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Entering the Mainstream: Making Children Matter in Immigration Law

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ENTERING THE MAINSTREAM: MAKING CHILDREN MATTER IN IMMIGRATION LAW

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ABSTRACT

Myths that parents are afforded easy and unwarranted pathways to U.S. citizenship through their U.S. citizen children and that children receive privileged treatment in U.S. immigration law stubbornly persist in public discussion surrounding possible immigration reform. Testing these myths, this essay examines immigration law's treatment of children in three contexts: (1) as lawfully immigrating dependents of adults; (2) as immigrants on their own or outside the structures of immigration law; and (3) as individuals empowered to generate immigration rights in others. In each of these contexts, analysis reveals that the failure of immigration law to advance, or in most instances even consider, the interests of children places it far from mainstream values and legal conceptions regarding children. In particular, immigration law fails to fully recognize children as individuals with independent rights and interests, attaches punishing and lasting legal consequences to children for choices of adults in their lives or for choices that children make prior to reaching the age of discretion, and effectively and pervasively precludes children from generating immigration rights in their parents or others.

At the least, this deeper understanding of the nature of immigration law's marginalization of children serves as a counterweight to calls for reform based on false characterizations of current law. Ironically, myths about the treatment of children in immigration law serve as an effective template for simple, yet fundamental reforms that would bring U.S. immigration law closer to mainstream values and approaches regarding children. The essay suggests three simple, yet fundamental reforms that would not only bring the law closer to mainstream values, but also closer to the place where many seem to think it is already. Any reform agenda that fails to address the role of children in immigration law will not prevent accepted societal and demographic pressures from replicating the current situation in

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which millions find themselves unable to reconcile their family relationships and responsibilities with the dictates of immigration law. Children matter, and it is time they mattered in U.S. immigration law.

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INTRODUCTION

Listening to the national discussion on immigration, it would be easy to conclude that children hold a privileged position in U.S. immigration and nationality laws. Children, we are warned, enable their parents to avoid deportation and obtain lawful immigration status in the country. Indeed, it is common to hear "frustration that pregnant women could cross the border from Mexico illegally, then rely on their American citizen newborns to put them immediately on a path to citizenship."[1] And, as some voices unease about children "anchoring" their parents to the United States, other voices express contrary concerns about parents who are not grounded in the United States and "drop and leave," raising their U.S. citizen children outside the United States where they may develop allegiances counter to U.S. interests.[2] Certainly such arguments regarding the citizenship and immigra-

1. Julia Preston, *Citizenship From Birth is Challenged on the Right*, N.Y. TIMES, Aug. 6, 2010, http://www.nytimes.com/2010/08/07/us/politics/07fourteenth.html?_r=1&ref=fourteenth_amendment. "You know the anchor baby. You know what that is. It's when a child is born here, becomes a citizen and they help the illegal parents become citizens, right? . . . Oh, that baby is a child. It's an anchor. It's an anchor to stay here." *Truth-O-Meter*, POLITIFACT (June 19, 2009), http://www.politifact.com/truth-o-meter/statements/2009/jun/19/glenn-beck/glenn-beck-claims-us-only-country-automatic-citize/ (quoting Glenn Beck, Fox News, June 10, 2009).

2. *See, e.g.*, Andy Barr, *Grahman Eyes "Birthright Citizenship,"* POLITICO (July 29, 2010), http://www.politico.com/news/stories/0710/40395.html. At its extreme, the concern is that terrorists would use "young women, who became pregnant, would get them into the United States to have a baby . . . And then they would turn back where they could be raised and coddled as future terrorists. And then one day, 20, 30 years down the road, they can be

tion rights of children have long been part of a loud political discourse and predictably serve as an effective wedge issue in the shifting winds of electoral politics.[3] Yet even setting aside the most extreme distortions, the discussion of children and immigration is characterized by persistent myths about the treatment of children and their parents in U.S. law. Whatever position is taken on policy issues, it is common to characterize the rights and role of children in matters of nationality and immigration as expansive. As the mainstream calls for examination of children's citizenship and immigration rights, the actual treatment of children in U.S. immigration law warrants deeper exploration.

This analysis reveals that the actual treatment of children under U.S. immigration law strays far from mainstream conceptions regarding children. Indeed, perhaps one reason for the persistence of myths related to children and immigration is that reality is so dissonant with accepted notions and values about the treatment of children in law. In many contexts, immigration law is notable for its exceptionalism.[4] Yet revealing the extent to which U.S. immigration law diverges from the mainstream in its approach to children provides striking evidence of the extreme level at which immigration law fails to synchronize with broadly held views of law and society. At least a deeper understanding of the nature of immigration law's marginalization of children serves as a counterweight to calls for reform based on false characterizations of current law. More importantly, the examination of the treatment of children in immigration law serves not only as a critique of current law, but also as a template for simple, yet fundamental reforms that would bring U.S. immigration law closer to mainstream values and approaches regarding children.[5]

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sent in to help destroy our way of life." Jen Phillips, *Sexism in the Immigration, Birthright Debates*, MOTHER JONES (Aug. 4, 2010), http://motherjones.com/mojo/2010/08/birthright-citizenship-sexism-drop-babies (quoting Rep. Gohmert) (alteration in original).

3. *See* Emi Kolawole, *A Blast From Harry Reid's Past on Birthright Citizenship*, WASH. POST, Aug. 13, 2010, http://voices.washingtonpost.com/44/2010/08/reids-immigration-problem.html (noting that in contrast to his current position on the issue, "Reid sponsored a bill in 1993 that would have denied citizenship to children born in the United States if their mothers were not citizens at the time of delivery").

4. *See* Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("This Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of the Congress more complete than it is over' the admission of aliens." (quoting Oceanic Navigation Co. v. Stranhan, 214 U.S. 320, 339 (1909))); Matthews v. Diaz, 426 U.S. 67, 79-80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (upholding racially based deportation law directed at Chinese laborers).

