IMMIGRATION STATUS AND THE BEST INTERESTS OF THE CHILD STANDARD

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INTRODUCTION

Federal immigration law and state family law seem about as unrelated as two areas of law could be. One involves national identity and foreign policy; the other involves the most local of institutions – the family. But the two areas actually are interrelated in pervasive and significant ways.[1] One example of this interrelation occurs in cases where state court judges adjudicate custody disputes involving immigrant parents. The vast majority of states use a "best interests of the child" standard to determine what custody arrangements are appropriate in contested cases of all kinds. The "best interests" inquiry frequently requires courts to consider the relationship the child has with each parent and the child's physical and emotional needs.[2] The question judges find themselves asking when a custody case involves an immigrant parent is "can or should the immigration status of a parent be considered in applying the best interests standard?"

Just this past year, the Nevada Supreme Court answered that question with a qualified "yes." In *Rico v. Rodriguez*, the court affirmed a family court decision granting custody of two children to their father, a Mexican immigrant who was a legal resident of the United States, in part

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[1] As I have explored elsewhere, immigration law functions as family law when it regulates the marriages of immigrants and citizens who marry immigrants. *See* Kerry Abrams, *Immigration Law and the Regulation of Marriage*, forthcoming, 91 Minn. L. Rev. (2007).

[2] *See, e.g., Uniform Marriage & Divorce Act,* § 402 (as amended, 1973) (listing five factors as relevant to a best interests determination: (1) the wishes of the child's parents; (2) the wishes of the child; (3) the interaction and interrelationship of the child with parents, siblings, or other persons who may significantly affect the child's best interest; (4) the child's adjustment to home, school, and community; and (5) the mental and physical health of all individuals involved).

because of their mother's undocumented immigrant status.[3] Although the *Rico* court's opinion limited the use of immigration status to cases where it was one of many factors, the opinion serves as an example of how damaging a state court's misperceptions about federal immigration law can be, and shows how these misperceptions can significantly affect the outcome in child custody cases.

This essay does not attempt to critique the final outcome of the *Rico* case. Child custody cases are very difficult, fact-based inquiries, and it is difficult to determine with certainty what the best outcome would have been without having heard testimony first hand, and even then, reasonable people might disagree. What this essay does do is to identify the analytic problems with the *Rico* court's treatment of immigration status, and to use the case as an opportunity to consider how courts and legislatures could improve the way in which they consider immigration status in child custody cases.

In his article in this volume, *You Can't Go Here From Here: Toward a Child-Centered Immigration System*, David Thronson outlines the ways in which our current immigration system short-changes the needs of immigrant children and children of immigrants.[4] In his previous work, Professor Thronson has also analyzed the way in which children of undocumented immigrant parents are treated in family court, the effects of deportation on the parent-child relationship, and how federal immigration law conceives of children's rights.[5] This essay builds on Professor Thronson's entire body of work, asking the question: what role should a parent's immigration status play in a custody dispute?

I conclude that in most cases the immigration status of a parent is likely to be an irrelevant factor in determining the best interests of the child; if anything, it will serve the dangerous function of as acting as a repository for the unconscious biases and punitive impulses of judges against immigrant parents. In some cases, however, such as where there

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[3] 120 P.3d 812 (Nev. 2005).

[4] *Supra* at ___.

[5] *See* David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 Nev. L. J. 1165 (2006); David B. Thronson & Victoria Tobar Thronson, *Immigrants and the Family Courts*, 14 Nev. Law. 30 (January 2006); David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 Texas Hisp. J.L. & Pol'y. 47 (2005); David B. Thronson, *Kids will be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 Ohio St. L.J. 979 (2002).

is evidence that an immigrant parent is about to be deported and intends to take the child with him or her to a jurisdiction where the other parent will not be able to assert legal custody or visitation rights, immigration status would be relevant to a "best interests" inquiry. I propose a solution to the dilemma of when to consider immigration status in the form of a rebuttable presumption that immigration status cannot be used as a factor in the best interests analysis. The presumption could be rebutted in specific classes of cases (like the one outlined above) where immigration status is likely to be highly probative and unlikely to be used for prejudicial reasons. The essay proceeds as follows: Part I gives a brief description of the *Rico v. Rodriguez* case; Part II outlines some of the problems with courts' use of immigration status as a best interests factor, and Part III offers the rebuttable presumption solution.

