
COMMENT

“BEST” INTERESTS AND “BAD” PARENTS: IMMIGRATION
AND CHILD WELFARE THROUGH THE LENS
OF SIJS AND FOSTER CARE

ELLYN JAMESON†

INTRODUCTION 513

I. HISTORY AND BACKGROUND ON FOSTER CARE AND SIJS 516

 A. *Foster Care* 516

 B. *Special Immigrant Juvenile Status (SIJS)* 521

II. PARALLELS BETWEEN SIJS AND CHILD WELFARE 524

 A. *SIJS and Voluntary Foster Care Placements: A Comparison* 525

 B. *SIJS and Kinship Care: A Comparison* 533

III. INTERSECTIONS AND TENSIONS BETWEEN CHILD WELFARE
 AND SIJS 540

IV. SUGGESTIONS FOR CHANGE..... 544

CONCLUSION 547

INTRODUCTION

At first glance, the immigration system and the domestic child welfare system may appear to be worlds apart, but in fact they have much in common and often overlap. This Comment offers a targeted look at a particular process within the U.S. immigration system, Special Immigrant Juvenile Status (SIJS), and how it intersects with and parallels the domestic foster care system. Both SIJS and foster care struggle to meet the competing goals of

† J.D. Candidate, University of Pennsylvania Law School, 2020. Thank you to all the practitioners who generously shared their time and experience during my research, as well as to Volume 168 for their hard work and helpful edits, my friends and family for their support, and to Professor Roberts for providing guidance, feedback, and inspiration throughout this project.

preserving and reuniting families on the one hand and punishing “undesirable” families on the other. The tendency of these systems to see families in terms of innocent children against “bad” parents, and the ability of our society to tolerate systems that punish parents in this way, is part of a long history of discrimination in this country, particularly against poor families of color. This comparison between SIJS and the domestic foster care system will highlight some of the underlying assumptions that make both processes so harsh for the families involved and discuss how the apparent tensions between the two systems are actually rooted in the same harmful normative ideas.

Part I provides an overview and history of both SIJS and foster care and explains how SIJS functions within the broader immigration and child welfare systems.

Part II takes a more in-depth look at some important parallels between SIJS and two sub-areas of the foster care system: voluntary placement of youth in foster care by their parents and kinship care. SIJS shares certain problematic ideas and structures with both voluntary placement and kinship care.

In voluntary placement agreements and SIJS, parents and children alike are forced by a lack of other alternatives into systems designed to be punitive and to keep families apart. In voluntary placements, parents often have no other viable options for receiving needed support—particularly for children with severe emotional and behavioral problems—besides the child welfare system; these parents then become trapped in a system that assigns them the blame for being bad parents rather than one that acknowledges society’s role in creating the family’s desperate circumstances. Youth seeking SIJS status often do so because it is the only pathway toward legal status in the U.S. they qualify for, and many do so through one-parent SIJS, in which a non-abusive parent retains custody of the youth. However, the benefit of SIJS status comes with strings attached, which end up needlessly separating families. Principally, SIJS recipients are prohibited from ever sponsoring their parent—even the non-abusive parent—for legal status. The lack of other necessary supports (both socioeconomic and migratory) forces families into these systems, yet as a society we have failed to acknowledge or take responsibility for this lack of alternatives for achieving needed support and stability. Additionally, parents are blamed for their involvement in those systems, furthering the oversimplified narrative that these systems protect innocent children from “bad” parents. This rigid “innocent child/bad parent” framework serves to mask the structural inequalities and discrimination that those “bad” parents face that force them into processes like SIJS and foster care. And by casting children as passive victims, it drowns out the voices and agency of youth themselves.

Likewise, the parallels between SIJS and kinship care demonstrate the way both systems fail to respect the autonomy of these marginalized families, particularly those with nontraditional structures that arise as a result of systemic problems such as poverty, the carceral state, and the broken immigration system. Instead of supporting extended, multicultural, and multinational families, both kinship care and SIJS view them with suspicion and subject them to invasive state surveillance as a precondition of the support they seek. SIJS imposes an adversarial model of custody on families and relationships that, prior to state involvement, might not have been adversarial at all, and places undocumented sponsors at direct risk for supporting children. Similarly, kinship care requires that extended family members comply with the intrusive supervision requirements of foster care. This phenomenon in both systems is also a direct result of societal narratives that view those adults and families as undeserving and untrustworthy.

Part III describes how the common normative ideas underlying both SIJS and foster care give rise to tensions when the two systems intersect in state dependency courts. While child welfare law, at least in principle, strives for reunification as a primary goal, SIJS youth have no such protection, as reunification is explicitly prohibited if they are to receive immigration status through SIJS. While dependency law is supposed to leave the door to reunification open as long as it is in a child's best interests, SIJS applicants ask courts for an immediate and permanent determination. While the foster care system, at least in theory, is not supposed to equate poverty with neglect, SIJS-eligible youth must often make the exact opposite argument. In essence, the few protections the child welfare system has for families are by design not applicable to immigrant youth, making the adjudication of SIJS in state juvenile court an uncomfortable fit at best.

Finally, Part IV concludes by proposing changes to the SIJS statute as currently written based on this comparative approach. While foster care is far from perfect, it contains important lessons about the importance of reunification and reliance on extended family networks that can and should be applied to SIJS. Such policy changes may not happen in the near future, but I include some considerations for advocates in both systems that may help to change the conversation.

As a threshold matter, there are certainly situations in which youth seeking SIJS and foster care protections have suffered terrible abuses; this Comment does not argue otherwise or address those cases. Rather, this Comment looks systemically at how families are underserved and undermined by the rigid viewpoints reflected in U.S. child welfare and immigration laws, highlights problems in each through a comparative

approach, and shows how discriminatory narratives in our society give rise to and reinforce those problems.

I. HISTORY AND BACKGROUND ON FOSTER CARE AND SIJS

The histories of SIJS and foster care are intertwined. SIJS was initially created in response to the needs of undocumented youth in the state foster care system.¹ Both have gone through substantial legislative changes throughout their histories that have been framed by rhetoric of protecting innocent children while painting their families as undeserving or even evil.² While the history of foster care is much longer than that of SIJS, the creation and evolution of SIJS featured the same arguments and rhetoric. Understanding this common history is necessary to fully understand the current processes in place in SIJS and foster care and how they affect both the families and children they serve.

A. Foster Care

The history of the child welfare system in the U.S. has been characterized as a pendulum that “swings from expressing the predominant objective of keeping . . . families together to making protection of children from parental harm its top priority.”³ The foster care system has its roots in the mid-nineteenth century, when the Children’s Aid Society of New York sent thousands of children, often the children of poor immigrants, west on orphan trains to new homes.⁴ While child welfare law is principally a state law issue, the federal government began to pass legislation relevant to foster care beginning with the Social Security Act of 1935, which provided the first federal funds for services to abused and neglected children.⁵ In 1980, the Adoption Assistance and Child Welfare Act required “reasonable efforts” by state agencies to help children remain at home.⁶ That same law was amended in 1997 with the Adoption and Safe Families Act (ASFA), which encouraged

¹ Elizabeth Keyes, *Evolving Contours of Immigration Federalism: The Case of Migrant Children*, 19 HARV. LATINO L. REV. 33, 45-46 (2016).

² See, e.g., *infra* notes 3, 4, 44.

³ DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 104 (2002).

⁴ Jeanne F. Cook, *A History of Placing-Out: The Orphan Trains*, 74 CHILD WELFARE 181, 181 (1995). The framing of the orphan train children as innocent and “deserving” victims of bad parents was present even in this era. See *id.* at 186 (“Impoverished parents of these same children were generally presented in the press as unsympathetic characters who constituted ‘a class from which spring mainly the great tides of wretchedness and crime.’”).

⁵ Sharon F. Bass, *The Public Foster Care System and the Transracial Placement of African-American Children: Exploring the History and the Issue*, 4 U. PA. J. L. & SOC. CHANGE 73, 78 (1997).

⁶ Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 471(a)(15), 94 Stat. 500, 503 (1980) (amended 1997); ROBERTS, *supra* note 3, at 105.

quick termination of parental rights and adoption as a remedy for the inarguable harms that extended time in substitute care can inflict on children.⁷ The predictable result of those changes was that state child welfare agencies became less focused on reunification and more concerned with adoption or concurrent planning, causing often insurmountable obstacles for parents who have mental health or addiction problems, are living in poverty, or are incarcerated.⁸

This historical shift away from reunification and toward adoption makes sense when viewed alongside the shift in public discourse during that same time period; poor families were increasingly disparaged for receiving welfare benefits, in particular single Black mothers.⁹ ASFA was passed immediately following the 1996 welfare reforms that dramatically reduced available aid to the same poor families most at risk of involvement in the child welfare system.¹⁰ As a result, the same families that were required under ASFA to more quickly show that they could provide for their children in order to achieve reunification were stripped of the safety net with which to do so.¹¹ This contradiction is a reflection of how "Americans' compassion toward poor children has always existed in tension with the impulse to blame their parents."¹²

Currently, there are over 440,000 youth in foster care nationwide, the vast majority of whom are placed in care for reasons relating to neglect.¹³ Only sixteen percent of new entries into foster care in Fiscal Year 2017 cited physical or sexual abuse as a reason for removal, while "neglect" was cited as a reason for removal in sixty-two percent of cases.¹⁴ The statutory definition of neglect varies by state,¹⁵ and the vague definition of this term leads to over-

⁷ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103(a), 111 Stat. 2115, 2117-18 (codified as amended at 42 U.S.C. § 675(5)(e)); ROBERTS, *supra* note 3, at 105-06.

⁸ See "You Have to Get it Together": *ASFA's Impact on Parents and Families* (Nora McCarthy & Lynne Miller eds.), in URBAN INST., CTR. FOR STUDY OF SOCIAL POLICY, INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT, 36, 37 (2009), https://www.urban.org/research/publication/intentions-and-results-look-back-adoption-and-safe-families-act/view/full_report [<https://perma.cc/CZ7F-KDQK>] (noting that "ASFA is most unfair to parents who are unable to reunify with their children because of factors beyond their control—prison sentences or drug treatment programs longer than 15 months, court delays, or mental illnesses that may prevent parents from ever having sole custody").

⁹ ROBERTS, *supra* note 3, at 173.

¹⁰ See generally Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105; ROBERTS, *supra* note 3, at 173.

¹¹ ROBERTS, *supra* note 3, at 173-74.

¹² *Id.* at 173.

¹³ U.S. DEP'T. OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, THE AFCARS REPORT: PRELIMINARY FY 2017 ESTIMATES 1 (2017) [hereinafter AFCARS REPORT], <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport25.pdf> [<https://perma.cc/27TK-YAPZ>].

¹⁴ *Id.* at 2.

¹⁵ While many states do try to differentiate between poverty and neglect in their child welfare laws, it is a difficult line to draw and states frequently include circumstances related to poverty when

reporting and a discretionary role for child protective service workers investigating those reports.¹⁶ Although there are constitutional limitations on the states' ability to remove children from the home in circumstances relating solely to poverty, such broad definitions of neglect predictably put poor children at increased risk of entering the system.¹⁷ This in turn disproportionately affects families of color.¹⁸ The racial disparities of youth in foster care—although better than they once were—are still striking: for example, in 2017, non-Hispanic Black children made up only fourteen percent of the total population, but twenty-three percent of children in foster care.¹⁹

Often, a child is removed from their home and placed in foster care as a result of a tip to a state child protective service.²⁰ Such tips may come from community members or mandated reporters, who have a statutory duty to report such suspicions.²¹ Case workers then visit the family and make a

defining neglect. *See, e.g.*, ARIZ. REV. STAT. § 8-201(25) (2019) (defining neglect as “[t]he inability or unwillingness of a parent, guardian or custodian of a child to provide that child with supervision, food, clothing, shelter or medical care if that inability or unwillingness causes unreasonable risk of harm to the child’s health or welfare,” and only providing an exception for lack of available services in meeting “the needs of a child with a disability or chronic illness.”); N.Y. FAM. CT. ACT § 1012(f)(i)(A) (2019) (attempting to exclude poverty by defining “neglected child” as one whose parent has failed to “supply[] the child with adequate food, clothing, shelter or education . . . though financially able to do so or offered financial or other reasonable means to do so”); 23 PA. CONS. STAT. § 6303(a)-(b)(1)(7) (2019) (defining “serious physical neglect” in part as “[t]he failure to provide a child with adequate essentials of life, including food, shelter or medical care” with no explicit exception for inability to do so).

¹⁶ *See* Robert Lukens, *The Impact of Mandatory Reporting Requirements on the Child Welfare System*, 5 RUTGERS J.L. & PUB. POL’Y 177, 201, 222 (2007) (arguing that over-reporting to child protective services occurs in part because of “vague or over inclusive” definitions of neglect, and child protective workers must make discretionary determinations about whether to proceed with an investigation).