5. Though beyond the scope of this essay, it is worth noting that this exercise has relevance internationally as well as domestically. *See* Ann Laquer Estin, *Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the*

I. CHILDREN IN IMMIGRATION LAW

The parameters of immigration law are easily seen to encompass decisions about who may enter and remain in the United States. In thinking about these decisions, the focus generally and understandably turns to the immigrants themselves. This analysis will do the same, starting with an examination of children lawfully immigrating as dependents of adults, then turning to children immigrating on their own or outside the structures of immigration law. In both situations, examination reveals that U.S. immigration law fails to fully recognize children as individuals with independent rights and interests.

Less obvious is that immigration law encompasses the empowerment of individuals to generate immigration rights in others. Much of U.S. immigration law details which individuals and entities are empowered to generate immigration rights in others through their relationships and actions. It is in this regard that children are most openly marginalized and devalued by U.S. immigration law.

A. Children as Dependents and Derivatives

Descriptions of U.S immigration law often note its purported goal of keeping families intact, and in a limited respect, such statements are entirely accurate.[6] Immigration law includes an elaborate system of family-sponsored immigration and provisions for derivative immigration of the family members of certain immigrants who qualify under family-sponsored, employment-based, or diversity visa lottery provisions.[7] The application of these provisions in these three primary avenues to achieve lawful immigration status in the United States results in the issuance of immigration visas to many children, leaving a general impression that immigration law is favorably oriented towards children.[8]

United States, 62 FLA. L. REV. 47, 48 (2009) ("As the scale and frequency of global movement has increased, family and children's issues have also taken on a new relevance in foreign relations.").

6. *See, e.g.*, Carol Sanger, *Immigration Reform and Control of the Undocumented Family*, 2 GEO. IMMIGR. L.J. 295, 296-97 (1988).

7. *See generally* Immigration and Nationality Act § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2006) (excluding "immediate relatives" of U.S citizens from direct numerical limitations on immigrant visas); *id.* § 1151(c) (setting levels of family-sponsored immigrants); *id.* § 1153(a) (creating preference categories for family-sponsored immigrants); *id.* § 1153(d) (permitting some family members to accompany or follow to join family members with immigrant visas).

8. "The legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united." H.R. REP. NO. 1199, at 7 (1957), *reprinted in* 1957 U.S.C.C.A.N. 2016, 2020.

For example, in fiscal year 2009 children as beneficiaries of petitions by parents or as derivatives of parents granted immigration visas constituted about 26.6% of all family-sponsored immigration.[9] Similarly, 24.7% of employment-based visas and 26.2% of diversity visas were issued to children as derivatives.[10] Children are a significant portion of the flow of immigrants into the United States pursuant to immigration laws, and their numerical prominence could easily be interpreted as an indication that children's interests are an important focus in immigration law. Delving deeper than the numbers, however, reveals that immigration law is structured to advance the interests of adults, not children.

As an initial matter, not all children are "children" for immigration purposes. Under immigration law, a child is recognized as a "child" only if she meets the criteria of a "particularly exhaustive" statutory definition.[11] With clear intent not to include all children, a "child" is defined as one who meets other qualifying conditions, such as being born in wedlock or having a father who has taken specified steps to "legitimate[]" his child.[12] By basing the qualifications of who becomes a "child" firmly on the actions and decisions of parents, this definition empowers parents as "rights holders who may take action to recognize a 'child' for immigration purposes. Children, in contrast, are by definition passive objects subject to parental control."[13]

Moreover, relationships outside the formal confines of the statutory definition of child, even those that approximate or functionally match the statutory categories, do not create a parent-child relationship for immigration purposes.[14] Even when a woman's "relationship with her nieces closely resembles a parent-child relationship, [the courts] are constrained to hold that Congress, through the plain language of the statute, precluded this

9. Of the 747,413 immigrants admitted under immediate relative and family preference categories, 198,751 were children. DEP'T OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2009, *available at* http://www.dhs.gov/files/statistics/publications/LPR09.shtm (follow "Table 7" hyperlink).

10. Of 144,034 employment-visas, 35,570 were issued to derivative children. Child derivatives were 11,479 of 47,879 admissions under the diversity lottery. *Id.*

11. INS v. Hector, 479 U.S. 85 (1986) (per curiam); *see also* Immigration and Nationality Act § 101(b)(1), 8 U.S.C. § 1101(b)(1) (2006).

12. *See* 8 U.S.C. § 1101(b)(1).

13. David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 992 (2002).

14. *See* Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 AM. J. COMP. L. 511, 529 (1995) (noting that the Immigration and Nationality Act "enumerates recognized family relationships, and the courts have consistently rejected attempts to use surrogate family relationships to meet statutory requirements").

functional approach to defining the word 'child.'"[15] Although courts have noted that with regard to "the technical definition of 'child' contained within this statute . . . it could be argued that the line should have been drawn at a different point . . . these are policy questions entrusted exclusively to the political branches of our Government."[16] This formalistic approach fails to account for choices outside the child's control about who can and will provide care for her, and contrasts with the treatment of children in other areas of law. "To be sure, the [Immigration and Nationality Act's] definition of 'child' may be far out of step with the times, and may have particularly deleterious effects on aliens whose culture's definition of 'family' is legitimately broader than the traditional definition of those related by blood or adoption."[17]

Even when adults have acted in such a way that children may be recognized as children under immigration law, the result is not that children are empowered under immigration law, but rather that immigration law allows parents to decide if their children may accompany them in the exercise of the parents' rights.[18] An "unfortunately common problem with the family-based immigration regime . . . [is that] [d]erivative beneficiaries are just that—derivative—meaning that they have few rights of their own and instead depend on the competence and cooperation of the principal immigrant."[19] Not all parents are cooperative, and others are not able to competently avoid actions or decisions that preclude their attainment of lawful immigration status. By limiting access to the major avenues for acquiring permanent resident status for children to their status as dependents, immigration law subordinates children to their parents' rights and abilities. Family-sponsored immigration provides no benefits to children because

15. *Hector*, 479 U.S. at 90-91 (reversing a decision that nieces aged ten and eleven in the care of their aunt for three years were the "functional equivalent" of children under the Immigration and Nationality Act); *see also* Moreno-Morante v. Gonzales, 490 F.3d 1172, 1173 (9th Cir. 2007) (rejecting the argument that grandchildren were "de facto" children); Dorado v. Gonzalez, 202 F. App'x 898, 899 (6th Cir. 2006) (holding that the unadopted son of the applicant's long time girlfriend was not a "child" under the Act).

