agencies since the 1947 National Security Act, which created the Central Intelligence Agency and the National Security Council and shifted the military under the Secretary of Defense. National Security Act of 1947, Pub. L. No. 80-235, ch. 343, 61 Stat. 496. As part of the newly declared "war on terror," the Homeland Security Act also consolidated anti-terrorism initiatives, border security, and immigration enforcement under a single Homeland Security Czar. The renamed Immigration and Customs Enforcement came under the auspices of Department of Homeland Security. In March 2003, the care and custody of unaccompanied children transferred from ICE to the Office of Refugee Resettlement, a division of the Department of Health and Human Services. While ORR's expertise in the intersection of child welfare and refugee populations has shaped the policies and procedures for the care of unaccompanied children, this program was the first in which ORR needed to collaborate with ICE on a regular basis due to the unauthorized presence of unaccompanied alien children.

[43] ELAINE M. KELLEY, DEP'T OF HEALTH & HUMAN SERVS., ORR PROGRAMS FOR VULNERABLE AND UNACCOMPANIED CHILDREN (2009),

detained, children await sponsorship from detention, placement in federal foster care, voluntary departure, or aging-out of ORR custody on their eighteenth birthday.[44] Of the approximately 8,000 migrant children categorized as "unaccompanied alien minors" and transferred to ORR each year, approximately eighty-five percent come from Central America, primarily Honduras, Guatemala, and El Salvador.[45] Of these youths, twenty-three percent are consistently between the ages of birth and fourteen years old and eighty percent are between fifteen to eighteen years old.[46] Of the total number of unaccompanied children in ORR custody, approximately seventy-four to seventy-seven percent are male and twenty-two to twenty-six percent are female.[47] Experts suggest that this is only a fraction of the total number of unaccompanied children entering the U.S. each year.[48]

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icpc.aphsa.org/home/Doc/KelleyICPCReviewingPractices.pdf; *About Unaccompanied Children's Services*, ADMIN. FOR CHILD. & FAMILIES, OFF. REFUGEE RESETTLEMENT, http://www.acf.hhs.gov/programs/orr/programs/ucs/about (last visited Apr. 15, 2013).

[44] As of the Spring of 2012, ORR funded 70 programs: 37 shelter facilities; 9 staff secure facilities; 6 secure facilities; 3 residential treatment centers; 2 therapeutic staff secure; and 13 foster care programs with a capacity of 2,850 beds (Office of Refugee Resettlement, email communication, July 19, 2012).

[45] *Unaccompanied Children's Services*, ADMIN. FOR CHILD. & FAMILIES, OFF. REFUGEE RESETTLEMENT, http://www.acf.hhs.gov/programs/orr/programs/unaccompanied-childrens-services (last visited Dec. 12, 2012); *see also The Rise in Unaccompanied Minors: A Global, Humanitarian Crisis*, CENTER FOR MIGRATION STUD. (Oct. 15, 2012), http://cmsny.org/2012/10/15/the-rise-in-unaccompanied-minors-a-global-humanitarian-crisis/.

[46] *Id.*

[47] *Id.*

[48] While statistics on the flow of children across U.S. borders remain largely untraced, legal experts estimate that over 500,000 immigrant children enter the United States each year. Carolyn J. Seugling, Note, *Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States*, 37 VAND. J. TRANSNAT'L L. 861, 863 (2004). Central American experts have estimated over 45,000 Central American children immigrate to the U.S. each year. (Estimates from Manuel Capellin, Director of *Casa Alianza Honduras.* Cited in LA PRENSA, Apr. 3, 2008, at Migrantes.) Most recent estimates from the

Advocacy and policy efforts over the last several decades have pushed to distinguish the migrant children from the migrant adult and to align unaccompanied "alien" children with their refugee counterparts. While these shifts have meant significant institutional reforms in the care and custody of children, evidenced most prominently by the transfer of care from the INS to ORR in 2003, the law enforcement approach to unaccompanied children pervades. Part III identifies three emergent sensibilities that continue to influence the care and custody of migrant children under ORR.

III. The Law Enforcement Approach

Existing research on the U.S.-Mexico border illustrates the ways law enforcement prioritizes a child's unauthorized status over his status as a legal minor. From research involving local law enforcement, border patrol, immigration officers, and ICE attorneys, this Article argues that law enforcement's approach to unauthorized children coalesces around three overlapping sensibilities. Part III, Sections B through D, detail each sensibility in turn—the illegal alien, the criminal, and the enemy within—by drawing upon legal and social science research as well as original field work.[49]

A. "But these are not *our* children."[50]

Department of Justice indicate 101,952 unaccompanied children were apprehended in 2007, with four of every fifth child from Mexico. *See, e.g.*, CHAD C. HADDAL, CONG. RESEARCH SERV., RL 33896, UNACCOMPANIED ALIEN CHILDREN: POLICIES AND ISSUES Summary (2007), http://www.hsdl.org/?view&did=479378.However, many children evade apprehension and pass clandestinely into the United States joining the 11.9 million unauthorized immigrants currently residing in the United States. JEFFREY S. PASSEL & D' VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 21 (2009), http://www.pewhispanic.org/files/reports/107.pdf.

[49] *See supra* note 1.

[50] Interview with Station Commander, U.S. Customs & Border Patrol, in El Paso, Tex. (July 2006) (transcript on file with the author). Under the confidentiality provisions of the Johns Hopkins Institutional Review Board and consistent with disciplinary custom, the author does not provide the Station Commander's name or identifying information.

Prior to a meeting at a Border Patrol station along the Texas-Mexico border, a Station Commander played a video, which delved "inside the work of the Border Patrol." Reminiscent of the reality television show COPS, the fifteen-minute video opened with blasting music with a deep bass as quick images of uniformed Border Patrol and ICE officers flashed across the small television in the three room station.[51] In the video, a white Border Patrol vehicle pursued a van at high speed along a deserted highway, resulting in a violent crash as the driver lost control of the van. Officers contended with a raging grass fire and youth firebombed officers as they arrested an unauthorized migrant. At the video's end, the Station Commander explained, "This is what we must contend with. We are not dealing with nice little kids."[52]

B. The Illegal Alien

In the law enforcement approach to unaccompanied children, the migrant child is fused with the pervasive rhetoric of the "illegal alien" who must be apprehended, controlled, and removed from the state.[53] This social sensibility taps into anxieties about an *invasion* or

[51] In conducting research, the author met a Station Commander at a Border Patrol station along the Texas-Mexico border. The author met the Station Commander with the intention of discussing the agents' experiences apprehending migrant children.

[52] Interview with Station Commander, *supra* note 50.

[53] The term "illegal alien" appears throughout the U.S. Code, though it is not explicitly defined. However, the term "alien" is defined as "any person not a citizen or national of the United States." 8 U.S.C.A. § 1101(a)(3) (West 2012). For a discussion of the legal history of the term, see Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 263-92 (1997). While consistent with legal terminology, the term "illegal alien" has become increasingly politicized as someone who willfully trespasses on national sovereignty. For a useful discussion on the socio-legal history of the term "illegal alien," see Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 LAW & HIST. REV. 69, 69-108 (2003). Amongst the migration and human rights networks, "no human is illegal" has become a rallying cry against the derogatory connotations of the term, often associated with criminality or along specific racial lines. *See* Mae M. Ngai, *No Human Being Is Illegal*, IMMIGRANT CITY CHI., http://www.uic.edu/jaddams/hull/immigrantcitychicago/essays/ngai_nohumanillegal.html (last visited Jan. 17, 2013). In the United States, rhetoric defines the debate

flood of "illegal aliens," [54] requiring repression and containment of unaccompanied children in the same ways as adult migrants. Relying on the state's authority to regulate inclusion or exclusion of subjects, individuals working in law enforcement view the migrant youth as an ungovernable subject—an outlaw.[55] As sociologist Esther Madriz observes, the figure of the outlaw "brings together members of society in a common conviction, to direct their disapproval against those who are outside the social boundaries. Fear is a very important component in the creation of outlaws: we should fear them because they are dangerous, or evil, or just threatening to 'us.'"[56] Despite limited evidence supporting its efficacy, the detention of unauthorized migrants is an increasingly pervasive state strategy

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on immigration–dehumanizing the "illegal" or the "alien" as one without due process and without rights. NGAI, IMPOSSIBLE SUBJECTS, *supra* note 17. However, the boundary between citizen and *illegal* is porous. Under some conditions, such as Temporary Protected Status or certain types of visas, an individual can transform his illegal status to legal, just as an individual with legal status in the United States can lose his status through committing certain crimes. *See* Lauren Heidbrink, *At a Crossroads: Youth at the Intersection of the Family and the State*, *in* 10 ADVANCES IN ECOPOLITICS: TRANSNATIONAL MIGRATION, GENDER AND RIGHTS 149, 173 (Ragnhild Aslaug Sollund vol. ed., Liam Leonard series ed., 2012) [hereinafter Heidbrink, *At a Crossroads*]. *See generally* Kitty Calavita, *Immigration, Law, and Marginalization in a Global Economy: Notes from Spain*, 32 LAW & SOC'Y REV. 529, 529-566 (1998). In the case of the Special Immigrant Juvenile, unaccompanied children can lose their legal status simply by turning eighteen years old. Angie Junck, *Special Immigrant Juvenile Status: Relief for Neglected, Abused, and Abandoned Undocumented Children*, 63 JUV. & FAM. CT. J. 48, 58 (2012) [hereinafter Junck, *Special Immigrant Juvenile Status*] (noting "[s]tate laws, however, generally require that a child be under 18 at the time he or she first is declared a juvenile court dependent. Because courts often do not accept jurisdiction of children 18 or older, some children may not be eligible to apply for SIJS even though they are under 21."). For these reasons, this author enlists the term "unauthorized migrant" which is a more neutral term that recognizes both the integrity of individual migrants and the fluctuation of their legal status in the United States.

[54] *See, e.g.*, LEO R. CHAVEZ, COVERING IMMIGRATION: POPULAR IMAGES AND THE POLITICS OF THE NATION 73-74 (2001); *see, e.g.*, LATIN LOOKS: IMAGES OF LATINAS AND LATINOS IN THE U.S. MEDIA 5-8 (Clara E. Rodríguez ed., 1997).

[55] *See* ESTHER MADRIZ, NOTHING BAD HAPPENS TO GOOD GIRLS: FEAR OF CRIME IN WOMEN'S LIVES 97 (1997).

[56] *Id.* at 96.

enlisted to control and remove the "contagion" or "criminal" as well as to deter and to de-incentivize future unauthorized migratory flows.[57]

As there is minimal distinction between children and adults in immigration law,[58] there is little difficulty in identifying unauthorized immigrants exclusively in terms of illegality rather than distinguishing any markers of difference along lines of age, gender, race, ethnicity, or any specific need for rights.[59] While children are often held in an immutable category of innocence, the law enforcement approach toward unauthorized migrants prioritizes the "alien" status over their status as legal minors.[60] The fear that drives the creation and proliferation of the migrant as an "outlaw" fails to recognize that illegal alienage is not a preconditioned set of rules and

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[57] Jane Schneider & Peter Schneider, *The Anthropology of Crime and Criminalization*, 37 ANN. REV. ANTHROPOLOGY 351, 351-73 (2008).

[58] In addition to the three year study in which the author observed immigration proceedings for children, the author also draws on five years of experience working with adult political asylum seekers in the United States in both affirmative immigration interviews and hearings before the Executive Office of Immigration Review. In total, the author has observed over 150 immigration proceedings for both adults and children since 1999. *See also* Amanda Levinson, *Unaccompanied Immigrant Children: A Growing Phenomenon with Few Easy Solutions*, MIGRATION INFO. SOURCE (Jan. 2011), http://www.migrationinformation.org/Feature/display.cfm?ID=823 (noting "[i]mmigration and asylum law in the United States has not historically afforded protections to children based on their status as minors, and largely makes no distinction between adults and children").

[59] *See, e.g.*, ELANA ZILBERG, SPACE OF DETENTION: THE MAKING OF A TRANSNATIONAL GANG CRISIS BETWEEN LOS ANGELES AND SAN SALVADOR 14 (2011).

[60] In this study, the author consistently and repeatedly observed how children's lawful status took precedence over their identity as legal minors. *See* HEIDBRINK, IN WHOSE BEST INTERESTS, *supra* note 13; *see* Heidbrink, *At a Crossroads*, *supra* note 53. As previously mentioned, children are not afforded specialized accommodations under immigration law as in other areas of legal and social life. *See* BHABHA & SCHMIDT, *supra* note 13, at 33. For further discussion on the disparities between the treatment of children under family law and immigration law, see also David B. Thronson, *You Can't Get Here from Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL'Y & L. 58, 58-86 (2006).

regulations or inherent traits as law enforcement suggests, but it is culturally constructed.[61]

In fact, the bright line distinguishing alien from citizen is "soft."[62] As historian Mae Ngai argues, "[i]llegal alienage is not a natural or fixed condition but the product of positive law; it is contingent and at times unstable. The line between legal and illegal status can be crossed in both directions."[63] Migrants can move in and out of lawful immigration status over time.[64] At the same time, the state can also repeal one's legality or grant graduated benefits and rights contingent upon the individual's type of lawful status.[65] While various forms of legal relief are available to children, including political asylum, victims of crime visas, Special Immigrant Juvenile ("SIJ") visas,[66] trafficking visas,[67] family sponsorship, Violence Against Women ("VAWA"),[68] as well as temporary statuses such as Deferred Action for Childhood Arrivals ("DACA")[69] or Temporary

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[61] *See* MADRIZ, *supra* note 55, at 97-98.
[62] NGAI, IMPOSSIBLE SUBJECTS, *supra* note 17, at 6.
[63] *Id.*
[64] *See generally* SUSAN BIBLER COUTIN, LEGALIZING MOVES: SALVADORAN IMMIGRANTS' STRUGGLE FOR U.S. RESIDENCY (2000) (analyzing the struggles of Salvadoran immigrants to gain and maintain legal status in the United States).
[65] *Id.*
[66] Special Immigrant Status for Certain Aliens Declared Dependent on a Juvenile Court (Special Immigrant Juvenile), 8 C.F.R. § 204.11(a) (2013). SIJ is a form of legal relief that allows abused, abandoned, or neglected children to receive permanent residency.
[67] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464. The Act established special services, including visas, for victims of human trafficking. *See* Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006); *see* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044.
[68] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796. For a helpful discussion on the prevalence of domestic abuse of immigrants and the contrasting underrepresentation of VAWA applicants, see Anita Raj & Jay Silverman, *Violence Against Immigrant Women: The Roles of Culture, Context, and Legal Immigrant Status on Intimate Partner Violence*, 8 VIOLENCE AGAINST WOMEN J. 367, 367-98 (2002).
[69] Deferred Action for Childhood Arrivals is a 2012 Program of the Obama Administration which enlists prosecutorial discretion, a decision "not to assert the

Protective Status ("TPS"),[70] these statuses are both difficult to obtain and easy to lose. Despite the popular perception that the United States serves as a refuge for immigrants, particularly children, there are significant obstacles impeding children's pursuit of these few forms of legal relief, including the absence of court-appointed attorneys, guardians *ad litem*, specialized courts, and binding procedural accommodations for children.

Despite the malleability of both children's and adults' legal status, law enforcement practices historically have treated detained migrant children as inherently illegal, blocking children's access to forms of legal relief from which they could otherwise benefit outside of the "care and custody" of the federal government.[71] In

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full scope of the enforcement authority available to the agency in a given case." Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, Dep't of Homeland Sec., to All Field Office Dirs., All Special Agents in Charge, & All Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 2 (June 17, 2011), http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf. *See Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD (last updated Jan. 18, 2013) [hereinafter *Consideration of Deferred Action*].

[70] The Department of Homeland Security designates nationals from a foreign country for Temporary Protected Status when a country's conditions make it temporarily unsafe for nationals to return or where a country "is unable to handle the return of its nationals adequately." *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=848f7f2ef0745210VgnVCM100000082ca60aRCRD&vgnextchannel=848f7f2ef0745210VgnVCM100000082ca60aRCRD (last updated Jan. 9, 2013). For a discussion of the simultaneous protection and precariousness under Temporary Protected Status, see also Alison Mountz et al., *Lives in Limbo: Temporary Protected Status and Immigrant Identities*, 2 GLOBAL NETWORKS 335, 349-51 (2002).

[71] *See* Interoffice Memorandum from William R. Yates, Assoc. Dir. for Operations, U.S. Citizenship & Immigration Servs., to Reg'l Dirs. & Dist. Dirs., Memorandum #3—Field Guidance on Special Immigrant Juvenile Status Petitions (May 27, 2004) [hereinafter Field Guidance Memorandum], *available at*

immigration law, which lacks a legal recognition of a child's individual relationship to the state, unaccompanied children must rely on an adult or guardian as a proxy to petition state courts for a dependency finding, which could lead to legal status.[72] In family reunification petitions, for example, a parent can petition for his or her child as derivatives of an asylum application; however, a child as a principal applicant cannot petition for his or her parents until the child becomes a U.S. citizen *and* reaches the age of twenty one.[73] Absent a legally recognized parent or guardian, the state serves *in loco parentis*,[74] and, as such, until 2008, ICE served as gatekeeper for those seeking access to the law.[75] Children were required to seek "special consent" from the Department of Homeland Security in order to enter into state court and ultimately to pursue the Special Immigrant Juvenile Visa, a principle legal remedy for unaccompanied children who have been abandoned, abused, or neglected.[76]

1. Special Consent

DHS policies and practices have been inconsistent and convoluted in regards to specific consent in which a single individual maintained the authority to grant or to deny children's petitions to enter into state court.[77] Through outright denials, delaying applications for sometimes up to six months, or by waiting until a child turns eighteen, ICE's National Juvenile Coordinator served as lawyer, judge, and jury with no mechanism for appeal.[78] From

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http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/sij_memo_052704.pdf; *see DHS, HHS Reach Agreement on Improved Care for Unaccompanied Children*, *supra* note 42, at 494.

