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# Unintended Consequences: Reverberations of Special Immigrant Juvenile Status

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## Unintended Consequences: Reverberations of Special Immigrant Juvenile Status

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# Unintended Consequences: Reverberations of Special Immigrant Juvenile Status

## **Acknowledgements**

The author wishes to thank Walter Afable, the anonymous reviewers from JARC, and the young people and their families who generously shared their experiences.

*Dear Mama,*

*I hope you are not mad. I want to help you but it's complicated. I go to school every day. I am learning English but it is hard. I am not working. I want to but it's prohibited. I promise you that I will do my best in everything I do. I will find a way to help you. I will not forget you.*

*I like my mother here but you are my real mother. You will always be my real mom.*

*I love you.*

—Johanna, 16-year-old  
Mexican girl in foster care

### **Introduction**

The relationship between the state, the family, and the child is a fundamental unit of analysis in society. The law and social norms that shape this triad inform the ways adults care and provide for their children. Parents also affect the ways children are socialized into the community, allowing for social continuity over time and space. In the United States, the nature of this relationship has shifted over time as have the roles that children are recognized as playing in this relationship. The growing presence of unaccompanied children (an individual under the age of eighteen who has no lawful immigration status in the United States and who has no parent or legal guardian to provide care and custody) challenges how institutional and legal conceptualizations of childhood pathologize the migrant child and the transnational family.

In this article, I provide an overview of the socio-legal factors that shape the relationship between the child, the family, and the state, and the ways migrant children's lives have come to be defined and contested. The legal identity of migrant children is socially situated within a history that intertwines social movements of helping professionals, legal jurisdictions characterized by increasingly intolerant approaches to juveniles, and shifts in the treatment of unauthorized migrant children under immigration law over time. When there is a perceived rupture in the social norm of the nuclear family, particularly in moments of crisis (such as parental death, abandonment, divorce, abuse, or neglect) the state often enters and acts

as the mediator of domestic relations.<sup>1(pxiv-xv),2</sup> While historically and culturally decontextualized, child migration is increasingly identified as a threat to healthy childhood and an indication of familial rupture. For unaccompanied children in federal detention facilities run by the Office of Refugee Resettlement (ORR)\*, this evolving series of actions and interventions shape how ORR evaluates parental competence and fitness, and how courts make custody determinations. In a globalized world like today's, this triangular relationship between children, families, and the state is becoming increasingly complex and dynamic. Social policies and legal norms are lagging behind the diverse and fluid domestic arrangements of transnational families. As an unintended but powerful consequence, the relationships between unaccompanied children and their kin are getting strained and, in some instances, severed.

I begin by tracing how creation of the juvenile court and emergence of the tutelary complex has radically shifted the notion of children as legal subjects in the United States. I analyze the legal case of *Polovchak v. Meese*, a critical precursor to a relatively new form of legal recourse for some migrant children—the Special Immigrant Juvenile (SIJ) status. SIJ is a form of legal relief available to migrant children who have been abused, abandoned or neglected. An unauthorized child may pursue a finding of abuse, abandonment and neglect in state court, and then apply for a SIJ visa from the U.S. Citizenship and Immigration Services. Through this hybrid process between state courts and federal immigration law, SIJ is the only provision in immigration law that considers the child's best interests. However, in practice, I argue that SIJ ensnares migrant youth

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\* In 2003 with the reorganization of Homeland Security, the care of unaccompanied children transferred from Immigration and Naturalization Services (now known as Immigration and Customs Enforcement) to the Office of Refugee Resettlements Division of Unaccompanied Children's Services. While less restrictive than the rented bed space in juvenile jails that housed unaccompanied children under the INS, ORR detention facilities, euphemistically called "shelters", are not experienced as such. Children constantly are monitored by security cameras, watched and counted continuously by staff, permitted to leave the facility only when supervised at particular staff-to-child ratios, restricted to communication with one or two preapproved family members by phone for twenty minutes per week. Most facilities have locked, alarmed doors and windows. Staff documents medical and mental health sessions, behaviors, personal communication, phone calls, and visits with advocates within the child's institutional file, which is freely shared with law enforcement upon request. As a *total institution*, every action and reaction is subject to surveillance and documentation in the child's ORR file. Staff members remind children that misbehavior will affect their "case," widely understood by children as their release and long-term permanency in the United States.

between competing allegiances to the state and to the family. Through the narratives and social agency of young people like Johanna, whose letter opened this article, we may recognize the gravity of these forces on the ways youth and their families navigate the complex and uneven terrain of everyday life.

### **Research Methods**

Unaccompanied children are economic, political, and social migrants who arrive both lawfully and unlawfully, and originate from many countries around the globe. They face similar challenges to those of other populations of migrants, confronting language barriers, intergenerational conflict, cultural assimilation, and limited access to resources. But what remains unique are the ways the law and institutions frame children seemingly without parents or kinship ties. Independent or unattached, migrant children bereft of family or kinship networks therefore threaten the notion of how children can and should act. Their unauthorized presence and exercise of “independent” agency calls into question the state’s reliance on the nuclear family as the site for producing future citizens. The figure of the “unaccompanied alien child” challenges dominant Western conceptualizations of child dependence and passivity explicitly through their unauthorized and independent presence in the United States and implicitly in the ways they move through multiple geographic and institutional sites. Thus, migrant children become a problem remaining to be solved.

This article draws from a large, multi-sited ethnography on the complex institutions and actors that emerge when children migrate clandestinely from Central America and Mexico to the United States, and the ways young people understand the law, institutional interventions, and their own best interests.<sup>3</sup> While the larger study focuses on how young migrants navigate legal and institutional processes, this article narrows its gaze to the specific form of legal relief, SIJ, being increasingly utilized on behalf of unaccompanied children. As such, my fieldwork focused on four contexts. First, I conducted participant observation in highly restrictive and largely inaccessible spaces of immigration detention, immigration and family courts, and federal foster care programs for unaccompanied children.<sup>†</sup> I conducted multiple, one-on-one interviews with 82 detained

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<sup>†</sup> In order to conduct research, I secured permission not only from my university’s institutional review board and two of the organizations’ research review committees but also from the thirteen other individuals and organizations who laid claim to speak for the best interests of the child, a two year process. Although the director of the ORR Division of Children’s Services is the legal guardian of all detained “unaccompanied alien children”

and non-detained children from 19 countries, many of whom qualified for the Special Immigrant Juvenile status. It is their experiences I focus on in this article.

Second, I conducted one-on-one structured and semi-structured interviews with nearly 350 “stakeholders”—individuals engaged in the apprehension and detention of migrant children, including government bureaucrats, nongovernmental facility staff, attorneys, guardians ad litem, state court and immigration judges, Immigration and Customs Enforcement (ICE) agents, foster families, teachers and policymakers across multiple sites in Texas, Arizona, Illinois, New York, Maryland, and Virginia. Situated within these interviews, I focused on stakeholder accounts of SIJ that exemplify the tensions and contradictions in the relationship between children, families, and the state within the larger study.

Third, I collected and analyzed the various types of institutional paperwork produced by governmental and nongovernmental “stakeholders” tracking the presence of unaccompanied youth in federal custody in the United States, including custody transfer forms between ICE, ORR, detention centers and families; immigration applications and rulings; and fingerprint and photographic records—each asserting the lawful or unlawful status of the youth’s tenuous presence in the United States. I analyzed the marks of the state through genres of writing and practices connecting youth to the state. This focus on institutional paperwork, in combination with legal analysis of shifts in the law, provides a critical space in the analysis of youth agency as it provides an avenue through which to consider how youth are influenced by institutions they encounter, and how they shape those institutions simultaneously. While the law is often assumed to be impermeable, youth as social actors dynamically interact and engage with the law and legal practices. By focusing on the persistence of certain legal notions of childhood over time amid specific moments of legal change, I examine how the law simultaneously reflects change and continuity in the space of childhood, even as it shapes their daily lives.<sup>4</sup>

Fourth, I conducted ethnographic research with a sample of 20 youth and their families in the US, several of whom pursued SIJ following release from detention. This longitudinal approach allowed me to track change over time, and to observe the intended and unintended

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in the United States, other state and nonstate actors recognized themselves as integrally involved in the care and custody of unaccompanied children. For additional discussion on the ethical and methodological considerations taken in conducting research with migrant children, see Heidbrink 2014.

consequences of SIJ on young people and their families.

