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ARTICLE

Offering protection to immigrant youths in America: Is asylum or Special Immigrant Juvenile Status truly in the best interest of the child?

Erin L. McAuliffe | **Yakirah Mitchel**

Department of Sociology, University of Michigan, Ann Arbor, Michigan, USA

Correspondence
Erin L. McAuliffe, Department of Sociology, University of Michigan, 500 S. State St., Rm. 3001, Ann Arbor, MI 48109, USA.
Email: erinlymc@umich.edu

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Abstract

In the United States (US), children's 'best interest' principles are central to child welfare policy, but their incorporation into immigration laws is less robust. Drawing on data from international and domestic policies, interviews with legal professionals and legal guidelines, we compare how Special Immigrant Juvenile Status (SIJS) and asylum – the main forms of immigration relief for undocumented youths in the US – align with children's best interest principles. SIJS, while promising, undermines family integrity by imposing rigid child-rearing standards that may penalize immigrant families. Asylum upholds family integrity, but the application process involves intense interviews and strict evidentiary standards that harm youths' well-being. Given asylum's high denial rates, the process often results in trauma without much promise of the permanency asylum can offer. Consequently, both SIJS and asylum fall short of protecting children's rights and best interests. We argue that how legal systems manage youths significantly affects youths' well-being and their access to rights and benefits. The impact of legal processes on youths should be paramount to best interest policies and practices. We conclude with policy recommendations for SIJS and asylum that better promote children's best interests.

1 | INTRODUCTION

Children's 'best interest' principles are enshrined in both international law and domestic state statutes in the United States (US). Key tenets include upholding family integrity, providing children with a permanent living environment, ensuring the health and safety of the child and considering the

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child's wishes in their welfare decisions. Despite the US' failure to adopt and implement the United Nations' (1990) Convention on the Rights of the Child (CRC), similar 'best interest' principles have become central to US laws, court decision-making and child welfare advocacy. Their incorporation into immigration law and practice, however, remains debated.

In this article, we analyse how Special Immigrant Juvenile Status (SIJS) and asylum – the two primary forms of immigration relief available to undocumented immigrant youths present in the US – reflect children's best interest principles. Both offer recipients a path to US citizenship but through different conceptualizations of victims in need of protection and different procedures for viewing and handling youths. SIJS is a form of immigration legal relief available to unmarried immigrant youths under age 21 who have experienced abuse, abandonment or neglect. Asylum is available to immigrants of all ages who have been persecuted or who fear persecution in their home country as a result of their race, religion, nationality, political opinion or membership in a particular social group. We conceptualize undocumented immigrant youths as individuals under age 21 who enter the US without inspection. This population includes youths formally designated as Unaccompanied Alien Children (UACs)[1] by the U.S. Citizenship and Immigration Services (USCIS) and youths who crossed with or reunited with family members in the US. We do not consider the immigration legal experiences of minors formally registered as refugees by the United Nations High Commissioner for Refugees (UNHCR) because youths who enter the US with a formal refugee designation do not go through the same legal petitioning process as non-refugee designated immigration youths to determine their eligibility for legal protections in the US. Our analysis largely captures the experiences of youths fleeing economic deprivation and gang-inflicted violence in Central America, notably in Guatemala, Honduras and El Salvador, who constitute a large percentage of immigrant youths entering the US without inspection and petitioning for either asylum or SIJS (Office of Refugee Resettlement [ORR], 2023).

We ask: How do SIJS and asylum incorporate and contradict key tenets of 'children's best interest' principles? What reforms are needed to better incorporate children's best interests in SIJS and asylum? We exemplify how the US immigration and child welfare systems fall short in upholding 'a child's best interest' in both asylum and SIJS cases. Although SIJS is the first and only child-specific form of immigration relief that specifically considers a 'child's best interest' (Heidbrink, 2014b; Jameson, 2020), contributing to eligibility criteria and procedures that make it easier for youths to secure SIJS than asylum, we argue that SIJS fails to uphold important principles of family integrity. On the other hand, although asylum protects family integrity, the intensive interview requirements and criteria standards of asylum threaten youths' emotional and physical well-being. Because of asylum's limited viability, youths endure this trauma without the promise of permanency. We then use the comparison of the SIJS and asylum process for youths to argue that in addition to considerations of family unity and permanency, which often focus on the best situational *outcomes* for youths, children's best interest practices in US legal systems need to consider how legal *processes* affect children's rights and well-being. As we demonstrate, legal procedures and legal professionals' handling of youths can compromise or support youths' well-being and access to important rights and protections. Although both asylum and SIJS fall short of adhering to children's best interest principles, SIJS remains the better option for youths because it is both a more successful and less traumatic procedure than asylum for applicants. We conclude with policy recommendations for SIJS and asylum that better promote children's best interests.