[72] *See* Thronson, *Kids Will Be Kids?*, *supra* note 9; *see* Woodhouse, *supra* note 9.

[73] 8 U.S.C.A. § 1151 (b)(2)(A)(i) (West 2012); 8 U.S.C.A. § 1153(a) (West 2012).

[74] Latin for "in place of the parent."

[75] *See* Nugent, *supra* note 36, at 233.

[76] *Id.*

[77] *Id.*; *see* Tori Marlan, *Racing the Calendar: America's Rule That's Supposed to Save Abused Immigrant Children*, THE ALICIA PATTERSON FOUND. (2006), http://aliciapatterson.org/stories/racing-calendar-america%E2%80%99s-rule-that%E2%80%99s-supposed-save-abused-immigrant-children (last updated May 5, 2011).

[78] Nugent, *supra* note 36, at 233-34; Field Guidance Memorandum, *supra* note 71.

January 2001 until August 2006, the National Juvenile Coordinator approved only seventy percent of special consent petitions, many of which, advocates contend, came too late to affect a child's legal claim.[79] Once a child reached eighteen years old, he or she could not obtain the required orders in most state courts.[80] In effect, ICE's National Juvenile Coordinator would prejudge cases, often freezing the child's illegal status by limiting his or her ability to file a petition in state court. Consequently, children were held in a double bind—unable to access the law because of their minor status and because the state-as-parent did not grant permission to such access. By restricting children's access to the courts, ICE prevented the opportunity to regularize legal status.[81] The law-enforcement approach to unaccompanied children fixed the criminality of unauthorized migrant children, hedging out potential humanitarian forms of legal relief to child migrants in the name of safety and the security of the nation.[82] In many ways, law enforcement practices invented permanent illegality and inherent criminality, not unlike the way turn-of-the-century reformers invented delinquency as ascribed to behaviors of poor and immigrant children.[83]

In 2008, federal litigation pressured reforms in ICE's gatekeeping of state courts, seeking to stop practices that made illegality and criminality an innate quality of unaccompanied migrant children.[84] Following federal litigation in *Perez-Olano v. Gonzales*,

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[79] BHABHA & SCHMIDT, *supra* note 13, at 52-53; Nugent, *supra* note 36.

[80] Nugent, *supra* note 36, at 229; Junck, *Special Immigrant Juvenile Status*, *supra* note 53, at 548.

[81] Nugent, *supra* note 36, at 229.

[82] HEIDBRINK, IN WHOSE BEST INTERESTS, *supra* note 13.

[83] *See* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (1969) (discussing the ways delinquency was invented from the behaviors of immigrants and immigrant children seen as outside the social and behavioral norms of the middle and upper class at the turn of the century).

[84] The Department of Homeland Security entered into a Settlement Agreement in 2008. Settlement Agreement, Perez-Olano v. Holder, No. CV 05-3604 (C.D. Cal. 2010) [hereinafter Settlement Agreement, Perez-Olano v. Holder], http://www.uscis.gov/USCIS/Laws/Legal%20Settlement%20Notices%20and%20Agreements/Perez-Olano%20v%20Holder/Signed_Settlement_Agreement.pdf. Prior to *Perez-Olano v. Holder*, children in actual or constructive federal custody required *specific consent* from DHS/ICE before proceeding into state court for a

unaccompanied children must now seek permission to enter into state courts from ORR rather than ICE.[85] For the moment, ORR, *in loco parentis*, has maintained an open access policy permitting all children the "privilege"—although not a "right"—of filing a petition in state court.[86] In practice, however, ORR's subcontracted non-profit organizations often restrict access, as they will not serve as guardian for the purposes of SIJ while youth are held in their facilities, leaving detained children unable to pursue this principle legal remedy and its ensuing benefits.[87]

2. Parent-Child Nexus

Critical to the functionality of this sensibility are the ways law enforcement approaches the relationship between migrant children and their parents. Those children whose parents are identifiable are seen as reproductions of their parents' illegal or criminal behavior, destined to reproduce the same pathological behaviors embodied in their illicit presence in the United States.[88] In this view, deceptive

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dependency finding. 8 U.S.C.A. § 1101 (a)(27)(J)(iii)(I) (West 2012). In January 2008, a federal district court in California decided that unaccompanied children were not required to seek "specific consent" from ICE prior to entering state court in petitions for SIJ. Perez-Olano v. Gonzalez, 248 F.R.D. 248, 264 (C.D. Cal. 2008).

[85] Settlement Agreement, Perez-Olano v. Holder, *supra* note 84.

[86] ORR does not require specific consent if the unaccompanied child "only seeks a dependency order and does not seek to have the state court determine or alter his or her custody status or placement . . . . If the UAC [unaccompanied alien child] wishes to go to state court only to be declared dependent in order to make an application for SIJ status (i.e., receive an 'SIJ-predicate order'), the child does not need HHS' consent." ADMIN. FOR CHILDREN & FAMILIES, DIV. OF UNACCOMPANIED CHILDREN'S SERVS., PROGRAM INSTRUCTION: SPECIFIC CONSENT REQUESTS, LOG. NO. 10-01 (Dec. 24, 2009), http://www.acf.hhs.gov/sites/default/files/orr/special_immigrant_juvenile_status_specific_consent_program.pdf. Ironically, immigration authorities will not accept a dependency finding "in cases where the court's jurisdiction was sought primarily to obtain lawful immigration status" leaving children in a double-bind. Junck, *Special Immigrant Juvenile Status*, *supra* note 53, at 57.

[87] *See* HEIDBRINK, IN WHOSE BEST INTERESTS, *supra* note 13 (discussing the impasses between ORR policy on consent to enter into state court for the purposes of petitioning SIJ and the practices of many detention facilities that will not serve as guardian of record).

[88] The author draws these conclusions based on her research. *See supra* note 1.

parents pay smugglers to transport their children illegally to the United States, knowingly violating the law.[89] Children unaccompanied by an adult caregiver are treated as if lacking the parental relationship necessary for effective socialization and governance. For many unaccompanied children, law enforcement and advocates alike assume that their parents have abandoned them, forcing them to live on the streets and to turn to a life of crime. Policymakers and advocates view migration as an indicator of family rupture.[90] In this view, without parents to effectively socialize youth into productive citizens, the unaccompanied child remains pathologically independent and in need of state intervention and discipline. However, there is a critical contradiction in this perspective: ICE considers some children as products of their parents' poor decisions, and in this way divorces children from any social agency to make their own decisions or to contribute to familial migration decisions.[91] At the same time, unaccompanied children are held no less responsible for the outcomes of their parents' decisions even if these choices are viewed as not of their own making. This contradiction is laid bare in the detention of unauthorized infants in federal facilities and in the absence of permanent legal relief for youth who were brought unlawfully to the U.S. as children.[92]

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[89] *See supra* note 1.

[90] *See* EVERYDAY RUPTURES, *supra* note 6.

[91] *See generally* The Development, Relief, and Education for Alien Minors Act of 2010, S. 3827, 111th Cong. (2d Sess. 2010) (proposing immigration relief for children who came to the United States through "no fault of their own"). This "no fault of their own" language reoccurs in the *Plyler* decision, and is referenced repeatedly in the media and political forums with the recent Deferred Action for Childhood Arrivals. Plyler v. Doe, 457 U.S. 202, 226 (1982); *see Consideration of Deferred Action, supra* note 69.

[92] Infants and small children are routinely detained in ORR facilities. While prioritized for federal foster care, as of 2012, ORR established new tender-age facilities in which children under the age of twelve are detained in group homes. It is also common practice to hold U.S. citizen infants with their unauthorized teen parents. In this three year study, the author regularly witnessed small children, pregnant and parenting teens, and infants born in the U.S. to detained youth. By virtue of birthright citizenship, U.S.-citizen infants were detained with their unauthorized teen mothers in ORR facilities. The American citizenship of infants in

C. The Criminal

In a second overlapping sensibility, law enforcement concretizes the link between the criminalization of immigrants with the criminalization of youth of color by analogizing "illegal" immigration with issues of urban crime and gang violence. In each case, predominantly male youth are framed as exhibiting anti-social behavior and existing outside of the law.[93] While different bodies of law govern immigration and state court decisions, both systems draw from the analogous public and institutional narratives that criminalize youths of color.[94] Contemporary American courts contend with multiple layers of norms and values, which inform notions of pathology in relation to multiple and often overlapping terms of race, ethnicity, and poverty.[95] Public perceptions of the criminality and delinquency of youth create tremendous fear, as evidenced in cases of highly publicized school shootings or gang violence.[96] High rates of teen pregnancy and school drop-outs among youth, particularly in African-American and Latino communities, have led some to call for simultaneous policy reform and institutional interventions to "save"

ORR care was further substantiated in interviews of ORR supervisors, advocates, attorneys, social workers, and facility staff across multiple sites. *See supra* note 1.

[93] *See* BEYOND RESISTANCE! YOUTH ACTIVISM AND COMMUNITY CHANGE: NEW DEMOCRATIC POSSIBILITIES FOR PRACTICE AND POLICY FOR AMERICA'S YOUTH (Shawn Ginwright et al. eds., 2006); *see* Henry A. Giroux, *Racial Injustice and Disposable Youth in the Age of Zero Tolerance*, 16 INT'L J. QUALITATIVE STUD. EDUC. 553, 554 (2003).

[94] *See, e.g.*, Bernardine Dohrn, *Children, Justice and Punishment*, 58 GUILD. PRAC. 65, 67 (2001).

[95] *See, e.g.*, M.A. Bortner et al., *Race and Transfer: Empirical Research and Social Context*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 277, 279 (Jeffrey Fagan & Frankin E. Zimring eds., 2000); *see* Jeffrey J. Shook, *Contesting Childhood in the U.S. Justice System: The Transfer of Juveniles to Adult Criminal Court*, 12 CHILDHOOD 461, 465 (2005).

[96] Madelaine Adelman & Christine Yalda, *Seen But Not Heard: The Legal Lives of Young People*, POL. & LEGAL ANTHROPOLOGY REV., Nov. 2000, at 37, 37; *see* HENRY A. GIROUX, STEALING INNOCENCE: YOUTH, CORPORATE POWER, AND THE POLITICS OF CULTURE 15 (2000).

troubled youth, while the state bolsters enforcement efforts to allay public anxieties.[97]

Some scholars have attempted to contextualize youth delinquency through studies focusing on how youth experience the law through lenses of race, ethnicity, gender, education level, or socio-economic status. Sociologist Mike Males, for example, argues that by controlling for race in instances of juvenile crime, income inequality becomes the prominent determinant, rather than ethnic or racial differences.[98] Given that more people of color in the United States live in poverty, it remains unsurprising that youth of color are more frequently arrested for criminal activity.[99] Legal scholar Peter Edelman terms these inequalities the "duality of youth," suggesting that there is a division along racial, ethnic, and class lines that signals the disparate social and economic support accessible to and ultimately received by youth.[100] Philosopher and feminist theorist Ann Ferguson traces how race and gender identities shape whether the school system labels African-American youth as either "troublemakers" or "school boys."[101] She argues that, albeit a fiction, race continues "as a system for organizing social difference and as a device for reproducing inequality in contemporary United States."[102]

This criminalization of youth of color folds comfortably into the national public discourses, which associate Latinos and African-Americans with social ills such as poor schools, poverty, unemployment, crime, overpopulation, and public health crises.[103] As

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[97] *See* HENRY A. GIROUX, CHANNEL SURFING: RACISM, THE MEDIA, AND THE DESTRUCTION OF TODAY'S YOUTH (1998); *see* Dohrn, *supra* note 94, at 68.
[98] MIKE A. MALES, FRAMING YOUTH: TEN MYTHS ABOUT THE NEXT GENERATION (1999).
[99] *Id*.
[100] *See* Peter Edelman, *American Government and the Politics of Youth*, *in* A CENTURY OF JUVENILE JUSTICE 310, 318 (Margaret K. Rosenheim et al. eds., 2002); *see* Shook, *supra* note 95, at 469.
[101] ANN ARNETT FERGUSON, BAD BOYS: PUBLIC SCHOOLS IN THE MAKING OF BLACK MASCULINITY 212 (2000).
[102] *Id.* at 17.
[103] *See, e.g.*, Nicholas De Genova, *Alien Powers: Deportable Labour and the Spectacle of Security*, *in* THE CONTESTED POLITICS OF MOBILITY: BORDERZONES AND IRREGULARITY 91, 107 (Vicki Squire ed., 2011).

evidenced by Mario's poem that opened this article, unequal access to employment, education, and health care, combined with disproportionate attention from law enforcement officers, demonstrates the structural ways that the state contributes to and exacerbates marginality of youth of color. In U.S. conceptualizations of delinquency, differences in economic status are integrally intertwined with race and ethnicity. Variation in skin color becomes a visible means by which to identify delinquent youth, marking those who require punishment and those who warrant leniency.[104]

1. From Rehabilitation to Punishment

The juvenile court has shifted from a model based on the tutelary complex as a means of distributing social services, to a more punitive mechanism of social control that ignores mediating conditions of structural poverty and racism.[105] Yet, the conditions under which the court must operate also have changed.[106] Social worker and sociologist Jeffrey Shook traces how legislative changes in the United States blur the boundaries between juvenile and criminal courts, not only shifting the court's focus to "more punitive and control-oriented goals," but also revealing changes in social attitudes toward delinquency of children and youth.[107] The increased ease with which children are transferred from juvenile courts to the adult criminal justice system signals a contestation in the meanings of childhood and adolescence by policymakers and judicial authorities.[108] Individual states in the U.S. may ignore the legal

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[104] *See* Edelman, *supra* note 100, at 324-26; FERGUSON, *supra* note 101, at 10.
[105] JACQUES DONZELOT, THE POLICING OF FAMILIES 96 (Robert Hurley trans., 1979).
[106] *See* Daniel P. Mears et al., *Public Opinion and the Foundation of the Juvenile Court*, 45 CRIMINOLOGY 223, 225-27 (2007) (discussing the history of juvenile court); *see generally* VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN (1985) (tracing the changing ways Americans characterize the space of childhood with decreasing economic utility and increasing sentimental value. This shift in the social orientation to children and labor has shaped the ways the courts view the proper social place of the child.).
[107] Shook, *supra* note 95, at 461.
[108] *Id.* at 462; *see* Jeffrey M. Jenson & Matthew O. Howard, *Youth Crime, Public Policy, and Practice in the Juvenile Justice System: Recent Trends and Needed Reforms*, 43 SOC. WORK 324, 324-25 (1998).

distinction youth maintain as minors, and instead try them as adult offenders and incarcerate them in adult state prisons. In effect, states are claiming that a child is no longer a child.[109] "Supported by images of youth as 'superpredators' or otherwise violent and 'dangerous,' transfer [to adult courts] denotes the point where youth have crossed over the line into adulthood."[110]

Acts of violence destabilize the notion of the child's innate innocence because the child has acquired "adult knowledge" with which he appears willingly, and with awareness commits social transgressions. Courts may view juveniles as competent and capable actors responsible for their actions, though youth are not granted such an independent standing in other areas of contemporary social life. In spite of a dramatic expansion of child protective services, such transfer practices are emblematic of how the state "redraw[s] the boundaries between childhood and adulthood in contradictory ways."[111] Although youth as problematic or as pathological is not a new phenomenon,[112] the treatment of unaccompanied children as if they possess attributes of certain criminal behaviors associated with adults speaks to the disproportionate consequences for unauthorized children. Through the lens of race, unaccompanied migrants enter into the carceral complex in the U.S. that disproportionately detains young men of color with little hope of rehabilitation.[113] For unaccompanied migrant youth, the state's presumption is that the youth are an inherent risk to public safety, and as a result, forfeit any opportunity for rehabilitation.[114] Instead, by governing through crime, the state can easily remove them from the "homeland" while

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[109] *See* Dohrn, *supra* note 94.
[110] Shook, *supra* note 95, at 462-63.
[111] JENNIFER TILTON, DANGEROUS OR ENDANGERED?: RACE AND THE POLITICS OF YOUTH IN URBAN AMERICA 11 (2010).
[112] *See* Janet L. Finn, *Text and Turbulence: Representing Adolescence as Pathology in the Human Services*, 8 CHILDHOOD 167, 170 (2001).
[113] *See* ANGELA DAVIS, THE PRISON INDUSTRIAL COMPLEX (AK Press Audio 2001); *see* Eric Schlosser, *The Prison-Industrial Complex*, THE ATLANTIC, Dec. 1998, at 51, *available at* http://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/304669/.
[114] HEIDBRINK, IN WHOSE BEST INTERESTS, *supra* note 13.

those who are citizens remain incarcerated with little potential for rehabilitation.[115] In many ways, migrant youth share in the experiences of discrimination and incarceration as citizen youth of color, yet their unauthorized status becomes the principle marker of difference justifying specialized detention and containment.

