
DOING WHAT'S BEST: DETERMINING BEST INTERESTS FOR CHILDREN IMPACTED BY IMMIGRATION PROCEEDINGS

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ABSTRACT

With a large population of affected children in the country and a growing number of children arriving at a rapidly increasing rate, what legal protections are available when these children inevitably enter into the U.S. immigration system? The “best interests of the child” standard is not available to parties in immigration proceedings—and certainly not to children whom are not parties to proceedings. However, using a proposed simplified “best interests” test that accounts for advances in the scientific understanding of child development may help address this gap. While they are sometimes justified, decisions made in immigration proceedings often result in hardship not just to the primary party but also to his or her innocent family. These hardships are state-imposed and state-condoned, and, as such, the state has an immense responsibility to justify its decisions in these circumstances.

*There is both a legal and statutory basis from which to implement the recommendations in this Article. Streamlining the required analysis and incorporating a best interests determination and standard into U.S. immigration law assures that children are protected and recognized as people with rights and interests. Using this framework and standard would likely uphold many decisions, like that in *Cabrera-Alvarez v. Gonzales*. Although the court did not apply a best interests standard, it did ultimately determine several substantive components of the children’s best interests. Even given a best interests standard, the court may still have found that the state’s interests in immigration enforcement outweighed the children’s interests in having their father at home. For other cases, however, especially for those of unaccompanied migrant children and children who do not fit comfortably within asylum law, the shift could be positive and life-changing. In *In re S-E-G et al.*, a best interests determination and standard would certainly have prevented the children in the case from being returned to a violent and risk-laden community despite their not fitting easily into a protected ground under international or U.S. asylum law.*

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I. INTRODUCTION

Tens of thousands of migrant children enter the United States each year.¹ Some come with their families or other guardians (accompanied children), but many make the journey on their own or become separated from their parents or guardians during the journey or when they arrive

1. CTR. ON GENDER & REFUGEE STUDIES, A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM 2 (2014) [hereinafter CTR. ON GENDER & REFUGEE STUDIES].

(unaccompanied or separated children).² While children arrive at U.S. borders from all over the world, the greatest number, especially of unaccompanied children, arrive from Mexico and Central America, specifically from El Salvador, Guatemala, and Honduras.³

The number of unaccompanied children has been growing exponentially in recent years, with 13,625 children entering U.S. custody in Fiscal Year 2012 and nearly double that in Fiscal Year 2013.⁴ The U.S. government expected this number to more than double in 2014, predicting that a staggering 60,000 children or more would enter the United States unaccompanied.⁵ In Fiscal Year 2014, the Office of Refugee Resettlement (ORR) had an “unprecedented 57,496 referrals” from DHS.⁶ These are not the only children affected by the U.S. immigration system. In 2009, undocumented children, many living with their undocumented parents, made up approximately 12 percent of undocumented immigrants in the United States.⁷ U.S. citizen children are also impacted when parents are deported. An estimated 103,055 children, of whom 86 percent were U.S. citizens, experienced a mother or father being deported between 1997 and 2007.⁸ With a large population of affected children in the country and a growing number of children arriving at a rapidly increasing rate, what legal

2. See, e.g., Homeland Security Act of 2002, Pub. L. 107-296, § 462(g)(2), 116 Stat. 2135, 2205 (defining the term “unaccompanied alien child”).

3. CTR. ON GENDER & REFUGEE STUDIES, *supra* note 1, at 2.

4. *Id.*

5. See *id.*; *HHS FY 2015 Budget in Brief*, DEP’T OF HEALTH AND HUMAN SERVS., <http://www.hhs.gov/about/budget/fy2015/budget-in-brief/> (last updated June 4, 2014).

6. *Fact Sheet*, OFFICE OF REFUGEE RESETTLEMENT, https://www.acf.hhs.gov/sites/default/files/orr/fact_sheet.pdf (last updated Nov. 2015); *Facts and Data*, OFFICE OF REFUGEE RESETTLEMENT, <http://www.acf.hhs.gov/programs/orr/about/ucs/facts-and-data> (last updated Sept. 10, 2015).

7. See Michael Hoefer, Nancy Rytina, & Bryan C. Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2009*, at 5, DHS.gov (Jan. 2010), https://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf. Note that these are also the children we know the least about given the recent increase in research on unaccompanied children in the United States. Andrew I. Schoenholtz, Deputy Director of Georgetown University’s Institute for the Study of International Migration, notes, “We know least about the children who accompany or join their parents and have no legal immigration or residence status.” Andrew I. Schoenholtz, *Developing the Substantive Best Interests of Child Migrants: A Call for Action*, 46 VAL. U. L. REV. 991, 997 (2012).

8. INT’L HUMAN RIGHTS LAW CLINIC AT U.C. BERKELEY ET AL., *IN THE CHILD’S BEST INTEREST? THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION*, 4–5 (2010).

protections are available when children inevitably enter into the U.S. immigration system? It turns out, very few.

The “best interests of the child” standard pervades international and domestic U.S. family law.⁹ In fact, one study found that the standard has been used in almost 20,000 U.S. court decisions (both state and federal).¹⁰ Child advocates hold the standard up as the ultimate child protection tool,¹¹ even while, in the United States at least, there is “widespread dissatisfaction with the standard’s subjectivity.”¹² In response to this subjectivity, legal organizations, states, and international bodies have issued guidelines to varying degrees of specificity and from differing perspectives guiding lawyers and courts on how to evaluate “best interests.”¹³ Internationally, best interests principles are guided by the United Nations Convention on the Rights of the Child (CRC), the United Nations Committee on the Rights of the Child (The Committee), and by other UN bodies like the United Nations High Commission on Refugees (UNHCR).¹⁴ Notably, the United States has

9. See Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 HARV. J. ON LEGIS. 331, 345 (2013).

10. *Id.* at 355.

11. See CHILD WELFARE INFO. GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD 1 (2012) [hereinafter DETERMINING THE BEST INTERESTS], https://www.childwelfare.gov/pubPDFs/best_interest.pdf (“All States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands have statutes requiring that the child’s best interests be considered whenever specified types of decisions are made . . .”).

12. Jean Koh Peters, *The Roles and Content of Best Interest in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505, 1514 n.18, 1516 (1996) (citing Donald N. Duquette, *Child Protection Legal Process: Comparing the United States and Great Britain*, 54 U. PITT. L. REV. 239, 279 (1992)); see also Danuta Villarreal, *To Protect the Defenseless: The Need for Child-Specific Substantive Standards for Unaccompanied Minor Asylum-Seekers*, 26 HOUSTON J. INT’L L. 743, 758 (2004) (“The only significant shortcoming of the best interests principle is its lack of well-defined criteria.”).

13. See, e.g., Duquette, *supra* note 12, at 279, at 245 (“[T]he subjectivity of the ‘best interests’ standard is leading states to devise more precise statutory tests for various decisions . . .”); see also, e.g., King, *supra* note 9 (“In the area of children’s rights, international and regional human rights standards have firmly established the ‘best interests of the child’ as a guiding principle.”).

14. See King, *supra* note 9, at 344. The Convention on the Rights of the Child (CRC) states in Article 3:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

signed, but not ratified, the CRC.¹⁵ Under U.S. law, no standard definition exists.¹⁶ In U.S. immigration law, the best interests standard is neither explicitly acknowledged nor binding.¹⁷

This Article argues that for immigration courts to adequately and effectively balance the interests of parents, families, the state, and the child, it is essential to establish and weigh the best interests of the child in any decision “fundamentally impacting” the child’s life.¹⁸ Further, a manageable

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

G. A. Res. 44/25, Convention on the Rights of the Child, art. 3, §§ 1–2 (Nov. 20, 1989) [hereinafter G.A. Res. 44/25].

15. CTR. ON GENDER & REFUGEE STUDIES, *supra* note 1, at 3 n.10. “Although the U.S. has signed, but not ratified, the CRC, it is still ‘obliged to refrain from acts that would defeat the object and purpose of the agreement.’” *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 312 (1987)).

16. DETERMINING THE BEST INTERESTS, *supra* note 11, at 22.

17. CTR. ON GENDER & REFUGEE STUDIES, *supra* note 1, at 3. Some proceedings for particularly vulnerable children may consider best interests as determined by a family court. *See id.* at 36. The Special Immigrant Juvenile Status (SIJS) and certain protections for trafficked or unaccompanied children account for the child’s interests by encouraging consideration of best interests and by encouraging appointment of an independent child advocate. *Id.* Although not considering best interests, the following is a complete list of immigration options for undocumented immigrant children: SIJS; a visa through the Violence Against Women Act (VAWA) (providing children with the opportunity to get family-based visas); U Visa; Trafficking Visa; Asylum; Temporary Protected Status (TPS); Family Visas; Conditional Permanent Residence; and Deferred Action Childhood Arrivals (DACA). *See generally* IMMIGRATION LEGAL RESOURCE CTR., IMMIGRATION OPTIONS FOR UNDOCUMENTED IMMIGRANT CHILDREN (2013), http://www.ilrc.org/files/documents/ilrc-immig_options_undoc_children-2013-07.pdf. Further, USCIS employs “child-sensitive” approaches in asylum and immigration proceedings and trains immigration officials on evaluating children’s claims and testimony to attempt to make the adversarial process more appropriate and less traumatic for children. *See, e.g.*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. – RAIO – ASYLUM DIVISION, ASYLUM OFFICER BASIC TRAINING COURSE GUIDELINES FOR CHILDREN’S ASYLUM CLAIMS 36 (2009), <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Guidelines-for-Childrens-Asylum-Claims-31aug10.pdf> (referencing the best interests principle throughout, while cautioning that “the best interests principle, while useful for procedural and interview considerations, does not replace or change the refugee definition in determining substantive eligibility”).

18. *See* UNHCR, UNHCR GUIDELINES ON FORMAL DETERMINATION OF THE

and substantively descriptive legal test is needed to guide immigration professionals in both determining the child's substantive best interests and applying the best interests standard. Such a test is based on existing guidelines and on recent advances in child development and neuroscience. Part I of this Article outlines the current definitions of the best interests standard and existing guidelines for determining what a specific child's best interests are. Part II analyzes the current usage domestically of guidelines in family law and as applied to immigration law. Part III synthesizes existing frameworks and incorporates the science of child development to propose a user-friendly legal test for determining best interests for use in immigration decisions. Finally, Part IV briefly considers how to incorporate such a test and the associated evidentiary requirements into the immigration system in the United States.

II. WHO IS A CHILD AND WHAT DOES SHE NEED?

A. *The Science of Childhood*

Why are children different than adults, and why should courts and lawyers pay special attention to protecting their interests? Children require focused and special protection because of the nature of human development, and the disproportionate impact state decisions and the exercise of coercive power has on the rest of their lives.¹⁹

More than a decade after "the Decade of the Brain,"²⁰ advances in the science of child development have shifted the way people think about children, and this field of science continues to evolve.²¹ There is now a much

BEST INTERESTS OF THE CHILD, PROVISIONAL RELEASE, 9 (2006). I borrow this language from the UNHCR GUIDELINES ON BEST INTEREST DETERMINATIONS, acknowledging that decisions in U.S. immigration court that impact children will inevitably fundamentally impact the child's life, including those decisions affecting their parents. *See id.* This Article continues to use this concept throughout.

19. *See Right to Protection: Understanding Children's Right to Protection*, HUMANIUM, <http://www.humanium.org/en/fundamental-rights/protection/> (last visited Nov. 18, 2015). This stems from the state's coercive power, which is especially strong over children. For fundamental theory on the state's possession and use of coercive power, see Robert Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 POL. SCI. Q. 470 (1923), reprinted in DAVID KENNEDY & WILLIAM W. FISHER III, *THE CANON OF AMERICAN LEGAL THOUGHT* 93, 93–99 (Princeton ed. 2006) [hereinafter KENNEDY & FISHER].

20. *See, e.g.*, Proclamation No. 6158, 104 Stat. 5324, 5324–25 (July 17, 1990), <http://www.loc.gov/loc/brain/proclaim.html>.

21. *See, e.g.*, Johanna Bick & Charles A. Nelson, *Early Adverse Experiences: What does the Latest Brain Research Tell Us?*, EARLY CHILDHOOD MATTERS 10 (June 2015),

clearer picture of what the brain and body look like as a child develops, and a much more complex understanding of how people become people.²² Drastic and remarkable changes occur in the brain throughout “childhood” until early adulthood, much longer than had been previously thought.²³ Further, a new field of research has emerged in epigenetics, revealing that gene expression, once thought to be unchangeable, is dependent in large part on experiences in the earliest years of life and into young adulthood.²⁴

The two periods with the greatest transformation in children’s brains occur during early childhood and again in adolescence.²⁵ Findings from the past two decades about how the brain develops are not only extremely helpful for devising domestic child policy, but they also apply globally.²⁶ The most rapid period of brain development occurs in the first 4–5 years of life, when basic sensory functions are developing and children are learning to form relationships.²⁷ Early childhood is also when self-regulation—an important component of executive functioning—begins to develop, which continues to influence brain development well into young-adulthood.²⁸

<http://earlychildhoodmagazine.org/wp-content/uploads/2015/07/2.-Early-adverse-experiences.pdf>.

