Special Immigrant Juvenile Status: Problems with Substantive Immigration Law and Guidelines for Improvement

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# SPECIAL IMMIGRANT JUVENILE STATUS: PROBLEMS WITH SUBSTANTIVE IMMIGRATION LAW AND GUIDELINES FOR IMPROVEMENT

*Maria Virginia Martorell*

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I. INTRODUCTION

There is a long-standing tradition in the justice system of recognizing that legal matters involving minors are inherently different, requiring laws to protect children in the courthouse and in society. The juvenile system of justice began in the United States in 1824 and was designed for the benefit of children. The purpose of creating a separate system for juveniles was “(1) to separate children from adult offenders and (2) to rehabilitate” juveniles. Most juvenile courts have exclusive jurisdiction over the majority of cases involving minors, and these are transferred to the adult court system only when it “serve[s] the best interest of the child and the public.” The government assumes responsibility for serving the best interest of the child by providing protection and

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2 Id.

3 Id. at 1065.

4 Id. at 1066 (citing Kent v. United States, 383 U.S. 541, 566-67 (1966) (“identifying factors juvenile courts should consider during transfer hearings”)).
guidance to children appearing before the court. The goal of protecting the child’s interest arises from the concept of *parens patriae*. Supra note 7, at 2-4.

*Parens patriae* is Latin for “parent of the nation” and refers to “the state in its capacity as provider of protection to those unable to care for themselves.” However, the notion of *parens patriae* and serving the best interest of the child is mostly absent from substantive immigration law. For example, asylum law makes no distinction between unaccompanied children and adults, treating both under the same set of law. In some cases immigration laws not only ignore a child’s best interests, but actually considers the child to be the property of his parent. Although a child in regular juvenile proceedings would not be forced to navigate the legal system without special provisions- appointed guardians ad litem, attorneys ad litem, non-adversarial court proceedings and best interest of the child protections- immigrant children are systematically denied these protections.

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5 Id. at 1065 & n.37.

6 BLACK’S LAW DICTIONARY 1144 (9th ed. 2009).

Even the best interest of the child, the hallmark of the juvenile legal system, is not normally taken into account when the child is an immigrant.

One immigration law exception to the general policy of disregarding the child’s best interest is Special Immigrant Juvenile Status (SIJS).\(^9\) SIJS is a legal remedy that allows unaccompanied alien children who have been “abused, abandoned or neglected” to petition to the U.S. Citizenship and Immigration Services (USCIS) to withhold removal proceedings and adjust their status to permanent residency.\(^{10}\) SIJS is unique in the area of immigration law. It is currently the “only provision in substantive immigration law that incorporates the best interest principle.”\(^{11}\) SIJS law also takes into account the special needs of unaccompanied alien children.\(^{12}\) It also recognizes and attempts to address the “procedural and substantive aspects of handling unaccompanied alien


\(^{10}\) 8 C.F.R. §204.11 (2009).

\(^{11}\) BYRNE, supra note 7, at 31.

\(^{12}\) William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 §235(d)(8), supra note 9 (“Specialized needs of unaccompanied alien children: Applications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children’s cases.”).
children’s cases”.\textsuperscript{13} Although the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 made an effort at improving the process by which minors attain legal relief, immigrant children continue to face serious legal hurdles.\textsuperscript{14}

Before USCIS can adjudicate an SIJS case, a state juvenile court has to declare the child abused, abandoned or neglected by one or both parents and determine that it is not in the best interest of the child to return to his country of citizenship.\textsuperscript{15} There is confusion because different state courts (juvenile court, family court, probate court, county court at law, child welfare court) may have the power to assert jurisdiction based on state law and there is no consensus on the standards the courts should use to determine when and how to assert jurisdiction.\textsuperscript{16} Confusion is worse confounded by the overarching

\textsuperscript{13} Id. §235(d)(8).

\textsuperscript{14} Id. §235; see also Byrne, supra note 7; see also Wendy Young & Megan McKenna, Special Project: The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States, 45 Harv. C.R.-C.L. L. Rev. 247, 2010.

\textsuperscript{15} William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 §235, supra note 9.

obstacle of children seeking relief from deportation in an “immigration system that was never designed to take children into account.”

Unaccompanied alien children depend on state judges to assert jurisdiction over their cases and make custody determinations. Many state court judges are weary of making decision in matters dealing with immigrant children and would rather not enter a holding on unaccompanied minor’s petitions even though they have jurisdiction to do so, primarily because they generally lack sufficient knowledge regarding SIJS law. Additionally, there are problems of custody and jurisdiction in SIJS law that prevent children from obtaining legal relief. This article aims at providing an outline of the

17 Young, supra note 14, at 252 (“For the most part, these immigration programs continue to treat immigrant children and adults identically under U.S. law. Often, in this one-size-fits-all approach, children are, at best, squeezed into programs that are not designed for them. At worst, children in dire need of protection slip through the cracks and are deported.” (citing Immigrant and Nationality Act § 101(a)(27)(j), 8 U.S.C. §1101 (a)(27)(j), amended by William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, supra note 9.)).

18 See Borkowsky, supra note 16, at 575-577 (“An SIJ petition, along with proof of identity and age of the child must contain evidence that a state “juvenile court” has declared the juvenile dependent...” (citing 8 C.F.R. §204.11(d)(1) (2009)); see also Kathy Moccio, Steven Thal & Daniel Stracka, No Child Left Behind: Immigration Options for Children, 2010 AILA TELECONFERENCE/WEB CONFERENCE (2010), available at http://www.aila.org/content/fileviewer.aspx?docid=31222&linkid=219960; See also Young, supra note 14.

