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Humanitarian Protections and the Need for Appointed Counsel for Unaccompanied Immigrant Children Facing Deportation†

Ashley Ham Pong*

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I. Introduction

Labyrinthine. This word accurately describes the complex and fragmented immigration system of the United States that incorporates the intersection of federal codes, statutes, judicial precedent, and competing federal agency policies. Although the Supreme Court of the United States has stated that “the right to counsel is the foundation for our adversary system,”¹ in the context of civil immigration proceedings, this means that

† Transcript of presentation was given on Friday, February 28, 2014 at the Emerging Issues of Child Welfare symposium, held by the *Washington and Lee Journal of Civil Rights and Social Justice*.

indigent children are afforded the right to *secure* counsel, but no right to *free* counsel such as a public defender in the criminal justice system.² In practice, this means that thousands of children, even toddlers, who are in removal proceedings—*i.e.* facing deportation—often have no choice but to face an immigration judge and argue in their defense without the assistance of counsel. Absent an attorney, a child is unlikely to successfully do so.

This due process violation is particularly concerning for any immigrant child facing deportation, and even more troubling for children who are “unaccompanied.” Under the law, an “unaccompanied alien child”³ is defined as someone who is under the age of 18 with no lawful status and who has no parent or legal guardian in the United States who is able to provide care and physical custody.⁴ With the U.S. Department of Homeland Security (DHS) aggressively apprehending and deporting significantly more individuals during the past few years than ever before,⁵ combined

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1. *Martinez v. Ryan*, 132 U.S. 1309, 1317 (2012).
2. *See* Immigration and Naturalization Act [hereinafter “INA”], 8 U.S.C. §§ 1229a (2012).
3. Hereinafter “unaccompanied immigrant child/ren” or “unaccompanied child/ren.”
4. 6 U.S.C. § 279(g)(2) (2012).
5. *See* U.S. Dep’t of Homeland Sec., Homeland Sec. Office, Office of Immigration Statistics, Yearbook of Immigration Statistics 2012 Enforcement Actions (2013), *available at* <http://www.dhs.gov/yearbook-immigration-statistics-2012-enforcement-actions> (reporting the removal of 419,384 noncitizens in 2012; 388,409 in 2011; and 384,031 in 2010, compared to the removal of 280,974 noncitizens in 2006; 246,431 in 2005; and 240,665 in 2004). Further, U.S. Immigration and Customs Enforcement (ICE), one sub-agency within DHS, reported the removal of 368,644 noncitizens in fiscal year 2013, not including removals by DHS’s other enforcement agency, U.S. Customs and Border Patrol (CBP). *See* U.S. Dep’t of Homeland Sec., ERO Annual Report: FY 2013 ICE Immigration Removals (2013), *available at* <http://www.ice.gov/removal-statistics/index.htm>. *See also* The White House, Office of the Press Secretary, Letter from the President—Efforts to Address the Humanitarian Situation in the Rio Grande Valley Areas of Our Nation’s Southwest Border (June 30, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/06/30/letter-president-efforts-address-humanitarian-situation-rio-grande-valle>. In the text of a letter from President Obama to Congress dated June 30, 2014, the President stated his intent to request congressional action on emergency supplemental appropriations legislation to support aggressive deterrence strategies focused on the removal and repatriation of recent border crossers and to quickly return unlawful migrants to their home countries.

with the 2014 “surge” of unaccompanied children crossing the southern border and creating a humanitarian situation,⁶ indigent children are particularly at risk of being denied full access to justice.

A significant number of unaccompanied immigrant children flee their home countries—alone—to avoid gang violence, child abuse, trafficking, and other life-threatening situations. Because of their age, mental capacity, lack of resources and family ties, unaccompanied children are among the most vulnerable and underrepresented populations facing deportation. For these reasons, the federal government has recognized the extreme need to provide particular humanitarian relief and protections for unaccompanied children at different stages of the immigration process, including apprehension, detention, defense to removal, and removal. Nevertheless, the fairness and due process of the judicial system in the United States will continue to be undermined so long as the institutional problem of lack of counsel to indigent children persists.

II. Overview of the Immigration System for Unaccompanied Immigrant Children

A. Edwin’s Story

At just 14 years old, Edwin⁷ left his home country of El Salvador to escape his father’s physical abuse. His father would whip him with a belt, burn his feet, and tie him to a tree if Edwin tried run from him. Many times, Edwin would lose consciousness because of the severity of the beatings. Other times, he would choose to sleep in the streets instead of face his father. With nothing but a few dollars and his clothes, Edwin embarked on

6. See Dep’t of Justice, Department of Justice Actions to Address the Influx of Migrants Crossing the Southwest Border in the United States (July 9, 2014), *available at* <http://www.justice.gov/iso/opa/resources/214201479112444959.pdf> (announcing EOIR will re-prioritize its dockets to focus on recent border crossers and that new priorities include unaccompanied children who recently crossed the southwest border); *see also* Beth Werlin, *Lawsuit Seeks Appointed Counsel for Children*, *The Voice*, AILA 14, (Aug. 27, 2014), <http://www.aila.org/content/fileviewer.aspx?docid=49907&linkid=279585> (stating that the Department of Justice’s announcement that it will prioritize cases of children who arrived recently, resulting in the emergence of juvenile “rocket dockets,” will only exacerbate the problem).

7. Edwin’s story is based on true accounts of an unaccompanied child detained by the Office of Refugee Resettlement at one of its immigration centers in Virginia and who received free legal services in 2013 from the Capital Area Immigrants’ Rights (CAIR) Coalition. His name has been changed to protect his identity.

the dangerous journey towards what he called “*El Norte*” or “the North.” Edwin hitchhiked, walked, and begged for food along the way, passing through Guatemala in order to make his way to the south of Mexico. There, he climbed to the roof of the cargo freight train, known as “*La Bestia*” (“the Beast”) or the “Death Train,” notorious among other undocumented migrants for causing the death of hundreds riding atop the train, headed towards the border to chase their dream of a better life.

During the ride, Mexican cartel members boarded the train and robbed and kidnapped many young people, including Edwin. Narco-human traffickers brought Edwin to a holding house with other kidnappees, where he stayed for two days without food and water. Because Edwin had no money and no family to pay any ransom, the cartel members then strapped a heavy bag of marijuana to Edwin’s back, and forced him at gunpoint to carry the bag into the United States. Edwin and the other kidnapped migrants began their walk in the desert with armed cartel members, who were instructed to shoot them if they disobeyed orders. Upon crossing into Texas, Edwin was able to drop his bag and run while his traffickers were distracted. As soon as he saw U.S. immigration authorities, he turned himself in.

B. Apprehension and Detention of Children

Edwin’s story reflects the “home” setting for numerous unaccompanied children, as well as the many risks and dangers that unaccompanied children face in their journeys towards the United States. Over the past three years, the United States has seen an unprecedented increase in children like Edwin crossing over the southern border. According to the U.S. Department of Health and Human Services (DHHS), the agency responsible for the care and custody of unaccompanied children, less than 8,000 unaccompanied children crossed into the United States and were referred to DHHS each year between 2003 and 2011.⁸ Yet in 2012, this number nearly doubled, and in 2013, the number more than tripled.⁹ At the beginning of 2014, DHHS projected that an estimated 60,000 unaccompanied children would be referred to its care.¹⁰ Of the

8. U.S. Dep’t of Health and Human Serv., Office of the Admin. for Children and Families, Office of Refugee Resettlement, About Unaccompanied Children’s Services (June 15, 2014), <http://www.acf.hhs.gov/programs/orr/programs/ucs/about>.