2 | DATA AND METHODS

We analysed the international treaties and US child welfare policies that first introduced principles of children's best interests to identify and compare how children's best interests and rights were conceptualized in international and domestic legal frameworks. We analysed interview transcripts and notes from 57 interviews conducted by the lead author over Zoom with attorneys and social workers

supporting immigrant youths' SIJS and asylum applications and state court judges familiar with SIJS cases in their courtrooms. Although these interviews were intended to capture relevant professionals' experiences with SIJS, interviewees often discussed their experiences with or feelings about SIJS comparative to the asylum process. The importance of a comparative analysis between the SIJS and asylum process thus emerged through these interview data, influencing a coding schema focused on comparisons between the two immigration legal opportunities. Additionally, attorneys' discussions of children's best interests focused on how youths were handled by the immigration and child welfare systems in asylum and SIJS, prompting our investigation into how youths' experiences with legal processes reflect their best interest. We identified key components of children's best interest principles from international and domestic policies and laws, and these themes were used by the lead author and a research assistant to code interview transcripts with the support of a qualitative analysis software. For additional insight into some of the codes and excerpts used to substantiate this article's argument, see Table A1.

Interviewees were emailed an informed consent document when recruited, and the lead author read the document aloud prior to beginning the interview and received each individual's verbal consent to participate and, in most cases, be audio recorded. Recorded interviews were transcribed verbatim, and, where interviewees did not consent to audio recording, the lead author took extensive notes, which were subsequently typed up for analysis. All names of interviewees are pseudonyms. Finally, we analysed legal guidelines – sometimes called state court bench books – for lawyers and judges and U.S. Government policy memoranda and manuals to examine how children's 'best interests' were discussed in asylum and SIJS policy discussions and guidelines for professionals. We identified these documents through the interviews with professionals.

3 | THE PUNITIVE AND RECEPTIVE POLICIES OF US IMMIGRATION GOVERNANCE

Immigration scholarship shows how rising anti-immigrant nationalism has invigorated punitive immigration policies, resulting in the criminalization of immigrants and high rates of deportation (Brotherton & Kretsedemas, 2008; Fassin, 2011; Menjívar et al., 2018). But states also make humanitarian exceptions for immigrants they consider deserving of protection (Chauvin & Garces-Mascarenas, 2014; Galli, 2020; Lakhani, 2013). These humanitarian protections, however, are often compounded by the structural violence of the immigration state (Ticktin, 2011).

Humanitarian protections for immigrants emerged following the Second World War. Initial refugee laws from the 1940s to the 1970s in the US extended protection only to populations fleeing specific political regimes. In the 1980s and 1990s, however, the US expanded humanitarian protections and benefits to immigrants that provided amnesty and a pathway to legal permanent residency for broader categories of immigrants (Baker, 1997; Calavita, 1989; Coutin, 2011). But the expansion of benefits to more immigrants, particularly those who had entered the country without formal inspection, raised anxieties for state officials concerned with controlling unplanned, unauthorized and unsolicited migration (Coutin, 2011; Gorman, 2017).

Immigration policy in the 1980s and 1990s exemplifies the tension between immigrant humanitarianism and criminalization, showing how opportunities for immigrant amnesty have been met with the intensification of immigration controls (Brotherton & Kretsedemas, 2008; Menjívar et al., 2018; Stumpf, 2006). With regard to immigrant youths specifically, the increasing criminalization of immigrants resulted in harsh family separation policies that removed children from their parents' care in the name of 'protecting' children from the conditions of imprisonment (Stumpf, 2020). These youths became classified as UACs by the U.S. Government and placed in shelters alongside immigrant youths who migrated alone.[2] Many of these youths entered the US child welfare system, particularly in absence of clear family reunification procedures for unaccompanied and separated immigrant youths.

All immigrants – adults and children alike – must navigate opportunities for humanitarian protection within an increasingly punitive immigration landscape. Children who migrate or reunify with a parent who can successfully petition for immigration legal relief, such as asylum, have the benefit of receiving the same protections as a derivative recipient. However, children who are separated from, or not accompanied by, a parent, or whose parent cannot successfully petition for legal relief, must apply for immigration legal relief on their own. SIJS introduced the first and only child-specific form of immigration relief that specifically considers a 'child's best interest' (Heidbrink, 2014b; Jameson, 2020). But what is meant by a child's 'best interest', and why is it considered paramount?

4 | PRINCIPLES AND PRACTICES: IN THE BEST INTEREST OF THE CHILD

The 'best interest of the child' framework appears in international treaties, domestic child welfare laws and guidelines for working with youths. Across these international and US domestic legal frameworks, there is neither a standard definition nor a uniform practice for 'best interest' determinations (Banach, 1998; Kelly, 1997; Rodriguez, 2016). How decisions about children's best interests are made is often an act of discretion. However, in both international and US domestic policies and laws, certain principles are considered paramount to children's best interests, such as family integrity and permanency.