¹⁷ Daan Braveman & Sarah Ramsey, *When Welfare Ends: Removing Children from the Home for Poverty Alone*, 70 TEMP. L. REV. 447, 462-64 (1997).

¹⁸ In 2017, about 8.5% of people in the U.S. reporting as “White, not Hispanic” lived below 100% of the Federal Poverty Line, as compared to 21.7% of Black individuals, 18.3% of Hispanic individuals, and 9.7% of Asian individuals. CURRENT POPULATION SURVEY, U.S. CENSUS BUREAU, POV-1: AGE AND SEX OF ALL PEOPLE, FAMILY MEMBERS AND UNRELATED INDIVIDUALS ITERATED BY INCOME-TO-POVERTY RATIO AND RACE (2017), <https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pov/pov-01.html> [<https://perma.cc/6VKH-4DWV>].

¹⁹ *Foster Care*, CHILD TRENDS DATABANK (May 24, 2018), <https://www.childtrends.org/?indicators=foster-care> [<https://perma.cc/JZ65-5FYZ>].

²⁰ Melissa Jonson-Reid et. al., *What Do We Really Know About Usual Care Child Protective Services?*, 82 CHILD. & YOUTH SERVS. REV. 222, 222 (2017).

²¹ *Id.*; *see also* Lukens, *supra* note 16, at 201 (describing how a Child Protective Services investigation begins). Starting at the referral stage, poor youth of color are more likely to come into contact with the state agency, perhaps because callers have “culturally specific ideas about what a good parent looks like.” VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR 146, 153-54 (2018). In many states, callers may choose to remain anonymous, making it more difficult to determine their motivations for calling. *Id.* at 155.

discretionary determination about whether to remove the child from the home or provide other services.²² Of the youth exiting the foster care system in Fiscal Year 2017, children nationwide usually spent 19.2 months on average in out-of-home care.²³ Of those children, 49% were reunified with a parent or former caregiver; of the rest, most either aged out of the system (8%), were adopted (24%), or were placed in the guardianship of a relative or individual that was not their former caregiver (7%).²⁴ African-American children are more likely to enter care, are less likely to be adopted, and have worse outcomes after leaving care in terms of housing, employment, and educational stability.²⁵

In a subset of cases particularly relevant to comparing SIJS and foster care, parents themselves either relinquish their children to the state agency when investigated, or independently contact the agency asking for help because they are in crisis. When caregivers reach an agreement with the child welfare agencies about placing the child in foster care, it is called a voluntary placement, and the procedures and standards for this process vary widely among states.²⁶ When families who are being investigated agree to voluntarily place their children, it is difficult to separate out the need for support from fear of even worse consequences such as having abuse and neglect charges filed against them if they fail to cooperate, but both may be part of the decision.²⁷ Parents that contact protective services directly are often in a situation in which their child has severe behavioral or mental health problems that the family does not have the means to address.²⁸

While exact data is not easily available, one study relying on data from the Adoption and Foster Care Analysis Reporting System (AFCARS) found that in 2013, about 3.4% of removals from the home were through voluntary placements.²⁹ While those children were demographically similar to those placed by court order in terms of race and gender, youth with a disability

²² Jonson-Reid, *supra* note 20, at 226.

²³ AFCARS REPORT, *supra* note 13, at 3.

²⁴ *Id.*

²⁵ See FOSTERING YOUTH TRANSITIONS, THE ANNIE E. CASEY FOUNDATION 2-3 (2018), <https://www.aecf.org/m/resourcedoc/aecf-fosteringyouthtransitions-2018.pdf> [<https://perma.cc/88DS-W5WM>] (offering data on how Black youth are three times as likely to be in foster care as white youth, 10% more likely to be emancipated from foster care, and have especially poor outcomes for education and employment).

²⁶ Annette Semanchin Jones et al., *Voluntary Placements in Child Welfare: A Comparative Analysis of State Statutes*, 88 CHILD. YOUTH SERV. REV. 387, 387-88 (2018).

²⁷ Somini Sengupta, *Despondent Parents See Foster Care as Only Option*, N.Y. TIMES (Sept. 1, 2000), <https://www.nytimes.com/2000/09/01/nyregion/despondent-parents-see-foster-care-as-only-option.html> [<https://perma.cc/9EMJ-MCFE>] ("Sometimes, child welfare officials offer voluntary placement as an alternative to filing abuse or neglect charges against the parents.").

²⁸ Katherine Hill, *Prevalence, Experiences, and Characteristics of Children and Youth Who Enter Foster Care Through Voluntary Placement Agreements*, 74 CHILD. YOUTH SERV. REV. 62, 63 (2017).

²⁹ *Id.* at 65.

diagnosis were far more likely to have been placed in foster care voluntarily, with 41% of the voluntary placements involving children with a disability diagnosis.³⁰ Outcomes for those youth were worse overall, with the study indicating that they “spend more time in a higher number of placement settings than children who enter foster care through a court order.”³¹

In another subset of cases explored in this Comment, one of the most promising changes to the foster care system has been the increase in kinship care, an arrangement in which children are placed with members of their own extended family rather than traditional foster care placements or group homes.³² In 2017, about 32% of youth in foster care resided with a relative.³³ Children removed from their homes fare far better in kinship care than in foster care with strangers by every metric and it has been lauded as the best solution for the notoriously problematic foster care system.³⁴ Youth are “more likely to maintain contact with their parents[,]” stay in a single placement, and maintain cultural and community connections.³⁵ These benefits are unsurprising, as kinship care mirrors the historic model of community and extended family support that has been a source of resilience, particularly for poor Black families, since the beginning of the nation’s history.³⁶

However, kinship care has its own set of problems for families. Kinship care providers in many states receive lower levels of economic support despite the fact that kinship care providers are usually more economically disadvantaged than non-relative foster parents.³⁷ Additionally, rather than respecting the autonomy of kinship relationships while supporting them

³⁰ *Id.* at 66 tbl.1.

³¹ *Id.* at 67.

³² Leonard Edwards, *Relative Placement: The Best Answer for our Foster Care System*, 69 JUVENILE & FAMILY CT. J. 55, 57-59 (2018). While relative placement is currently the preferred federal policy following the Fostering Connections to Success and Increasing Adoptions Act of 2008, the reluctance of federal policy to embrace kinship care is also related to the distrust policymakers have of those relatives, or as Judge Leonard puts it, “because of the old adage that ‘an apple does not fall far from the tree.’” *Id.* at 57.

³³ AFCARS REPORT, *supra* note 13.

³⁴ Children in relative, or kinship, care are more likely to maintain sibling and family connections, have fewer disruptive placements, maintain cultural and community identity, and experience less stigma and trauma. Edwards, *supra* note 32, at 58; *see also* Meredith L. Alexander, Note, *Harming Vulnerable Children: The Injustice of California’s Kinship Foster Care Policy*, 7 HASTINGS RACE & POVERTY L.J. 381, 393-96 (2010) (describing the emotional and trauma-mitigating benefits of kinship placement, including that “[c]hildren in kinship foster care tend to feel a sense of belonging, warmth, history and value to others”).

³⁵ Dorothy Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHI.-KENT L. REV. 1619, 1625 (2001).

³⁶ *See* Bass, *supra* note 5, at 76 (tracing the history of quasi-kinship networks and extended family support to slavery).

³⁷ *See* Alexander, *supra* note 34, at 385-87, 396-97, 410-13 (describing the unique challenges facing kinship care providers and why many do not qualify for federal foster care funding).

economically, the formal kinship care system subjects families seeking support to surveillance and potentially adverse consequences.³⁸ Kinship foster parents must pass background tests, meet licensing requirements, and comply with regular observation from caseworkers.³⁹ Some families may forego any state support at all to avoid this oversight.⁴⁰ On the other hand, youth in a kinship placement tend to reunify more slowly with their parents than youth in non-relative care than they would otherwise,⁴¹ perhaps due to the need for the economic support that comes with kinship care,⁴² thereby extending the length of time the family is subjected to state oversight as a price of that support.

In sum, involvement with the foster care system, whether through voluntary placements or kinship care, disproportionately affects poor families of color and brings them under the control of a system that mistrusts and monitors them in the name of protecting those children.

B. *Special Immigrant Juvenile Status (SIJS)*

Much like foster care, the history of SIJS legislation reveals the tension between helping sympathetic youth and placing restrictions on families considered undeserving of protection and government support. SIJS was created in 1990 for undocumented youth in the foster care system, and initially, only youth that were adjudicated dependent by a juvenile court qualified.⁴³ The original goal of the statute was to provide a permanent solution for those youth that would age out of foster care only to face deportation or unstable undocumented status.⁴⁴ The first version of the statute covered youth that had been declared dependent by a state juvenile

³⁸ Roberts, *supra* note 35, at 1632.

³⁹ *Id.* at 1627 ("The agency inspects relatives' homes, including sleeping arrangements, the number of bedrooms, and square footage, and investigates relatives' backgrounds . . .").

⁴⁰ Salendria Mabrey, *The Cost of Kinship Care: Caring for Relatives Limits Budgets of the Elderly*, FOSTER CARE NEWSL. (Sept. 1, 2015), <http://foster-care-newsletter.com/the-cost-of-kinship-care/#.XJ94Z5hKjIU> [<https://perma.cc/SRR5-9X4A>] ("Some kinship providers . . . just don't want the state involved in any way because of the stigma that comes with the reputation of child welfare systems.").

⁴¹ Marc Winokur, Amy Holton, & Keri E. Batchelder, *Kinship Care for the Safety, Permanency, and Well-Being of Children Removed from the Home for Maltreatment*, 1 COCHRANE DATABASE SYSTEMATIC REVS. 2014, at 1, 18.

⁴² Valerie O'Brien, *The Benefits and Challenges of Kinship Care*, 18 CHILD CARE PRAC. 127, 136-37 (2012).

⁴³ Keyes, *supra* note 1, at 46.

⁴⁴ *Id.* at 45-46; *see also* Shannon Aimée Daugherty, *Special Immigrant Juvenile Status*, 80 BROOK. L. REV. 1087, 1092-93 (2015) (providing the legislative history leading up to the original enactment of SIJS).

court, were eligible for long-term foster care, and for whom it was not in their best interest to return to their country of origin.⁴⁵

SIJS was altered in 1997 to include the additional requirement that the youth be eligible for foster care because of abuse, neglect, or abandonment.⁴⁶ This addition was based in part on fears within Congress that SIJS provided a loophole through which any child, including international students, could receive permanent resident status. As such, Congress sought to restrict access to SIJS to a smaller subset of allegedly deserving youth— those that had been abused, abandoned, or neglected.⁴⁷ This restriction occurred alongside the draconian changes of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, which expanded the number of crimes that made immigrants deportable, dramatically increased funding for immigration enforcement, restricted forms of relief, and instituted the harsh ten-year bar to reentry for anyone who had accumulated a year of unlawful presence.⁴⁸

In 2008, the pendulum swung the other way. SIJS was greatly expanded in the William Wilberforce Trafficking Victims Protection Reauthorization Act (the Wilberforce Amendments) to (1) include youth for whom reunification with one or more parents was not viable due to abuse, abandonment, or neglect and (2) remove the requirement that the youth establish eligibility for long-term foster care.⁴⁹ In other words, youth that were abused, abandoned, or neglected by only *one* parent, and were in a safe living situation with the other parent or another guardian, became eligible for SIJS.⁵⁰ These provisions greatly increased the number of eligible youth, and

⁴⁵ Keyes, *supra* note 1, at 44 tbl.1.

⁴⁶ See Angela Lloyd, *Regulating Consent: Protecting Undocumented Immigrant Children from their (Evil) Step-Uncle Sam, or how to Ameliorate the Impact of the 1997 Amendments to the SIJ Law*, 15 B.U. PUB. INT. L.J. 237, 244-45 (2006) (describing the legislative history of the 1997 amendments).

⁴⁷ See Daughtery, *supra* note 44, at 1093 (noting congressional fears of widespread abuse of SIJS relief); Keyes, *supra* note 1, at 44 tbl.1 (summarizing changes to SIJS over the years). Those amendments also resolved ongoing tensions between the Immigration and Naturalization Service (INS) and state courts by giving INS exclusive jurisdiction over youth in its custody. This potentially created a motive to not release eligible children and instead expedite their removal in order to frustrate their attempts to apply for SIJS. Gregory Zhong Tian Chen, *Elian or Alien? The Contradictions of Protecting Undocumented Children Under the Special Immigrant Juvenile Statute*, 27 HASTINGS CONST. L.Q. 597, 613-14 (2000).

⁴⁸ See generally Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (codified as amended at 8 U.S.C. § 12 (2012)).