9. *Id.*

10. *Id.*

unaccompanied children who crossed into the United States and were referred to DHHS in 2013, 37 percent were from Guatemala, 26 percent from El Salvador, 30 percent from Honduras, 3 percent from Mexico,¹¹ 2 percent from Ecuador, and 3 percent from other countries.¹² Further, 73 percent of those were male, while 24 percent were under the age of 14.¹³

Once in the United States, unaccompanied children like Edwin are afforded special administrative procedures with respect to their apprehension and detention, in large part due to the Homeland Security Act (HSA) of 2002¹⁴ and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).¹⁵ The term “unaccompanied alien child” was legally defined by the passing of the HSA of 2002,¹⁶ distinguishing the term from “child,” which is defined as an unmarried individual under the age of 21 by the Immigration and Nationality Act (INA).¹⁷ Through the HSA of 2002, Congress also dramatically changed the physical placement of unaccompanied children by delegating the care and custody of these children to the Office of Refugee Resettlement (ORR) within DHHS’s Office of the Administration for Children and Families.¹⁸ Prior to the HSA of 2002, legacy Immigration and Naturalization Services¹⁹ (INS) within the U.S. Department of Justice (DOJ) was charged with their care and custody.²⁰

11. Under section 235(a)(2) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, 5045 (2008) [hereinafter “TVPRA”], “Special Rules for Children from Contiguous Countries,” Mexican and Canadian nationals may independently and voluntarily withdraw their applications for admission to the United States and be returned, so long as the child does not express a fear of returning and there is no indication that the child has been a victim of a severe form of trafficking or is at significant risk of being so. Those who opt for voluntary return are not transferred to DHHS and remain in DHS’s custody until their return.

12. *Id.*

13. *Id.*

14. 6 U.S.C. § 279(g)(2).

15. TVPRA, Pub. L. No. 110-457, 122 Stat. 5044, 5045 (2008).

16. 6 U.S.C. § 279(g)(2).

17. INA, 8 U.S.C. § 1101(b)(1) (2012).

18. 6 U.S.C. § 279(g)(2).

19. On March 1, 2003, INS ceased to exist under that name. Under the HSA of 2002, its functions were delegated to three new entities within the newly created U.S. Department of Homeland Security: U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP). 6 U.S.C. §§ 211, 252, 271 (2012).

20. *See Reno v. Flores*, 507 U.S. 292 (1993); *see also Flores v. Meese Stipulated Settlement Agreement*, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997) [hereinafter *Flores Settlement Agreement*] (stating “[t]he INS treats, and shall continue to treat, all minors in its

For many immigrant children who are apprehended shortly after crossing the border, their first encounter with U.S. immigration authorities is with agents from Customs and Border Protection (CBP), a sub-agency within the U.S. Department of Homeland Security (DHS). In contrast, unaccompanied children apprehended within the United States, perhaps through juvenile delinquency proceedings or other encounters with authorities, will typically be brought to the attention of Immigration and Customs Enforcement (ICE), another sub-agency within DHS. While in the custody of DHS, agents process unaccompanied children by taking their pictures and fingerprints, as well as conducting inquiry to create a record of biographical and personal information, including criminal history and circumstances for coming to the United States.²¹ At this time, DHS agents will often issue a child his or her Notice to Appear (NTA), a document that DHS files with the immigration court to institute civil removal proceedings against a noncitizen.²² The NTA includes the nature of the proceedings as well as the civil infractions against an unaccompanied child, which in most cases involves charging the child with inadmissibility for entering without inspection, that is, for being an immigrant present in the United States without first having been properly admitted at a designated port of entry.²³

For unaccompanied children apprehended at the border, CBP will keep them in holding rooms until their cases are processed.²⁴ By law, DHS agents must notify DHHS within 48 hours whenever an agent apprehends someone that he or she suspects to be an unaccompanied immigrant child.²⁵

custody with dignity, respect and special concern for their particular vulnerability as minors. The INS shall place each detained minor in the least restrictive setting appropriate to the minor's age and special needs . . ."). The *Flores Settlement Agreement* was a federal class action lawsuit instituted against legacy INS challenging the arrest, processing, detention and release procedures with respect to unaccompanied children. The DOJ and the plaintiffs negotiated a settlement agreement in August of 1996 whereby INS agreed to abide by the settlement's terms of processing, detaining, and releasing unaccompanied children held in its custody. Despite the agreement, INS continued to violate its terms. For a further discussion of the *Flores Settlement Agreement*, see Rebeca M. López, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1648 (2012). See also KATE M. MANUEL & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R43623, UNACCOMPANIED ALIEN CHILDREN—LEGAL ISSUES: ANSWERS TO FREQUENTLY ASKED QUESTIONS, 3-5 (July 18, 2014), available at <http://fas.org/sgp/crs/homesecc/R43623.pdf>.

21. U.S. DEP'T OF HOMELAND SEC., OFFICE OF THE INSPECTOR GENERAL, CBP'S HANDLING OF UNACCOMPANIED ALIEN CHILDREN (2010) [hereinafter CBP's Handling of UACs], available at http://www.oig.dhs.gov/assets/Mgmt/OIG_10-117_Sep10.pdf.

22. INA, 8 U.S.C. § 1229 (2012); 8 C.F.R. § 1003.14 (2014).

23. INA, 8 U.S.C. § 1182 (2012).

24. CBP's Handling of UACs, *supra* note 21, at 4.

25. TVPRA, 8 U.S.C. § 1232(b) (2012).

Within 72 hours, DHS must transfer the child to DHHS's custody, absent exceptional circumstances.²⁶ Once in the care of DHHS's Office of Refugee Resettlement (ORR), ORR's policies include protecting children from traffickers and others who seek to victimize or harm them, and placing them in the least restrictive setting that is in the child's best interest.²⁷ Various ORR settings include high to low security detention centers, shelter or group homes, residential treatment centers, and long-term foster care. The least restrictive setting may also include identifying a proposed custodian for a child, such as a safe and appropriate family member or friend with whom the child could reside while he or she continues through the immigration system.²⁸ For some unaccompanied children, however, they will not have the opportunity for reunification with a family sponsor and will remain in the care of ORR/DHHS at an immigration detention or shelter until they resolve their individual immigration cases, or until they no longer meet the definition of unaccompanied immigrant child.²⁹

C. The Need for Appointed Counsel in Immigration Court Proceedings

Regardless of whether a child remains in federal custody or is released to a custodian, an unaccompanied child whose removal proceedings have been instituted by DHS must then appear for his or her hearing before the immigration court in order to avoid an order by default, also known as an *in absentia* deportation order.³⁰ Delegated by the authority under the Attorney General, immigration judges for the Executive Office for Immigration Review (EOIR) within the U.S. Department of Justice (DOJ) oversee the removal proceedings of hundreds of thousands of noncitizens a year.³¹ Some courts, including the immigration courts in Arlington, Virginia and Baltimore, Maryland have designated juvenile dockets.

26. *Id.*

27. *Id.* at § 1232(c); *See Flores Settlement Agreement*, *supra* note 20. The Flores Settlement Agreement also serves as guidance for DHHS's current detention and release standards and practices.