Under both the presidencies of George W. Bush and Barack Obama, the repertoire of enforcement measures that criminalize migrants has diversified and expanded.[116] Surveillance of the U.S.-Mexico border has become increasingly militarized.[117] There has been an expansion of workplace raids, both large and small.[118] ICE campaigns such as 287g[119] and Secure Communities[120] have

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[115] *See* Jonathan Simon, *Governing Through Crime*, *in* THE CRIME CONUNDRUM: ESSAYS ON CRIMINAL JUSTICE 171, 176 (Lawrence M. Friedman & George Fisher eds., 1997).

[116] *See* THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT (Nicholas De Genova & Nathalie Peutz eds., 2010) [hereinafter THE DEPORTATION REGIME].

[117] *See* Jason Ackleson, *Constructing Security on the U.S.-Mexico Border*, 24 POL. GEOGRAPHY 165 (2005).

[118] Jonathan Xavier Inda, *Borderzones of Enforcement: Criminalization, Workplace Raids, and Migrant Counterconducts*, *in* THE CONTESTED POLITICS OF MOBILITY: BORDERZONES AND IRREGULARITY 74, 74 (Vicki Squire ed., 2011).

[119] 8 U.S.C.A. § 1357(g) (West 2012). This statute commonly referred to as Section 287(g) authorized federal immigration enforcement to enter into written contracts with state local law enforcement to perform aspects of federal immigration law, including the investigation, apprehension, or detention of aliens, under the direction and supervision of the Department of Homeland Security. *Id.*

[120] *Id.* Administratively created by DHS in 2008, the Secure Communities is a program designed to prioritize the deportation of criminal aliens by entering into partnerships with local and state law enforcement. Through accessing existing federal and immigration databases, local and state law enforcement can identify "individuals who present the most significant threats to public safety as determined by the severity of their crime, their criminal history, and other factors . . . ." *Secure Communities*, IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities (last visited Jan. 17, 2013). However, the program has come under public criticism for misrepresentation of how DHS prioritizes removal of unauthorized migrants. *See, e.g.*, Julia Preston, *Immigrants Are Matched to Crimes*, N.Y. TIMES, Nov. 13, 2009, at A13 (discussing "Secure Communities" program). DHS issued a response to local resistance and negative national media attention to expansion of Secure Communities. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, OFFICE OF THE DIR., PROTECTING THE HOMELAND: ICE

formalized partnerships between state and local law enforcement and federal immigration authorities. Since 2000, criminal prosecutions have increased, and misdemeanors that are neither "aggravated" nor "felonies" have transformed into aggravated felonies with mandatory deportation orders.[121] Despite claims to a progressive agenda, the Obama administration has deported over 1.06 million migrants in two and one half years—in comparison to 1.57 million deportations during George W. Bush's two presidential terms—a peculiar and under-publicized milestone for a democratic president with significant support from Latino constituents.[122] The Department of Homeland Security has exceeded President Bush-era rates of deportation with nearly 400,000 individuals deported annually.[123] Mass incarceration of unauthorized migrants has become a multi-billion dollar industry in the United States.[124] At the same time, there is a decreased availability of visas and waivers, and new laws increasingly obstruct the ability of migrants to secure and maintain legal status.[125] Regardless of their legal status, children are impacted disproportionately by the enforcement and deportation regime that may target them individually or may divide their families based on differing legal status.[126] As a result, the enforcement regime has produced a class of irregular migrants, many of whom are

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RESPONSE TO THE TASK FORCE ON SECURE COMMUNITIES FINDINGS AND RECOMMENDATIONS (2012), http://www.ice.gov/doclib/secure-communities/pdf/hsac-sc-taskforce-report.pdf.

[121] *See, e.g.*, 8 U.S.C.A. § 1101(a)(43) (West 2012).

[122] Molly O'Toole, *Analysis: Obama Deportations Raise Immigration Policy Questions*, REUTERS, Sept. 20, 2011, *available at* http://www.reuters.com/article/2011/09/20/us-obama-immigration-idUSTRE78J05720110920.

[123] Spencer S. Hsu & Andrew Becker, *ICE Officials Set Quotas to Deport More Illegal Immigrants*, WASH. POST, Mar. 27, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/03/26/AR2010032604891.html.

[124] *See The Money Trail*, DETENTION WATCH NETWORK, http://detentionwatchnetwork.org/node/2393 (last visited Dec. 29, 2012).

[125] *See* THE DEPORTATION REGIME, *supra* note 116.

[126] *See* David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1174 (2006).

children.[127] The "War on Terror" has simply exaggerated enforcement-only measures.[128]

D. The Enemy Within

Following the September 11, 2001 terrorist attacks in New York and Washington, D.C., a third sensibility emerged conflating the immigrant with the criminal alien or terrorist. Both the 2001 USA Patriot Act and the 2002 Homeland Security Act[129] exemplify the codification of this cultural shift in which the terrorist and the immigrant are conflated. In the weeks and months following the attacks, escalating terror-alert warnings—from yellow to orange to red—broadcast at airports, in convention centers, and on the radio and television marked the imminence of an attack on native soil.[130] Announcements on highway traffic boards, on public transportation, and in airport terminals encouraged citizens to be aware of suspicious packages, activities, or individuals.[131] ICE issued a Special Registration Program[132] for male youths over sixteen years old from predominantly Muslim countries, further institutionalizing the criminalization of young men of color, of foreign origin, and of

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[127] *See* THE DEPORTATION REGIME, *supra* note 116. "Irregular migrants" is a term often interchanged with unauthorized or undocumented migrants. In contrast to "illegal alien," the term emphasizes that migrants may commit administrative, rather than criminal offenses.

[128] *Id.*

[129] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

[130] Following September 11, 2001, the Homeland Security Advisory System ("HSAS") enlisted a color-coded advisory alert scale, which was broadcast widely. Alerts corresponded to heightened or decreased levels of security at airports and public venues. The National Terrorism Advisory System has since replaced the HSAS. *NTAS Public Guide*, U.S. DEP'T HOMELAND SECURITY, http://www.dhs.gov/ntas-public-guide (last visited Feb. 12, 2013).

[131] *Id.*

[132] Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,584 (Aug. 12, 2002) (to be codified at 8 C.F.R pt. 264.1(f)(2)(i)). *See, e.g.*, Ty S. Wahab Twibell, *The Road To Internment: Special Registration and Other Human Rights Violations of Arabs and Muslims in the United States*, 29 VT. L. REV. 407 (2005).

particular faiths. Capillary surveillance *a là* Foucault was, and is, in many ways still in full force.[133]

The lack of knowledge about terrorists, their motivations, and their potential for violent action has led some behavioral and social scientists to draw insights and model intervention strategies from criminal street gangs, leading to a stronger racialization of criminal behavior associated with youth.[134] Racial profiling, particularly of young men, as demonstrated in the Special Registration program, became acceptable in an indefinite war on a still-amorphous enemy.[135] In the ensuing anti-immigrant context, smugglers are seen as agents of terrorism and immigrants as potential terrorists. In 2005, then-Speaker of the House Newt Gingrich warned,

> [F]ueled by the global nature of the drug trade, gangs are increasingly international operations, with many of the largest and most vicious gangs operating in America hailing from South America. With the infrastructure in place to move and distribute drugs from across the border, the danger exists that they will

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[133] *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books ed. 1979) (1977). Foucault argues that surveillance is both a powerful and efficient way in which states might enlist citizens to serve as policing agents in everyday life, rather than relying on hierarchical structures to enforce law. Taken together, the Homeland Security Alert System, public announcements calling individuals to report suspicious behavior, and the Special Registration program are technologies of social surveillance. Since the events of September 11, 2001, these technologies have expanded. Most notable, Texas Governor Rick Perry's Virtual Border Watch—a real-time Internet site where individuals can monitor the U.S.-Mexico border and notify Border Patrol via email of any alleged unlawful crossings. *Virtual Border Watch*, BLUESERVO, http://www.blueservo.net/index.php?error=nlg (last visited Jan. 17, 2013).

[134] *See* JESSICA GLICKEN TURNLEY & JULIENNE SMRCKA, ADVANCED CONCEPTS GRP., SANDIA NAT'L LABS., TERRORIST ORGANIZATIONS AND CRIMINAL STREET GANGS: AN ARGUMENT FOR AN ANALOGY 1-5 (2002), http://www.au.af.mil/au/awc/awcgate/sandia/terrorism_gang_analogy.pdf.

[135] *See* Mary Romero, *Racial Profiling and Immigration Law Enforcement: Rounding Up of Usual Suspects in the Latino Community*, 32 CRITICAL SOC. 447 (2006); SUNAINA MARR MAIRA, MISSING: YOUTH, CITIZENSHIP, AND EMPIRE AFTER 9/11, at 252 (2009).

> use their network to, for the right price, traffic terrorists and weapons into the country.[136]

Central American gangs, in particular, are cast as a growing threat to national security and as requiring increased levels of surveillance and intervention along the border and within the interior of the country.[137] A 2007 guilty verdict against former Chicago Latin Disciples gang member, Jose Padilla, for his support of terrorism overseas,[138] linked Latino youth, gang activity, and terrorism specifically to the Midwestern landscape.

In addition to being subjected to the vicissitudes of the war on terror and the war on immigrants, unaccompanied children also exist as a particular kind of palpable threat to the body politic.[139] The view that children are in the process of becoming social agents and of being not-yet-socialized into mature, responsible adults translates into the contested potentiality of migrant youth.[140] On the one hand, the potential for socialization and rehabilitation offers some assurances to the state that the child will not become deviant; on the other, the malleability of impressionable youth leaves them open to forming suspicious or even dangerous allegiances with other states, criminals, or terrorists.[141] The dispersed character of contemporary

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[136] *American Gangs: Ties to Terror?* (Fox News television broadcast July 3, 2005) (transcript available at http://www.foxnews.com/story/0,2933,160595,00.html).

[137] *See Operation Community Shield/Transnational Gangs*, IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/community-shield/ (last visited Jan. 17, 2013); *see* CELINDA FRANCO, CONG. RESEARCH SERV., RL 34233, THE MS-13 AND 18TH STREET GANGS: EMERGING TRANSNATIONAL GANG THREATS? 15 n.74 (2008), http://www.fas.org/sgp/crs/row/RL34233.pdf (citing the U.S. Immigration and Customs Enforcement website that stated "Operation Community Shield has since been expanded to include 'all criminal street gangs that pose a threat to national security and public safety'").

[138] Abby Goodnough, *Jose Padilla Convicted on All Counts in Terror Trial*, N.Y. TIMES, Aug. 16, 2007, http://www.nytimes.com/2007/08/16/us/16cnd-padilla.html?_r=0.

[139] HEIDBRINK, IN WHOSE BEST INTERESTS, *supra* note 13.

[140] *Id.*

[141] Following the massive immigration rallies in Chicago in 2007, conservative news outlets openly criticized immigrants for waving Mexican flags rather than American ones. Instead of recognizing the flag as a symbol of one's ethnic

terrorism leaves those allegiances simultaneously undetermined yet, in many respects, inconsequential.[142] It is the fear of the realization of children's potential, influenced by violent terrorist organizations, that warrants additional attention and containment.[143] Images of child soldiers from conflicts around the world and headlines of children as young as fourteen years old training to be suicide bombers in Gaza, Pakistan, Iraq, and Afghanistan offer the public further proof of the capacity of children to commit terrorism.[144] Unaccompanied migrant youth become yet another group of unencumbered, untrustworthy, brown men requiring law enforcement intervention to control the threat to the nation.[145] While seemingly irreconcilable with the image of the hardened criminal incapable of rehabilitation, the still-malleable youth as a potential homegrown terrorist stems from social anxieties of violence and xenophobia. Whether it is due to the INS' Special Registration Program, Latino youth being profiled as gang members, or public fears that children may be terrorists, the out-of-place migrant youth ultimately transforms from *at* risk to *the* risk.

Part III has identified three overlapping and emergent sensibilities and sentiments—the illegal alien, the criminal, and the enemy within—woven throughout the law enforcement approach to migrant children and youth. In practice, these sensibilities override both state and international best interest standards,[146] which dictate child welfare practices in other areas of social and legal life. The very

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heritage, it became a revelation of one's indisputable allegiance. *See* Alex Kotlowitz, *Our Town*, N.Y. TIMES (Magazine), Aug. 5, 2007, http://www.nytimes.com/2007/08/05/magazine/05Immigration-t.html?pagewanted=all (offering a poignant reflection on the sentiments woven in the image of the Mexican flag preceding and following the rally).

[142] HEIDBRINK, IN WHOSE BEST INTERESTS, *supra* note 13.

[143] *See* Twibell, *supra* note 132.

[144] *See* Peter W. Singer, Opinion, *Terrorists Must Be Denied Child Recruits*, BROOKINGS INSTITUTION (Jan. 20, 2005), http://www.brookings.edu/research/opinions/2005/01/20humanrights-singer.

[145] *See, e.g.*, Nina Bernstein, *Two Girls Held as U.S. Fears Suicide Bomb*, N.Y. TIMES, Apr. 7, 2005, http://www.nytimes.com/2005/04/07/nyregion/07suicide.html.

[146] Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990). (Somalia and the United States have not ratified the Convention).

"shelters" designed as a less restrictive environment than the INS' immigration jails that detained children just a decade prior have become "total institutions" which not only control and document everyday behaviors, conversations, interactions, and activities, but also restrict knowledge from the very children whose fates hang in the balance.[147] As a Border Patrol officer surveilling the Texas-Mexico border remarked, "[b]ut these are not *our* children."[148] Taken together, these sensibilities frame the migrant child as not possessing the vulnerability or rights of children at all. The detention, containment, and removal of the "Other" are palpable. The illegality and perceived innate criminality of migrant youth have become the preeminent factors in the ways they are apprehended, detained, and cared for by both law enforcement and civil society to which Part IV now turns.[149]

IV. A Humanitarian Response?

In most nations, the history of immigration law is at a minimum a catalogue of strategic and intricate interventions to shape or to control flows of people and goods across national borders. Yet, one cannot assume that these interventions derive from a unified or coherent state strategy or that the law itself is necessarily complete or definitive.[150] Instead, as anthropologist Nicolas de Genova argues in

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[147] *See* ERVING GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES (1961). Sociologist Erving Goffman developed the term *total institution* to signify a closed social system with barriers to "social intercourse with the outside" and with the purpose of controlling most aspects of an individual's life. The total institution is characterized by individuals "cleanly stripped of any of [their] accustomed affirmations, satisfactions, and defenses, and is subjected to a rather full set of mortifying experiences: restriction of free movement, communal living, diffuse authority of a whole echelon of people, and so on. Here one begins to learn about the limited extent to which a conception of oneself can be sustained when the usual setting of supports for it are suddenly removed." *Id.* at 4, 148.

[148] Interview with Station Commander, *supra* note 50.

[149] *Supra* note 1.

[150] Nicholas P. De Genova, *Migrant "Illegality" and Deportability in Everyday Life*, 31 ANN. REV. ANTHROPOLOGY 419, 424 (2002).

his review of migrant illegality, "the intricate history of law-making is distinguished above all by the constitutive restlessness and relative incoherence of various strategies, tactics, and compromises that nation-states implement at particular historical moments, precisely to mediate the contradictions imminent in social crises and political struggles . . . ."[151] In this vein, the policies and practices that govern the social and legal lives of unaccompanied children do not stem from a coherent and singular legal code, but involve a constellation of anxieties and interests that have emerged over time and space. The 1997 *Flores* Settlement Agreement is a revealing historical moment in the legal lives of unaccompanied children that incorporates multiple, and at times diverging, interests within the care and custody of unauthorized children in the United States.[152]

A. *Flores* Settlement Agreement

In 1985, the California-based Center for Human Rights and Constitutional Law filed a class action lawsuit against the INS, *Flores v. Reno*, because of the INS' policies of detaining, processing, and releasing unaccompanied children.[153] The case challenged a new INS policy that would release youth only to "a parent or legal guardian"[154] rather than to another trusted adult or caregiver who might be available to care for the child. The U.S. Supreme Court ruled against the plaintiff and declared that the INS' detention and release policies were constitutional and further, that institutional custody, through not the preferred method, was not unconstitutional.[155] In the absence of authorized parents, the state as *parens patriae* was entitled to intervene and institutionalize unaccompanied youth.[156] According to the Court, such an

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[151] *Id.* at 425.
[152] Stipulated Settlement Agreement, Flores v. Reno, No. CV-85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997) [hereinafter *Flores* Stipulated Settlement Agreement], http://www.aclu.org/pdfs/immigrants/flores_v_meese_agreement.pdf.
[153] Reno v. Flores, 507 U.S. 292, 292 (1993).
[154] *Id.* at 296.
[155] *Id.* at 292.
[156] *Parens patriae*, "literally 'parent of the country,' refers traditionally to the role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane, and in child custody determinations, when acting on behalf

intervention was not a limitation on migrant children's rights, as advocates had maintained.[157]

Despite the verdict, the INS was willing to negotiate a settlement decree, otherwise known as the 1997 *Flores* Settlement Agreement, which continues to set the minimum standards of care and release of detained unaccompanied children under the Office of Refugee Resettlement.[158] The decree is based on the premise that the U.S. government must treat children in immigration custody with "dignity, respect and special concern for their vulnerability as minors."[159] In particular, the agreement stipulated that the INS must: 1) ensure the prompt release of children from immigration detention; 2) for those with a pending release from detention, place children in the "least restrictive setting appropriate to the minor's age and special needs"; and 3) implement basic standards of care and treatment of children in immigration detention, including a range of requirements for mental health services, health care, education, recreation, religious services, access to legal representation, telephones, and transportation arrangements.[160]

In the *Flores* Settlement Agreement, the practices of care and protection are exclusively predicated on the child as a victim devoid of social agency and do not apply to those children who have been charged or *potentially* face a chargeable offense, have committed or threaten to commit a violent act against himself or others, have proven disruptive, are an escape-risk, or must be held for their own safety.[161] While subject to interpretation, underlying each exception is an ongoing restriction of the child's social agency to exclusively potential destructiveness and thus necessitating heightened restrictions. For example, ICE consistently refuses to transfer children who face a chargeable offense to ORR.[162] For many youth, it

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of the state to protect the interests of the child." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

[157] *Flores* Stipulated Settlement Agreement, *supra* note 152.