22. See, e.g., JACQUELINE BHABHA, *ADOLESCENTS: CURRENT RIGHTS FOR FUTURE OPPORTUNITIES* 15 (2013), http://cdn2.sph.harvard.edu/wp-content/uploads/sites/5/2013/10/Jacqueline-Bhabha_Adolescents-Report_4_Oct2013.pdf.

23. See *id.*; B.J. Casey, Rebecca M. Jones, & Leah H. Somerville, *Braking and Accelerating of the Adolescent Brain*, 21 J. RES. ON ADOLESCENCE 21, 24 (2011).

24. Nat’l Sci. Council on the Developing Child, *Early Experiences Can Alter Gene Expression and Affect Long-Term Development* 4 (Ctr. on the Developing Child at Harv. Univ., Working Paper No. 10, 2010) [*Gene Expression*, Working Paper No. 10], <http://developingchild.harvard.edu/resources/early-experiences-can-alter-gene-expression-and-affect-long-term-development/>; Michael J. Meaney, *Epigenetics and the Biological Definition of Gene x Environment Interactions*, 81 CHILD DEV. 41, 42, 52–53 (2010); see also Schoenholtz, *supra* note 7, at 999–1000; Nat’l Sci. Council on the Developing Child, *supra*, at 2.

25. See Nat’l Forum on Early Childhood Policy and Programs & Nat’l Sci. Council on Developing Child, *Building the Brain’s “Air Traffic Control” System: How Early Experiences Shape the Development of Executive Function* 4, (Ctr. on the Developing Child at Harv. Univ., Working Paper No. 11, 2011) [hereinafter *Building the Brain’s “Air Traffic Control” System*, Working Paper No. 11], <http://developingchild.harvard.edu/wp-content/uploads/2015/05/How-Early-Experiences-Shape-the-Development-of-Executive-Function.pdf>.

26. Schoenholtz, *supra* note 7, at 1000–01.

27. See *Building the Brain’s “Air Traffic Control” System*, Working Paper No. 11, *supra* note 25, at 4–7.

28. See, e.g., Jack P. Shonkoff, *From Neurons to Neighborhoods: Old and New*

Important structural changes take place again in adolescence.²⁹ Executive functions develop more fully and cognitive and logical reasoning abilities develop rapidly.³⁰ Jacqueline Bhabha, Director of Research of the FXB Center for Health and Human Rights, notes that this makes educational access critical at this time of life.³¹ Puberty causes significant chemical changes that impact “the perception of rewards and punishments,” affecting adolescents’ “sensation-seeking behaviour” in addition to their emotions.³² In later adolescence, the brain develops the capacity for complex decisionmaking, forward planning, and emotional regulation.³³ As discussed in Part III, stress and other risk factors can be incredibly detrimental to the healthy and adaptive (rather than maladaptive) development of the brain.³⁴ Each child’s development is important for that individual child, and more broadly the healthy development of children is essential for the well-being of society as a whole.³⁵ Many of the decisions made in immigration proceedings have the potential to be severely detrimental to children’s development and life chances.³⁶ As such, the fundamental interest in their healthy development must be considered.

Although some academics are reluctant to bring advances in science into the realm of the law based on a discomfort with the pace at which scientific opinions change, leave open questions, and sometimes conflict, this Article argues that it is an essential *piece* of how laws are devised.³⁷ Lawyers

Challenges for Developmental and Behavioral Pediatrics, 24 DEV. & BEHAV. PEDIATRICS 70, 71 (2003).

29. See BHABHA, *supra* note 22, at 15.

30. *Id.*

31. *Id.* at 18.

32. *Id.* at 15.

33. *Id.*; see also Casey et al., *supra* note 23, at 22, 29.

34. See discussion *infra* Part III.

35. See, e.g., Ingrid Schoon & Samantha Parsons, *Competence in the Face of Adversity: The Influence of Early Family Environment and Long-term Consequences*, 16 CHILD. & SOC’Y 260, 270 (2002) (noting that children growing up in socio-economic adversity fare less well than their advantaged peers in levels of full-time employment, educational attainment despite exhibiting resilience).

36. See Jacqueline Hagan, Brianna Castro & Nestor Rodriguez, *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799, 1818–22 (2010).

37. See, e.g., John E. Coons, Robert H. Mnookin & Stephen D. Sugarman, *Deciding What’s Best for Children*, 7 NOTRE DAME J.L. ETHICS & PUB. POL’Y 465, 477 (1993). For a discussion on the use and importance of research in child law and policy, see Elizabeth Bartholet, *Creating a Child-Friendly Child Welfare System: The Use and Misuse of Research*, 13 WHITTIER J. CHILD & FAM. ADVOC. 1 (2014),

should use this information the way they have been trained to use any evidence: by considering its implications for legal principles, and analyzing its reliability, existing corroboration, and what it does and does not show. This Article does not argue that any scientific research can prescribe a certain legal interpretation or completely determine what the law should be. But to ignore settled knowledge about brain development and to exclude emerging research and discovery from the available guidance when making decisions about how to structure the law and its outcomes, is to artificially and negatively limit the available tools to best serve those most in need. Writing about adolescent policy, Professor Bhabha succinctly advocates for incorporating an understanding of brain development in “devising appropriate adolescent policy,” citing the parallel and acknowledged importance of understanding and incorporating “the impact of early childhood deprivation” to wide-spread advances in child protection for young children.³⁸ With careful consideration and critical inquiry, the science of childhood can be an important, illuminating and compelling tool for lawmakers and legal practitioners where children intersect with the legal system.³⁹ What science reveals makes it essential that legal systems be shaped appropriately to promote healthy development so that children can become functioning and productive members of society.

B. *The Child in the Law*

Although the clinical definition of the child has been extended through the early- to mid-twenties,⁴⁰ the legal definition has remained relatively stable over the past century, particularly since the advent of compulsory education and child labor laws.⁴¹ The applicable legal definition of a “child” varies depending on the statute or body of law in use. Under the CRC, a child is any “human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”⁴² The Executive Office for Immigration Review (EOIR) in the U.S. Department of Justice

http://www.law.harvard.edu/faculty/bartholet/Creating%20Child%20Friendly%20Child%20Welfare%20System_Whittierl.pdf.

38. BHABHA, *supra* note 22, at 15.

39. Michael N. Tennison & Amanda C. Pustilnick, “*And If Your Friends Jumped Off A Bridge, Would You Do It Too?*”: How Developmental Neuroscience Can Inform Regimes Governing Adolescents, 12 IND. HEALTH L. REV. 533, 538 (2015).

40. See Lucy Wallis, *Is 25 the New Cut-off Point for Adulthood?*, BBC (Sept. 23, 2013), <http://www.bbc.com/news/magazine-24173194>.

41. See, e.g., BHABHA, *supra* note 22, at 13.

42. G.A. Res. 44/25, *supra* note 14, at art. 1.

uses the statutory definition in the Immigration and Nationality Act (INA), in which a child is “an unmarried person under 21 years of age.”⁴³ Because this age sometimes drops to 18 depending on the child’s circumstances or immigration status, this Article uses “child” to mean any person aged 18 years or younger, acknowledging that in some cases the rights and procedures discussed here may be extended depending on the statutory definition that applies.⁴⁴ It may be necessary to further distinguish children by developmental phase when determining the child’s best interests, as suggested by guidelines issued by EOIR in 2007.⁴⁵

43. EXEC. OFFICE OF IMMIGRATION REVIEW, OPERATING POLICIES AND PROCEDURES MEMORANDUM 07-01: GUIDELINES FOR IMMIGRATION COURT CASES INVOLVING UNACCOMPANIED ALIEN CHILDREN 3 (2007) [hereinafter EOIR, GUIDELINES] (citing Immigration and Nationality Act, Pub. L. No. 82-414, §§ 101(b)(1), (c)(1), 66 Stat. 163, 171 (1952)). Note that the Executive Office of Immigration Review (EOIR) regulations use “juvenile” and “minor” to describe subgroups of children with which it deals. *See id.* In the regulations, “juvenile” means “an alien under the age of 18.” 8 C.F.R. § 1236.3(a) (2012). The word “minor” describes “[aliens] under the age of 14.” *Id.* § 1236.2(a). Finally, the Homeland Security Act of 2002 uses the term “unaccompanied alien child” when referring to:

a child who—

- (A) has no lawful immigration status in the United States;
- (B) has not attained 18 years of age; and
- (C) with respect to whom—
 - (i) there is no parent or legal guardian in the United States; or
 - (ii) no parent or legal guardian in the United States available to provide care and physical custody.

Homeland Security Act of 2002, Pub. L. No. 107-296, § 462(g)(2), 116 Stat. 2135, 2205.

44. *See Child Status Protection Act (CSPA)*, U.S. Citizenship and Immigration Servs., <http://www.uscis.gov/green-card/green-card-processes-and-procedures/child-status-protection-act/child-status-protection-act-cspa> (last updated Mar. 30, 2011) (noting the Child Status Protection Act (CSPA) permits benefits to be applied to certain persons until they reach the age of 21 by protecting “child” status for certain immigrants).

45. *See* EOIR, GUIDELINES, *supra* note 43, at 3. The EOIR Guidelines note that “all . . . cases are not alike, and the procedures appropriate for a very young child may differ significantly from those appropriate for a teenager.” *Id.* The UNHCR also provides helpful age delineations for incorporating children’s views into decisions, in line with child development, as follows:

Children 16 years and older are normally assumed to be sufficiently mature to make decisions, such as decisions relating to their caregivers.

Children between 14 and 16 are presumed to be mature enough to make a major

C. A Child's Best Interests: The Standard & the Substance

Before describing “best interests,” it is important to distinguish it from “stated interests,” the typical approach used in the legal context.⁴⁶ Stated interests consist of what the client or party states he or she wants.⁴⁷ While a child’s stated interests play an important role in evaluating the child’s best interests, they are not necessarily the same.⁴⁸ Given that best interests and stated interests may conflict, the judge charged with considering or determining a child’s best interests, or “[t]he lawyer entrusted with the job of representing a child’s best interests[,] must determine those interests with extreme caution” and “have a principled understanding of what that best interests determination looks like and how those principles are applied from case to case.”⁴⁹ Note the fact that the standards are distinct does not preclude their important relationship to one another.⁵⁰ Regardless of which standard is used, the lawyer is permitted and even encouraged “to counsel . . . clients about the lawyer’s view of their ‘best interests’” in reference to considerations beyond the law.⁵¹

contribution.

Children between 9 and 14 can meaningfully participate in the decision-making procedure, but their maturity must be carefully assessed on an individual basis. However, care must be taken with younger children and they may require specific assistance to ensure that they can express themselves clearly and freely.

Children younger than 9 have the right to give their opinion and be heard. They may be able to participate in the decision-making procedure to a certain degree, but caution should be exercised to avoid burdening them by giving them a feeling of becoming decision makers.

UNHCR, *supra* note 18, at 31–32.

46. See, e.g., Benjamin Good, Note, *A Child's Right to Counsel in Removal Proceedings*, 10 STAN. J. C.R. & C.L. 109, 148 n.211 (2014).

47. *Id.* at 152.

48. See, e.g., *id.* at 148 n.211; Bridgette A. Carr, *Incorporating a “Best Interests of the Child” Approach Into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 126 (2009) (describing the difference between the duty of a lawyer and the duty of a guardian ad litem who “is bound to protect the child’s interests, which may not be the same as the child’s expressed preferences”).

49. Peters, *supra* note 12, at 1523.

50. See Carr, *supra* note 48, at 126–27 (noting the best interests standard takes into account a child’s stated interests by “prioritiz[ing] allowing the child to have a voice”).

51. Peters, *supra* note 12, at 1519–20 (noting that Model Rule 2.1 allows a lawyer to provide advice considering “moral, economic, social and political factors . . . relevant to the client’s situation” (citing MODEL RULES OF PROF’L CONDUCT r. 2.1 (AM. BAR ASS’N 1983))).