28. TVPRA, 8 U.S.C. § 1232(c)(3).

29. *See* 6 U.S.C. § 279(g)(2) (2012) (defining an "unaccompanied alien child").

30. INA, 8 U.S.C. § 1229a (2012); 8 C.F.R. § 1003.26 (2014).

31. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2013 STATISTICS YEARBOOK, 6 (2014) [hereinafter "EOIR FY 2013"], *available at* <http://www.justice.gov/eoir/statpub/fy13syb.pdf>. For past years dating back to 2000, visit: <http://www.justice.gov/eoir/statpub/syb2000main.htm>.

A child seeking to resolve his or her case will typically appear before an immigration judge to explain whether he or she wishes to be repatriated, will be seeking or has been granted an application for relief, *i.e.* defense from removal, or merits a favorable exercise of discretion.³² These adversarial proceedings require that the child articulate his or her case against a trial attorney for DHS—acting as a prosecutor—who is trained in substantive immigration law and immigration court procedures and can present facts and legal arguments against the child.³³ Each side is presumed to have the ability to represent its own interests before the immigration judge, who then makes a determination in favor of the government or the child.³⁴ Either side can then appeal the decision to the Board of Immigration Appeals (BIA).³⁵ Not surprisingly, this imbalance heavily favors the government, especially when the noncitizen is a child acting without the assistance of counsel. As the Ninth Circuit noted, “[w]ith only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in its complexity. A lawyer is often the only person who could thread the labyrinth.”³⁶

To ensure due process and fundamentally fair proceedings, the U.S. Supreme Court has held that juveniles need the assistance of counsel to ascertain and prepare a defense when facing juvenile delinquency charges, noting that a child “requires the guiding hand of counsel at every step in the proceedings against him.”³⁷ This, however, is not the case for immigrant children in civil removal proceedings. Noncitizens generally do not have a right to counsel at the government’s expense in administrative removal proceedings, neither under the Fifth and Sixth Amendments, nor the Immigration and Nationality Act.³⁸ The Fifth Amendment guarantees that

32. 8 C.F.R. § 1003.14; *See generally* U.S. Dep’t of Justice, Office of the Immigration Judge, Immigration Court Practice Manual (2013) [hereinafter “EOIR Practice Manual”].

33. INA, 8 U.S.C. § 1229a(b); *J.E.F.M. v. Holder*, No. 2:14-cv-01026 (W.D. WA, filed July 9, 2014), *available at* https://www.aclu.org/sites/default/files/assets/ filed_complaint_0.pdf (describing ICE trial attorneys as prosecutors and stating “the Government continues to send children like the Plaintiffs in this case without lawyers to face off against ICE trial attorneys who argue for their deportation before Immigration Judges”).

34. INA, 8 U.S.C. § 1229a(b) (stating that an alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s behalf, and to cross-examine witnesses presented by the Government).

35. 8 C.F.R. § 1003.1(d)(1).

36. *Baltazar-Alcazar v. INS*, 286 F.3d 940, 948 (9th Cir. 2004).

37. *In re Gault*, 387 U.S. 1, 41 (1967).

38. Kate M. Manuel, Cong. Research Serv., R43613, *Alien’s Right to Counsel in Removal Proceedings: In Brief*, (June 20, 2014), *available at* <http://fas.org/sgp/crs/homesecc/R43613.pdf>.

“[n]o person . . . shall be deprived of life, liberty, or property” without due process of law.³⁹ In applying the Fifth Amendment, courts have historically viewed a noncitizen’s access to counsel at his or her own expense as required to ensure “fundamental fairness” in removal proceedings, but that it does not mandate government-appointed counsel.⁴⁰ Similarly, although the Sixth Amendment’s “right to . . . have the Assistance of Counsel” at the government’s expense ensures that indigent persons are afforded free counsel, this applies to criminal proceedings but not civil removal proceedings.⁴¹ In the civil removal context, the Immigration and Nationality Act provides that a noncitizen has the “privilege” of being represented at no expense to the government by the counsel of his or her choice,⁴² which some courts have construed as establishing a statutory right to counsel at the noncitizen’s expense.⁴³

In practice, this has meant that of the more than 100,000 case records obtained and analyzed by Syracuse University’s Transactional Records Access Clearinghouse (TRAC), almost half (48 percent) of the children appearing in court to determine whether they should be sent back to their home countries had to appear alone without the assistance of an attorney to help them present their case.⁴⁴ Further, of the children who appeared with an attorney, an immigration judge allowed five out of every ten children to remain in the United States.⁴⁵ In contrast, however, for children who appeared without an attorney, only one in ten were allowed to stay, which means unrepresented children were nine times more likely to be ordered removed.⁴⁶

Although children do not have the right to a free attorney in removal proceedings, many non-profit organizations throughout the United States receive federal funding to provide very limited free legal services to unaccompanied children currently in the custody of DHHS and facing

39. U.S. CONST. amend. V.

40. See MANUEL, *supra* note 38, at 2.

41. *Id.*

42. INA, 8 U.S.C. § 1229a(b) (2012).

43. See MANUEL, *supra* note 38, at 4 (citing *Castro-O’Ryan v. United States Dept. of Immigration and Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987)) (noting that the caption of Section 292 of the INA, as well as its legislative history, “confirms that Congress wanted to confer a right”).

44. *New Data on Unaccompanied Children in Immigration Court*, SYRACUSE UNIV. (July 15, 2014), available at <http://trac.syr.edu/immigration/reports/359/>.

45. *Id.*

46. *Id.*

removal.⁴⁷ These programs are administered by attorneys or legal representatives who provide “Know Your Rights” presentations and initial screenings, as well as appearances as “friend of the court” with children who have status update hearings—also known as master calendar hearings—while in federal custody.⁴⁸ For the most part, these federally funded programs are not funded to provide direct representation to resolve a child’s case from start to finish. More commonly, these programs will, however, provide direct representation to a child in court seeking removal to his or her home country. The foundation of these programs stems from HSA of 2002 and the TVPRA of 2008, which require that DHHS timely appoint counsel to represent unaccompanied children in federal custody facing immigration proceedings, and in doing so, make every effort to use the services of *pro bono* counsel who agree to provide representation at no cost to the child.⁴⁹ However, DHHS is only required to do so *to the greatest extent practicable*.⁵⁰ With unprecedented and growing numbers of unaccompanied children crossing into the United States, DHHS must turn its efforts towards housing and detaining these children.⁵¹ As a result, funding for legal services is stretched even thinner.

Further, in June of 2014, DOJ announced it would allocate \$2 million to partner with the Corporation for National Community Service to establish a program known as Justice AmeriCorps in which approximately 100 AmeriCorps members will provide legal assistance to unaccompanied

47. Some examples include: The Capital Area Immigrants’ Rights (CAIR) Coalition’s Detained Children’s Program in Washington, D.C.; Kids in Need of Defense (KIND) in Newark, New Jersey; Catholic Charities of the Archdiocese of Galveston-Houston’s St. Francis Cabrini Center for Immigrant Legal Assistance in Houston, Texas; National Immigrant Justice Center in Chicago, Illinois; and Legal Services for Children in San Francisco, California. For a full list of partners with the Vera Institute of Justice, visit: <http://www.vera.org/centers/center-immigration-and-justice>.

48. *Unaccompanied Children Program*, VERA INST. OF JUSTICE (Jun. 17, 2014), <http://www.vera.org/project/unaccompanied-children-program>; see also EOIR PRACTICE MANUAL, *supra* note 32, at 67.