I. THE CASE OF RICO V. RODRIGUEZ

In many ways, *Rico v. Rodriguez* was a typical custody battle between two unmarried parents: on one side was the mother, Araceli Perez Rico, on the other was the father, Jose Rodriguez, and caught in the middle were their two children, M.P. and J.P. But *Rico* was different than many custody cases because both Ms. Rico and Mr. Rodriguez were immigrants from Mexico.

M.P. and J.P. were born when Ms. Rico and Mr. Rodriguez both still lived in Mexico.[6] When M.P. was three and J.P. was one, Mr. Rodriguez left Ms. Rico and immigrated to the United States. After arriving, he married a United States citizen and obtained permanent resident status (a "green card").[7] Ms. Rico thereafter had primary physical custody of the children for seven years. In 2003, Ms. Rico and her children moved to Las Vegas seeking child support from Mr. Rodriguez, and contacted him to ask if they could live with him.[8] Mr. Rodriguez responded the way fathers presented with child support questions often respond: by suing for custody of M.P. and J.P.[9] The trial court ordered home studies of

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[6] 120 P.3d at 814-15 .

[7] *See* Immigration and Nationality Act § 204, 8 U.S.C.A. § 1154 (2006) (any citizen claiming an alien is entitled to "immediate relative" status as described in INA § 201(b)(2)(A)(i) may file a petition with the Attorney General for such status); INA § 201(b)(2)(A)(i), 8 U.S.C.A. § 1151(b)(2)(A)(i) (spouses of U.S. citizens qualify as "immediate relatives").

[8] 120 P.3d at 815.

[9] 120 P.3d at 815; *see also* Deborah Harris, *Child Support for Welfare Families: Family Policy Trapped in its Own Rhetoric*, 16 N.Y.U. Rev. L. & Soc. Change 619, 624 (1987-88) (noting that child support actions may "prompt fathers to retaliate and counter-sue for custody"); Tonya L. Brito, *The Welfarization of Family Law*, 48 U. Kan. L. Rev. 229, 266 (2000) (arguing that a mother might

each parent that showed that although the father was wealthier, each parent could provide a suitable home for the children.[10] Yet Mr. Rodriguez, who had expressed no interest in or support for his children until Ms. Rico arrived in the United States, was granted primary physical custody.[11] Ms. Rico was merely awarded visitation.[12]

How did this happen? A good part of the court's decision seems to have been motivated by factors that often influence judges in best interests of the child determinations. Mr. Rodriguez was married, but Ms. Rico lived with her boyfriend.[13] Mr. Rodriguez and his wife lived in a "modest but adequate" home, but Ms. Rico lived in a trailer with several other people.[14] While still in Mexico, Ms. Rico was a single, working mother, so her mother (the children's grandmother) had frequently taken care of them, and the older child helped the other one by dressing and feeding him.[15] Finally, the younger child had a health problem – a speech impediment.[16] The district judge granted primary physical custody to Mr. Rodriguez largely because he thought that Ms. Rico was not economically stable enough to provide adequate medical care, whereas the father was employed and had access to medical insurance.[17] (Why Mr. Rodriguez could not have named his children as insureds on his policy without obtaining full custody of them was not explained).[18]

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prefer to forgo her right to collect support out of fear that the father will retaliate against her, either through threats of violence or by countersuing for custody of the child).