19 Borkowsky, supra note 16, at 575 (“This will require educating the court regarding the necessity of particular findings or specific language in the state court order, as it will be the basis for eligibility of SIJ status.”).

20 See BYRNE, supra note 7.
sources of problems, and overview of how immigrant children are being treated today and suggestions on how to improve SIJ law.

II. SPECIAL IMMIGRANT JUVENILE STATUS

A. Unaccompanied Alien Children

Thousands of children cross the border each year “without their parents, legal guardians, or traditional caregivers.”\(^\text{21}\) Minors who find themselves in the U.S. alone are called unaccompanied alien children.\(^\text{22}\) Immigration officials and lawmakers often overlook this growing population of abandoned, abused and neglected children who lack legal status and adult guardians.\(^\text{23}\)

The U.S. Customs and Border Protection detained more than 86,000 unauthorized (both accompanied and unaccompanied) foreign juveniles every year from 2001 to

\(^{21}\) Young, supra note 14, at 247-8 (“Congress and the Obama administration largely overlook one population when assessing the possibilities of overhauling the nation’s immigration system: children under age 18 who arrive without their parents, legal guardians, or traditional caregivers. The number of unaccompanied children who arrive in the U.S. each year has increased substantially in the part decade.”); See also CHAD C. HADDAL, Cong. Research Serv., RL 33896, UNACCOMPANIED ALIEN CHILDREN: POLICIES AND ISSUES (2007).

\(^{22}\) Homeland Security Act of 2002 §462(g), codified as amended 6 U.S.C. §179(g) (2002) (“The term “unaccompanied alien child” means a child who (A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.”).

\(^{23}\) See Young, supra note 14, at 247-48; See also Cong. Research Serv., RL 33896.
The majority of these children were returned to their home country of Mexico almost immediately, so it is unknown how many were unaccompanied. However, it is estimated that an overwhelming 70% of all children currently detained are unaccompanied. The number of detained unaccompanied children has been increasing annually since the 1990’s. Unauthorized alien children who are in the country without parents or guardian are placed in custody of the federal government. From 2005 to 2007 more than 8,000 unaccompanied alien children were placed in custody of the federal government.

24 Young, supra note 14, at 248 (citing CONG. RESEARCH SERV., RL 33896).

25 Young, supra note 14, at 248 (citing JACQUELINE BHABHA & SUSAN SCHMIDT, SEEKING ASYLUM ALONE: UNACCOMPANIED AND SEPARATED CHILDREN AND REFUGEE PROTECTION IN THE U.S. 16 (2006)).

26 Reno v. Flores, 507 U.S. 292, 294 (1993) (Detention of minors is complicated “when the juvenile is arrested alone, i.e., unaccompanied by a parent, guardian, or other related adult. This problem is a serious one, since the INS arrests thousands of alien juveniles each year (more than 8,500 in 1990 alone) -- as many as 70% of them unaccompanied. Most of these minors are boys in their midteens, but perhaps 15% are girls and the same percentage 14 years of age or younger.” (citing Brief of Petitioners, Reno v. Flores, 1991 U.S. Briefs 905, 13 (1993) (“Although INS did not then maintain nationwide records as to the number of juveniles unaccompanied by related adults, records from the Southern Region (principally South Texas) show that 73% of the 1317 juveniles detained there in 1990 were unaccompanied.”)) (citing NESTOR RODRIGUEZ & XIMENA URRUTIA-ROJAS, UNDOCUMENTED AND UNACCOMPANIED: A MENTAL-HEALTH STUDY OF UNACCOMPANIED, IMMIGRANT CHILDREN FROM CENTRAL AMERICA (Univ. of Houston Law Ctr. Inst. for Higher Educ. Law and Governance (1990))).

27 Young, supra note 14, at 248.


29 Young, supra note 14, at 248 (citing DIV. OF UNACCOMPANIED CHILD SERVS., DEP’T OF HUM. HEALTH & SERVS., FISCAL YEAR SUMMARY: UAC STATISTICS (2008)).
The Homeland Security Act (HSA) was enacted in 2002 in the aftermath of September 11, 2001 to update immigration policy and increase border security.\textsuperscript{30} The HSA eliminated the United States Immigration and Naturalization Services (INS), created the Department of Homeland Security (DHS), and divided the immigration enforcement functions to three separate divisions of the DHS: U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP).\textsuperscript{31} The Office of Refugee Resettlement (ORR), a division of the Department of Health and Human Services (HHS), was assigned the responsibility for the care, custody and placement of unaccompanied children as of March 1, 2003.\textsuperscript{32}

\textsuperscript{30} \textsc{Byrne}, supra note 7, at 16 (“In 2002, with immigration policy and border security under increased scrutiny in the aftermath of September 11, 2001, Congress passed the Homeland Security Act (HSA).”); see \textit{Homeland Security Act of 2002}, supra note 22.

\textsuperscript{31} \textsc{Byrne}, supra note 7, at 16; see \textit{Homeland Security Act of 2002}, supra note 22.

