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Kids Will Be Kids?
Reconsidering Conceptions of Children's Rights Underlying Immigration Law

DAVID B. THRONSON*

Deeply ingrained ideas about children's rights, often unacknowledged and unexamined, shape and color the treatment of children in immigration matters. This article seeks to uncover how critical frameworks of immigration law simultaneously reflect and reinforce discredited approaches to children's rights. The article explores the way in which adherence to these particular conceptions of children's rights creates barriers to the adoption of more child-centered approaches in immigration law. This exploration then serves as a starting point to suggest an agenda for reform.

An Immigration Judge denied asylum to Tsion, a seventeen-year-old applicant, in part because her credibility "cannot be determined"[1] *regarding central testimony about witnessing the traumatic deaths of her parents when she was a young child.*

The Board of Immigration Appeals ruled that forcing Daisy and Eric, United States citizens, to leave the United States with their father would not cause the children sufficient hardship to justify canceling their father's removal. The record included testimony from Eric, age nine at the time, that he would like to stay in the United States, but no other assessment of the impact on the children of separation from their childhood home and customary family circle.[2]

At Maria's asylum hearing, which was consolidated with that of her parents, Maria's father was the only witness to testify and his testimony pertained solely to his own eligibility for asylum. An Immigration Judge ordered Maria deported after denying her asylum claim.[3]

In rejecting teenager Lucienne's asylum claim, the Immigration Judge stated that "it is almost inconceivable to believe that the Ton Ton Macoutes could be fearful of the conversations of 15-year-old children."[4]

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[1] Kahssai v. INS, 16 F.3d 323, 325 (9th Cir. 1994) (Reinhardt, J., concurring).

[2] *See In re* Monreal-Aguinaga, 23 I. & N. Dec. 56 (BIA 2001).

[3] Alexandrova v. INS, 162 F.3d 1161 (6th Cir. 1998), *available at* No. 97-3932, 1998 WL 552811, at *1 (6th Cir. Aug. 11, 1998).

[4] Civil v. INS, 140 F.3d 52, 55 (1st Cir. 1998).

I. INTRODUCTION

Immigration decisions transform the lives of children every day. As in the examples above, these often are decisions that turn on understanding the capacities, experiences, and perspectives of children. Eliciting narratives, evaluating fears and hardships, and judging credibility are central to many aspects of immigration decisions. Yet life-altering determinations in immigration matters routinely are reached without consideration of the voices and viewpoints of children who are directly involved.

Deeply ingrained ideas about children's rights, often unacknowledged and unexamined, shape the way children are perceived and treated. These ideas underlie and color our perceptions of children's abilities and roles, and they influence the way law engages them.[5] Broader debates about children's rights have largely bypassed immigration law and efforts to develop workable, child-centered approaches in immigration law have gained little footing. Immigration law and decisions continue to reflect conceptions of children that limit their recognition as persons and silence their voices.

This article seeks to uncover some of the limited children's rights notions inherent in the basic frameworks of immigration law and evident in decisions reached in the immigration context. This exploration serves as a starting point to discuss the way underlying notions of children's rights have hindered the implementation of measures aimed at introducing a child-centered perspective in one area of immigration law and to suggest needed reforms. Part I of this article provides a brief overview of competing conceptions of children's rights. Part II demonstrates how fundamental frameworks of immigration law, and decisions that they produce, reflect and reinforce particular underlying conceptions of children. Part III looks at the only provision of immigration law that explicitly calls for consideration of the best interests of the child, special immigrant juvenile status, and analyzes the manner in which adherence to discredited notions of children's rights creates barriers to adoption of a child-centered approach. Part IV suggests an agenda for reforms to enhance child-centered perspectives in immigration law.

II. FROM PROPERTY TO PERSONS

Children's rights have always been controversial.[6] Suspicion of children's

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[5] *See* Martha Minow, *"Forming Underneath Everything That Grows:" Toward a History of Family Law*, 1985 WIS. L. REV. 819, 819 (noting that family law is "'underneath' other legal fields in the sense that its rules about roles and duties between men and women, parents and children, families and strangers historically and conceptually underlie other rules about employment and commerce, education and welfare, and perhaps the governance of the state").

[6] *See* Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1867–71 (1987).

HeinOnline -- 63 Ohio St. L.J. 980 2002

rights derives in part from the contrast between the real needs and dependency of children at various stages of development and notions of autonomy and individual choice that regularly, though not necessarily, attend the rhetoric of rights.[7] Yet, despite skepticism, there is consensus that control of children by parents, or the State, is not absolute and that children do have rights. These rights need not be adversarial to parents' rights; they exist not only as claims for independence and autonomy from adults, but also as claims for care and protection by adults and claims for relationships with adults. The ongoing challenge in developing coherent frameworks for thinking about children's rights, then, is to find a balance, rooted in the relation between children and adults, that empowers children but also acknowledges the role of parents, and that recognizes children's needs but also parents' rights and responsibilities.[8]

As grounding for an exploration of children's rights in immigration law, this section briefly introduces some of the competing ideas that have marked debate about the development of children's rights. Though this discussion presents ideas chronologically, the development of children's rights is anything but a linear process. Any such telling would oversimplify the ambiguity and turbulence that is family law.[9] All of the ideas presented here have been challenged, and some largely discredited, yet each continues to influence thinking about children's rights in important, if contradictory, ways.[10]

A. *Children as Property*

A conception of children as parental property is "at least as ancient as the Greek and Judeo-Christian traditions identifying man as the procreative force."[11]

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[7] *See* Cecelia M. Espenoza, *Good Kids, Bad Kids: A Revelation About the Due Process Rights of Children*, 23 HASTINGS CONST. L.Q. 407, 408 (1996) ("Children, as nonvoting actors in society, cannot advocate for their own rights. Instead, their rights are determined by others."); *see also* Minow, *supra* note 6, at 1882–83; Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1051 (1992) (noting that, "[h]istorically, children's rights have been severely limited in practice because they depend upon adults for articulation, assertion, and enforcement").

[8] *See* Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 FAM. L.Q. 815, 816 (1999) (describing the need for "a coherent, workable system for allocating responsibility for children in a way that empowers parents without treating children as chattels"); *see also* Minow, *supra* note 6, at 1870–71.

[9] Woodhouse, *supra* note 7, at 1039; *see id.* at 1037 (rejecting depiction of "American family law as having undergone a process of transformation, from the hierarchical, patriarchal model of the family of colonial times toward a more egalitarian model").

[10] Minow, *supra* note 5, at 826 (noting that "traditional outline of legal doctrinal developments governing the family in America since colonial days . . . expresses contemporary preoccupations as much as it reveals the past").

[11] Woodhouse, *supra* note 7, at 1043; *see also* Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents' Rights*, 5 GEO. J. ON

HeinOnline -- 63 Ohio St. L.J. 981 2002

Early law in the United States did not recognize children as individual rights holders independent of their parents. Children were parental, or more specifically paternal, assets who were under the direct and extensive control of their fathers.[12] As late as "the nineteenth century, a father could enroll his male children in the army and collect the enrollment bounty, betroth his minor female children to persons of his choice, put his children to work as day laborers on farms or factories and collect their wage packets."[13] Children essentially were treated as property, always bound to their parents and under parental control.[14] Fathers virtually "had an absolute right to their children, 'owning' them as if they held 'title' to them."[15]

Notions of parental property rights in children, though discredited, have persistent influence.[16] For example, legal language used to define the custody decision making process employs, implicitly and explicitly, the idea of children as property.[17] At the most basic level, the very idea of "custody" implies control and possession.[18] The rhetoric of children as "belonging" to the parent continues to exert great force and influence on the way we think and speak about children.[19] Saying that children "belong" to parents promotes the idea that custody is more about parental ownership than about parental responsibility to children as persons.[20] Even as patriarchal views regarding custody have given way, notions of children as property have lingered. Today's joint custody arrangements have allowed "a move backward toward the more explicit treatment of children as property—only this time the property is to be divided equally."[21] Similar uses of property-influenced rhetoric are apparent in parental variations on the statement

FIGHTING POVERTY 313, 313–14 (1998) (identifying notions of children as property in Roman law).

[12] *See* Woodhouse, *supra* note 7, at 1037 (noting that the United States colonial law "employed a property theory of paternal ownership and treated children 'as assets of estates in which fathers had a vested right.... Their services, earnings, and the like became the property of their paternal masters in exchange for life and maintenance'").

[13] Woodhouse, *supra* note 11, at 314.

[14] *Id.* (noting that lines "between persons and property, were patrolled and reinforced by age as well as by race. It was simply a fact of economic and social life that all children were 'bound' to somebody").

[15] Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 737 (1988).

[16] *See* Gary A. Debele, *A Children's Rights Approach to Relocation: A Meaningful Best Interests Standard*, 15 J. AM. ACAD. MATRIM. LAW. 75, 89 (1998).

[17] Fineman, *supra* note 15, at 737.

[18] *Id.*

[19] Woodhouse, *supra* note 7, at 1042.

[20] Under this view, children "being naturally dependent, belong to the individuals who create them until majority, when they acquire the status of independent individuals." Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1811 (1993).

[21] Fineman, *supra* note 15, at 739–40.