[158] *Id.*

[159] *Id.* at 7.

[160] *Id.*

[161] *Id.* at 12-13.

[162] Lauren Heidbrink, Field Notes (on file with author).

is sufficient that they are accused of a crime, whether a minor drug possession, curfew violations, or driving without a license, even if the charges are dismissed or never filed by the arresting agent.[163] From research within ORR facilities, youth exhibiting or even potentially exhibiting delinquent behaviors translates into higher security placements reserved for youth with a "criminal background."[164]

While advocates continue to hail the *Flores* Settlement Agreement as a victory that improved the standards and conditions of housing and release for unaccompanied children, it has not been a panacea for the identification and treatment of unaccompanied migrant children.[165] In fiscal year 2000, there were 1,933 children held in juvenile detention facilities, of which 1,569 were non-delinquent.[166] In 2001, for example, thirty-four of the fifty-seven detention facilities housing unaccompanied minors could not guarantee that delinquent and non-delinquent minors would not be co-mingled.[167] In spite of the *Flores* Settlement Agreement and with limited oversight, the INS still treated children minimally different from juvenile offenders.[168] While binding, the recommendations are still subject to considerable interpretation and elective implementation by both ICE (formerly the INS) prior to 2003 and ORR since that time.

Since the transition of care and custody of unaccompanied children from ICE to ORR in 2003, unaccompanied children have fared better in their access to education, recreation, and health services, but law enforcement practices pervade in both structural ways and everyday practices. For example, across multiple sites,

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[163] *Id.*

[164] Lauren Heidbrink, Field Notes (on file with author). From research and interviews with facility staff, legal advocates, and ORR Federal Field Specialists across twelve ORR-funded programs, "criminal background" is the term pervasively used in reference to children with any gang involvement or allegations of involvement.

[165] *See supra* notes 1, 15; *see* HALFWAY HOME, *supra* note 20, at 3-4.

[166] U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., UNACCOMPANIED JUVENILES IN INS CUSTODY, I-2001-009 (2001).

[167] *Id.*

[168] Duncan, *supra* note 38.

facility staff consistently consider any child with an impending deportation order as a flight risk, often refusing children phone calls to family members, confiscating a child's shoes to deter flight, and subjecting children either individually or collectively to "lock down" in facilities.[169] In some respects, the staff considers all unaccompanied children as flight risks and as a result, regularly restricts knowledge of their family reunification options, withholds updates on one's "case" or impending release, and denies access to the phone or email, which compounds children's anxieties within their already liminal existence in immigration detention.[170] By tightly controlling the dissemination of information, claiming the child's own best interests and safety, ORR and the facility staff aim to regulate a child's delinquent tendencies embodied in the very agency that brought him to the United States as an unaccompanied minor. In the case of unauthorized children, agency becomes quickly diverted from discussions of empowerment of individual youth to questions of accountability and the need for containment.[171]

B. Victimhood

Notably, advocates enlisted the *Flores* Settlement Agreement to untangle the child from the migrant adult and from illegality.[172] By instantiating the dependency of children who require care within a language of vulnerability, the Agreement forced the image of the vulnerable, migrant child in need of a humanitarian intervention into direct opposition with the criminalized alien who is subject to

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[169] Lauren Heidbrink, Field Notes (on file with author). On eight occasions across six ORR-facilities, the author experienced a "lock down" in which staff confiscated children's shoes, restricted children to their rooms, cancelled outings for recreation, and prohibited weekly phone calls with family members.

[170] *See supra* note 1.

[171] Susan J. Terrio, *New Barbarians at the Gates of Paris? Prosecuting Undocumented Minors in the Juvenile Court—The Problem of 'Petits Roumains'*, 81 ANTHROPOLOGICAL Q. 873, 876 (2008); Bluebond-Langner & Korbin, *supra* note 6, at 242-44; *see* TOBIAS HECHT, AT HOME IN THE STREET: STREET CHILDREN OF NORTHEAST BRAZIL (1998).

[172] Lauren Heidbrink, Field notes (on file with the author). Multiple advocates involved in both advocacy and litigation resulting in the *Flores* Settlement Agreement articulated that the Agreement was a tool with which to reclassify the child in a category distinct from the unauthorized adult.

removal. Vulnerability became an explicitly defined quality of apprehended migrant children forced to flee war, violence, abuse, depravity, and the street.[173] Mobility was a symptom of their vulnerability as children and a condemnation of the conditions spurring their migration.[174] Claims of a troubling increase in the migration of children were not based on historical fact but on a constructivist approach to child migration as a social problem.[175] Drawing from a perception of increased movement of children across international borders, advocates have come to frame this movement as representative of a rupture in the family unit.[176] The discourses of "lost childhoods" and social anxieties around the "lost generation" gained traction as advocates publicized the victimization of child migrants, abandoned children, and trafficking victims.[177]

However, as sociologist Joel Best cautions, one must look at why and how these anxieties emerged in the first place rather than exclusively on the social concern that advocates seek to remedy.[178] What are the factors that resulted in a surge of interest in child migration as a social phenomenon? How has the image of the child "menaced by deviants" shaped expressions of care?[179] How do American social values shape cultural and economic values of

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[173] Stephens, *supra* note 6, at 9.
[174] *See* EVERYDAY RUPTURES, *supra* note 6.
[175] JOEL BEST, THREATENED CHILDREN: RHETORIC AND CONCERN ABOUT CHILD-VICTIMS 11 (1990).
[176] EVERYDAY RUPTURES, *supra* note 6, at 1.
[177] *See also* Stephens, *supra* note 6, at 9, 30 (tracing the ways social and political anxieties have emerged around how childhood as a space characterized as safe, innocent, and care-free has become threatened. Stephens calls for both a historically-informed analysis of childhood and research on children as social agents as essential components in understanding the power of cultural politics in late capitalism.).
[178] *See also* BEST, *supra* note 175, at 4-6 (detailing the ways the figure of the child has shifted in the eyes of Child Savers from the 19th century through modernization. Best identifies how Child Savers across the centuries have developed social images of the child and childhood that emerge from adult social anxieties. Images include the rebellious child, the deprived child, the sick child, the child victim, and the threatened child.).
[179] *Id.* at 6.

migrant families in their countries of origin?[180] How has capitalism's impact on the economic functionality of the nuclear family shaped child circulation? By exploring the possible answers to these questions, the framing of a social issue reveals more about the anxieties and values of the framer (advocate) than the framed (child).[181] In response to the imaginaries depicting youth as threatening and in need of containment, advocates framed migrant children as the 'ideal victim'—"a person or a category of individuals who—when hit by crime—most readily are given the complete and legitimate status of being a victim."[182] The humanitarian response to child migration continues to be predicated on an understanding of children as dependent upon adults and the welfare state, and on a culturally-situated understanding of childhood as necessarily shielded from adult responsibilities of care-giving and labor.[183]

The language of the law conceives of the child in a particular way. In many ways, the law requires victimhood as constitutive of the migrant child, discounting the migrant child as an independent social actor. As the United Nations Trafficking Protocol of 2000 argues, a child "can never consent to an exploitative migration facilitated by intermediaries."[184] Yet, an increasing number of

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[180] Deborah A. Boehm, *"For My Children:" Constructing Family and Navigating the State in the U.S.-Mexico Transnation*, 81 ANTHROPOLOGICAL Q. 777, 793-97 (2008) [hereinafter Boehm, *"For My Children"*]; *see* DEBORAH A. BOEHM, INTIMATE MIGRATIONS: GENDER, FAMILY, AND ILLEGALITY AMONG TRANSNATIONAL MEXICANS (2012) [hereinafter BOEHM, INTIMATE MIGRATIONS].

[181] BEST, *supra* note 175.

[182] Nils Christie, *The Ideal Victim*, *in* FROM CRIME POLICY TO VICTIM POLICY: REORIENTING THE JUSTICE SYSTEM 18, 18 (Ezzat A. Fattah ed., 1986).

[183] Sarah Horton, *Consuming Childhood: "Lost" and "Ideal" Childhoods as a Motivation for Migration*, 81 ANTHROPOLOGICAL Q. 925, 929-30 (2008); *see* Jenalia Moreno, *Indigent Families Rely on Teen Immigrant Workers*, HOUS. CHRON., Mar. 20, 2005, http://www.chron.com/news/nation-world/article/Indigent-families-rely-on-teen-immigrant-workers-2014912.php.

[184] JACQUELINE BHABHA, INDEPENDENT CHILDREN, INCONSISTENT ADULTS: INTERNATIONAL CHILD MIGRATION AND THE LEGAL FRAMEWORK 1 (2008), http://www.globalmigrationgroup.org/uploads/gmg-topics/children/2.H_Independent_children_inconsistent_adults_UNICEF.pdf (citing United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, at 31-39, U.N. Doc. A/RES/55/25 (Jan. 8, 2001)).

unaccompanied youth enter court dockets each year.[185] The explicit consequence is that the unlawful and independent presence of the unaccompanied child forces a production of self that cannot reconcile with the ways institutions and the state have produced them. Thus, the unresolved paradox remains that the child is neither an agent nor an existing category of person, yet must stake a claim as such.

1. In the Interests of the Child

The early 2000s heightened the stakes of the debate between law enforcement and advocates in which the state's failure to recognize the innate vulnerability of child migrants and to provide safeguards became a judgment on the values of the nation.[186] The state's failure to protect the most vulnerable population of youth because of their lega status called into question national values of inclusiveness and multiculturalism as well as the United States' heritage as a nation of immigrants.[187] The United States, a nation founded on the premise of protecting the most vulnerable from harm in the spirit of Emma Lazarus' *New Colossus* brazened on the feet of the Statue of Liberty, failed to protect the "littlest immigrants."[188] In

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[185] OLGA BYRNE & ELISE MILLER, VERA INST. OF JUSTICE, CTR. ON IMMIGR. & JUSTICE, THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICY MAKERS, AND RESEARCHERS 2 (2012), http://www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf.

[186] PRISON GUARD OR PARENT?, *supra* note 35, at 3.

[187] While believed to be as old as the United States itself, the popular term "nation of immigrants" originated in a 1958 with a book entitled *Nation of Immigrants* by Robert Kennedy. Intimately linked to Cold War politics and the civil rights movement in the United States, Kennedy's project professed a political, social, and historical commitment to cultural pluralism in America. JOHN F. KENNEDY, A NATION OF IMMIGRANTS (Harper Perennial, 2008) (1964). As Mae Ngai adeptly identifies, however, Kennedy's work failed to include immigrants from Asia and Latin America, instead focusing exclusively on a European immigrant history in the United States. Mae M. Ngai, "A Nation of Immigrants": The Cold War and Civil Rights Origins of Illegal Immigration (Apr. 2010) (unpublished paper), www.sss.ias.edu/files/papers/paper38.pdf.

[188] S*ee* Ginger Thompson, *Crossing with Strangers: Children at the Border; Littlest Immigrants, Left in Hands of Smugglers*, N.Y. TIMES, Nov. 3, 2003, http://www.nytimes.com/2003/11/03/world/crossing-with-strangers-children-border-littlest-immigrants-left-hands-smugglers.html?pagewanted=all&src=pm.

a 2002 report entitled *Prison Guard or Parent?*, the Women's Refugee Commission claimed, "One true measure of a society is its treatment of children. The United States must acknowledge and uphold the rights and needs of newcomer children in order to live up to its reputation as a leader in human rights and a nation that protects children."[189] This accusation has particular resonance within the U.S. context, as the country is one of only two nations not a signatory to the United Nations Convention on the Rights of the Child.[190] Instead of protecting children against the dangers of smugglers and traffickers, as well as from abusive parents, the state has developed an extensive apparatus of law enforcement, courts, and legal provisions, and has funded the expansive private prison industry[191] to detain children on the sole basis of their alienage without consideration of their status as legal minors. The accusation unfolded as a condemnation of the state's willful and discriminatory negligence of the child and of the "Other."

2. In the Interests of the State

In the months prior to the 2003 transfer from the INS to ORR, advocates vocalized the explicit divergence between the interests of the state and the best interests of the child.[192] Advocates argued that the state had a moral imperative to care for unaccompanied children as victims, whether documented or not, but the state's interests to secure its borders and control migratory flows were, and continue to be, paramount. The public persona of the unaccompanied child can be seen throughout the legislative language and appears to inform judicial practice. If unaccompanied children are delinquent, illegal, and potentially terrorists, they are presented as undeserving of specialized care and of limited government resources. The state views some migrants—those who come from countries where the

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[189] PRISON GUARD OR PARENT?, *supra* note 35.
[190] *See* Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).
[191] Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 83 (2005); *see* Michael Welch, *The Role of the Immigration and Naturalization Service in the Prison-Industrial Complex*, 27 SOC. JUST. 73, 74-76 (2000).
[192] *See* PRISON GUARD OR PARENT?, *supra* note 35.

U.S. maintains critical political interest—as uniquely deserving of special protection.[193] Historically, nationals from Cuba and the Soviet Union receive special treatment and status under the law, while children and adults alike from Latin America, namely Central America and Mexico, were and are treated as criminalized adults who transgressed the laws of the state.[194] Where the political interests of the state in combating communism and the individual child align, the migrant child calls for specialized accommodations, care, and legal status.[195]

Amidst best intentions to care for migrant children, civil society has unwittingly adopted an agent-less approach to advocacy on behalf of migrant children and youth. Advocates embrace the migrant child devoid of agency in order to divorce children from responsibility or blame that might subject them to punitive laws reserved for perpetrators. In the humanitarian approach, advocates deemphasize a child's agency for the very reasons law enforcement accentuates it—to constitute the deserving victim or the culpable delinquent. Conceiving of agency as necessarily existing within a moral dimension compounds the disempowerment of children with a negation of their essential contributions to society. To illustrate, Part

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[193] For example, under the power of the U.S. Attorney General, Cuban entrants are admitted to the U.S. under a special parole that not only affords them specialized access to humanitarian services but also places them on a pathway to U.S. citizenship. *See* Refugee Education Assistance Act of 1980, Pub. L. No. 96-422, § 501(e), 94 Stat. 1799. In contrast, Guatemalans and Salvadorans systematically were denied asylum until a 1991 Settlement Agreement recognized the discriminatory practices of the USCIS, the Executive Office of Immigration Review, and the Department of State. *See* Am. Baptist Churches v. Thornburgh, 760 F. Supp. 796, 799-800 (N.D. Cal. 1991). The 1997 Nicaraguan Adjustment and Central American Relief Act ("NACARA") also recognized some unauthorized migrants from Nicaragua, El Salvador, Guatemala, Cuba, and some former Soviet bloc countries as *de facto* refugees who had been categorically denied legal status in the 1980s and 1990s. *See* District of Columbia Appropriations Act, 1998, Pub. L. No. 105-100, §§ 202(b)(1), 203(a)(1), 111 Stat. 2160, 2194, 2196 (1997). For some families the legalization process has gone on for decades, resulting in a differing prevalence of legality among some Central Americans and among their child beneficiaries who may age-out of their parents' petitions for legal status.

[194] *See supra* note 193.

[195] *See, e.g.*, Polovchak v. Meese, 774 F.2d 731, 736 (7th Cir. 1985).

V provides an ethnographic vignette of Mario, a Salvadoran youth who found himself ensnared between the competing interests of law enforcement, civil society, and his own social agency.

V. "I walked their geography." [196]

To evidence the ways these competing regimes trap migrant youth in untenable situations, this Article turns to the narrative of Mario, a lanky youth of fifteen from El Salvador, whose poem "*Sueños Rotos*" opened this Article. Upon meeting Mario, he was dressed in a neon blue sweatshirt with matching pants and black plastic flip-flops provided to him by the facility where he resided. In June's El Paso heat, Mario incessantly wiped the sweat from his brow onto his right sleeve. The facility's director explained that the florescent colored clothing—red, blue, yellow, and green—allowed staff to easily identify children who attempted to escape the federal facility where they were detained. The sandals were also standard-issued flip-flops to deter fast footed children from getting very far along the gravel road connecting the facility to the interstate over a dozen miles away.

At the time, the convoluted network of four government departments, fifteen federal government agencies,[197] and a myriad of voluntary agencies involved in the care and custody of apprehended unaccompanied children were indecipherable to Mario. In his mounting frustration with his "captivity" at the facility, Mario

[196] Lauren Heidbrink, Case study of Mario (2006-2009). The author first met Mario (pseudonym provided pursuant to confidentiality provisions of the Johns Hopkins Institutional Review Board), an unaccompanied child, in 2006 while he was in federal immigration detention in Texas. Upon his release from ORR custody, the author continued to meet with him bi-weekly in Maryland, in his uncle's home, at area restaurants, legal appointments, and at school. In 2006, the author also conducted research with his family and community members in El Salvador. The author maintained regular communication with Mario until 2011. Quotes in this section that are not otherwise cited are a part of that communication (field notes and interview transcripts are on file with the author).