### **Children as Legal Subjects**

In this section, I examine the emergence of children as legal subjects in the United States with a specific focus on the relationships of migrant children with their families. Colonial law in America perceived the family as a unit of labor led by the male head of household with the wife and children as subordinate members who maintained no independent power. Fathers maintained “an almost limitless right to the custody of their minor legitimate children.”<sup>5(p54)</sup> The state relied on family unity as a mechanism for economic and social governance, in which the patriarch wielded uncontested power in the domestic sphere. Nineteenth-century family law followed the tradition of English law by not recognizing children as individual rights holders independent of their parents; instead, the interests of the family were seen as synonymous with the patriarch’s wishes. According to Michael Grossberg’s study of nineteenth-century family law, the law considered children as wage-earning assets of their fathers, in which “their services, earnings and the like became the property of their paternal masters in exchange for life and maintenance.”<sup>6(p25)</sup> In moments of transgression of the law, children were acknowledged as individuals, but there was minimal distinction between children and adults, subjecting children as young as seven to the harsh gaze of adult criminal courts.

Nineteenth century marked a critical shift in the ways both women and children were viewed. What Stanley Cohen termed, a profound “moral panic” emerged concerning gangs of children overstepping the confines of childhood and threatening “societal values and interests,” particularly among new immigrant communities.<sup>7(p9),8,9(p63)</sup> The financial demands on working and lower-class immigrant households often necessitated that both parents work multiple jobs, leaving children in the care of others or depending on divergent notions of care and child independence, at times leaving them unattended with limited supervision. Children’s exposure to peers and to the street was perceived as a strong enticement into bad habits. Specialized police organizations emerged to track crime, while philanthropic and religious organizations developed special schools and programs to inoculate against the contagions of youth delinquency. Through monitoring and controlling the negative habits of youth, a specialized pedagogy emerged to intervene in the lives of children “beyond parental control.”<sup>10(p156)</sup>

From the 1820s to the 1920s, the child-saving movement coalesced, in which middle and upper-class American reformers sought a humanitarian response to youth delinquency. The reformers, who came to



be known as the “child savers,” sought to protect children from both the vagaries of the street and increased automobile traffic, which claimed the lives of an increasing number of immigrant children accustomed to playing in the streets.<sup>11</sup> Through restricting children’s movements to schools, playgrounds, and playrooms in the name of their own safety and well-being, the child savers sought to provide children moral education and to instill social behavioral standards. They labored to ensure the “salvation” of troublesome youth through institutional interventions designed to safeguard children against parental inattention and neglect. By the 20th century, reformers had established settlement houses—large homes in densely populated urban areas where predominantly immigrant families could engage in education, seek repose from factory life, and receive medical care.

Anthony Platt has convincingly argued that in their quest to preserve the purity and innocence of childhood, the child savers “invented new categories of youthful misbehavior” that corresponded to the behaviors of youth in predominantly urban, immigrant ghettos.<sup>12(p3)</sup> Recognizing the family as the primary means of instilling morality and social values, the child savers developed a series of programs for children and families to instill American values in the newly arrived immigrant families. For those families requiring more substantial intervention and rehabilitation, the child savers developed reformatory schools to serve as surrogate families for youth, shaping impressionable children to an ethic of obedience, labor, discipline, and morality. By the early 20th century, Progressive Era reformers had fundamentally altered the relationship between the state, the family, and the child—no longer did a patriarch have absolute possession and control over his child; the state had begun monitoring the community’s social investment in the child.

The transition to the pedagogical state at the turn of the century in the United States exemplifies this dynamic relationship through the institutionalization and dissemination of self-governance, guidance of the family and children, management of the household, and care of the soul at a particular historical moment<sup>11,12</sup> State interventions were not exclusively reserved for migrant children and families but reached to communities along racial and class lines. The child savers and the courts began to speak a “politics of truth,” generating new forms of knowledge and news technologies of regulation and intervention. Perhaps the most lauded innovation of early reformers was the establishment of the first juvenile court in Illinois in 1899 and its transformation into a national system in 1908. The juvenile court was founded on the British legal doctrine of *parens patrie*, “parent of the nation,” in which the state serves as the

metaphoric head of household. The court's founding act claims that the institution's goal was "to regulate the treatment and control of dependent, neglected, and delinquent children."<sup>13(p458)</sup> The juvenile courts brought together a spectrum of children viewed as delinquents and as victims of parental neglect. In court, a perception of "parental neglect" justified the active involvement of the state as a means of safeguarding the lives of children.<sup>‡</sup> Philanthropic organizations not only became instrumental in defining the criteria of neglect and proper expressions of care, but also became folded into the institutional apparatus of the state by serving as probation officers, directly shaping the court's decisions in cases of neglect and delinquency. Philanthropic organizations were a form of government concerned with "the conduct of conduct" governing both themselves and others.<sup>14(p48)</sup> The categories of care and protection began to move more fluidly across philanthropic and state boundaries, laying the foundation for the emergence of a shadow state of civil society. At the same time, the courts and philanthropic organizations became instrumental in shifting the responsibility for these newly defined behaviors and social risks, be they delinquency, illness, or poverty, from the state to the individual subject (and family) responsible for his or her care.

Since its inception, the juvenile court has expanded its interventionist role within the family in the interest of, as officers of the court see it, the well-being of the child.<sup>15§</sup> Child savers argued that juvenile courts were a revolutionary innovation that provided needed diagnosis and training to delinquent youth. Imbued with progressive ideals, the court was designed to respond to delinquency by viewing the criminality of youth as a consequence of psychological problems spurred by familial neglect and not as a manifestation of a child's depraved nature. Seeking to protect and provide for this inherently vulnerable population, the court began to emphasize children's rights, which "operated both as standards for

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<sup>‡</sup> Previously, cases involving children and youth were brought before a local criminal court, which issued rulings based on laws also regulating adult actions. The act not only created a separate court with a single judge to adjudicate claims of children under age sixteen, but also provided for a separate space for proceedings, for prohibitions on children under twelve serving jail time, and for a court-appointed probation officer not paid by the state to represent the interests of the child before the court (Illinois Juvenile Court Act of 1899, 1899 Ill. Laws 131, cited in Schultz 1973, p458).

<sup>§</sup> For example, in 1943, the Commonwealth of Massachusetts intervened in the case of a nine-year-old Jehovah's Witness preaching on public streets. The court determined that the child's caregiver had violated state child labor laws by asking the child to distribute flyers in exchange for contributions. Amid claims that the state's intervention violated the child's right to religious freedom and the caregiver's right to raise the child, the U.S. Supreme Court ruled that the state's intervention was constitutional (*Prince v. Massachusetts*, 321 U.S. 158 (1944), cited in Lloyd 2006: 237).

parental behavior and as limitations on parental power. Parental failure to live up to these standards violated children's rights and justified community intervention."<sup>16(p1052),17(p979)</sup> Furthermore, by distinguishing between adults and children, juvenile courts sought to shield youth from the harmful gaze of the criminal courts and to offer tailored interventions focused on the needs of the child instead of the offense.<sup>18,19(p108)</sup> Child savers argued that by focusing on the underlying problem instead of on the manifested behaviors, the courts sought to act in the "best interests of the child," the legal principle that still prevails in contemporary juvenile courts. Under this rubric, the state could interject itself directly into family life in order to ensure appropriate therapeutic interventions for children.