In the United States, best interests are substantively what a child's parent says they are; according to settled doctrine, "there is a presumption that fit parents act in the best interests of their children."⁵² This presumption is based on parents' "maturity, experience, and capacity of judgment required for making life's difficult decisions" and the "natural bonds of affection" that "lead parents to act in the best interests of their children."⁵³ Therefore, when parents are available and "fit," best interests are implicitly considered through the parent.⁵⁴ Further, in most circumstances, there is an assumption that a child's best interests can be served by staying with parents and family.⁵⁵ In the immigration context, however, this presumption can be problematic for several reasons. First, for children who enter the immigration system without parents or guardians, there is no existing parent or family to make these determinations for the child. Further, where children are with their parents, parents may not be able to voice or carry out what they determine the best interests of their child to be.⁵⁶ Therefore, a more objective standard is needed, and the state must be required to act in (or at least consider) the interests of the child where he or she has no parent who is allowed or able to do it.⁵⁷

In the United States, the best interests standard is used primarily in the context of family law.⁵⁸ According to Bridgette Carr, Clinical Professor of Law at the University of Michigan Human Trafficking Clinic, the best interests approach emerged between 1790 and 1890 and is now closely associated with the guardian ad litem (GAL) system that arose in the early 1970s in child abuse and neglect cases.⁵⁹ In 1996, the role of the GAL in determining best interests was defined in the Child Abuse Prevention and Treatment Act (CAPTA), which focused on obtaining a "clear understanding of the situation and needs of the child; and to make

52. *Troxel v. Granville*, 530 U.S. 57, 68 (2000).

53. *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

54. *See id.*

55. Carr, *supra* note 48, at 138.

56. *See id.* at 128–31.

57. Beyond legal definitions, Professor Peters warns, "various other professionals almost certainly have conflicting theories within their profession about the definition of 'best interests,'" and have even proffered alternatives, like "'least detrimental' alternatives," as more administrable standards. Peters, *supra* note 12, at 1516–17. So far U.S. courts and legislatures do not seem to have embraced this approach. *See DETERMINING THE BEST INTERESTS*, *supra* note 11, at 2.

58. *See Carr*, *supra* note 48, at 125.

59. *Id.*

recommendations to the court concerning the *best interests of the child*.”⁶⁰

The Department of Health and Human Services (HHS) conducted a survey of state law on best interests and found “the term generally refers to the deliberation that courts undertake when deciding what types of services, actions, and orders will best serve a child as well as who is best situated to take care of the child.”⁶¹ Similarly, Professor Carr notes that in the United States,

it is impossible to point to one legal standard defining the “best interests of the child” approach in domestic law. It is, however, possible to identify the priorities of the “best interests” approach. Procedurally, the “best interests” approach prioritizes allowing the child to have a voice. Substantively, the “best interests” approach prioritizes the child’s safety, permanency, and well-being.⁶²

She goes on to advocate for the incorporation of “voice, safety, permanency, and well-being” into immigration law and procedure.⁶³

As previously mentioned, the best interests standard does not exist independently in U.S. immigration law. Special Immigrant Juvenile Status (SIJS) takes the best interests of the child into consideration, and does so through the family court system.⁶⁴

In immigration law, the closest analog the best interests standard exists in removal proceedings, and the standard is used to cancel removal of a parent if that parent’s removal would cause “exceptional and extremely unusual hardship” to the U.S. citizen or legal permanent resident child.⁶⁵ This is a high bar and has an adult-centered approach.⁶⁶ It can only be used if the *parent* meets a physical presence and other requirements, and as a result, it is unavailable to many children.⁶⁷

One area of growing importance that reflects a policy-wide balancing of children’s best interests is eligibility for Deferred Action for Childhood

60. *Id.* at 125–26 (quoting Child Abuse Prevention and Treatment Act Amendments of 1996, § 107(b)(2)(A)(ix)(1)).

61. DETERMINING THE BEST INTERESTS, *supra* note 11, at 2.

62. Carr, *supra* note 48, at 126–27.

63. *Id.* at 124 n.20, 127 (citations omitted).

64. See CTR. ON GENDER & REFUGEE STUDIES, *supra* note 1, at 37.

65. Carr, *supra* note 48, at 134.

66. See *id.*

67. *Id.*

Arrivals (DACA), and now Deferred Action for Parents of Americans and Legal Permanent Residents (DAPA).⁶⁸ These programs have the potential to benefit millions of people, including child immigrants and U.S. citizen children of immigrant parents.⁶⁹ DACA was announced through executive action on June 15, 2012, in a memorandum from Janet Napolitano, then Secretary of Homeland Security.⁷⁰ In that memorandum, the Department of Homeland Security (DHS) issued guidance for the exercise of prosecutorial discretion, shifting enforcement priority away from “certain young people who were brought to this country as children and know only this country as home,” who generally “lack[] the intent to violate the law,” and are low-priority cases.⁷¹ The memorandum lists the following criteria for consideration of prosecutorial discretion:

- came to the United States under the age of sixteen;
- has continuously resided in the United States for at least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum;
- is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- is not above the age of thirty.⁷²

These criteria outline a balancing test between the interests of the

68. *Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/daca> (last visited Nov. 19, 2015).

69. *See id.*

70. Memorandum from Janet Napolitano, Sec’y of Homeland Sec., to David V. Aquilar, Acting Comm’r of U.S. Customs and Border Prot., Alejandro Mayorkas, Dir. of U.S. Citizenship and Immigration Servs., & John Morton, Director of U.S. Immigration and Customs Enforcement, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012) [hereinafter *Napolitano Memorandum*], <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

71. *Id.*

72. *Id.* An individual can apply for prosecutorial discretion—i.e. “Deferred Action for Childhood Arrivals (DACA)” —through the USCIS website. *See* Dep’t of Homeland Sec., *Consideration of Deferred Action for Childhood Arrivals DACA*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last updated Aug. 3, 2015).

federal government and the interests of the child (who may now be an adult).⁷³ Provided that the child is not a threat to the United States and is prepared to contribute to the economy and society (proven by the child's educational attainment), the child's interest in remaining in the United States, with family and in the communities and society they have known most of their lives, outweighs the government's interest in protecting its borders or sovereignty.⁷⁴ Although DACA and DAPA make no direct mention of the best interests of children or families in their criteria, the balance is an underlying and integral part of the policy.⁷⁵ Ultimately, the balance comes out in favor of children's best interests rather than the state's coercive powers or sovereign interests.⁷⁶

Canada provides a useful example defining best interests in an individualized immigration context. In Canada, a humanitarian visa is available to children based on their best interests, and the Canadian Federal Court of Appeal has held:

The "best interests of the child" are determined by considering the benefit to the child of the parent's non-removal from Canada as well as the hardship the child would suffer from either her parent's removal from Canada or her own voluntary departure should she wish to accompany her parent abroad. Such benefits and hardships are two sides of the same coin, the coin being the best interest of the child.⁷⁷

In this example, Canada refers to substantive best interests.⁷⁸ Admirably, the Canadian court does not fault the child for a voluntary departure with his or her parent, and instead considers it in the broader evaluation of the child's

73. See Napolitano Memorandum, *supra* note 70, at 1.

74. See *id.* at 2; see also *Written Testimony of U.S. Department of Homeland Security Secretary Janet Napolitano for a House Committee on the Judiciary hearing titled "Oversight of the Department of Homeland Security."* Dep't Homeland Sec. (July 17, 2012), <http://www.dhs.gov/news/2012/07/17/written-testimony-dhs-secretary-janet-napolitano-house-committee-judiciary-hearing>.

75. See Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to Tom S. Winkowski et al., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants 6 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf; Napolitano Memorandum, *supra* note 70.

76. See Napolitano Memorandum, *supra* note 70, at 1–2.

77. Carr, *supra* note 48, at 148 (quoting *Hawthorne v Canada*, [2002] F.C.A. 475, ¶ 4 (Can.)).

78. See *id.* (quoting *Hawthorne*, [2002] F.C.A. at ¶ 4).

best interests.⁷⁹ While the court considers hardship in determining the child's substantive best interests, it evaluates any decision in light of the best interests standard.⁸⁰ In the United States, despite the fact that in the family law context, the "harm" standard (ostensibly a higher bar) and the best interests standard are explicitly distinct,⁸¹ in the immigration context, courts in the United States have conflated the two standards, leaving unclear which, if any, takes precedence.⁸²

In international law, the Committee on the Rights of the Child enumerates the three components of the "concept" of a child's best interests: "[a] substantive right . . . [, a] fundamental, interpretative legal principle . . . [, and a] rule of procedure," where "the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned."⁸³ The Committee clarified the standard (as a right and interpretive principle) in General Comment 14, stating,

The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child. The Committee has already pointed out that "an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention." It recalls that there is no hierarchy of rights in the Convention; all the rights provided for therein are in the "child's best interests" and no right should be compromised by a negative

79. See *id.* (quoting *Hawthorne*, [2002] F.C.A. at ¶ 4).

80. See *id.* (quoting *Hawthorne*, [2002] F.C.A. at ¶ 4).

81. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 96 (2000) ("While it might be argued as an abstract matter that in some sense the child is always harmed if his or her best interests are not considered, the law of domestic relations, as it has evolved to this point, treats as distinct the two standards, one harm to the child and the other the best interests of the child. The judgment of the Supreme Court of Washington rests on the assumption, and I, too, shall assume that there are real and consequential differences between the two standards.").

82. See *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1012 (9th Cir. 2005) ("When an alien parent seeks cancellation of removal because of exceptional and extremely unusual hardship to a qualifying child, that child's 'best interests' are precisely the issue before the agency, in the sense that best interests are merely the converse of 'hardship.'" (internal citation omitted)).

83. U.N. Comm. on the Rights of a Child, General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration, ¶ 6, U.N. Doc. CRC/C/GC/14 (May 29, 2013) [hereinafter Comm. on the Rights of a Child, General Comment 14].

interpretation of the child's best interests.⁸⁴

This is also the definition used by the UNHCR in its guidelines on determining the best interests of the child.⁸⁵ Substantively, the Committee uses "best interests" to mean "the holistic physical, psychological, moral and spiritual integrity of the child and [to] promote his or her human dignity."⁸⁶

Case law also helps establish, if not a unified test, at least important substantive components to be considered in the best interests standard.⁸⁷ Courts have issued a warning, however, asserting that neither the state nor the court can make custody decisions "merely because it could make a better decision," but rather, only to prevent harm to the child.⁸⁸ Notably, in the immigration context, the state is often the entity making the decision that will cause the harm (whether to deport the child or a parent), making it even more important to consider the consequences of its actions.⁸⁹ The best interests are primarily concerned with the well-being of the child.⁹⁰ Family relationships, especially the parent-child relationship, are highly relevant.⁹¹ Stability plays an important role.⁹² The court in *Bennet v. Jeffreys* asserted that "in ascertaining the child's best interest, the court is guided by principles which reflect a 'considered social judgments in this society respecting the family and parenthood,'" and gave consideration to the child's emotional health and risk of psychological trauma.⁹³

Ultimately, to even consider the child's best interests substantively or as a legal standard, the reasons for the court or state to intervene must be "compelling."⁹⁴ The court in *Bennet v. Jeffreys* vehemently stated,

84. *Id.* at ¶ 4 (footnotes omitted).

85. UNHCR, *supra* note 18, at 6.

86. Comm. on the Rights of a Child, General Comment 14, *supra* note 83, at ¶ 5.

87. *See Troxel v. Granville*, 530 U.S. 57, 83–84 (2000) (Stevens, J., dissenting) ("In particular, the state court gave no content to the phrase, 'best interest of the child,'—content that might well be gleaned from the State's own statutes or decisional law employing the same phrase in different contexts, and from the myriad other state statutes and court decisions at least nominally applying the same standard.").

88. *See, e.g., Bennet v. Jefferys*, 356 N.E.2d 277, 281 (N.Y. Ct. App. 1976); *see also Troxel*, 530 U.S. at 63.

89. *See Carr*, *supra* note 48, at 124–25.

90. *See, e.g., Caban v. Mohammed*, 441 U.S. 380, 391 (1979).

91. *See, e.g., Troxel*, 530 U.S. at 69–70.

92. *Caban*, 441 U.S. at 391.

93. *Bennett*, 356 N.E.2d at 283–84 (quoting *Matter of Spense-Chapin Adoption Serv. v. Polk*, 274 N.E.2d 431, 436 (N.Y. 1971)).

94. *Id.* at 285.