49. 6 U.S.C. § 279(b)(1)(A) (2012); TVPRA, 8 U.S.C. § 1232(c)(5) (2012).

50. TVPRA, 8 U.S.C. § 1232(c)(5) (emphasis added).

51. On June 9, 2014, ORR announced a funding opportunity in which it estimates allocating \$350 million in funding to help provide housing to recent surge of unaccompanied immigrant children. This grant opportunity is available to residential care providers who are licensed by an appropriate State agency to provide residential, group, or foster services for dependent children, including a program operating group homes, foster homes, or facilities for special needs minors. U.S. DEP’T OF HEALTH AND HUMAN SERV., OFFICE OF REFUGEE RESETTLEMENT, *Residential Services for Unaccompanied Alien Children* (HHS-2015-ACF-ORR-ZU-0833) (Jun. 9, 2014), http://www.acf.hhs.gov/grants/open/foa/files/HHS-2015-ACF-ORR-ZU-0833_0.pdf.

immigrant children in many of the nation's immigration courts.⁵² To qualify, a child must be in the geographic reach of services, under the age of 16, not in the custody of ORR or DHS, and have his or her own case—that is, not consolidated with a parent or legal guardian—before an immigration court.⁵³

In an effort to supplement federal funding—and in the absence of timely comprehensive immigration reform—some city and state actors have allocated funds to provide legal services to these children. On September 27, 2014, California Governor Jerry Brown signed into law a bill allocating \$3 million to non-profit organizations to provide representation to children in federal immigration court.⁵⁴ Just days before, the city of New York announced the Unaccompanied Minor Children Initiative, a public-private initiative created to provide free legal representation and access to other services appearing before the New York Immigration Court.⁵⁵ The New York City Council agreed to allocate \$1 million of its fiscal year 2015 budget, matched with a donation of \$550,000 from Robin Hood—a poverty-fighting organization, and \$360,000 from the New York Community Trust, which has funded the city's nonprofits for 90 years.⁵⁶ New York City was the second city in the United States to allocate city funds, following the city of San Francisco which, just one week earlier, passed a city ordinance allocating \$2.1 million over the next two years to provide legal services for unaccompanied children and families on the San Francisco Immigration Court's expedited removal docket.⁵⁷

Despite these programs, there is no mandated requirement for indigent children, either accompanied or unaccompanied, to have appointed counsel during their removal hearings at no cost to the child. Due to the struggle between the high volume of unaccompanied children and restrictions in

52. Press Release, Am. Immigration Lawyers Assoc., AILA Welcomes Program to Help Unaccompanied Migrant Children (Jun. 6, 2014), *available at* <http://www.aila.org/content/default.aspx?docid=48838>.

53. *Id.*

54. Alex Dobuzinskis, *California Sets Up Fund for Legal Representation of Immigrant Children*, THOMSON REUTERS (Sept. 27, 2014), <http://www.reuters.com/article/2014/09/28/us-usa-immigration-california-idUSKCN0HN00B20140928>.

55. Press Release, N.Y.C. Council, NYC Council Speaker Melissa Mark-Viverito, the Robin Hood Foundation and New York Community Trust Announce New \$1.9 Million Unaccompanied Minor Initiative (Sept. 23, 2014), *available at* <http://council.nyc.gov/html/pr/092314um.shtml>.

56. *Id.*

57. San Francisco, Cal., Ordinance No. 203-4 (Sept. 23, 2014), *available at* <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances14/o0203-14.pdf>.

resources and funding, many unaccompanied children are not afforded the legal services they need to see their immigration case through to the end. As such, children as young as 6 years old may appear before a judge without a parent, or an attorney.⁵⁸ Even if a child has family in the United States, cultural differences, language barriers, limited education and poor economic backgrounds often mean that a child will still be unable to secure an attorney. With the increasing costs of raising a child, many underprivileged families are ill-equipped to cover basic necessities, medical bills, and housing for a recently arrived child, let alone legal fees. And yet, within the context of ineffective assistance of counsel, the Supreme Court of the United States has commented more broadly on the issue of right to counsel for the indigent. The court has stated that the “right to effective assistance of counsel is the bedrock principle in our justice system,”⁵⁹ further noting that “[i]t is deemed an ‘obvious truth’ the idea that ‘any person hauled into court who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided him.’”⁶⁰

D. Challenges to the Government's Failure to Provide Appointed Counsel on Federal Grounds

In an unprecedented class action lawsuit brought on behalf of detainees with mental disabilities, a California federal district court construed section 504 of the Rehabilitation Act to require the appointment of “qualified representatives”—which includes but is not limited to legal counsel—for noncitizens who are “mentally incompetent” to represent themselves in removal proceedings.⁶¹ On April 23, 2013, a judge in the U.S. District Court for the Central District of California issued an order requiring that ICE, the Attorney General, and EOIR provide legal representation for seriously mentally ill immigrants who are unable to adequately represent themselves in their removal and detention proceedings in California, Arizona, and Washington.⁶² In its reasoning, the court stated that a

58. See Julia Preston, *Young and Alone, Facing Court and Deportation*, N.Y. TIMES, Aug. 26, 2012, at A1 (describing Juan David Gonzalez, a 6 year old immigrant in immigration court in Harlingen, Texas, without a parent—and also without a lawyer).

59. *Martinez v. Ryan*, 132 U.S. 1309, 1317 (2012).

60. *Id.* (citing *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)).

61. MANUEL, *supra* note 38, at 9.

62. *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at *20 (C.D. Cal. Apr. 23, 2013).

noncitizen's ability to exercise his or her rights to meaningfully participate in the immigration court process, including the right to examine evidence against the noncitizen or to present evidence on the noncitizen's behalf, are hindered by his or her mental incompetency.⁶³ As such, the court found that the "provision of competent representation able to navigate the proceedings is the only means by which they may invoke these rights."⁶⁴ In anticipation of this decision after approximately three years of litigation, ICE and EOIR both issued agency guidance directing that procedures be in place to ensure that unrepresented detainees who are mentally incompetent are properly identified and afforded the necessary safeguards to ensure due process.⁶⁵ This federal court order, however, only applies to mentally ill or mentally incompetent individuals. Sadly, no such mandate exists outside California, Arizona and Washington, and no such guarantees of appointed counsel apply to child immigrants facing deportation anywhere in the United States, despite some having significant diminished mental capacity as tender age children. Although DHHS is authorized to appoint an independent "child advocate" to represent a child's best interests in cases of child trafficking victims and other vulnerable unaccompanied children,⁶⁶ this too does not create the right to counsel for all indigent unaccompanied children facing deportation.

On July 9, 2014, eight immigrant children with the assistance of *pro bono* counsel⁶⁷ instituted a class action by filing a complaint before the U.S. District Court for the Western District of Washington in Seattle, challenging the federal government's failure to provide appointed legal representation for children in immigration proceedings on federal statutory and constitutional grounds.⁶⁸ The complaint named Attorney General Eric

63. *Id.* at 9–10.

64. *Id.* at 10.

65. Memorandum from John Morton, Dir., U.S. Immigration and Customs Enforcement to Thomas Homan, Peter Vincent, and Kevin Landy, U.S. Immigration and Customs Enforcement (Apr. 22, 2013), available at https://www.ice.gov/doclib/detention-reform/pdf/11063.1_current_id_and_infosharing_detainees_mental_disorders.pdf; U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, *Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions* (Apr. 22, 2013), <http://www.justice.gov/eoir/press/2013/SafeguardsUnrepresentedImmigrationDetainees.html>.