[197] BHABHA & SCHMIDT, *supra* note 13, at 40 (noting in their 2006 report that there is limited coordination across the departments and agencies involved in the lives of unaccompanied children).

remarked, "I am ashamed that I got caught. I made my decision, had everything organized, had my plan, and now what? I am trapped here in this place. My debt is increasing as I sit here wasting my time learning geography. They must think I'm stupid. I walked their geography." Mario found himself forced to learn something he already knew in a deeply embodied way. Facility staff ignored his phenomenological familiarity with the very national territories they desired him to respect.

Although Mario's reputation as a talented student and responsible worker brought him school awards for excellence, stable employment as a dishwasher, and an occasional carpenter in his hometown of Santa Ines, it also brought him to the attention of the "Joker," the local *Mara Savatrucha* (also known as MS-13) gang leader. The Joker's first contact with Mario was to demand the new tennis shoes that Mario purchased with his earnings. Later, demands came for sex with Mario's girlfriend and his participation in gang activities. Each threat was met with Mario's scared though firm and sometimes belligerent refusal. "I am not interested in your *babosadas* [stupidity or rubbish]," he told them. On three occasions, several gang members beat Mario, with the Joker directing each blow. They would wait for Mario outside of school, his place of work, and even church on Sundays. At times Mario left through an alternate door, climbed a fence behind the school, or ran to escape these confrontations, but often without success. "It was hard to hide from them," Mario remarked on his efforts to avoid gang members in his community. "I'm taller than most people in my town. It's kind of hard for me to blend in."

Mario contributed to his family's food supplies and to the schooling expenses for his six younger siblings. His two elder sisters, now married with children, had limited capacity to contribute to the household's needs. Mario's stepfather was intermittently employed as a truck driver, which varied with the demand for timber from neighboring Honduras, Guatemala, and Nicaragua, and with his bouts of heavy drinking; he was verbally and physically abusive. After a particularly brutal beating by the Joker and three of his fellow gang members that resulted in Mario suffering a broken arm, Mario stopped attending school and work, only leaving the house once in

six weeks to remove his cast. "I tried to become invisible," he explained. He slept most of the day or watched Hollywood films on a small television set in the living room, attempting to avoid the gaze of his stepfather, who fortunately was working in Honduras for several weeks at a time during that period. Gang members would regularly pass Mario's home and yell threats through the windows. On one occasion the Joker knocked on the door. When Mario's mother answered, she said Mario had left for the United States, which was a decision Mario had been contemplating for several months. Mario recalled this period of hiding: "There was nothing for me there. I couldn't work; I couldn't study; I couldn't protect my mom from my stepfather or even myself. I had to hide to survive; that is no way to live."

After six weeks of retreat, Mario and his mother began discussing his journey to the United States. She located Mario's distant uncle, who moved to Maryland eight years earlier, and called on Mario's behalf requesting help. Mario's uncle agreed to secure him employment and provide him a place to live, if Mario could get to Maryland on his own. Mario borrowed $6,000 from a local police officer for whom he had done some carpentry work, but who could not provide him protection from the MS-13's recruitment apparatus. The police officer introduced Mario to his brother, a broker for *coyotes*,[198] who smuggled migrants through Guatemala and Mexico into the United States. Mario's $3,000 down payment assured him passage to the U.S.-Mexico border, or so he thought.

His departure from Santa Ines marked Mario's entrance into a liminal period of transit, both literally, in moving through borders and nations, and metaphorically, in which he was simultaneously *outside*—devoid of state protection and not-yet arrived—and *inside*—physically present and moving through—the nation.[199] He journeyed for three weeks, by bus through Guatemala, by car and train through Mexico, and eventually by foot into the United States. The success of Mario's journey was predicated upon his hiding in

[198] *Coyote* is a colloquialism in Spanish which commonly refers to "smuggler" of unauthorized migrants.

[199] Susan Bibler Coutin, *Being En Route*, 107 AM. ANTHROPOLOGIST 195, 196 (2005).

ditches along the road, on the top of trains, and in the back of vans. He rarely spoke for fear of passers-by detecting his Salvadoran accent and vocabulary. Recalling, the experience, Mario said:

> I imagined I was a super-hero in a comic book, you know, who had the power to make himself invisible. No one could see me. I never spoke. It is like I wasn't even there. Besides, it all seems like a bad nightmare now. I try not to think about it. It never really happened.

Mario entered another dimension in an effort to absent himself while in transit. Anthropologist Susan Coutin analyzes how *clandestinity* is a public secret, a known social reality in which unauthorized migrants must be "absent from the spaces they occupy."[200] For unauthorized migrants arriving in the U.S., the law becomes a mechanism by which the state may *absent* those who are present through the prohibition of unauthorized entrance or the denial of certain rights and services. The state is vested in the power to physically absent, through mechanisms of detention and deportation, those that are unlawfully living within national borders.[201]

Upon crossing the territorial boundary between the United States and Mexico, Mario entered into a new juridical space. His principal legal identity shifted from that of a citizen of El Salvador to that of an *illegal alien* with limited access to rights and services in the United States. Within three days of Mario's crossing the border by foot near McAllen, Texas, U.S. Border Patrol agents apprehended him en route to Houston. They interrogated him for two hours and held him for eight days in a small cell with six other migrants. Eventually, because of his age and his presence without a legal guardian, Mario was transferred to an ORR facility for unaccompanied children.

In order to remain in the United States, the most viable legal option for Mario was to petition for a Special Immigrant Juvenile Visa, in which Mario had to detail how his father abandoned him at a

[200] *Id.* at 195.
[201] *Id.* at 196.

young age and the abuse that he and his siblings received at the hands of his stepfather from which his mother could not, or chose not, to protect him.[202] In effect, Mario had to publicly claim that he was "abused, neglected, or abandoned" by his family—a claim that, according to Mario, was not only emotionally inaccurate but also undermined his personal and financial commitment to his mother and siblings. "I just can't say those bad things about my family to a room of people, to a judge. You just don't do that. They are my family." According to Mario's former employer in Santa Ines, the physical abuse was public knowledge, but something not discussed or addressed.[203] He said, "[Domestic violence] happens. I know it happens but it is a family affair. [Mario] never said anything to me, but I knew what was going on. We all knew."[204]

Mario's mother explained, "It was tough for him here. He is smart and he didn't have options."[205] In addition to the lack of opportunity, she framed his migration north as a rite of passage. "His uncles went to *el Norte* [the north; United States]; many of his cousins did; his father—even if he doesn't remember him."[206] Migration was one alternative within a catalog of choices that Mario's father, extended family members, and now Mario enlisted.

In Santa Ines, even casual conversations are marked by a migration narrative—either of the individual himself or of a close friend or family member. As sociologist and migration scholar Douglas Massey details, a culture of migration develops over time and becomes a social value. "For young men, and in many settings young women as well, migration becomes a rite of passage, and those who do not attempt to elevate their status through international

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[202] *See* Special Immigrant Status for Certain Aliens Declared Dependent on a Juvenile Court (Special Immigrant Juvenile), 8 C.F.R. § 204.11(a) (2013).
[203] After two months of meeting with Mario in an ORR facility, the author traveled to El Salvador to speak with family and community members of detained youth in the U.S. and to continue her work with two youths who had since been deported to El Salvador (field notes and interview transcripts are on file with the author).
[204] Interview with Police Officer, in El Salvador (July 2006) (field notes and interview transcripts are on file with the author).
[205] Interview with Mario's Mother, in El Salvador (July 2006) (field notes and interview transcripts on file with the author).
[206] *Id.*

movements are considered lazy, unenterprising, and undesirable."[207] What remains striking, though, is that the social agency and entrepreneurialism as well as the fundamental concern for his own physical safety and his family's well-being that spurred Mario's migration is turned on its head upon arrival in the United States. Mario is viewed as delinquent and undesirable in the U.S.-context, denied access to the American mythological virtues of hard-work, innovation, self-reliance, and family values, which are attributes that describe Mario's character.[208] Savvy to this contradiction, Mario articulated the greatest weakness ascribed to him: "my worst enemy is always by my side. I am Latino and an immigrant."[209]

The quickly growing network of Office of Refugee Resettlement facilities for unaccompanied children might suggest that the law has begun to recognize the social agency of an entrepreneurial youth who orchestrates his transnational journey. However, the bureaucratic processes and institutional practices are predicated exclusively on children as undeveloped and dependent upon adults.[210] Gang-based asylum claims have limited success[211],

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[207] Douglas S. Massey et al., *Theories of International Migration: A Review and Appraisal*, 19 POPULATION & DEV. REV. 431, 453 (1993).

[208] Here the author invokes Horatio Alger and other self-made American heroes, and the 'American dream' that brought so many immigrants to the U.S. at the turn of the 20th century.

[209] *Sueños Rotos*, *supra* note 2.

[210] The cultural construction of childhood within the United States routinely clashes with the lived experiences of unaccompanied children in youth. For example, several informants were married, owned property, or were parents, yet could not be released unless an adult was willing or able to assume legal custody of the minor. Authenticated marriages in the youth's country of origin were insufficient to permit phone calls with a youth's spouse. The proliferation of non-governmental organizations, transnational social movements, and international meetings around children's rights has only bolstered the impression that the space of childhood is at once singular and universal. *See generally* HUGH CUNNINGHAM, CHILDREN AND CHILDHOOD IN WESTERN SOCIETY SINCE 1500 (1995) (tracing the development of a romantic ideal of childhood since the 1500s, in which a dominant middle-class Western ideology of childhood has led to increasing restrictions placed upon child labor and state regulation of parent-child relationships). *See also* ZELIZER, *supra* note 106 (discussing how increasing involvement of the state and civil society in children's lives through compulsory schooling, public health campaigns, and the

which may reflect how law and law-like processes associate social agency with the risks of delinquency. Mario's *pro bono* attorney attempted to convince him that proving abuse, abandonment, or neglect in the form of Special Immigrant Juvenile status was a more viable option than political asylum, though he could have pursued both simultaneously.[212] She remarked, "In court, child abuse is more palatable than gangs."[213]

From the moment at which Mario became visible to the state, immigration authorities treated him as a criminal without rights and privileges. Shackled at the point of apprehension, he and others like him were detained in prison cells and interrogated by uniformed U.S. and Border Patrol officers. "No matter what I say, [Border Patrol doesn't] believe me. I am fifteen. I am hungry. I cannot go back [to El Salvador]. I am telling the truth. I cannot go back." Mario's desperation clashes with the institutional perception of Mario, that he is somehow dangerous, as evidenced by the facility staff, and ORR's repeated reference to alleged drug use and "gang involvement" which Mario consistently denied. The overlapping categories of race, age, gender, and delinquency create a youth who is not to be trusted, and in many instances a person to fear.[214]

On the other hand, by positioning migrant youth as victims, legal advocates consistently seek to claim certain rights on Mario's behalf. In contrast to his state-issued sweat suits and sandals, which marked Mario as a prisoner, Mario's attorney also sought to physically and symbolically dress him as a deserving child victim, worthy of the court's sympathies. His attorney explained:

> If you have a client who comes into the courtroom with muscles, visible tattoos or even just a bad

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development of social work has resulted in the child as laborer decreasing in economic value while increasing in sentimentality).

[211] IINE Development Staff, *Gang Violence, Asylum Claims*, INT'L INST. NEW ENG. (Apr. 15, 2011), http://iine.us/2011/04/gang-violence-asylum-claims/.

[212] Interview with Mario's *pro bono* attorney, in Balt., Md. (Oct. 2006) (interview transcripts on file with the author).

[213] *Id.*

[214] *See* MALES, *supra* note 98; Edelman, *supra* note 100; FERGUSON, *supra* note 101.

> attitude, you will have an extremely difficult time convincing the judge that your client is sufficiently sympathetic and deserving of asylum. However irrelevant to your legal claim, your client must play into a more sympathetic image of the victim—docile, quiet, and sufficiently fearful.[215]

By doing so, attorneys de-emphasize the sophisticated decision-making processes and social agency required not only to cross vast distances but also to survive with some level of mental and physical integrity. A debilitated victim, particularly the child victim, is framed as unable to exercise such significant displays of social agency. In part, the singular depiction of the youth as a victim undermines the credibility of the unaccompanied child, whose narrative becomes an irreconcilable account of passivity and agency.

Sociologist Saskia Sassen argues that migrations are highly selective, structured processes in which migrants travel along specific routes for specific reasons.[216] Mario came to the United States with clearly articulated motivations, not blindly or haphazardly propelled northward. Anthropologist and migration scholar Laura Agustin highlights the fact that:

> Individual personalities play their part, differences such as self-confidence, willingness to take risks and adaptability in the face of change. Being in a structurally less powerful position than people in the First World does not mean that one is not making decisions, and that those decisions are influenced by a vast multiplicity of circumstance, including individual desire. Being poor does not make people poor in spirit.[217]

Mario does not see himself as a passive victim without options. Instead, he considers himself a survivor of persecution, a provider for

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[215] Interview with Mario's *pro bono* attorney, *supra* note 212.
[216] SASKIA SASSEN, GUESTS AND ALIENS, at XIV (The New Press 1999) (1996).
[217] Laura María Agustín, *Forget Victimization: Granting Agency to Migrants*, 46 DEVELOPMENT, no. 3, 2003 at 30, 32.

his family, a protector of his mother, and a future car mechanic. "I am here [in the U.S.] for me, my future and my family," he explained later, while at his uncle's home in suburban Maryland. He has exercised his social agency in his decision to leave home and to journey north. He solicited knowledge from other migrants as to which *coyotes* (smugglers) were reliable, borrowed large sums of money to fund his journey, and clandestinely crossed three national borders. In spite of his attorney's encouragement, Mario declined to petition for SIJ, but rather decided to pursue political asylum. He awaits a decision on his petition. While the Author does not wish to suggest that agency equates with autonomous decision-making amidst an abundance of choices or that his situation is necessarily of his own making, Mario understands his reasons for migration in ways consistent with other decision-making processes in his life—to pursue an education, to support his family, and "for a better tomorrow." He is making the most of his limited options.

Through the narrative of Mario, Part V illustrates how children and youth find themselves caught between two competing regimes that depict them either as victims devoid of social agency or as delinquent with threatening pasts and potentials. By examining Mario's understanding of his own agency and subjectivity, Part V blurs the bright lines of law enforcement and humanitarian approaches by contextualizing both Mario's social agency and the landscape of his migration. Part VI builds on the call to recognize youth social agency by examining the activism of the contemporary beneficiaries of *Plyler v. Doe*, unauthorized youth activists known as DREAMers.[218] The vocal, civic engagement of DREAMers demands not only further reconsideration of their socio-legal position in American society but also questions the wisdom of framing youth either as agentive-less or as a risk to the nation.

VI. No Fault of Their Own

To contextualize the denial of agency specific to child and youth migrants, this Article now turns to another crucial legal ruling,

[218] The Development, Relief, and Education for Alien Minors Act of 2010, S. 3827, 111th Cong. (2d Sess. 2010). DREAMers are young migrants that might have benefitted from the now stalled Development, Relief, and Education of Alien Minors Act.

Plyler v. Doe, which laid the foundation for the current impasses between enforcement and humanitarianism beyond the detention context.[219] In 1982, the U.S. Supreme Court struck down a 1975 Texas state statute that denied state K-12 educational funding based on a child's (il)legal status and attempted to charge tuition to unauthorized students attending public schools.[220] In a 5-4 majority ruling, the U.S. Supreme Court found that the law was in violation of the Fourteenth Amendment because it targeted children and "impose[d] its discriminatory burden on the basis of a legal characteristic over which children can have little control."[221] At the most basic level, the ruling was the first to acknowledge that an undocumented child is a person—in some ways distinct from his or her parents.[222] The Court found that children "can affect neither their parents' conduct nor their own status" and should not be punished for the decisions of their parents.[223] The Court further stated that holding children responsible for the actions of their parents "does not comport with fundamental conceptions of justice."[224] Unauthorized children were seen as blameless for actions of migration across national borders, in effect failing to recognize the children's influence on familial migration decisions and actively denying children the capacity of exercising any agency.

The Court explained that denying education to unauthorized children would result in "the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."[225] The state has an integral role in protecting children from the tenuous border between becoming an educated member of society and a criminal in a permanent underclass, or "shadow population."[226] In this view, the welfare state must protect children from the consequences of their

[219] Plyler v. Doe, 457 U.S. 202 (1982).
[220] *Id.*
[221] *Id.* at 220.
[222] *Id.* at 202.
[223] *Id.* at 220.
[224] *Id.*
[225] *Id.* at 230.
[226] *Id.* at 218.

parents' poor decisions and criminal acts, socializing potential citizens through education while protecting that state's interests in public safety and fiscal responsibility.