Family integrity, or family unity, is considered to be the key tenet of children's best interest principles. According to the CRC (1990), children have a right to family unity and to be raised by their biological parents (Art. 7, 9 and 10), which is a right that the US has also upheld in Supreme Court Decisions (U.S. Supreme Court, 1972; U.S. Supreme Court, 2000). In domestic legislation, the US first began explicitly prioritizing family reunification through the 1980 Adoption Assistance and Child Welfare Act (1980 AACWA) in response to the increasing number of African American children being removed from their homes (Reich, 2008; Roberts, 2002). According to the 1980 AACWA, states must make 'reasonable efforts to prevent or eliminate the need for removal of the child from his home and make it possible for a child to return home' (Section 471(a)(15)). Prior to the 1980 AACWA, child welfare interventions operated to instil white middle-class family values in children, prioritizing removal over family preservation (Hubner & Wolfson, 1998; Platt, 1969; Reich, 2008).

Permanency is also central to children's best interests. According to the CRC, a child has a right to an 'appropriate and stable family-based solution' when their family cannot care for them (CRC Preamble). Similar concerns are also reflected in US domestic child welfare policy. In the US, issues regarding permanency in child welfare interventions emerged in response to children's tenure in foster care (Moye & Rinker, 2002). The 1997 Adoption and Safe Families Act (1997 ASFA) elevated the importance of permanency by limiting the time parents have to complete court services to 22 months before initiating the process to terminate their rights (Curtis & Denby, 2003; Lercara, 2016; Moye & Rinker, 2002). These policies reveal the tension between family integrity and permanency in child welfare decisions as well as demonstrate how US domestic approaches to parents' and children's rights have shifted alongside the passage of international legislation, even though the US has not ratified the CRC (Kernan & Lansford, 2004; Whitt-Woosley & Sprang, 2014; Wilkinson-Hagen, 2004).

Family integrity and permanency principles consider *outcomes* in the best interest of the child, but these principles do not address considerations for how involvement in the legal *process* impacts youths. The legal system's handling of youths, however, has a significant impact on their well-being. How legal processes manage youths, and the types of opportunities afforded through different approaches, should be paramount to policy considerations regarding their best interests. As we show next, permanency and family integrity not only come into conflict as undocumented immigrant youths pursue legal relief on humanitarian grounds, but these processes pinpoint the crucial need to consider the impact of legal processes in evaluating children's best interests.

5 | 'BEST INTEREST' PRINCIPLES IN US IMMIGRATION POLICIES

As discussed above, international conventions and US welfare policies address 'best interest' principles for children; however, US immigration laws neither explicitly discuss nor outline obligations for federal authorities to consider children's 'best interests' in decision-making, save for one exception. The 1990 Immigration Act added SIJS as an immigration relief for court-dependent immigrant children. The definition and eligibility for SIJS have expanded since its inception in 1990. Today, eligibility for SIJS requires a 'predicate finding' – a state court finding – that the child cannot reunify with one or both parents due to abuse, abandonment or neglect, and it is not in their 'best interest' to return to their home country (Immigration Act of 1990, 8 U.S.C. § 1101(a)(27)(J)). SIJS thus became the only component of immigration law to explicitly consider children's 'best interests'.

In recent decades, certain immigration practices have incorporated 'best interest' considerations for handling youths. For example, in 1998, the former immigration authorities, the Immigration and Naturalization Service (INS),[3] outlined child interviewing techniques for asylum officers (U.S. Department of Justice, 1998). In 2007, the Executive Office for Immigration Review (EOIR) issued guidelines for federal judges confronting undocumented immigrant youths in immigration courts, describing the 'best interest' standard as a factor relating to immigration judges' discretion in ensuring a child-appropriate court environment (OPPM 07-01). However, a 2017 revised guideline removed the 'best interest' language in discussing judges' discretion, stating that the Immigration and Nationality Act (INA) does not direct immigration judges to consider children's 'best interest' as a legal standard for determining removability or eligibility for relief (Bronstein & Cutlip-Mason, 2018; OPPM 17-03).

Pivotal to considerations of children's best interests in immigration matters, however, is the 2008 William Wilberforce Trafficking Victims Protection Reauthorization Act (2008 TVPRA). The 2008 TVPRA explicitly mentions children's best interest in two instances: (1) a minor (individual under the age of 18) in the custody of the HHS 'shall be promptly placed in the least restrictive setting that is in the best interest of the child' (Section 235(b)(4)(2)), and (2) the Secretary of HHS can appoint a child advocate who can 'effectively advocate for the best interest of the child' (Section 235(b)(6)). Additionally, the 2008 TVPRA requires DHS to refer apprehended minors to the ORR, a programme office within HHS, within 72 h. These changes facilitate better care arrangements for immigrant youths, such as family reunification and foster care placements, which can have a positive impact on their sense of support, educational opportunities and mental well-being (Aleghfeli & Hunt, 2022; Mitra & Hodes, 2019; O'Higgens et al., 2018).

A glance at how immigration policy engages children's 'best interest' principles reveals a focus on improving the legal process for youths rather than on welfare outcomes, such as placement or status. In the next sections, we compare how SIJS and asylum incorporate family integrity and permanency. We use this comparison to advocate for considering the impact of the legal process on youths' well-being as an additional key tenet of children's best interest practices. How youths are managed by various legal systems and legal professionals has a clear impact on their access to benefits and rights, as well as on their emotional and physical well-being.