⁴⁹ 8 U.S.C. § 1101(a)(27)(J) (2018); Angie Junck, *Special Immigrant Juvenile Status: Relief for Neglected, Abused, and Abandoned Undocumented Children*, 63 JUV. & FAM. CT. J. 48, 50 (2012) (“Due in part to the problematic and limiting language of the 1997 amendments, revisions to the SIJS statute were made in 2008 by the [TVPR].”).

⁵⁰ Keyes, *supra* note 1, at 56. This interpretation was not immediately accepted, and some state courts continued to be resistant to one-parent SIJS. See generally Rodrigo Bacus, *Defending One-*

since then SIJS applications have steadily increased.⁵¹ Now, youth applying for SIJS are usually in the custody of a family member or other guardian, although they may also be in state or federal foster care.⁵²

Although this shift allowed SIJS-eligible youth to remain with their families, including undocumented guardians, it continued to draw a sharp distinction between innocent children and their undocumented family members. The beneficiary child was still prohibited from ever sponsoring a parent for legal status—even a non-abusive, custodial parent.⁵³ This was not an oversight or a drafting error; advocates fought hard for its repeal.⁵⁴ Rather, the only way that the amendments could pass was by limiting them to children who elicited public sympathy while safeguarding against any benefits for their parents who did not.

Parent SIJS, 42 FORDHAM URB. L.J. 921 (2015) (describing conflicting state court cases on one-parent SIJS).

⁵¹ Prior to the expansion of SIJS under the TVPRA in 2008, the number of new arrivals for “juvenile court dependents” in 2008 was just twenty. DEP’T OF HOMELAND SEC., YEARBOOK OF IMMIGRATION STATISTICS, 22 tbl.7 (2008), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2008.pdf [<https://perma.cc/G2ZJ-WKNH>]. A report documented an increase in the number of I-360 petitions for SIJS filed from 73 in 2005 to 3,432 in 2013. RUTH ELLEN WASSAM, CONG. RESEARCH SERV., SPECIAL IMMIGRANT JUVENILES: IN BRIEF 6, (2014). According to DHS statistics, SIJS applications increased from only 1,646 in FY 2010 to 21,800 in FY 2018. U.S.C.I.S., DEP’T OF HOMELAND SECURITY, NUMBER OF I-360 PETITIONS FOR SPECIAL IMMIGRANT WITH A CLASSIFICATION OF SPECIAL IMMIGRANT JUVENILE (SIJ) BY FISCAL YEAR, QUARTER AND CASE STATUS (2018), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Adjustment%20of%20Status/I360_sij_performancedata_fy2018_qtr4.pdf [<https://perma.cc/NJ9K-67QV>]. Despite this dramatic increase in applications filed, Citizenship and Immigration Services, the agency within DHS responsible for affirmative applications, has steadily decreased the rate at which it processes SIJS applications, with a dramatic drop-off in 2016. Austin Rose, *For Vulnerable Immigrant Children, A Longstanding Path to Protection Narrows*, MIGRATION POLICY INST. (July 25, 2018), <https://www.migrationpolicy.org/article/vulnerable-immigrant-children-longstanding-path-protection-narrows> [<https://perma.cc/7XW9-BAU6>].

⁵² See IMMIGRANT LEGAL RESOURCE CENTER, SPECIAL IMMIGRANT JUVENILE STATUS, Chapter 3, § 3.2: Introduction And Overview To Special Immigrant Juvenile Status, *in* Part II: Special Immigrant Juvenile Status For Children And Youth Under Juvenile Court Jurisdiction (June 2018), https://www.ilrc.org/sites/default/files/resources/sijs-5th-2018-ch_03.pdf [<https://perma.cc/77SQ-2ZWG>] (describing the different processes for applying for SIJS based on whether a child is in the custody of a family member or the state or federal government).

⁵³ 8 U.S.C. § 1101(a)(27)(J)(iii)(II) (2018) (“No natural parent or prior adoptive parent of any alien provided special immigrant status . . . shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.”).

⁵⁴ In other respects, the legislative history in fact indicates a careful and thoughtful drafting process. See Bacus, *supra* note 50, at 934 (noting that drafts of the legislation indicated a careful expansion of SIJS in the phrasing of the provision about foster care); Irene Scharf, *Second Class Citizenship? The Plight of Naturalized Special Immigrant Juveniles*, 40 CARDOZO L. REV. 579, 587 (2018) (rejecting the possibility that the failure to enact this change was a last-minute drafting error, because the exact language used in the 2008 amendments had already been proposed a year earlier).

SIJS remains unique among forms of immigration relief in many ways. It applies exclusively to children, in contrast to the majority of U.S. immigration law, which is overwhelmingly designed with adult applicants in mind.⁵⁵ For other potential forms of relief, such as asylum, T visas, and U visas, youth are adjudicated under the same standards and procedures as adults.⁵⁶ It is the sole place in immigration law where the best interests of a child are considered at all.⁵⁷ SIJS is also the only type of relief in which state courts adjudicate the underlying facts before applying to U.S. Citizenship and Immigration Services (USCIS).⁵⁸ These differences between SIJS and other forms of immigration relief are linked to its history and development in conjunction with state child welfare systems, making it a rich area in which to examine the connections between those systems.

II. PARALLELS BETWEEN SIJS AND CHILD WELFARE

A comparison between the child welfare system and SIJS reveals that the same troubling ideas animate both programs. This section highlights those ideas through a targeted comparison of SIJS with two sub-elements of foster care: voluntary placements and kinship care.

⁵⁵ See Maura Ooi, *Unaccompanied Should Not Mean Unprotected: The Inadequacies of Relief for Unaccompanied Immigrant Minors*, 25 GEO. IMMIGR. L.J. 883, 883-84 (2011) (describing children as immigration law's "biggest void" and explaining the inadequacies of protection for unaccompanied minors).

⁵⁶ David B. Thronson, *Kids Will be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 1001 (2002) ("Adult immigrants have few rights in immigration court, and child immigrants fare no better.").

⁵⁷ Lauren Heidbrink, *Unintended Consequences: Reverberations of Special Immigrant Juvenile Status*, 5 APPLIED RES. ON CHILD. 1, 2 (2014) ("SIJ is the only provision in immigration law that considers the child's best interests . . ."). The 1989 U.N. Convention on the Rights of the Child incorporated a special consideration of best interests of a child in refugee and asylum determinations, but despite having a major role in drafting the CRC, the United States never ratified it. Craig B. Mousin, *Rights Disappear When US Policy Engages Children as Weapons of Deterrence*, 21 AMA J. ETHICS 1: E-58-66, 58, 60 (2019). Similarly, the U.N. High Commissioner for Refugees has proposed child-specific guidelines for asylum claims. Ooi, *supra* note 55, at 893-94.

⁵⁸ Another potential parallel in which state law and state courts determine a necessary predicate of eligibility might include marriage licenses for family-based visas; however, those are issued routinely without special findings, and USCIS still independently determines the validity of a marriage before granting such an application. Likewise, U visas require certification from state prosecutors or law enforcement for an applicant to qualify, although again USCIS makes an independent determination on the merits of the applicant's cooperation. Finally, adjudications or even arrests within the state criminal justice system provide an increasingly strong predicate for exclusion and removability. For more on the connection between state law and immigration, see generally CÉSAR CUAUHTÉMOC GARCIA HERNÁNDEZ, *CRIMMIGRATION LAW* (Am. Bar Ass'n 2015) (state criminal justice systems and immigration); Michael Kagan, *Immigrant Victims, Immigrant Accusers*, 48 U. MICH. J.L. REFORM 915 (2015) (U visas and state law enforcement); David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45 (2005) (state family courts and immigration).

A comparison between SIJS and voluntary placement illustrates how both systems punish and separate families in the name of protecting children rather than recognize a larger societal responsibility for the socio-economic conditions that put families in such difficult positions in the first place. The child welfare system systematically punishes poor families—especially of color—rather than provide them with the economic support that they need.⁵⁹ Likewise, the immigration system punishes poor immigrant families rather than supply meaningful alternatives for migration that would reunite families and recognize their value.⁶⁰ The false choice between innocent children and bad parents that is pervasive throughout public narratives facilitates this lack of alternatives.

A comparison between SIJS and kinship care highlights how even when foster care and SIJS offer important benefits to youth, those benefits come at the price of increased surveillance by the state and decreased family autonomy. This comparison also shows how both processes fail to respect the fluidity and autonomy of nontraditional family structures in a way that can undermine the stability and best interests of children.

A. *SIJS and Voluntary Foster Care Placements: A Comparison*

Individuals and families are often forced into both SIJS and the child welfare system because of a lack of alternatives for providing needed services or status to their children.⁶¹ Rather than recognize or remedy the lack of better alternatives, society instead assigns the blame to parents for their children's need to enter those systems. Discourse from both sides of the aisle consistently references the innocence of children in these systems—explicitly or implicitly in contrast to the blameworthiness of their parents.⁶² As Naomi

⁵⁹ See generally ROBERTS, *supra* note 3.

⁶⁰ See generally Anita Ortiz Maddali, *Left Behind: The Dying Principle of Family Reunification Under Immigration Law*, 50 U. MICH. J. L. REFORM 107 (2016). As a more general matter, even when developed countries allow for migration, legal status is seen as a benefit bestowed on migrants out of the receiving country's generosity, a framework that itself has been called into question as masking the role of those receiving countries in creating the global conditions that necessitate migration, and then perpetuating the violence and harsh conditions that migrants are escaping as a requisite to receiving those benefits. See Eddie Bruce-Jones, *Refugee Law in Crisis: Decolonizing the Architecture of Violence*, in RACE, CRIMINAL JUSTICE, AND MIGRATION CONTROL 176, 183 (Bosworth, Parmar, & Vasquez eds., 2018).

⁶¹ See *supra* notes 9-12, 46-48 and accompanying text.

⁶² See, e.g., Proclamation No. 9374, 83 Fed. Reg. 19,895 (Apr. 30, 2018) ("We also observe this month, with sadness, the plight of innocent children who are in foster care because their lives have been disrupted by neglect or abuse."); Cory Gardner, *It is Unfair to Deny Innocent Immigrant Children Legal Status*, in ILLEGAL IMMIGRATION (quoting Rep. Cory Gardner's testimony advocating for a path to legal status for dreamers because "[w]hile these children remain innocent, we cannot reward those family members who have broken the law."); *About the Children*, ADOPT U.S. KIDS, <https://www.adoptuskids.org/meet-the-children/children-in-foster-care/about-the-children>

Glenn-Levin Rodriguez puts it, “[W]orthy’ child migrants are juxtaposed with the popular conception of the unworthy migrant, a symbolic reference to migrants who ostensibly seek to benefit from services and opportunities that they have not, through some broad category of suffering, such as abuse, abandonment, or trafficking, come to ‘deserve.’”⁶³ This tendency is part of a much larger history of discrimination against poor, minority, and immigrant families.⁶⁴

Families are forced into SIJS because of a lack of migratory alternatives. SIJS is one of the very few options available to a large number of undocumented youth living in the country, and particularly the unaccompanied minors from Central America.⁶⁵ Other common paths to legal status such as asylum, T visas, or U visas all require youth who have undergone severe trauma to be adjudicated in the same way as adults.⁶⁶ They have no additional right to counsel, and must meet the same already demanding standards for evidence and credibility as adults.⁶⁷ The lack of migratory options for youth and their families in the U.S. is the result of immigration laws that seek to limit immigrants seen as undesirable and labels poverty as an illegitimate reason to migrate.⁶⁸ Most adults gain legal status through family petitions, but the severe limitations on the number of family visas available⁶⁹ and the obstacles to adjusting status, such as the 10-year bar to reentry,⁷⁰ combine to preclude even adults who have lived for years in the United States from gaining legal status, and by extension from sponsoring

[<https://perma.cc/9XQS-XZMQ>] (“Children and teens enter foster care through no fault of their own, because they have been abused, neglected, or abandoned . . .”); Sarah Harmeyer, *It’s Really That Bad. The Secret of the Hidden Children*, FOR EVERY MOM (Mar. 14, 2017), <https://forevermom.com/family-parenting/its-really-that-bad-the-secret-of-the-hidden-children-sarah-harmeyer/> [<https://perma.cc/2QCJ-F7SQ>] (“It isn’t their fault their parents were selling drugs. It isn’t their fault the grownups in their lives tried to solve problems by beating each other up. It isn’t their fault that someone got shot.”).

⁶³ NAOMI GLENN-LEVIN RODRIGUEZ, *FRAGILE FAMILIES: FOSTER CARE, IMMIGRATION, AND CITIZENSHIP* 44 (2017).

⁶⁴ For a broad overview of how the United States has historically treated both citizens of color and immigrants, and how the discrimination against both groups can be illuminated through a comparative perspective, see generally Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 *IND. L.J.* 1111 (1998).