This language absenting a child's social agency has continued in over a decade of iterations of the Development, Relief, and Education for Alien Minors Act ("DREAM Act") or surrounding the more recent Deferred Action for Childhood Arrivals ("DACA").[227] Within DACA, children, "through no fault of their own," are undocumented in the United States.[228] In the absence of personal responsibility, youth are seen as deserving of benefits, such as in-state tuition for higher education and a pathway to citizenship.[229] The Supreme Court's decision in *Plyler v. Doe*, the DREAM Act, and DACA cast the child as lacking any agency or decision-making power and as a victim of "the sins of their fathers."[230] Thus, the responsibility lies in the hands of the parents, or the state in lieu of the parent, which frees the state to provide some form of relief or specialized services to children. DREAMers themselves question the wisdom of agent-less depictions of the deserving victim, whereby youth who do not fulfill the pristine image of the migrant valedictorian, are excluded from benefiting from legislation.[231] As

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[227] The Development, Relief, and Education for Alien Minors Act of 2010, S. 3827, 111th Cong. (2d Sess. 2010); *Consideration of Deferred Action*, *supra* note 69.

[228] President Obama has enlisted this phrase repeatedly in discussions of the DREAM Act and DACA. For example, he stated: "One thing that I'm very clear about is that young people who are brought here through *no fault of their own*, who have gone to school here, pledged allegiance to our flag, want to serve in our military, want to go to school and contribute to our society, that they shouldn't be under the cloud of deportation, that we should give them every opportunity to earn their citizenship." President Barack Obama, Remarks by the President in a News Conference (Nov. 14, 2012) (emphasis added), *available at* http://www.whitehouse.gov/the-press-office/2012/11/14/remarks-president-news-conference.

[229] *Consideration of Deferred Action*, *supra* note 69.

[230] *Exodus* 20:5 (King James). "Sins of the father" or "sins of their fathers" is a popular phrase broadly used to absolve responsibility from children for situations resulting form their parents' actions or choices.

[231] In a separate study, the author conducted one-on-one interviews with 26 youth who self-identify as DREAMers. The author attended conferences, rallies, presentations, and organizational meetings of youth organizers between 2008-2012.

one youth leader, Jorge, said, "I am a normal teen, but getting in trouble is a luxury for me."[232] Being an innocent victim has become the legislative gold standard. Further, the demonization of unauthorized parents has profound consequences on the inter-generational relationships between DREAMers and their parents in which youth may benefit from some legal remedies while their parents remain excluded.[233]

The vocal and highly visible activism of DREAMers undermines the image of the docile dependent child as depicted in *Flores v. Reno* and *Plyler v. Doe*. Modeled after the Lesbian, Gay, Bisexual, and Transgender community, undocumented youth began to come "out" publicly regarding their (un)documented status.[234] In public rallies, congressional sit-ins, teach-ins, and online, youth have emerged from the proverbial shadows of their parents, out of both desperation and hope, that they may live lawfully and permanently in the country where they were raised.[235] Educated and socialized in America, DREAMers embrace civic participation as the vehicle for social change and publicly demand resolution to their tentative legal status in the United States.[236] At a rally of DREAMers, another youth, Sofia, declared in defiance, "You gave me this label without asking my permission."[237] In Sofia's statement, "you" refers to the law that has deemed her ineligible for self-actualization. By noting the lack of permission, Sofia asks the listener to recognize the denial of her agency by virtue of her minor and unauthorized status. She went on to describe how her illegality was an emotional paralysis passed from one generation to the next in which she moved through the shadows with her head held down, never making contact with the police despite a pressing need to do so in her gang-affected

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[232] Interview with Jorge (pseudonym provided pursuant to confidentiality provisions of the Johns Hopkins Institutional Review Board) in Chi., Ill. (Sept. 2010) (interview transcripts are on file with the author).
[233] *See supra* note 231.
[234] *See supra* note 231. It is from this fieldwork that the author recounts youth sentiments of coming out as undocumented in the public sphere.
[235] *See supra* note 231.
[236] *See supra* note 231.
[237] Interview with Sofia (a pseudonym provided by the speaker), Public Rally Participant, in Chi., Ill. (Aug. 2009) (field notes on file with the author).

neighborhood.[238] "In coming out about my status, I stand before you, not powerless but powerful, not vulnerable but fierce, not a criminal but an activist, not afraid but committed to a better tomorrow."[239] Sofia resists the law labeling her simultaneously as a powerless victim of her parents' decisions and as an outlaw hiding from the long arm of the law.[240]

VII. Conclusion

Ascribing agency only in terms of delinquency or moral rectitude not only fails to reflect the realities of youth like Mario, Jorge, and Sofia, but also carries considerable risks. Without an acknowledgement of how knowledge, responsibility, and choice are culturally informed notions, advocates and law enforcement alike misrepresent a child or youth's agency and ultimately misunderstand the reasons for child migration. On the one hand, advocates explicitly summon a restoration of the blameless approach toward delinquency,[241] in which structural inequality and implicitly racist policies characterize delinquency and in which a child's agency appears only marginally relevant, if at all. The child victim in need of saving usurps power from the child and places it in the hands of the advocate "to give voice" to victimized children. As anthropologist Laura Agustin argues, victimization as a strategy has become a way of characterizing people with structurally less access to power,[242] but does not mean that children do not make decisions and that those decisions are influenced by a variety of factors and relationships.

On the other hand, the practices of law enforcement convey that a child's agency is equivalent to responsibility for one's criminal actions, whether real or potential. The ways that both advocates and law enforcement enlist agency highlights the complexity and, at

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[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 139 (1997).
[242] Agustín, *supra* note 217, at 30.

times, non-translatability of the concept of pure agency into law. Legal argumentation makes use of claims to agency or a lack of agency to secure or to deny particular rights for subjects. In effect, there is a moral weight or value assigned to agency by both advocates and law enforcement alike that shifts contingent on the context of the law and the particular legal struggles of youth. In such a landscape, the two approaches are at such loggerheads that it emboldens the perception that the legal and child welfare systems must necessarily remain irreconcilable.

In order to draw migrant children and youth from the margins of the state, it is important to examine the ways in which both agency and rights are critical, yet unstable, categories of analysis. This Article has argued that children are social actors not easily contained by exclusive analyses of family units, yet are informed by their relationality to social networks and the state. The Author's research with migrant children and youth reveal that children are shaped by their cultural, social, and political contexts, and like adults, are embedded in intricate webs of meaning. Children and youth are active and creative subjects that engage in constant negotiation with other "stakeholders," including the state. In this study, migrant children and youth routinely evade, resist, and transform the law and institutional practices that attempt to discipline them.

Without such a fluid, multiple, and contextualized conceptualization of agency and actor, there is a significant risk of continuing to locate the problem within the migrant child or the migrant family, rather than the ways in which the state and civil society may condition and undermine "national values" of family integrity, equal rights, and a pursuit of justice. As explicitly seen in the *Flores* Settlement Agreement, *Plyler v. Doe*, Mario's narrative, and the activism of DREAMers, the notion of social agency shifts ground and valence as it rubs against different claims and interests that also run through the law. Without a historically situated and culturally informed discussion of child migration, the highly politicized and moralized debates over social agency and responsibility force children "along a road with no exit." [243]

[243] *Suenos Rotos*, *supra* note 2.

Interview with:
An American DREAMer Shaping the Land of Opportunity

By Thalia Roussos

For two brothers, it started as a weekend trip to visit a high school friend. As the boys heard the train conductor announce their stop in Buffalo, New York, United States Immigration and Customs Control agents ("ICE") stepped aboard and ordered passengers to present identification of United States citizenship. Since the 9/11 terrorist attacks, the reach of ICE within the U.S. borders has broadened in an effort to find undocumented individuals with criminal records and suspected terrorists. However, while border control in Southern U.S. states like Arizona has been a topic of lively debate, the *New York Times* notes that border security changes along the Northern U.S. border are "happening without public debate." But experiences like that of the Robles brothers put undocumented young people in the spotlight.

Just minutes after the ICE agents boarded the train to check passengers' documentation, these agents led the two teenage brothers off the train car. Carlos Robles and his younger brother are not U.S. citizens. They had nothing to show the agents that day. "Everyone was staring at us suspiciously," Carlos said. Yet despite the glares from passengers on the train, Carlos described the border patrol agents as lenient. "They were apologizing, acknowledging that we didn't do anything wrong, but also telling us that they had to do what they had to do." Carlos suggested that his American English, young age, and untarnished legal record distinguished the treatment he and his brother received from others at the immigration detention center. The agents seemed "conflicted about how to treat us because we were kids–easy to relate to and able to express ourselves clearly."

Against the instinct most kids would have to turn to their parents for help, upon arrest, Carlos and his brother did not call their parents. They knew this would expose their parents' undocumented status. After eight hours of paperwork, immigration agents took the

brothers to the county jail. Carlos explained, "when we were taken off the train, I thought they would send us straight to Mexico. I didn't know that the deportation process could take so long." Carlos mentions his fleeting thought of living in his family's old town in Mexico as he sat in the station. Carlos matter-of-factly said, "You don't go to school there . . . it is not nice to live there. Maybe we would find somewhere new to go?" The teenager pondered these life-changing situations, wracking his brain for what to do next.

The first people Carlos called from the police station were his high school tennis coaches. Carlos and his brother played on the school's tennis team throughout high school. They grew close to the teachers and coaches who recognized their ability to overcome language barriers and other challenges as new students in the U.S. Within hours of calling his coaches, they had built a network that connected Carlos and his brother to a lawyer from the National Immigrant Justice Center ("NIJC"). One of the coaches came to the county jail in Buffalo to post their bond. Carlos reflected on his parent's commitment to their children's academic and extra-curricular excellence; with his parents' motivation and guidance, the people with whom Carlos had built relationships all worked together to help on that Saturday in Buffalo.

Carlos and his family, which consists of his brother, his sister, and his parents, came to the U.S. from Mexico in 2004 on a temporary six-month tourist visa. Carlos was fourteen and ready to start high school. Since their arrival, Carlos and his family have remained in the U.S. Carlos excelled in his first three years of high school, only confronting his undocumented status as it came time to apply to college. "I was mad and confused about the whole process. I didn't know what to do; I just thought college was this place where, once you are there, you are there." He explained his struggle to understand the Federal Application for Student Aid ("FAFSA"), as well as his frustration that, being undocumented, he did not qualify for any significant scholarships. Carlos recalled, "I didn't know where to turn. Should I go back to Mexico?"

After extensive brainstorming between his parents, counselors, and teachers, they ultimately found a private scholarship dedicated to sending a Hispanic student to Harper Community

College for two years, all expenses paid. After two years at Harper Community College, Carlos enrolled at Loyola University Chicago, a private school that could accommodate his financial needs. However, as a part-time student, he still could not receive substantial financial aid. Committed to furthering Carlos's education, his parents paid out of pocket from their savings for the first two years in order for Carlos to attend Loyola University. Even after confronting great financial difficulty, Carlos has a notably optimistic outlook: "I do not resent or blame my parents for leaving Mexico because we would be much worse off if we were still there."

While Carlos's story may sound similar to the journey undertaken by many others, Carlos decided to share his story. The NIJC, working with Carlos and his brother on their case, invited the Robles brothers to speak at a conference about the Development, Relief, and Education for Alien Minors Act ("DREAM Act"). After the Robles brothers shared their experience with others at the conference, the NIJC reached out to the *Los Angeles Times*. Carlos and his brother sought to illuminate the personal struggles of undocumented students, as well as the positive outcomes that could be achieved through collaboration and advocacy. The article published in the *Los Angeles Times* prompted interest from newspapers all over the country, including the *Chicago Tribune*. At that point, Carlos remembers telling himself, "even if I do get deported, at least people have heard about my experience."

This publicity paved the way for the next step in the Robles brothers' case. The NIJC subsequently sent the case to Senator Dick Durbin of Illinois, who spoke with the U.S. Department of Homeland Security ("DHS"). Senator Durbin arranged for the Robles brothers to receive Federal Deferred Action for Childhood Arrivals ("DACA" or "Deferred Action"), without a deportation order. Deferred Action allows children who are brought into the U.S., and pose no risk to the public, to avoid removal proceedings. However, Deferred Action does not change a person's undocumented status. Deferred Action normally requires renewal every two years to avoid deportation, at the discretion of the DHS; however, because DHS granted the Robles brothers Deferred Action without a deportation order, they would avoid being subject to this unpredictable renewal process entirely.

Carlos asserted, "it was so rare, it felt like we had won the lottery. It was a year earlier than anyone else got it. It's been an amazing change to have a Social Security number, a driver's license. I feel legitimate—I can show my ID without question." But should a child's access to these documents be a rare and astounding occurrence, or should it be the humanitarian norm for children?

Though Carlos and his brother feel a weight lifted from their shoulders, Carlos still feels weighed down by the plight of others who have been less fortunate. He explains that people in the same position, including his own sister, could not get the same break. Today, however, his sister has applied for DACA. Carlos smiled and said, "When we got Deferred Action, it's almost like my parents did, too. They know now that their children can live without fear."

While some argue that Deferred Action is a temporary fix, Carlos acknowledged that, "While it is a patch, it's a really nice one. And it is pretty groundbreaking—such a big change after thirty plus years of the same thing. Hopefully the Obama administration will keep moving forward." If ever given the opportunity to stand in front of Congress in support of undocumented people seeking the American dream, Carlos would relay the following message: "We aren't asking for the very best of everything, we're just asking not to live in the shadows, and to have a place in society. The U.S. gave us tools to do well, and we want to use these tools here." He asserted that although some people think undocumented immigrants benefit from U.S. services without paying their dues, mechanisms like Tax Identification Numbers ensure all types of people are accountable to the government.

Carlos has told his story to many different people and in many different forums. But each day he thinks of more he would like to share. Carlos emphasized:

> "We don't need your sympathy, we need your support to change the system and make a difference for thousands of students who want to make the U.S. better, not just better themselves. Give us a legal identity so that we are able to give back. So we're on the books as an 'American.'"

Interview with an American DREAMer

Carlos shrugged his shoulders as he explained that he is unsure whether he is Mexican or American. He says he is from Mexico, but the U.S. is the country that has given his family a better life. Everyone in the U.S. has a different heritage behind being "American"—after all, many Americans came here to express their heritage freely. Why should young people, like Carlos and his brother, be precluded from claiming the identity they already have? Why must they be forced into choosing one identity, rather than embracing two? By giving undocumented children a legal identity, these children can stop living in fear and can openly contribute to society through the experiences that have shaped their unique identity.

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Statistically Speaking: Immigration by the Numbers

By: Caitlyn Sharrow

The United States Department of Homeland Security ("DHS") collects data on immigration and publishes a variety of annual reports. Two of the reports are the *Estimates of the Unauthorized Immigrant Population Residing in the United States*, ("*Estimates*") and *Immigration and Enforcement Actions* ("*Enforcement Actions*"). The *Estimates* report provides general demographic information including the total estimated number of unauthorized immigrants, the regions from which they immigrated, the states to which they have immigrated, and their gender and age. The *Enforcement Actions* report details information about the United States Customs and Border Protection ("CBP") and United States Immigration and Custom Enforcement ("ICE") actions such as apprehension, arrests, detentions, returns, and removals.

These reports do not convey information specific to youth. However, a report published by the Pew Hispanic Center describes several statistics about immigrant children. All three reports are significant because the information they convey offers some context for the potential impact immigration reform can have on society and an on undocumented youths.

The *Estimates* report uses a residual method to generate the illegal immigrant population estimate. The residual method, as the report indicates, results from the remainder after estimates of the legally resident foreign-born population are subtracted from the estimate of the total foreign-born population. Legally resident foreign-born individuals include legal permanent residents, naturalized citizens, asylees, refugees, and certain aliens who were legally admitted temporarily, such as students. Most of the data used to generate such estimates are derived from the United States Census and the American Community Survey ("ACS") of the United States Census. Estimating population and demographics for an entire country is challenging and those challenges are amplified when trying to collect data about undocumented individuals. Further, the

Estimates report notes the variability in the report's data because of sampling error and undercounts in Census information.

Specifically, the 2011 *Estimates* Report states that approximately 11.5 million unauthorized immigrants were living in the United States in January 2011. The report notes that the unauthorized immigrant population likely has not increased since 2007 because the rate of immigration is affected by the U.S. unemployment rate, the economic conditions in Mexico, the number of apprehensions of unauthorized immigrants at U.S. borders, and the level of border enforcement. It is also reported that about 59 percent of the unauthorized immigrant population emigrated from Mexico, while other unauthorized immigrants came from El Salvador, Guatemala, Honduras, and China. The states that had the highest levels of unauthorized immigrant populations were California (2.8 million individuals), Texas (1.8 million), Florida (740,000), New York (630,000), and Illinois (550,000). Finally, the report estimated that 12 percent of the unauthorized immigrant population was less than 18 years old.

The *Enforcement Actions*, is another annual DHS report. This report illustrates the number and type of actions the CBP and ICE offices engage in each year. The report also offers helpful definitions of immigration enforcement terms. For example, the report defines an expedited removal as, "the removal of an alien who is inadmissible because the individual does not possess valid entry documents or is inadmissible for fraud or misrepresentation of material fact . . . The alien may be removed without a hearing before an immigration court." The data reported is collected in a variety of DHS databases and is reported by event, which means that each action, regardless of whether the action is taken against the same individual, counts as a separate record.

The data reported for 2011 indicates the number of apprehensions, detentions, returns, and removals. An apprehension involves being identified by CBP or ICE and often results in removal, return, detention, or being issued a Notice to Appear before the immigration court. In 2011, there were 642,000 apprehensions reported. Detention is "the seizure and incarceration of an alien in order to hold him/her while awaiting judicial or legal proceedings or

return transportation to his or her country of citizenship." In 2011, ICE detained 429,000 foreign nationals—an all-time high. The report also indicates that 324,000 foreign nationals returned to their home countries. A return is a confirmed movement of an inadmissible or deportable alien out of the United States not based on an order of removal. Finally, 392,000 individuals were removed, meaning "compulsory and confirmed movement of an inadmissible or deportable alien out of the United States based on an order of removal."