[10] 120 P.3d at 815.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] It appears that the court erroneously assumed that Mr. Rodriguez would be unable to name his children as insureds or covered persons on his insurance policy. The Nevada legislature clearly views child support (including insurance access) and child custody as separate issues. State law provides that "every court order for the support of a child . . . must include a provision specifying whether the parent required to pay support is required to provide coverage for the health care of the child." Nev. Rev. Stat. Ann. sec. 125B.085 (LexisNexis 2004). In other words, a noncustodial parent ordered to pay child support to the custodial parent could also be ordered to enroll the child on his or her insurance. Once such an order is in place, an insurance company must permit its employee to enroll his or her child as an insured. Nev. Rev. Stat. Ann. sec. 608.1576 (LexisNexis 2006).

In addition to these other factors, the court used Ms. Rico and Mr. Rodriguez's respective immigration statuses as a factor in deciding that custody should go to Mr. Rodriguez. Ms. Rico and the children were in the country without legal status, while Mr. Rodriguez had permanent resident status as the spouse of a citizen.[19] Status was relevant in a best interests analysis, the court held, because Mr. Rodríguez's legal permanent resident status made him eligible to sponsor his children for citizenship.[20] But Mr. Rodriguez could not have sponsored his children for citizenship, regardless of whether he had custody of them, because he was not a citizen himself.

Instead, as a permanent resident, Mr. Rodriguez could have sponsored the children for permanent resident status.[21] Because Mr. Rodriguez was not married to the children's mother, he would have needed to prove something beyond mere biological fatherhood in order to confer resident status on his children.[22] But that something was not that he had primary custody of the children. Rather, he could sponsor them for residency by doing one of two things: (1) legitimating the children or (2) creating a "bona fide parent-child relationship" with them.[23] A "bona fide" relationship could be shown through evidence of financial support, correspondence between parties, or notarized affidavits of friends, neighbors, or others who knew of the relationship.[24] In other words, it was in Mr. Rodriguez's power (and had been for quite some time) to sponsor his children for permanent residency regardless of custody.

Even if Mr. Rodriguez was unable to demonstrate a bona fide relationship, there was another avenue available for residency for his children. His wife, as a citizen, could sponsor the children for residency as their stepmother.[25] Again, she would have had this opportunity

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[19] 120 P.3d at 815.

[20] *Id.* at 816.

[21] Immigration and Nationality Act § 203(a)(2), 8 U.S.C.A. § 1153 (2006) (unmarried sons and daughters of lawful permanent residents can be sponsored for permanent residency).

[22] Immigration and Nationality Act § 101(b), 8 U.S.C.A. § 1101 (2006) (definition of "child").

[23] Immigration and Nationality Act § 101(b)(1)(C)-(D), 8 U.S.C.A. § 1101(b)(1)(C)-(D) (2006).

[24] 8 C.F.R. § 204.2(d)(2)(iii) (2006).

[25] Immigration and Nationality Act § 201(b)(A)(i), 8 U.S.C.A. § 1101 (2006) (child of U.S. citizen eligible for resident status); INA § 101(b)(1)(B) ("child" includes a "stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred").

regardless of the custody arrangement so long as Mr. Rodriguez was found to be the children's legal father.

In its opinion, the Supreme Court of Nevada expressly found that the district court erroneously interpreted federal immigration law.[26] When ruling on Ms. Rico's due process claim, the court even stated that "Rico and Rodriguez stood on equal footing before the district court," and that "[n]othing in the record indicates that the district court's ultimate decision turned primarily on Rico's immigration status," thereby implying that a decision based *solely* on immigration status might have violated Ms. Rico's due process rights.[27] But because immigration status was officially simply one of many factors used in the determination, the court found the district court's use of the factor harmless, and its ultimate decision acceptable.[28]

II. THREE PROBLEMS

The *Rico* case provides a good jumping-off point for analyzing the problems with using immigration status as a best interests factor. The problems can be loosely grouped into three categories: (1) state courts' lack of expertise regarding immigration law; (2) the risk that judges will engage in "double-counting" of other factors (such as employment opportunity or income); and (3) the possibility that judges will use the best interests test to punish an undocumented migrant for violating immigration law. In this section, I address each problem in turn.