\textsuperscript{32} \textsc{Byrne}, supra note 7, at 16 (“When unaccompanied children began to arrive in the United States in increasing numbers in the 1980s, they were under the legal custody of the now-defunct Immigration and Naturalization Service (INS). A separate agency, the Community Relations Service (CRS), a division within the Department of Justice, was responsible for their day-to-day care. The INS began to play a more significant role in the day-to-day care of unaccompanied children in 1987, when the two agencies reached an agreement to share the responsibility for providing care and other child welfare related services. Nine years later, this function was fully integrated into the INS as a result of budget cuts, leaving the former INS with sole responsibility for the care and custody of unaccompanied children…With the closing of the INS, responsibility for the care, custody and placement of unaccompanied children was transferred to the Office of Refugee Resettlement (ORR), a division of the Department of Health and Human Services (HHS). The ORR officially assumed this role on March 1, 2003.”); see \textit{Homeland Security Act of 2002}, supra note 22.
B. Purpose and Background of SIJS

Immigrant children have a few options for legal relief to prevent deportation and gain lawful residency. The options available depend on the child’s family’s legal status in the United States, the situation they would face in their home country, their reason for immigrating or other factors. These include asylum, relief from deportation for children who are victims of human trafficking, U-Visa for victims of crime, and various family-sponsored immigration visas.

One of the forms of relief available to unaccompanied alien children is SIJS, a special immigration visa. SIJS was first created through the Immigration Act of 1990 and was amended by William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). It was designed to allow undocumented

33 BYRNE, supra note 7, at 26.

34 Id. at 26.


37 Id.; see also Memorandum from Donald Neufeld, Acting Assoc. Dir. Domestic Operations, U.S. Citizenship and Immigration Serv., HQOPS 70/8.5 to Field Leadership (Mar. 24, 2009) (“Section 235(d) of the TVPRA 2008 amends the eligibility requirements for SIJ status at section 101(a)(27)(J) of the Immigration and Nationality Act (INA), and accompanying adjustment of status eligibility requirements at section 245(h) of the INA. Most SIJ provisions of the TVPRA 2008 take effect March 23, 2009, although some provisions took effect on December 23, 2008, the date of enactment of the TVPRA 2008.”).
children who have been abused, abandoned or neglected by one or both parents to remain lawfully in the U.S. when it is not in the best interest of the child to return to his country of citizenship.\textsuperscript{38} Unaccompanied minors can apply for SIJS whether they’ve had no prior contact with immigration officials\textsuperscript{39} or whether they’ve been detained by CBP and are seeking SIJS as a defense against deportation.\textsuperscript{40}

The Immigration and Nationality Act (INA) sets out the requirements for SISJ.\textsuperscript{41} §101(a)(27)(j) of the INA (as amended by the TVPRA) spells out the requirement for SIJS by defining a special immigrant as:

an immigrant who is present in the United States-

(i) who has been declared dependent on a juvenile court located in the United States or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;

(ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien’s best interest to be returned to the alien’s or parent’s


\textsuperscript{39} Memorandum of Joseph E. Langlois, Chief, U.S. Citizenship and Immigration Serv. Asylum Division, HQRAIO 120/12a to All Asylum Office Staff (Mar. 25, 2009).

\textsuperscript{40} Gregory Zhong Tian Chen, \textit{Elian or Alien? The Contradictions of Protecting Undocumented Children under the Special Immigrant Juvenile Statute}, 27 HASTINGS CONST. L.Q. 597, 605 (2000).

previous country of nationality or country of last habitual residence; and

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

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

(II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act.”

Additionally, §204.11(c) of the Code of Federal Regulations, Title 8: Aliens & Nationality (CFR), explains in further detail the eligibility requirements for SIJS. The child must prove that he:

(1) is under twenty-one years of age;
(2) is unmarried;
(3) has been declared dependent upon a juvenile court located in the United States in accordance with state law governing such declarations of dependency, while the alien was in the United States and under the jurisdiction of the court…
(6) has been the subject of judicial proceedings authorized or recognized by the juvenile court in which it has been determined that it would not be in the alien’s best interest to be returned to the country of nationality or last habitual residence of the beneficiary or his or her parent or parents…


43 8 C.F.R. §204.11 (2009).

44 Id.; See also Moccio, supra note 18 (Explaining that requirement in subsections 4 and 5 were stricken by the TVPRA: juvenile courts no longer need to find that the juvenile is eligible for long term foster care and reunification needs to be a non-viable option with just one parent, not both. Additionally, specific consent from the Attorney General is no longer a prerequisite for the juvenile court to assert jurisdiction.).
A juvenile court is defined by the CFR as “a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles.” Depending on state law, the court with jurisdiction over the juvenile may be a juvenile court or a family court, probate court, county court at law, or child welfare court.

After the juvenile court has asserted jurisdiction over the child and made the required special findings, the child can then petition to USCIS for SIJS status. If the child had previously been detained and placed in removal proceedings, he can simultaneously file an application for adjustment of status. Otherwise, after the SIJS petition is approved by USCIS, the child can apply for adjustment of status as a legal permanent resident.

45 8 C.F.R. §204.11(a).

46 Borkowsky, supra note 16, at 576.

47 William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, supra note 9; See also NATIONAL CENTER FOR REFUGEE & IMMIGRANT CHILDREN/USCRI, A GUIDE TO COMMON FORMS OF LEGAL RELIEF FOR UNACCOMPANIED IMMIGRANT CHILDREN (2009), available at www.nationalchildrenscenter.org.

48 William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, supra note 9; See also NATIONAL CENTER FOR REFUGEE & IMMIGRANT CHILDREN/USCRI, supra note 47.