The Pew Hispanic Center released a report specifically related to youth in 2009 titled, *A Portrait of Unauthorized Immigrants in the United States*. The Pew Hispanic Center is a research organization and project of the Pew Research Center. The Pew Research Center works to provide information on the issues, attitudes, and trends shaping the U.S. and the world. The Pew Hispanic Center conducts studies on a wide range of topics. The 2009 report related to immigrant youth stated that there were 1.8 million unauthorized immigrant children—under age 18—living in the U.S. and that there has been no increase in that number since 2003. The report also stated that children of unauthorized immigrants, "both those who are unauthorized themselves and those who are U.S. citizens, make up 6.8% of the students enrolled in the nation's elementary and secondary schools." Additionally, in states such as Arizona, California, Colorado, Nevada, and Texas, at least one-in-ten students have parents who are unauthorized immigrants. Further, the research shows that in 2008, four million U.S.-born children lived with unauthorized parents, and 47 percent of unauthorized immigrant households consist of couples with children.

These three reports offer some numerical context to the large number of individuals that may be affected by immigration reform. As these reports indicate, it is estimated that a large number of unauthorized immigrants reside in the United States, a significant number of children have unauthorized parents, and many individuals are impacted by the enforcement actions of CBP and ICE. Further, these numbers should illustrate the need for immigration reform in the United States.

Immigration by the Numbers

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Review: Exploring *Half the Sky*

By: Elizabeth Scannell

Shery WuDunn and Nicholas Kristof travel to five different countries to tell the stories of activists and survivors of gendered violence in *Half the Sky: Turning Oppression into Opportunity for Women Worldwide* ("*Half the Sky*"). Joining them are a variety of female celebrities, each paired with an activist organization working to empower girls across the globe. Each country brings new barriers and cultural norms, but the recurrent theme runs true: violence against women and girls is a global crisis.

Kristof begins the film with the story of how he and WuDunn began to explore global gender-based violence, contending that the two of them quickly found that ". . . the central human rights abuse of our age didn't involve political repression, didn't involve so many other things we focused on, but involved the chromosomes that people were born with."

The film covers a variety of forms of gender-based violence, including rape culture in Sierra Leone, sex trafficking in Cambodia, educational repression in Vietnam, genital mutilation in Somaliland, and economic empowerment in Kenya. In Sierra Leone, an activist characterized the 9,000 rape survivors her organization has seen over eight years as being composed of fifty-two percent children between twelve to seventeen years old, and twenty-six percent under twelve years old. Somaly Mam, an activist in Cambodia, explains the systemic culture that allows sex slavery to persist, and even conducts a brothel raid with Kristoff.

Mam tells Kristoff and Meg Ryan about how she wants to help the girls she works with become children again, and help them learn to laugh again. WuDann and others such as Gloria Steinman call attention to the prevalence of trafficking within the United States, and how a multi-leveled response is needed to combat it on a domestic and international scale. Activists in Vietnam focus on educational repression, and argue that education is the key to empowerment—while Gabrielle Union rides the seventeen-mile distance with a girl who rides her bike to get to school every day.

Review of *Half the Sky*

It is extremely difficult to measure the quantitative prevalence of sex trafficking within the U.S., but some activists estimate that over 1.6 million children have been caught in the sex trafficking syndicate within the U.S. The U.S. Immigration and Customs Enforcement averages that 800,000 children and adults are trafficked into the U.S. for prostitution or forced labor per year. Further, the average age of entry into the trafficking syndicate in the U.S. is twelve to fourteen years old.

Melanne Verveer, the U.S. Ambassador for Global Women's Issues, recommends a "Heat at the Top and Heat at the Bottom" response to trafficking: government action, informed legislation, and consistent enforcement of those laws — as well as a societal and communal response to the devaluation of women and girls as human beings.

Half the Sky has drawn criticism for employing a "white savior" tone, particularly with its use of Western celebrities to serve as audience surrogates. Critics questioned why viewers needed celebrities to tell the stories of other women and girls, when those women and girls were able and willing to share their stories directly to the audience. They also argue that it is extremely problematic for Kristof and the various celebrities, all Western and privileged, to barge into a culture and use dramatics to trigger fleeting change for the sake of the cameras.

However, Kristof and other contributors are honest about that component early on in the miniseries, and Kristof directly addresses the problems with "outsiders" coming in and expecting an entire culture to change. He states very honestly that the famous women who accompany him will draw attention to the film and therefore the issues, and thus the ends justify the means. In contrast to what critics say, the fundamental message of *Half the Sky* is empowerment, and how progress for women and girls will benefit the greater society. These women and girls are the solution to many problems communities face. As Mam poignantly puts it, "This country cannot be a better country if women are not part of the solution."

Review of *Half the Sky*

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In the Courts: Special Immigrant Juvenile Status and the Problem of Federal Consent to State Jurisdiction

By Katherine Hinkle

Special Immigrant Juvenile Status ("SIJS") was created by the Immigration Reform Act of 1990, and amended by the Trafficking Victims Protection Reauthorization Act of 2008, to protect undocumented immigrant children who had been abused and neglected and to give them a path to citizenship. However, a 1997 amendment to the Immigration Reform Act allowed the Federal Government to step in and deny children seeking SIJS the opportunity to present their case for permanent residency if the federal government had reason to believe that they were seeking SIJS for reasons other than protection from abuse. Courts have repeatedly found that this amendment gives the federal government broad powers to deny children SIJS. As a result of these developments, vulnerable immigrant youths are being denied the protection they were originally guaranteed under SIJS.

Immigrant youths, including the undocumented, may apply for SIJS status in order to seek protection from abuse or neglect, proceed on the path to permanent residency, and get their "green card." In order to receive this special status, the child must have been declared dependent on a juvenile court in the United States. Additionally, a state court must determine that reunification with the juvenile's parents is impossible due to abuse, neglect, or abandonment.

In 1997, the process to apply for SIJS became more complicated when the federal government became more involved and took the determination of abuse, neglect, and abandonment out of the hands of the state courts. When an immigrant youth is in the custody of the United States, the Attorney General must expressly consent to the juvenile pursuing SIJS in state court by allowing the juvenile court to have jurisdiction over the traditionally federal matter of immigration. In other words, the Attorney General, or a lower official appointed by the Attorney General, serves as a gatekeeper to state court proceedings. The federal government must approve the petition to ensure that SIJS is not being sought for means other than protecting the child from abuse and neglect.

Seeking SIJS is already challenging for vulnerable immigrant youths, but the most troublesome area of an SIJS proceeding is the issue of federal consent to SIJS. The federal government has final say over whether the child may pursue SIJS, even before a state court gets the chance to determine if the child meets the criteria. Courts

have upheld federal denials of consent in cases where there is clear evidence of abuse, denying the child the right to plead his or her case to the state court, in contravention of Congressional intent to leave such determinations of abuse, neglect, and abandonment to the expertise of state courts.

In a U.S. Court of Appeals Third Circuit case, *Yeboah v. U.S. Department of Justice*, a young man from Ghana was denied consent to seek SIJS because the Immigration and Naturalization Service (INS), acting on behalf of the Attorney General, believed that the boy was sent to America in order to procure citizenship for himself and bring his family over from Africa. A child psychologist found that the boy's father had seriously abused him while they were living in Ghana, but the INS still refused to grant consent for SIJS, even though fact-finding of this nature is traditionally left to the family court system.

The Third Circuit found that any request for a dependency hearing for a child in the custody of the United States is entirely dependent on an INS director's consent to such proceedings. The court reasoned that it was proper for the INS director to make a determination that the child's primary purpose in seeking SIJS was not to gain protection from abuse or neglect, even when there was mixed evidence on the issue. This finding was in stark contrast to Congressional intent for SIJS, which clearly left the determination of dependency, abuse, and neglect to the more experienced state juvenile courts. Nevertheless, the Third Circuit affirmed the federal government's ultimate authority in the SIJS procedures to make a preliminary determination that SIJS is sought due to abuse or neglect, and thus substitute the federal government officials' own judgment for that of the state court.

Additionally, federal courts have held that the Department of Homeland Security (DHS), which took over the INS's role in SIJS proceedings after its creation in 2002, may properly refuse to render a decision on a child's request for consent to SIJS proceedings. In *F.L. v. Thompson*, a federal district court for the District of Columbia found that, not only may the federal government refuse to allow a child's matter to be heard in state court, but it may also keep a child in limbo by refusing to grant or deny consent at all. The court found

that the revision of the Immigration Reform Act to require federal consent was "intended to curtail the granting of special immigrant juvenile status . . . [and] demonstrates an intent to remove immigration decisions from the exclusive control of juvenile courts and the social agencies affiliated with them." Therefore, the *F.L.* decision strongly suggests that the purpose of federal consent to SIJS is to make it harder for children to receive the protections of SIJS.

Furthermore, because federal courts will review the actions of the federal government only to assess if such determinations are "arbitrary and capricious," youth who are denied SIJS proceedings will rarely succeed in challenging a federal determination of ineligibility. In order to prove that the federal government's determination was incorrect, a juvenile will have to prove that the DHS had *no reasonable basis* to make the determination. With such a deferential standard of review, once the federal officials have chosen to deny consent, it will be almost impossible for an immigrant youth to overturn the decision.

The judicial trend towards limiting access to SIJS status through denying federal consent has made seeking SIJS protection even more challenging for these vulnerable youths. By interpreting changes to the governing law as limits on access to SIJS, federal courts are denying these children the chance to present their case to state courts, which have the requisite expertise to determine whether there is sufficient evidence of abuse, neglect, and abandonment, to warrant SIJS. The complex issues of federal consent to SIJS means that some youths will never receive the benefit of being heard in juvenile court, where judges are better equipped to handle the types of determinations inherent in SIJS status.

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Around the World: Illegal Immigrants and the Cost of Higher Education in the U.K.

By Amanda M. Walsh

In the most recent decades, the United States has witnessed an increased dialogue around the right to higher education for undocumented youth. At the center of this debate has been an understanding that children brought illegally to the U.S. before the age of sixteen were unable to make the decision to enter the country illegally, and thus cannot be held accountable for their undocumented status. Through this reasoning, the U.S. Supreme Court has held that undocumented children should have equal access to primary education. This decision has influenced recent legislation that provides a pathway to citizenship, which can allow undocumented youth to pursue higher education and qualify for financial aid and in-state tuition costs that are available to U.S. citizens.

Alongside the U.S., other countries face policy challenges due to illegal immigration. In 2009, there were an estimated 725,000 illegal immigrants present in the United Kingdom. Today, the number of illegal immigrants has increased to approximately 863,000, with an estimated 120,000 children who are illegal immigrants. These numbers have led to new government efforts to deport illegal immigrants as well concerns about the children's welfare, children's educational needs, and the economic cost of immigrant families present in the U.K.

The debate in the U.K. around illegal immigration swings between assisting undocumented children and their families to gain citizenship and removing them from the country through deportation proceedings. Recently, the U.K. Border Agency ("UKBA") increased pressure on finding ways to remove illegal immigrants from the country and created tougher controls to protect the border.

In fact, undocumented youth and their families have little support from both the general public and the U.K. government. The U.K. defines an illegal entrant as an individual present in the U.K. who has either unlawfully entered or sought to enter in breach of a deportation order. An illegal entrant is also defined as a person who

entered or sought to enter by means, such as deception by a third person. Unlike the U.S., however, children who are brought into the U.K. illegally by their parents' deception may be viewed under the law as equal to adults who enter by deception of a third party. These children can then be treated as if they were active participants in their parents' deception, which can lead to deportation. For those youth who manage to avoid deportation, they may face other challenges, such as obstacles that prevent access to education.

Similar to U.S. laws that state all youth, including undocumented youth, have a right to free, public education, each Local Education Authority ("LEA") in the U.K. must provide an education to each child between the ages of four and sixteen. However, despite the LEA's duty to provide this compulsory education to all children, many undocumented youth are still denied access. Many youth face barriers including difficulty obtaining forms of identification, a parent's fear of being detected, and local school discretion. Further, the LEA's do not have a duty to provide education before the age of four or after the age of sixteen. College and other forms of higher education can remain outside the reach of undocumented children raised in the U.K., as a result of the legal and financial barriers. In fact, if an undocumented child with limited funds pursues higher education, they will not qualify for financial aid, called Learner Eligibility funds, because they are not a legal resident of the U.K.

Similar to the U.S., universities within the U.K. differentiate tuition costs based on residency. These costs are called "home fees," which are lower tuition rates for those students who have lived in the U.K., and "overseas fees" are higher tuition rates for students who are not from the U.K. In England, to qualify for the lower home fees, a student must fall into one of ten categories, all of which require that the student be "ordinarily resident" in the U.K. on the first day of classes. Ordinarily resident is defined as an individual who has habitually, normally, and *lawfully* resided in the U.K. Therefore, every category excludes undocumented children from qualifying for home fees.

While some politicians support relief for undocumented youth and their families, such as qualifying for home fees, the strong push

against illegal immigration has prevented any immigration reform legislation from passing in the U.K. Without legislation to allow undocumented youth, who have resided in the U.K. for a long period of time, to qualify for home fees or to secure a path to citizenship, which would allow automatic qualification for home fees, many youth will be unable to afford higher education. The only current option for undocumented youth is to apply for asylum as a refugee, which would put them in a category that qualifies them for home fees and Learner Eligibility funds.

However, undocumented youth can only seek asylum if they are fleeing persecution in their home country. Unfortunately, this is not a viable option for all undocumented youth and can put them at risk for deportation. Only one-third of asylum applications are granted yearly and once an application is rejected, the undocumented youth can face immediate removal from the U.K. Because the chances of being granted asylum are slim, these youth have no remedy either to a pathway to citizenship or to meet qualifications for lower education costs.

Researchers and some politicians support the need for new governmental policy to protect the interests of all children within the borders of the U.K., whether by guaranteeing education opportunities or providing pathways to citizenship. One possibility to protecting these interests would be to apply the reasoning of a recent U.K. Supreme Court judgment, *ZH (Tanzania) v. Secretary of State for the Home Department*. *ZH (Tanzania)* involved the deportation of undocumented immigrant parents who had children who were born in Britain and were, therefore, legal citizens. The immigrant parents fought their deportation, arguing that it would either separate them from their children or force the removal of their children who are allowed to remain in Britain. The Court ultimately decided that the best interests of the child, as mandated by the United Nations Convention on the Rights of the Child, was a greater priority than a parent's immigration status. Therefore, the Court affirmed that decisions regarding a parent's or a child's immigration status must not go against the best interests of a child.

This holding can be expanded to allow pathways to citizenship and access to higher education and lower tuition fees for

undocumented youth by arguing that it is in the child's best interest to have access to these options, regardless of their immigration status. This is especially true if they have resided in the U.K. for the same period of time as legal citizens. The best interest standard, despite legal immigration status, can be used to ignite legislation that provides pathways to citizenship by removing the blame for a child's illegal immigration , which could stop automatic deportation of children brought to the U.K. below a certain age, or by allowing access to reduced costs for higher education.

Additionally, removing the requirement of legal residence from the qualifying categories for home fees is an alternative method to protect the best interests of undocumented youth who are pursuing higher education. In lieu of the legal residence qualification, universities can institute other requirements for undocumented youth, such as stating that the youth must have resided in the U.K. since before a certain age.

By using the best interest standard or flexibility around the concept of legal residence when determining the cost of higher education, the U.K. would follow the U.S.'s current legislative attempts to protect the overall welfare of undocumented youth. Although the U.K. has yet to propose such legislation, the recent court decision provides an opportunity for the government to do so.

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Education Connection: The Chilling Effects of Student Immigration Tracking Systems Violate *Plyler*

By: Dan Baczynski

In May 1975, Texas passed a law withholding state funds from local school districts for children who were not legally admitted into the United States. The law also allowed public schools the right to deny enrollment for children who were not legally admitted. Effectively, the Texas law denied illegal aliens access to free public education.

The law was quickly challenged and made its way to the Supreme Court in the case *Plyler v. Doe*. In a 5-4 decision, the Supreme Court found the law unconstitutional. The Supreme Court stopped short of declaring education a fundamental right, but also found the state interest to be insufficient. Texas claimed providing an education to undocumented children created a financial burden on the state. The Court found a financial reason to be unsubstantial, considering that there was no evidence that illegal immigrant children cost substantially more to educate than legal immigrant children. Furthermore, the majority considered that the effect of the Texas law would be extremely detrimental because the law would create "a subclass of illiterates within our boundaries, surely adding to the problems and cost of unemployment, welfare, and crime."

The *Plyler* ruling has faced numerous challenges since 1975. In the 1990s, the Republican Congress almost pushed through a bill that would have granted states the option of denying illegal immigrants access to public education. In 1994, California voters approved Proposition 187, which denied illegal immigrants access to social services, including public education. A district court declared the law unconstitutional and California decided not to appeal.