16. *Hector*, 479 U.S. at 89 (quoting Fiallo v. Bell, 430 U.S. 787, 798 (1977)).

17. *Dorado*, 202 F. App'x at 902. For an insightful discussion of the implications of this formalistic approach, see Marcia Zug, *Deporting Grandma: Why Grandparent Deportation May Be the Next Big Immigration Crisis and How to Solve it*, 43 U.C. DAVIS L. REV. 193 (2009).

18. *See* 8 U.S.C. § 1151(b)(2)(A)(i) (2006) (allowing petitions for children by U.S. citizen parents); *id.* § 1153(a)(2) (allowing petitions for children by permanent residence parents).

19. Fornalik v. Perryman, 223 F.3d 523, 527-28 (7th Cir. 2000) (describing abusive father's failure to include his seventeen-year-old son in an immigration petition for other family members which led to the determination to deport him alone back to Poland while leaving his mother and siblings in the United States).

they are children. The "right" parent who advances successfully through the maze of immigration law is rewarded, and the child may benefit. But other than as a dependent of the "right" parent, the major paths to acquiring lawful immigration provide no special recognition or rights to children as individuals.[20]

By focusing on the adults in children's lives rather than children themselves, U.S. immigration law fails to recognize children as individuals. By arbitrarily limiting the pool of adults in children's lives who matter for purposes of immigration law, the law further devalues the perspective of the child, who might be cared for by persons other than those qualifying as parents under immigration law. This rejection of the perspectives and realities of children reinforces the conception of children as dependents, not as individuals. This has negative consequences for the child lacking the "right" parent, and the pervasive influence of this limiting conception of children further impedes children who immigrate on their own or outside legal pathways.

B. Children as Immigrants

Children arriving as dependents of lawfully immigrating parents are not the only child immigrants to the United States. Unaccompanied children arrive in the United States by the thousands each year.[21] Many more children arrive with their parents or other adults, yet outside the frameworks of lawful immigration.[22] In 2008, approximately 1.5 million unauthorized children lived in the United States with their parents,[23] and there has been "little change in number of unauthorized children since 2003"[24] because

20. "To the extent that the framework for family-sponsored and derivative immigration tends to achieve family integrity, it does so by ceding control over a child's status to parents and by denying opportunities for children to achieve legal status as children without their parents." David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1182 (2006).

21. Approximately 80,000 unaccompanied children are apprehended annually. *See* CHAD C. HADDAL, CONG. RESEARCH SERV., RL 33896, UNACCOMPANIED ALIEN CHILDREN: POLICIES AND ISSUES 1 (2009). Many are turned back, while others are detained. *See id.* at 18 (noting that in fiscal year 2007, the Department of Homeland Security detained 8227 unaccompanied children).

22. In fact, children in immigrant families are significantly more likely to live with two parents than are children in native families. DONALD J. HERNANDEZ, GENERATIONAL PATTERNS IN THE U.S.: AMERICAN COMMUNITY SURVEY AND OTHER SOURCES 15 (2009), *available at* http://www.brown.edu/Departments/Education/paradox/documents/Hernandez.pdf.

23. JEFFREY S. PASSEL & D'VERA COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 6-7 (Pew Hisp. Ctr. 2009), *available at* http://pewhispanic.org/files/reports/107.pdf.

24. *Id.* at 4. The population of undocumented children was estimated at 1.8 million in 2005. JEFFREY S. PASSEL, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT

even as children become adults and cease to be counted as children, new arrivals augment the population of children with lawful immigration status. As a result of these flows of child immigrants outside the frameworks of immigration law, about thirteen percent of unauthorized immigrants living in the United States are children.[25]

As described in the section above, the most prominent pathway of family-sponsored immigration provides no benefit to children based on being children. In seeking other forms of immigration relief, children are not expressly precluded but are held to the same substantive criteria as adults. For example, while children are theoretically eligible for employment-based immigration they are unlikely to meet the immigration law requirements related to education and experience, let alone restrictions on the employment of child labor.[26]

Like adults, children can independently seek humanitarian forms of immigration relief, such as asylum and protection from removal under the Convention Against Torture,[27] but the "normative and legal substantive framework for unaccompanied children in removal proceedings is based upon an adult framework and does not incorporate a child-oriented framework."[28] Moreover, the dominant conception in immigration law of children as dependents can inhibit the recognition of individual rights and perspectives of children, especially when children are not alone.[29] In fact, the one form of immigration relief solely available to children, special immigrant juvenile status, is available only to children declared dependent by a

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POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 7 (Pew Hisp. Ctr. 2006), *available at* http://pewhispanic.org/files/reports/61.pdf.

25. PASSEL, *supra* note 24, at 5.

26. *See* Immigration and Nationality Act § 201(b), 8 U.S.C. § 1151(b) (2006).

27. *See, e.g.*, Gonzalez v. Reno, 212 F.3d 1338, 1347 n.8 (11th Cir. 2000) (affirming that any person, regardless of age, may apply for asylum); Christopher Nugent, *Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT. L.J. 219 (2006).