In all of this troublesome and troubled area there is a fundamental principle. Neither law, nor policy, nor the tenets of our society would allow a child to be separated by officials of the State from its parent unless the circumstances are compelling. Neither the lawyers nor Judges in the judicial system nor the experts in psychology or social welfare may displace the primary responsibility of child-raising that naturally and legally falls to those who conceive and bear children. Again, this is not so much because it is their “right”, but because it is their responsibility. The nature of human relationships suggests overall the natural workings of the child-rearing process as the most desirable alternative. But absolute generalizations do not fulfill themselves and multifold exceptions give rise to cases where the natural workings of the process fail, not so much because a legal right has been lost, but because the best interest of the child dictates a finding of failure.⁹⁵

These cases confirm the observation that family courts generally have “broad power to decide the outcome [of custody cases] according to what the judge thinks is in the individual child’s best interest.”⁹⁶ In the immigration context, this important discretion and consideration of a child’s interests is only available in SIJS cases—a limited and narrow class of immigration cases impacting children.⁹⁷

Although (and likely, because) courts and judges are given broad discretion, legislatures, international bodies, and non-profit organizations often provide guidance as to what elements should be considered in substantive best interests determinations.⁹⁸ Domestically, best interests typically consider “factors related to the child’s circumstances and the parent or caregiver’s circumstances and capacity to parent, with the child’s ultimate safety and well-being the paramount concern.”⁹⁹ *In re J.F.C.* provides a succinct list of factors considered in best interests determinations by a Texas court, including:

1. the desires of the child,
2. the emotional and physical needs of the child now and in the future,
3. any emotional and physical danger to the child now and in the future,

95. *Id.*

96. Coons, Mnookin & Sugarman, *supra* note 37, at 469.

97. See CTR. ON GENDER & REFUGEE STUDIES, *supra* note 1, at 37.

98. See DETERMINING THE BEST INTERESTS, *supra* note 11, at 3. HHS found that approximately 21 States and the District of Columbia include best interest factors in their state statutes. *Id.*

99. *Id.* at 2.

4. the parenting ability of the individuals seeking custody,
5. the programs available to assist those individuals to promote the best interest of the child,
6. the plans for the child by those individuals or by the agency seeking custody,
7. the stability of the home or proposed placement,
8. the acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one, and
9. any excuse for the acts or omissions of the parent.¹⁰⁰

These factors align closely with the guiding principles and factors laid out in the HHS guidelines on best interest determinations.¹⁰¹ The common guiding principles include:

- (a) family integrity and preference for avoiding removal of the child from his/her home[.]
-
- (b) The health, safety and/or protection of the child[.]
-
- (c) The importance of timely permanency decisions[, and]
-
- (d) care, treatment, and guidance that will assist the child in developing into a self-sufficient adult.¹⁰²

The common factors required by state statutes include:

- The emotional ties and relationships between the child and his or her parents, siblings, family and household members, or other caregivers . . .
- The capacity of the parents to provide a safe home and adequate food, clothing, and medical care . . .
- The mental and physical health needs of the child . . .
- The mental and physical health of the parents . . .
- The presence of domestic violence in the home . . .¹⁰³

100. *In re J.F.C.*, 96 S.W.3d 256, 261–62 (Tex. 2002).

101. Compare DETERMINING THE BEST INTERESTS, *supra* note 11, at 3, with *In re J.F.C.*, 96 S.W.3d at 261–62.

102. DETERMINING THE BEST INTERESTS, *supra* note 11, at 2.

103. *Id.* at 3 (footnotes omitted).

Further, “Approximately 11 States and the District of Columbia require courts to consider the child’s wishes when making a determination of best interests,” in light of the child’s “age and level of maturity to express a reasonable preference.”¹⁰⁴

International bodies and other countries have also established factors to consider in determining the best interests of the child in an immigration and broader child-rights context. The CRC issued a general comment to provide specific and substantive guidance on determining the child’s best interests, to “ensure the full and effective enjoyment of the rights recognized in the Convention and its Optional Protocols, and the holistic development of the child.”¹⁰⁵ The CRC lists the following elements to consider when evaluating best interests, “as relevant to the situation in question”:

- (a) The child’s views;
....
- (b) The child’s identity
... [including] characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality ...
....
- (c) Preservation of the family environment and maintaining relations
....
- (d) Care, protection and safety of the child
....
- (e) Situations of vulnerability
....
- (f) The child’s right to health[, and]
....
- (g) the child’s right to education.¹⁰⁶

104. *Id.* at 5.

105. Comm. on the Rights of the Child, General Comment 14, *supra* note 83, at ¶ 82.

106. *Id.* at ¶¶ 52–79. The full list and an abridged explanation of elements is as follows:

Based on these preliminary considerations, the Committee considers that the elements to be taken into account when assessing and determining the child’s best interests, as relevant to the situation in question, are as follows:

(a) The child's views

....

(b) The child's identity

... includ[ing] characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality.

... Due consideration of the child's best interests implies that children have access to the culture (and language, if possible) of their country and family of origin, and the opportunity to access information about their biological family, in accordance with the legal and professional regulations of the given country (see art. 9, para. 4).

....

(c) Preservation of the family environment and maintaining relations

... The term "family" must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom (art. 5).

....

Given the gravity of the impact on the child of separation from his or her parents, such separation should only occur as a last resort measure, as when the child is in danger of experiencing imminent harm or when otherwise necessary; separation should not take place if less intrusive measures could protect the child.

....

When the child's relations with his or her parents are interrupted by migration (of the parents without the child, or of the child without his or her parents), preservation of the family unit should be taken into account when assessing the best interests of the child in decisions on family reunification.

....

Preservation of the family environment encompasses the preservation of the ties of the child in a wider sense. These ties apply to the extended family, such as grandparents, uncles/aunts as well friends, school and the wider environment and are particularly relevant in cases where parents are separated and live in different places.

(d) Care, protection and safety of the child

... Children's well-being, in a broad sense includes their basic material, physical, educational, and emotional needs, as well as needs for affection and safety.

Emotional care is a basic need of children; if parents or other primary caregivers do not fulfil the child's emotional needs, action must be taken so that the child develops a secure attachment. Children need to form an attachment to a caregiver at a very early age, and such attachment, if adequate, must be sustained over time in order to provide the child with a stable environment.

The UNHCR also offers useful and context-specific guidelines. Aiming to “identify the most appropriate durable solution for the child,” the UNHCR emphasizes the primacy of “continuity of the child’s relationship with the parents and the family” in its guidelines on formal Best Interest Determinations (BIDs), because family continuity can meet fundamental needs of children.¹⁰⁷ These needs include “the feeling of being wanted and valued” because it is central to emotional and intellectual development and to social needs of the child.¹⁰⁸ The UNHCR necessarily recognizes the CRC requirement that “the views of the child be given due weight in accordance with the age and maturity of the child.”¹⁰⁹ Finally, it notes that a decision that would cause further distress to a “seriously distressed” child “cannot be

....

Applying a best-interests approach to decision-making means assessing the safety and integrity of the child at the current time; however, the precautionary principle also requires assessing the possibility of future risk and harm and other consequences of the decision for the child’s safety.

(e) Situation of vulnerability

....

The best interests of a child in a specific situation of vulnerability will not be the same as those of all the children in the same vulnerable situation. Authorities and decision-makers need to take into account the different kinds and degrees of vulnerability of each child, as each child is unique and each situation must be assessed according to the child’s uniqueness. An individualized assessment of each child’s history from birth should be carried out with regular reviews by a multidisciplinary team and recommended reasonable accommodation throughout the child’s development process.

(f) The child’s right to health

....

... The health of the child and possibilities for treatment may also be part of a best-interests assessment and determination with regard to other types of significant decisions (e.g. granting a residence permit on humanitarian grounds).

(g) The child’s right to education

Id.

107. See UNHCR, *supra* note 18, at 15, 34 (identifying three durable solutions: voluntary repatriation, local integration or resettlement in a third country, and the need to determine an appropriate timeline for the chosen solution). The International Organization on Migration also published a handbook on unaccompanied child migrants, and lists these solutions and adoption as “long-term options.” INT’L ORG. FOR MIGRATION, UNACCOMPANIED CHILDREN ON THE MOVE 60 (2011).

108. UNHCR, *supra* note 18, at 36.

109. *Id.* at 31 (citing G.A. Res. 44/25, *supra* note 14, at art. 12).

considered to be in his or her best interests.”¹¹⁰ Factors that “outweigh any other factors” are those related to “risk of irreparable harm,” and are addressed in U.S. immigration law primarily through the asylum system.¹¹¹ In light of what new insights about the developing brain, the risk of irreparable harm to a child is far higher in reality than is recognized in the courts.

Interestingly, in the affirmative immigration context (rather than in defensive proceedings), family reunification remains a paramount consideration, especially when children are the beneficiary of their parents’ immigration status.¹¹²

III. BEST INTERESTS FOR U.S. (NOT THEM)

Given the extensive and varied definitions and guidelines of “best interests,” how courts actually apply the concept and standard, especially in conjunction with immigration decisions, becomes the pressing question.¹¹³ As has been noted, best interests are rarely considered in immigration proceedings,¹¹⁴ highlighting the uncomfortable dichotomy between the protections for children from “American” families compared to those from immigrant families. While the best interests standard is an admirable one, it is ultimately the procedures for applying it that determine its usefulness to children and to the legal professionals who are tasked with applying the standard.

A. *Checking-in with the Child*

The first step in determining a child’s best interests is to determine whether an immigrant is a child under the applicable law,¹¹⁵ and to conduct

110. *Id.* at 33.

111. *Id.* Examples of risks include “violations of [the child’s] right to life, the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, underage recruitment or trafficking[.] . . . the presence of a well-founded fear of persecution[.] . . . [and] access to life-saving treatment for mentally and/or physically ill children or children with disabilities.” *Id.* In the U.S., asylum, withholding of removal, and protection under the Convention Against Torture (CAT) typically protect children from these risks. See Carr, *supra* note 48, at 139.

112. See Carr, *supra* note 48, at 153–54; see also, e.g., 8 U.S.C. § 1186a(a)(1) (2012) (providing for conditional permanent resident status for certain alien spouses, sons, and daughters).

113. See discussion *supra* Part I.

114. See Carr, *supra* note 48, at 123, 135.

115. See, e.g., Comm. on the Rights of the Child, General Comment 14, *supra* note

some investigation into the child's views, experiences, and potential legal claims.¹¹⁶ Happily, greater protections to ensure these vital first steps have been put in place in the United States in recent years.¹¹⁷ The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) establishes broader protections for unaccompanied migrant children, especially those from Mexico who had previously been routinely turned back at the border with no process or inquiry.¹¹⁸ These protections include mandatory interviewing of unaccompanied Mexican minors to ensure "the child (i) is not a potential victim of trafficking, (ii) has no possible claim to asylum, and (iii) can (and does) voluntarily agree to go back home."¹¹⁹ The law does not, however, give the child any right to have his or her interests weighed if he or she does not (or cannot) voluntarily agree to go back home but is not a potential victim of trafficking, and does not have a possible claim to asylum.¹²⁰ Instead, it provides guidance to facilitate the safe repatriation of these children primarily by assuring that there is a responsible adult to receive them during working hours in the country of return.¹²¹ While this reflects an improvement and a necessary first step in identifying children and at least some of their interests (namely, avoiding future severe harm upon return), it is certainly a meager gain for children who may have good reason to stay in the United States but do not fit neatly into existing asylum law.

B. Child Representation

A major hurdle for many children impacted by immigration proceedings is access to representation, either of their legal interests, best

83, at art. 1 (noting the definition of a child as a person under the age of 18); 8 U.S.C. § 1101(b)(1) (defining child as "an unmarried person under 21 years of age").

116. See, e.g., Comm. on the Rights of the Child, General Comment 14, *supra* note 83, at ¶¶ 52–79.

117. See BETSY CAVENDISH & MARU CORTAZAR, CHILDREN AT THE BORDER: THE SCREENING, PROTECTION AND REPATRIATION OF UNACCOMPANIED MEXICAN MINORS 1 (2011), <http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf>.

118. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044; CAVENDISH & CORTAZAR, *supra* note 117, at 13.

119. CAVENDISH & CORTAZAR, *supra* note 117, at 1; accord 8 U.S.C. § 1232(a)(2)(A).

120. See 8 U.S.C. § 1232(a)(2)(A); see also CAVENDISH & CORTAZAR, *supra* note 117, at 8.

121. See 8 U.S.C. § 1232(a)(2)(C).

interests, or ideally, both.¹²² Generally, international law and guidelines call for representation of unaccompanied children by “a legal guardian, organisation or authority which shall act in the best interests of that child.”¹²³ While best interests are relevant to any proceeding or decision affecting a child, formal BIDs are required for unaccompanied children on the theory that, having lost the protection of their family, the state must step in.¹²⁴ Canada, with whom the United States has a Safe Third Country Agreement,¹²⁵ mandates that both unaccompanied and accompanied children have a designated representative when they are the subjects of proceedings.¹²⁶ The designated representative may be a parent, but in cases where the parent’s interests are in conflict with those of the child, or the parent cannot represent the child, a separate representative is designated.¹²⁷ Further, Canada requires separate refugee determinations to be made for children and parents when their claims are heard jointly.¹²⁸

Domestically, academics, advocates, and the U.S. Government have all raised concerns about child representation, particularly with respect to unaccompanied migrant children who do not have parents to presumptively advocate for their best interests.¹²⁹ Amendments to the INA through the passage of the TVPRA have been important in ensuring that unaccompanied child migrants who are victims of trafficking have legal representation.¹³⁰ This represents only a small portion of unaccompanied migrant children, however, and the rest often go through immigration

122. See CTR. ON GENDER & REFUGEE STUDIES, *supra* note 1, at 75.

123. Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, C.E.T.S. Jan. 2, 2008, No. 197, ch. III, art. 10, ¶ 4, https://www.coe.int/t/dghl/monitoring/trafficking/Source/PDF_Conv_197_Trafficking_Erev.pdf; accord 8 U.S.C. § 1232(c)(6); Comm. On the Rights of the Child, General Comment No. 14, *supra* note 83, at ¶ 96; UNHCR, *supra* note 18, at 14.