Opposition to the *Plyler* ruling continues today. States have turned to alternative means to deter illegal immigrant children from accessing public education. Instead of laws directly denying access to public education, many states have passed legislation requiring

schools to record and monitor the immigration status of the children upon registration. This has the effect of deterring parents from registering children at public schools in fear that their illegal status could be made known to the U.S. Immigration and Customs Enforcement or other government agencies. Though student immigration status systems do not directly deny illegal immigrant children access to public education, these systems have a chilling and deterring effect that creates a sufficient burden on immigrant families, such that many children and parents refuse to access these resources. Due to these secondary effects, student immigration tracking systems should be found unconstitutional according to the *Plyler* ruling.

Student immigration tracking systems have gained traction in several states over the last few years. In 2010, Arizona lawmakers introduced a bill that would mandate all school districts to collect and report data on "aliens who cannot prove lawful residence." The Arizona Department of Education would then report on the costs associated with educating undocumented children to the state legislature. In Texas, state lawmakers introduced similar legislation that would require school districts to determine whether a child is undocumented. Texas also justified its system as an analysis of the costs of illegal immigration.

Tracking systems have not passed without challenge. In 2008, Maryland lawmakers introduced legislation requiring public schools to count the number of undocumented students. Students who could not provide proof of their lawful status would be recorded and tracked. The Maryland legislature claimed the tracking system was necessary to determine the cost of providing education for undocumented students.

Later that year, the Maryland State Board of Education took under review whether the local school system had the authority to collect such data. In March 2009, the School Board decided that "the impact of illegal immigrant students on the school system's budget is not a valid public purpose under the ruling and reasoning of *Plyler v. Doe*." Because the purpose of the legislation was not valid, the School Board ruled that schools were not authorized to collect student immigration status data.

Student Immigration Tracking Systems

On June 2, 2011, Alabama passed the most aggressive tracking proposal. The Beason-Hammon Alabama Taxpayer and Citizen Protection Act, also known as H.B. 56, mandates that all K-12 public schools determine whether a child wishing to enroll was born outside of the U.S. or was born to undocumented parents. If a child is unable to provide a birth certificate demonstrating that the child was born within the U.S., he has to provide some other form of official documentation or attestation by a parent as to his immigration status. If neither of these is presented within thirty days, the child is deemed to be "an alien unlawfully present in the United States." The Alabama Department of Education then uses this data to create an annual report detailing the costs associated with educating undocumented students.

The Alabama statute encompasses more than just tracking systems. The law also requires employees of the state, including school employees, to report any violation of the law. For example, in May 2010, Michelle Obama visited a suburban Washington D.C. school. A second grader asked if "Barack Obama is taking everybody away that doesn't have papers?" Mrs. Obama replied that it is something that needs to be worked on. The young girl continued, disclosing "but my mom doesn't have any papers." Had this occurred in an Alabama elementary school, school officials would have been required to report the child's mother's violation.

This mandatory reporting requirement puts school officials in a difficult situation. Often times, immigrant students, legal and illegal, are misinformed about what is required or the different options available to access higher education. These students' only source of information comes from school officials, teachers, and counselors. With the new Alabama legislation, school employees may be reluctant to aid likely immigrant students for fear that a violation could be innocently disclosed. The school official would then be obligated to report the violation or face the potential of a Class A misdemeanor, which can result in a sentence of up to one year in jail or a $6,000 fine.

Section 13 of the Alabama law raises additional concerns due to its non-clarity. The section makes it a crime to "conceal, harbor, or shield an alien from detection in any building, place, or means of

transportation . . . if the person knows the alien remains in the U.S. in violation of Federal Law." Depending on the interpretation, a teacher, a principal, or even a bus driver could conceivably be held in violation of the criminal statute. Even if no one is prosecuted, the vagueness of the law is likely to create a level of fear in school officials, deterring them from their usual daily interactions with students.

The numerous provisions of the Alabama legislation create a substantial burden on undocumented children and their families. Undocumented immigrant families, often unclear about the registration process at schools, could be instantly deterred from enrolling their child simply because of the immigration questions. Even if the child is a U.S. born citizen, if the parent is an undocumented alien, the parent could be dissuaded from registering the child in fear that the parent may be found and deported. Immigration tracking systems violate *Plyler* due to their secondary effects. The information that the schools demand in order to register is so sensitive in nature that many parents decide not to register their children in the state and, instead, move out of the state. The tracking system has the effect that the *Plyler* decision sought to prevent. Undocumented children end up without access to public education due to state action. This indirect result should be sufficient to find all immigration tracking systems unconstitutional.

Even if *Plyler* does not apply to tracking systems, the laws still create a hardship on undocumented children that is not faced by non-immigrant students. As undocumented children are protected under the Equal Protection Clause, the state would still need to provide a compelling interest for the legislation. In *Plyler*, the Supreme Court found that financial concerns did not constitute a compelling interest. This opinion was also expressed by the Maryland Board of Education when deciding whether local schools could track immigration status. The purpose of the Alabama law is to determine the financial effect of undocumented students. Though undocumented students have a financial effect, there is no evidence that the effect is substantial. In *Plyler*, this was the deciding factor in determining whether Texas had a compelling interest. The Supreme Court understood that undocumented children had some effect; but

with no evidence that the effect was substantial, the state's interest was not compelling. Because there is still no evidence that undocumented immigrants have a substantial financial effect on school systems, it is likely that tracking systems would be found unconstitutional under the Equal Protection Clause.

The tracking systems being implemented in Alabama, Arizona, and Texas have the effect of excluding undocumented children from the public education system. By requiring evidence of immigration status, these states deter parents from registering their children at public schools for fear that the child or the parent will be deported back to their home country. In *Plyler*, the Supreme Court determined by a 5-4 decision that undocumented children could not be denied a public education. Immigration status systems are unconstitutional because they deny undocumented students a public education. In addition, these systems are simply bad policy. Twenty-five years after the *Plyler* decision, the plaintiff from that case, Jim Plyler has changed his mind on denying access to public education. He believes that had he won the case, it "would have been one of the worst things to happen to education." Requiring a student's immigration status during registration has been found unconstitutional in Texas, Alabama, and Arizona. However, attempts are still being made by states to create a tracking system that can pass constitutional muster. To prevent serious societal harm, and because they violate *Plyler*, immigration status systems should be found unconstitutional.

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Legislative Update: Michigan Joins Majority of States Allowing Driver's Licenses for Immigrants who are Lawfully Present Under DACA

By Erin Wenger

The topic of immigration reform has become a widely discussed and hotly debated issue in the United States during the 21st Century. In his 2013 State of the Union address, President Obama discussed the need for comprehensive immigration reform that addresses illegal immigration, as well as accessible pathways to citizenship. President Obama referred to bipartisan efforts currently underway to create and pass immigration reform bills, the results of which have yet to be seen. However, some signs of progress are visible as the United States Senate formally initiated hearings on immigration reform on February 13, 2013.

The present level of immigration in the United States is at the highest number in the country's history. Of the current immigrant population, there are nearly 1.8 million individuals who are unauthorized immigrants that could be eligible, or become eligible, for a deferred action initiative. In June 2012, the Obama Administration, through the Secretary of Homeland Security, announced that immigrants meeting certain criteria could apply for deferred action on removal proceedings under the Deferred Action for Childhood Arrivals policy ("DACA"). Under DACA, any removal proceedings would be delayed for the immigrant for two years, and extensions beyond that period could be considered.

Among the qualifications for DACA, a person must: (1) be under the age of thirty-one as of June 15, 2012; (2) have arrived in the United States prior to his or her sixteenth birthday; and (3) be enrolled in school, have graduated from high school, have obtained a general education development ("GED") certificate, or be honorably discharged from the military. If an individual qualifies for DACA, he or she will not be granted legal status, but he or she will also not be considered to be *unlawfully* present in the United States during the Deferred Action period. The individual may attend school or possibly

gain employment during the Deferred Action stage. However, DACA does not remove all obstacles that may be involved in pursuing those activities, such as state-imposed restrictions on gaining a driver's license to simply travel to and from school or place of employment.

Many states have laws that require an applicant for a driver's license to not only be a resident of that state, but to also provide proof of citizenship, lawful status, or a Social Security number. These types of requirements can prevent an illegal immigrant from getting a driver's license if he or she cannot provide adequate documentation. Individuals who qualify for DACA, however, are able to apply for a Social Security number, and, therefore, would presumably be able to apply for a driver's license. Additionally, the federal government has officially announced that qualified individuals under DACA are *not* unlawfully present in the United States. Most states have thus recognized that this lawful presence and ability to get a Social Security number would allow these individuals to qualify for driver's licenses, even if a state statute prohibits granting licenses to unlawful immigrants.

Unfortunately, not all states have interpreted DACA and their own statutes regarding driver's licenses to coincide in this manner. Because DACA is a discretionary determination made with regard to enforcing removal proceedings, and not a federal law granting lawful status to immigrants, individual states can still pass their own laws restricting benefits to those that have lawful status and, in doing so, can choose to not recognize lawful presence as qualifying under their standards.

Prior to February 1, 2013, only three states continued to prevent DACA recipients from being eligible to obtain driver's licenses—Michigan, Arizona, and Nebraska. However, on February 1, 2013, Michigan took the necessary steps toward leaving this minority group by announcing an official policy change. The Michigan Secretary of State's Office declared that it would change its policy pursuant to the federal government's determination that DACA conferred legal status on recipients for the specified time period allowed under DACA. Therefore, as of February 19, 2013, noncitizens living in Michigan who qualify for Deferred Action are eligible to apply for Michigan driver's licenses for the pendency of

their deferred status under DACA. Making this official announcement not only clearly establishes Michigan's policy for the public, but also brings the state in line with the federal government's position with regard to the legal status of immigrants that qualify for DACA.

In order to prevent confusion or misinterpretation of legal authority, it would be advisable for states to make their policies clear with regard to allowing DACA recipients to qualify for state driver's licenses, as Michigan has now done. This can also be accomplished through enacting new legislation or an updated vehicle code provision, as in the case of Illinois. The Illinois Vehicle Code's current provisions concerning the issuance of driver's licenses went into effect on January 1, 2013. The Illinois statute governing driver's license applications requires a residence address and a Social Security number, but it does not contain a provision regarding immigration status of an applicant. Similarly, Iowa's statute on driver's license applications does not explicitly state that lawful citizenship status is required, but it does require a Social Security number unless the applicant is a foreign national temporarily present in Iowa, and it requires certification of residency within Iowa. Therefore, those who qualify under DACA and subsequently obtain a Social Security number would be able to apply for a driver's license in Illinois and Iowa.

These states' statutes are in stark contrast to Arizona's licensing requirements. Arizona's statute explicitly states that a driver's license shall not be issued to an applicant who cannot prove that his presence in the United States is authorized under federal law. Although Arizona's current statute was enacted in 2008, it remains one of only two lingering states that refuse to recognize individuals who are granted deferred action under DACA as having a lawful presence in the United States, despite the federal government's support for such recognition.

Like Arizona, Nebraska also does not allow DACA recipients to obtain driver's licenses. Nebraska's statute requires that applicants "present valid documentary evidence that he or she has lawful status in the United States," and lists nine possible documents that could fulfill that requirement. Additionally, the statute provides that other

documentation of lawful status can be produced to fulfill the criterion, if approved by the Director of Motor Vehicles. When considering Nebraska's statutory language, it would appear that if the Director acknowledged DACA as providing a lawful status to qualified recipients, they would be eligible for driver's licenses in that state. However, Nebraska has yet to take such action.

Only time will tell if the remaining two states adjust to follow the lead of the other forty-eight and allow DACA recipients to obtain driver's licenses. The American Civil Liberties Union ("ACLU") has a pending lawsuit in Arizona challenging this very issue, and across the United States there continues to be a push for immigration reform that includes a pathway to citizenship for individuals meeting criteria similar to that which is contained in DACA. Given that President Obama touched upon immigration issues in his 2013 State of the Union address, which was given shortly after beginning his second term as President of the United States, the next four years could be very dynamic in immigration policy.

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Spotlight on: The Young Center for Immigrant Children's Rights

By: Elizabeth Youakim

Each year over 80,000 unaccompanied minors seek entry to the United States. In 2010, United States Immigration Authorities took more than 8,000 unaccompanied immigrant children into custody at borders and airports. As of 2013, more than 700 of these children are in federal custody in Texas alone and countless others remain in custody across the nation. The children come from around the world and for various reasons; some come to flee political turmoil, poverty, and child labor, while others are motivated to be reunited with family members already in the United States. Despite these variances, these children have one thing in common: they venture across United States borders alone, without the help or guidance of an adult guardian.

Named after one of the first child clients they served, the Young Center for Immigrant Children's Rights ("Young Center") advocates for the best interests of unaccompanied immigrant and refugee children in the United States. Although the Young Center is based in Chicago, Ill., they just opened a new office in Harlingen, Tex. in 2013. Staff attorneys, law students, social work students, and other volunteers receive training to serve as either Child Advocates or friends of the child. The volunteers get to know the children, determine why the children are in the United States, and identify the next steps for the child. Some children qualify for asylum or special protective visas. Regardless of where the children eventually end up, all of the volunteers and advocates protect the best interests of the children they serve.

Currently, the Young Center is sponsored by the Tides Center, a nonprofit organization that provides fiscal sponsorship to other organizations. Other organizations, such as the Chicago Bar Foundation, support the Young Center. Additionally, the organization asks for private donations from individuals.

Like many organizations dedicated to serving vulnerable populations, the Young Center relies on volunteers to continue their mission. The Young Center trains volunteers to become Child Advocates for unaccompanied immigrants. Although the Young Center has a need for bilingual volunteers, the organization welcomes volunteers from all backgrounds, professions, and cultures who are at least twenty-one years old. Volunteers attend a two-day training session covering child development, effective communication with children, United States immigration laws, and the issues facing unaccompanied immigrant children. After successfully completing

the training, each Advocate is assigned to an individual child. The Advocates continue to receive training, support, and supervision from the Young Center throughout this process. In turn, the Advocates must maintain constant communication with the Young Center, the child's case manager at the shelter, and the child's attorney representing the child.

In addition to training, Advocates commit to serving the needs of their specific child. This includes: visiting the child at least once a week, helping the child think through options and decisions, and accompanying the child to court hearings and other important meetings or interviews. Additionally, the Advocate must conduct research on the current situation in the child's home country, draft a written report regarding the best interest recommendations for the specific child, and advocate for the best interests of the child.

In 2004, the Young Center received seed funding from the United States Department of Health and Human Services Office of Refugee Resettlement ("ORR") in order to develop a program where guardians *ad litem* ("GAL") could assist unaccompanied immigrant children. In child protection proceedings or other proceedings involving incompetent adults, court-appointed GALs typically represent the minors and incompetent adults in order to represent the best interests of the individual. In this role, the attorney must investigate the case, interview the children and the parties involved, and submit a written report to the court regarding best interests recommendations. United States immigration courts, however, do not recognize the inherent differences between children and adults and do not distinguish between them in immigration and deportation proceedings.

With the help of the ORR funding, the Young Center developed a model program whereby both experienced attorneys and volunteers actively worked to serve as child advocates for unaccompanied immigrant minors. The attorneys have experience in both immigration and child welfare, combining the GAL model with the immigration proceedings. Additionally, by working on establishing a best interests standard for juvenile immigration proceedings, they hope to change the current immigration justice

system into one that recognizes children as a class of their own and focuses on the safety and well being of this vulnerable population.

Children in immigration proceedings experience drastically different conditions than children in domestic child protection cases. Once immigration authorities take custody of an unaccompanied minor, the child faces removal proceedings in Immigration Court. These proceedings are adversarial and do not distinguish between adults and children. Children must adhere to the same rules of evidence and procedure as adults. Contrast this with the traditional child protection case, where the court appoints a GAL and must consider the child's best interests before handing down a decision on whether to remove a child from his or her home.

In partnership with the Vera Institute of Justice, a nonprofit organization dedicated to improving justice and safety systems nationally, the Young Center has recommended expansion in three additional sites across the nation. The Young Center will tailor its programs and procedures to meet the specific needs of the site and its community. Until these new sites are fully operational, the Young Center is currently training volunteers from specific sites so they can be assigned as Child Advocates in complex cases. These volunteers will receive the same training, support, and guidance as volunteers in Chicago and Harlingen.

Additionally, the Young Center advocates for national policy change. First, the organization is working on protecting a child's right to be raised by their parents, in accordance with Article 9 of the Convention on the Rights of the Child. The Young Center has also advocated against the increase of detention centers for unaccompanied minors along the United States-Mexico border. The organization posits that these detention centers place additional barriers between children and reunification with their families.

The Young Center lists fourteen principles that guide the organization and the work of their attorneys and Advocates. The principles come from international standards set forth by the United Nations as well as domestic proceedings. The organization focuses on caring for the safety and well being of the child involved. For example, "In all actions concerning children, the best interests of the child shall be a primary consideration." The Young Center also

recognizes this as a right and not a privilege, stating, "Every child has the right to such protection and care as is necessary for his or her well-being." The organization also goes so far as to suggest policy considerations, such as, "Organizations, government departments and professionals involved in providing services to unaccompanied children must cooperate to ensure that the welfare and rights of unaccompanied children are enhanced and protected."

One story featured on the Young Center's website highlights how advocates use these principles to guide their recommendations for the children they serve. The story involved two siblings who had been abandoned and abused by their family. At the request of an attorney, Child Advocates prepared an in-depth best interest report and provided recommendations based upon their findings, which was then submitted to the Immigration Judge. As a result of this report, the two siblings were granted asylum, which allowed them to lawfully stay in the United States. This story highlights how the Young Center embraces its guiding principles and advocates for unaccompanied children.

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