6 | SIJS: A CHILD-SPECIFIC FORM OF LEGAL RELIEF

SIJS is formally the only US immigration policy to explicitly consider a child's best interests in their eligibility for legal relief, which has contributed to eligibility criteria and procedures that make it easier for youths to secure SIJS. Immigrant youths seeking SIJS must first obtain a state court 'predicate order' that finds reunification with at least one of their parents not viable due to abuse, abandonment and/or neglect. In the US, states have broad definitions of abuse, abandonment and neglect, which can operate to conflate these issues with the challenges of poverty, disproportionately impacting already marginalized families of colour and those of lower socio-economic status. But these broad definitions also make it easier for youths to establish SIJS eligibility. The predicate order must also indicate the

best permanent living plan for the child by concluding that it is not in the child's best interest to return to their home country. For SIJS seekers, the best interest findings often compare 'levels of violence, educational or employment opportunities' between the US and the home country, and where the child has a stable caregiver (Cooper, 2017). The state predicate order constitutes the primary eligibility documentation required for the immigration relief application with USCIS.

In incorporating state court decisions into the SIJS process, Congress acknowledges the state courts' authority over child and family welfare. This recognition is detailed in the bench books used by state court judges (State Justice Institute, 2015; Washington Leadership Institute, 2016). State court judges themselves also echo the belief that state courts *should* have the authority to handle such immigrant youths and make important decisions about their best interests and well-being. Sonia, a state court judge, shares, 'the state court is in a much better position to get information about child abuse and neglect than the federal courts. It is not in the federal court's purview of information to address [these matters]'. These feelings have been reinforced by federal authorities, who declare that it is 'impractical and inappropriate for [immigration authorities] to routinely re-adjudicate' the SIJS state court findings (Code of Federal Regulations, 1993). State court judges, who operate within a model of inclusiveness in extending protections, thus become gate-openers to immigration protections in facilitated youths' access to SIJS.

In addition to making SIJS a more successful pathway to immigration legal relief for youths, the state court process also creates a more positive experience for youths (and their attorneys) compared with the asylum process in immigration courts and with immigration authorities. Attorneys often describe the benefits of being in state court:

> I would much rather a juvenile court make decisions that could benefit children than leave it to an immigration judge. In state court, there is more of an emphasis on children's well-being, and in immigration court they are not even necessarily seen as children. Immigration court is intimidating, and they talk to the youth like they are dangerous criminals. But in state court, they talk to youths like children who have opinions and should be respected. (Isabel, Attorney)

As attorneys mention, the different ways that child welfare and immigration legal systems handle youths contribute to SIJS being a better option in support of children's well-being. Attorneys often compare how youths are handled by state legal structures in SIJS and federal immigration legal structures in asylum to make their claims. In addition to discussing how state courts were more prepared and structured to see children's needs and interests, they also discuss how, compared to asylum procedures, state court requirements during SIJS were created or adjusted to reduce the potential negative or traumatic impacts on youths. Emily, an attorney, explains:

> Asylum is much harder for the client to get [than SIJS]. They have to tell their story for asylum on a level that they don't have to necessarily tell it for SIJS. There are certain facts that need to be known for SIJS, but you don't have to show all the details. For asylum, you really need to show the details, and you really do have to show the real physical or emotional harm. Kids really have to walk through all these events and how they affected them. Asylum is much more invasive. With SIJS, the petition includes a declaration that the attorney can write based on their discussions with the kid. (Emily, attorney)

Unlike the state child welfare procedures and decisions, asylum operates on an exclusive model driven by suspicion of undocumented immigrants, leading adjudicators to seek reasons to deny rather than approve claims. This results in youths, and their attorneys, having to articulate details of trauma extensively during asylum petitions. With SIJS, a child does not need to relive and repeat the details of their traumas to the same extent that they do in an asylum process. SIJS applicants often only need to share with their attorney and/or supporting social worker. These experiences from legal professionals support the reason for including state courts in determining eligibility for SIJS: They are trained to work

with children and understand matters pertaining to their welfare. The inherent child-specific nature of SIJS is one way in which SIJS varies greatly from asylum. This distinction, and the ways in which the asylum process and standards are often adversarial for children, will be further expanded upon in the following sections on the asylum process and its impact on children's well-being.

Although involving the state court can result in a better experience for youth, it can introduce significant variation in outcomes for SIJS applicants (Blue et al., 2021; Catangay, 2016; Paznokas, 2017). Price (2017) showed that SIJS predicate findings may be more difficult to secure in politically conservative states where courts argue they should not be responsible for 'national issues', and easier in more progressive states where courts adopt a more favourable approach towards youths seeking SIJS. Nancy, a state court judge, believes SIJS cases 'shouldn't be a matter related to political beliefs' but shared that they often do become intertwined with politics: 'We're elected officials. My county is predominantly Democratic, but in smaller counties with a different political make-up, some judges are very hostile to these proceedings because of their personal views or how they think the public will view their decisions' (Nancy, state court judge). Judges were not the only ones to acknowledge how political attitudes impact judges' engagement with SIJS proceedings. Attorneys also frequently describe receiving pushback on their SIJS cases from judges in Republican-leaning states due to anti-immigrant sentiments.