HeinOnline -- 63 Ohio St. L.J. 982 2002

that "the child is mine and it is nobody's business what I do with it." Such statements continue to have great rhetorical force and influence society's frequent reluctance to intervene in families on behalf of children.[22]

A modern children as property model "asserts not that children *are* property but that our culture makes assumptions about children deeply analogous to those it adopts in thinking about property."[23] Parental authority is exercised as a parental right, "like rights in property, as a right of possession and control."[24] A property theory thus "conceptualizes parental rights as being virtually absolute and an end in themselves, rather than as an outgrowth of parents' responsibilities and a means to secure the well-being of their children."[25] Viewing children as property grounds parental authority solely in notions of parental rights and ignores any suggestion that parents must earn authority through meeting their obligations and responsibilities toward children.[26] Parents are individual rights holders, in this view, but children are not. This emphasis on parental rights objectifies children and marginalizes their existence as independent persons.

B. *Children as Wards*

The traditional notion of parental possession of children was confronted in the late nineteenth century by "reformist discourse [which] viewed children not so much as individual property . . . but as a form of social investment in which custody produced concomitant social duties on the part of each parent, the performance of which the state could supervise."[27] Progressive Era reformers, such as the settlement house workers, "launched a 'child-saving' movement with a focus on children's welfare, confidence in experts, and acceptance of the

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[22] Woodhouse, *supra* note 7, at 1044. In contrast, the state in other instances readily intervenes to reinforce parental authority, such as adjudicating children as "incorrigible" or "in need of supervision" at the parents' request. Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571, 1579–80 (1996).

[23] Woodhouse, *supra* note 7, at 1042.

[24] Woodhouse, *supra* note 20, at 1811.

[25] Woodhouse, *supra* note 11, at 313; *see also* James G. Dwyer, *School Vouchers: Inviting the Public into the Religious Square*, 42 WM. & MARY L. REV. 963, 966 (2001). Dwyer notes:

> most arguments about child-rearing issues give little attention to, and often simply ignore, the developmental interests of the children involved. Instead they focus on the interests and rights of parents, of the rest of society (e.g., societal interests in pluralism, in creating good citizens, or in avoiding public expense) and of other individual adults who claim to be affected by state policies.

Id.

[26] Woodhouse, *supra* note 20, at 1811 (asserting that grounding parental authority in "notions of right rather than obligation and earned authority neglects children's need for adult responsibility").

[27] Fineman, *supra* note 15, at 737.

HeinOnline -- 63 Ohio St. L.J. 983 2002

government as a paternal presence in children's lives."[28] New institutions and laws treated children as qualitatively different from adults. Compulsory education, child labor laws, child welfare agencies, and juvenile courts all challenged parents as the locus of authority over children.[29]

Articulations of children's rights were premised on children's "essential nature," emphasizing children's vulnerability and need for nurture and protection.[30] Children's rights "operated both as standards for parental behavior and as limitations on parental power. Parental failure to live up to these standards violated children's rights and justified community intervention."[31] The community claimed a high stake in children and, correspondingly, children's "highest duty was no longer obedience to parents, but preparation for citizenship."[32]

In a sense, parents were not viewed as property owners, but as fiduciaries. For the benefit of the community as a whole, children were seen as persons in need of protection and guidance as they moved toward adulthood.[33] While a parent fiduciary wields great power, this authority is not wielded solely for the benefit of the child beneficiary. Common articulations of children's rights "reflected a sense of the child not as private property of his parent, nor of himself, but as belonging to the community, the collective family."[34] This communitarian perspective, coupled with the focus on children's dependency and vulnerability, failed to consider children as individual persons with their own rights.

During this time, the "best interests of the child" standard emerged as the prevailing substantive legal principle in determining the fate of children.[35] In removing children from adult courts to specially created juvenile courts, reformers rejected an emphasis on punishment in favor of a therapeutic focus on

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[28] Martha Minow, *Whatever Happened to Children's Rights?*, 80 MINN. L. REV. 267, 279 (1995); *see also* Espenoza, *supra* note 7, at 414 ("In the early 1900s, the parens patriae power emerged from common law chancery to justify action by the state against parents.").

[29] Debele, *supra* note 16, at 85–86.

[30] *See* Kristine K. Nogosek, *It Takes a World to Raise a Child: A Legal and Public Policy Analysis of American Asylum Legal Standards and Their Impact on Unaccompanied Minor Asylees*, 24 HAMLINE L. REV. 1, 17 (2000) (noting influence of "European attitude that children are developmentally incomplete emotionally, morally and cognitively, rendering them psychologically vulnerable, and . . . therefore dependent on adults"); *see also* Woodhouse, *supra* note 7, at 1056.

[31] Woodhouse, *supra* note 7, at 1052; *see also* PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 138 ("A doctrine of parens patriae has served throughout the nation's history to establish government's right and duty to step in to protect the best interests of children, even against the wishes of their parents.").

[32] Woodhouse, *supra* note 7, at 1051.

[33] Woodhouse, *supra* note 11, at 314.

[34] Woodhouse, *supra* note 7, at 1054; *see also* Schall v. Martin, 467 U.S. 253, 265 (1984) (stating that children are "always in some form of custody").

[35] Debele, *supra* note 16, at 81; Fineman, *supra* note 15, at 737.

HeinOnline -- 63 Ohio St. L.J. 984 2002

guidance and treatment.[36] In juvenile courts, procedural rights were limited for children who were categorically "believed to be vulnerable, a condition that makes them either incapable of effectively or knowingly executing rights, or otherwise in need of an overriding parens patriae protection vested in the state."[37] Special treatment and protections, not rights, were grounded in the presumed weakness and vulnerability of all children. This approach quickly became the target of the next generation of reformers who thought the special protections for children in juvenile courts not worth the surrender of procedural protections.[38] While the special protections provided in juvenile courts distinguished children, as a group, from adults, they stopped short of recognizing children as individual persons.[39]

C. *Children as Adults*

"Liberationists" found institutions such as juvenile courts and child labor laws "disrespectful to children as persons and confining to their liberties and capacities for choice."[40] Notions of children as dependent due to their vulnerabilities were thought to reflect histories of subjugation and were rejected.[41] The best interests standard, they argued, was too often invoked not as a means to inject children's voices into decision making, but rather as "a rationalization by decision-makers justifying their judgments about a child's future, like an empty vessel into which adult perceptions and prejudices are poured."[42] Liberationists challenged the assumption that all children are legally incompetent until they reach the age of majority, arguing instead for a presumption of competence until individualized assessment demonstrated otherwise.[43] For liberationists, the "language of 'rights' offered a way to argue for both more protection and more independence for a variety of children."[44]

In certain limited contexts, a series of Supreme Court decisions in the 1960s and 1970s "began to recognize children as distinct individuals deserving a direct

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[36] Espenoza, *supra* note 7, at 415; Minow, *supra* note 28, at 279.

[37] Espenoza, *supra* note 7, at 418–19.

[38] Minow, *supra* note 28, at 280.

[39] Espenoza, *supra* note 7, at 427 ("The parens patriae position used by the state limited the rights of the children by articulating a protective function that trumped the due process protection claimed by the class. Unfortunately, as a result, these children exist as objects and not individuals.").

[40] Martha Minow, *Children's Rights: Where We've Been, And Where We're Going*, 68 TEMPLE L. REV. 1573, 1575 (1995). "Perhaps ironically, some of the most vivid issues cast as claims of rights for children arose in response to the institutions created by a prior generation of child advocates." Minow, *supra* note 28, at 278.

[41] Minow, *supra* note 40, at 1575.

[42] Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 513 (1973).

[43] *Id.* at 507–09.

[44] Debele, *supra* note 16, at 89.

relationship with the state under a legal regime protecting liberties against both public and private authorities."[45] Perhaps most famously, the Supreme Court's ruling in *In re Gault*[46] assured a right to counsel,[47] a right against self-incrimination,[48] a right to notice of charges,[49] and a right to confront and cross-examine accusers in juvenile delinquency proceedings.[50] In other areas, the Court upheld First Amendment rights of students[51] and procedural due process rights prior to school suspensions.[52]

As much as these decisions demonstrated shifting views of children, they also "reflected social science criticisms of the juvenile court, national turmoil over the Vietnam War and racial tensions, and widespread legal challenges to unfettered authority."[53] Fundamentally, "these decisions departed from the traditional view of children as properly subjected to parental and institutional authority beyond state review because such authorities no longer seemed entirely trustworthy."[54]

These decisions thus evidence a movement away from older approaches to children's rights more than they reveal a move toward any coherent vision of children's rights.[55] Even as the Supreme Court recognized certain "adult" rights for children, it refused to extend others.[56] Countering movement toward adult rights for children, traditional views emphasizing parental authority have persisted, rejecting "rights for children as either unnecessary or harmful given

[45] Minow, *supra* note 28, at 276; *see also* Janet L. Dolgin, *The Age of Autonomy: Reconceptualizations of Childhood*, 18 QUINNIPIAC L. REV. 421, 431 (1999) ("Within the last several decades, the law has effectively redefined children in a number of contexts as autonomous individuals. In other cases, however, the law preserves more traditional understandings of children and childhood.").

[46] 387 U.S. 1 (1967).

[47] *Id.* at 36.

[48] *Id.* at 55.

[49] *Id.* at 33.

[50] *Id.* at 57.

[51] Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 514 (1969).

[52] Goss v. Lopez, 419 U.S. 565, 584 (1975).

[53] Minow, *supra* note 28, at 276.