49 William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, supra note 9; See also NATIONAL CENTER FOR REFUGEE & IMMIGRANT CHILDREN/USCRI, supra note 47.
Because SIJS cases must go through an unusual route through both state juvenile courts as well as federal immigration courts,\(^{50}\) jurisdiction and procedural problems arise often. Initially, unaccompanied minors claiming SIJS status must appear before a juvenile court, which is “delegated critical decisions about eligibility for SIJS.”\(^{51}\) Juvenile courts, as opposed to immigration judges, often lack the knowledge and expertise to make these determinations.\(^{52}\) In addition, different states assign jurisdiction over juvenile matters to different courts.\(^{53}\) Depending on state law either juvenile courts, family courts, probate courts, county courts at law, or child welfare courts may have the power to assert jurisdiction and make a dependency ruling in an unaccompanied alien minor’s case.\(^{54}\)

**C. Current SIJS Law and the TVPRA**

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\(^{50}\) See Byrne, supra note 7, at 31-32 (citing David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law*, 63 Ohio State Law Journal 979 (2002)).  

\(^{51}\) Id.  

\(^{52}\) Id. at 31 (“According to Thronson, this seemingly convoluted process represents a careful balance of state and federal decision making that delegates critical decisions about eligibility for SIJS to the juvenile courts- as opposed to immigration judges, who often lack expertise in child welfare.”).  

\(^{53}\) Borkowsky, supra note 16, at 576.  

\(^{54}\) Id.
The TVPRA updated and refined the requirements and procedures of SIJS law.\textsuperscript{55} Since its passage in 2008, the TVPRA has been considered by advocates to be the “first major steps toward developing a more effective system to address the needs of unaccompanied children.”\textsuperscript{56} The policies put in place by the new law attempted to expedite the process by which unaccompanied alien children attain legal relief by “developing a more effective system.”\textsuperscript{57}

The TVPRA tackled one of the most debated “points of contention between advocates and the government”: the detention of unaccompanied alien children.\textsuperscript{58} The TVPRA attempted to streamline the process by which unaccompanied children are identified and placed in an appropriate facility.\textsuperscript{59} It also created a notification requirement so that the Department of Health and Human Services (HHS) can learn within 48 hours

\textsuperscript{55} William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, supra note 9.

\textsuperscript{56} Young, supra note 14, at 252-3.

\textsuperscript{57} Id.

\textsuperscript{58} Id. at 250; See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, supra note 9 (“HHS is notified when an unaccompanied immigrant claims or is under suspicion of being under 18 years old.”)

\textsuperscript{59} Young, supra note 14, at 250; See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, supra note 9.
about the apprehension or discovery of an unaccompanied alien child.\textsuperscript{60} The TVPRA also
created a 72-hour deadline for HHS to receive custody of the unaccompanied alien child
from the Federal government.\textsuperscript{61} Once HHS has custody, the child must “promptly be
placed in the least restrictive setting that is in the best interest of the child.”\textsuperscript{62}

Additionally, specific consent from the Attorney General is no longer a
prerequisite for the juvenile court to assert jurisdiction.\textsuperscript{63} If the child is in actual or
constructive custody, Health and Human Services, rather than the Department of
Homeland Security as previously mandated, has the authority to grant specific consent.\textsuperscript{64}

However, “if an immigrant 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, the

\textsuperscript{60} William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, supra note 9.

\textsuperscript{61} Id.

\textsuperscript{62} Id. (“In the making of such placements, the Secretary must consider danger to self, danger to the
community, and risk of flight… A child shall not be placed in a secure facility absent a determination that
the child poses a danger to self or others or has been charged with having committed a criminal offense.
The placement of the child in a secure facility shall be reviewed, at a minimum, on a monthly basis, in
accordance with procedures prescribed by the Secretary, to determine if such placement remains
warranted.”).

\textsuperscript{63} Id.

\textsuperscript{64} Id.
immigrant child is not required to seek any consent from [Health and Human Services].”\(^\text{65}\)

The TVPRA also clarified and expanded the definition of abandonment.\(^\text{66}\) Under the new law, the juvenile court has to find that reunification with just one parent, not both parents as was previously required, is not a viable option.\(^\text{67}\)

Under the old criteria, a child needed a final order issued for long-term care of the state before applying for SIJS.\(^\text{68}\) Unaccompanied children sometimes had to wait up to 18 months to meet the state custody requirement before the SIJS process could begin.\(^\text{69}\)

Under the TVPRA, however, a child may be eligible to apply much sooner because the

\(^{65}\) Id.; see also Moccio, supra note 18.


\(^{67}\) Id.

\(^{68}\) Id.

\(^{69}\) Id.; see also Jane Burstain, CENTER FOR PUBLIC POLICY PRIORITIES, SPECIAL REPORT: UNDOCUMENTED AND ABUSED, A TEXAS CASE STUDY OF CHILDREN IN THE CHILD PROTECTIVE SERVICES SYSTEM 9 (2010), available at www.cppp.org (“At least one change under the TVPRA may have important implications for undocumented children in state custody due to abuse or neglect in Texas. Under the old eligibility criteria, a child was not able to apply for SIJS until after a final order was issued placing the child in the long-term care of the state. This meant that the child may not have even been eligible to initiate the process until they had been in care for up to 18 months. Under the new provision, however, reunification only has to be ruled out for one parent so a child may be eligible to apply much sooner. In many cases, at least one parent is absent from the child’s life. If that parent is properly served and does not appear, the court can take a default and make a finding of abuse, neglect or abandonment (depending on what DFPS has pled) and that reunification with that parent is not viable. Once that order is made, the child may then be eligible to apply for SIJS even if they are still pursuing reunification with the other parent.”).
juvenile court has to hold that reunification with just one parent is not viable.\textsuperscript{70}

Additionally, the requirement that the juvenile court find the child eligible for long-term foster case has been eliminated.\textsuperscript{71} Once the absent or abusive parent is served with notice of the suit and fails to appear, the court can make a valid finding of abuse, neglect or abandonment.\textsuperscript{72} This translates to quick special findings for many children since in many cases “at least one parent is absent from the child’s life.”\textsuperscript{73} Once a special finding is made, the child can apply for SIJS even if the court is “still pursuing reunification with the other parent.”\textsuperscript{74}

Although the detention and dependency requirements were major hurdles that barred many juveniles from attaining SIJS, there still exist procedural and jurisdictional

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\textsuperscript{70} William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, \textit{supra} note 9; \textit{see also} Burstain, \textit{supra} note 69, at 9.