The availability of established networks and resources for immigrant communities across different states also influences how youths are handled by state courts in SIJS cases. Sophia, an attorney who works on the border of two states, grapples with such resource differences in her work: 'Here, nobody really knows what I'm doing when I go to court. I think the issue is a lack of training, understanding, and frequency here, because in [neighboring state], they have developed an SIJS order template for judges. There, I also think the judges have seen SIJS cases more'. Although SIJS is the most promising pathway to permanent legal status in the US for undocumented immigrant youth, in part because of the involvement of the state court in the legal process, the incorporation of state laws, local judges, and various resource networks introduces considerable variability in SIJS access depending on where the youth resides in the US.

7 | CHALLENGES TO FAMILY INTEGRITY AND WELL-BEING WITH SIJS

The involvement of state courts connects SIJS to US child welfare laws and practices. In the US, child welfare interventions disproportionately impact racial and ethnic minority families of lower socio-economic status, often conflating consequences of poverty with abuse, abandonment and neglect (Edwards, 2019; Fong, 2020; Reich, 2008; Roberts, 2002). SIJS applicants and their families often fall into these demographics. SIJS can punish parents, degrade their parenting and impose US middle-class standards of child-rearing on transnational families. Although there are certainly severe and substantiated cases of abuse, abandonment or neglect, SIJS cases can compromise family integrity in their pursuit of crucial legal relief and permanency for undocumented immigrant youths.

These are concerns that should be considered in SIJS cases but were not frequently discussed by attorneys during interviews. Isabel was the only attorney interviewed who described how her clinic explicitly considers child welfare implications in their SIJS advocacy:

> For SIJS, we think about whether it is necessary to get the state involved. Dependencies have historically been very racist in how the state imposes itself on Black and Brown families and removes children. So, we don't want to get families into that situation if it isn't necessary. For example, if the client has a child themselves, we might not want to pursue a dependency since we don't want to open doors for the state to have such close eyes on this young family. We try to balance these factors when considering relief options.

Child welfare interventions can have a cascading effect on families who are already disproportionately impacted by state surveillance. The record-keeping produced by surveillance also provokes fear of

continued state intervention in private affairs (Baughman et al., 2021; Fong, 2020; Harp & Bunting, 2020; Roberts, 2014).

Accusations of abuse, abandonment or neglect can also have profound consequences for the accused parent. These allegations can hinder parents' own immigration petitions and disqualify them from employment opportunities (Heidbrink, 2014b; Liebmann, 2007). As Isabel shared, consequences for the parents are not 'something immigration attorneys think often about'. But, as Alecia points out, because states often have a database for child abuse and neglect, 'if that parent is in the U.S. or if they come to the U.S. someday, [these allegations] could affect their ability to work in professions that might require a license. Such findings can follow them and affect their lives'. Alecia, a former attorney who represented parents in state child welfare cases, recalls her concerns when an SIJS petition accused their client (the parent) of neglect. 'I just didn't want my client to have that label [of being negligent], because I didn't know how it would affect their immigration status and what implications it would have for them, so we kind of put up a fight'. The permanency offered through SIJS is promising and important, but it may contribute to the disproportionate impact of state surveillance and intervention in the lives of already marginalized populations.

Additionally, applicants pursuing SIJS have to reckon with conceptualizations of their parents' care as abusive or neglectful. Cases can constitute a grey area where conditions of poverty become grounds for parental neglect:

> There were kids who had obvious cases of abuse, abandonment, and neglect. But then there's always this issue of what do you do when the parent is so poor that the kid has to work from an early age, or the kid doesn't have enough food and there's food instability, and there are gangs that are trying to recruit the kid. It's not like the parents didn't try. Many parents are likely in the same situation in that particular country. We want the judges to find abuse, abandonment, or neglect because we knew that it was in the best interests of our clients. It wasn't necessarily that they had uncaring parents, but their parents didn't have the resources. (Zoe, Attorney)

Although a child may not see their parents this way, SIJS can introduce these ideas about parental abuse and neglect, damaging how youths think about their parents and their care at home (Jameson, 2020). Kayleigh, another attorney, describes how her office saw cases that definitely met the definition of abuse, abandonment or neglect in the US, though they likely did not rise to that level in other cultures. She said that it is hard because they 'never want to demonize parents who have been doing their best', but want to make sure their clients receive legal relief. This often results in difficult conversations with youth clients:

> I would talk with them and say, 'this meets the definition of abuse here and so you qualify for this form of relief. We're not saying that your mom or dad is a bad person, but these actions lead to this situation and will allow you to get the safety you need here'. […] There were young people who just had a hard time wanting to make the SIJ claim. They loved their parents even if a parent treated them poorly. That also was something we would talk about [with our clients]. We would tell them to honour that love for their parent(s) and that they can do that and still provide these facts to the court to seek this relief that they need. (Kayleigh, Attorney)

Allegations of parental abuse, abandonment and neglect for SIJS cases rely on US standards of child-rearing. International differences can result in the harmful framing of children's relationships with their parents.