[54] *Id.* at 277.

[55] *See* Dolgin, *supra* note 45, at 439 ("*In re Gault* and its progeny have been widely interpreted—and in significant part, accurately—to suggest little beyond a need to correct inadequacies in the juvenile court system."); *see also* Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299, 303 (1998) (noting that "[i]n the years following *Gault*, courts frequently proclaimed the right of children to representation, but provided remarkably little explanation regarding the reasons or purpose for the representation").

[56] *See* Wisconsin v. Yoder, 406 U.S. 205, 231–34 (1972) (allowing Amish parents to keep their children out of high school without considering the children's perspective); McKeiver v. Pennsylvania, 403 U.S. 528, 551 (1971) (denying the right to a jury trial for juvenile court proceedings).

HeinOnline -- 63 Ohio St. L.J. 986 2002

relationships of authority and responsibility held by adults in children's lives."[57]

Certainly, the universal extension of adult rights to children is not, in and of itself, a panacea.[58] Merely extending rights to children does nothing to insure that children are capable of effectuating their rights.[59] Individualized assessments of children's capacities reveal that not every child is at a developmental stage that enables her to independently exercise all adult rights meaningfully.[60] In many instances, children lack the capacity of adults to advocate their rights and interests.[61] Therefore, while liberationist recognition of children as individual rights holders is an advance toward treating children as persons, it is insufficient standing alone.

Yet the determination that children lack capacity to exercise certain rights is inherently different from the conclusion that children lack rights. The choice need not be between an extreme position of abandoning children to their rights and earlier paradigms in which children's vulnerabilities blocked recognition of them as rights holders. More recent thinking on children's rights separates the question

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[57] Minow, *supra* note 28, at 281; *see also* Bruce Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Children to Their "Rights"*, 1976 BYU L. REV. 605, 607 (arguing that long-term interests of children risk permanent harm as the state and parents "abandon the children to their 'rights'").

[58] *See* John E. Coons, et al., *Puzzling Over Children's Rights*, 1991 BYU L. REV. 307, 341 ("Clearly, the extreme liberationist can be understood only as a provocateur."); *see also* Lynne Marie Kohm & Maria E. Lawrence, *Sex at Six: The Victimization of Innocence and Other Concerns over Children's "Rights"*, 36 BRANDEIS J. FAM. L. 361, 369 (1997–1998) (arguing that "[v]esting children with legal rights per se . . . is not the most appropriate way to care for their best interests"); Woodhouse, *supra* note 8, at 816 ("No sensible person would support an emancipation proclamation for children; laws empowering a parent to control and make decisions for children are clearly necessary components of a democratic society.").

[59] By merely extending rights, "children are not brought into parity with adults. Instead, the grant of rights legitimates punishment of youth for the harm they have inflicted, while simultaneously disadvantaging youth who are not capable of maturely exercising those rights." Espenoza, *supra* note 7, at 418. "Insofar as children are not, in fact, capable of reasoning and behaving as adults do, defining them as autonomous individuals removes from them the protections, however paternalistic, that society affords those in a dependent status, but does not afford them the benefits of autonomy." Dolgin, *supra* note 45, at 447; *see also* Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 12 (1994) (arguing that those children not "possessed of mature reason and adult perspective . . . cannot assume either the prerogatives or burdens of full legal personhood"); Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy, Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 475 (1983) ("To 'abandon children to their rights' not only ignores the real needs of children, but also creates within adults a false expectation that they, too, can be—or should be—'liberated' from the arduous demands of a parental and community commitment to childrearing.").

[60] *See* Irene Scharf & Christine Hess, *What Process is Due? Unaccompanied Minors' Rights to Deportation Hearings*, 1988 DUKE L.J. 114, 124–27 (discussing data questioning children's ability to make knowing, intelligent, and voluntary waivers of Miranda rights).

[61] Coons et al., *supra* note 58, at 333.

of whether a child has rights from the question of how a child with limited capacity might exercise those rights. Recognizing children as individuals and acknowledging them as rights holders need not result in abandoning children to their rights—rights need not presuppose total autonomy.[62]

D. *Children as Persons*

An emerging conception of children's rights as international human rights, perhaps best represented by the United Nations Convention on the Rights of the Child,[63] has rapidly gained acceptance. The Convention is the most universally adopted of all human rights charters, ratified by all but two countries in the world within the first ten years of its existence.[64] The United States, one of the two holdouts, has signed the Convention but has not ratified it.[65] Somalia remains the only other country that has not ratified the Convention.[66] Given the international nature of immigration and the importance of international human rights norms to the interpretation of certain aspects of immigration law, any workable framework for children's rights in immigration law must account for the idea of children's rights as human rights represented by the Convention.[67]

The idea of children's rights as human rights provides an approach to children's rights centered on the personhood of children.[68] Children have rights

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[62] *See* Minow, *supra* note 6, at 1879.

[63] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter Convention].

[64] Barbara Bennett Woodhouse, *Keynote Address, Symposium on Legal Reform and Children's Human Rights*, 14 ST. JOHN'S J. LEGAL COMMENT. 331, 333 (2000).

[65] *Id.* at 333–34. For discussion of the ongoing debate over U.S. ratification, see Roger J.R. Levesque, *The Internationalization of Children's Human Rights: Too Radical for American Adolescents?*, 9 CONN. J. INT'L L. 237 (1994); Kevin Mark Smith, *The United Nations Convention on the Rights of the Child: The Sacrifice of American Children on the Altar of Third-World Activism*, 38 WASHBURN L.J. 111 (1998); David P. Stewart, *Ratification of the Convention on the Rights of the Child*, 5 GEO. J. ON FIGHTING POVERTY 161 (1998).

[66] Woodhouse, *supra* note 64, at 333–34.

[67] For purposes of the current discussion, the Immigration and Naturalization Service (INS) acknowledges that even if the United States has not ratified a particular treaty, treaty provisions provide guidance as to applicable human rights norms. ASYLUM DIVISION AND OFFICE OF THE GENERAL COUNSEL, IMMIGRATION AND NATURALIZATION SERVICE, THE BASIC LAW MANUAL: U.S. LAW AND INS REFUGEE/ASYLUM ADJUDICATIONS 12–13, 24 (1994); Memorandum from Jeff Weiss, Acting Director, Office of International Affairs, U.S. Dep't of Justice, Regarding Guidelines for Children's Asylum Claims 2 n.1 (Dec. 10, 1998) (on file with author); *see also* Jacqueline Bhabha & Wendy A. Young, *Through a Child's Eyes: Protecting the Most Vulnerable Asylum Seekers*, 75 No. 21 INTERPRETER RELEASES 757, 760 (June 1, 1998).

[68] *See* Guy S. Goodwin-Gill, *Unaccompanied Refugee Minors: The Role and Place of International Law in the Pursuit of Durable Solutions*, 3 INT'L J. CHILDREN'S RTS. 405, 410 (1995) (hailing the Convention as "a model of the achievable").

HeinOnline -- 63 Ohio St. L.J. 988 2002

not because they are sufficiently adult-like or because of their particular vulnerabilities. Children are cast simply as human beings who deserve the kind of dignity and respect that the rhetoric of human rights signals.[69] Children therefore are rights holders, even in instances where the child may lack capacity to exercise rights autonomously.[70] Parents, families, and the community are trustees, charged with assisting children in the assertion of their rights. They act on behalf of children, not themselves or the community. The Convention therefore turns children "from family possessions into individual agents, from objects into subjects."[71]

Implementation of the approach of the Convention rests on two fundamental ideas. First, the Convention assures "to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."[72] This principle "imposes procedural responsibilities on [decision makers] to provide suitable circumstances and adequate opportunities for a child to freely and fully articulate his or her views."[73]

Second, to insure that children's voices are not simply disregarded, the Convention establishes that in "all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[74] Plainly, immigration decisions fall under the scope of this provision. This provision does not mandate that the child's best interests be the only decision criteria, but requires that decision makers not lose sight of the child's perspective by identifying best interests as "a primary" consideration. The requirement that the child's voice be respected limits the danger that the best interests standard becomes a vehicle for the opinions of adults.

At the center of this approach is the principle that children possess not only the rights reserved to all persons, but also may claim special assistance in effectuating those rights because of their youth.[75] The human rights approach

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[69] Minow, *supra* note 28, at 296.

[70] Woodhouse, *supra* note 64, at 333.

[71] 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).

[72] Convention, *supra* note 63, art. 12(1).

[73] Bhabha & Young, *supra* note 67, at 760.

[74] Convention, *supra* note 63, art. 3(1).

[75] *See* Woodhouse, *supra* note 11, at 343.

> Children, in particular, are less powerful than others economically and politically, and certainly different, and more vulnerable, physically, emotionally, and mentally. The very content of rights children claim invoke protection against others, given such inequalities. Rights may entail different treatment, not the same treatment, precisely in recognition of difference between individuals and groups.

Minow, *supra* note 6, at 1879.

HeinOnline -- 63 Ohio St. L.J. 989 2002

"rejects the pretense that children are just like adults in all respects relevant to the law."[76] Children's lack of autonomy does not affect their status as rights holders; it only alters the protections required to give those rights effect. The vulnerabilities of children are seen neither as the basis of children's rights nor as an excuse not to recognize children as rights holders.