Rooted in a medical model of deviance that views "abnormal" behavior as a dysfunction of the individual, the juvenile courts provided a technology for charitable organizations not only to control delinquent youth socially through the law but also to shape the normative structure of the court.<sup>19(p109)</sup> Platt argues that the juvenile court movement in the United States extended beyond a purely humanitarian concern for adolescents and became a mechanism for assimilation.<sup>12</sup> He writes, "It was not by accident that the behavior selected for penalization by the child savers—drinking, begging, roaming the streets, frequenting dance halls and movies, fighting, sexuality, staying out late at night, and incorrigibility—was primarily attributable to the children of lower-class migrant and immigrant families."<sup>12(p139)</sup>

The concluding section of the Illinois Juvenile Court Act of 1899 reads, "This act shall be liberally construed, to the end that its purpose may be carried out, to wit: that the care, custody, and discipline of a child shall approximate as nearly as may be that which should be given by its parents, and in all cases where it can properly be done the child be placed in an improved family home and become a member of the family by legal adoption or otherwise."<sup>13(p458)</sup> In effect, the state via the courts broke from its paternalistic position to a metaphoric head of household, distributing justice or punishment as "should be given by its parents." When the "care, custody, and discipline" did not approximate that of a parent, the court could intervene as a parent "should" to preserve the mental and physical hygiene of the child. This constellation of spatial, social, and legal reforms marked a critical shift in allegiance, in which a child's "highest duty was no longer obedience to parents, but preparation for citizenship."<sup>16(p1051)</sup> The culturally normative position of the law and the juvenile court used deviance of youth behavior and parenting practices as a justification for the state's intervention in family life, disproportionately affecting immigrant families whose domestic arrangements and practices were different. The

law became a critical site, reflecting broader changes in the forms of care, discipline and governance that emerged from the state and charitable organizations during this time period.

The juvenile court became “a visible form of the state-as-family” through the *tutelary complex*, an apparatus of laws and helping professionals, ranging from psychiatrists to social workers to judges, who determined the spectrum of norms and deviance in children.<sup>20(p104)</sup> Public supervision of children and their families through clinical observation, psychiatric evaluation, social work visitation, and court hearings replaced customary means of discipline and punishment of children in reformatory schools, mental institutions, prisons and work camps. Professionals claiming to know the natural state of childhood and the proper behaviors of youth aided in the rehabilitation of deviant youth, the supposed aim of the juvenile court system.<sup>11,12,20</sup> By focusing efforts on the child as a subject instead of focusing on the act, like adult courts did, the tutelary complex institutionalized childhood through the state, family, and education system beyond the normalization tactics it enacted, thereby raising panopticism to a new level.<sup>21</sup>

In *The Policing of Families*, Jacques Donzelot argues that the liberal state was caught between two inclinations: preserving social order and maintaining the autonomy found in the private lives of families.<sup>20</sup> With the hope that private consumption of their moral guidance would yield public good, philanthropic organizations understood families as a site of social intervention, distributing advice on financial savings or targeting the housing of the poor with medical and hygienic sanitation interventions.<sup>20(p92)</sup> Despite strategies of resistance, the family became a mechanism for mediation between individuals and the state.<sup>20(p94)</sup> Donzelot argues that “government through families” replaced “government of families.”<sup>20(p48)</sup>

Donzelot’s genealogy of the social control of the family remains relevant in the United States today not only for its delineation of the ways charitable organizations serve as an extension of and vital informant to legal judgments but also for its insight into how the family is subject to the state’s impersonal regulation of private life. Particularly for unaccompanied children in “shelters”, federally-subcontracted nongovernmental organizations serve at once as prison guards, rehabilitative experts, and probation officers. In the absence of family, family reunification specialists, social workers, and clinicians become regulators of children’s behaviors and of the legitimacy and quality of parenting practices. There is an institutional presumption that parents of unaccompanied migrant children are unfit by virtue of their child’s status as “unaccompanied”—at the

moment of apprehension, a child was not in the custody of a parent or customary care provider. Constructed as it may be, the juridical category of the “unaccompanied alien child” marks a rupture in the social unit of the nuclear family and calls into question a parent’s capacity to attend to the child’s “care, custody, and discipline.” Only through completing a rigorous series of institutional paperwork and enduring scrutiny by charitable organizations may parents regain custody of their children from the federal government. In the interim, facility staff are charged with the education, socialization, and monitoring of children’s behaviors.<sup>3</sup>

In the 1960s, we see another shift in the courts from a pedagogical to an increasingly punitive approach to youth. High levels of incarceration, zero-tolerance policies, and fast-track adjudication point to those courts’ contemporary concerns with prosecuting youth instead of providing excessive counseling. Juvenile courts in the United States continue to request the supervision and rehabilitative services of social service agencies, but organizations remain overwhelmed with the demand and are underfunded and understaffed. Distinct from earlier claims of saving youth or of preserving childhood, the current U.S. court system reveals repressive and controlling tactics. The increasing notoriety of both the police and the prosecutors, who investigate and arrest youth, places juvenile justice in a new light, in contrast to the early twentieth-century emphasis of the courts as *in loco parentis*.

During the same time period, the U.S. Supreme Court teetered between granting some essential rights to children and repealing other provisions affecting children’s equal standing in the courts.\*\* The U.S.

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\*\* *In re Gault*, 387 U.S. 1 (1967); in June 1964, fifteen-year-old Gerald Gault was taken into custody after being accused of making lewd telephone calls; finding him to be delinquent, a juvenile court judge ordered him to be committed to the State Industrial School until he reached majority (a period of six years); his parents petitioned the Arizona Supreme Court for a writ of habeas corpus to obtain their son’s release; the court referred the case back to the original judge, who dismissed the habeas petition; the Gaults appealed to the Arizona Supreme Court, which agreed that due process should apply to delinquency proceedings, but held that due process requirements were not offended by the proceedings in the Gault case, and affirmed the dismissal of the petition. The case was appealed to the U.S. Supreme Court, which reversed the Arizona decision, ruling that a child has a constitutional guarantee to protection and to due process when he or she is committed to a state institution such as a juvenile detention facility. The juvenile court must afford children a notice of charges, a right to counsel, the right to confront and cross-examine witnesses, and the right against self-incrimination. Yet, in 1971, the Supreme Court denied a child’s right to a trial by jury, making made a fundamental distinction: children possess rights only inasmuch as they do not conflict with the priorities and social expectations of the state’s behavioral norms and expectations of children located in the family and society.

Supreme Court has observed that children possess a special status under the law: “Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly during the formative years of childhood and adolescence, minors often lack the experience, perspective and judgment expected of adults.”<sup>22(p831)††</sup> In many ways, early rulings<sup>‡‡</sup> not only further institutionalized a cultural construction of childhood that was put forward by the early reformers but also relegated children to second-class citizenship within the state. Contemporary state and federal courts consistently view children as individuals who do not possess rights and agency equivalent to those of adults. Furthermore, while such rulings do make special accommodations and distinctions in the treatment of children as distinct from adults, it is critical to note that these provisions are not binding in federal immigration courts in their treatment of unauthorized children. The few rights granted to youth in state and federal courts do not extend to unauthorized youth in immigration court.

Historically, youth has been a contentious category in which the members benefit from some specialized provisions due to their perceived dependence and vulnerability, while they are simultaneously excluded from the rights afforded adults. The courts have increasingly assumed an interventionist role in the domestic sphere, attempting to protect children from abusive parents. The 1980s and early 1990s brought a renewed emphasis on and sensitivity toward child abuse. While laudable, it bolstered the state’s ability to intervene in a parent-child relationship particularly in cases of abuse and of dangerous or inadequate parenting.<sup>§§</sup> Congress “created incentives for states to provide permanency for children on whose behalf the state had intervened to sever the family relationship.”<sup>15(237-238)</sup> Unauthorized children who are abused, abandoned, or neglected in theory are subject to state intervention similar to that accorded to documented youth.

While the expansion of state intervention in the domestic sphere of the family explicitly and profoundly shapes the lives of all youth, in many ways unauthorized migrant youth are excluded from any of the positive measures such strategies may have. Within federal detention facilities for unaccompanied children, institutional interventions remain predicated on

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<sup>††</sup> See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982) in which the court ruled that youth is a mitigating factor in the death sentence of a sixteen-year-old.