⁶⁵ See Chiara Galli, *Protecting Children? Assessing the Treatment of Unaccompanied Minors in the U.S.*, *LATINO PUB. POL.* Spring 2018, at 2, 12-13 (describing the narrow avenues for relief available to unaccompanied youth apprehended at the border, among which SIJS is prevalent).

⁶⁶ See Heidbrink, *supra* note 57, at 18-19 (describing how alternative forms of immigration relief are ill-suited to the procedural and substantive needs of youth).

⁶⁷ *Id.*

⁶⁸ GLENN-LEVIN RODRIGUEZ, *supra* note 63, at 21-22.

⁶⁹ Maddali, *supra* note 60, at 119.

⁷⁰ *Id.* at 136-37 (describing how backlogs impose delay on adults attempting to adjust status); *Id.* at 153-54 (describing the harsh time penalties on reentry for adults who have violated immigration laws).

their own children.⁷¹ This instability of status is then passed on to youth that hope to qualify for an ever-shrinking range of options for legal status.⁷²

Even youth that do qualify for SIJS frequently feel conflicted about the need to paint one or both of their parents as abusive, but choose to do so because of the lack of other viable options for immigration relief. Although impossible to quantify, anecdotal evidence regarding such conflicted feelings abounds. One immigration attorney explained that her SIJS clients were “reluctant to give us the information we need to throw their parents under the bus.”⁷³ In a qualitative study, researcher Lauren Heidbrink presented the experiences of two SIJS-eligible youth in Office of Refugee Resettlement (ORR) detention and their feelings about painting their parents as abusive.⁷⁴ In one case, after “understanding that her release from detention . . . was contingent upon her claim of SIJ, [she] astutely explained to me, ‘My mom has to be the bad one. She wants the best for me. She will understand[.]’”⁷⁵ In contrast, another youth “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[.]” eventually choosing to abandon his case and return to his home country instead.⁷⁶

Although youth and parents alike choose to apply for SIJS because the benefits of that child receiving legal status outweigh the costs, those benefits come with real consequences for the parents. SIJS doesn’t allow the youth, even after gaining citizenship, to sponsor either parent, even one that is not abusive.⁷⁷ This rule—which may have made sense when the child needed to show abuse, abandonment, or neglect from both parents—is now unnecessarily punitive, particularly for the parent that a state court has found is the most suitable custodial guardian for the child.⁷⁸ It also strips the naturalized SIJS recipient of one of the rights of citizenship, in effect making

⁷¹ *Id.* at 138 (noting that parents with status can sponsor a child without it, but a child with status cannot sponsor a parent without it, meaning that “in a growing number of cases, it is children . . . who would, but for the asymmetry just mentioned, have the right to establish family unity around them.”).

⁷² See Heidbrink, *supra* note 57, at 12 (explaining how immigration law “recogniz[es] 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)”).

⁷³ Interview with Stephanie Lubert, Staff Attorney, Hebrew Immigrant Aid Society of Pennsylvania, in Philadelphia, Pa. (Jan. 8, 2019).

⁷⁴ Heidbrink, *supra* note 57, at 22–24.

⁷⁵ *Id.* at 23.

⁷⁶ *Id.* at 24.

⁷⁷ 8 U.S.C. § 1101(a)(27)(J)(iii)(II) (2018).

⁷⁸ Javeria Ahmed, *No Parents Allowed: The Problem with Special Immigrant Juvenile Status*, 24 CARDOZO J. EQUAL RTS. & SOC. JUST. 131, 133–34 (2017).

him or her a second-class citizen.⁷⁹ Guardianship offers no protection from deportation for an undocumented parent or custodian, despite the finding of a state court that placement with that caretaker is in the child's best interests.⁸⁰ This process ultimately subjects the family to additional uncertainty and trauma.⁸¹

Similarly, families resort to voluntary placement of their children in foster care when they cannot access meaningful support any other way. Most youth enter the foster care system for reasons related to poverty, such as a shortage of food in the home, unstable living conditions, or lack of supervision while parents are working.⁸² For families whose children have serious physical or behavioral health problems, the challenges of living in poverty are compounded.⁸³ Medicaid may not cover needed treatment or a healthcare provider willing to accept Medicaid may not be available.⁸⁴ Others may fear for their child's safety. One devoted father described his heartbreaking decision to place his daughter in foster care after numerous violent outbursts in which she bit her classmates and a police officer, and his disappointment in the difficult process of regaining custody:⁸⁵ "When I saw her shaking like that, I started crying myself . . . I thought she was going to come out all right. I thought by this time, she'd be back home again."⁸⁶ These conditions

⁷⁹ See Scharf, *supra* note 54, at 586, 629-30 (claiming that this rule is an unconstitutional class-based distinction that turns naturalized SIJS recipients into second-class citizens).

⁸⁰ See Ahmed, *supra* note 78, at 142-43 (arguing that this provision violates the Equal Protection Clause).

⁸¹ See RANDY CAPPS ET. AL., MIGRATION POL'Y INST. & URBAN INST., IMPLICATIONS OF IMMIGRATION ENFORCEMENT ACTIVITIES FOR THE WELL-BEING OF CHILDREN IN IMMIGRANT FAMILIES 9-11 (2015) (describing the long-term toxic stress and trauma experienced by children in families where the constant threat of separation looms large).

⁸² AFCARS REPORT, *supra* note 13; EUBANKS, *supra* note 21.

⁸³ See Sengupta, *supra* note 27 (describing how the stresses of a child with major emotional and behavioral needs are exacerbated for "parents who don't have a support system or the economic means to purchase a support system").

⁸⁴ See Julia Zer, MaryBeth Musumeci, & Rachel Garfield, *Medicaid's Role in Financing Behavioral Health Services for Low-Income Individuals*, KAISER FAM. FOUND. (June 29, 2017), <https://www.kff.org/medicaid/issue-brief/medicaids-role-in-financing-behavioral-health-services-for-low-income-individuals/> [<https://perma.cc/DM32-6CAG>] (describing how approximately 2.5 million people with Medicaid reported an unmet need for mental health treatment in 2015). This is a problem for youth as well: In 2015, only 39.3% of youth aged 12-17 who had suffered a major depressive episode in the previous year received any type of treatment at all. *Results from the 2015 National Survey on Drug Use and Health*, CTR. FOR BEHAV. HEALTH STAT. & QUALITY, Table 11.3B (Sept. 8, 2016), [https://www.samhsa.gov/data/sites/default/files/NSDUH-DetTabs-2015/NSDUH-DetTabs-2015.pdf](https://www.samhsa.gov/data/sites/default/files/NSDUH-DetTabs-2015/NSDUH-DetTabs-2015/NSDUH-DetTabs-2015.pdf) [<https://perma.cc/X77D-TVQ8>].

⁸⁵ Sengupta, *supra* note 27.

⁸⁶ *Id.* (internal quotation marks omitted).

do not exist independently; they are a result of an insufficient and inconsistent social safety net that fails to meet the needs of poor families.⁸⁷

More recently, the foster care system has been criticized for failing to provide meaningful economic assistance to families that would not only create better conditions for children, but would also be less expensive for child welfare agencies in the long run.⁸⁸ Still, most federal child welfare spending continues to be poured into the foster care system,⁸⁹ instead of alternative forms of support for struggling families. Each state implements child welfare programs using a mix of federal, state, and local funds, with the primary sources of federal funds being Title IV-B and Title IV-E of the Social Security Act.⁹⁰ Title IV-E provides federal funding to states for foster care, adoption assistance, guardianship assistance (referred to in this Comment as kinship care), and the Chafee Foster Care Independence Program.⁹¹ Notably, it does not provide any funding for programs where the child remains at home.⁹² In contrast, Title IV-B has a wider mandate, but most of the money received through those programs goes to programs after the child has been removed from the home rather than supporting reunified families.⁹³ Although reunification is the most common outcome for youth exiting foster care, most post-permanency spending by states goes to adoptive parents.⁹⁴ Of the IV-B Subpart 1 funds, which are broadly discretionary, states spent on average

⁸⁷ See Frank Edwards, *Saving Children, Controlling Families: Punishment, Redistribution, and Child Protection*, 81 AM. SOC. REV. 575, 586 (2016) (finding a higher rate of foster care entry in states with less generous and more complex welfare programs); see also Eduardo Porter, *Patching Up the Social Safety Net*, N.Y. TIMES (Mar. 17, 2015), <https://www.nytimes.com/2015/03/18/business/patching-up-the-social-safety-net.html> [<https://perma.cc/ZT6B-9QTC>] (arguing that the redistributive focus of social spending ultimately undermines the generosity of those programs); Sarah Bruck, *Inequalities in U.S. 'Safety Net' Programs for the Poor*, SCHOLARS' STRATEGY NETWORK (Nov. 13, 2015), <https://journalistsresource.org/studies/government/congress/inequalities-safety-net-programs-poor/> [<https://perma.cc/JUZ4-W76B>] (describing major variations among states for welfare benefits); *Social Expenditures Database*, OECD, <http://www.oecd.org/social/expenditure.htm> (showing a relatively low level of public social spending for the U.S. as compared to other developed countries).

⁸⁸ See ROBERTS, *supra* note 3, at 133-35 (describing how successful family preservation programs cost the state less and avoid the trauma of removal); see also Edwards, *supra* note 87, at 576 ("The extent to which a state prefers punitive or redistributive strategies for addressing social problems affects both the frequency of child protection intervention and the character of those interventions.").

⁸⁹ John Sciamanna, *Reunification of Foster Children with Their Families: The First Permanency Outcome 7*, FIRST FOCUS (Oct. 2013), <https://firstfocus.org/wp-content/uploads/2014/11/Reunification-of-Foster-Children-with-their-Families.pdf> [<https://perma.cc/E2GS-XXQN>].

⁹⁰ Kerry DeVooght & Hope Cooper, *Child Welfare Financing in the United States 3*, STATE POL'Y ADVOC. & REFORM CTR. (Feb. 2012), <https://childwelfaresparc.files.wordpress.com/2013/02/child-welfare-financing-in-the-united-states-final.pdf> [<https://perma.cc/7ET4-8JQH>].

⁹¹ *Id.* at 5.

⁹² Sciamanna, *supra* note 89, at 1.

⁹³ *Id.*

⁹⁴ *Id.* at 1, 5.

forty-four percent of that funding on child protective services in 2017, compared to only twelve percent on family preservation.⁹⁵

The insufficiency of public safety nets and the overwhelming centrality of foster care to child welfare services combine to put poor families raising a child with physical or mental disabilities in an especially precarious position with few other options to turn to but an out-of-home placement. When children enter foster care through voluntary placements, they are on average older and far more likely to have a disability diagnosis.⁹⁶ While voluntary placements are supposed to facilitate connections between parents and youth, children who enter foster care through voluntary placements spend a longer amount of time in care, have more placements, and are more likely to enter a group home or an institution than are youth in the foster care system as a whole.⁹⁷ This raises questions about “the supports and systems available for children with disabilities and their families in the community . . . and about the use of child welfare to connect families of children with disabilities with the interventions they need.”⁹⁸ Raising children with severe mental health needs can cause major financial hardship even for middle class families, due to both direct costs such as higher out-of-pocket co-pays and uncovered services⁹⁹ and indirect costs such as lost wages or employment because of time spent treating and caring for the child.¹⁰⁰ Parents, particularly poor parents working with insufficient public resources, may not be able to access services that their children need without placing them into care.¹⁰¹ Accessing needed services without turning to foster care is particularly difficult for families of color, who are less likely to be diagnosed with mental health disorders and “receive less care and of poorer quality” when they are.¹⁰²

95 CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., REPORT TO CONGRESS ON STATE CHILD WELFARE EXPENDITURES 2 (2017). The nondiscretionary Subpart 2 funding of Title IV-B is divided into “Crisis Intervention (Family Preservation),” “Prevention and Support Services,” “Time-Limited Family Reunification Services,” and “Adoption Promotion and Support Services,” with states spending about an equal amount on each. *Id.* at 3.

96 Hill, *supra* note 28, at 66-67.

97 *Id.* at 67.

98 *Id.* at 68; see also Eileen Brennan & Frances Lynch, *Economic Impact and Supports*, in *WORK, LIFE, AND THE MENTAL HEALTH SYSTEM OF CARE* 251 (Rosenzweig & Brennan eds., 2008) (indicating that “relinquishment of children to state custody to obtain needed mental health services” can be the “only way out for families who cannot afford or access services they feel their child must have, including residential treatment.”).

99 Brennan & Lynch, *supra* note 98, at 242-43.

100 *Id.* at 244-48.

101 *Id.* at 251.