The human rights approach protects traditional notions of family by characterizing parents as the principal guardians of children's rights, creating "a child-centered perspective on the rights of parents, viewing the relationship as one of trust, rather than one of ownership."[77] This child-centered approach to children's rights forces adults "to focus on the fact that children are not just potential adults but also persons who live in real time, with real hopes, fears, hurts, and joys."[78]

E. *Ongoing Debate*

Despite a growing international consensus centered on the human rights approach exemplified by the Convention, conceptions of children's rights have "failed to secure a coherent political or intellectual foundation, not to mention a viable constituency with political clout."[79] For instance, it remains plausible to argue "that young people deserve the same legal treatment as adults, that young people deserve special legal protections differing from adults, and that the law should refrain from intruding on the ordinary practices of adults responsible for children."[80] In advancing arguments for any of these outcomes in a particular situation, however, it is no longer plausible to ignore children's voices and child-centered perspectives that recognize children as individual persons.

III. CHILDREN IN IMMIGRATION LAW: OBJECTS AND ADULTS

Debates about the nature of children's rights have largely bypassed immigration law. This section explores fundamental aspects of immigration law with an eye to uncovering the underlying conceptions of children's rights that inform them. First, this section examines immigration law's most common treatment of children, as dependents of adults in the context of family

[76] Minow, *supra* note 28, at 296.

[77] Woodhouse, *supra* note 11, at 315. Under this approach, "rights are interdependent and mutually defining. They arise in the context of relationships among people who are themselves interdependent and mutually defining. In this sense, every right and every freedom is no more than a claim limited by the possible claims of others." Minow, *supra* note 6, at 1884 (footnotes omitted).

[78] Minow, *supra* note 40, at 1583.

[79] Minow, *supra* note 28, at 287.

[80] *Id.*; *see also* Dolgin, *supra* note 45, at 442 ("Children can now be understood as dependent and loving or as autonomous and unconnected, or both at once.").

HeinOnline -- 63 Ohio St. L.J. 990 2002

immigration. Second, this section contrasts the treatment of children in family contexts with the treatment of unaccompanied children in immigration proceedings. In the family setting, "children" are conceived as objects rather than actors, and their voices are largely ignored. In the unaccompanied setting, "minors" are subject to the same harsh laws and procedural complexities as adults. Through these frameworks, immigration law reinforces conceptions of children that limit their recognition as persons and silence their voices.

A. *All In the Family: Accompanied Children as Objects*

The vast majority of children encountered by the Immigration and Naturalization Service (INS) are derivatives of adults in the context of family immigration. The conception of children established in this framework serves as the dominant paradigm for the way children are viewed in immigration matters.

1. *No "Child" Without a Parent*

In laws establishing admission categories for immigrants, the concept of "child" is extremely narrow. In immigration law, "child" is a term of art limited to "an unmarried person under twenty-one years of age" who falls into one of six categories.[81] To qualify in any of these categories requires a particular relationship with a parent, such as birth in wedlock, creation of a stepchild relationship, "legitimation," or adoption. Immigration law never employs the term "child" except in relationship to a parent and, therefore, does not conceive of a "child" existing outside this relationship.

Notions of dependency underlie each of the qualifying conditions set out in the definition of child. For example, a marriage ends childhood because it is seen to alter the dependency relationship between parent and child. An adoption must be finalized before age sixteen to create a "child" for immigration purposes—an

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[81] These include: (1) "a child born in wedlock;" (2) a stepchild, "provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred;" (3) "a child legitimated . . . if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation;" (4) "a child born out of wedlock, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother or to its natural father if the father has or had a bona fide parent-child relationship with the person;" (5) "a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years;" or (6) "a child, under the age of sixteen at the time a petition is filed in his behalf . . . who is an orphan" and whose adoptive parents have "complied with the preadoptive requirements." Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(A)–(F) (2000). Once children marry or reach the age of twenty-one, but otherwise meet the definition of child, they are no longer "children," but rather are considered "sons" or "daughters." Immigration and Nationality Act, 8 U.S.C. § 1153(a)(1), (3) (2000); 22 C.F.R. § 40.1(s) (2001).

HeinOnline -- 63 Ohio St. L.J. 991 2002

adoption too close to the most common threshold age of adulthood provides unconvincing evidence of the dependent status of the child. In contrast, a stepchild may be a "child" where the relationship is established a single day before the reaching the age of eighteen.[82] Unlike the adoptee context where the putative child is stranger to both parents, here the natural parent provides assurance of a preexisting relationship of dependency. Likewise, requirements of "legitimation" or a "bona-fide parent-child relationship" assure that a parent has acknowledged the child as a dependent.

Emphasizing dependence on parents as a prerequisite to being a "child" strongly reflects notions of the child as property. It accepts the idea that children are not independent beings but rather are always bound to someone. Parental possession and control, central to the idea of children as property, are the hallmarks of a parent-child relationship in immigration law.

Moreover, while the immigration definition of "child" may serve to test the genuineness of claims to a parent-child relationship,[83] establishing the prerequisites for eligibility in a particular category, such as legitimation, may not be accomplished by children. Immigration law recognizes a "child" only through parental action.[84] In the absence of a parental act of legitimation, no level of proof from the child establishing the veracity of a paternity claim would suffice to force recognition as a "child" for immigration purposes. Parents are 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.

2. *Family-Sponsored and Derivative Immigration*

The framework of family-sponsored and derivative immigration furthers the property-based approach set up by the definition of a child, emphasizing parental possession and control by limiting children to passive roles. Full explanation of the roles to which children are relegated requires a brief overview of the system of family-sponsored immigration.

Immigration law allows citizens and permanent legal residents to petition for family members who fall within certain limited categories to become legal permanent residents.[85] Both the immigration status of the sponsoring petitioner, as either citizen or legal permanent resident, and the relationship between the

[82] Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(B) (2000).

[83] *See* Fiallo v. Bell, 430 U.S. 787, 799 (1977).

[84] In limited instances, state action may suffice to establish the prerequisite dependency. *See, e.g.*, Matter of Goorahoo, 20 I. & N. Dec. 782, 785 (BIA 1994) (noting that "when the country where a child was born eliminates all legal distinctions between legitimate and illegitimate children, all children are deemed to be the legitimate offspring of their natural parents from the time that country's laws are changed"). In these instances, state action shifts power away from parents, but not toward children.

[85] *See* Immigration and Nationality Act, 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a) (2000).

HeinOnline -- 63 Ohio St. L.J. 992 2002

petitioner and the beneficiary determine the priority given to the request.[86] Some relationships, such as that between a citizen parent and child, are not subject to numerical limitation and provide for the immediate availability of an immigrant visa.[87] Others, such as the relationship between a legal permanent resident and a child, are subject to annual numerical limitations, resulting in backlogs now stretching as long as five years.[88] The relationship given lowest priority by immigration law, that between siblings, may require waits in excess of twenty years.[89] The law overtly prioritizes relationships comprising traditional nuclear families over other relationships.[90]

"Family-sponsored" immigrant families are not viewed as a unit, and individual family members are not equal. The direct beneficiary of a family-sponsored petition is typically an individual, the principal beneficiary, who has a qualifying relationship with the sponsoring petitioner.[91] If this principal beneficiary has a spouse or children, they generally may acquire immigration status as "derivatives" of the principal beneficiary.[92] Derivative status is available not only for family-sponsored immigrants, but also for beneficiaries of employment-based petitions and winners of the "diversity" visa lottery.[93] Asylees and refugees also can obtain derivative status for their spouses and children.[94]

This framework creates a sharp divide between active and passive participants. Sponsoring petitioners have absolute control over the decision to file for a potential beneficiary. No matter how close the relationship, beneficiaries have no right to force the filing of petitions on their behalf.[95] Similarly, potential

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[86] *See id.*

[87] *See* Immigration and Nationality Act, 8 U.S.C. § 1151(b) (2000). The immediate availability of an immigration visa does not mean that immigration may take place immediately. Processing delays often extend to periods of more than a year, even for persons who are immediately eligible for visas.

[88] *See* DEP'T ST. VISA BULL., Feb., 2002 at 1–3.

[89] *See id.*

[90] *See* Linda Kelly, *Family Planning, American Style*, 52 ALA. L. REV. 943, 955–60 (2001); Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 AM. J. COMP. L. 511, 528 (1995).

[91] In fact, although "family-sponsored" is the largest immigration category, immigration law never looks at a family as a unit, but rather as a series of individuals. The inadmissibility of a family member (other than the principal immigrant) does not render the family inadmissible as a whole. Only the inadmissible family member will be left behind.

[92] *See* Immigration and Nationality Act, 8 U.S.C. § 1153(d) (2000).

[93] *See id.*

[94] *See* Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(3), 1157(c)(2) (2000).