<sup>‡‡</sup> See also *Kent v. United States*, 383 U.S. 541 (1966); and *In re Winship*, 397 U.S. 358 (1970).

<sup>§§</sup> Adoption Assistance and Child Welfare Act of 1980; Adoption and Safe Families Act of 1997; and the Child Abuse Prevention and Treatment Act of 2000 (see, e.g., Lloyd 2006).

middle-class norms of childhood and parenting practices that place immigrant youth in a marginalized and often tenuous position in relationship to their families and to the state. This is particularly acute for unauthorized children who do not benefit from unconditional protection from the state due to their unauthorized presence in the United States. At the state level, a child welfare system can remove a child, whether documented or undocumented, from an abusive parent and provide care through state foster care programs, but on their eighteenth birthday, unauthorized children re-embody their unauthorized status, unable to live or work lawfully in the United States. In spite of the legal justification for state intervention and its intense and sustained involvement, which includes removing children from their parents, the state effectively abandons such children on their eighteenth birthday. The protection of children from abusive families and from the state that seeks to deport them is predicated on children's ability to navigate the law amid restricted rights, limited accommodations, and marginal standing within the courts. This fluctuating relationship between the child and the state becomes particularly problematic for the ways in which youth conceive of their future selves amid significant uncertainty.

In spite of the above-detailed shifts in how the law conceptualizes children, contemporary federal immigration law still frames immigrant children as objects, analogous to now-discarded notions of children as property, recognizing the identity of a child only inasmuch as that child is a derivative of the actions, legal status, and presence of his or her parent(s).<sup>\*\*\*</sup> U.S. immigration law is predominantly family-based, presuming that adults are the decision makers and providers for children. Children exist as derivatives of adult petitions or as dependents that are petitioned for by their parent or legal guardian in family reunification applications. Given this, children must rely on their parents to access the law, while the children forfeit any individual relationship to the state in immigration law. In the context of immigration law, children are not acknowledged as individuals, nor do they possess specific rights or social agency autonomously. Immigration law is an anomaly—the exclusive form of law that does not consider or even acknowledge the status or needs of children outside their relationship to their parents. To be clear, other areas of law have not necessarily gotten it right or are unworthy of critique.<sup>†††</sup>

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<sup>\*\*\*</sup> Legal scholar David Thronson (2002) skillfully traces the ways immigration law both mirrors and buttresses historic approaches to the rights of children, attending specifically to the adverse consequences that impact their experiences with the law.

<sup>†††</sup> For example, contract law considers a contract voidable based on a child's minor status, and tort law either releases children from any liability at all or affords them flexible

For unaccompanied children, the inability to access the state and the law directly becomes highly problematic. Immigration law consistently frames children as variables or liminal figures and not as actors in or involved contributors to migration decisions. The law does not view children as autonomous individuals from birth, but as beings that families must socialize into mature adults. The law views unaccompanied children without a legally recognized caregiver as existing alone though paradoxically still dependent. Without a recognizable parent, the child cannot access the state to petition for legal relief. At the same time, the legal identity of unaccompanied children is contingent because of their illegal presence in the United States. Unaccompanied children are “impossible subjects,” to enlist Mae Ngai’s term.<sup>23</sup> Their presence is “simultaneously a social reality and a legal impossibility—a subject barred from citizenship and without rights.”<sup>23(p4)</sup>

Immigration law remains the only area of law that has made no legally binding distinction between adults and children in the adjudication of legal petitions. Immigration law does not provide any compulsory child-specific accommodations customary in family and juvenile courts. Under these laws children do not have a right to state-funded attorneys but must secure and pay for their own representation during immigration proceedings; there is no best-interest legal standard that takes into account the safety and well-being of the child; the rules of evidence remain the same for children and adults, forcing children to meet the same credibility and evidentiary requirements as adults; and child applicants cannot petition for their siblings or parents as derivatives in their applications for political asylum.<sup>24</sup> As one attorney remarked, “You can put a baby in a basinet before an immigration judge and she would have to make her claim just like a forty-five-year-old man would” (personal interview). However, court records are abundant with examples of youth challenging this static framework. The sheer presence of a growing number of unaccompanied children speaks to the legal challenges that result from ignoring youth as rights holders capable of social and political agency. The case of Walter Polovchak is one such example.

### **The Littlest Defector**

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liability given their “intelligence, maturity, and experience” (Bien 2004: 830; Bhabha and Schmidt 2006: 46). Under the jurisdiction of the juvenile court, criminal law affords children special procedures with a stated intent of “rehabilitation” instead of punishment, harking back to the reformist’s initial intent for assistance rather than punishment for the court in 1899.



In January 1980, two citizens of the Soviet Union, Michael and Anna Polovchak, came to the United States with their three children, residing temporarily in Chicago. After a few months, they decided to return to the USSR, but their two eldest children, Nataly (17 years old) and Walter (12 years old), refused to return with them. Nataly and Walter left the family home in Chicago to live with a cousin. Disagreeing with their decision, Michael and Anna Polovchak asked the police to force Walter to return to their home in Chicago. The police took Walter from his cousin's home, but instead of returning him to his parents, they held him because Walter feared his parents would force him to return to the Soviet Union. After consulting with the State Department and the Immigration and Naturalization Services (INS), the police initiated custody proceedings in Cook County Circuit Court. The trial judge temporarily placed Walter in the state's custody, "as a minor in need of supervision." "Later that same day Walter, with his attorney but without his parents, filed an application for asylum with the regional INS office."<sup>25</sup> Walter's application for asylum was granted and in October 1981 his status was changed to that of a "permanent resident alien." The state trial court held a hearing on Walter's wardship and eventually adjudicated both Walter and Nataly as wards of the court, removing them from their parents' custody. The Illinois Appellate Court reversed that decision in December 1981, "determining that the Polovchaks should not have been deprived of parental custody,"<sup>25</sup> but the parents had returned to the Soviet Union by that time. The Illinois Supreme Court affirmed the appellate court's decision in May 1983. The district court initially determined that "the private interest of...Walter...is by its very nature considerably less than that of his parents."<sup>25</sup> In the absence of his parents, who, as the adult family members, maintained Walter's legal status and to whom his lawful presence was contingent, Walter was unauthorized to remain in the United States. A fierce and very public debate ensued. In a context of Cold War politics, protecting a child who chose "freedom" over "communism" raised the stakes.

In the Illinois Appellate Court's view, Walter's parents had a fundamental right to make decisions about their child's care and custody and, given his young age of 12, those rights superseded Walter's desire to remain in the United States. Walter's age became the centerpiece of a debate on parental rights. Just five years older, Nataly maintained a visa independent of her parents, and, as a result, her parents did not legally contest her decision to remain in the United States. However, the appellate court's ruling was later complicated by Walter's petition for

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<sup>†††</sup> *Polovchak v. Meese*, 774 F.2d 731 (7th Circuit, 1985).

political asylum in federal immigration court based on his fear of persecution as a practicing Baptist in the Soviet Union. Walter was quickly granted political asylum and, in the context of Cold War politics, heralded as “the littlest defector.” Discontented with the ruling, Walter’s parents petitioned the federal court, stating that “the grant of asylum violated substantive constitutional rights protecting their privacy and the integrity of their family, as well as their right to raise and control their son and to participate in his major life decisions.”<sup>25</sup>

The tensions that emerge in this case reverberate through the lives of unaccompanied children more than 30 years later. The legal case *Polovchak v. Meese* illustrates the still-conflicting and disparate conceptualizations of a child’s legal identity between family and immigration courts and the legislators that guide their rulings. State family courts traditionally adjudicate family disputes, given their recognized expertise in child welfare and the organizational apparatus in which to provide services and monitor compliance. By granting Walter political asylum, the federal government in effect made a custody determination, not only denying the parents legal standing but also ultimately conflicting with the wishes of the parents. Under the Refugee Act of 1980, the federal government is obligated to provide protection to those who are persecuted in their country of origin. While parental rights ultimately were not terminated in this case, Walter was temporarily deemed a ward of the state prior to receiving political asylum. Without receiving notice from the court, his parents, who had since returned to the Soviet Union, had been excluded from the political asylum process affecting their son. When the parent is absent, the state serves as the legal guardian with the autonomy to decide what is in the best interest of the child, which necessarily coincides with the best interests of the state. The federal government uncomfortably became the mediator of domestic relationships in an explicit and highly political way. In Walter’s case, a child’s decision to petition for asylum for political reasons placed his wishes in direct confrontation with a parent’s right to determine the proper living environment for the child.