124. See UNHCR, *supra* note 18, at 14.

125. Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, Can.-U.S., Dec. 5, 2002, 2002 U.S.T. LEXIS 125; Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry, 69 Fed. Reg. 69480 (Nov. 29, 2004) (codified at 8 C.F.R. §§ 208, 212, 235); Carr, *supra* note 48, at 146.

126. Carr, *supra* note 48, at 146.

127. *Id.* at 146–47.

128. *Id.*

129. See, e.g., CTR. ON GENDER & REFUGEE STUDIES, *supra* note 1, at 75–76; Carr, *supra* note 48, at 146–47, 150.

130. See 22 U.S.C. § 7105(b)(1)(F) (2012); 8 U.S.C. § 1232(c)(5).

proceedings with no representation.¹³¹

Another relatively recent legal innovation to address this problem is the Special Immigrant Juvenile Status (SIJS), which has existed in the United States since 1990.¹³² SIJS is a hybrid legal tool that operates through both family law and immigration law to provide visas for children aged 21 and under who have been abused, abandoned, or neglected by one or both parents and, significantly, for whom repatriation is not in their best interests.¹³³ This is a promising area of immigration law for child immigrants. A 2012 case heard by the Minnesota Court of Appeals held that a finding of viability of reunification with one parent does not preclude SIJS eligibility, and therefore, “[a] finding of viability of reunification with appellant’s mother therefore does not dispense with the need to determine the viability of reunification with the appellant’s father.”¹³⁴ Although some qualified children do not want to take advantage of SIJS because it precludes parents from benefiting from their child’s immigration status, this status serves to close at least some of the gap in child protection in our immigration system.¹³⁵

Further, an alien child may request a hearing for a determination of dependency status and is entitled to due process protection in the decision, which can help increase access to obtaining a legal best interests determination in U.S. courts.¹³⁶ These best interests determinations are

131. See CHILDREN IN DANGER: A GUIDE TO THE HUMANITARIAN CHALLENGE AT THE BORDER, AM. IMMIGR. COUNCIL (July 2014), <http://www.immigrationpolicy.org/special-reports/children-danger-guide-humanitarian-challenge-border> (“[E]ach year, thousands of children are forced to appear before an immigration judge and navigate the immigration court process, including putting on a legal defense, without any legal representation.”).

132. CTR. ON GENDER & REFUGEE STUDIES, *supra* note 1, at 37.

133. 8 C.F.R. § 204.11 (2015); CTR. ON GENDER & REFUGEE STUDIES, *supra* note 1, at 37. “Congress first created this special status to address a particular gap in the protection of children without legal status who were placed in state foster care programs. While the state was able to protect these children from their harmful caregivers, the children lacked an avenue for permanent lawful status in the United States and thus a plan for their *permanent* well-being.” CTR. ON GENDER & REFUGEE STUDIES, *supra* note 1, at 37 (emphasis added).

134. *In re Welfare of D.A.M.*, No. A12-0427, 2012 WL 6097225, at *6–7 (Minn. Ct. App. 2012).

135. See 8 U.S.C. § 1101(a)(27)(J) (“[N]o natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter . . .”); 8 C.F.R. § 204.11(c).

136. 8 U.S.C. § 1101(a)(27)(J); see also, e.g., *Yeboah v. U.S. Dept. of Justice*, 345

made by “a non-immigration judge adjudicator with special expertise in issues facing children,” typically a family court judge.¹³⁷ In this way, the legal decisionmakers with the most expertise in children’s issues are those that make best interests determinations, and Congress avoids encroaching on state’s traditional autonomy over family law decisions.¹³⁸

Even with advances in assuring representation for unaccompanied minors in the immigration system, this leaves a large number of children who are significantly impacted by immigration decisions and remain voiceless.¹³⁹ Professor Carr observes, “Under current United States immigration law, accompanied children who are directly affected by immigration proceedings have no opportunity for their best interests to be considered,” despite the fact that immigration proceedings “frequently result in decisions that directly affect the placement of children.”¹⁴⁰ Although, in the past, courts have been “sensitive to the plight of the directly affected immigrant children of immigrant parents who fear persecution or torture,” this sensitivity does not extend to parents who themselves do not fear persecution, but rather only fear the persecution of their children should they be forced to return.¹⁴¹ Notably, under the current legal structure, family courts are not able to make these determinations unless these children are declared dependent on the courts and essentially separated from their “fit” parents.¹⁴²

C. The Delicate (and Rarely Done) Balance

If best interests are formally established, they do not necessarily trump

F.3d 216, 221–23, 225 (3d Cir. 2003).

137. Carr, *supra* note 48, at 136.

138. *Id.* at 155–56 (noting that this hybrid model “replicates the traditional allocation of power between federal and state governments” and takes advantage of existing strengths and expertise.)

139. *See id.* at 121–22.

140. *Id.* at 123, 125 (citing David Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453, 454 (2008)).

141. *Id.* at 139–40. Professor Carr notes that many of the circuit courts—with the exception of the Sixth Circuit—have denied relief to parents on a theory that persecution of the child constituted persecution of the parent. *Id.* at 140. This issue has been particularly visible and problematic in cases concerning female genital mutilation (FGM), where a mother has already undergone it and therefore cannot possibly fear that she herself will be subject to FGM if returned, but she fears that neither she nor the state will be able to protect her daughter from being subjected to FGM. *See, e.g., Olowo v. Ashcroft*, 368 F.3d 692, 698 (7th Cir. 2004).

142. *See Carr, supra* note 48, at 136.

others' interests or rights.¹⁴³ Instead, best interests determinations are rightly intended to place children's interests into the evaluation so that they can be given due consideration when weighing the many interests and rights that inevitably arise in cases significantly affecting children's lives.¹⁴⁴ This role for best interests determinations is emphasized both in domestic law and in international frameworks. The UNHCR emphasizes that a formal BID is necessary to provide procedural safeguards for the child, but ultimately its purpose is to allow a decisionmaker "to weigh and balance all the relevant factors of a particular case, giving appropriate weight to the rights and obligations recognized in the CRC and other human rights instruments."¹⁴⁵ It explicitly recognizes that the CRC expects rights-based balancing once best interests have been determined.¹⁴⁶ The Committee also recognizes the importance of balancing competing interests and rights, noting that "[i]f harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned" while maintaining that greater weight should be given to "what serves the child best."¹⁴⁷ In the United States, courts have vehemently embraced balancing, although in the immigration context they have resisted giving "extra weight" to the child's interests, and sometimes give the child's interests no weight at all.¹⁴⁸

The failure to appropriately weigh children's best interests is aptly illustrated by a 2005 case, *Cabrera-Alvarez v. Gonzales*, which considered citizen children's interests in response to their father's application for cancellation of removal.¹⁴⁹ The Ninth Circuit rightly emphasized that making the child's best interests "a primary consideration" as the CRC demands did not mean that the child's interests would "prevail."¹⁵⁰ The court in *Cabrera-Alvarez*, however, found that the immigration judge (IJ) sufficiently considered the child's best interests while holding those interests up to a

143. See, e.g., *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1011 (9th Cir. 2005) ("[T]he Convention [on the Rights of the Child] demands that the 'best interests of the child' be 'a primary consideration' in considering a parent's application for cancellation of removal, not that the child's interests will always prevail.").

144. See *id.*

145. UNHCR, *supra* note 18, at 14.

146. *Id.* at 37.

147. Comm. on the Rights of the Child, General Comment 14, *supra* note 83, ¶ 39.

148. See, e.g., *Cabrera-Alvarez*, 423 F.3d at 1011–12; see also *In re S-E-G*, 24 I. & N. Dec. 579, 583–84 (B.I.A. 2008) (failing even to consider the child's best interests).

149. See *Cabrera-Alvarez*, 423 F.3d at 1012–13.

150. *Id.* at 1011 (denying that any "extra weight" should be given to the child's best interests in applications for cancellation of removal).

wholly different standard.¹⁵¹ The court found that simply *inquiring* about the child's interests satisfies any requirement that best interests be considered, and stated, "the agency's entire inquiry focuses on the qualifying children, making their interests a 'primary consideration' in the cancellation-of-removal analysis."¹⁵² Note, the court conspicuously left out the important qualifier, "best."¹⁵³

While certain factors from the various guidelines were considered, there is no indication that a full best interests analysis had been performed and, more importantly, that a best interests standard was used to weigh any determinations.¹⁵⁴ Instead, the court used the factors to establish the child's interests, and then weighed those interests against the much higher bar of "exceptional and extremely unusual hardship."¹⁵⁵

In addition to not giving equal weight to the impacted child's interests, this analysis exemplifies a fundamental balancing failure.¹⁵⁶ Because the standard is dependent on the relative hardship a child may experience,¹⁵⁷ it does very little to protect any of a child's interests. Using the "extreme and unusual" standard, the weight and analysis of a child's interests depends entirely on "the relative strength of the child's interests as compared with those of the other children whose parents face removal."¹⁵⁸ Instead of balancing the child's interests with other interests in the case, the court turned to children completely unrelated to the individual case and balanced all children's interests against each other.¹⁵⁹ While the United States legal system certainly requires balancing of interests, it typically does not include such "race-to-the-bottom" style standards, essentially finding that if other

151. *Id.* at 1013.

152. *Id.* at 1012 (citing *In re Francisco Javier Monreal-Aguinaga*, 23 I. & N. Dec. 56, 63 (B.I.A. 2001)).

153. *See id.*

154. *See id.* "[T]he children's ages, health . . . , special education needs . . . , 'lower standard of living,' . . . adverse conditions that they might experience in the country of removal . . . , the children's ability to speak that country's language . . . , financial support for the children . . . , location of, and support from, other family members, [and if the child will be separated from the parent,] the hardship caused by that separation" are considered, but the court does not address the procedure or outcomes of those considerations in any detail. *Id.*

155. *Id.*

156. *See id.*

157. *See id.*

158. *Id.* (citation omitted).

159. *See id.*

people's rights are also being violated, or worse, if the government is abusing everyone or a "similarly situated" subset of people equally, the hardship imposed by the government is acceptable.

In some SIJS cases, where best interests must explicitly be considered by juvenile courts,¹⁶⁰ they can be brushed aside once the case moves past the family court stage. An appeal from a petitioner on March 26, 2015 was filed because "[t]he director determined that the petitioner was not eligible for SIJ classification because the record did not provide a reasonable factual basis for the juvenile court's dependency order."¹⁶¹ An interoffice memorandum from William R. Yates, Associate Director for Operations of USCIS, instructs that consent to SIJ classification "is an acknowledgment that the request for SIJ classification is bona fide" and therefore not "sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect [or abandonment.]"¹⁶² The Administrative Appeals Office (AAO) noted that this requirement applies to both custody orders and best interest determinations.¹⁶³ In this appeal, the AAO found for the petitioner, writing that the director who refused consent

erred by going behind the court's order to make her own determination that the petitioner had not been abandoned by his father under New Jersey law, and determining that the primary purpose in obtaining the custody order was for immigration purposes because the brief supporting the custody complaint referenced SIJ status.¹⁶⁴

This reveals a lot about how a U.S. Citizen and Immigration Services (USCIS) director applies and decides SIJS, and about inconsistencies

160. See Carr, *supra* note 48, at 136; CTR. ON GENDER & REFUGEE STUDIES, *supra* note 1, at 37.

161. Petition for Special Immigrant Juvenile Pursuant to Section 203(b)(4) of the Immigration and Nationality Act, 8 U.S.C. §1153(b)(4), as described at Section 101(a)(27)(J) of the Act, 8 U.S.C. § 1101(a)(27)(J), at 2 (USCIS Mar. 26, 2015), http://www.uscis.gov/sites/default/files/err/C6%20-%20Dependent%20of%20Juvenile%20Court/Decisions_Issued_in_2015/MAR262015_01C6101.pdf [hereinafter USCIS, March 2015 Appeal].

162. Memorandum from William R. Yates, Assoc. Dir. for Operations, U.S. Citizenship & Immigration Servs., to Reg'l Dirs. & Dist. Dirs., Memorandum #3 – Field Guidance on Special Immigrant Juvenile Status Petitions 2 (May 27, 2004) (quoting H.R. Rep. No. 105–405, at 130 (1997) (alteration in original)).