28. M. Aryah Somers et al., *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL'Y 311, 372 (2010).

29. *See* Don v. Gonzalez, 476 F.3d 738, 739 n.1 (9th Cir. 2007) ("Don is the principal or lead petitioner; his wife's and child's petitions are derivative of his petition. Therefore, their asylum claims succeed or fail with Don's claims."). I have argued elsewhere regarding the negative impact that the dominant paradigm of immigration law has on the plight of unaccompanied minors. *See* Thronson, *supra* note 13, at 992-94; *see also* Bridgette A. Carr, *Incorporating a "Best Interests of the Child" Approach Into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 122-23 (2009) ("In contrast with unaccompanied or separated children, accompanied children face a bigger risk of being invisible in the United States immigration system and face the additional risk of having conflicting interests with their parents.").

juvenile court, and emphasizes not children's agency, but their dependency.[30]

Recent legislative reforms, drawing heavily from numerous and exhaustive scholarly critiques of precedent and prior legal practice,[31] have improved procedures for unaccompanied minors in removal proceedings and detention policies for children.[32] Despite these reforms, for unaccompanied minors "the removal system has structurally remained largely intact and . . . [w]ith the advent of new actors and roles in the system, the dependency and developmental constructions of childhood have found greater expression in the structure of the removal system."[33]

Just as the substantive eligibility criteria for immigration relief apply to children as they do adults, grounds of inadmissibility that can baffle even qualified immigrants apply to children just as they do adults.[34] Furthermore, there are penalties and barriers that immigration laws impose on persons who enter the United States without inspection and fail to maintain lawful status, which apply to children as well as adults.[35]

This is true regardless of whether the child exercised independent judgment and volition in deciding to enter the United States, or whether the child was carried across the border as a baby. For example, a child who was carried into the United States without inspection as an infant is forever barred from an important immigration law procedure known as adjustment of status, which forecloses that individual from establishing eligibility for

30. *See* 8 U.S.C. § 1101(a)(27)(J) (2006); Thronson, *supra* note 29.

31. *See, e.g.*, Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INT'L J. REFUGEE L. 84, 93 (1999); Angela Lloyd, *Regulating Consent: Protecting Undocumented Immigrant Children From Their (Evil) Step-Uncle Sam, or How to Ameliorate the Impact of the 1997 Amendments to the SIJ Law*, 15 B.U. PUB. INT. L.J. 237 (2006); Nugent, *supra* note 27; Katherine Porter, Comment, *In the Best Interests of the INS: An Analysis of the 1997 Amendment to the Special Immigrant Juvenile Law*, 27 J. LEGIS. 441 (2001).

32. *See, e.g.*, Homeland Security Act of 2002, Pub. L. No. 107-296, § 462(g)(2)(A)-(C), 116 Stat. 2153 (transferring custody, care, and placement of "unaccompanied alien children" from the disbanded Immigration and Naturalization Service to the Office of Refugee Resettlement); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008). For a thorough discussion of procedural and detention policy evolution, see Somers et al., *supra* note 28.

33. Somers et al., *supra* note 28, at 372 (alteration in original).

34. No distinction is made between children and adults in grounds of inadmissibility that apply generally to all immigrants. *See, e.g.*, 8 U.S.C. § 1182(a)(6)(A) (2006) (establishing inadmissibility ground for all persons present without permission or parole regardless of age); *id.* § 1182(a)(7)(A) (establishing documents-related inadmissibility grounds regardless of age).

35. *See* 8 U.S.C. § 1255(a) (limiting adjustment of status to persons "inspected and admitted or paroled into the United States"); *id.* § 1255(c)(7) (barring adjustment of status of persons "not in a lawful immigration status").

lawful immigration through other avenues, such as marriage or employment.[36] Here, as noted in the above section, the child is not held accountable for individual actions, but is saddled with consequences of decisions often made or influenced by parents and other adults.[37] Rather than special treatment based on childhood, children are punished for the choices of adults in their lives or for choices made prior to reaching the age of discretion.

C. Children as Generators of Immigration Rights in Others

With the passage of state and local laws impacting immigrants, the tension between state and federal power to regulate immigration is on constant display. But, on a practical level, most choices about who acquires lawful immigration status are neither federal nor state, but rather profoundly personal. It is obvious that immigration law addresses the rights of persons seeking to immigrate or remain in the United States, but it is less remarked upon that immigration law deals directly with determining when U.S. citizens, legal permanent residents, and businesses may create immigration rights in others. A few forms of immigration relief, such as asylum, are available to qualifying applicants upon their own request based on their personal experiences.[38] In contrast, U.S. immigration law is structured mainly to sift through requests from U.S. citizens, permanent residents, and businesses who seek the right to be joined to individual relatives or prospective employees they have selected for an immigration benefit, not to consider requests from intending immigrants themselves.

Indeed, this decentralization of immigration decisions is a key characteristic of U.S. immigration law and it empowers individuals, not governments, to determine who will be eligible to immigrate to the United States.[39] Subsequent to eligibility, immigration law creates limitations based on screening for inadmissibility criteria, such as the exclusions of individuals with criminal histories.[40] Nevertheless, underlying eligibility for immigration as a family member or employee is a matter of individuals' choices and discretion, not federal, state, or local governments. Ultimately, the intending immigrant's right to immigrate turns less on their own talents

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36. *See* 8 U.S.C. § 1255(c)(7).

37. Jacqueline Bhabha, *"Not a Sack of Potatoes": Moving and Removing Children Across Borders*, 15 B.U. PUB. INT. L.J. 197, 198-99 (2006).

38. *See* 8 U.S.C. § 1101(a)(42)(A).

39. This system contrasts with those of other countries utilizing "point systems," where intending immigrants qualify based on the accumulation of points for various personal achievements and characteristics.