*Polovchak v. Meese* is also a critical precursor to contemporary context affecting unaccompanied children because of the politicization of the migrant child and how these conditions shape the choices available to youth. As with the notorious case of Elian Gonzales in 2000, the notoriety of Walter’s asylum petition reached the floor of the U.S. Senate and the news media.<sup>§§§</sup> Particularly during the Cold War era, the political

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<sup>§§§</sup> While the INS (now ICE, Immigration and Customs Enforcement) considers Cuban nationals as a unique category of political refugee, Elian’s alien presence revolved

implications of revoking Walter's grant of asylum and returning him to his parents would have adversely affected the United States as a nation of refuge and reliability. However, in the circuit court's view recognizing parents' unchecked right to remove their children from the United States forcibly would unnecessarily commodify children as property of their parents, subjecting children exclusively to the decisions of their parents, instead of recognizing children as individual rights holders. It is important to recall that there were no special provisions or procedures in the immigration court enlisted to treat Walter any different from an adult asylum seeker, yet the court's rulings had real implications on the feasibility of the Polovchak family's future visitations and communication. The Asylum Office and Executive Office of Immigration Review (EOIR), which adjudicate asylum petitions, do not have authority to make custody determinations. However, by granting Walter political asylum in the absence of his parents' consent, the court's ruling had significant implications for parental custody and family unity.

Because of Walter's status as a minor, the case raises concerns about the child's independent relationship to the state.<sup>26</sup> As Evelyn Glenn convincingly argues, independence is a "key ideological concept anchoring citizenship," manifested in rights such as property ownership, voting, and recognition as decision makers.<sup>27(p27)</sup> At the same time the family becomes the mediator of the state's investment in the child as a future citizen. Because of this presumed dependence, children must rely on their parents as proxies before the law, restricting their independent access to the state.<sup>17,28-30</sup> In *Polovchek v. Meese*, Walter's wishes directly contradicted his parents' decisions about their minor child, which unsettles the state's perception that children are necessarily and exclusively dependent and that children cannot forge an independent relationship with the state. In this view, to claim political agency (in the form of a political asylum petition), Walter must be shorn of his kinship ties and become a dependent of the state.

Walter's independent desire to remain in the United States in spite of his parents' desire for his return to the USSR marks a deviation in the social norms of a dependent child. The site of the family as mediator of the law for the child was called into question. Walter's illegality and physical

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around his status as a dependent minor, who under U.S. immigration law could not independently stand before the law. Declining a congressional offer for political asylum, Elian's father, still residing in Cuba, requested Elian's immediate return. Despite a political asylum application filed on his behalf by his uncle, Elian was ultimately repatriated to Cuba, though only after an armed raid by immigration officers "freed" Elian from the captivity of his extended family members in Miami.

presence in the absence of his family complicated the state's response—which was to bounce Walter between legal systems that struggled to respond to the state's diverging obligations to provide sanctuary (via immigration law), to not intervene in family matters, and to ensure the safety and well-being of children (via family law). Because of his status as a child and as an unauthorized migrant, Walter's case crossed over multiple domains of the law that conflict in the treatment of and obligation to a child.

Were the child in question an adult with recognizable rights, agency, and a defined relationship to the state, the circumstances would be quite different. Take Walter's sister Nataly, who maintained her own legal status and who was already positioned in the upper end of "an age range in which a minor may be mature enough to assert certain individual rights that equal or override those of his parents" in contrast to Walter who, at age 12, the court identified at "the lower end of an age range."<sup>25</sup> Walter Polovchak's case bounced between state and federal courts involving seven different lawsuits until the asylum adjudication process was complete on the eve of his eighteenth birthday in 1985. His right to protection in the form of political asylum had augmented with his age. It was reasoned that, as an adult, Walter was legally allowed to make his own decisions. In the U.S. Senate chamber, legislators celebrated Walter's eighteenth birthday with a "birthday party of freedom" in his honor.

### **Special Immigrant Juvenile Status**

Cases such as Walter Polovchak and Elian Gonzalez have given rise to new legal avenues that seek to remedy the legal and institutional tensions that emerge in a child's independent and unlawful presence in the United States. Historically, the state has defined and positioned unaccompanied youth largely through the law, or by legislating citizenship, labor, or eligibility for government programs.<sup>31-33</sup> Shifts in immigration law for unaccompanied children have begun to guarantee some measure of legal relief for minors through the introduction of Special Immigrant Juvenile (SIJ) status. While SIJ has existed since the early 1990s, advocates have increasingly used this tool since 2000.

The SIJ legislation initially emerged when child welfare advocates in Santa Clara County, California, began applying for amnesty under the 1986 Immigration Reform and Control Act (IRCA) for unauthorized children who were dependents of the Santa Clara County's Department of Children and Family Services (DCFS). In an interview with one of the drafters, he explained, "When the [immigration] amnesty came, I was

working with twenty children dependent on DCFS who qualified for amnesty. I, as the prudent parent and as the guardian ad litem, thought I had the right to apply for them, and so I applied for all of the children in the Santa Clara child welfare system. I got most of them through, but one immigration officer refused the last two children. The legislation emerged as a clean-up measure. The initial impact was not that much. It was relatively obscure at the time” (personal interview).

Even amid a growing anti-immigrant climate in the late 1980s, the SIJ legislation was remarkably inclusive of unauthorized children and might have served as a legal remedy for cases like Walter Polovchak in the 1980s. Early provisions of the law stipulated that unauthorized youth must be (1) a dependent of the juvenile court, (2) deemed eligible for long-term foster care due to abuse, neglect, or abandonment, and (3) a youth for whom return to his or her home country is not in the best interests of the child (INA, 8 U.S.C. §1101(a)(27)(J) (2003)). The legislation did not require the abuse or neglect to occur in U.S. territory or that the offending parent has legal status. Furthermore, SIJ initially included children who had never been involved with the immigration system, though this was amended in the 1997 revision amid concerns about potential abuse of SIJ.

While in many ways SIJ is consistent with immigration law’s view that children are necessarily dependent, it does open a critical window through which advocates began to push for expanded rights of children and initially a more nuanced perspective on migrant children. SIJ is the only provision in immigration law that considers the best interests of the child, creating a unique hybrid of state courts and federal immigration law, which provides certain unauthorized children with an avenue to citizenship. The mechanism of the best interests standard with the SIJ petition is one of the only ways by which the voice of the child might figure into immigration proceedings. While SIJ might suggest recognition of children as independent social actors or agents at least of their own migration, initial discussions of SIJ applicants operated on the assumption that children could not be responsible for migration decisions, whether lawful or unlawful. In the SIJ regulations the INS insisted, “A child in need of the care and protection of the juvenile court should be precluded from obtaining Special Immigrant Status because of the actions of an irresponsible parent or other adult.”<sup>15(p243)</sup> In the INS’ view not only could the migrant child not make autonomous migratory decisions but also the child’s unlawful presence was evidence of the condemnable behavior of the child’s parents.