66. See TVPRA, 8 U.S.C. § 1232(c)(6)(A) (2012).

67. The children were represented by the Northwest Immigrant Rights Project, American Civil Liberties Union, American Immigration Council, Public Counsel, and K&L Gates LLP.

68. See *J.E.F.M. v. Holder*, No. 2:14-cv-01026, at 1, 4 (W.D. WA, filed July 9, 2014), available at https://www.aclu.org/sites/default/files/assets/filed_complaint_0.pdf.

Holder and several government agencies—EOIR, DOJ, ORR, DHHS, and DHS’s Immigration and Customs Enforcement (ICE) and Enforcement and Removal Operations (ERO)—as defendants.⁶⁹ The plaintiffs were eight immigrant children, ranging in age from 10 to 17, who were facing deportation without an attorney and who had fled their home countries due to severe violence or abuse.⁷⁰ J.E.F.M., a 10 year old boy from El Salvador, fled the country with his two older siblings after gang members threatened to harm them.⁷¹ A few years earlier, J.E.F.M. and his two siblings, also plaintiffs in the class action, had witnessed their father’s murder in the street in front of their house.⁷² Their father, a former gang member turned pastor, had started a rehabilitation center for people leaving gangs.⁷³ Gang members retaliated against the center and had warned J.E.F.M.’s parents to stop assisting former gang members two weeks before murdering his father.⁷⁴

The complaint defined the plaintiff class as “all individuals under the age of eighteen (18) who are or will be in immigration proceedings on or after July 9, 2014, without legal representation in their immigration proceedings.”⁷⁵ In its complaint, the plaintiffs contended that the Immigration and Nationality Act and the Due Process Clause of the Fifth Amendment mandate that the government ensure that all children in immigration proceedings have legal representation.⁷⁶ As relief, the plaintiffs requested that the court issue an injunction directing the defendants to ensure that the plaintiffs and other members of the class receive legal representation in their immigration proceedings.⁷⁷ On September 19, 2014, the government moved to dismiss the case on four grounds.⁷⁸ First, the government argued that the case was not ripe because the plaintiffs had not yet had a merits hearing and thus it was not yet determinable whether the

69. *Id.*

70. *Id.* at 2.

71. *Id.* at 15.

72. *Id.*

73. *Id.* at 15.

74. See *J.E.F.M. v. Holder*, No. 2:14-cv-01026, at 1, 4 (W.D. WA, filed July 9, 2014), available at https://www.aclu.org/sites/default/files/assets/filed_complaint_0.pdf.

75. *Id.* at 23.

76. *Id.* at 21.

77. *Id.* at 7.

78. *J.E.F.M. v. Holder*, No. 2:14-cv-01026-TSZ, 1, 2 (W.D. WA, filed Sept. 19, 2014), available at http://www.legalactioncenter.org/sites/default/files/docs/lac/80_Def.%20motion%20to%20dismiss%20amended%20complaint.pdf.

plaintiffs had been adversely affected by not having counsel.⁷⁹ Second, under the Immigration and Nationality Act, the Ninth Circuit Court of Appeals, not the District Court, was the appropriate and statutorily mandated forum.⁸⁰ Third, the sovereign immunity doctrine does not apply where plaintiffs have an alternative forum, *i.e.* the Ninth Circuit Court of Appeals.⁸¹ Lastly, the government contended that the plaintiffs' constitutional claim failed because there is no constitutional right for noncitizen minors to receive taxpayer-funded lawyers for administrative removal proceedings.⁸² On September 29, 2014, the U.S. District Judge denied plaintiffs' motion for a preliminary injunction and deferred a ruling on the class certification until the court could consider the government's motion to dismiss, and only upon a finding that the court had jurisdiction to consider the claims.⁸³ At the time of this publication, the lawsuit was still pending.

III. Common Forms of Humanitarian Protection

Due to the dangerous and unsettling circumstances surrounding an unaccompanied child's departure from the home country and arrival to the United States, many unaccompanied children qualify for humanitarian relief. In interviewing 404 unaccompanied immigrant children, the United Nations High Commissioner for Refugees (UNHCR) reported that no less than 58 percent of them had been forcibly displaced from their homes because they suffered or faced harms that indicated a potential or actual need for international protection.⁸⁴ Notably, the Vera Institute of Justice, a non-profit organization, reported that approximately 40 percent of children in ORR custody in 2010 qualified for lawful statuses that protect them from

79. *Id.* at 2, 4.

80. *Id.* at 3, 7.

81. *Id.* at 3, 13.

82. *Id.* at 2, 16.

83. *J.E.F.M. v. Holder*, No. 2:14-cv-01026-TSZ, 1, 14–5 (W.D. WA, filed Sept. 29, 2014), *available at* http://www.legalactioncenter.org/sites/default/81_Order%20Denying%20Preliminary%20Injunction.pdf.

84. U.N. HIGH COMM'R FOR REFUGEES, *Children on the Run* (2014) [hereinafter "Children on the Run"], *available at* <http://unhcrwashington.org/children>. Of those forcibly displaced, 48 percent of children reported they had been personally affected by violence by organized criminal actors, such as gangs or cartels; 28 percent reported they had survived abuse and violence in their home by their caregivers; 11 percent reported having suffered or being in fear of both violence in society and in the home.

deportation, such as asylum, special immigrant juvenile status, and visas for victims of crimes such as trafficking.⁸⁵ This number has since risen to 63 percent, according to a recent assessment by the Refugee and Immigrant Center for Education and Legal Services (RAICES) in which the non-profit organization screened 925 children in ORR custody.⁸⁶

A. Asylum

Asylum is a form of lawful status granted to those who warrant particular humanitarian concern because they are in the United States and meet the definition of “refugee.”⁸⁷ A refugee is a person who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, his or her country of nationality because of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.⁸⁸

Traditionally, immigration courts and asylum offices have more commonly granted asylum to individuals seeking protection from racial, ethnic, religious, or politically-motivated persecution. However, a rising number of children are fleeing their home countries in fear of gangs or illegal criminal organizations, referred to as *pandillas* and *maras* in Central America.⁸⁹ Since 2009, the UNHCR has registered increasing numbers of asylum-seekers, both children and adults, from El Salvador, Honduras, and Guatemala.⁹⁰ In 2012, the UNHCR reported that 85 percent of asylum applications were from those three countries alone.⁹¹ The major gangs in

85. Olga Byrne and Elise Miller, *The Flow of Unaccompanied Children Through the Immigration System*, VERA INST. OF JUSTICE 24 (Mar. 2012), available at <http://www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf>.

86. See Letter from Jonathan D. Ryan, Exec. Dir., Refugee Immigrant Ctr. for Educ. & Legal Servs., to President Barack Obama (July 18, 2014), available at <http://immigrationimpact.com/wp-content/uploads/2014/07/Letter-to-President-Obama-from-RAICES.pdf> (finding that 63 percent of the 925 children who underwent intake with RAICES staff at the Lackland Air Force Base in San Antonio, Texas were likely to be found eligible for relief by a U.S. Immigration Judge).

87. See INA, 8 U.S.C. § 1158(a)-(b) (2012).

88. *Id.* at § 1101(a)(42)(A).