102 See Julie Rosenzweig & Judy Kendall, *Inside the Family: Insights and Experiences of Family Members*, in *WORK, LIFE, AND THE MENTAL HEALTH SYSTEM OF CARE* 79 (Rosenzweig & Brennan eds., 2008) (describing how discrimination from health care providers, combined with “an understandable lack of trust of the treatment system in ethnic minority communities” leads to underdiagnosis and undertreatment). A similar dynamic exists more broadly in child welfare, where

Families resort to both voluntary placement and SIJS after they have already been forced into situations with no good alternatives. Youth who are searching for a better future in this country or seeking to reunite with family members here that lack status have few other options to gain legal status beside SIJS. Youth in desperate need of medical or behavioral interventions who cannot afford private treatment often turn to voluntary placements as the only viable means of receiving those services.¹⁰³ SIJS and voluntary placements would not likely be the first choice of most of the individuals who utilize those processes; they were simply the only choices they had.

But a lack of other options is not the only parallel. Both voluntary placements and SIJS exist within systems that insist that the lack of options was the result of decisions made by those youth and their families, rather than recognizing the larger systemic inequalities and failures of the immigration and welfare systems that created those situations. Then, adding insult to injury, both systems villainize parents that are forced into them for not having avoided those impossible choices. In SIJS, parents who lack status to sponsor their children as legal immigrants are blamed for having chosen to reside here without authorization; this ignores the scarcity of paths to legal status that would allow them to do so.¹⁰⁴ Parents who act in their children's best interests by sending them to a better and safer life in the U.S. may find that very action forming the foundation of a charge of abuse, abandonment, and neglect against them.¹⁰⁵ In voluntary placements, parents who cannot afford or access the services that their children need end up relinquishing custody of their children to foster care, and are then viewed with suspicion or hostility by the system for their inability to provide for their children.¹⁰⁶ Any entry into the

poor families are rightfully hesitant to ask for help, as any contact with the system increases the likelihood that they will be targeted for supervision, particularly through the use of high-tech algorithms that flag families as high-risk. See EUBANKS, *supra* note 21, at 161-63 (describing how "[p]arenting while poor means parenting in public," and the ripple effects that it has on how families perceive even child welfare services that do not result in removal of their children).

¹⁰³ Sengupta, *supra* note 27; *supra* notes 96-102 and accompanying text.

¹⁰⁴ See GLENN-LEVIN RODRIGUEZ, *supra* note 63, at 73 (arguing that "the systemic removal of children whose parents are caught up in immigration enforcement actions is rooted in a politics of citizenship that categorizes undocumented parents as irredeemably 'unfit'"). For an example of such rhetoric, see Fox News, *ICE Director: Illegal Immigrant Parents Using Kids as Pawns*, YOUTUBE (Jun. 18, 2018), <https://www.youtube.com/watch?v=RN7YvIhxugI> [<https://perma.cc/CC62-MJYX>] ("As far as separation of families are [sic] concerned, you have to put the blame on the parents.").

¹⁰⁵ See J. Weston Phippen, *Young, Illegal and Alone*, THE ATLANTIC, Oct. 15, 2015 (describing the story of a child whose journey to the U.S. formed the basis of a claim of abandonment and abuse against his father).

¹⁰⁶ See Barbara J. Friesen & Nancy M. Koroloff, *Giving Up Custody to Obtain Services: Overall and Multicultural Implications* 12 (Mar. 1991), <https://www.pathwaysrtc.pdx.edu/pdf/pbGivingUpCustody.pdf> [<https://perma.cc/L4TG-34UA>] (describing the additional stigma poor parents face when voluntarily placing their children into care, and quoting one parent

foster care system leads to parents being characterized as bad caretakers and criticized for failing to care for their child, even when parents turn to the foster care system to ensure a better outcome for their child.

Society's nonchalance about assigning blame to these parents rather than recognizing systemic injustice is hardly a coincidence when we consider who those parents are. There is a long history in this country of blaming the poor, and particularly poor minorities, for their own hardships.¹⁰⁷ Parents who are blamed for their children's involvement with foster care or SIJS are from those same populations. No other immigration process besides SIJS includes a child's best interests as a consideration at all—only when the best interests of a child are pitted against those of a “bad” parent do they seem to matter to the state for determining immigration benefits.¹⁰⁸ Likewise, society disparages families that rely on public assistance, decreases the availability of that assistance, and then labels placements as voluntary when they were more likely the only viable choice within that family's means.¹⁰⁹ Rhetoric about so-called illegal immigrants and welfare mothers appeals to the same underlying notion: that those individuals chose—out of laziness,¹¹⁰ immorality,¹¹¹ or

who gave up custody in order to obtain services as saying “[t]hrough the judge's eyes we were seen as neglectful. The pain and frustration of that experience was humiliating to us as parents”).

¹⁰⁷ For a more detailed look at this history of blame and discrimination, see DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 203-09 (1997) (“Black mothers' inclusion in welfare programs once reserved for white women soon became stigmatized as dependency and proof of Black people's lack of work ethic and social depravity.”); Beth Mandel, *The White Fist of the Child Welfare System: Racism, Patriarchy, and the Presumptive Removal of Children from Victims of Domestic Violence in Nicholson v. Williams*, 73 U. CIN. L. REV. 1131, 1154 (2005) (“[M]odern welfare discourse scapegoats poor Black mothers and blames poverty on the breakdown of the nuclear family and the alleged ‘inherent degeneracy’ of the Black race.”).

¹⁰⁸ See Heidbrink, *supra* note 57, at 2 (“SIJ is the only provision in immigration law that considers the child's best interest.”). This is particularly striking when compared with the process through which many undocumented adults in removal proceedings must seek relief: cancellation of removal. Cancellation requires “extreme and exceptionally unusual hardship” to a qualifying citizen or LPR relative, a notably higher standard that explicitly only weighs the interests of a qualifying child in comparison to all others, resulting in a “race to the bottom” in which “if the government is abusing everyone or a ‘similarly situated’ subset of people equally, the hardship imposed by the government is acceptable.” Becky Wolozin, *Doing What's Best: Determining Best Interests for Children Impacted by Immigration Proceedings*, 64 DRAKE L. REV. 141, 169-70 (2016).

¹⁰⁹ Friesen & Koroloff, *supra* note 106, at 5.

¹¹⁰ For example, take Senator Hatch's reluctance to renew funding for the Children's Health Insurance Program because, in his words, “I have a rough time wanting to spend billions and billions and trillions of dollars to help people who won't help themselves, won't lift a finger and expect the federal government to do everything.” Rachel Black & Aleta Sprague, *Republicans are Bringing 'Welfare Queen' Politics to the Tax Cut Fight*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/12/08/republicans-are-bringing-welfare-queen-politics-to-the-tax-cut-fight/?utm_term=.738d1dce1786 [<https://perma.cc/Z7ZH-9HC6>].

¹¹¹ Senator Grassley expressed his opposition to helping individuals who “are just spending every darn penny they have, whether it's on booze or women or movies.” *Id.* The article goes on to point out that such rhetoric is “grounded in narratives, cultivated over centuries, that portray black

criminal intent¹¹²—to end up in their particular situation. By casting parents in this role, societal discourse assigns them the blame for not only their own misfortunes, but also their children's circumstances. It is easier to scapegoat "bad" parents for harming innocent children than it is to accept societal responsibility for the positions that they are in, particularly when those families are poor and minority families that have historically been scapegoated.

B. SIJS and Kinship Care: A Comparison

In addition to punishing and blaming undesirable parents, both SIJS and foster care fail to respect nontraditional family models and the agency of individuals in them. For centuries in which families of color were excluded from state child welfare programs, extended family and community child care networks were a necessary response to poverty and marginalization, that were then used as evidence of bad parenting.¹¹³ Families separated by rigid immigration laws similarly adapt by relying on extended family and community networks to support youth.¹¹⁴ Rather than recognize the resilience and strength of these relationships, both foster care and the current immigration laws continue to hold up the nuclear family as the most desirable model.¹¹⁵ Even

Americans, especially black women, with suspicion and derision. These narratives create the justification for punitive and paternalistic treatment of the working poor while bestowing generous giveaways to the wealthy under the pretense of merit." *Id.*

¹¹² See Daniel E. Martinez et. al., *Sanctuary Cities and Crime*, in ROUTLEDGE HANDBOOK ON IMMIGRATION AND CRIME 277-78 (Ventura Miller & Peguero, eds., 2018) (tracing the history of, and debunking, the "immigrant-crime link"); Yolanda Vasquez, *Enforcing the Politics of Race and Identity in Migration and Crime Control Policies*, in RACE, CRIMINAL JUSTICE, AND MIGRATION CONTROL 143-45 (Bosworth, Parmar, & Vasquez, eds., 2018) (describing how immigration laws and public discourse have created the concept of the "criminal alien" that is additionally racialized as Latino).

¹¹³ This has been the case particularly for Black families, for whom the need for communal child-rearing is rooted in slavery and continued through their formal exclusion from segregated child welfare services until the middle of the twentieth century. Roberts, *supra* note 35, at 1621-22; see also Bass, *supra* note 5, at 76 (discussing how the institution of slavery shaped African American family life). Similarly, suspicion of communal child-rearing was one of the primary cultural biases that led to the widespread removal of Native American children from their homes that eventually resulted in the landmark Indian Child Welfare Act. See Lorie M. Graham, "The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine, 23 AM. INDIAN L. REV. 1, 25 (1998) ("The cultural values and social norms of Native American families—particularly indigenous child rearing practices— were viewed institutionally as the antithesis of a modern-day 'civilized' society. . . . This disparity in viewpoint was the result of general disdain for American Indian family life.").

¹¹⁴ See Claire Podgorski & Carolyn Rumer, *Effects of Immigration on the Family*, 3 INST. FOR LATINO STUD., UNIV. OF NOTRE DAME STUDENT RESEARCH SERIES, Fall 2009, no. 1 at 1, 12-13, https://latinostudies.nd.edu/assets/95243/original/3.1_effects_of_immigration.pdf [<https://perma.cc/BGS5-P89F>] (describing the U.S. legal system as an external pressure shaping immigrant family life, not only by defining who counts as a family member but also by shifting power dynamics within those families).

¹¹⁵ See ROBERTS, *supra* note 3, at 195 ("Whereas single welfare recipients must take paid jobs, more affluent mothers are expected to stay home full-time to care for their children. Middle-class

when foster care and immigration policy recognize nontraditional family structures as in the child's best interests, they condition their support and benefits on state approval, increased surveillance, and control. This mistrust and disregard for the autonomy of nontraditional families stems once again from society's disdain for the families involved in those systems.

SIJS, and immigration law more generally, fail to recognize nontraditional and extended family structures that are so common in multinational families. Unaccompanied minors who emigrate to the U.S. without an adult guardian clearly do not conform to a traditional family model, but neither do parents working in the U.S. to support children abroad, siblings in the same families with different legal status or different countries of residence, or youth entering the country to live with older siblings or extended family members.¹¹⁶ Yet, the cornerstone of immigration policy—family petitions—presumes a nuclear family as well as traditional gender roles.¹¹⁷ Historically, immigration law has ignored the agency of women, making them dependent (first statutorily and later in practice) on male partners, either as sponsors or victims of abuse.¹¹⁸ Although the Trump administration's family separation policy sparked outrage in the summer of 2018, it was not the first time immigrant families were separated based in part on the same outdated ideas of family models and gender roles.¹¹⁹ So-called “[f]amily detention,” in which mothers were detained with children and fathers were separated from their families, was in fact a “cornerstone of Obama's second term.”¹²⁰

mothers are supposed to depend on their husband's income to meet their financial needs.”); Maddali, *supra* note 60, at 112 (describing the historic privileging of the nuclear family model in immigration law).

¹¹⁶ The prevalence of mixed-status families is by no means limited to youth applying for SIJS. In fact, thirty percent of youth living in an immigrant family having at least one undocumented parent. RANDY CAPPS, MICHAEL FIX & JIE ZONG, MIGRATION POL'Y INST., A PROFILE OF U.S. CHILDREN WITH UNAUTHORIZED IMMIGRANT PARENTS 9 tbl. 2 (2016), <https://www.migrationpolicy.org/research/profile-us-children-unauthorized-immigrant-parents> [https://perma.cc/LX39-WM2J]. Likewise, nearly 6 million U.S. children have at least one family member, often a parent, who is undocumented. AM. IMMIGRATION COUNCIL, U.S. CITIZEN CHILDREN IMPACTED BY IMMIGRATION ENFORCEMENT (2018), <https://www.americanimmigrationcouncil.org/research/us-citizen-children-impacted-immigration-enforcement> [https://perma.cc/QKF9-Z3V5].

¹¹⁷ Maddali, *supra* note 60, at 133-34.

¹¹⁸ See generally Maddali, *supra* note 60, which traces the rhetoric and motivations regarding the ideal of family reunification in U.S. immigration law, arguing that even at its most principled, the immigration system has presumed and privileged heteronormative, male-led, nuclear families, a model that “no longer reflects the modern family (perhaps it never did) and is unresponsive to the needs of those families.” *Id.* at 112-13.