However, SIJ is an insufficient remedy for unauthorized children in the United States. As Ani Ajemian reminds us, “While this opportunity for

legal status [via SIJ] appears an appropriate solution to the unaccompanied child problem, it is still fairly narrow in its application and fails to take into account a number of child-specific harms no less deserving of protection.<sup>34(p25)</sup> Unaccompanied migrant children may also seek political asylum, but the obstacles are significant. As mentioned previously, the rules of evidence and testimony do not distinguish a child from an adult, forcing children to meet the levels of detail and credibility standards of adults. Further, immigration law does not easily recognize child-specific persecution, including social phenomena such as child soldiers, street children, youth resisting gang membership, or even youth as political activists. Attorneys have experienced some success in petitioning for children by rooting their legal claims in discourses of human rights instead of framing their claims as child-specific persecution.<sup>\*\*\*\*</sup> U.S. immigration law, just as international refugee law, has failed to keep pace with contemporary forms of persecution and in recognizing young people as social actors.<sup>35</sup>

While Congress's original intent in SIJ was to defer to the expertise of the juvenile court in determining the best interests of the child, conflicts ensued over jurisdiction.<sup>36++++</sup> The state court may make recommendations on the proper care and best interests of the child, at times finding the child a dependent of the court. However, when the federal government takes a child into custody, the state court no longer maintains jurisdiction over the child regardless of his or her needs, because federal immigration proceedings preempt state court proceedings. As a result, many state court judges are unwilling to make the necessary findings indicating a child is dependent upon the court while not providing any services or oversight of the child's permanency planning.

In addition, while the legislative history gives no indication of a distinction between detained and nondetained youth, the INS explicitly distinguished between the two populations, stating: "The INS will seek revocation of any juvenile court dependency order issued for a detained alien juvenile [as such] juveniles are not eligible for long-term foster care

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<sup>\*\*\*\*</sup> For further discussion, see Bhabha 2002.

<sup>++++</sup> Hamm cites *Gao v. Jenifer*, 185 F. 3d 548 (6th Cir. 1999), which found that "state courts may still exercise jurisdiction over a neglected or abused immigrant child who has been paroled to foster care by the Immigration and Naturalization Service (INS) without necessarily interfering with the federal mandate to regulate immigration" (Hamm 2004: 324). Hamm cites, *In re C.M.K.*, N.W.2d 768 (Minn. Ct. App. 1996), indicating that "once INS had taken the child into custody, the state court had no jurisdiction over that child regardless of need because federal immigration proceedings preempted state proceedings" (Hamm 2004: 324).

because of their federal detention.”<sup>15(p244)</sup> The INS argued that state courts could not find a child dependent if that child was under the care and custody of the federal government, in practice, preventing detained children from seeking SIJ. Although the 1997 amendments clarified that no distinction should be made between detained and nondetained youth, the vestiges of this distinction persist in practice in the contemporary relationship between ICE, ORR, and state courts whereby detained youth who have been abused, abandoned, or neglected do not necessarily have open access to family courts to protect them.<sup>+++</sup> They face significant political and economic resistance from state welfare authorities, judges, and state’s attorneys involved in state court proceedings.

Following numerous complaints and lawsuits, the U.S. Congress revisited SIJ in subsequent efforts to clarify its intent in 1997, 2003, and 2009. These court cases and legislative modifications clarified some of the jurisdictional issues, accelerated or resolved delays in processing applications, attended to age-out provisions, which deemed youth with a pending application who reached eighteen as ineligible, and addressed issue of “specific consent” procedures.<sup>§§§§</sup>

In 2008, the Trafficking Victims Protection Reauthorization Act (TVRA) replaced the language “eligible for long-term foster care due to abandonment, abuse, or neglect” with “reunification with one or both parents is not viable due to abandonment, abuse, neglect or a similar basis” (Pub. L. 110-457, 122 Stat. 5044 (2008), INA 101(a)(27)(J)). This modification broadened the eligibility for SIJ for children who could not reunify with both parents to children who could not reunify with only one parent. In other words, in theory, a child feeling abuse by one parent in her home country could reside with a non-abusive parent in the U.S. However, in practice, one-parent SIJ findings have been difficult to secure.<sup>37</sup>

Since the early 2000s, the number of successful SIJ petitions has spiked. In fiscal year 2005, USCIS approved 660 SIJ petitions.<sup>38</sup> The number rose to 1590 in fiscal year 2010 and to 3434 approved petitions in

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<sup>+++</sup> See *Gao v Jenifer* (1999). See Heidbrink 2014.

<sup>§§§§</sup> The Department of Homeland Security entered into a Settlement Agreement in 2008. Settlement Agreement, *Perez-Olano v. Holder*, No. CV 05-3604 (C.D. Cal. 2010), [http://www.uscis.gov/USCIS/Laws/Legal%20Settlement%20Notices%20and%20Agreements/Perez-Olano%20v%20Holder/Signed\\_Settlement\\_Agreement.pdf](http://www.uscis.gov/USCIS/Laws/Legal%20Settlement%20Notices%20and%20Agreements/Perez-Olano%20v%20Holder/Signed_Settlement_Agreement.pdf). Prior to *Perez-Olano v. Holder*, children in actual or constructive federal custody required *specific consent* from DHS/ICE before proceeding into state court for a dependency finding. 8 U.S.C.A. § 1101 (a)(27)(J)(iii)(I) (West 2012). In January 2008, a federal district court in California decided that unaccompanied children were not required to seek “specific consent” from ICE prior to entering state court in petitions for SIJ. *Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 264 (C.D. Cal. 2008).

fiscal year 2013.<sup>39</sup> This increase reflects a rise in the number of unaccompanied children detained in the U.S. and their zealous advocates who have sought SIJ on behalf of their clients. The rise also reflects proactive child welfare services in jurisdictions like Los Angeles County that pursue immigration relief on behalf of their young charges.

Despite various revisions, the fundamental principle underlying SIJ has only concretized: children claiming SIJ must be shorn of kinship ties and become dependents of the state (via its proxy as the ORR or the juvenile court).<sup>\*\*\*\*</sup> Under SIJ a child forfeits any right to petition for his or her parents or siblings to immigrate. Further, since a special immigrant juvenile status recipient is “no longer the ‘child’ of an abusive parent, the CIS (U.S. Citizenship and Immigration Services) may assert that he or she no longer has any sibling relationship with brothers and sisters.”<sup>40(p9)</sup> As such, SIJ suffers from a “legal aconsanguinity” in which “immigration policies nullify legal legitimacy of some kinship ties.”<sup>41(p32-33),42(p427)††††</sup>

Not only does SIJ prohibit the simultaneity of allegiance to kinship networks and to the state, but also requires children seeking SIJ to, in effect, sustain legal charges against their parent or parents. Children who are abused, abandoned, or neglected by one parent become a public charge of the state, a relevant factor in the parent’s petition for legal relief. If a child receives SIJ status, the immigration court may deem the parent as exhibiting moral turpitude, an irreconcilable value with granting of legal status and citizenship to the parent.

The question arises: Are attorneys creatively pursuing SIJ on behalf of children for whom this form of legal relief is not well-suited? Is the long-term damage to social relationships of unaccompanied children an unintended side-effect of an ill-suited legal process? Attorneys must balance their professional commitment to zealously advocate on behalf of their clients with recognition that the complex experiences of migrant children do not easily fit into the few forms of immigration relief available to them. A seasoned immigration attorney observed, “It’s like forcing a

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<sup>\*\*\*\*</sup> It is important to note that SIJ in state court does not necessarily require the termination of parental rights, though it does happen with frequency.

<sup>††††</sup> A child granted SIJ status could apply for a sibling but must first become a naturalized U.S. citizen, which requires a five-year waiting period following the child’s adjustment of status to a legal permanent resident, and must be over twenty-one before applying for the sibling(s) to immigrate to the United States. Currently, there is a backlog of over ten years for sibling petitions of U.S. citizens. Immigration law is very clear that a child granted SIJ status cannot petition for his or her parent(s), stating “no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter” (INA, 8 U.S.C. §1101(a)(27)(J)(iii)(II)).



square peg into a round hole because it is the only hole we have. Instead, we need to drill more holes” (personal interview). Forced to navigate this convoluted and ethically murky terrain, attorneys are routinely placed in positions of power over children and their narratives. Attorneys routinely must grapple with how to distill a child’s narrative into the requisite eligibility criteria without reifying the child victim into the law. In representing unaccompanied migrant children in SIJ proceedings, attorneys require a nuanced and culturally-informed approach, recognizing the potential consequences of pursuing SIJ, while, at the same time, advocating for new forms of legal relief that better reflect the complexity of children’s experiences.