89. See CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., RL34112, GANGS IN CENTRAL AMERICA 2 (2014) [hereinafter *Gangs in Central America*], available at <http://www.fas.org/sgp/crs/row/RL34112.pdf>.

90. See *Children on the Run*, *supra* note 84, at 4.

91. *Id.*

Central America with ties to the United States are the “18th Street” gang and their main rival, the *Mara Salvatrucha* (MS-13), both of whose proliferation can be attributed to the aggressive deportation of undocumented immigrants from Los Angeles, many with criminal convictions, after the passage of the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA) of 1996.⁹² Plagued with a history of civil conflict, institutional instability, lack of education, and poverty, Honduras, Guatemala and El Salvador have provided fertile breeding grounds for gangs.⁹³

Gang violence is a feature of everyday life in many Central American countries, with an estimated 85,000 MS-13 and 18th Street gang members in El Salvador, Guatemala, and Honduras.⁹⁴ Gangs thrive in numbers to effectuate a wide range of criminal activities including robbery, theft, assault, kidnappings, drugs and weapons trafficking, and murder.⁹⁵ Gangs such as the *maras* rely heavily on forced recruitment of youth to expand and maintain their membership, often recruiting people who are poor, homeless, and marginalized from society.⁹⁶ Further, gangs retaliate against those who refuse their recruitment tactics, seeing it as a sign of disrespect, which often triggers a violent and punitive response.⁹⁷

Because of their age, economic status, and lack of family protection, many unaccompanied children fall victims to *maras*, and therefore, must base their claims on past or future persecution by gangs for recruitment purposes. Unfortunately, these claims fall within the most frequently litigated and most ambiguous “particular social group” protected ground, which requires that a minor show that his or her group is immutable, well-defined with particularity, and socially distinct.⁹⁸ This has been a challenge

92. See Gangs in Central America, *supra* note 89, at 2–3.

93. See *id.* at 5; see also Michael Boulton, *Living in a World of Violence: An Introduction to the Gang Phenomenon*, U.N. HIGH COMM’R FOR REFUGEES 7–11 (2011), available at <http://www.unhcr.org/4e3269629.pdf>.

94. See Gangs in Central America *supra* note 89, at 3 (citing William R Brownfield, Assistant Sec’y, Bureau of Int’l Narcotics and Law Enforcement Affairs, Remarks at the Inst. of the Americas (Oct. 1, 2012)).

95. See Gangs in Central America, *supra* note 89 at 2.

96. See U.N. HIGH COMM’R FOR REFUGEES, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* 2–3 (2010), available at <http://www.refworld.org/docid/4bb21fa02.html>.

97. See *id.*

98. See *In re M-E-V-G-*, 26 I&N Dec. 227 (BIA Feb. 7, 2014). In order to clarify that the “social visibility” element required to establish a cognizable “particular social group” does not mean literal or “ocular” visibility, that element is renamed “social distinction.” An applicant for asylum or withholding of removal seeking relief based on “membership in a particular social

in light of decisions by the BIA, finding that terms like “youth” are not immutable because their age can change over time, and that “refusal to join a gang” fails the particularity element because an applicant is “not in a substantially different situation from anyone who has crossed the gang, or who is perceived to be a threat to the gang’s interest.”⁹⁹

Nevertheless, there are some cases in which gang violence against an individual falls under persecution on account of a particular social group. In *Crespin-Valladares v. Holder*, the Fourth Circuit Court of Appeals held that “the family provides a prototypical example of a particular social group,”¹⁰⁰ specifically in the context of family members of “those who actively oppose gangs . . . by agreeing to be prosecutorial witnesses.”¹⁰¹ In keeping with this finding, unaccompanied children whose family members are targeted for publicly retaliating against a gang would have a basis for seeking asylum within the Fourth Circuit. In addition, the Fourth Circuit Court of Appeals has found that gang persecution against a former gang member who has rejected gang membership and its attendant violence may also be grounds for asylum.¹⁰² Notably, in *Martinez v. Holder*, the court held that the social group of “former MS-13 gang member from El Salvador” meets the immutability requirement, because the only way to change one’s membership in the group would be to rejoin MS-13, which would be contrary to the humanitarian purpose of asylum laws.¹⁰³

group” must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. *See also In re W-G-R-*, 26 I&N Dec. 208 (BIA Feb. 7, 2014).

99. *See In re S-E-G-*, 24 I&N Dec. 579 (BIA July 30, 2008) (holding that neither Salvadoran youth who have been subjected to recruitment efforts by the MS-13 gang and who have rejected or resisted membership in the gang based on their opposition to the gang’s values and activities, nor the family members of such Salvadoran youth constitute a “particular social group”); *see also In re E-A-G-*, 24 I&N Dec. 591 (BIA July 30, 2008) (finding that “persons resistant to gang membership” lack the social visibility that would allow others to identify its members as part of such group); *see also In re C-A-*, 23 I&N Dec. 951 (BIA July 15, 2006) (holding that the members of a particular social group must share a common, immutable characteristic, but it must be one that members of the group either cannot change, or should not be required to change, because it is fundamental to their individual identities or consciences).

100. *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011).

101. *Id.* at 120–21.

102. *See Martinez v. Holder*, 740 F.3d 902, 911 (4th Cir. 2014) (“We agree that Martinez’s membership in a group that constitutes former MS–13 members is immutable.”).

103. *Id.*; *But see In re W-G-R-*, 26 I&N Dec. 208 (BIA Feb. 7, 2014) (holding that respondent failed to establish that “former members of the Mara 18 gang in El Salvador who have renounced their gang membership” constitute a “particular social group” or that there is a nexus between the harm he fears and his status as a former gang member).

Regardless of the facts of the case, an unaccompanied child wishing to proceed with an asylum claim is afforded special protections under the TVPRA. Notably, unaccompanied children are not subject to the safe third country exception which allows for DHS to deny asylum and remove an individual, pursuant to a bilateral or multilateral agreement, to a safe third country in which the person's life or freedom would not be threatened and where he or she would have access to a full and fair asylum procedure.¹⁰⁴ In addition, a child is not subject to the one-year filing deadline in which other applicants must apply, and which begins to run from the date of arrival to the United States.¹⁰⁵ Specifically, a child may file for asylum at any time so long as he or she meets the definition of "unaccompanied alien child,"¹⁰⁶ and in some cases, even after the child turns 18 years old.¹⁰⁷ Further, the asylum office within U.S. Citizenship and Immigration Services (USCIS)—not the immigration judge—has initial jurisdiction over asylum applications filed by unaccompanied children.¹⁰⁸ This protection allows for a child to articulate his or her fear in a less adversarial setting than a courtroom before an asylum officer with specialized training in handling unaccompanied children's claims, and gives discretion to an officer to grant asylum.¹⁰⁹ If the officer finds that the child does not meet the elements required by law, then the child's case is referred to the immigration court and he or she will have the opportunity to litigate the case again before the immigration judge.¹¹⁰ A noncitizen who is granted asylum will then have the opportunity

104. *See* TVPRA, 8 U.S.C. § 1232(d)(7)(C) (2012); *see also* INA, 8 U.S.C. § 1158(a)(2)(A) (2012).

105. *See* INA, 8 U.S.C. § 1158(a)(2)(B).

106. *See* TVPRA, 8 U.S.C. § 1232(d)(7)(C).