163. USCIS, March 2015 Appeal, *supra* note 161, at 3.

164. *Id.* at 3–4.

between states in application of this federal immigration status.¹⁶⁵ In reference to the hierarchy of deference, the AAO later stated, “USCIS is not the fact finder in regards to issues of child welfare under state law.”¹⁶⁶ This means that variance in state law can benefit children, especially when the law is broader or more comprehensive than a USCIS director may wish.¹⁶⁷ State flexibility and deference to state court expertise in determining child welfare gives states room to benefit more children in need.¹⁶⁸ For example, one 2012 case heard by the Minnesota Court of Appeals rightly held that a finding of viability of reunification with one parent does not preclude SIJS eligibility, and that “[a] finding of viability of reunification with appellant’s mother therefore does not dispense with the need to determine the viability of reunification with the appellant’s father.”¹⁶⁹ In these cases, state courts were able to see that widely differing circumstances, from the death of a parent,¹⁷⁰ to living with one parent but being unable to reunify with the other,¹⁷¹ could satisfy the requirements of the law.

What is even more troubling about the AAO decision is that there seems to have been no mention of, or regard for, the interests of the child immigrant by the USCIS director.¹⁷² Family courts must take the child’s interests into consideration.¹⁷³ When the USCIS encroaches on family courts’ “expertise” regarding the children’s best interests, it seems it is likely to ignore the standard or read it out of the statute altogether and instead focus exclusively on rule-based elements of the law.¹⁷⁴ This is an example of one of the strengths state-based juvenile courts bring to the field: they are trained and sensitized to evaluate children’s interests when they make any findings related to a child.¹⁷⁵ By placing the special findings responsibilities

165. *See id.* at 4.

166. *Id.*

167. *See id.*

168. *See id.*

169. *In re Welfare of D.A.M.*, No. A12-0427, 2012 WL 6097225, at *6–7 (Minn. Ct. App. Dec. 10, 2012).

170. USCIS, March 2015 Appeal, *supra* note 161, at 5–6.

171. *In re Welfare of D.A.M.*, 2012 WL 6097225, at *6–7.

172. *See* USCIS, March 2015 Appeal, *supra* note 161, at 4–6.

173. *See* DETERMINING THE BEST INTERESTS, *supra* note 11, at 1.

174. *See* USCIS, March 2015 Appeal, *supra* note 161, at 4–6.

175. *See* WILLIAM H. BARTON & JEFFREY A. BUTTS, BUILDING ON STRENGTH: POSITIVE YOUTH DEVELOPMENT IN JUVENILE JUSTICE PROGRAMS 5–6 (2008), <http://www.aecf.org/m/resourcedoc/aecf-BuildingOnStrengthPositiveYouthDevelopment-2008.pdf>.

in juvenile courts' hands, regardless of the variance across state lines, there is at least some level of protection for the children's interests built into the evaluation.¹⁷⁶

In an even more concerning example, the court in *In re S-E-G* did not evaluate, let alone mention, the best interests of the children who were the subject of the case, despite the children's very real interests in their own safety and well-being.¹⁷⁷ In light of these examples and the limited protections available to particularly vulnerable immigrant children, existing law does not sufficiently consider children's interests, let alone their best interests, nor does it provide enough immigration options for children "who are deemed ineligible for relief [and] face repatriation, even if it may be dangerous and/or otherwise contrary to their best interests."¹⁷⁸

In a situation as life-changing as removal from home and family, where the state is taking affirmative action that can seriously harm the development of a child, the court should be obligated to consider that child's interests in making its decision. Further, the state should consider its own interests in children's healthy development, particularly children that will remain in the state as legal members of society.

D. Kids in the U.S. Family Law Courtroom

In stark contrast, best interests play a central and influential role in the family law context. In abuse, neglect, dependency, custody, and visitation proceedings, once a child has been declared dependent (or the parent deemed unfit), "the system focus is the child's best interests."¹⁷⁹ The Child Abuse Prevention and Treatment Act (CAPTA) uses funding incentives to require states to provide a guardian ad-litem (GAL), who may be an expert or an attorney, to represent every child in an abuse or neglect case resulting in a judicial proceeding, primarily to discover and represent the child's best

176. See, e.g., U.S. CITIZENSHIP & IMMIGRATION SERVS., SPECIAL IMMIGRANT JUVENILE STATUS: INFORMATION FOR JUVENILE COURT 1-2, http://www.uscis.gov/sites/default/files/USCIS/Green%20Card/Green%20Card%20Through%20a%20Job/Information_for_Juvenile_Courts_FINAL.pdf (last visited Nov. 20, 2015).

177. See *In re S-E-G*, 24 I. & N. Dec. 579, 581-90 (B.I.A. 2008).

178. CTR. ON GENDER & REFUGEE STUDIES, *supra* note 1, at 54.

179. MARVIN VENTRELL, LEGAL REPRESENTATION OF CHILDREN IN DEPENDENCY COURT: TOWARD A BETTER MODEL—THE ABA (NACC REVISED) STANDARDS OF PRACTICE, NACC CHILDREN'S LAW MANUAL SERIES 171 (1999); see also AMERICAN BAR ASSOCIATION SECTION OF FAMILY LAW STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES 1 (2003).

interests.¹⁸⁰ Notably, however, some jurisdictions do not require independent counsel for the child in a given case, although they likely employ some other child advocate to express or determine the child's best interests (e.g. a GAL).¹⁸¹

Taking Texas as an example, where many immigrant children arrive, both accompanied and unaccompanied, the Texas Family Code has incorporated best interests through both presumptions and factors to be considered by the court.¹⁸² Notably, especially in contrast with the very lengthy immigration process, "the prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest."¹⁸³ In fact, teenagers 16 years old or older are given extra consideration in permanency planning.¹⁸⁴ In their cases, the court must address the child's impending transition from foster care to independent living, and "whether this transition is in the best interests of the child."¹⁸⁵ This consideration by the Texas legislature and family courts is often not afforded to immigrant children whose best interests are not considered, many of whom may be sent back to independent living situations or worse.¹⁸⁶ Finally, it is worth noting

180. Child Abuse Prevention and Treatment Reauthorization Act of 2010, 42 U.S.C. § 5106a (2012). The relevant section states in full:

provisions and procedures requiring that in every case involving a victim of child abuse or neglect which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, including training in early childhood, child, and adolescent development, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings—

(I) to obtain first-hand, a clear understanding of the situation and needs of the child; and

(II) to make recommendations to the court concerning the best interests of the child[.]

Id. § 5106a(b)(2)(B)(xiii).

181. VENTRELL, *supra* note 179, at 171–72.

182. See TEX. FAM. CODE ANN. § 263.307(a) (West 2015); DETERMINING THE BEST INTERESTS, *supra* note 11, at 30.

183. TEX. FAM. CODE ANN. § 263.307(a).

184. *Id.* § 263.307(c).

185. *Id.*

186. See, e.g., CTR. ON GENDER & REFUGEE STUDIES, *supra* note 1, at iii ("Failure to consider the best interests of the child prior to repatriation has led to children being sent back to countries where they have no dedicated adult to care for them or where their well-being, and even their life, is otherwise in danger, resulting in violations of

that when making decisions regarding parental custody, the Code does not explicitly refer to the child's best interests;¹⁸⁷ it does, however, list the importance of "care, nurturance, and appropriate discipline consistent with the child's physical and psychological development" and "an understanding of the child's needs and capabilities" among the factors contributing to adequate parenting skills.¹⁸⁸

Where parents are not deemed unfit, as in custody proceedings following divorce, parents are presumed to act in the best interests of their child¹⁸⁹ and separate determinations are typically not made.¹⁹⁰ Indeed, one article notes that in practice "judges almost invariably adopt the solution, if any, agreed to by the divorcing couple, thereby giving cooperative parents de facto power over the custody decision."¹⁹¹ Typically, wide discretion is given to the lawyer and to the court in representing and determining the child's best interests, a model Jean Koh Peters, Professor of Law at Yale University and expert in children, families, and the law, feels serves neither the child client nor the child welfare system.¹⁹² Speaking about child client representation, Professor Peters argues that in a legal system aiming for "quality representation, predictability and consistency," the total discretion model employed by so many states and courts leaves too much room for personal value judgments "including references to [a lawyer's] own childhood, stereotypical views of clients whose backgrounds differ from [the lawyer's], and [the lawyer's] own lay understanding of child development and children's needs," leading to "a system containing unacceptable variability."¹⁹³ Similar problems arise when judges are given virtually total discretion, leaving the decisionmaker "with the power of a virtual sovereign in the relevant field."¹⁹⁴

Despite its failings, the family law system does a much better job determining and accounting for children's best interests than the

children's human rights.").

187. This is not unusual. Parental fitness determinations are a prerequisite in family law to the children's best interests determinations because parents are presumed to act in their child's best interests unless declared unfit. *See Troxel v. Granville*, 530 U.S. 57, 68 (2000) (citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979)).

188. *See* Tex. Fam. Code Ann. § 263.307(b).

189. *Troxel*, 530 U.S. at 68 (citing *Parham*, 442 U.S. at 602).

190. *See id.* at 68–69 (citing *Reno v. Flores*, 507 U.S. 292, 304 (1993)).

191. Coons, Mnookin & Sugarman, *supra* note 37, at 469.

192. *See* Peters, *supra* note 12, at 1526–27.

193. *Id.*

194. Coons, Mnookin & Sugarman, *supra* note 37, at 475.

immigration system. This is in part due to what many claim is structural necessity and federalism,¹⁹⁵ but it is not inevitable. There is room for immigrant children's rights to be considered through existing family law structures, within the immigration system, or preferably, through both. This is already happening to some extent in offices within the U.S. government assigned to serve immigrant children.¹⁹⁶ According to the Executive Office for Immigration Review (EOIR) guidelines, the Office of Refugee Resettlement (ORR) under the Department of Health and Human Services (HHS) works with unaccompanied alien children and the Department of Homeland Security (DHS) works with accompanied children.¹⁹⁷

Professor Peters writes, "A determination of best interests must begin and end with the child in her context and the child's expressed views."¹⁹⁸ Immigrant children come to the United States for a wide range of reasons, from being brought by immigrating parents to making their own decisions to immigrate, often to escape violence at home or in their communities.¹⁹⁹ Each child must have the opportunity to be heard when the state makes major decisions significantly affecting his or her life and future. In light of what we know about how a child's context impacts his or her development, these decisions may well determine the well-being of the child for the rest of his or her life.

IV. A PROPOSED FRAMEWORK FOR BEST INTERESTS DETERMINATIONS IN U.S. IMMIGRATION LAW

With a variety of models in use in a range of contexts, and vastly differing guidelines on what factors should be considered in determining a child's best interests, it is difficult to expect a federal system to effectively administer any best interests test. Before evaluating existing guidelines, this Part will briefly turn to emerging research on adversity, stress, risk, and protective factors (or, "resilience") that can serve to illuminate the essential components of healthy child development and help distill the key components necessary to determining a child's best interests.²⁰⁰

195. Carr, *supra* note 48, at 155–56.

196. See EOIR, GUIDELINES, *supra* note 43, at 2.

197. *Id.*

198. Peters, *supra* note 12, at 1513.

199. Katherine M. Donato & Blake Sisk, *Children's Migration to the United States from Mexico and Central America: Evidence from the Mexican and Latin American Migration Projects*, 3 CTR. MIGRATION STUD. N.Y. 58, 62 (2015).

200. See Cecilia Martinez-Torteya et al., *Resilience Among Children Exposed to*

A. Children and the Developing Brain

Government immigration decisions impose stress on children. As such, the concept of “toxic stress,” referring to “strong, frequent, or prolonged activation of the body’s stress management system,” is fundamental to understanding how decisions made by immigration courts may affect children’s long-term development.²⁰¹ Toxic stress responses can be caused by “[s]tressful events that are chronic, uncontrollable, and/or experienced without children having access to support from caring adults,” adversely impacting brain architecture and potentially causing the brain to over-develop those areas “involved in fear, anxiety, and impulsive responses” to the detriment of the areas “dedicated to reasoning, planning, and behavioral control.”²⁰² In the context of immigration decisions, outcomes may be out of the child’s control and frequently experienced without the support of caring adults.²⁰³

When toxic stress responses occur frequently or endure for long periods of time, the body and brain can become worn down and there is a greater risk of physical and mental illness in adulthood, in addition to impairments in learning, memory, coping, and impulse control.²⁰⁴ These responses may occur in cases of chronic abuse or neglect, in violent or chaotic environments, or in the context of immigration detention or

Domestic Violence: The Role of Risk and Protective Factors, 80 CHILD DEV. 562, 563 (2004). Martinez-Torteya, Bogat, Von Eye, and Levendosky provide a clear and succinct definition of resilience, stating,

Resilience has been defined as the maintenance of healthy/successful functioning or adaptation within the context of a significant adversity or threat. Thus, two elements must co-occur for resilience to be present: a circumstance that has the potential to disrupt children’s development and reasonably successful adaptation.