**“Who are the perpetrators? Who are the victims?”**

To illustrate the tensions that emerge with SIJ, I provide three ethnographic vignettes that represent trends from my research with unaccompanied children and their families. These narratives balance the unique and diverse experiences of youth migrants with the themes identified during a larger study from which this article emerges.<sup>3</sup>

Lucia<sup>\*\*\*\*</sup>, a 34 year old Mexican woman, was convicted for a series of shoplifting offenses and sent to jail, leaving her daughter Leticia as a dependent of the court. Following Lucia’s release, she later told me, “I thought Leticia would be better without me. I had no money, nowhere to live, and no papers” (personal interview). A child protective services (CPS) agency petitioned for SIJ for Leticia based on abandonment by her mother. Lucia eventually secured employment and had two more children with her U.S.-citizen husband. In evaluating her petition to adjust her status, USCIS discovered that Leticia received SIJ and claimed that on the grounds of moral turpitude of abandoning her child, Lucia’s application for lawful permanent residency was denied. The legal issues facing unaccompanied children, whether detained or not, have grave implications for the entire family system. “Who are the perpetrators? Who are the victims? It is hardly ever clear. . .and these families don’t have the money to clean this up,” lamented a social worker (personal interview).

Johanna’s letter to her mother which opened this article explaining her inability to remit money speaks to how youth are caught between familial obligations, legal permanency via the state, and the subsequent institutional practices shaping their everyday lives. In initial meetings with her attorneys, Johanna did not believe her mother had abused or neglected her. “I did what I wanted to do. My mom did not control me. She

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<sup>\*\*\*\*</sup> Following disciplinary custom, I use pseudonyms for all research participants.

worked hard to provide for us. My problems are my responsibilities. It has nothing to do with her” (personal interview). Unbeknownst to her mother, Johanna had been sexually abused by a neighbor, and on the basis of her mother’s failure to protect Johanna from the repeated abuse, attorneys identified Johanna as eligible for SIJ. Initially resistant, Johanna asked, “She is not a bad person. She didn’t know. How could she do anything to stop it?” Johanna maintained a deep emotional bond to her mother and her younger siblings, though a relationship complicated by her history of abuse and her rebelliousness during her pre-teen years. Gradually understanding that her release from detention and placement in foster care was contingent upon her claim of SIJ, Johanna astutely explained to me, “My mom has to be the bad one. She wants the best for me. She will understand” (personal interview).

Since her placement in federal foster care, Johanna has been reluctant to explain that she cannot extend her legal status to her mother or siblings, instead continuing to promise to bring them to the United States. Her inability to remit money to support her family, a restriction of the federal foster care program, has only frustrated Johanna’s relationship with her mother. “She wonders if I love her anymore. She thinks I have a new family” (personal interview). Her mother’s request for financial support resulted in the monitoring of their phone calls for six weeks rather than its assistance of Johanna in meeting her social and financial obligations to her family. Struggling with her inability to assist her mother and three siblings, Johanna drafted a letter to convey her ongoing commitment to her “real mother” in spite of her inability to fulfill her social obligations to them.

In meeting with pro bono attorneys who had agreed to represent him, Elias, then a 17 year old indigenous youth from San Marcos, Guatemala, quietly corrected them: “They trust me to work and not get in trouble and to always remember them. They didn’t send me. I came” (personal interview). The decision to migrate is often a collective one; and while public discourse on unaccompanied children cast them as victims of poor or manipulative parental decisions, allowing their children to undertake a life-threatening journey across multiple international borders, the cultural context of migration proved difficult for Elias’ attorneys to comprehend. His attorney later remarked to me, “What parents puts their kid in the hands of a criminal, sends them on this treacherous trip, and tells them to work? What kind of parent does that? It’s just not right” (personal interview).

During his migration to the U.S., Elias was brutalized by *coyotes* (smugglers) to whom his parents had paid US\$7,500 to transport him

through Mexico and into the United States. Upon learning he had two brothers working in the U.S., the smugglers held Elias for ransom in a drop-house in Mexico, threatening to kill him unless his family paid an additional US\$500 to secure his release. Elias' attorneys were now pursuing SIJ, making several interrelated arguments. First, Elias' parents did not support him attending school, forcing him to drop out at age 10 to work on the family farm. Second, when the family's crop failed two consecutive seasons, his parents placed Elias in the hands of human smugglers with little regard to Elias' safety and well-being, instead motivated by their own financial interests in their son potential earnings. Third, now in the United States, Elias parents obligated him to pay back the now \$8,000 of accumulated migration debt and ransom plus 8% monthly interest. In effect, as his attorneys argued, Elias' parents had neglected his education and well-being, constructively abandoning him to criminals, and continued to abuse him by forcing him to labor for several years to pay for the parents' loans. After nine months in ORR custody, Elias recognized that his release was contingent upon securing SIJ, yet he could not reconcile his attorney's depictions of his parents with his understanding of their realities and motivations.<sup>§§§§§</sup> Elias eventually abandoned his claim for SIJ and petitioned for voluntary departure to Guatemala.

Each of these ethnographic vignettes demonstrates the unintended consequences of Special Immigrant Juvenile status and the ways that children are forced to choose between kinship ties, legal and imagined, and the legal status provided by the state. In spite of best intentions, SIJ fails to consider the complex, transnational relationships between migrant children and their families, ignoring the multiple and simultaneous obligations to one's own future but also to one's family's survival. For Lucia, her daughter Leticia's SIJ petition became evidence against her fitness as a parent. For Johanna, the effects of SIJ reverberated long after she secured legal status, calling into question her allegiances to her mother and belonging to her family in spite of her physical separation. Plagued by guilt and limited by institutional interventions, Johanna struggled to reconcile her past with her future. Recognizing the precarious

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<sup>§§§§§</sup> One of the few benevolent aspects of immigration law in regards to children allows for their release from detention to a family member or sponsor while they continue in removal proceedings. While his two brothers completed the family reunification process, ORR deemed them as not viable placements, leaving Elias in custody for several months. Because of his age of 17, there were no federal foster care programs who were willing to accept Elias without having secured legal status, as his funding would "run-on" on his 18<sup>th</sup> birthday.

and compromising position which SIJ might place him, Elias evaded the “choice” to remain in the U.S. by returning to Guatemala. SIJ provides critical protection and security for children like Leticia, Johanna, and Elias who have been abused, abandoned or neglected, yet attention must be paid to the unintended and long-term consequences of manufacturing a choice between the family and the state, a choice which fails to reflect the complex and fluid relationships of some transnational families.

### Conclusion

In this article, I have argued that changes in immigration law for unaccompanied children, including provisions for SIJ status, have shifted the relationship between the state, the family, and the child, positioning the state at odds with lived kinship structures. Without an individual relationship to the state or recognition of their legal rights, unauthorized youth are forced to choose between the state (and partial citizenship) and existing kinship ties. By interrogating legal interventions, such as political asylum and SIJ, this article argues that the forms of legal relief available to migrant children fail to recognize the social agency of young people who challenge romanticized notions of childhood and social norms of the nuclear, geographically-fixed family. In response to the independent presence of unaccompanied children, the state provides care for youth including food, shelter, and medical attention; yet simultaneously, due to their unauthorized entry, state institutions initiate deportation proceedings against unaccompanied youth. As such, youth encounter the state as both paternal protector and punishing regulator. The policies and practices of the state in response to the presence of unaccompanied children reveal how the state operates through an ideal of a unified entity yet splinters into a multipronged labyrinth with potentially conflicting objectives for solving the “problem” of migrant youth. Amid contentious national debates on immigration and security, this article argues that the law’s false choice—between the family and the state—challenges the historic reputation of the United States as a place of refuge for the most vulnerable—children.

An influx of unaccompanied children from Central American to the U.S. in 2014, an eightfold increase from the previous year, extends the urgency to effectively respond to the needs of migrant children and youth. In recognizing youth as social and collective actors, the following policies are critical:

- 1. U.S. immigration law must recognize children’s legal rights to due process and protection.** Appointing attorneys and guardians ad litem to children at the government’s expense is an essential step in allowing children a fair opportunity to present their claims for

legal relief.