[95] Under the Violence Against Women Act, spouses and children who have been battered or subject to extreme cruelty by a citizen or legal permanent resident spouse or parent may qualify to "self-petition." Immigration Nationality Act, 8 U.S.C. §§ 1154(a)(1)(A)(iii), (B)(iii) (2000). This exception recognizes the extreme power that accompanies control over the immigration status of family members and seeks to curtail this in extreme cases by allowing the abused to file on their own. Unfortunately, self-petitioning does not extend to cases in which the

HeinOnline -- 63 Ohio St. L.J. 993 2002

derivatives are reliant on principal beneficiaries. 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."[96] Seventeen-year-old Boguslaw Fornalik discovered this when his abusive father's failure to include him in an immigration petition resulted in an INS decision to send him alone back to Poland while leaving his mother and siblings in the United States.[97]

In the framework of family-sponsored immigration, children are always beneficiaries and derivatives; they are never petitioners for others. The law permits parents to sponsor children but does not allow children, even citizen children, to sponsor parents or siblings.[98] For example, a child born out of wedlock may immigrate on the basis of a parent-child relationship with one parent. Immigration law does not then permit this child to sponsor the other parent or any siblings. Similarly, while an adult granted asylum can reunite with a spouse and children, a child asylee cannot reunite with parents by sponsoring them. Furthermore, a "child" who has his or her own child faces great difficulty. Derivative status extends only one generation from the principal beneficiary. A young parent who otherwise qualifies as a child cannot immigrate as a derivative without leaving her own child behind.[99] This system thus conceptualizes adult parents as active rights holders and children as passive objects subject to their control, again reflecting notions of children as property.

The framework of family-sponsored immigration dominates the workload of immigration decision makers and establishes the baseline conception of children in immigration law. It is commonly noted that family-sponsored categories of immigration regularly account for the bulk of total legal immigration. In 1998, the last year for which the government has published full immigration statistics, family-sponsored immigration accounted for 71.9% of all legal immigration.[100] Not all of these immigrants were children, however, and some children entered as derivatives in non-family-based categories. A more useful figure is that one-third, 33.5%, of all permanent immigration visas were granted to children as dependents and derivatives.[101] Moreover, the number of children as dependents, over

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principal stops short of abuse or extreme cruelty, or simply fails to act on behalf of a beneficiary out of spite or incompetence.

[96] Fornalik v. Perryman, 223 F.3d 523, 527–28 (7th Cir. 2000).

[97] *Id.* at 526–27.

[98] At least not until age twenty-one, when no longer a child for immigration purposes.

[99] *See* Immigration and Nationality Act, 8 U.S.C. § 1153(d) (2000).

[100] U.S. IMMIGRATION & NATURALIZATION SERV., STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE, 1998, 29 tbl.5, 33. Of the total 660,477 permanent visas issued, 474,848 were issued to immigrants in immediate relative and family preference categories.

[101] *Id.* Of the total 660,477 permanent visas issued in 1998, 221,139 were issued to dependent children. Of family-sponsored immigrants, 37% were dependent children (from the

HeinOnline -- 63 Ohio St. L.J. 994 2002

220,000, dwarfs the relatively small number of approximately 5,000 unaccompanied minors annually encountered by the INS.[102]

The dominance of the family immigration paradigm establishes the property-influenced idea of children as objects as a primary lens through which immigration decision makers view children in immigration matters. For many children—those whose cases are uncomplicated and who immigrate without incident—this bias seems unimportant. But widespread conceptualization of children as objects leaves them powerless and voiceless, creating tremendous obstacles for children to overcome when necessary.

3. *Marginalizing Children's Voices*

Ingrained perceptions of children as property are reflected by immigration decision makers in a variety of contexts, spilling over into decisions which, unlike family-sponsored immigration, do not turn on establishing a parent-child relationship. Outside the family-sponsored immigration context, children may, in many instances, present independent claims for immigration status.[103] These claims need not be adversarial to parents' wishes, and most often are not.[104] Yet enduring images of children as passive objects or as property continue to influence decision making even when children have independent grounds for immigration relief. Such limited perspectives of children are reflected not only by decision makers, but also by advocates and parents who do not perceive the need to present children's voices.

Consequences of ignoring children's voices can be serious for both parent

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total of 474,848 family-based immigrants, 70,472 were immediate relative children and 89,520 were family preference children or derivatives). Of all employment-based visas, 28.3% were issued to child dependents as derivatives (21,931 of 77,517 total employment-based permanent visas).

[102] American Bar Association, Immigration Pro Bono Development Project, *Fact Sheet on Detained Immigrant and Refugee Children*, *available at* http://www.abanet.org/immigprobono/factsheetsimmigration.doc (July 2001) (noting that the "INS detains more than 4,600 children annually in the U.S.").

[103] For example, children may independently apply for asylum. Gonzalez v. Reno, 212 F.3d 1338, 1347 (11th Cir. 2000); *see also* Bhabha & Young, *supra* note 67, at 758 ("Children are, of course, technically eligible for the same protection under international refugee law as adults."). There also is no immigration law barrier to a child's application for an employment-based visa, though common sense and child labor laws make satisfying the requirement of a qualifying employment offer unlikely.

[104] The case of Elian Gonzalez, with its direct conflict between a parent's wishes and a child's purportedly independent claim, is highly unusual. Indeed, the rarity of the situation is evidenced by the absence of any formal INS policy for addressing the situation. *See* Memorandum from Bo Cooper, General Counsel, Immigration and Naturalization Service, Regarding Elian Gonzalez (Jan. 3, 2000) (on file with author). More commonly, the relationship between unaccompanied minors and their parents is much more complex and ambiguous. *See infra* notes 123–25 and accompanying text.

and child. For example, when a parent includes a child in an asylum claim, the child may benefit from a grant of asylum as a derivative.[105] But a denial to the parent will apply to the child as well.[106] Among refugees, for example, "[a]ccompanied children have tended to be subsumed within their family's asylum application; indeed both the United Nations High Commissioner for Refugees . . . and the INS have pointed out that invisibility is a common problem for refugee children."[107] Subsuming children into their parents' claim too often means that children are ignored.[108] This is particularly tragic when children have individual claims that are stronger than those of their parents. For example, children who have gay or lesbian sexual orientations may experience persecution that would not be faced by their parents.

In some instances, removal proceedings can even take place without a child's knowledge, let alone participation.[109] It is not uncommon for children who are later separated from their parents to learn that an immigration court ordered them removed in absentia as a derivative of a parent in an immigration proceeding of which the children had no knowledge. Prior orders of removal can cause substantial complications, perhaps even insurmountable barriers, to future immigration relief for the child. In such instances, children's invisibility has enduring consequences, yet is viewed as commonplace and unremarkable.

The failure to give weight to children's perspective extends even to instances where the law specifically makes children a central issue. Francisco Monreal sought cancellation of removal on the basis of "exceptional and extremely unusual hardship" to his two children, Eric and Daisy, who would accompany him to Mexico if he were removed.[110] At the time of Monreal's hearing, the Board of Immigration Appeals had not yet issued a decision establishing the

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[105] Immigration and Nationality Act, 8 U.S.C. § 1158(b)(3) (2000).

[106] *See, e.g.*, Khourassany v. INS, 208 F.3d 1096, 1097 n.1 (2000) ("Because the claims of [Khourassany's] wife and child are derivative, their petitions are also denied in light of our holding.").

[107] Bhabha &Young, *supra* note 71, at 87.

[108] *See, e.g.*, Alexandrova v. INS, No. 97-3932, 1998 WL 552811, at *1 (6th Cir. 1998) (noting that, despite independent claims by his wife and child, the father "was the sole witness to testify. His testimony related solely to his own eligibility for asylum"). Often independent claims of children are not even articulated. *See, e.g.*, Lal v. INS, 255 F.3d 998, 1001 n.1 (9th Cir. 2001) ("The application for asylum is based on Mr. Lal's experience; since the applications of both his wife and child are derivative of his claim, we will focus on Mr. Lal's application in this opinion.").

[109] 8 C.F.R. section 3.25 allows the Immigration Judge to waive the presence of the child. 8 C.F.R. § 3.25 (2001).

[110] In re Monreal-Aguinaga, 23 I. & N. Dec. 56, 57, 64 (BIA 2001). A person "of good moral character" found removable by the immigration court who has been physically present in the United States for not less than ten years may seek cancellation of removal by establishing that his or her removal would cause "exceptional and extremely unusual hardship" to a spouse, parent, or child who is a citizen. Immigration and Nationality Act, 8 U.S.C. § 1229(b)(1) (2000).

HeinOnline -- 63 Ohio St. L.J. 996 2002

parameters of the "exceptional and extremely unusual hardship" standard.[111] Plainly the claim for relief requires a focus on the children. Yet the record included virtually no exploration of hardship from the perspectives of the children.[112] The Board of Immigration Appeals noted that the children did not "have any particular health problems" and that if removed they likely "will suffer some hardship, and likely will have fewer opportunities," but the Board still denied relief.[113] In failing to make a case for the children, the family lost.

Perhaps the most disturbing aspect of this decision is not the outcome itself, but the fact that the Board felt it could reach a decision without remanding for a fuller record. In this decision, which now stands as the Board's fullest articulation on the meaning of hardship to children, the children are invisible, or at best passive objects accompanying their father. This decision sets a tone which validates the absence of children's voices and establishes children's silence as the norm.[114]

Decisions such as those discussed in this section demonstrate how foundational ideas of children as passive objects have continuing influence. All too often, because children are not expected to have any role or meaningful contribution, the absence of their voices is not of concern to decision makers and advocates.

B. *All Alone: Unaccompanied Minors as Adults*

If a "child" can exist only in relation to a parent, immigration law needs another term for those children who defy this definition and either arrive unaccompanied or find themselves unaccompanied after arrival. Most commonly, however, immigration law provides no alternative and simply treats unaccompanied children as adults by default. In particular circumstances, immigration law employs "minor" as a substitute for "child," though the scattered and inconsistent references to "minors" provide a sharp contrast to the painstaking thoroughness with which a "child" is defined and used.[115] Less often, the term

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[111] *Monreal-Aguinaga*, 56 I. & N. Dec. at 58.