40. *See* 8 U.S.C. § 1182 (general grounds for inadmissibility); *id.* § 1182(a)(2) (inadmissibility related to criminal activity).

and experiences than in the law's empowerment of U.S. citizens, permanent residents, and businesses to choose potential immigrants. In this regard, the ability to generate immigration rights in others diverges sharply between children and adults.

Even when a qualifying family relationship is satisfactorily established under U.S. immigration law, children are not afforded the same rights as adults to exercise agency and extend the possibility of immigration status to other family members. Under the immigration law's family-sponsored immigration provisions, legal permanent residents and U.S. citizens may petition for immigrant visas for select relatives.[41] The "petitioner" is always the person having legal immigration status and the "beneficiary" is the person the petitioner wishes to immigrate.[42] Through this framework, petitioners with lawful immigration status control the flow of immigration status from themselves to others of their choosing. Immigration law places the decision whether to petition for a qualifying relative exclusively with the petitioner.

Immigration law prioritizes petitions of U.S. citizens above those of legal permanent residents, and prioritizes some family relationships above others.[43] Among the most favored petitions are those by U.S. citizens for their unmarried minor children, and such petitions are not subject to numerical limits.[44] Petitions also may be based on the relationship between a legal permanent resident parent and a child, though these types of petitions face annual numerical limitations which result in backlogs.[45]

Under this framework, the parent-child relationship is favored, but only if the parent holds legal immigration status. As discussed in Part I.A, parents who have or are successful in acquiring status as U.S. citizens or legal permanent residents may extend that status to their dependent children. In stark contrast, the framework of family-sponsored immigration does not permit children to petition for their parents. Even though the parent-child relationship is among those most favored by immigration law, it works in

41. *See* Immigration and Nationality Act § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2006); Immigration and Nationality Act § 203(a), 8 U.S.C. § 1153(a) (2006).

42. 8 U.S.C. § 1154.

43. *See generally* Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law's Conflicted Answer*, 32 HOFSTRA L. REV. 273 (2003); Linda Kelly, *Family Planning, American Style*, 52 ALA. L. REV. 943, 955-60 (2001); Motomura, *supra* note 14, at 528; Victor C. Romero, *Asians, Gay Marriage, and Immigration: Family Unification at a Crossroads*, 15 IND. INT'L & COMP. L. REV. 337 (2005).

44. *See* Immigration and Nationality Act § 201(b), 8 U.S.C. § 1151(b) (2006). Bureaucratic processing delays mean that the immediate availability of immigration visas should never be confused with the ability to immigrate immediately.

45. The Department of State published a monthly Visa Bulletin which tracks the backlogs and processing of immigrant visa petitions. *See Visa Bulletin*, U.S. DEP'T OF STATE, http://travel.state.gov/visa/bulletin/bulletin_1360.html (last visited Nov. 3, 2010).

only one direction, with parents petitioning for children, but not vice versa. In fact, U.S. citizens may petition for their parents only when the petitioner is considered an adult at age twenty-one.[46]

The ability of a parent to generate immigration status for a child in the absence of the ability of children to do so for their parents reveals an asymmetry that is pervasive in immigration law.[47] Child asylees and refugees may not extend derivative status to their parents, yet adult asylees and refugees may generate derivative status for their spouses and children.[48] Similarly, a child granted protection from removal pursuant to the Convention Against Torture may not extend eligibility to a parent.[49] A child who obtains legal immigration status through a family petition from one parent or a stepparent may not include the other parent as a derivative.[50] In fact, children who are parents themselves may not even extend immigration status acquired through a petition from a parent to their own children because derivative status extends to only one generation.[51]

This asymmetry extends beyond the family-sponsored immigration framework into other areas where family relationships are granted significance by immigration law. In instances where a person is eligible for an immigration visa, grounds for inadmissibility still may preclude a beneficiary from being able to immigrate to the United States.[52] Since 1996, for example, U.S. immigration law has included provisions barring for three years the reentry of people who leave the United States after remaining here unlawfully for more than 180 days.[53] A person who remains in the United States unlawfully for a year or more, then leaves, is barred from reentry for ten years.[54] The result is that a person who has been in the country unlawfully for more than a year cannot initiate the consular process without facing a ten year wait outside the country despite otherwise quali-

46. Immigration and Nationality Act § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2006).

47. *See* Jacqueline Bhabha, *The "Mere Fortuity" of Birth? Are Children Citizens?*, *in* 15 DIFFERENCES: J. FEMINIST CULTURAL STUD. 91, 95 (2004) (discussing the "striking asymmetry in the family reunification rights of similarly placed adults and minor children").

48. *See* Immigration and Nationality Act §§ 207(c)(2), 208(b)(2), 8 U.S.C. §§ 1157(c)(2), 1158(b)(3) (2006).

49. *See generally* Lori A. Nessel, *Forced to Choose: Torture, Family Reunification and United States Immigration Policy*, 78 TEMP. L. REV. 897 (2005). *See also* 8 C.F.R. § 208.16(c) (2010) (setting forth procedures and criteria for applications for relief pursuant to the Convention Against Torture).

50. Immigration and Nationality Act § 203(a), 8 U.S.C. § 1153(d) (2006).

51. *Id.*

52. *Id.* § 1182.

53. *Id.* § 1182(a)(9)(B)(i)(I).