\textsuperscript{71} William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, \textit{supra} note 9; \textit{see also} Moccio, \textit{supra} note 18 (Explaining that requirement in subsections 4 and 5 were stricken by the TVPRA: juvenile courts no longer need to find that the juvenile is eligible for long term foster care).

\textsuperscript{72} William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, \textit{supra} note 9; \textit{see also} Burstain, \textit{supra} note 69, at 9.

\textsuperscript{73} Burstain, \textit{supra} note 69.

\textsuperscript{74} \textit{Id}.
\end{flushright}
issues that prevent many more juveniles from having their care heard in juvenile court in the first place.\textsuperscript{75}

II. PROBLEMS WITH SIJS LAW

A. SIJS Jurisdictional Problems

The INA defines juvenile courts broadly: any court in the United States with jurisdiction under state law to make determinations about the custody and care of children.\textsuperscript{76} Because of the broad definition, a number of different juvenile courts that may assert jurisdiction over the SIJS petitioner to make the special finding of abuse, abandonment and neglect.\textsuperscript{77} This leads to confusion among state judges who are unfamiliar with immigration law.\textsuperscript{78}

Juvenile courts with jurisdiction to make determinations about the care and custody of children vary not only by state, but also by county.\textsuperscript{79} For example, in Texas the courts

\textsuperscript{75} See Moccio, \textit{supra} note 18; see also Young, \textit{supra} note 14.

\textsuperscript{76} William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, \textit{supra} note 9.

\textsuperscript{77} Meredith Linsky & Diane Eapson, \textit{The Univ. of Tex. School of Law 32nd Annual Conference on Immigration and Nationality Law, Types of Relief: Special Immigrant Juvenile Status} (2008), \textit{available at} http://www.refugees.org/data/nationalcenter/docs/Christina_Wilkes.ppt.

\textsuperscript{78} See Moccio, \textit{supra} note 18; see also Young, \textit{supra} note 14.
that may make this determination include: the child welfare court (for children in custody of the Texas Department of Protective and Family Services and Child Protective Services), county courts at law, family probate courts (for guardianship proceedings for non-detained children reunified with family members in the United States), and juvenile courts.\footnote{80}

Unfortunately, many state judges are not exposed to enough information regarding SIJS or even general immigration law to know that they may assert jurisdiction over unaccompanied alien minors’ petitions to make special findings. Additionally, law and procedures vary widely by state court, so counsel for unaccompanied minors (most of whom are pro bono)\footnote{81} are forced to waste their limited resources researching state procedural law. These inefficiencies thwart the availability of legal relief for unaccompanied children who depend on very limited legal resources.\footnote{82}

\subsection*{B. Lack of Legal Representation}

\footnote{79} Linsky, \textit{supra} note 77, at 5.

\footnote{80} \textit{Id.}

\footnote{81} \textit{BYRNE, supra} note 7, at 35 (“While estimates vary as to the exact proportion of unaccompanied children without legal representation, the general consensus is that it is more than half.” (citing \textit{OFFICE OF THE INSPECTOR GEN., UNACCOMPANIED JUVENILES IN INS CUSTODY, Report I-2001-009 (Sept. 28, 2001)})).

\footnote{82} \textit{Id.}
It is estimated that more than half of all unaccompanied alien minors lack legal representation. Very few unaccompanied minors have resources to hire legal counsel, so they depend the limited pro bono resources that are currently available.

Unfortunately, public interest and pro bono resources are scarce, particularly in remote counties near the Mexican border where many of these children are detained. The procedural obstacles faced by SIJS petitioners in court exacerbate the problem of scarce legal resources. It also increases the chances that unaccompanied children will be unnecessarily deported back to the country they fled from and force their return to abusive parents, neglect and few opportunities for escape.

C. SIJS Procedural Problems

83 Byrne, supra note 7, at 35 and n. 163 (citing Office of the Inspector Gen. (“Estimates concerning the proportion of children represented by counsel include children who obtain counsel through their own means as well as those who do so with the assistance of a legal service organization or pro bono legal service provider.”)); see also Young, supra note 14, at 256.

84 Byrne, supra note 7, at iii.

85 Young, supra note 14, at 258 (“Immigration detainees are often located in rural areas where pro bono services are not readily available, such as along the Texas border where legal resources are scarce.”).

86 Id. at 256 (“Children with limited education and English skills are therefore pitted against trained government attorneys and before administrative judges. These proceedings rely on a highly complex system of arcane rules, and children must adhere to the same standards and burdens of proof as adult immigrants. Without counsel, these children are unlikely to understand the procedures they face and the options and remedies that may be available to them under the law.”).

87 See Byrne, supra note 7.
Another obstacle that often prevents SIJS cases from being adjudicated is the result of procedural problems that arise during the juvenile court’s special findings phase. The procedural differences in the various juvenile courts and varying levels of judge’s proficiency in immigration law create confusion for judges and attorneys. Confusion leads to inefficiency and waste of the very limited resources available to immigrant children.  