2. **U.S. immigration law must incorporate a best interests standard.** Consistent with both international law and best practices in domestic child welfare, meaningfully incorporating a best interests standard into immigration law will allow for the consideration of the safety and well-being of migrant children beyond the few forms of legal relief available to them.
3. **U.S. immigration law must permit immigration status to flow from a minor-child to parent.** Allowing legal status to flow from a minor child to a nonabusive parent would guard against the separation of children from their families. This policy would impact not only SIJ beneficiaries but also over 4 million mixed-status families residing in the U.S.<sup>43</sup>
4. **Refugee law is in need of urgent and comprehensive reform.** The changing nature of conflict, the shifting role of the nation-state, the development of powerful state-like actors including gangs and cartels, and child specific harms such as forced recruitment into gangs and armed forces, all pose challenges to current configurations of international refugee law and by extension, U.S. immigration law. Expanding refugee protections to reflect these changes not only will better protect children, but also will recognize the dynamic and fluid nature of transnational families in an increasingly global society.

### References

1. Mason MA. *From Father's Property to Children's Rights: A History of Child Custody*. New York: Columbia University Press; 1994.
2. Coe C, Re, Reynolds RR, Boehm DA, Hess JM, Rae-Espinoza H, eds. *Everyday Ruptures: Children, Youth, and Migration in Global Perspective*. Nashville, Tennessee: Vanderbilt University Press; 2011.
3. Heidbrink L. *Migrant Youth, Transnational Families, and the State: Care and Contested Interests*. Philadelphia: University of Pennsylvania Press; 2014.
4. James A, James A. *Constructing Childhood: Theory, Policy and Social Practice*. London: Palgrave Macmillan; 2004.
5. Murray TH. *The Worth of a Child*. Berkeley: University of California Press; 1996.
6. Grossberg M. *Governing the Hearth: Law and the Family in Nineteenth-Century America*. Chapel Hill: University of North Carolina Press; 1985.
7. Cohen S. *Folk Devils and Moral Panics: The Creation of the Mods and Rockers*. New York: St. Martin's; 1972.
8. Davin A. When is a child not a child? In: Corr H, Jamieson L, eds. *Politics of Everyday Life: Continuity and Change in Work and the Family*. London: Macmillan; 1990:37–61.
9. Pearson G. *Hooligan: A History of Respectable Fears*. London: Macmillan; 1985.
10. Rose NS. *Governing the Soul: The Shaping of the Private Self*. London: Routledge; 1989.
11. Zelizer V. *Pricing the Priceless Child: The Changing Social Value of Children*. New York: Basic Books; 1985.
12. Platt AM. *The Child Savers: The Invention of Delinquency*. Chicago: University of Chicago; 1969.
13. Schultz JL. The cycle of juvenile court history. *Crime Delinquency*. 1973;19(4):457–476. doi:10.1177/001112877301900402
14. Gordon C. Governmental rationality: An introduction. In: Burchell G, Gordon C, Miller P, eds. *The Foucault Effect: Studies in Governmentality*. Chicago: University of Chicago Press; 1991:1–51.
15. Lloyd A. Regulating consent: Protecting undocumented immigrant children from their (evil) step-uncle sam, or how to ameliorate the impact of the 1997 amendments to the SIJ law. *Boston University Public Interest Law J*. 2006;15:237–261.
16. Woodhouse BB. "Who owns the child?": Meyer and Pierce and the child as property. *William Mary Law Rev*. 1992;33(4):995–1122.

17. Thronson DB. Kids will be kids? Reconsidering conceptions of children's rights underlying immigration law. *Ohio State Law J.* 2002;63:979–1016.
18. Grossberg M. Changing conceptions of child welfare in the United States, 1820–1935. In: Rosenheim M, Zimring FE, Tanenhaus DS, Dohrn B, eds. *A Century of Juvenile Justice*. Chicago: University of Chicago Press; 2002:3–41.
19. Sutton JR. *Stubborn Children: Controlling Delinquency in the United States, 1640–1981*. Berkeley: University of California Press; 1988.
20. Donzelot J. *The Policing of Families*. New York: Pantheon; 1979.
21. Foucault M. *Discipline and Punish: The Birth of the Prison*. Random House LLC; 1977.
22. Bien R. Nothing to declare but their childhood: Reforming U.S. asylum law to protect the rights of children. *J Law Policy.* 2004;12:797–842.
23. Ngai M. *Impossible Subjects: Illegal Aliens and the Making of Modern America*. Princeton, N.J.: Princeton University Press; 2004.
24. Nessel L. Forced to choose: Torture, family reunification, and United States immigration policy. *Temple Law Rev.* 2005;78:897–948.
25. *Polovchak v. Meese*, 774 F2d 731 (7th Circuit 1985).
26. Schneider, DM. *American Kinship: A Cultural Account*. Englewood Cliffs, New Jersey: Prentice Hall; 1968.
27. Glenn, E. *Unequal Freedom: How Race and Gender Shaped American Citizenship and Labor*. Cambridge, Mass.: Harvard University Press; 2002.
28. Jans M. Children as citizens: Towards a contemporary notion of child participation. *Childhood.* 2004;11(1):27–44. doi:10.1177/0907568204040182
29. Leiter V, McDonald J, Jacobson H. Challenges to children's independent citizenship: Immigration, family and the state. *Childhood.* 2006;13 (1):11–27. doi:10.1177/0907568206059978
30. O'Neil J. Is the child a political subject? *Childhood.* 1997;4(2):241–250. doi:10.1177/0907568297004002007
31. Garcia MC. *Seeking Refuge: Central American Migration to Mexico, the United States, and Canada*. Berkeley: University of California Press; 2006.
32. Hagan JM. *Deciding to Be Legal: A Maya Community in Houston*. Philadelphia: Temple University Press; 1994.
33. Orellana MF, Thorne B, Chee A, Lam W. Transnational childhoods:

- The participation of children in processes of family migration. *Social Problems*. 2001;48(4):572–591.
34. Ajemani, A. *Alone and Ignored: Unaccompanied Alien Children Seeking Asylum in the United States, Canada and Australia*. Unpublished paper; 2007.
  35. Bhabha J. Internationalist gatekeepers? The tension between asylum advocacy and human rights. *Harvard Human Rights J*. 2002;15:155–181.
  36. Hamm D. Special immigrant juvenile status: A life jacket for immigrant youth. *J Poverty Law Policy*. 2004;38(5–6):323–28.
  37. Johnson M, Stewart K; American Immigration Lawyers Association. Unequal access to special immigrant juvenile status: State court adjudication of one-parent cases. <http://apps.americanbar.org/litigation/committees/childrights/content/articles/summer2014-0714-unequal-access-special-immigrant-juvenile-status-state-court-adjudication-one-parent-cases.html>. Published July 14, 2014.
  38. Office of Immigration Statistics. 2005 Yearbook of Immigration Statistics Department of Homeland Security. [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS\\_2005\\_Yearbook.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005_Yearbook.pdf). Published 2006.
  39. U.S. Citizenship and Immigration Services. Consolidated Operational Repository. Department of Homeland Security, <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Adjustment%20of%20Status/I-360FY2013.pdf>. Published 2013.
  40. Kinoshita S, Brady K. *Special Immigrant Juvenile Status for Children under Juvenile Court Jurisdiction*. San Francisco: Immigrant Legal Resource Center; 2005.
  41. Coutin SB. *Legalizing Moves: Salvadoran Immigrants' Struggle for U.S. Residency*. Ann Arbor: University of Michigan Press; 2000.
  42. De Genova NP. Migrant 'illegality' and deportability in everyday life. *Annu Rev Anthropol*. 2002;31:419–447.
  43. Passel JS, Cohn D; Pew Research Hispanic Trends Project. A portrait of unauthorized immigrants in the United States. <http://www.pewhispanic.org/2009/04/14/a-portrait-of-unauthorized-immigrants-in-the-united-states/>. Published April 14, 2009.