54. *Id.* § 1182(a)(9)(B)(i)(II).

fying for an immigration visa. These provisions particularly impact persons who entered the country without inspection, who are thus barred from processing their immigration petition in the United States through a process known as adjustment of status.[55]

Recognizing the hardship that a bar to admission for three or ten years can impose, immigration law does provide for a waiver of these grounds of inadmissibility by establishing that inadmissibility would result in hardship to family members.[56] Under the terms of the waiver provision, however, only hardship faced by adult family members, i.e., spouses and parents, is considered.[57] Hardship that will result to children is statutorily irrelevant and children's interests are excluded from the waiver process.[58]

The absence of meaningful consideration of children and their interests also is present when persons face removal from the United States. Persons in removal proceedings may apply for cancellation of the removal if they meet a number of criteria, including having been physically present in the United States for ten years and being of good moral character.[59] They also must establish that removal would cause "exceptional and extremely unusual hardship" to a legal permanent resident or U.S. citizen spouse, parent, or child.[60] While hardship to children is factored in to this form of immigration relief, the standard is high and difficult to satisfy. To qualify, parents must demonstrate hardship to children "substantially different from, or beyond that which would normally be expected from the deportation of an alien with close family members here."[61]

In other words, the expected or normal hardship that the deportation of a parent entails is deemed an acceptable result of the enforcement of immigration laws and insufficient to warrant relief. Under this reasoning, sepa-

55. Immigration and Nationality Act § 245(a)-(c), 8 U.S.C. § 1255(a)-(c) (2006). Unsurprisingly, the impact of this provision is most felt by immigrants from countries relatively close to the United States from which it is difficult to obtain visas permitting lawful entry. For example, 84% of unauthorized migrants from Mexico and 73% of unauthorized migrants from Central America entered without inspection. PEW HISP. CTR., MODES OF ENTRY FOR THE UNAUTHORIZED MIGRANT POPULATION 4 (2006), *available at* http://pewhispanic.org/files/factsheets/19.pdf. In contrast, 91% of all other unauthorized migrants are visa overstays who escape penalties imposed for entering without inspection.

56. Immigration and Nationality Act § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v) (2006).

57. *Id.*

58. *Id.*

59. Immigration and Nationality Act § 240A, 8 U.S.C.A. § 1229b (2008). Variations of cancellation of removal also apply to persons already granted legal permanent resident status, *id.* § 1229b(a)(1), and children and spouses who have been battered or subjected to extreme cruelty by U.S. citizens or legal permanent residents, *id.* § 1229b(b)(2).

60. *Id.* § 1229b.

61. *In re* Monreal-Aguinaga, 23 I. & N. Dec. 56, 65 (BIA 2001).

ration between parents and children left behind in the United States is unlikely to rise to "exceptional and extremely unusual hardship" because this harm is not unusual and "[d]eportation rarely occurs without personal distress and emotional hurt."[62] Family separation is "simply one of the common results of deportation or exclusion [that] are insufficient to prove extreme hardship."[63]

Arguments that hardship will result from children accompanying deported parents abroad are equally difficult. Diminished access to education, health care, and economic opportunities for U.S. citizen children are common results of deportation and thus do not meet the "exceptional and extremely unusual hardship" standard.[64] One circuit court of appeals described the standard to qualify for relief as so high that it requires hardship that is "uniquely extreme, at or closely approaching the outer limits of the most severe hardship the alien could suffer and so severe that any reasonable person would necessarily conclude that the hardship is extreme."[65] Indeed, this "onerous standard is so difficult to satisfy that there is only one published [Board of Immigration Appeals] decision that grants cancellation of removal after finding that the requisite 'exceptional and extremely unusual hardship' existed."[66]

In two limited contexts, through the provision of non-immigrant T and U visas to victims of severe forms of trafficking in persons, and persons suffering substantial physical or mental abuse as victims of certain other crimes,[67] immigration law for the first time provides a means through which a child's immigration status can flow from child to parent and from child to siblings.[68] These visas are significant for those who qualify, but

62. Sullivan v. INS, 772 F.2d 609, 611 (9th Cir. 1985).

63. Jimenez v. INS, 116 F.3d 1485 (9th Cir. 1997) (internal quotation marks omitted).

64. *Id.*; *In re* Piggot, 15 I. & N. Dec. 129, 131 (BIA 1974) ("Congress has never accepted the theory that minor American-born children of deportable aliens must, or even should, remain in the United States, and that living with their deportable parents in their home country would result in 'extreme hardship' to them.").

65. Hernandez-Cordero v. INS, 819 F.2d 558, 563 (5th Cir. 1987).

66. Cabrera-Alvarez v. Gonzalez, 423 F.3d 1006, 1014 (9th Cir. 2005) (Pregerson, J., dissenting). The Board of Immigration Appeals is generally the final authority because agency decisions regarding the existence of hardship are largely insulated from court review. *See* 8 U.S.C. § 1252(a)(2)(B) (2006); Romero-Torres v. Ashcroft, 327 F.3d 887, 891-92 (9th Cir. 2003).

67. Immigration and Nationality Act § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T)-(U) (2006).

68. Provisions enacted as part of the Violence Against Women Act provide for a parent to obtain status in some situations based on the abuse of a child by the other parent, but in such instances the ultimate source of immigration status is the abusive parent. *See* 8 U.S.C. § 1154(a)(1)(B)(ii)(bb). Though beyond the scope of this essay, it is worth noting that many aspects of these visas present problems, such as the conflicting humanitarian and law en-

they are available only in extreme situations, with eligibility triggered only by intense suffering as a result of serious criminal activity.

In contrast to the narrative of children as anchoring parents in the United States, the major avenues to lawful immigration status effectively and pervasively preclude children from generating immigration rights for their parents. Concern that parents find easy and unwarranted pathways to U.S. citizenship through their children is overstated. Furthermore, children as immigrants themselves similarly face uphill battles. Yet myths that children generate immigration rights for parents under U.S. immigration law stubbornly persist. What might U.S. immigration law look like if it actually treated children in the way that the commonly advanced myths presume it does?