¹¹⁹ César Cuauhtémoc García Hernández, *Cruel and Immoral: America Must Close the Doors of its Immigration Prisons*, THE GUARDIAN, Jun. 17, 2018, <https://www.theguardian.com/commentisfree/2018/jun/17/family-separation-family-detention-immigration> [https://perma.cc/2LMB-HKKB].

¹²⁰ *Id.*

SIJS extends those presumptions to youth. Many SIJS cases are one-parent cases in which the non-custodial parent has abused, abandoned, or neglected the child. The cases in which this most straightforwardly fits with the lived reality of SIJS-eligible youth is when there is an absentee parent who has abandoned the family; however, cases with only findings of abandonment are being treated more skeptically under the current administration.¹²¹ In cases where both parents are part of a child's life but one is living abroad, the parent seeking custody and the child are often forced to depict the parent living abroad as abusive, neglectful, or abandoning. For example, 15-year-old Guillermo was forced to flee his home in El Salvador, where he had grown up with his father, when gangs threatened to kill him and his family.¹²² Once reunited with his mother in the U.S., his best chance to avoid deportation and certain death was to apply for SIJS.¹²³ In order to do so, "Guillermo's father, who'd taken out a \$7,500 loan to pay for his journey to America, now had to declare that he'd failed to protect his son— and legally disown him."¹²⁴

This imperfect fit between the presumption of a traditional family structure and reality is particularly apparent in the case of non-parent sponsors for SIJS, who are usually extended family members or close friends. SIJS requires a sponsor, either through the state child welfare system or a custody order granted by a court.¹²⁵ SIJS thereby forces non-parent sponsors into an adversarial custody process against the parents, when in reality they may have a more flexible co-parenting relationship necessitated by geographic and economic limitations. Parents who have entrusted these extended family members and friends to care for their children in their absence may maintain close communication and contact with both the sponsors and their children. Despite the existence of this extended caretaking network, the sponsor must challenge the parent(s) in an adversarial proceeding in which the sponsor shows that the parents have mistreated their child, potentially damaging relationships between the parents and the sponsors as well as the parents and their children.¹²⁶

¹²¹ See Katie Annand, Andrea Del-Pan & Rachel Prandini, *Guidance for SIJS State Court Predicate Orders in California*, IMMIGRANT LEGAL RESOURCE CTR. 2 (2017), <https://www.ilrc.org/new-guidance-sijs-state-court-predicate-orders-california> [<https://perma.cc/N3JW-ZC9R>] ("USCIS has increased scrutiny of SIJS state court predicate orders in recent years.")

¹²² Phippen, *supra* note 105.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ 8 U.S.C. § 1101(a)(27)(J)(i) (2018).

¹²⁶ See Heidbrink, *supra* note 57, at 2 ("[T]he relationships between unaccompanied children and their kin are getting strained and, in some instances, severed.")

Kinship care developed as an acknowledgement of similar nontraditional family and community structures and their benefits for children.¹²⁷ It is associated with many positive outcomes for youth when compared to non-family placements, such as better self-esteem, fewer placements, and greater ease of maintaining a relationship with parents.¹²⁸ Extended family members, such as grandparents, can access the economic supports of foster care that a family desperately needs while still giving children a sense of security.¹²⁹

Both SIJS and kinship care offer important and needed state supports for families and children. In both programs, however, the price of those benefits is state surveillance and intrusion into the family. States vary in the requirements for kinship care providers to become licensed, and in most states the level of licensing is directly tied to the financial support a family receives.¹³⁰ Those who oppose the expansion of kinship care do so by highlighting the “undeserving” nature of the extended family members that provide those services, even framing cases where youth retained ties with their parents as negative examples that undermine the goals of the system to keep children away from their “bad” parents.¹³¹

Likewise, SIJS sponsors, whether parents or guardians, must convince a court that they are the most suitable home for that child to be awarded custody in the underlying state court proceeding.¹³² This oversight reflects

¹²⁷ Roberts, *supra* note 113, at 1622-23.

¹²⁸ Michele Cranwell Schmidt & Julie Treinen, *Using Kinship Navigation Services to Support the Family Resource Needs, Caregiver Self-Efficacy, and Placement Stability of Children in Informal and Formal Kinship Care*, 95 CHILD WELFARE 69, 70-71 (2017); Meredith L. Alexander, Note, *Harming Vulnerable Children: The Injustice of California’s Kinship Foster Care Policy*, 7 HASTINGS RACE & POVERTY L.J. 381, 393-96 (2010).

¹²⁹ Alexander, *supra* note 128, at 400.

¹³⁰ See Olivia Golden & Jennifer Macomber, *The Adoption and Safe Families Act (ASFA), in INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT* 19 (2009) (“In most but not all states, higher payment has followed higher standards.”); *Supporting Relative Caregivers of Children*, NAT’L CONF. OF STATE LEGIS. (Feb. 13, 2017), <http://www.ncsl.org/research/human-services/relative-caregivers.aspx> [<https://perma.cc/GM6D-4X9D>] (giving an overview of state legislation regarding the regulation of kinship care).

¹³¹ For example, Maggie Gallagher argued in an op-ed that kinship care “threatens to turn a vital child-protection service into a supplementary welfare program, squandering resources meant for profoundly troubled families, marooning children in foster care far longer than is appropriate, and threatening the integrity of the system itself.” She then proposed that the costs of foster care to the state be reduced by encouraging relatives to adopt, and expressed optimism that this plan would be successful because “[t]he many grandmothers who have themselves been abused by their addict daughters might be more than willing to cooperate with authorities . . . in order to protect their grandchildren.” Maggie Gallagher, *Foster Care as Welfare*, CITY J. (Summer 1991), <https://www.city-journal.org/html/foster-care-welfare-12751.html> [<https://perma.cc/6KWZ-F2FF>].

¹³² See 8 U.S.C. § 1101(a)(27)(J)(i) (2018) (requiring a state court order placing the child in custody of the state or an individual). The standards for receiving the underlying custody order will vary by state, but often include a showing that custody with that sponsor is in the child’s best interest. See, e.g., 23 Pa. C.S. § 5323a (2019) (“[T]he court may award . . . custody if it is in the best interest of the child”).

the suspicion and disrespect both systems harbor of these nontraditional families. Implicit in this distrust is the idea that the government is in a better position than the child's parents, extended family, or community to determine what living arrangement is in the child's best interests.¹³³ Such an idea is tenable only because society already distrusts and disrespects those parents, and by extension their communities.¹³⁴

The oversight and surveillance that comes with participating in SIJS or kinship care is more than just an invasion of privacy; it often comes with adverse effects for the guardians who take on responsibility for these children. Although long-term placement in kinship care may be in a child's best interests, the more recent push towards freeing children for adoption through the ASFA means that adults providing kinship care may be left with fewer legal rights to a child than they would have been otherwise, because foster parents are not given special standing in disputes that may arise over custody following a termination of parental rights.¹³⁵ Additionally, the much-needed economic support that kinship care provides could create perverse incentives for delaying reunification with parents.¹³⁶

For undocumented parents or guardians that sponsor SIJS-eligible youth, the risks are even more pronounced, and they are put at direct risk for sponsoring their own children. In order to sponsor a child for release from federal custody with ORR, which is responsible for the custody of unaccompanied minors, an adult must provide his or her address, fingerprints, and other identifying information to the government, and potentially undergo a home study.¹³⁷ In 2018, Immigration and Customs Enforcement (ICE) and ORR signed a memorandum of agreement allowing

¹³³ Wolozin, *supra* note 108, at 144-45.

¹³⁴ In analyzing the intersection between migrant families and foster care systems, Naomi Glenn Levin-Rodriguez eloquently places the distrust of those parents within a historical context that includes orphan trains and forced assimilation of Native American children. In her words:

Child saving practices, and perhaps all forms of intervention into families, are fraught because intervention relies upon a normative sense of proper parenting. . . . Custody in such cases is determined by the belief that all children should be placed with families who are members of the dominant social group, usually white and Christian families: those best equipped to satisfy the 'best interest' of the children, at least under circumstances where poverty or an inferior position in an established racial hierarchy constitutes neglect and abuse.

GLENN-LEVIN RODRIGUEZ, *supra* note 63, at 56-58.

¹³⁵ See Pamela Laufer-Ukeles, *Money, Caregiving, and Kinship: Should Paid Caregivers Be Allowed to Obtain De Facto Parental Status?*, 74 MO. L. REV. 25, 46-49, n.112 (2009) (arguing that foster parents should be given special de facto legal recognition in custody disputes).

¹³⁶ Roberts, *supra* note 35, at 1634-35.

¹³⁷ OFFICE OF REFUGEE RESETTLEMENT, ORR GUIDE: CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED § 2.2.3-4 (2015), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.2> [<https://perma.cc/Y2KE-HLYQ>].

ICE to access information that ORR collects about sponsors; subsequently, at least 170 potential sponsors who came to the attention of the government after agreeing to sponsor a child for release were arrested by ICE in 2018.¹³⁸ Parents and guardians of SIJS-eligible youth may also come to the attention of ICE through information sharing from state agencies, mandatory fingerprinting in some courts,¹³⁹ and even ICE arrests occurring in family courts.¹⁴⁰ Undocumented parents and sponsors have no choice but to accept the risks associated with state oversight if they want to gain custody of their child or help their child apply for SIJS.¹⁴¹

These surveillance and information-sharing practices fail to consider how some of the consequences of state oversight—such as potential detention and deportation—threaten the wellbeing and stability of the entire family.¹⁴² This disregard for the instability of immigrant families was captured in White House Chief of Staff John Kelly’s response to a question about the fate of immigrant children separated from their families: “The children will be taken care of—put into foster care or whatever.”¹⁴³ While this statement was made

¹³⁸ NAT’L YOUTH LAW CTR., *The Flores Settlement Agreements and Unaccompanied Children in Federal Custody* 8 (Feb. 2019), <https://youthlaw.org/wp-content/uploads/2019/02/Flores-Congressional-Briefing.pdf> [<https://perma.cc/3UJT-5EZ6>]; Sarah Ramey, *Sponsors of Immigrant Children are Getting Arrested—We Must Protect Them*, THE HILL (Oct. 9, 2018), <https://thehill.com/opinion/immigration/410596-sponsors-of-immigrant-children-are-getting-arrested-we-must-protect-them> [<https://perma.cc/78LK-AJGB>]. The use of children as “bait” to facilitate ICE arrests of their undocumented parents and sponsors is the subject of an ongoing class action lawsuit. Third Amended Complaint & Petition for Writ of Habeas Corpus at 1, *J.E.C.M. v. Hayes*, No. 1:18-CV-903-LMB (E.D. Va. Jan. 18, 2019) (acknowledging that the Trump administration used children detained by ORR to bait potential sponsors into providing identifying information).

¹³⁹ Advisory Memorandum from the Advisory Council on Immigration Issues in Family Court to the Chief Administrative Judge Lawrence Marks, 5-6 (Oct. 27, 2017).

¹⁴⁰ See generally SHELLER CTR. FOR SOC. JUSTICE AT TEMPLE LAW SCH., *OBSTRUCTING JUSTICE: THE CHILLING EFFECT OF ICE’S ARRESTS OF IMMIGRANTS AT PENNSYLVANIA’S COURTHOUSES* (2019), <https://www2.law.temple.edu/cs/publication/obstructing-justice-the-chilling-effect-of-ices-arrests-of-immigrants-at-pennsylvanias-courthouses/> [<https://perma.cc/A7PG-RPNE>].

¹⁴¹ Even when sponsors do take that risk, they may then face an additional hurdle of being denied custody for reasons related to poverty. The National Youth Law Center Congressional Briefing describes incidents of sponsors being denied custody unless they could move to a larger home or better neighborhood, reduce the number of other children living in their home, or afford psychotropic medicines prescribed by the government. In the poignant words of one child interviewed for that report, “I don’t fully understand why ORR won’t let me live with my sister, but I think it is because ORR thinks she doesn’t have enough money. I would prefer to live with my sister or family over foster care, and I believe even poor families have the right to live together.” *Flores Settlement Agreement*, *supra* note 138, at 10.

¹⁴² See *id.* at 7 (“A longstanding body of research has established that detaining children interferes with healthy development, exposes youth to abuse, undermines educational attainment, makes mentally ill children worse, and puts children at greater risk of self-harm.”).

¹⁴³ Amy Davidson Sorkin, *The Case of the Missing Immigrant Children*, THE NEW YORKER (May 29, 2018), <https://www.newyorker.com/news/daily-comment/the-case-of-the-missing-immigrant-children> [<https://perma.cc/LB56-GYJ6>].

regarding unaccompanied minors rather than citizen or SIJS-eligible children whose parents had been deported,¹⁴⁴ it embodies the callousness with which the current administration treats the stability and welfare of immigrant youth and families.