Id. (citations omitted).

201. Nat’l Sci. Council on the Developing Child, *Excessive Stress Disrupts the Architecture of the Developing Brain* 2 (Ctr. on the Developing Child at Harv. Univ., Working Paper No. 3 (Updated Edition), 2014), http://www.developingchild.harvard.edu/wp-content/uploads/2015/05/Stress_Disrupts_Architecture_Developing_Brain-1.pdf [hereinafter *Excessive Stress*, Working Paper No. 3].

202. *Id.* at 2.

203. See, e.g., Bruce Lesley, *Immigration: Making Decisions in the Best Interest of the Child*, HUFFINGTON POST (Jan. 27, 2014), http://www.huffingtonpost.com/bruce-lesley/immigration-making-deci_b_4671750.html.

204. *Excessive Stress*, Working Paper No. 3, *supra* note 201, at 2–3.

repatriation to stressful environments.²⁰⁵ The concept of toxic stress underlies many of the known risk factors to impaired child development, and the factors influencing resilience generally mitigate toxic stress responses.²⁰⁶

“Resilience” is equally important in the immigration context, where decisions are highly likely to cause stress and the pertinent question is what effect the stress may have on the child’s development. Resilience has varying, but related, definitions and is a way of studying “ordinary rather than extraordinary” human processes of adaptation—specifically, “the process or phenomenon of competence despite adversity.”²⁰⁷ A key factor in a child’s resilience, evident in most of the best interests guidelines and legal structures that emphasize family unity,²⁰⁸ is “a sensitive and responsive caregiver.”²⁰⁹ Positive caregivers can help buffer children’s stress responses and mitigate children’s exposure to stress hormones, countering the otherwise damaging effect of chronic or prolonged toxic stress.²¹⁰ Accordingly, “The essential features of the environment that influence children’s development are their relationships with the most important people in their lives.”²¹¹ The essential components for a positive child-caregiver relationship are “love, stability, security, responsive interaction, and encouragement of exploration and learning.”²¹² This type of positive relationship is also known as “secure attachment,” a protective factor that seems to be particularly far-reaching.²¹³

205. See *id.* at 5 (noting an increased risk for victims of abuse, neglect, and post-traumatic stress disorder).

206. *Id.* at 6.

207. Mirella De Civita, *Strength-Based Efforts for Promoting Recovery from Psychological Harm*, 14(4) RECLAIMING CHILD. & YOUTH 241, 241 (2006) (quoting Suniya S. Luthar, Dante Cicchetti & Bronwyn Becker, *The Construct of Resilience: A Critical Evaluation and Guidelines for Future Work*, 71 CHILD DEV. 543, 554 (2000)).

208. See, e.g., DETERMINING THE BEST INTERESTS, *supra* note 11, at 3 (noting a common theme among best interest considerations in the United States as the presence of factors taking into account “[t]he emotional ties and relationships between the child and his or her parents, siblings, family and household members, or other caregivers”).

209. *Excessive Stress*, Working Paper No. 3, *supra* note 201, at 4.

210. *Id.*

211. Shonkoff, *supra* note 28, at 72.

212. *Id.*

213. See Ida Eriksson et al., *What We Know and Need to Know About Factors that Protect Youth from Problems: A Review of Previous Reviews*, 5 PROCEDIA SOC. & BEHAV. SCI. 477, 480–81 (2010) (“These kinds of general protective factors seem to buffer against several risk factors even within the family, such as psychological problems of a parent, parental depression, and domestic violence.”); see also Martinez-Torteya et

In addition to stable and secure attachment through continuous relationships with responsive and sensitive caregivers, there are a number of other factors strongly associated with resilience.²¹⁴ One important type of protective factor, especially for adolescents, is “extended support networks.”²¹⁵ Resilience is often studied in the context of children facing socio-economic adversity, which “is associated with . . . poor living conditions, overcrowding, or lack of material resources that pose risks for adaptive development.”²¹⁶ These circumstances may characterize the environment to which a child is repatriated or introduced through the child’s voluntary accompaniment of the child’s parent. Dr. Mirella De Civita cites four influential factors for positive adaptation:

- (a) connectedness, as in building strong positive relationships with others; (b) continuity, as it relates to developing a sense of continuous belonging to a group, family, or spiritual entity; (c) dignity, as in cultivating purpose, showing respect and being courteous; and (d) opportunity, as in providing experiences to capitalize on strengths.²¹⁷

Embedded in these is another important factor: “experiences that contribute to a sense of responsibility over one’s life,” which once again speaks to a child’s sense of control.²¹⁸

The caregiver’s mental health is an important factor in resilience, with maternal depression being a widely-studied and serious risk factor for high-risk children.²¹⁹ This has particular salience in immigration proceedings where caregivers may be separated from a spouse or existing support system, or worse, may be forced to return to a country where they experienced past violence and trauma.²²⁰ This presumably raises the likelihood of mental illness in caregivers, and the likelihood of experiencing post-traumatic stress disorder.²²¹ In addition to being potentially harmful to the child’s development, parental depression may be inherited by the child, making the

al., *supra* note 200, at 564 (“Thus, children whose mothers are available and supportive will be better able to develop self-regulation abilities within the context of effective mother-child interactions.”).

214. See De Civita, *supra* note 207, at 242.

215. Jean M. Gerard & Cheryl Buehler, *Cumulative Environmental Risk and Youth Maladjustment: The Role of Youth Attributes*, 75 CHILD DEV. 1832, 1833 (2004).

216. Schoon & Parsons, *supra* note 35, at 261.

217. De Civita, *supra* note 207, at 242.

218. *Id.*

219. Martinez-Torteya et al., *supra* note 200, at 573.

220. See *id.*

221. See *id.* at 564.

child more vulnerable to mental health issues activated by stress.²²²

The child's own temperament and cognitive ability also influences his or her resilience.²²³ Children who are more cheerful and approachable, with more stable and less reactive moods, are less likely to exhibit behavioral problems despite adverse situations.²²⁴ As noted earlier, age also likely has an impact on a child's temperament, sense of control, and responsibility over his or her life. Dr. De Civita uses a helpful analogy, suggesting a child moves "through life along some 'developmental pathway, with the particular pathway followed always being determined by the interaction of the personality as it has so far developed and the environment in which it then finds itself.'"²²⁵ In addition to recognizing children's evolving and flexible personalities, the analogy points to the potential impact of multiple risk factors.²²⁶ This analogy reflects the widely studied and accepted idea that risk accumulation is particularly harmful because it indicates more frequent and more prolonged stressors that may produce toxic stress responses.²²⁷

Based on these core concepts and existing guidelines, Section B distills a workable and appropriate tool for evaluating children's best interests in the context of U.S. immigration proceedings.

B. A User-Friendly Tool: Best Interests in the Context of Immigration

Before beginning, note the most important aspect of the above field of research: it is not prescriptive. Although it highlights important generalizations about how children develop and how they deal with stress and adversity, every child is unique, and it is impossible to predict how he or she will develop.²²⁸ Further, much of the research emphasizes factors that are important to development without prescribing definitive outcomes based on the degree to which these factors are present.²²⁹ Recognizing this complexity,

222. *Id.*

223. *Id.*

224. *Id.*

225. De Civita, *supra* note 207, at 242 (quoting J. Bowlby, *Developmental Psychiatry Comes of Age*, 145 AM. J. PSYCHIATRY 1, 6 (1988)).

226. *See id.*

227. *See, e.g.,* Gerard & Buehler, *supra* note 215, at 1833, 1839 ("As hypothesized, cumulative risk was associated positively and linearly with T1 conduct problems and depressed mood.").

228. *See* Comm. on the Rights of the Child, General Comment 14, *supra* note 83, ¶ 32.

229. *See, e.g.,* *Gene Expression*, Working Paper No. 10, *supra* note 24, at 6–7.

the CRC General Comment 14 succinctly describes the best interests concept as follows:

The concept of the child's best interests is complex and its content must be determined on a case-by-case basis. . . . Accordingly, the concept of the child's best interests is flexible and adaptable. It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs.²³⁰

As such, it is impossible to create a tick-checking rubric to determine a child's interests or to balance his or her interests against the interests of others in the case.²³¹ Instead, a framework based on risk and resilience can guide decisionmakers when a decision they have been tasked with making on behalf of the state will fundamentally impact a child's life.

Because decisions to repatriate a child or the child's caregiver are likely to be extremely stressful, best interests determinations in immigration proceedings should focus more heavily on ensuring that the child has enough internal and external support mechanisms to mitigate the affected child's stress. The following is a four-part test for use in immigration decisions based on research on brain development, risk and resilience, and on existing legal guidelines for best interests determinations. A legal decisionmaker or practitioner should investigate and analyze each part in the process of determining best interests, and consider each part individually and as a whole when balancing the child's interests with the other interests in the case.

1. *The Presence of Caregivers & Supportive Networks*

As is evident from the research—and from nearly all the legal guidelines on children's best interests—parents, caregivers, family, and social networks play a prominent role in children's lives.²³² The quality of caregivers and social networks (extended family, strong community ties, etc.) should be considered both in the United States and in the child's country of origin. This is perhaps the most important component, especially for young children.²³³ Adolescents may have broader support systems among peers and within their school communities. They may also have greater

230. Comm. on the Rights of the Child, General Comment 14, *supra* note 83, ¶ 32.

231. *See id.*

232. *See, e.g.,* DETERMINING THE BEST INTERESTS, *supra* note 11, at 3; *Excessive Stress*, Working Paper No. 3, *supra* note 201, at 3–4.

233. *See Excessive Stress*, Working Paper No. 3, *supra* note 201, at 3–4.

interests in education. Even so, strong personal relationships with adults are vital for all children and should be the first consideration when evaluating children's best interests. Similarly, the likelihood of remaining with a caregiver in the event of caregiver deportation should be evaluated to determine the child's existing and future secure relationships, and to evaluate the following three parts of the test.

2. *The Destination's Socio-Economic Context*

This component is highly important because community characteristics and the child's immediate environment have great potential to cause toxic stress responses.²³⁴ This may be especially true for adolescent children who spend a greater portion of time outside of the home and who are more susceptible to certain common risk factors such as gang recruitment.²³⁵ Factors mentioned above—like social belonging, stability, sufficient living conditions, and material resources—also fall under this component.

Under international law and often under state law, economic status “cannot factor into consideration in best interests determinations, just as a parent's poverty cannot serve as a basis for finding neglect under state laws.”²³⁶ This is an important protection against state abuse resulting in unfounded removal of children from already disadvantaged families. Therefore, by focusing attention not on the parent or family's current status, but on the holistic context of the destination to which the child or parent will be sent, this test remains within the constraints of the law while providing a space for consideration of factors including community violence, stable housing, and the parent or caregiver's ability to find a job—all of which have been considered in immigration proceedings when determining extreme and unusual hardship.²³⁷

234. *See id.* at 4.

235. *See, e.g., In re S-E-G-*, 24 I. & N. Dec. 579, 579–80 (B.I.A. 2008).

236. CTR. ON GENDER & REFUGEE STUDIES, *supra* note 1, at 56.

237. *See, e.g., In re Gonzalez Recinas*, 23 I. & N. Dec. 467, 472 (B.I.A. 2002) (citing the “heavy financial and familial burden on the adult” as relevant to whether the child would experience extreme and unusual hardship); *see also* *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1012 (recognizing that courts consider the “lower standard of living, . . . whether the removed parent will be able to provide sufficient financial support,” and “other adverse conditions” that the child may experience if he or she accompanies a removed parent).

3. *The Child's Personality*²³⁸

Each child is unique and may have existing strengths and weaknesses to draw upon when affected by an immigration decision. This may be based on past adversity and exposure to toxic stress, or on more developed reasoning, self-regulation, and emotional control due to age or other factors.²³⁹ A child's personality is a central factor for decisionmakers to determine both the impact of the actual decision and how a child may respond to the consequences of the decision.²⁴⁰ For example, a very young child will not understand why a caregiver has disappeared from his or her life, whereas an adolescent may have developed these logical reasoning skills. As addressed above, a child prone to depression or other mental health problems may react more severely to a decision resulting in family separation or repatriation than a child who is constitutionally cheerful and

238. Researchers routinely use reliable tests to measure children's personalities, including behavioral, cognitive, and temperament analyses. *See, e.g.*, Martinez-Torteya et al., *supra* note 200, at 564, 566. Courts and qualified professionals could implement the same tests for children impacted by immigration decisions. In their article examining resilience in children exposed to domestic violence, Dr. Cecilia Martinez-Torteya and her colleagues, use "developmentally appropriate versions of the Child Behavior Checklist" based on mothers' ratings of their children. *Id.* at 566 (citation omitted). This measure is reliable:

Excellent internal consistency (α s = .90-.96) has been reported for the broadband scales Children were classified as positively adapted if their CBCL scores were lower than 60 for both scales at all time periods. Children with scores equal to or higher than 60 (i.e., clinical cutoff) on either scale at one or more time periods were classified as negatively adapted.