II. ENTERING THE MAINSTREAM

Perhaps one reason for the staying power of myths about children and immigration is that the myths actually are much more in line with the general treatment of children in law and society than are the realities of U.S. immigration law. Indeed, the very ubiquity and persistence of the myths prompt an examination of what immigration law might look like if it were more consistent with these mainstream perceptions regarding children. The discussion below does not attempt to comprehensively reform immigration law, but rather imagines three simple reforms to U.S. immigration law that would bring the law more in line with mainstream values regarding the treatment of children in the law. Each of these also would bring the law more in line with prevailing myths about the treatment of children in immigration law. Indeed, there is irony in these suggestions in that the suggested reforms would leave the law not only closer to mainstream values, but also closer to the place where many seem to think it is already.

A. Expanding Notions of Family

In sharp contrast to the rigidity of immigration law, mainstream approaches to families and children largely leave families to make their own critical decisions about who is considered family.[69] Moreover, mainstream treatment of families is more likely to acknowledge the importance of nontraditional arrangements for caretaking and support of children. Immigra-

forcement objectives at play, the strange federalism concerns inherent in the role for local and state law enforcement in a federal immigration scheme, and the expansion of visa eligibility criteria centered on essential conceptions of persons as "victims."

69. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 506 (1977) ("[T]he Constitution prevents [the government] from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns.").

tion law's exclusive use of a narrow construct of family effectively "negates other prevalent family configurations which make up functional families, such as single-parent households, grandparent-grandchild households, same-sex couples, polygamous marriages, and extended family configurations."[70] This approach ignores the fact that millions of children in the United States "grow up in families in which care is not provided exclusively by two heterosexual opposite-sex parents. Instead, caregivers increasingly include gay and lesbian families, single parent or 'cohabiting' parent families, families with grandparents (either as primary caregivers or in addition to primary caregivers), and various other formations."[71]

The failure to recognize non-traditional families in immigration law creates disparate impacts across racial and ethnic lines. For example, failure to recognize grandparents who care for their grandchildren for immigration purposes has a focused impact on Latino populations because "Hispanic grandparents are the largest population of noncitizen caregiver grandparents."[72] Thus by clinging to a narrow and outdated construction of family, immigration law advances "a false construct of human society, cultural constructions, and racial and ethnic prejudices."[73]

In the mainstream, without consideration of immigration law, families routinely are built around children and their interests. Decisions about who lives with whom often take into account who cares for or provides for whom. Indeed, such interdependency and support are hallmarks of the notion of family. Allowing immigration law to take into consideration important relationships in children's lives would involve a conceptual shift in immigration law, but not a major restructuring of the general framework and institutions that immigration law employs. Simple changes to the statutory definition of "child" could ensure that every child could be recognized as such for immigration law purposes.

In some instances the existing statutory definition of "child" already requires adjudication of the bona fides of a parent-child relationship. It would take little to adapt such scrutiny and analysis to evaluate the bona fides of other relationships between children and the people who support and care for them. Such a move away from the narrow nuclear family would acknowledge and value the reality of children's lives, and in some

70. Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family That Protects Children's Fundamental Human Rights*, 41 COLUM. HUM. RTS. L. REV. 509, 515 (2010).

71. Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care Based Standard*, 16 YALE J. L. & FEMINISM 83, 91 (2004).

72. Zug, *supra* note 17, at 242.

73. King, *supra* note 70.

instances, provide children and families with otherwise unavailable family-sponsored immigration opportunities.

B. Removing Punishment for the Acts of Parents

The notion of penalizing children for the sins of their parents has long been rejected as a mainstream approach to the treatment of children in law and broader society. For example, it is generally accepted that the idea of penalizing children for the circumstances of their birth out of wedlock is "illogical and unjust."[74] Imposing disabilities on children for such circumstances outside their control "is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent."[75] Mainstream notions that recognize children as autonomous individuals mandate rejection of the imposition of legal disabilities upon children for actions taken by the adults in their lives.[76]

Moreover, it is widely accepted that compared to adults, "juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'"[77] Because "juveniles have lessened culpability they are less deserving of the most severe punishments."[78] Mainstream approaches to children, therefore, do not expect adult levels of maturity from children and do not assign legal consequences to juveniles as they do adults.

As noted above, however, U.S. immigration law imposes upon children the same severe penalties and barriers that apply to adults who enter the United States without inspection or remain without authorization. Even where a child was too young to be capable of exercising independent judgment and volition in entering the United States, such as infants carried across the border, the legal consequences of unauthorized entry are imposed. This effectively negates the possibility that children's responsibility

74. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

75. *Id.*

76. *See* Richard L. Brown, *Disinheriting the "Legal Orphan": Inheritance Rights of Children After Termination of Parental Rights*, 70 MO. L. REV. 125, 150 (2005) (noting that deterring adult activity by punishing children rather than the adults who engaged in that activity is "grossly unfair").

77. Graham v. Florida, 130 S. Ct. 2011, 2026 (2010) (quoting Roper v. Simmons, 543 U.S. 551, 569-70 (2005)).

78. *Id.* (citing *Roper*, 543 U.S. at 551).

is proportionate to any perceived culpability.[79] In such instances, U.S. immigration law attaches the consequences of adult decisions and actions to children who had no control over the actions for which they are now punished. As a deterrent to adult behavior, this approach has demonstrably failed, evidenced by the large and constantly replenished population of children among the wider population of unauthorized immigrants.[80]

The solution to this anomaly is quite straightforward: U.S. immigration law statutes establishing grounds of inadmissibility or barring adjustment of status based on unauthorized entry and presence without lawful status can be modified to exclude reference to these actions while a minor.[81] Such amendments would not in and of themselves provide lawful immigration status to those who were brought to the United States without consent, but they would remove barriers for those who otherwise qualify for pathways to lawful status via family or employment.