Texas courts provide an example of a procedural gridlock that prevents a number of unaccompanied children from attaining SIJS relief. In Texas, family courts have jurisdiction over juvenile cases, and a Suit Affecting Parent-Child Relationship (“SAPCR”) is the method by which the court makes a custody determination. Although SAPCRs are familiar instruments to family judges in Texas, when unaccompanied alien

88 BYRNE, supra note 7, at iii (“Unfortunately, pro bono (volunteer) legal services for these ‘unaccompanied children’ are in short supply, and very few of these children have the resources to hire their own legal counsel.”).

89 TEX. FAM. CODE ANN. § 101.032 (West 2009) (“Suit affecting the Parent-Child Relationship: (a) "Suit affecting the parent-child relationship" means a suit filed as provided by this title in which the appointment of a managing conservator or a possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is requested.”).
minors seeks special findings through SAPCR filings many are denied because of procedural glitches and confusion.

It is common for unaccompanied alien children to self-petition SAPCR claims in juvenile court. Texas law gives the child standing to file his SAPCR suit through a representative authorized by the court.90 In ordinary family court cases- divorces and custody suits- normally the child’s guardian petitions on behalf of the minor child, so children in those cases typically do not self-petition.

But most unaccompanied minors do not have a guardian available to petition for them. Unaccompanied minors also choose to self-petition because their new guardians in the United States often do not meet the six-month minimum custody requirement that is necessary for the guardian to have standing to file the suit.91 SIJS petitioners have to file for relief within strict deadlines, which conflicts with the custody time requirement.92

90 Id. at § 102.003 (“General Standing to File Suit: (a) An original suit may be filed at any time by: … (2) the child through a representative authorized by the court.”).  
91 Id. at § 101.032; see also, id., at § 101.025 (“Suit Affecting the Parent-Child Relationship: (a) “Suit affecting the parent-child relationship” means a suit filed as provided by this title in which the appointment of a managing conservator or a possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is requested.”)  
92 Id. at § 101.003 (Texas law defines a "Child" or "minor" as “a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes”. Once the minor is 18 or older, the family court loses jurisdiction and the minor will not be able to have a
Many unaccompanied minors file their juvenile court petition on the eve of their 18th birthday, so there may not be enough time to wait for the guardian to meet the six-month custody requirement to have standing to bring the suit on behalf of the child before the child ages out of the juvenile court’s jurisdiction. Unfortunately, some Texas juvenile court judges unnecessarily deny or delay SAPCR petitions when the child is self-petitioning because they are unsure about the laws regarding minors who self-petition.

Although an SIJS petitioner by definition is a child without a parent or guardian, the fact that there is no parent or guardian petitioning for the child baffles family judges to inaction. This is in spite of the fact that the INA gives juvenile courts the power to assert jurisdiction to make SIJS special findings and the Texas Family Code gives minors standing to file a SAPCR petition. When an unaccompanied minor is precluded from

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93 TEX. FAM. CODE ANN. § 101.003; see also Burstain, supra note 69, at 9, (“A recent change in Texas law has important implications for SIJS eligibility...The 2009 Legislature...amended the Texas Family Code so that now, a youth who is 18 can request that the court continue jurisdiction until they turn 21 or they withdraw their consent for continuing jurisdiction.”).  

94 FIND CITE (Galveston family court case where SAPCR denied bc SIJS minor was self-petitioning)  

95 William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, supra note 9; see also
receiving a juvenile court determination, he is in effect barred from SIJS relief since an immigration judge cannot adjudicate the SIJS petition absent a juvenile court finding of abuse, abandonment or neglect.\textsuperscript{96} The juvenile court’s failure to make a special finding leaves unaccompanied alien children with effectively no alternative to deportation back to a country where no parent or guardian is available to care for them. It is unknown what happens to many children who are deported back to their homeland alone.\textsuperscript{97}

Procedural problems also arise because states have varying definitions of who qualifies as a child, i.e. who the state juvenile court has jurisdiction over. Although most states consider children to be those under the age of 18 for purposes of jurisdiction, some

\begin{verbatim}
TEX. FAM. CODE ANN. § 102.003.
\end{verbatim}

\textsuperscript{96} \textsc{Byrne}, supra note 7, at 25 (“Several advocacy groups have expressed concern that the DHS does not do enough to ensure that unaccompanied children are repatriated safely. And indeed, little is known about what happens to children after they are returned to their home countries. Nugent has referred to repatriation as a “black hole where unaccompanied children easily fall through the cracks,” noting that government protocols or standards for ensuring that children are safely returned to their home countries are not publicly available. He further speculates that in some cases, children are removed to dangerous or life-threatening situations without any intervention on the part of U.S. authorities. As Nugent points out, although the DHS has the authority to remove from the United States noncitizens who are found to be in violation of immigration laws, no agency is responsible for deciding whether repatriation would be in an unaccompanied child’s best interests.” (citing \textsc{Cong. Research Serv.}, RL 33896; Elżbieta M. Goździak & Margaret MacDonnell, \textit{Closing the Gaps: The Need to Improve Identification and Services to Child Victims of Trafficking}, 66 \textsc{Human Org.} 2, 171-84 (2007); Christopher Nugent, \textit{Protecting Unaccompanied Immigrant and Refugee Children in the United States}, \textsc{Human Rights Magazine} 32 (2005), available at http://www.abanet.org/irr/hr/winter05/immigrant.html)).