107. *See* U.S. CITIZENSHIP AND IMMIGRATION SERVS., Questions and Answers: Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications filed by Unaccompanied Alien Children 2 (June 10, 2013), <http://www.uscis.gov/sites/default/files/USCIS/Refugee,%20Asylum,%20and%20Int'l%20Ops/Asylum/ra-qanda-determine-jurisdiction-uac.pdf>.

108. *See* TVPRA, 8 U.S.C. § 1232(d)(7)(C).

109. *See* 8 C.F.R. § 1208.14(b) (2014); *see also* Memorandum from John Lafferty, Chief, Asylum Div., USCIS, to Asylum Office Dirs., Supervisory Asylum Officers, Quality Assurance Officers and Asylum Officers, USCIS 2 (Jan. 27, 2014), *available at* <http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Asy-Changes-CaseCategories-AsyHQ-Review.pdf>. (stating that the juvenile category of affirmative asylum cases requiring USCIS Headquarters review is being narrowed to include only referrals, notices of intent to deny and denials of juvenile cases).

110. *See id.*

to apply for lawful permanent residence (“green card”) after one year so long as several conditions are met.¹¹¹

B. Special Immigrant Juvenile Status

Special Immigrant Juvenile Status (SIJS) is a humanitarian protection that provides an immediate pathway to lawful permanent residence for immigrant children who have been abandoned, abused, neglected, or similarly mistreated.¹¹² Unlike many other forms of lawful status that purely involve federal law, SIJS is unusual because it involves a careful balancing of state and federal law. In the past, when immigrant children sought protection through the State courts after having been mistreated by their parents, they later faced legal obstacles preventing them from remaining legally in the United States.¹¹³ A court may have determined that it was in the child’s best interest to be placed in foster care to protect him from the harmful caregiver, only to have the child age out of the court’s jurisdiction with no means to obtain legal status, find a job, or attend college.¹¹⁴ In order to address this intersection between state family law and federal immigration law, Congress created SIJS through its enactment of the Immigration Act of 1990.¹¹⁵

Notably, in order to qualify for SIJS, a child must be declared dependent on a juvenile court in the United States, or be placed in the custody of an individual or entity appointed by a State or juvenile court, and obtain an order from the juvenile court finding that reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law.¹¹⁶ In addition, the child must show that

111. See INA, 8 U.S.C. § 1159 (2012); see also 8 C.F.R. §§ 209.2(b), 1209.2(b) (2014).

112. See INA, 8 U.S.C. §§ 1101(a)(27)(J), 1255(h) (2012).

113. See Laura E. Ploeg, *Special Immigrant Juveniles: All the Special Rules*, IMMIGRATION LAW ADVISOR, U.S. DEP’T OF JUSTICE 1, 1 (Jan. 2014).

114. See *id.*

115. See *id.*; Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

116. See *id.*; see also 8 C.F.R. § 204.11 (2014). Note that the Code of Federal Regulations has not been updated to reflect the newer language under the TVPRA. Rather, it still includes the language of Section 153 of the Immigration Act of 1990, Pub. L. No. 101-649-104 Stat. 4978, which required, among other things, that a child be declared “dependent on a juvenile court located in the United States and has been deemed eligible by that court for long-term foster care” in order to qualify for SIJS. The TVPRA replaced this language with broader language that allows for a child to show he or she has been declared dependent by the juvenile court *or* placed in the care of an individual, entity, state department or agency appointed by the juvenile court, which includes, but is not limited to, long-term foster care. See TVPRA, 8

either through administrative or judicial proceedings, it has been determined that it would not be in his or her best interest to return to the child's or the parents' previous country of nationality or last habitual residence.¹¹⁷ In practice, this means that a child like Edwin may obtain SIJS if a juvenile court finds that he is dependent on the court or placed in the care of a relative or a foster care program, has been abused by his father and that it is not in his best interest to return to El Salvador.

Because there is no federal definition of "abuse," "abandonment," "neglect," or "best interest," juvenile court judges must turn to state definitions and exercise discretion in determining eligibility for SIJS findings under state law. Once a state court judge makes SIJS findings as required under the Immigration and Nationality Act, the child may then proceed to the federal component and apply for SIJS before USCIS, and ultimately, for lawful permanent residence.¹¹⁸ In creating this two-step process of initial review before a state court, Congress delegated the application of state law to those who have the expertise and are in the best position and most qualified to apply state definitions and standards with respect to children.¹¹⁹ As these factual findings are within the expertise of the juvenile court, they will generally not be disturbed by immigration officials.¹²⁰ Nevertheless, the federal government retained sole authority to adjudicate and grant or deny immigration status.¹²¹

SIJS is available to those who meet the definition of "child," and not just unaccompanied children, which means that petitioners can be under the age of 21. Petitioners are further afforded an age-out protection under the TVPRA which maintains a child's age as the age *at the time of filing*, regardless of the petitioner's age at the time of adjudication.¹²² Yet, in some cases, state law may preempt this definition and prevent a child who is

U.S.C. § 1232(d)(1) (2012); *see also* RUTH ELLEN WASEM, CONG. RESEARCH SERV., R43703, SPECIAL IMMIGRANT JUVENILES: IN BRIEF 2 (Aug. 29, 2014), *available at* <http://fpc.state.gov/documents/organization/231777.pdf>.

117. *See* INA, 8 U.S.C. §§ 1101(a)(27)(J)(ii).

118. *See* INA, 8 U.S.C. §§ 1101, 1255(h).

119. *See* Special Immigration Status, 58 Fed. Reg. 42,847 (Aug. 12, 1993); *see also* Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54,980 (Sept. 6, 2011).

120. *See* Ploeg, *supra* note 113, at 4 (citing Special Immigrant Juvenile Petitions, 76 Fed. Reg. at 54,980).

121. *See id.*

122. *See* TVPRA, 8 U.S.C. § 1232(d)(6) (2012); *see also* Memorandum from the Office of the Dir., USCIS to all USCIS Personnel 4 (Apr. 4, 2011), *available at* <http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/April/perez-olano-settlement.pdf>.

above the state's age of majority, but younger than 21 years old, from applying for SIJS. For example, in Virginia and the District of Columbia, juvenile courts will not exercise jurisdiction over a custody proceeding instituted after the child's 18th birthday.¹²³ However, in Maryland, pursuant to House Bill 315, which was approved by Governor Martin O'Malley on April 8, 2014 and became effective October 1, 2014, immigrant children instituting custody proceedings with a motion for SIJS findings are eligible to do so until the age of 21.¹²⁴

Upon the filing of an SIJS petition, the TVPRA allows for an expeditious 180-day adjudication in which USCIS must render a decision.¹²⁵ Once USCIS approves a child's petition for SIJS, the child is immediately eligible to apply to adjust his or her status to that of lawful permanent resident.¹²⁶ In keeping with the particular humanitarian concerns of immigrant children who have been abandoned, abused and neglected, the TVPRA created additional statutory waivers, *i.e.* "pardons," for certain grounds of inadmissibility that may otherwise apply to non-SIJS applicants.¹²⁷ For instance, a noncitizen that enters without inspection is generally inadmissible to the United States and therefore cannot apply for adjustment of status to lawful permanent resident.¹²⁸ However, the TVPRA created an automatic waiver of this bar for special immigrant juveniles.¹²⁹ The Attorney General may also waive other grounds of inadmissibility for humanitarian purposes, family unity, or when it is otherwise in the public interest.¹³⁰ Although SIJS provides some stability with respect to a child's immigration status, the law is narrowly tailored to protect only child victims of mistreatment and thus prevents a child from later petitioning for their natural parents, even if the child was only abandoned by one parent.¹³¹