C. Children as Generators of Immigration Rights

Changing immigration law to recognize children as potential generators of immigration rights for their parents would constitute a major shift in immigration law. Of course, the political viability of any proposal to recognize children as generators of immigration rights is suspect, at best. But this political judgment is an indicator of how far out of sync U.S. immigration law has become with other values related to the treatment of children. Outside the realm of immigration law, the primacy of children's interests in legal decisions regarding family is well established.[82] Yet in immigration, the last two decades have seen movement in the other direction. For example, to avoid deportation through cancellation of the removal, "exceptional and extremely unusual hardship" must be shown, which is a higher standard than the prior standard of "extreme hardship" to children.[83] U.S. immigration law has strayed so far from other areas of law in its treatment of children, that we are left expecting from immigration law no more than the mere avoidance of exceptional and extremely unusual hardship to children.

Changes that would permit children and their interests to serve as generators of immigration rights in others would be significant reforms, but would not be difficult or expensive to implement. As with the changes dis-

79. *See* Bhabha, *supra* note 37.

80. *See supra* notes 21-25 and accompanying text.

81. *See supra* notes 34-37 and accompanying text.

82. For example, "[t]he custody law in every state in the United States . . . embraces the 'best interests' standard." D. Marianne Blair & Merle H. Weiner, *Resolving Parental Custody Disputes—A Comparative Exploration*, 39 FAM. L.Q. 247, 247 (2005).

83. *See supra* notes 59-66 and accompanying text.

cussed above, fundamental reforms could be quickly accomplished within the existing structures and mechanisms of immigration law. The provisions and omissions that marginalize children in immigration law are subtle, yet have major implications. Rolling back the limitations and barriers that devalue children in immigration law can be accomplished with little more than reversing these subtle omissions and barriers.

Most simply, changing the standard for cancellation of removal would result in vastly different outcomes under currently existing procedures and frameworks. Reverting to the pre-1996 standard of "extreme hardship"[84] would acknowledge that extreme hardship to children is an important and relevant consideration in immigration law, even if such hardship is commonplace when parents face deportation. Yet shifting the standard only from "exceptional and extremely unusual" back to "extreme hardship" would hardly put immigration law in conformity with mainstream treatment of children. There is much room between "exceptional and extremely unusual hardship" and the "best interests of the child," which is otherwise the accepted standard when considering children.[85] Indeed, a major step toward a more child-centered immigration law would be accomplished by allowing consideration of the hardship to children that is common when families face separation due to deportation, rather than declaring it irrelevant simply because it is not extremely unusual. Any movement to further recognize the important interests of children would inch immigration law closer to the values the country espouses in the treatment of children in other contexts.

More radical change, accomplished with simple changes in eligibility language to ameliorate the omission of children from critical family-sponsored and waiver provisions as discussed above,[86] would allow existing family-sponsored immigration mechanisms to be adapted to permit children to serve as the basis of family petitions. Children would not need to actively serve as petitioners if provisions modeled on the Violence Against Women Act's (VAWA) self-petitioning process were utilized.[87] Pursuant to these provisions, a batterer's role as petitioner is bypassed and victims are able to petition on their own behalf.[88] As with parents of battered children under VAWA, parents under a revised eligibility statute could take the lead in navigating through the application process.[89] Re-

84. 8 U.S.C. § 1254 (1995) (repealed).
85. *See supra* note 82.
86. *See supra* notes 56-58 and accompanying text.
87. *See, e.g.*, 8 U.S.C. § 1154(a)(1)(B)(ii)(bb) (2006).
88. *Id.*
89. *Id.*

quirements related to public charge grounds of inadmissibility might be a problem in some cases, but the provisions already in place to permit the inclusion of the income of household members would suffice in many instances.[90]

Allowing parents to obtain legal immigration status further advances the goals and policies that generally advance and promote child welfare. Parents with lawful immigration status are better able to integrate economically and socially for the benefit and support of the child and the family as a whole.[91] Providing immigration status to the family "enhances an individual's ability to integrate and thrive in the U.S. Immigrant families are vital economic, psychological, and cultural resources that shelter and sustain family members . . . . Stripping away this support would foster social isolation and disconnection among immigrants rather than acculturation."[92] Empowering children to generate immigration rights in their parents permits the legalization of families instead of just individual children. It will also increase the family's integration and reduce the possible need for state intervention or support for the child.

CONCLUSION

Giving life to the most basic notion that children's interests should have relevance to U.S. immigration law should not sound like an overly ambitious goal. Surely, the misalignment of U.S. immigration law with underlying legal and societal values related to children and families has contributed to the growth of the unauthorized population in the United States. And surely this misalignment must be addressed for any immigration reform to succeed. Any reform that looks back in deciding who may qualify without looking at the law going forward will do nothing to address the asymmetry of U.S. immigration law. Reforms that do not address the role of children in immigration law will not prevent the societal and demographic pressures from replicating the current situation in which millions find themselves unable to reconcile their family responsibilities with the dictates of immigration law.

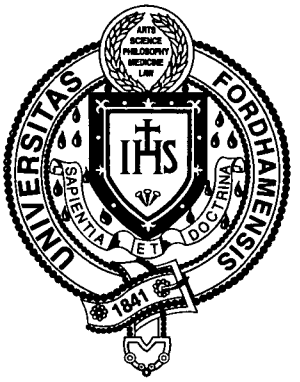
U.S. law and policy in other contexts applaud the role that parents play in supporting and nurturing their children. Children matter to parents. Indeed, we expect that children matter to parents and we value actions by parents that are in their children's interests. Moreover, we generally expect

90. *See* 8 C.F.R. § 213a.2 (2010).

91. *See* Immigr. Pol'y Ctr., *Family Immigration: Repairing our Broken Immigration System*, AM. IMMIGR. COUNCIL (2010), http://www.americanimmigrationcouncil.org/sites/default/files/docs/Family_Solutions_011510.pdf.

92. *Id.*

that children will matter across the spectrum of social and legal institutions. The failure of U.S. immigration law to advance, or in most instances even consider, the interests of children places it far out of the mainstream. Children matter, and it is time they mattered in U.S. immigration law.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