[112] *See id.* at 70 (Rosenberg, J., concurring and dissenting) (noting the "minimal amount of evidence that was presented"). The record included no professional evaluation of the children's language abilities, no medical or psychological reports indicating the impact of relocation, no sociological studies reflecting the ability of United States citizen children to adapt to different cultures and countries, and no information concerning the children's ability to maintain contact with extended family in the United States. *Id.* at 72–73.

[113] *See id.* at 65.

[114] For example, Elian Gonzalez, perhaps the most publicized child immigrant of all time, was never interviewed by the INS. Stripped of the political frenzy, the ultimate resolution of the case was not surprising. But it is incredible that the INS never felt the need to even speak to the child at the center of the controversy.

[115] The term "minor" is not defined and is used in contradictory ways. For example, it is used as an adjective, so that the "minor children" of a student visa holder may accompany him

HeinOnline -- 63 Ohio St. L.J. 997 2002

"juvenile" is used.[116] "Minor" and "juvenile" are occasionally used interchangeably, even within sentences.[117] Unlike "child," both "minor" and "juvenile" are terms of recent vintage in immigration law.[118]

1. *Why Alone?*

Thousands of children arrive in the United States unaccompanied by parents every year. More are separated from their parents after arrival. The limited definition of "child" in immigration law cannot alter the complex reality that thousands of children struggle through the maze of immigration law without adult assistance. Last year alone the INS detained more than 4,600 unaccompanied children.[119] The reasons that children arrive without their parents, or are separated from their parents, are varied and complex.

Some children are refugees fleeing persecution. It is estimated that over half the world's twenty million refugees and internally displaced persons are children, and that two to five percent of these children—up to one million children—are separated from their parents.[120] From the pool of refugees, only a small number of children make it to the United States. Those already separated from their families may make the journey on their own initiative. Parents, though, may send refugee

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until age twenty-one. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(F)(ii) (2000). In contrast, under the heading "Minors," calculations of time unlawfully present in the United States exempt "time in which the alien is under 18 years of age." Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(iii). In limited instances, special service requirements apply for "a minor under 14 years of age." 8 C.F.R. § 103.5a(c)(2)(ii) (2001); *see also* J. Daniel Dowell et al., *Protection and Custody of Children in United States Immigration Court Proceedings*, 16 NOVA L. REV. 1285, 1288–89 (1992) (noting immigration law's "morass of terminology" regarding children).

[116] By regulation, a juvenile is "defined as an alien under the age of 18 years." 8 C.F.R. § 236.3(a) (2001). In addition to seemingly excluding the possibility that U.S. citizens might be juveniles, the definition is inconsistent with provisions that persons may be eligible for classification as a "special immigrant juvenile" if under twenty-one years of age. *See* 8 C.F.R. § 204.11(c)(1) (2001) (extending eligibility for "special immigrant" to age twenty-one).

[117] "*Juveniles* may be released to a relative (brother, sister, aunt, uncle, or grandparent) not in Service detention who is willing to sponsor a *minor* and the *minor* may be released to that relative notwithstanding that the *juvenile* has a relative who is in detention." 8 C.F.R. § 212.5(a)(3)(i) (2001) (emphasis added).

[118] The distinction in terminology between "children" and "minors" is not insignificant. Language differences simultaneously reflect and reinforce underlying conceptions of children and children's rights. *See* Espenoza, *supra* note 7, at 411 (arguing that "the difference in language used [by the Supreme Court] to characterize . . . children sheds some light on the 'packaging' of children, which in turn shapes the Court's perception and, hence, the rights that will be extended to them").

[119] American Bar Association, Immigration Pro Bono Development Project, *Fact Sheet on Detained Immigrant and Refugee Children*, *available at* http://www.abanet.org/immigprobono/factsheetsimmigration.doc (Jan. 2002).

[120] *See* Bhabha & Young, *supra* note 67, at 758.

children to the United States seeking to find a safe haven.

Other children immigrate on their own or are sent by parents simply in search of a better life in the United States. In certain cases, a single family member is sent in the hope that he or she will serve as an "anchor" for later resettlement of other family members.[121] Still other children are "kidnapped, sold or tricked and trafficked into sexual or labor servitude."[122] This occurs both with and without a family's knowledge and consent.

Deciphering the motives underlying the arrival of children unaccompanied by parents is a complex task. Increasingly, unaccompanied children arrive through the intervention of traffickers or smugglers, even when their motivation and the immigration relief they seek is entirely legitimate.[123] The decision of parents to place a child in the hands of a smuggler may result from a wide range of motives. Some families may believe that they are acting in the best interests of the child, resorting to smugglers to secure safe passage and unaware of the exploitative practices to which such children are often exposed.[124] What may appear as the height of recklessness or malice may seem quite reasonable from the perspective of those in extreme situations.[125] In many instances, the judgment of children and parents is based on misinformation or incomplete information. Other children are victims knowingly placed in dangerous situations for the profit of their parents and others.

Children find themselves alone after arrival as well. Parents may bring a child to the United States, either with a temporary visa or through an illicit entry, and leave the child with relatives or friends to raise here following the parents' return home. While some children thus abandoned by parents may end up in a loving home, others encounter abuse or are neglected by their caretakers.[126] Undocumented immigrant children form a portion of the children that state child

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[121] *See* Jacqueline Bhabha, *Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children*, 7 U. CHI. L. SCH. ROUNDTABLE 269, 272 (2000).

[122] *Id.* at 275.

[123] For example, children with valid claims for asylum may seek the assistance of smugglers for entry at unauthorized points or for false documents for use at a regular port of entry. Babies adopted by well-meaning parents may have been obtained through illicit means. *Id.* at 272. The consequences of immigrating through illicit means can be serious and lasting. Such entry may create obstacles to obtaining legal status. Moreover, many children work for years to pay smugglers the fees charged for facilitating entry to the United States.

[124] *See id.* at 275.

[125] For example, a "Kosovar 16-year-old, orphaned and living in a refugee camp, may agree to be a prostitute in the Netherlands and not regret the decision post-migration. An exploitative or dangerous circumstance may be freely chosen as the most advantageous given the available options." *Id.* at 284–85.

[126] Gregory Zhong Tian Chen, *Elian or Alien? The Contradictions of Protecting Undocumented Children Under the Special Immigrant Juvenile Statute*, 27 HASTINGS CONST. L.Q. 597, 599 (2000).

HeinOnline -- 63 Ohio St. L.J. 999 2002

welfare systems remove from parents and caretakers.[127] Such children lack permanent legal immigration status and may later find themselves in removal proceedings or with limited options due to their lack of status.[128] Regardless of the reason children find themselves separated from parents, those children forced to navigate the immigration system alone face daunting barriers.

2. *Adult Procedures, Adult Laws*

Given that the basic framework of immigration law fails to recognize that children exist without parents, substantive and procedural rules do virtually nothing to account for the possibility of children in proceedings unaccompanied by parents. When children find themselves in immigration proceedings unaccompanied by adults, the same substantive rules, evidentiary requirements, and procedural complexities that apply to adults also apply to them.[129] Rather than remedies and procedures tailored for children, children suffer the same harsh consequences and limited procedural protections faced by adult immigrants.

The only procedural provision that distinguishes children and adults in formal immigration proceedings is a regulation which prohibits the Immigration Judge from accepting "an admission of removability from an unrepresented respondent who is incompetent or under the age of 18 and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend."[130] This provision is meant to protect children from making legal admissions that they do not understand. In lieu of accepting a legal admission, the Immigration Judge is instructed to hold a hearing to determine the facts of entry and immigration status.[131]

In practice, INS officers interrogate the child outside the court, where there are no safeguards in place to prevent abuse or coercion.[132] Resulting "facts" culled from these interviews, such as the child's reported birthplace and manner of entry, are then entered onto the court record, through documents or testimony, and the Immigration Judge makes the legal determination of removability.[133] Far from aiding children, this special "protection" guarantees that children will be

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[127] *Id.*

[128] *See* Judith Messina, *Life in the Margins: Young Illegal Alien's Hopes of a Normal Life in the United States Stifled by Deportation Fear*, CRAIN'S N. Y. BUS., July 16, 2001, at 1.

[129] *See* Bhabha & Young, *supra* note 67, at 757.

[130] 8 C.F.R. § 240.10(c) (2001). Generally, only after removability is established are applications for relief, such as asylum, heard.

[131] *Id.*

[132] *See* Perez-Funez v. INS, 619 F. Supp. 656, 662 (C.D. Cal. 1985) ("[T]he situation faced by unaccompanied minor aliens is inherently coercive.").

[133] *See* Terry Coonan, *Tolerating No Margin for Error: The Admissibility of Statements by Alien Minors in Deportation Proceedings*, 29 TEX. TECH L. REV. 75, 91 (1998) (proposing that various procedural requirements in the BIA system were inconsistent, and thus should be reformed).