123. See D.C. CODE §§ 11-1101(a)(1), 16-4601.01(2013); see also VA. CODE ANN. §§ 16.1-228, 16.1-241 (West 2014).

124. See H.B. 315, 2014 Gen. Assemb., Reg. Sess. (Md. 2014).

125. See TVPRA, 8 U.S.C. § 1232(d)(2).

126. See INA, 8 U.S.C. § 1255(h) (2012).

127. *Id.*

128. *See id.*

129. *See id.*

130. *See id.*

131. See INA, 8 U.S.C. § 1101(a)(27)(J)(iii)(II).

C. U visa

The U visa is a protection that grants a noncitizen, including an unaccompanied child, lawful status for 4 years if he or she has suffered substantial physical or mental abuse as a result of having been a victim of a qualifying crime in the United States and has been, is, or will be helpful to law enforcement in the investigation of the qualifying crime.¹³² There are 18 crimes that qualify under the Immigration and Nationality Act, including but not limited to, rape, torture, domestic violence, felonious assault, obstruction of justice, perjury and fraud.¹³³ Moreover, even if a crime is not statutorily listed, it may nevertheless qualify if it is substantially similar to an enumerated crime.¹³⁴ As an example, U visa applicants may include a young female forced to engage in prostitution by her pimp who uses her lack of immigration status to instill fear and to discourage her from notifying authorities. This young girl—a victim of trafficking who may be apprehended by undercover police officers—would be eligible for a U visa should she choose to cooperate with police or prosecutors.

Recognizing the importance of having victims come forward with important information relating to a crime, and the fear that many undocumented immigrants may have of interacting with authorities, Congress created the U visa through the Victims of Trafficking and Violence Protection Act (VTVPA) of 2000.¹³⁵ In order to qualify for a U visa, an applicant must include a certification (U certification)¹³⁶ signed by the designated head of the certifying agency along with his or her application for a U visa. Certifying agencies include federal, state, or local law enforcement officials, prosecutors, judges, or other federal state or local authorities charged with the investigation or prosecution of the qualifying crime.¹³⁷ This encompasses state and federal Departments of Labor, child protective services agencies, ICE and other DHS sub-agencies, and the Equal Employment Opportunity Commission.¹³⁸ However, like the juvenile court order making SIJS factual findings, the U certification does not

132. *See id.* at § 1101(a)(15)(U).

133. *See id.*

134. *See* 8 C.F.R. § 214.14(a)(9) (2014).

135. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464–1548 (hereinafter “VTVPA”).

136. *See* USCIS, FORM I-918 SUPPLEMENT B, U NONIMMIGRANT STATUS CERTIFICATION (Jan. 1, 2013), available at <http://www.uscis.gov/sites/default/files/files/form/i-918supb.pdf>.

137. *See* INA, 8 U.S.C. § 1101(15)(U).

138. *See* 8 C.F.R. § 214.14.

guarantee lawful status, as USCIS still has the sole jurisdiction and discretion to grant a U visa.¹³⁹

The U visa is a means for not only the victim, but also certain family members of the victim, to also gain status. Child victims who are granted a U visa receive U Nonimmigrant status for a period of 4 years, and may confer similar status to their parents, spouses, children, and unmarried siblings under the age of 18.¹⁴⁰ Although Congress has capped the issuance of U visas at 10,000 per year, family derivatives do not count towards this cap.¹⁴¹ Arguably, the most important benefit to the victim is that after 3 years of continuous presence in the U.S., the victim and derivative family members are eligible to apply for lawful permanent residence.¹⁴²

D. T visa

The T visa is similar to the U visa because it is also for victims of a crime, but more specifically, victims of trafficking. Created by the TVPA,¹⁴³ the T visa is for victims of a “severe form of trafficking in persons”¹⁴⁴ who are in the United States on account of their trafficking, and who would suffer extreme hardship involving unusual and severe harm upon removal.¹⁴⁵ Qualifying victimization includes sex trafficking, defined as the “recruitment, harboring, transportation, provision, or obtaining of a person for a commercial sex act” by way of fraud, force, or coercion, or the inducement of a child under the age of 18 to engage in a commercial sex act.¹⁴⁶ Similarly, the T visa is available to victims of labor trafficking, such as the use of a person for labor or service through fraud, force, or coercion for the purpose of subjecting him or her to involuntary servitude, peonage, debt bondage, or slavery.¹⁴⁷ Unlike the U visa, however, the T visa does not

139. *See id.* at § 214.14(c).

140. *See* INA, 8 U.S.C. § 1101(a)(15)(U)(ii).

141. *See* INA, 8 U.S.C. § 1184 (2012).

142. *See* INA, 8 U.S.C. § 1255(m) (2012).

143. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464–1548.

144. 22 U.S.C. § 7102(9) (2012).

145. *See* INA, 8 U.S.C. § 1101(a)(15)(T).

146. *See id.*; *see also* 8 C.F.R. § 214.11(a) (2014).

147. *See* 22 U.S.C. §§ 7102(5), (6), (9) (2012).

require cooperation with law enforcement, nor a certification, for applicants under the age of 18.¹⁴⁸

Within the context of unaccompanied children, this can often mean the forced recruitment of children by narco-human traffickers, as in the case of Edwin. Because many unaccompanied children travel by themselves to the United States, and come from poor economic backgrounds, they fall prey to kidnapping and violence by narco-human trafficking cartels. Like the U visa, a child may confer status to family members—spouses, children, unmarried siblings under 18 years old, and the child’s parents—if his or her T visa is approved.¹⁴⁹ USCIS, however, caps the number of T visas it grants to 5,000 per year, while derivative family members are not included in the cap.¹⁵⁰ Upon the approval of the T visa, USCIS grants T Nonimmigrant status to the victim for a period of 4 years.¹⁵¹ After 3 years of continuous presence in the U.S., a child victim of trafficking is eligible to apply for lawful permanent residence.¹⁵²

IV. Conclusion

The creation and implementation of special protections have dramatically changed the apprehension, detention, and removal of unaccompanied children entering the United States. Whether through the establishment of new lawful statuses over the past few decades in response to human crisis, or more recent administrative changes, Congress and immigration agencies have made commendable efforts to safeguard the rights and best interests of unaccompanied children. For some unaccompanied children, these humanitarian defenses have often meant the difference between life and death—allowing a child to stay in the United States in lieu of facing certain violence or crisis upon removal to his or her home country. Nevertheless, these legal measures fail to serve their very purpose if child immigrants without the funds to secure counsel are not afforded the right to effective legal representation to assist them in navigating the complex immigration system and applying for the humanitarian forms of relief designed to protect this very specific group of vulnerable immigrant children. For noncitizens who cannot fully and

148. See INA, 8 U.S.C. § 1101(a)(15)(T)(i)(III).

149. See *id.* at § 1101(a)(15)(T)(ii).

150. See INA, 8 U.S.C. § 1184(o) (2012).

151. See 8 C.F.R. § 214.11(p)(1).

152. See INA, 8 U.S.C. § 1225(l)(1)(A)–(C) (2012).

meaningfully participate in their proceedings, the appointment of counsel is the only way to remedy this deprivation of due process and properly invoke an indigent child's rights under the law.