A. LACK OF EXPERTISE

Federal immigration law involves a knotty and complex set of statutes and case law. The main immigration statute, the Immigration and Nationality Act ("INA") is hundreds of pages long and written in a highly-technical manner that can be opaque and confusing to outsiders. Even intelligent and experienced judges can have a difficult time understanding the provisions of the INA, especially if their practice does not normally involve interpreting it. As shown above, the district court

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[26] 120 P.3d at 816 ("Apparently, in attempting to understand [the effects of immigration status], the district court erroneously interpreted a federal immigration law by mistakenly relying on a memorandum of law prepared by Rodriguez's counsel").

[27] *Id.* at 817-18.

[28] *Id.* ("After balancing all the factors, including, but not limited to, Rico's immigration status, the district court determined that it was in the children's best interests to live with Rodriguez.").

in the *Rico* case failed to understand the consequences of both parties' immigration status. In the *Rico* case, the consequences the trial court cared about were the children's chances of obtaining U.S. citizenship. In other cases, courts have misapprehended other consequences of immigration law to similar ill effect.

One common state court misunderstanding is that undocumented, or "illegal," status means that a person is in imminent or likely danger of being deported. In one case, for example, a trial court terminated a father's rights "based on the possibility that the father could someday be deported."[29] But the chances of an undocumented immigrant like Ms. Rico being apprehended by federal authorities and put into removal proceedings are exceedingly small – less than 1%.[30] In fact, to use the *Rico* facts as an example, the statistical chance that Mr. Rodrigeuz would commit a crime and go to prison was probably higher than Ms. Rico's chance of being deported.[31] Yet courts do not use a man's greater theoretical likelihood of incarceration as a rationale for denying his children access to him or for placing custody with someone else.

The "undocumented status means likely deportation" theory is wrong for a host of other reasons as well. Even in the unlikely event that someone in Ms. Rico's shoes was put into removal proceedings, she might be eligible for "cancellation of removal." One of the factors in granting an undocumented immigrant cancellation of removal is the existence of family ties in the United States, which Ms. Rico would have had if Mr. Rodriguez had taken some minimal steps to obtain legal permanent residency for the children.[32] If she were successful on her

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[29] In re M.M., 587 S.E.2d 825, 832 (Ga. App. 2003).

[30] In 2000, there were 7,000,000 unauthorized immigrants in the United States. Census Bureau, Statistical Abstract of the United States: 2006, Table 7. In that year, 184,775 people were deported (including people who were here legally, but committed a crime), and many of those deported were simply removed immediately after their arrival. DHS Office of Immigration Statistics annual report Immigration Enforcement Actions: 2000, Ch. 6 at 4. Of those unauthorized immigrants who, like Ms. Rico, had been living here for over one year, only 42,000 were removed – only 0.6% of the unauthorized migrant population. *Id.* at 6.

[31] In 2000, 4% of Hispanic men and 1.7% of while men in their twenties and early thirties were incarcerated. Allen J. Beck & Jennifer C. Karberg, Prison and Jail Inmates at Midyear 2000, *Bureau of Justice Statistics Bulletin* (March 2001) at *1, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim00.pdf.

[32] Immigration and Nationality Act § 240A(b), 8 U.S.C.A. §1229b (2006). The requirements for cancellation of removal for an alien who is inadmissible or deportable are (1) she has been physically present in the U.S. for continuous period of not less than 10 years; (2) she has been a person of good moral

cancellation claim, she would be eligible to adjust her status to that of legal permanent resident.[33]

Finally, even in cases where deportation of one parent is likely, it is unclear that the fact of deportation cuts in the direction of giving custody to the parent who will remain in the U.S. Family court decisions involving immigrants often include evidence of a shortsighted "U.S. is best" mentality.[34] In the *Rico* case, given that Mr. Rodriguez does not appear to have been physically or emotionally present in his children's lives, it is unclear why separation from him if their mother had been deported would have been worse than losing contact with their mother. If Ms. Rico had been deported, she might have taken her children back to Mexico with her, and they would have grown up there instead of in the U.S. Many people who do not live in the United States nevertheless lead full and productive lives.