. . . .

Temperament characteristics were assessed using the Carey Temperament Scales. Mothers rated their child's attitudes and behavior on a 6-point scale. For this study, the rhythmicity, adaptability, approach, intensity, and mood scales were added to create an easy temperament variable. Adequate internal consistency has been reported for this composite (α = .87). . . . Children whose score was greater than the median were classified as having easy temperament; those with scores lower than or equal to the median were classified as difficult.

Id. at 566-67 (citations omitted). Self-esteem is also particularly important for adolescents. Research suggests "that positive self-regard provides broader immunity against the development of adjustment problems regardless of adolescents' risk status." Gerard & Buehler, *supra* note 215, at 1846.

239. *See* Comm. on the Rights of the Child, General Comment 14, *supra* note 83, ¶¶ 55-56.

240. *See id.*

optimistic. Therefore the child's personality will play a pivotal role in balancing interests and in evaluating existing risk factors.

4. *The Presence of Cumulative Risk Factors, Especially Those Spanning "Multiple Contexts"*

Because current research indicates that it is the accumulation of risk factors more than any individual factor that has the greatest negative impact on child development, the final evaluation in any best interests determination should center on an overall view of cumulative risk.²⁴¹ There is not a set number of risks that will result in maladaptive development, but it is clear that the combination of factors within the family, the child's own constitution, and the broader community can have a significantly more negative impact on child development than any individual factor on its own.²⁴² This component also allows for a holistic review of the previous three components.

Finally, individual findings and a holistic best interests determination must be balanced by the decisionmaker with parent and family interests and with state interests in making any decision in an immigration proceeding that will significantly impact a specific child.²⁴³

V. IMPLEMENTING THE TEST IN THE U.S. IMMIGRATION SYSTEM

This four-part test will be useless unless firmly incorporated into the immigration system, either through a hybrid model similar to SIJS or by establishing an independent body to make best interest determinations as prescribed by the UNHCR guidelines.²⁴⁴ The SIJS model is promising, but is necessarily limited to those children declared dependent on the court and also creates sometimes arbitrary results.²⁴⁵ Even the SIJS model is inconsistent, depending on the intricacies of each state's family law statutes and the decisionmakers that administer it.²⁴⁶ This Article now highlights some ways in which this test can and should be incorporated into the U.S. immigration system to ensure that children have an opportunity to be heard and fair consideration when the state makes decisions that fundamentally

241. See Gerard & Buehler, *supra* note 215, at 1844.

242. See *id.*

243. See UNHCR, *supra* note 18.

244. See *id.* at 21–23.

245. CTR. ON GENDER & REFUGEE STUDIES, *supra* note 1, at 37.

246. See *id.* at 37–38.

impact their lives.

A. The Right to a Representative and Counsel

The first step in protecting immigrant children's rights and in ensuring consideration of their best interests is appointing counsel or a representative in immigration proceedings where the decision may significantly (and negatively) impact the child's life.²⁴⁷ As previously mentioned, the U.S. government generally does not appoint counsel, let alone an independent child advocate for children in immigration proceedings, whether accompanied or unaccompanied.²⁴⁸ Instead, and perhaps as a work-around resulting from Congressional gridlock, the TVPRA of 2008 *encourages* HHS to take advantage of pro bono services to provide representation for unaccompanied children, but makes no guarantees, leaving most children unrepresented in their immigration proceedings.²⁴⁹ HHS "is authorized to appoint independent child advocates for child trafficking victims and other vulnerable unaccompanied alien children."²⁵⁰ However, the determination of who qualifies as an "other vulnerable unaccompanied alien child[]" is discretionary and decided by HHS "on a case-by-case basis."²⁵¹ Given children's developmental requirements and the existing legal structure surrounding best interests, children must have at least a representative, and preferably legal counsel, when facing immigration proceedings.

In light of the difficulty in determining a child's best interests and the complexities of the U.S. immigration system, child advocates widely recognize that "the appointment of a competent guardian as expeditiously as possible serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied child."²⁵² No matter their reason for coming to the United States, children's "best interests will be served only by an immigration process that gives voice to their expressed interests, needs, and wishes."²⁵³ Statistics on unaccompanied child migrants in the U.S. immigration system show a much higher likelihood of children winning their

247. *See id.* at 75.

248. *Id.*

249. *See id.* at 3 (emphasizing that children still go unrepresented even with pro bono services available).

250. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C. § 1232(c)(5) (2012).

251. *Id.* § 1232(a)(2)(A).

252. INT'L ORG. FOR MIGRATION, UNACCOMPANIED CHILDREN ON THE MOVE 19 (2011); *see also* King, *supra* note 9, at 332.

253. King, *supra* note 9.

immigration cases (and thereby avoiding repatriation) if those children have attorneys, highlighting the importance of having legal representation, even for meritorious cases.²⁵⁴ The American Bar Association also recognized the importance of providing unaccompanied minors with an attorney by adopting a rule in its *Standards for Custody, Placement and Care*, specifically condemning appointment of non-attorney representatives to meet children's legal needs.²⁵⁵ A representative or guardian, and ideally counsel, is necessary for the child's voice to be effectively heard in immigration proceedings.²⁵⁶

B. Incorporate Best Interests Determinations Into All Immigration Proceedings Affecting Children

While the trend toward providing counsel to unaccompanied child migrants is an important step in the right direction, it is not sufficient for ensuring that children's interests are taken into account in life-changing decision processes. The above test is applicable whether the child is the primary or ancillary party to an immigration proceeding or whether the child will simply be fundamentally impacted by the decision. Recognizing that it is a burden for the state to become the guardian of children of repatriated parents and that deportation and family separation are both serious and potentially harmful state action, best interests should be considered for all of these children. Although the United States has not ratified the CRC, it has signed and has committed to implementing the primary consideration due to the child's best interests.²⁵⁷ This is not, and should not be, limited to children who affirmatively or defensively end up in immigration court as the primary party to a case. It should apply to all affected children; from undocumented children brought over by their parents, to U.S. citizen children and legal permanent resident children whose undocumented

254. *Id.* at 350.

255. *Id.* at 376–77; *see also* AM. BAR ASSOC., STANDARDS FOR CUSTODY, PLACEMENT AND CARE; LEGAL REPRESENTATION; AND ADJUDICATION OF UNACCOMPANIED ALIEN CHILDREN IN THE UNITED STATES (2004), http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant_Standards.authcheckdam.pdf.

256. *See* Brian Rowe, *The Child's Right to Legal Assistance in Removal Proceedings Under International Law*, 10 CHI. J. INT'L L. 747, 747 (2010); CTR. FOR GENDER & REFUGEE STUDIES, *supra* note 1, at iv (“Changes to the immigration system are largely meaningless without counsel to guide children through the complexities of U.S. immigration laws and procedures.”); Jacqueline Bhabha & Susan Schmidt, *From Kafka to Wilberforce: Is the U.S. Government's Approach to Child Migrants Improving?*, 11-02 IMMIGR. BRIEFINGS 1, 2 (2011); King, *supra* note 9, at 376–78.

257. *See* CTR. ON GENDER & REFUGEE STUDIES, *supra* note 1, at 3 n.10.

parents face deportation.²⁵⁸ The child's status does not make their interest in their own healthy development, or society's interest in their healthy development, any less.

C. Law-gistics

Finally, this test, and more importantly, incorporating a best interests determination into immigration proceedings, raises significant logistical questions. These questions are raised here to further creative and innovative discussion about how best to implement this proposal. Many resources and models are already available and hold promise for bringing this proposal to fruition.

There are two issues that immediately arise: evidentiary requirements necessary to determine best interests based on the proposed test and the "location" of these decisions within the U.S. legal system. Certainly, administering this test will require evidence to be presented on each of the four components. This should be the primary responsibility of the child's representatives. In some cases, there are existing tests used in social science and medicine that may serve as useful evidence for one or more of these components.²⁵⁹ Evidence on country conditions is typically already included in asylum applications and again requires research and presentation by the child's legal representative.²⁶⁰ Testimony by family or others with whom the child has strong relationships may also be relevant, as well as expert testimony in certain cases. Gathering and presenting this evidence will certainly require resources that should be taken into consideration when allocating funding for children's counsel or non-legal representatives (similar to GALs).

The second issue is jurisdictional. There must be an appropriate forum for best interests determinations. Family courts will not necessarily have jurisdiction over these children if they are still dependent on their parents or

258. For a more extensive discussion on the impact of immigration decisions for parents on their children, see Lisete M. Melo, *When Children Suffer: The Failure of U.S. Immigration Law to Provide Practical Protection for Persecuted Children*, 40 GOLDEN GATE U.L. REV. 263 (2010); Keila E. Molina & Lynne Marie Kohm, "Are We There Yet?" *Immigration Reform For Children Left Behind*, 10 REGENT J. INT'L L. 1 (2013); JACQUELINE BHABHA, CHILD MIGRATION AND HUMAN RIGHT IN A GLOBAL (2014).

259. See, e.g., Martinez-Torteya et al., *supra* note 200, at 565–68.

260. See U.S. DEP'T OF HOMELAND SEC., OMB NO. 1615-0067., FORM I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING REMOVAL, <https://www.uscis.gov/sites/default/files/files/form/i-589.pdf> (last visited Jan. 12, 2016).

other guardians.²⁶¹ However, the immigration system currently lacks the expertise in child welfare to effectively administer this test without additional and extensive training.²⁶²

Two possible solutions can address this forum problem. The first is to establish an independent board composed of experts in child-welfare with the sole duty of hearing and determining the best interests of children impacted by immigration decisions. This board could be similar to the panels recommended by the UNHCR to make best interest determinations, composed of multi-disciplinary experts that make best interests determinations in specified circumstances under international law.²⁶³ They could sit in the immigration court with asylum officers and immigration judges and could perform evaluations in a non-adversarial setting as asylum officers do.²⁶⁴

The second solution would be either to appoint dual-system judges in both family and immigration court or to hire a specified number of child-expert immigration judges. The dual-system judges would spend part of their time riding the circuit to make best interests determinations in immigration proceedings. This would capitalize on the expertise of judges in family law while avoiding the jurisdictional issues associated with bringing non-state dependent children into family court. Hiring immigration judges who specialize in children's issues and family law may be an alternative solution, particularly in light of the growing number of children entering the immigration system today. These are only two of the many potential ways to implement best interests determinations and considerations within the immigration context. They show that the system has the structural resources to incorporate best interests, and it is merely a matter of agility to ensure that children's interests be heard.

VI. CONCLUSION

Using the proposed simplified best interests test is not novel, nor are the components unprecedented in U.S. law. There is both a legal and statutory basis from which to implement these recommendations. Streamlining the required analysis and incorporating both a best interests

261. See DETERMINING THE BEST INTERESTS, *supra* note 11, at 37.

262. See Carr, *supra* note 48, at 155–56.

263. See UNHCR, *supra* note 18, at 22.

264. See Gregg A. Beyer, *Establishing the United States Asylum Corps: A First Report*, 4 INT'L J. REFUGEE L. 455, 464 (1992).

determination and standard into U.S. immigration law will assure that children are protected and recognized as people with rights and interests. Using this framework and standard will likely uphold many decisions, like that in *Cabrera-Alvarez v. Gonzales*.²⁶⁵ Although the court did not apply a best interests standard, it did ultimately determine several substantive components of the children's best interests.²⁶⁶ Even given a best interests standard, the court may still have found that the state's interests in immigration enforcement outweighed the children's interests in having their father at home.

For other cases, however, especially for those of unaccompanied migrant children and children who do not fit comfortably within asylum law, the shift could be positive and life-changing. In *In re S-E-G et al.*, a best interests determination and standard would certainly have prevented the children in the case from being returned to a violent and risk-laden community despite their not fitting easily into a protected ground under international or U.S. asylum law.²⁶⁷ With immense respect for the rule of law, decisions made in immigration proceedings often result in unjustified hardship not just to the primary party but also to his or her innocent family. These hardships are state-imposed and state-condoned, and as such, the state has an immense responsibility to justify its decisions in these circumstances.

There is often no "savior" role for the state to play—no abusive or neglectful home from which to rescue a child, no family for which services and support can rehabilitate, no criminal culpability to punish. Instead, the state is potentially contributing to the problem of broken families and broken homes, and sending children back to situations of abuse. In some cases this may be warranted. In others, the costs in harm to children, to our justice system, and to our society as a whole certainly outweigh the state's interests in immigration enforcement. All this Article argues for is that each of these children be given the full consideration they deserve.

265. *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1013 (9th Cir. 2005).

266. *Id.* at 1013.

267. *See In re S-E-G-*, 24 I & N Dec. 579, 590 (B.I.A. 2008).