\textsuperscript{97} See \textsc{Young}, supra note 14.
state laws vary the age limit.\textsuperscript{98} Although federal law extends SIJS relief to children up to the age of 21,\textsuperscript{99} unaccompanied children who reside in states where juvenile courts limit jurisdiction to minors under 18 years old would be barred from SIJS relief if they fail to file in juvenile court before their 18\textsuperscript{th} birthday since they would be unable to attain the juvenile court’s special finding.\textsuperscript{100} Arbitrary differences in state laws regarding the age of minority can have dire implications for unaccompanied minors seeking relief through SIJS.

\textbf{D. Problems Arising from Best Interest of the Child Concept}

The TVPRA took the first major steps in immigration substantive law towards considering the best interest of the child.\textsuperscript{101} However, “the potential impact of these provisions is blunted by conflicting elements and general failures of implementation.”\textsuperscript{102}

\textsuperscript{98} TEX. FAM. CODE ANN. § 101.003; \textit{but see} ALA. CODE § 26-1-1 (2010) (The age of majority in Alabama is 19 years old.).


\textsuperscript{100} See Deborah Lee, Manoj Govindaiah, Angela Morrison & David Thronson, AILA \textsc{Practice} \textsc{Advisory}, \textsc{Update} \textsc{on} \textsc{Legal} \textsc{Relief} \textsc{Options} \textsc{for} \textsc{Unaccompanied} \textsc{Alien} \textsc{Children} \textsc{Following} \textsc{the} \textsc{Enactment} \textsc{of} \textsc{the} \textsc{William} \textsc{Wilberforce} \textsc{Trafficking} \textsc{Victims} \textsc{Protection} \textsc{Reauthorization} \textsc{Act} \textsc{of} \textsc{2008}, (2009), available at \url{http://www.immigrantjustice.org/resourcesattorneys/probonoresources/probonochildrenmaterials.html} (“Special Immigrant Juvenile self-petitioners should not fear aging out of eligibility, so long as they were eligible at the time of filing. However, legal practitioners should note that 8 C.F.R. § 204.11(c)(5) still maintains a continuing jurisdictional requirement for the juvenile court, in order for the Special Immigrant Juvenile self-petitioner to remain eligible for this immigration status. It appears that this regulation will need to be amended to reflect the TVPRA’s statutory age-out protection…”).
For example, the Legacy INC guidelines that used to control before the TVPRA was enacted are still in effect even though they oppose the TVPRA. These guidelines still require that the best interest “standard not play any role in the determination of a child’s status.” The guidelines for Children’s Asylum Claims mandate that the best interest of the child not play a role in determining substantive eligibility under the U.S. refugee definition.

Additionally, immigration judges are directed not to use the best interest of the child principle as a basis for providing immigration relief. The Execute Office for

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101 See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, supra note 9 (An unaccompanied child in HHS custody “shall be promptly placed in the least restrictive setting that is in the best interest of the child”. Also, HHS is authorized to appoint independent child advocates to “effectively advocate for the best interests of the child.”); see also Young, supra note 14, at 253.

102 Young, supra note 14, at 253; see also William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, supra note 9.


104 Young, supra note 14, at 253; Memorandum from Jeff Weiss, supra note 103.

105 Young, supra note 14, at 253 (“Certain international instruments can provide helpful guidance and context on human rights norms. For example, the internationally recognized ‘best interest of the child’ principle is a useful measure for determining appropriate interview procedures for child asylum seekers, although it does not play a role in determining substantive eligibility under the U.S. refugee definition.” (citing Memorandum from Jeff Weiss, supra note 103.)).

106 Young, supra note 14, at 253; Memorandum from David L. Neal, Chief Immigration Judge, U.S. Dep’t of Justice, to All Immigration Judges, Court Admins., Judicial Law Clerks, & Immigration Court Staff, Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving
Immigration Review’s Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children issued to immigration judges states that the best interest of the child should be taken into account when creating a “child appropriate” hearing environment in the courtroom.\textsuperscript{107} On the other hand, the Guidelines forbid judges from using the best interest of the child principle as a basis for providing relief.\textsuperscript{108} These conflicting Guidelines diminish the effects of the improvements that the TVPRA was attempting to bring to immigration law.

IV. GUIDELINES FOR IMPROVEMENTS

A. The Unaccompanied Alien Child Protection Act of 2000

The Unaccompanied Alien Child Protection Act of 2000 (UACPA) is a viable options for solving some of the problems currently facing SIJS cases.\textsuperscript{109} Senator Dianne

\textsuperscript{107} Young, supra note 14, at 253; Memorandum from David L. Neal, supra note 106.

\textsuperscript{108} Young, supra note 14, at 253; Memorandum from David L. Neal, supra note 106.

Feinstein (D-CA) first introduced a version of this bill in 2000. The most recent revision of the bill was referred to the Senate Judiciary Committee in 2007, but no further action has been taken. The Act would have altered “the bureaucratic framework in order to more effectively address the special needs of unaccompanied children and better protect the children’s interests.”

Many immigration lawyers believe that the UACPA would address problems through provisions such as the separation of unaccompanied children in government “custody from those with a juvenile justice conviction,” the requirement that custodial facilities provide proper services, and the provisions for legal representation and guardians ad litem for unaccompanied children. Some of the aims of the UACPA have been realized in legislation, although the Act itself was not enacted.