B. DOUBLE-COUNTING

The use of immigration status as a factor in a "best interests of the child" analysis also creates a danger of double-counting, and double-counting of a particularly pernicious kind, at that. The best interests test is a balancing test: once it has been decided that both parents are fit parents, the court then asks "which parent is better?" Each parent is likely to have positive and negative qualities, and so courts essentially add each quality up and then decide who will provide the better environment overall. If one negative factor gets counted twice (or three or four) times against a parent, it can make a significant impact on the result in the case.

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character during that period; (3) she has not been convicted of certain criminal offenses; and (4) she establishes that removal would result in "exceptional and extremely unusual hardship" to her spouse, parent, or child, who is a citizen or lawful permanent resident. § 240A(b)(1), § 1229b(1).

[33] *See* Immigration and Nationality Act § 240A(b)(1), 8 U.S.C.A. § 1229b(1).

[34] *See, e.g.,* In re M.M., 587 S.E. 2d 825, 832 (Ga. App. 2003) (reversing termination of father's rights where district court had determined that if the father were deported "the child could ... be returned to protective custody or taken with her father to 'an unknown future in Mexico'"). In a slightly different context, the legal scholar Leti Volpp named this attitude "West is Best." Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 Colum. L. Rev. 1573, 1604-05 (1996) (critiquing presumptions that the United States is "per se more progressive and more protective of women and children than the culture of Asian and African immigrants...."). "U.S. is best," while less catchy than "West is Best," may more accurately describe the mentality of family court judges in cases involving immigrants from Mexico or other Latin American countries.

In *Rico*, a form of double-counting seems to have occurred. The court based its determination on Mr. Rodriguez's employment, his ability to provide medical insurance and stable schooling, and Ms. Rico's immigration status.[35] But Ms. Rico's problems with maintaining employment and obtaining health insurance flowed directly from her undocumented immigration status. And as shown above, her immigration status did not affect her children's ability to obtain residency or citizenship, nor did it make her extraordinarily vulnerable to dislocation. The only legitimate purpose for considering her immigration status served the same purpose that considering her employment record, income, access to insurance, or access to schooling served, and the immigration status factor essentially duplicated these others. Other courts have been more careful; in one custody case appealed to the Nebraska Supreme Court, the court insisted that the mother's immigration status was not relevant "except insofar as it has affected her ability to obtain transportation and employment."[36] In other words, the transportation and employment issues were important, and it would be impossible to consider them without understanding the context in which they arose. But the court did not treat immigration status as a separate factor to be taken into consideration in its "best interests" analysis.

Double-counting is particularly troubling because the factors that are double-counted are typically factors that are already prime suspects for the importation of race- and class-based bias into the custody determination. The U.S. Supreme Court recognized this problem in a different context: when social workers of middle-class backgrounds make a choice between leaving a child with a foster family or returning the child to his or her biological parents, studies show that they "reflect[] a bias that treats the natural parents' poverty and lifestyle as prejudicial to the best interests of the child."[37] Indeed, it was these very biases that led to wholesale removal of Native American children from their tribes until the passage of the Indian Child Welfare Act.[38]

When a court uses immigration status to double-count a factor such as poor employment prospects, poverty, or lack of education or family ties, the court is not only double-counting but double-counting the very

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[35] 120 P.3d at 815.
[36] In re Interest of Aaron D, 691 N.W. 2d 164, 167 (2005).
[37] Smith v. Org. of Foster Families, 431 U.S. 816, 834 (1977).
[38] *See* 25 U.S.C. § 1901, *et seq.* (2006).

factors that are the most troubling. Again, the *Rico* case is worth looking at closely. The Nevada statute that the *Rico* court was applying made no explicit reference to immigration status as a factor to be used in the best interests test. Neither was there a reference to employment history, economic condition, or education level. The Nevada statute, like most best interests statutes, used broader categories, including: which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent; the ability of the parents to cooperate to meet the needs of the child; the mental and physical health of the parents; the physical, developmental and emotional needs of the child; and the nature of the relationship of the child with each parent.[39]