Documentation requirements for proposed guardians are another way in which the SIJS process compromises family integrity. Attorneys discuss how certain judges require the to-be guardian or custodian of the SIJS applicant to have certain identification documentation. These requirements reflect child welfare licensing requirements for foster families, which vary by state (ABA Center on Children

& the Law, 2017). These requirements may include citizenship or immigration status documentation, documented residency, social security numbers and other forms of documentation for background checks. Such requirements hinder undocumented family and community members from becoming recognized legal guardians or foster parents of youths (Greenberg et al., 2019; Hidalgo, 2013; Thronson, 2005). As a result, families may have to 'reach out to almost strangers', such as one mother of an SIJS applicant who asked her employer (Isla, attorney). Placement with family members, guardians or foster families with shared ethnic backgrounds (who may come from these communities), however, contributes to positive mental health among immigrant youths. As scholars show, they can provide youths with a sense of belonging, stability and support (Aleghfeli & Hunt, 2022; Mitra & Hodes, 2019; O'Higgens et al., 2018). Policies that prevent family or community members from becoming guardians may negatively impact these youths' well-being.

Finally, the state court process is not the only component of SIJS that challenges family integrity. SIJS is the only form of immigration relief that excludes derivative recipients (children and spouses who can receive relief or immigration status through the primary applicant) or the ability of the recipient to sponsor otherwise eligible family members' immigration once they become a legal permanent resident or US citizen. For example, asylum applicants and T-visa (humanitarian immigration relief for victims of trafficking) recipients can petition for their parents' immigration to the US and extend their benefits to certain derivative applicants, such as siblings or spouses. An SIJS recipient must also be unmarried when they apply and remain unmarried until they formally adjust their status and become a permanent resident (Special Immigrant Juvenile Classification, 2023). For certain applicants, such as those from Central American countries, the backlog in annual green card allotments means that SIJS recipients must often remain unmarried well into their 20s (Castillo-Granados et al., 2022). Furthermore, an SIJS recipient is never permitted to sponsor their parent's immigration to the US, even after the recipient naturalizes as a citizen. This includes the parent who has not been accused of abuse, abandonment or neglect (8 U.S.C. § 1101(a)(27)(J)(iii)(II)). SIJS applicants commonly reunify with a parent in the US or have a non-abusive parent remaining in their home country but will never be able to extend their legal benefits to that parent (Jameson, 2020). The challenge to family integrity and reunification that SIJS presents is an issue that attorneys often identify as a source of disappointment or concern for their clients. Conversely, this is one aspect of the asylum process that is preferable at times, given the ability of recipients to extend legal benefits to family members once granted asylum or permanent residency/citizenship.

8 | ASYLUM: AN OVERPROMISE OF PERMANENCY

Since the mid-twentieth century, asylum and refugee laws have promised persecuted individuals protection in another country. Asylum – the extension of refugee status and benefits to individuals already in the country, legally or otherwise, who have a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion' – was introduced in the US with the 1980 Refugee Act (Bohmer & Shuman, 2007; United Nations, 1951, Art. 1.A(2)). Asylum's promise of permanency, however, is limited. Granting rates are low (see: TRAC Immigration data) – a frustration attorneys also discuss – and policies continue to limit the availability of asylum for immigrant populations.

Asylum offers hope of permanency and safety in the US, but low granting rates and strict, discretionary eligibility criteria limit the prospect of permanency. Asylum does, however, uphold key elements of family integrity. The 1980 U.S. Refugee Act established that the spouse or child of an asylum-seeker 'shall be entitled to the same admission status as such refugee if accompanying, or following to join, such refugee and if the spouse or child is admissible' (8 U.S.C. § 1157(c)(2)(A)). Both the 1990 Immigration Act and the 1996 Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) upheld family unity principles within asylum, reiterating the eligibility of spouses and children of asylees to remain together (8 U.S.C. § 1158(3); IIRIRA Section 208; Immigration Act of 1990 Section 301).

9 | WHY ASYLUM REMAINS ADVERSARIAL FOR YOUTHS DESPITE POLICY CHANGES

Immigration advocates draw attention to the trauma associated with the asylum process for immigrants (Rosenberg, 2019). Before the 2008 TVPRA improved the asylum process for children, the application procedures for adult and child applicants were the same. The 2008 changes intended to make asylum more 'child-friendly' for young applicants, but the process often remains adversarial for youths.

Prior to 2008, all asylum seekers in immigration removal proceedings applied through the defensive asylum process, requiring them to appear before an immigration judge. However, the 2008 TVPRA permitted children – even those in removal proceedings – to apply for asylum affirmatively (Section 235(d)(7)(B)). Individuals applying for asylum through an affirmative process – traditionally individuals seeking asylum who have not been apprehended – do not defend their case in front of an immigration judge in court but rather submit an asylum application to USCIS and appear before an asylum officer for a 'non-adversarial' interview.