110 Unaccompanied Alien Child Protection Act, supra note 109.


112 Young, supra note 14, at 251.

113 Byrne, supra note 7, at 38 (citing Unaccompanied Alien Child Protection Act of 2000, supra note 109).

114 Young, supra note 14, at 251; see Unaccompanied Alien Child Protection Act of 2007, supra note 111.
For example, the transfer of custody of unaccompanied alien children from INS to ORR mandated by the Homeland Security Act of 2002 was an attempt to incorporate parts of the UACPA’s goals though a “unique legislative opportunity.” The Homeland Security Act of 2002 was enacted in response to the security threats related to the attacks of September 11, 2001. However, “sponsors of the bill, and of a companion bill in the House of Representatives, used the Act as a vehicle to attach the provisions of the UACPA related to care, custody, and placement.”

B. Guidelines and Increased SIJS Awareness in Juvenile Courts

Publishing guidelines for juvenile courts would be beneficial to inform state judges about SIJS law and the role they play in these cases. This would decrease the number of cases that are wrongfully denied or delayed. Guidelines for court clerks

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115 Young, supra note 14, at 251; see Homeland Security Act of 2002, supra note 22.

116 Young, supra note 14, at 251; see Unaccompanied Alien Child Protection Act of 2007, supra note 111.

117 Young, supra note 14, at 251; see Homeland Security Act of 2002, supra note 22.

118 Young, supra note 14, at 251 (citing Unaccompanied Alien Child Protection Act of 2007, supra note 111).

119 See Young, supra note 14.

120 See Young, supra note 14.
would also be beneficial. Sometimes SIJS self-petitions are delayed in juvenile courts because the clerks are not familiar with laws regarding self-petitioning minors.

Making SIJS guidelines more widely available to state court judges and employees would also be necessary. Guidelines are currently available for judges, such as the Immigration Benchbook for Juvenile and Family Court Judges distributed by the Immigration Legal Resource Center. General guidelines like the Immigration Benchbook are very informative, but state-specific outlines of the procedures and laws dealing with SIJS would be most beneficial for state judges. Manuals that outline state court-specific procedures are available in some states and are useful both to pro-bono attorneys and juvenile court judges.

Clearer guidelines for juvenile judges would not only improve the process by which SIJS cases are heard and adjudicated, but would also enable judges to make more

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121 See Memorandum from David L. Neal, supra note 106; see also Sally Kinoshita & Katherine Brady, IMMIGRATION LEGAL RESOURCE CENTER, IMMIGRATION BENCHBOOK FOR JUVENILE AND FAMILY COURT JUDGES (Jan. 2005), available at www.ilrc.org.

122 Kinoshita, supra note 121.

123 Id.

124 See generally Burstain, supra note 69.

125 Id.
informed decisions and better interpret state laws regarding unaccompanied children.\textsuperscript{126}

A better grasp on SIJS law gives judges the power to use state laws to circumvent procedural glitches that commonly arise in these cases.

A 2007 SIJS case from Massachusetts\textsuperscript{127} illustrates the kinds of solutions that juvenile judges can create when they have a firm understanding of SIJS law. In Massachusetts, juvenile courts may assert jurisdiction only until the child reaches the age of 18.\textsuperscript{128} In this case, the SIJS petitioner had been sexually abused while he was a child living in Guatemala by his father, two uncles and a neighbor.\textsuperscript{129} The child had serious emotional trauma from the abuse, which was exacerbated when the child learned that he had contracted the HIV virus as a result of the abuse.\textsuperscript{130} After running away from Guatemala and fleeing the United States, the child signed a Voluntary Placement Agreement ("VPA") to stay in the care of the Massachusetts Department of Social

\begin{footnotes}
\item[126] See Young, \textit{supra} note 14.
\item[128] \textit{Id.} at 3 ("Specifically, the District Director found that, once the applicant reached age 18, he was no longer dependent on the Commonwealth of Massachusetts Trial Court, Probate and Family Court Department ("juvenile court"), as contemplated by 8 C.F.R. § 204.11(c)(5).")
\item[129] \textit{Id.}
\item[130] \textit{Id.}
\end{footnotes}
Services past his 18th birthday because of his special assistance needs.\textsuperscript{131} The juvenile court in that state was able to extend the state’s custody of the child past age 18,\textsuperscript{132} which is what the child needed under the SIJS requirements at the time in order to qualify for relief.\textsuperscript{133}

The VPA, executed by both the child and the state’s Department of Social Services, extended the state’s custody of the child until his 21st birthday.\textsuperscript{134} The extended age limit allowed the child to qualify for custody,\textsuperscript{135} so the Administrative Appeals Office was able to hold that the child was still eligible for SIJS.\textsuperscript{136} The court concluded that under the statute, he continued to be committed to, or under the custody of, an agency or department of the state of Massachusetts.\textsuperscript{137} Although the custody determination is no longer an SIJS requirement,\textsuperscript{138} this case serves to illustrate how juvenile judges can better

\textsuperscript{131} Id.

\textsuperscript{132} Id.

\textsuperscript{133} William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, \textit{supra} note 9.

\textsuperscript{134} Matter of X, \textit{supra} note 127.


\textsuperscript{136} Matter of X, \textit{supra} note 127.

\textsuperscript{137} Id.

utilize state laws when they understand SIJS laws. Judges will be able to make the best
determinations regarding unaccompanied alien children only when they have the
knowledge to effectively evaluate and decide those cases.

CONCLUSION

Some steps have been taken by legislators and advocates to improve the treatment
and condition of immigrant children in the United States, particularly after the passage of
the TVPRA in 2009. Although these changes are in the right direction, problems of
jurisdiction and procedures still abound. These problems should be addressed via
legislative action and clear guidelines issued for attorneys representing children and
judges, both in state juvenile and federal immigration courts. Advocates of
unaccompanied alien children should continue to bring to light the harsh conditions
facing young immigrant, especially as immigration law continues to be discussed in the
national arena.