In the *Rico* case, the piece of the Nevada statute that best tracks the analysis undertaken by the court is the "physical, developmental, and emotional needs of the child" factor. The other facts that may have made a difference to the court in *Rico* (the trailer in which Ms. Rico lived; her nonmarital relationship with her boyfriend versus her husband's married status; her giving the children to their grandmother to care for while she worked) are more difficult to place. They could have been considered, perhaps, under the "physical, developmental and emotional needs of the child" or the "nature of the relationship of the child with each parent." The court appears to have completely bypassed what is usually the central inquiry under the "nature of the relationship of the child with each parent" factor: who was the children's primary caregiver previously? With whom did the children actually have an established relationship? The court faulted Ms. Rico for leaving the children with her mother, but no mention was made of the father's complete lack of involvement, financial support, or interest in the children until Ms. Rico showed up in the United States asking for help. Instead, the court went directly to evaluating which household presented a more favorable environment for a child in theory, and, predictably, found Ms. Rico's trailer home to be less desirable than Mr. Rodriguez's house. Added to this mix, Ms. Rico's undocumented immigration status may have been the factor that tipped the scales in Mr. Rodriguez's favor. Adding immigration status as a factor made it appear that the court has undertaken a multi-factor analysis, when in reality it had ignored many of the factors courts usually consider the most important and double-counted those that are most likely to reflect the prejudices of the individual judge.

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[39] Nev. Rev. Stat. § 125.480 (4)(c), (e)-(h) (2006).

C. ANIMUS

Courts are nearly universal on the proposition that the "best interests" standard is about what is best for the children, not what is best for the parents. As another Nevada Supreme Court opinion, cited by the *Rico* court, explained: "This court has made it clear that a court may not use changes of custody as a sword to punish parental misconduct."[40] Yet in the case of undocumented immigrants, that is precisely what appears to be happening. Sometimes the punitive motive is transparent, but in other cases it may be more difficult to discern. As an example of a transparent desire to punish, one judge told a father that he "had a problem with his INS situation" and that the father would have to "resolve" the issue before he could have custody of his child.[41] Of course, a person does not have complete control over his immigration status: in that case, the father had no grounds for applying for legal immigration status, so the court conditioned custody on something outside his control. But regardless of whether the father was delinquent in obtaining legal status, the question the court needed to consider was whether the child would be better off with the father.

In the *Rico* case, the motive to punish is less clear. The trial court record is spotty, and there is no language in the Supreme Court case that indicates that the trial court wanted to punish Ms. Rico for her status. Yet the court's use of immigration status as a factor casts a pall over the case. Given the prejudice against immigrants – especially against "illegal aliens" – in our society, it is very difficult to ever be certain that a judge who considers immigration status fair game in a best interests analysis is not doing it to punish the undocumented parent, or out of a prejudice against undocumented people.

III. A SOLUTION

The myriad problems associated with using immigration status as a best interests factor point to several possible solutions. Courts and legislatures could abolish consideration of immigration status altogether. Or they could establish guidelines for how to use status without falling into the traps outlined above. The first approach would be problematic because there may well be some circumstances in which immigration status is highly relevant, as I explain below. But the second approach is also dangerous because it still gives credence to the idea that

[40] Sims v. Sims, 109 Nev. 1146, 1149 (1993).
[41] In re M.M., 587 S.E. 2d 825, 831 (Ga. App. 2003).

immigration status is often a legitimate factor to consider. As Dorothy Roberts has shown, vague standards coupled with unbridled discretion function as an "invitation to racial bias" in the family court system.[42] Such tests essentially ask a judge to follow his or her hunches about what kind of environment would be optimal for a child. What sometimes gets lost in the calculus is the value to children of remaining with the parent with whom they have bonded.