In addition to their scrutiny and mistrust of nontraditional family structures, both the foster care and SIJS systems discount and minimize the agency of children themselves.¹⁴⁵ By characterizing the internal dynamic of families that interface with SIJS and foster care as one of innocent children against bad parents, the voices of the children are lost. Older children may be active decision makers within their families and may make conscious choices about what is in their best interests, including whether they want to remain in foster care¹⁴⁶ or to migrate.¹⁴⁷ Despite this agency, youth are consistently seen as passive victims, rather than active decision makers who have chosen where and with whom they want to live. The idea that a child actively decided to migrate is even seen as suspect, potentially making that child unworthy of protection.¹⁴⁸ It is telling that President Trump defended his administration's treatment of unaccompanied youth by claiming that "[t]hey look so innocent. They're not innocent."¹⁴⁹ Trump sought to demonize unaccompanied immigrant youth by associating them with crime, economic migration, and manipulation of immigration laws—associations usually reserved for their parents.¹⁵⁰ In doing so, both his comment and the backlash against it implicitly affirmed a binary framework in which immigrant children can either be passive, innocent victims, or exercise agency and become evil and undeserving.

Likewise, youth in the foster care system struggle to assert their own agency in a space that presumes that they cannot identify or achieve their own best interests.¹⁵¹ Most dependency courts do not require or even encourage youth to attend their own hearings, despite studies of former foster care youth that showed that attendance at hearings helped them to feel more

¹⁴⁴ *Id.*

¹⁴⁵ Maddali, *supra* note 60, at 107.

¹⁴⁶ Andrea Khoury, *Seen and Heard: Involving Children in Dependency Court*, 25 A.B.A. CHILD LAW PRAC. 145, 145-46 (2006), <https://docplayer.net/85313810-Child-law-practice-vol-25-no-10-december-2006-helping-lawyers-help-kids.html> [<https://perma.cc/X9PU-L6CR>].

¹⁴⁷ See Heidbrink, *supra* note 57, at 18 (“[I]nitial discussions of SIJ applicants operated on the assumption that children could not be responsible for migration decisions, whether lawful or unlawful.”).

¹⁴⁸ GLENN-LEVIN RODRIGUEZ, *supra* note 63, at 21.

¹⁴⁹ Seung Min Kim, *Trump Warns Against Admitting Unaccompanied Migrant Children: ‘They’re Not Innocent’*, WASH. POST (May 23, 2018), https://www.washingtonpost.com/politics/trump-warns-against-admitting-unaccompanied-migrant-children-theyre-not-innocent/2018/05/23/e4b24a68-5ec2-11e8-8c93-8cf33c21da8d_story.html [<https://perma.cc/W7MH-PHXU>].

¹⁵⁰ *Id.*

¹⁵¹ See generally Lynn Nybell, *Locating “Youth Voice”: Considering the Contexts of Speaking in Foster Care*, 35 CHILD. & YOUTH SERVS. REV. 1227 (2013).

empowered and informed.¹⁵² In the courtroom or in a meeting with a case worker, youth have limited power to assert their opinions, and may be misunderstood or disregarded when they attempt to articulate their needs and desires.¹⁵³ As one youth put it when reflecting on his experience in foster care, “All I ever wanted was to be heard and not just dismissed.”¹⁵⁴ While framing youth—both in foster care and immigration proceedings—as innocent victims of bad parents may increase public sympathy for them, it also drowns out their voices and decisionmaking abilities within their families.

III. INTERSECTIONS AND TENSIONS BETWEEN CHILD WELFARE AND SIJS

While the parallels between SIJS and foster care are striking, the two processes intersect in more direct ways as well. Because SIJS was historically intertwined with the child welfare system,¹⁵⁵ the influence of foster care proceedings continues to be apparent in SIJS proceedings even where there is no involvement from the child welfare agency.¹⁵⁶ The motivations behind families seeking SIJS and families involved in the foster care system are distinct, and the arguments each group makes may appear to be in tension with each other. However, rather than treat this area as one where the interests of immigrant families and domestic families diverge, advocates should recognize how the systemic injustices discussed above lead to these divergent arguments and are rooted in the same foundation of discrimination against their clients.

Notably, many SIJS-eligible youth are also in foster care.¹⁵⁷ Some enter state foster care in the same ways that citizen youth do.¹⁵⁸ In some cases, state agencies may even be resistant to assuming custody of immigrant youth, perhaps in part to avoid responsibility for their gaining SIJS.¹⁵⁹ Detained youth who do not have a sponsor but have a high likelihood of success on a

¹⁵² Khoury, *supra* note 146, at 145-46.

¹⁵³ See generally Nybell, *supra* note 151.

¹⁵⁴ Khoury, *supra* note 146, at 145.

¹⁵⁵ Daugherty, *supra* note 44, at 1092.

¹⁵⁶ *Id.* at 1098-99.

¹⁵⁷ *Id.* at 1103-04.

¹⁵⁸ See *id.* at 1102 (explaining that youth in foster care automatically satisfy the dependency prong of SIJS).

¹⁵⁹ See Randi Mandelbaum & Elissa Steglich, *Disparate Outcomes: The Quest for Uniform Treatment of Immigrant Children*, 50 FAM. CT. REV. 606, 610 (2012) (“At times... a youth simply does not come to the attention of the child protection agency. At other times, because a youth already has the support of an adult caregiver, often a relative, the child protection agency will determine that the youth is safe, no longer at risk of harm, and thus does not need the agency’s assistance.”).

petition for relief may also be placed in federal foster care.¹⁶⁰ However, the shortage of federal foster care homes and the requirement of a custody order limit youth who lack a willing sponsor or are detained from applying for SIJS even if they would be eligible.¹⁶¹ A large proportion of youth in ORR custody who accept voluntary departure or are deported when they turn eighteen would have been eligible for SIJS, but could not access a state court to obtain the necessary predicate order.¹⁶² This problem will probably increase as adults who are fearful of interacting with the government become less likely to come forward to sponsor youth for their release. Due to fear caused by ORR's increased cooperation with ICE and policies such as mandatory fingerprinting of potential sponsors, the number of youth in ORR custody increased by ninety-seven percent in 2018, despite the fact that the number of unaccompanied youth crossing the border remained constant during this time.¹⁶³ While SIJS cases where a child is in ORR custody or state foster care present additional challenges and complexities, this Comment focuses on youth with a willing sponsor who must still navigate their way through state juvenile courts.

For those youth, state courts have become immigration gatekeepers for the purpose of SIJS, and have done so in an inconsistent way across jurisdictions.¹⁶⁴ One common way this happens is through state laws that limit access to dependency or custody hearings for youth over eighteen from receiving the underlying predicate order. Because of this, youth between eighteen and twenty-one are blocked from applying for SIJS even though the federal statute allows someone to apply until age twenty-one.¹⁶⁵ Some

¹⁶⁰ Jennifer Baum et al., *Most in Need but Least Served: Legal and Practical Barriers to Special Immigrant Juvenile Status for Federally Detained Minors*, 50 FAM. CT. REV. 621, 622 (2012).

¹⁶¹ See *id.* at 622-23 (“[C]ontinued detention, and the concomitant inability of children to access state courts for the purpose of obtaining SIJS predicate orders, is often one of the largest hurdles such children face in defending their immigration cases.”).

¹⁶² *Id.* at 622.

¹⁶³ *Flores Settlement Agreements*, *supra* note 138, at 3. The average length of time that youth are spending in ORR custody has increased to well over the twenty days mandated by the *Flores* settlement, with the average time being sixty-seven days for the Homestead Shelter in Florida. *Id.* at 13. There was a huge drop in youth in custody in December 2018 when ORR partially rolled back the fingerprinting policy that allowed one “tent city” detention center in Tornillo, Texas to close entirely. *Id.* Homestead reports having no children sheltered there, but plans to remain open as a “prudent step to ensure that ORR is able to meet its responsibility, by law, to provide shelter for [unaccompanied minors] referred to its care by DHS.” Press Release, U.S. Dep’t of Health and Human Servs., Unaccompanied Alien Children Sheltered at Homestead Jobs Corps Site, Homestead, Florida (Aug. 6, 2019), <https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/homestead-job-corps-site-fact-sheet/index.html> [<https://perma.cc/TB26-FX5Y>].

¹⁶⁴ See generally Laila L. Hlass, *States and Status: A Study of Geographical Disparities for Immigrant Youth*, 46 COLUM. HUM. R. L. REV. 266 (2014).

¹⁶⁵ Junck, *supra* note 49, at 58; Jessica Pulitzer, Note, *Fear and Failing in Family Court: Special Immigrant Juvenile Status and the State Court Problem*, 21 CARDOZO J.L. & GENDER 201, 215 (2014);

dependency courts are reluctant to open a case at all for a child in a safe living situation, perhaps due to lack of understanding of SIJS, limited resources of an overburdened system, or the belief that youth are gaming the system just to get status.¹⁶⁶ This apprehension is apparent in the reasoning of one state court hesitant to even adjudicate one-parent SIJS cases following the 2008 amendments. The court expressed its disbelief that

a juvenile could apply for SIJS status, with its immigration advantages, even if that juvenile could be viably reunified with one parent who never abused, neglected, or abandoned the juvenile. Indeed, it would permit SIJS status even if that safe parent had raised the juvenile from birth, in love, comfort, and security¹⁶⁷

USCIS mirrors this same hesitance from the state courts as a matter of policy, by scrutinizing state court orders to ensure that “the[se] juvenile court order[s] w[ere] sought to obtain relief from abuse, neglect, abandonment, or a similar basis under state law, and not primarily or solely to obtain an immigration benefit.”¹⁶⁸ Furthermore, state courts consistently misunderstand their role in the SIJS process or include language opining on the merits of the child’s immigration application.¹⁶⁹

see also Policy Manual, Chapter 2, Eligibility Requirements, <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ-Chapter2.html#S-G> [<https://perma.cc/4A5Z-43BG>] [hereinafter *Eligibility Requirements*] (“[A] juvenile court may not be able to take jurisdiction and issue a dependency or custody order for a juvenile who is eighteen years of age or older even though the juvenile may file his or her petition with USCIS until the age of twenty-one. There is nothing in USCIS guidance that should be construed as instructing juvenile courts on how to apply their own state law.”). In contrast, some states have amended their laws to allow youth seeking SIJS status to receive a predicate order up to the age of twenty-one, and the refusal of USCIS to honor those orders for youth between 18 and 21 is the subject of ongoing class action litigation. *Complaint at 36, Moreno Galvez v. Cissna*, No. 2:19-cv-321 (W. D. Wash. Mar. 5, 2019).

¹⁶⁶ For example, one news report claimed that youth from India were manipulating SIJS in an elaborate fraud to gain legal status, prompting an attorney interviewed for comment to retort, “I think what you are trying to imply is that they’re gaming the system . . . [a]nd I stand by my client’s facts that they have enough evidence.” Melissa Russo, Evan Stulberger & Fred Mamoun, *I-Team: Family Court Exploited in Immigration Cases in Queens, Insiders Charge*, NBC NEW YORK (Mar. 4, 2015), <https://www.nbcnewyork.com/news/local/family-court-queens-immigration-cases-human-smuggling-green-card-295050931.html> [<https://perma.cc/A8KE-73CA>].

¹⁶⁷ Daugherty, *supra* note 44, at 1097 (citing *H.S.P. v. J.K.*, 87 A.3d 255, 268 (N.J. Super. Ct. App. Div. 2014)). It is also possible for delinquency courts to make the necessary findings for a SIJS predicate order, though less frequently utilized. *See Junck, supra* note 49, at 55 (“Because SIJS is often mistakenly seen as relief available only for children in dependency proceedings and, increasingly, in guardianship proceedings, relatively few children in delinquency proceedings apply for SIJS. The plain language of the federal statute, however, allows for the grant of SIJS to children in juvenile delinquency proceedings . . .”).

¹⁶⁸ *Eligibility Requirements, supra* note 165, at (D)(5).

¹⁶⁹ *See* Michelle Anne Paznokas, Note, *More Than One Achilles’ Heel: Exploring the Weaknesses of SIJS’s Protection of Abused, Neglected, and Abandoned Immigrant Youth*, 9 DREXEL L. REV. 421, 447-49 (2017) (“A common fallacy of the state court is to adjudicate the SIJS case on the merits of the

While dependency hearings are not supposed to make permanent findings about the child's best interest going forward or close the door to viable future reunification, SIJS requires these types of determinations.¹⁷⁰ When adjudicating SIJS petitions, USCIS will routinely issue requests for additional evidence—delaying or even denying the SIJS application—if it believes that a child's circumstances have or could change.¹⁷¹ For SIJS youth declared dependent on a juvenile court, the predicate order is issued through the dependency hearing process—routine hearings that take place periodically for youth and families under court supervision that are designed to track their progress toward a permanency goal.¹⁷² In dependency hearings, SIJS advocates try to elicit an immediate finding that reunification is not viable in order to get the predicate order needed to apply for SIJS, whereas child and parental advocates in dependency hearings try to prioritize reunification if it is viable rather than immediately terminate parental rights.