HeinOnline -- 63 Ohio St. L.J. 1000 2002

interrogated by immigration officers in a setting which provides the least protection from coercive practices. Children are treated worse than adults.[134]

In all other respects, children in immigration proceedings have no procedural protections different from those afforded adults. Charges of inadmissibility[135] or removability[136] generally result in a hearing before an Immigration Judge.[137] Children are subject to the same grounds of inadmissibility and removal as adults.[138] Proceedings are quite formal: judges wear robes, the government is represented by an INS trial attorney, proceedings are taped via microphones located at counsel tables and witness stands, witnesses testify pursuant to direct and cross-examination, and objections to testimony and documentary evidence are raised. This setting is intimidating and confusing for adults, and is especially daunting to children.[139]

Adult immigrants have few rights in immigration court, and child immigrants fare no better. Child respondents, like adult respondents, have the "privilege of being represented, at no expense to the Government, by counsel of the alien's choosing."[140] In practice, it is estimated that as many as ninety percent of all respondents are unrepresented. Estimates of representation for children in immigration proceedings are slightly better, but, even among detained children still more than half lack legal representation.[141] A removal proceeding is "a

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[134] In two lengthy decisions by the Board of Immigration Appeals upholding this practice, the word "child" is never used, indicating little effort to see the effects of this practice from the perspective of children. *See In re* Ponce-Hernandez, Int. Dec. 3397 (BIA 1999); *In re Amaya-Castro*, 21 I. & N. Dec. 583 (BIA 1996).

[135] *See generally* Immigration and Nationality Act, 8 U.S.C. § 1182 (2000). Grounds of inadmissibility apply to those newly arriving in the country.

[136] *See generally* Immigration and Nationality Act, 8 U.S.C. § 1227 (2000). Grounds of removability apply to persons in and admitted to the United States.

[137] Immigration and Nationality Act, 8 U.S.C. § 1229(a)(3) (2000) ("Unless otherwise specified in this Act, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States.").

[138] For example, arriving immigrants are commonly charged with inadmissibility for not possessing a valid visa, Immigration and Nationality Act, 8 U.S.C. § 1182(a)(7)(A)(i) (2000), or for fraud in the form of attempted entry with false documents. 8 U.S.C. § 1182(a)(6)(c)(i) (2000). These grounds apply to children and adults equally.

[139] *See* Bhabha & Young, *supra* note 67, at 770 ("The traditional environment, which in so many ways is designed to inspire respect for the seriousness of the process, may intimidate children and inhibit their ability to fully participate in the hearing.").

[140] 8 U.S.C. § 1229(b)(4)(A) (2000).

[141] Elizabeth Amon, *Access Denied: Children in INS Custody Have No Right to Lawyer; Those Who Get One Risk Retaliation*, NAT'L L. J., Apr. 16, 2001 A1, A16 ("Of the more than 4,600 people in INS custody under the age of 18, fewer than half have attorneys."); American Bar Association, Immigration Pro Bono Development Project, *Fact Sheet on Detained Immigrant and Refugee Children*, *available at* http://www.abanet.org/immigprobono/factsheetsimmigration.doc. ("Without the right to government-appointed

confusing and threatening process, particularly for a non-citizen, with limited knowledge of immigration law, who is subject to interrogation by an Immigration and Naturalization Service . . . attorney and the Immigration Judge . . . , and who is unsure of what evidence to offer and how to meet the legal burdens of proof."[142] Not surprisingly, represented immigrants fare better in immigrant proceedings.[143]

This treatment of children as adults represents an extreme liberationist approach to children's rights, providing children with adult rights without consideration of their ability to effectuate them. Children are treated as adults not because they are determined to be sufficiently mature to effectuate rights without special procedures or supports. Rather, they simply are not "children" under immigration law and no provision is made to distinguish them from adults. This unthinking abandonment of children to adult status serves to silence children by not providing them with the means to assure that their voices are heard.

One of the strongest critiques of the extreme position of treating children as adults in immigration proceedings comes from the INS itself. Unfortunately, it comes in the form of non-binding guidelines[144] which apply only to the small fraction of children's cases that are heard not in immigration court but by specialized asylum officers.[145] These guidelines acknowledge that "children may not present their cases in the same way as adults, and suggest[ ] child-sensitive procedures intended to help Asylum Officers to interact more meaningfully with the child during the asylum [process]."[146] For example, the guidelines call for special training for asylum officers in techniques of child-sensitive questioning "tailored to the child's age, stage of development, background, and level of

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counsel in immigration proceedings, an estimated 10% of people detained by the INS secure representation, including children.") (July 2001).

[142] Beth J. Werlin, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393, 394 (2000) (discussing how in light of the complex nature of deportation hearings, immigrants should be afforded the right to counsel).

[143] For example, "[i]n FY 1999, the immigration courts granted asylum claims four to six times as often where the claimant was represented." Susan F. Martin & Andrew I. Schoenholtz, *Asylum in Practice: Successes, Failures, and the Challenges Ahead*, 14 GEO. IMMIGR. L.J. 589, 595 (2000) (looking at refugee and asylum policy in practice in Europe and North America).

[144] Memorandum from Jeff Weiss, *supra* note 67.

[145] These so-called "affirmative" cases involve persons who have entered the United States but are not in removal proceedings. Applicants file first with the asylum office, where their claims are heard by a corps of asylum officers who have authority to grant asylum. If they do not grant an asylum claim, the case is referred to immigration court for removal proceedings, where asylum claims may be renewed before an Immigration Judge. *See* Immigration and Nationality Act, 8 U.S.C. § 1158(d)(5) (2000). Unaccompanied minors who are identified and detained by the INS are immediately placed in removal proceedings and thus will never have the opportunity to file affirmatively.

[146] Memorandum from Jeff Weiss, *supra* note 67, at 5.

HeinOnline -- 63 Ohio St. L.J. 1002 2002

sophistication."[147] But this training does not reach beyond the small asylum officer corps, and the overwhelming majority of immigration officers have no training related to working with or understanding children. The stark contrast between the child-centered approach of the guidelines and the adult reality faced by children in immigration court highlights the extent to which children are marginalized.

3. *Worst of Both Worlds*

Immigration courts are not specialized. For example, there is no asylum court or juvenile immigration court. The decision makers who decide the fate of children asylum seekers are the same who hear all other claims for relief. Even though subject to the same harsh laws and procedures as adults, unaccompanied children still struggle to overcome the dominant bias of immigration law that children are objects and not actors.

For example, in 1992, Lucienne Yvette Civil was fifteen years old when she began to speak out in favor of Jean-Bertrand Aristide in Haiti.[148] In immigration court, she testified that she fled Haiti because her pro-Aristide statements resulted in her being targeted by the Ton Ton Macoutes, who threatened her at her home in the middle of the night. In rejecting her asylum claim, the Immigration Judge opined that "it is almost inconceivable to believe that the Ton Ton Macoutes could be fearful of the conversations of 15-year-old children."[149] Even substantial and specific documentary evidence that "anti-Aristide forces viewed pro-Aristide young people as an important source of support for Aristide, and they went to great lengths to intimidate those young people through terror and torture"[150] could not shake the Immigration Judge's deeply ingrained ideas about children.

III. SPECIAL IMMIGRANT JUVENILE STATUS: A FOOTHOLD FOR THE BEST INTERESTS OF CHILDREN

Laura Arteaga was born in Mexico and brought to the United States by her parents at age two.[151] Following repeated incidents of severe abuse, the State brought proceedings to terminate parental rights and, at the age of four, Laura became a ward of the State.[152] At the time parental rights were terminated, Laura's father was a legal permanent resident, her mother was a temporary legal resident who had applied for permanent status, and her younger sister was a

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[147] *Id.* at 10.

[148] Civil v. INS, 140 F.3d 52, 53–54 (1st Cir. 1998).

[149] *Id.* at 55.

[150] *Id.* at 64 (Bownes, J., dissenting).

[151] Arteaga v. Tex. Dep't of Protective and Regulatory Servs., 924 S.W.2d 756, 758 (Tex. App. 1996).

[152] *Id.* at 759.

citizen due to her birth in the United States. Laura, however, did not have legal immigration status in the United States.[153]

State dependency in itself does nothing to alter federal immigration status. Until the last decade, even though children such as Laura had no control over their decision to immigrate to this country, they routinely found themselves in an immigration predicament. They remained in state care until adulthood. Upon release from care, they found themselves turned out to face the world without legal immigration status and all its associated benefits, such as protection from removal, employment authorization, and access to financial aid for college. In 1990, special immigrant juvenile status was created as an avenue to legal immigration status for children who become juvenile court dependents.[154] Laura was among the first to benefit from this underused law.[155] The number of children benefiting from this status, which is available to both children in the United States and those apprehended at the border, remains low.[156]

Special immigrant juvenile status remains unique in several respects. First, it is the only provision in immigration law that expressly incorporates a best interests of the child standard into its eligibility criteria. Second, it created a unique hybrid system of state and federal collaboration, drawing on state child welfare expertise to complement INS expertise in immigration matters. The statute, therefore, not only integrates a best interests standard into immigration law, but also locates decisions about child welfare with those most qualified to make them.

This approach represents a radical break from the dominant modes of thinking about children in immigration law. In stark contrast to the rest of immigration law, implementation of the special immigrant juvenile status affirmatively requires decision makers to view children as persons, not objects.