I would propose the following solution to this dilemma: a presumption that immigration status is not relevant in child custody disputes, coupled with specific classes of cases in which the presumption could be rebutted. This is, in fact, the approach that some courts have taken, although they have not named it as such.[43] A presumption has the virtue of being clear and of taking the form of an admonition. If judges understand the reasons a presumption is necessary (lack of expertise, double-counting, and potential for animus), they may be less likely to engage in the kind of prejudicial, hunch-based decision making that the *Rico* court appears to have done. Of course, there will always be judges who do not like undocumented immigrants, and there is nothing to stop them from disguising their animus by giving greater weight to other factors. But for most judges, a rebuttable presumption would be a reminder that their instincts may be contrary to the best interests of children.

When should the presumption be rebuttable? There are many classes of cases in which immigration status might be highly probative of best interests, in ways that would not double-count other considerations. What follows is a preliminary list of the kinds of cases in which the presumption might be rebutted. This list is not intended to be exhaustive; there may be other important exceptions that will arise in cases yet to be decided. It is meant merely to provide examples of the types of narrow exceptions to the general presumption against use of status that would make sense in child custody cases.

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[42] Dorothy Roberts, Shattered Bonds: The Color of Child Welfare 55 (2002).
[43] *See, e.g,* In re Aaron D., 691 N.W. 2d 164, 167 (Neb. 2005) (noting that the mother's immigration status was relevant only "insofar as it has affected her ability to obtain transportation and employment.").

A. CASES WHERE REMOVAL IS IMMINENT

As discussed above, there is a wide misperception that an undocumented immigrant is in constant danger of apprehension and removal. This alone would not be a good reason to consider status. But in some cases, an order of removal has actually been entered. In these cases, the parent's imminent deportation would have to be a factor in a best interests analysis. Joint custody, for example, would be impossible unless the other parent also moved, which might not be feasible or desirable. A court would also need to consider the living conditions in which the child would be raised if she accompanied her deported parent back to his or her country of origin. Of course, this inquiry would not necessary lead to the conclusion that "U.S. is best." For example, perhaps the parent in removal proceedings has extensive family ties in the country of origin, and the U.S.-based parent does not have any in the U.S. On these facts, a court might determine that it would be best for the parent who will be deported to have custody of the children, because he or she will have greater access to the support of an extended family and community. Factors such as these would be crucial to determining what the life of the child would be like in the parent's home country, and a court doing a best interest analysis would need to take them into account.

In many of these cases, the best way to preserve family ties may be to have the children live abroad with the deported parent: the U.S.-based parent will likely have little trouble obtaining a visa to visit the children, but the deported parent would have to wait years before being eligible to reenter the United States. In the *Rico* case this was certainly true: Mr. Rodriguez could have visited Mexico frequently, but Ms. Rico, once deported, could not have visited her children for at least 10 years.[44]

B. CASES WHERE ONE PARENT IS LIKELY TO KIDNAP THE CHILD

A second instance in which the presumption could be rebutted would be in cases where one of the parents has demonstrated a propensity to kidnap the child. Several cases like this have occurred, and courts have usually done an admirable job of weighing the immigration status of one

[44] Immigration and Nationality Act § 212(a)(9)(A)(ii), 8 U.S.C.A. § 1182(a)(9)(A)(ii) (2006). Even once the 10-year statutory bar had elapsed, Ms. Rico might have had difficulty convincing a consular officer to issue her a visa: given her history of deportation and the existence of her children in the United States, a consular office might suspect that Ms. Rico did not have a "residence in a foreign country which [s]he [had] no intention of abandoning," a requirement for most nonimmigrant visas. *See, e.g.*, Immigration and Nationality Act, § 101(a)(15)(B).

parent as a factor without succumbing to the problems outlined above. In one case, for example, an appellate court reversed a family court decision giving sole custody to the German mother of a child. The mother was in the U.S. on a tourist visa, so she would not have been able to remain legally much longer. She was also a physician with a job in Germany, so she was likely to return to her job. In addition, she had a track record of absconding with her children: she had previously removed the children from New York to Florida, in direct contravention of a family court order, and a court-appointed psychologist expressed concern that she seemed likely to return to Germany.[45] In cases like this one, where there are several reasons to believe that one parent is likely to leave with the children, immigration status may be relevant insofar as it contributes to this likelihood. This exception to the presumption would have to be used with care, however. There is a danger that it could be used as a loophole for injecting prejudice against unauthorized immigrants into child custody cases. There is no evidence that the undocumented, as a class, are more likely to kidnap their children than anyone else.