In both systems, most cases are based on neglect rather than actual abuse, but SIJS applicants and families seeking to reunify or remain together often make divergent arguments about what is neglect and what is poverty. Conflating the two already disproportionately punishes poor families of color in both systems.¹⁷³ In both SIJS and voluntary placement, courts often consider neglect to include lack of food, lack of supervision, or habitation in a dangerous neighborhood.¹⁷⁴ Poverty is not neglect, however, and family advocates in the foster care system seek tirelessly to separate the two.¹⁷⁵ Proposals to clearly separate the two concepts and prevent removal for reasons of poverty has even gained congressional attention as the focus of a bill proposed by Representative Moore in 2018.¹⁷⁶ However, as long as SIJS

immigration aspect of the application, which, in reality, is the federal government's responsibility."); see also IMMIGRANT LEGAL RES. CTR., SPECIAL IMMIGRANT JUVENILE STATUS: A PRIMER FOR ONE-PARENT CASES 4-6 (2015) (listing negative state court precedents regarding one-parent SIJS).

¹⁷⁰ See *Eligibility Requirements*, *supra* note 165, at (D)(2) ("The temporary unavailability of a child's parent does not meet the eligibility requirement that family reunification is not viable.")

¹⁷¹ See *id.* at (D)(1) ("Court-ordered dependency or custodial placements that are intended to be temporary generally do not qualify for the purpose of establishing eligibility for SIJ classification.")

¹⁷² Steven Weller & John A. Martin, *Dependency Filings in State Juvenile Courts on Behalf of Unaccompanied Alien Children Seeking Special Immigrant Juvenile Status*, CTR. FOR PUB. POL'Y STUD. & IMMIGRATION & THE STATE COURTS INITIATIVE 3-4 (July 15, 2014), http://www.sji.gov/wp/wp-content/uploads/Memo_on_UAC_and_the_State_Courts.pdf [<https://perma.cc/PZ6E-G23W>].

¹⁷³ See generally ROBERTS, *supra* note 3; GLENN-LEVIN RODRIGUEZ, *supra* note 63.

¹⁷⁴ Particularly for SIJS, these factors blur the lines of SIJS with asylum, and in fact many children qualify for both and can apply concurrently.

¹⁷⁵ See, e.g., *Poverty is NOT Child Neglect: Could Changes to the Law Protect Parents? (Pt 1)*, THE KRONZEK FIRM, PLC (Feb. 19, 2019), <https://abuseandneglectdefense.com/poverty-is-not-child-neglect-could-changes-to-the-law-protect-parents-pt-1.html/> [<https://perma.cc/PD95-AR6R>] (describing how poor families are more likely to come into contact with Child Protective Services and offering services focused on family defense).

¹⁷⁶ H.R. 6233, 115th Cong. (2d Sess. 2018).

is the only form of immigration relief available to the families of the youth applicants, SIJS applicants and advocates will have no choice but to continue to construe neglect broadly. This creates a dynamic in which SIJS advocates are forced to argue for a broad definition of neglect and a need for immediate permanency determinations—the very arguments that advocates for family preservation are fighting to discredit. This tension is an inevitable result of the way that SIJS and foster care are designed and implemented, and it stems from the same narrative in both systems that blames parents for circumstances that are beyond their control. Advocates in both systems should push back against these narratives and fight for immigration reform and a more adequate social safety net, as achieving these related policy goals will benefit families in both systems.¹⁷⁷

The seemingly contrary stances that advocates must take in child welfare law and SIJS cases result from the larger, systemic problems that make both processes inadequate to truly support these families. Both the immigration and child welfare systems are structured in a way that forces parents into impossible situations, blames and punishes them for being in those situations, and subjects them to supervision based on a fundamental mistrust of their fitness to determine the best interests of their own children. As such, SIJS and foster care alike fail to fully protect the youth they claim to care about by failing to protect their families. These tensions would dissolve if both systems implemented policies that truly sought to support, reunify, and protect families.

IV. SUGGESTIONS FOR CHANGE

Child welfare law is far from perfect, but policymakers can learn from its positive aspects and apply those lessons to improve SIJS and reduce the tensions between the two systems. Child welfare law has acknowledged that reunification is generally the most preferable permanency outcome.¹⁷⁸ While the foster care system notoriously struggles to meet that goal, statutory law in most states has recognized that helping parents and children reunite should

¹⁷⁷ The parallels between family separation in the immigration context and foster care have not gone unnoticed in public discourse, but most commentators draw these connections within a context that still frames bad parents as harming innocent children. See, e.g., Emily Atkin, *The Uncertain Fate of Migrant Children Sent to Foster Care*, THE NEW REPUBLIC (June 20, 2018), <https://newrepublic.com/article/149161/uncertain-fate-migrant-children-sent-foster-care> [https://perma.cc/2QL6-ZHDG] (pointing out the inconsistency between Trump's characterization of May as National Foster Care month as recognizing "the plight of innocent children who are in foster care" while at the same time disrupting the lives of innocent migrant children separated by his policies).

¹⁷⁸ See *Supporting Successful Reunifications*, CHILD WELFARE INFO. GATEWAY 1, 1 (Oct. 2017), https://www.childwelfare.gov/pubPDFs/supporting_reunification.pdf [https://perma.cc/Y6EM-QSNN] ("[S]afe and timely family reunification is the preferred permanency option for most children.").

be a priority and requires the state to make reasonable efforts to do so.¹⁷⁹ Extending this recognition to SIJS would mean allowing youth to eventually sponsor *both* parents regardless of a previous finding of abuse, abandonment, or neglect, if that parent can show a change in circumstances that makes reunification in the child's best interest.

As the comparatively better outcomes of kinship care show, extended and nontraditional families are often the best and most stable option for a child that cannot live with his or her parents, and supporting and encouraging these arrangements leads to better outcomes.¹⁸⁰ Similarly, in 2008, SIJS took important steps to recognize a more inclusive vision of family by allowing for one-parent cases and removing the foster care requirement.¹⁸¹ However, SIJS could do better by providing non-parent sponsors with economic support akin to what they would receive as part of the kinship care program, and by ensuring the stability of SIJS recipients by granting their custodial guardians legal status if they did not already have it. While SIJS could benefit from adopting kinship care's recognition and support of extended families, both systems should better respect the privacy and autonomy of those families. Economic support for kinship care providers should not be conditioned on full licensing as foster parents, and sponsors of SIJS-eligible youth should not have to disclose their immigration status directly or indirectly to ORR, family court, or any other government body.

Another needed change to SIJS that would similarly support extended and nontraditional families is to allow recipients to sponsor their custodial parent concurrent with their own application. Linking sponsorship with a recipient's application better ensures stability in the living situation that the state court has designated to be in the child's best interest. Undocumented status may be inappropriately used as a negative factor against parents in family court, with judges assuming that an undocumented adult cannot provide stability to a child due to their own marginalized status.¹⁸² While this precariousness is often overstated,¹⁸³ the current climate has fueled these fears and created a toxic stress that is harmful for immigrant families in its own right, whether mixed status or not.¹⁸⁴ Allowing children to sponsor a guardian

¹⁷⁹ See *Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children*, CHILD WELFARE INFO. GATEWAY (Mar. 2016), <https://www.childwelfare.gov/pubPDFs/reunify.pdf#page=2&view=When%20reasonable%20efforts%20are%20required> [https://perma.cc/KK92-2H3H] (providing an overview of "reasonable efforts" standards in all fifty states).

¹⁸⁰ Alexander, *supra* note 128, at 393-96.

¹⁸¹ See discussion *supra* notes 49-52 and accompanying text.

¹⁸² Thronson, *supra* note 58, at 65-66.

¹⁸³ *Id.*

¹⁸⁴ Olga Khazan, *The Toxic Health Effects of Deportation Threat*, THE ATLANTIC (Jan. 27, 2017), <https://www.theatlantic.com/health/archive/2017/01/the-toxic-health-effects-of-deportation-threat/514718/> [https://perma.cc/E363-5AN2].

for some kind of legal status would provide better stability for the child themselves, both economic and emotional. Even if Congress is unwilling to grant guardians permanent residency through a family-based petition, another potential option could be deferred action similar to Temporary Protected Status (TPS), which would allow guardians to receive employment authorization and protection from deportation, albeit without a path to residency or citizenship.¹⁸⁵

Since such changes are regrettably unlikely to occur in the near future, advocates representing clients in SIJS cases will inevitably need to continue to make arguments about permanency and neglect that are at odds with the goals of families in the foster care system. As such, they should be careful and purposeful with their language both before the court and with their clients. In conversations with clients, they should recognize and make explicit the different cultural standards around neglect that the youth might need to draw on, explain why it is necessary to make those arguments, and avoid demonizing the parent in conversations with the youth and family members.¹⁸⁶ Although a court finding that one parent abused, abandoned, or neglected a child is necessary for a successful SIJS application, an advocate can focus their arguments and evidence on what that parent *did* rather than who they *are*, which is concededly a small difference, but one that may be meaningful to the child on whose behalf it is made.

Advocates for youth and families in both systems could also benefit from recognizing their struggles as interconnected. Family advocates in foster care proceedings should continue to distinguish between neglect and poverty, but accept that in many SIJS cases, escaping conditions associated with extreme poverty is in the best interests of the child and the family. By recognizing that these tensions arise from the same false and harmful narratives about their clients, advocates can see those tensions not as conflicts, but as another reason to combat those false narratives in solidarity. Although it may be expedient for SIJS and child advocates alike to utilize the innocent child/bad parent framework for a particular case or a policy goal, advocates should instead push back on that false dichotomy when it arises and point out the systemic injustices that constrain and punish the families they work with. Advocates

¹⁸⁵ U.S. CITIZENSHIP & IMMIGR. SERVS., *Temporary Protected Status*, <https://www.uscis.gov/humanitarian/temporary-protected-status> [<https://perma.cc/NQD4-YD4Q>] (last visited Oct. 30, 2019).

¹⁸⁶ Many lawyers represent both the youth in the SIJS application and the guardian in family court, creating additional potential conflicts. See Alexis Anderson, *Ethics Issues Inherent in Special Immigrant Juvenile State Court Proceedings: Practical Proposals for Intractable Problems*, 32 GEO. IMMIGR. L.J. 1 (2017) (explaining that differing views about the non-custodial parent and what their relationship with the child should be is one potential source of conflict, making it all the more important for a lawyer to avoid expressing judgments that could exacerbate that conflict).

may not be able to change the laws of the systems they work within, but they can work to change the conversation.

CONCLUSION

As the parallels and intersections between the domestic foster care system and SIJS show, many of the same false ideas underlie both. Both systems frame the benefit they provide as protecting innocent children from bad parents as a result of our society's more general villainization of those parents, although the innocent child/bad parent narrative does not fairly reflect the reality for most families caught up in these systems. By framing the narrative this way, both SIJS and foster care have come to predominate as one of few viable alternatives for relief—both socioeconomic and migratory—for these families, thereby forcing families in need of socioeconomic or migratory support into those processes and that narrative. This ultimately disserves both the parents who are vilified by that framework and the youth whose voices and autonomy are lost. Despite the concrete benefits that these systems can provide, such as medical and behavioral treatment for youth who cannot afford it, supporting families in crisis through kinship care networks, and providing legal status for otherwise ineligible youth, the bad parent narrative undermines these benefits by subjecting families to increased state surveillance and control. Extended and nontraditional family caregiving networks, instead of being viewed as sources of resilience, are treated with mistrust by the government, which seeks to insert itself into the family as a precondition to support. Once they are forced into these systems, families must make arguments about permanency and neglect that seem to conflict, but are actually the result of the limited options and unfair narratives that constrain them. A closer look at these seemingly conflicting arguments reveals that they developed in response to the limited options for families in need and unfair narratives about families in need that inform welfare policy.

By highlighting the parallels and intersections between foster care and SIJS, this Comment seeks to increase awareness of, and in turn challenge, the harmful ideas underlying each system. Lawmakers who pay lip service to the best interests of innocent children should think critically about the way their policies affect the families of those children. The best interests of children are best met by supporting and valuing the immediate and extended family structures they already have. This means pushing back on the societal narratives that view parents in those systems as undesirable and undeserving, and which thereby facilitate systems that treat those parents punitively. Only by confronting the way our society and institutions view and treat *all* families can we truly ensure the best interests of every child in our country.

* * * * *