These changes improve the asylum process for children; however, attorneys continue to describe the process as hostile. Although children generally do not need to testify in front of an immigration judge unless USCIS denies their asylum application, the 'child-friendly' interviews with asylum officers often last several hours. Lawyers discuss needing to prep their clients for these interviews, resulting not only in the child having to articulate their past experiences and fears during a multi-hour interview with a government authority figure but also having to recount these experiences multiple times with an attorney. As Valeria, an attorney, describes, 'preparing a child, even an 18-year-old, to go into this office with a stranger for three hours is really hard on [the child]. And as much as you prepare, you never know what's going to be asked'. In addition to being long and unpredictable, these interviews are often distressing for youth:

> I've had asylum officers ask crude, unnecessary questions, making clients relive their trauma. For example, I had a client who had been sexually abused by two family members. And after that had been very well established, the asylum officer asked what was being said to her while she was sexually abused. I know asylum officers go through extensive training, but I don't think they keep in mind what that three-hour experience is like for a kid. (Valeria, attorney)

Although the application process for children is now different from that for adults in removal proceedings, the evidentiary standards remain the same for both populations (Dalrymple, 2006; Heidbrink, 2014a; Jameson, 2020). Children, like adults, must meet the formal definition of a refugee and demonstrate proof of a 'reasonable possibility of persecution', generally understood as proving they would experience significant physical or emotional harm back in their home country as a result of their race, religion, nationality, political opinion or membership in a particular social group (American Immigration Council, 2022; Kids in Need of Defense [KIND], 2015). Attorneys emphasize how children experience significant emotional stress retelling difficult life experiences and fears, as well as how difficult it can be for children to articulate necessary political histories and experiences of oppression that constitute evidence of a 'well-founded fear' of persecution (Bien, 2004; Fassin, 2013; Galli, 2018; Heidbrink, 2014a).

10 | CONCLUSION AND RECOMMENDATIONS

SIJS and asylum are the two primary pathways to immigration legal relief for undocumented immigrant youths, yet both fail to uphold important principles of children's best interests and human rights. SIJS has been applauded as the only form of immigration relief that explicitly considers a child's best interest, and our comparative data indicate that it is a clear preference for attorneys supporting youths. SIJS offers youths a more favourable application experience, significantly reducing potential trauma

invoked through reliving past hardships and confronting various bureaucratic officials, and it is also a notably more successful option than asylum. This is largely because SIJS is comparatively easier for youths to establish deservingness due, in part, to the involvement of the state courts. However, SIJS compromises family integrity by imposing standards of child-rearing that can punish immigrant families. Youths are prevented from facilitating family unity through their SIJS status, and the legal process compromises family relationships through invoking narratives of abuse and neglect and creating participation barriers for undocumented family members. Asylum upholds family integrity but threatens youths' emotional and physical well-being through invasive testimony and interview requirements and stringent eligibility standards. The experience of applying for asylum becomes a trauma that youths must endure without much promise of permanency, given asylum's high denial rates. To conclude, we offer policy recommendations for asylum and SIJS that would (a) better reflect 'children's best interest' principles and (b) limit the emotional and physical harm youths experience seeking immigration relief in the US.

10.1 | Policy recommendations for SIJS

States' child welfare policies and varying practices across judges can hinder undocumented family and community members from becoming the child's guardian, creating stress for the child and supporting family members in the US. We recommend eliminating guardian documentation requirements when a child welfare professional has determined the adult to be a suitable guardian. We also recommend requiring state court judges to undergo training on SIJS and the challenges immigrant families face in meeting US child welfare requirements. We also recommend eliminating the family sponsorship restriction for the parent not accused of abuse, abandonment and neglect and permitting derivative applicants for SIJS recipients. Since the 2008 TVPRA, a court only had to find that reunification was not viable with *at least one* parent due to abuse, abandonment or neglect. However, the restriction on family sponsorship for *both* parents remains intact. This ongoing restriction against the not-accused parent contradicts the family integrity tenet of children's best interest policies.

10.2 | Policy recommendations for asylum

The best interest finding in an SIJS predicate order asks the state court judge to consider whether it would be in the child's best interest to remain in the US or return to the home country. When evaluating an individual's fear of persecution and fear of return for asylum, we recommend including best interest considerations. Similarly, adopting common testimony practices in SIJS proceedings in state court can mitigate the significant emotional harm immigrant youths experience during an asylum interview. Finally, SIJS permits applicants until the age of 21. Youths commonly migrate to the US and seek asylum as non-derivative applicants in their late teens, and therefore we recommend asylum permit individuals to apply affirmatively until age 21, similar to SIJS application criteria.

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ORCID

Erin L. McAuliffe https://orcid.org/0000-0001-7990-6224
Yakirah Mitchel https://orcid.org/0009-0000-1853-9790

Notes

[1] USCIS defines UAC as youths who are under the age of 18, living in the US without lawful immigration status, and have no parent or legal guardian in the US to care for them (Code of Federal Regulations, 2023).

[2] Although the Committee on the Rights of the Child differentiates between an unaccompanied and separated minor (see: CRC/GC/2005/6, Para. 8), the US designates all apprehended youths who are separated from or not accompanied by a parent or family member as a UAC.