C. Cases Where One Parent Has Strategically Withheld Immigration Sponsorship from Spouse or Children

Advocates for battered spouses and children have long noticed a disturbing and unintended side effect of immigration law's use of citizen and resident spouses as "sponsors" of immigrant spouses: the strategic withholding of immigration status by the citizen spouse to maintain dominance in a relationship. In order to obtain a family-based immigrant visa, an immigrant needs his or her citizen or resident relative to act as a sponsor.[46] In some cases (often but not always involving domestic violence), the citizen spouse chooses to withhold sponsorship as a means of maintaining control over the immigrant spouse. Indeed, these cases were the reason for the passage of VAWA 2000. As explained in the Congressional Record, the Act removed "obstacles ... that may hinder or prevent battered immigrants from fleeing domestic violence safely and prosecuting their abusers by allowing an abusive citizen or lawful

[45] In re Ish-Shalom v. Wittmann, 19 A.D.3d 493, 494 (N.Y. App. Div. 2005); *see also* Abdel-Rahman v. Abdel-Rahman, 1996 WL 33362252 (Mich. App. 1996).

[46] Immigration and Nationality Act § 204(a), 8 U.S.C.A. § 1154(a) (2006).

permanent resident [spouse] to blackmail the abused spouse through threats related to the abused spouse's immigration status."[47]

The failure of one party to sponsor the other for citizenship would certainly not be dispositive in a best interests analysis. There are many reasons that someone might not sponsor a relative, ranging from ignorance of the opportunity to acquiescence to the wishes of the other parent. But the failure could be relevant in some contexts. First, if the failure to sponsor a spouse or children was coupled with some evidence of physical or emotional abuse, the withholding of immigration status could be corroborating evidence of abuse. Because Congress has found that perpetuators of spousal abuse often use the withholding of immigration status as a weapon in keeping the battered spouse under control, failure to sponsor a spouse, especially over a long period of time, should be viewed with suspicion.

Second, failure to sponsor a child could be an important fact to consider as part of analyzing the "nature of the relationship between the child and each parent."[48] The failure of one parent to sponsor his or her children for residency or citizenship when the capability was there could be a red flag that the parent (1) does not have a genuine interest in custody and is using the threat of a custody battle to force the other party to settle for less than optimal child support or alimony or (2) that the parent really had very little contact with the child previous to the dispute. In the *Rico* case, an answer to the question of why Mr. Rodriguez had not already sponsored his children for permanent residency might have provided the court much more probative information about the children's best interests than Ms. Rico's undocumented status did.

CONCLUSION

As Professor Thronson has so aptly shown, immigration law and family law are converging in ways that could potentially have dire consequences for children. Courts must find ways to be attentive to the ways in which the immigration status of parents can affect the well-being of children, but they also must be wary of the pitfalls of allowing prejudices about immigrants and misperceptions about immigration law

[47] 146 Cong. Rec. S10,188, S10,192 (2000). Under the Act, a battered immigrant spouse can self-petition for immigration status, thus engaging in an end-run around the citizen spouse. Immigration and Nationality Act § 204(a)(iii), 8 U.S.C.A. § 1154(a)(iii) (2006).

[48] *See, e.g.*, Nev. Rev. Stat. 125.480 (2006).

to govern custody determinations. This essay has proposed one solution to one piece of the problem: a rebuttable presumption against the use of immigration status in child custody determinations that will allow courts to exercise self-restraint while still making the consideration of immigration status available in exceptional circumstances.