[3] The Homeland Security Act of 2002 dissolved the INS and, in its place, created the United States Department of Homeland Security (DHS), which divided authority among three officers: USCIS, U.S. Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE).

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APPENDIX

TABLE A1 Qualitative data: comparing Special Immigrant Juvenile Status (SIJS) and asylum.

Main code	Core themes discussed	Example excerpts
	Easier/Better Approval Rate	It's a lot easier to be able to do SIJ than asylum. It's easier to prove that one or two parents abused, abandoned, or neglected the child rather than having to prove an entire asylum case that the child feared returning to their home country. (Andres)
Pros of SIJS		If there was any way to make an SIJS case for a client, we would just do that because the asylum cases were a ton more work. (Tia)
	Less traumatic and invasive	A lot of our cases end up being SIJS cases because that's the safest form of relief for kids to apply to with less of a burden of proof and less trauma to the youth themselves. (Alyssa)
		SIJS is just not as scary as asylum. The kid does not have to tell their story to an adjudicator, and they are not adversarial. That's huge. They basically just have to tell me everything in a comfortable setting and then I write it up it. (Luis)
	Family integrity	With SIJ, you can have one parent that really cares about you, but is a victim themselves. Or you're doing a single parent case and then you're not able to petition for that parent. I mean it doesn't make a whole lot of sense you can get placed with dad, but you can't petition for dad. So I don't think it takes into account like the realities of kids' lives and the complexities (Zoe)
		I explain every time to the child and parent that the [child's] benefit doesn't extend to the parent. It's disappointing for the child but for the most part, the parents just want their child to stay here. (Michael)
Cons of SIJS	**Child welfare requirements**	In a recent case, the caretaker was a cousin and that cousin had a partner whose record wasn't so clean and the household wasn't going to pass the [child welfare] clean record requirements. And they didn't want to move forward because they didn't want to expose that person to being subject to deportation or anything (Adriana).
		If that parent is in the U.S. or if they come to the U.S. someday, [these allegations] could affect their ability to work in some professions that might require a license. Such findings can follow them and affect their lives (Alecia).
	Judge/State variance	The elements that are required to meet the standards will be different from state to state. So the variation concerns me because it tells me that it really depends on where you are whether you're going to be able to pursue the relief form. (Emily)
		What's interesting for me with SIJS is seeing the difference between working on it in [three different states] that have different state court processes and what criteria they are going to see as abuse, abandonment, neglect, and what age you can apply until. We could have a kid with the exact same fact pattern, and we won't try that case in one county versus the other because we know that the judge won't approve it. (Alyssa)
	Family integrity	If you get asylum, you can petition for your parents or other family members. (Ysela)
Pros of asylum		Children who get asylum can extend that benefit to family, too. I think once they get a green card, it is easier to add family members to the application. (Carlos)
	Quicker access to services and LPR status	If you get approved for asylum, it seems to be an easier process to get work permit approval. I think it happens to have just a little more security heading into adulthood. (Justin)

(Continues)

TABLE A1 (Continued)

		The waiting period between filing your asylum status and getting a green card is less than with SIJS. (Isla)
	Harder/Low approval rating	Asylum is so much harder. At the asylum office level, probably two-thirds of my cases get rejected or denied. It's much harder to win asylum than SIJS. I think that's because – as I explained earlier – the different legal standards that have to be met for asylum and how asylum is future-looking and trying to predict what will happen (Daniel).
		Asylum is a lot harder to be approved for and it's a lot more work involved for the applicant and the attorney. (Faith)
	Traumatic and invasive	With asylum, the child's testimony is on the scene, whether it's the asylum office or in court, and that's something very intimidating. (Adriana)
		Asylum is just problematic to win and it's hard. The child just doesn't want to talk about and share the facts. It's very traumatizing. (Maria)
Cons of asylum	**Difficult to articulate persecution (child)**	The laws are getting stricter on how persecution is defined and how they are defining a particular social group. It becomes less of a guarantee that the child can meet it. And our children are not able to articulate persecution. (Sadiya)
		It's a lot of pressure on a child to prove that they were persecuted on account of a particular social group and then to define what that particular social group is and then to show that the actor was the government or outside the government's control, or that there is a likelihood of future persecution. (Michael)
	Discretion/Political influence	Changes in administrations can imply different policies [for asylum], like what Trump did with the work permit. With SIJS you can't just implement different policies. With asylum it just depends on who is in office. They can just sign executive orders. (Isla)
		With asylum it is night and day between court rooms. The asylum approval rate for our judges is really low but if you take a similarly situated judge out of [another jurisdiction] and the approval rates are higher. (Lydia)
	Limitation on returning to home country	Once you get asylum, it is hard until you become a citizen to go back to your home country because once you ask for asylum from that country, you endanger your asylum status when you go back. (Carlos)
		One drawback of asylum is the inability to return to the home country and that's always something that is tough to breakdown, especially to teenagers because they may not really think of what that may mean, like if their parents get sick or grandparents get sick. (Adriana)