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[153] *Id.*

[154] Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J) (2000). Although enacted in 1990 as section 153 of the Immigration Act of 1990, Pub. L. No. 101-649 (1990), necessary technical amendments and regulations delayed implementation until late 1993. *See* Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733; 58 Fed. Reg. 42850 (Aug. 12, 1993) (codified at 8 C.F.R. § 204.11) (2001); *see also* SARAH IGNATIUS & ELIZABETH STICKNEY, IMMIGRATION LAW AND THE FAMILY 14–75 (2001) ("Practitioners should be aware that this is a relatively new remedy with many grey areas that is still in the beginning stages of becoming clarified by case law.").

[155] *Arteaga*, 924 S.W.2d at 759.

[156] Only 287 children were granted special immigrant juvenile status in 1998. IMMIGRATION AND NATURALIZATION SERVICE, 1998 STATISTICAL YEAR 17 tbl.5, *available at* http://www.ins.usdoj.gov/graphics/aboutins/statistics/imm98.pdf. Special immigrant juvenile grants numbered 430 in 1997 and 390 in 1996. IMMIGRATION AND NATURALIZATION SERVICE, 1997 STATISTICAL YEAR, *available at* http://www.ins.usdoj.gov/graphics/aboutins/statistics/97immttl.pdf; IMMIGRATION AND NATURALIZATION SERVICE, 1996 STATISTICAL YEAR, *available at* http://www.ins.usdoj.govgraphics/aboutins/statistics/annual/fy96/index.htm.

HeinOnline -- 63 Ohio St. L.J. 1004 2002

But overcoming the established thinking about children has not proven easy. The discussion below sets outs the design and underlying rationales of the special immigrant juvenile scheme. It then turns to an exploration of the manner in which the statute has been implemented and discusses barriers that have emerged in practice. The difficulties encountered by children seeking relief pursuant to the special immigrant juvenile statute not only provide a window into the persistent influence of limited conceptions of children's rights, but also illustrate barriers to child-centered approaches that must be addressed and overcome in any broader attempts to reform thinking about children's rights in immigration law.

A. *Special Immigrant Juvenile Status as Designed*

Special immigrant juvenile status is designed to provide an avenue of immigration relief for undocumented children who are in need of protection from state juvenile court dependency systems.[157] It employs a unique hybrid procedure requiring the collaboration of state and federal systems. The statute, recognizing that juvenile courts have particularized training and expertise in the area of child welfare and abuse, places critical decisions about the child's best interests and the possibility of family reunification with state juvenile courts.[158] Subsequent immigration decisions by the INS are then predicated on the determinations of the juvenile court.

To establish eligibility for special immigrant juvenile status, a child first must be present in the United States. Most children who benefit from this provision are, like Laura Arteaga, already living in the United States. Special immigrant juvenile status, however, is plainly available to children who are intercepted on arrival and in the custody of the INS, though these children face the tremendous obstacle of obtaining INS consent to the jurisdiction of the juvenile court.[159]

Next, the applicant must be a child "declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or

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[157] A "juvenile court" is defined as any "court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles." 8 C.F.R. § 204.11(a) (2001).

[158] "The reliance upon state juvenile courts anticipated in the SIJ statutory scheme signals Congress' recognition that the states retain primary responsibility and administrative competency to protect child welfare." Chen, *supra* note 126, at 609. Congress has generally limited the federal role in child welfare to setting regulatory standards for state and local child welfare programs and offering monetary funding incentives to encourage state compliance. The implementation of systems to protect child welfare has generally been left to the states and "[t]he federal government's more limited regulatory role in child welfare has resulted in comparatively less operational capacity in dealing with individual child welfare cases." *Id.* at 611. Therefore, the federal government "lacks the professional staff and administrative support to make assessments of individual children's mental and physical conditions and their welfare needs." *Id.*

[159] *See id.* at 615–16; *see also infra* notes 176–94 and accompanying text.

placed under the custody of, an agency or department of a State and who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment."[160] By regulation, "long-term foster care" means "that a determination has been made by the juvenile court that family reunification is no longer a viable option."[161] A child who is determined "eligible" for long-term foster care generally will have been placed in a foster care program, though in some situations placement with a guardian or adoption based on a determination of eligibility for long-term foster care is sufficient.[162]

Third, the juvenile court must determine "that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence."[163] This best-interests determination, like the determination of eligibility for long-term foster care, is specifically assigned to the juvenile court and thus takes advantage of the juvenile court's expertise and experience. The juvenile court decision that it is in the best interests of a child not to be returned to another country is not an immigration decision. Rather, the statute requires only that juvenile courts decide issues that they regularly address: the best interests of a child based on the complex legal and policy considerations inherent in child welfare matters. The subsequent immigration consequences of this decision, outside the juvenile court's expertise,

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[160] Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J)(i) (2000). The words "due to abuse, neglect, or abandonment" were added to the statute in 1997. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, §§ 111, 113 Stat. 2440, 2460. There is "no contemporaneous legislative history . . . which explains why SIJ status was originally created in 1990" and "the 1990 definition of Special Immigrant Juvenile contained no requirements that the juvenile be abandoned, neglected or abused." Yu v. Brown, 92 F. Supp. 2d 1236, 1246 (D.N.M. 2000). Nonetheless, the House Conference Report on the 1997 amendment states that "[t]he language has been modified in order to limit the beneficiaries of this provision to those juveniles for whom it was created, namely abandoned, neglected, or abused children." H.R. CONF. REP. NO. 105-405, at 130 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2941, 2981.

[161] 8 C.F.R. § 204.11(a) (2001).

[162] "A child who is eligible for long-term foster care will normally be expected to remain in foster care until reaching the age of majority, unless the child is adopted or placed in a guardianship situation." 8 C.F.R. § 204.11(a) (2001). However, the "court's placement of the beneficiary in a guardianship situation does not preclude a finding that the beneficiary is dependent on the juvenile court." *In the Matter of Menjivar*, at 4 (INS Administrative Appeals Unit, Dec. 27, 1994) The court held

> [that the] acceptance of jurisdiction over the custody of a child by a juvenile court, when the child's parents have effectively relinquished control of the child, makes the child dependent upon the juvenile court, whether the child is placed by the court in foster care or, as here, in a guardianship situation.

Id.

[163] Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J)(ii) (2000).

HeinOnline -- 63 Ohio St. L.J. 1006 2002

are reserved to the INS.[164]

Though critical decisions affecting eligibility are delegated to juvenile courts, the INS retains authority over the final immigration determination. For example, grounds of inadmissibility and bars to adjustment of status, which apply to all immigrants, generally are applied to special immigrant juveniles.[165] Waivers of some grounds of inadmissibility are specifically allowed, and these are adjudicated by the INS.[166]

More centrally, the INS retains control over the ultimate immigration determination through the requirement that in all cases the Attorney General "expressly consent[] to the dependency order serving as a precondition to the grant of special immigrant juvenile status."[167] In addition to this general consent, there is a jurisdictional consent provision such that when a child is in the "actual or constructive custody" of the Attorney General, "no juvenile court has jurisdiction to determine . . . custody status or placement of an alien . . . unless the Attorney General specifically consents to such jurisdiction."[168]

Although these two consent provisions were enacted in 1997, the INS has yet to issue regulations regarding their implementation, and it has relied on two memoranda to set out its interpretation of the consent provisions.[169] As to the general consent, the INS acknowledges little discretion, stating that where a child

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[164] *See* Gao v. Jenifer, 185 F.3d 548, 555 (6th Cir. 1999) ("It is the operation of INS rules that may prevent Gao's deportation, not the action of the county court.").

[165] Immigration and Nationality Act, 8 U.S.C. § 1255(h) (2000). As initially enacted, the special immigrant juvenile statute made no special provision for waiving grounds of inadmissibility, such as bars to the admission of persons likely to become a public charge. Since juvenile court dependents are public charges by definition, none were admissible under the original statute which provided no waiver of this ground of inadmissibility. This oversight was corrected with a technical amendment, yet it delayed the implementation of special immigrant juvenile status for several years. *See* Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, §302, 105 Stat. 1733, 1744–45. Even then, the statute was not implemented until several years later, after regulations were finally promulgated. *See* 8 C.F.R. § 204.11 (2001).

[166] *See* Immigration and Nationality Act, 8 U.S.C. § 1255(h) (2000).

[167] Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J)(iii) (2000). The explicit provision for Attorney General consent as a part of SIJS eligibility was added in 1997. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105–119, §113, 111 Stat. 2440, 2460–61.

[168] Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J)(iii)(I) (2000).

[169] Memorandum from Thomas E. Cook, Acting Assistant Commissioner, Adjudication Division, U.S. Dep't of Justice, INS, Regarding Interim Field Guidance Relating to Public Law 105-119 (Sec. 113) Amending Section 101(a)(27)(J) of the INA, Special Immigrant Juveniles (August 7, 1998) (on file with author); Memorandum from Thomas E. Cook, Acting Assistant Commissioner, Adjudication Division, U.S. Dep't of Justice, INS, Regarding Special Immigrant Juveniles, Memorandum 2: Clarification Guidance (July 9, 1999) (on file with author) [hereinafter Cook Memorandum #2]. The first memorandum confused the INS consent required in all cases and the initial consent to jurisdiction of the juvenile court required only in cases where the child is in INS custody, resulting in the clarification memorandum.

is not in INS custody and a juvenile court order sets out the required findings for special immigrant juvenile status, "consent to the order serving as a precondition must be granted."[170] Where a child is in INS custody, the INS states that it "should consent to the juvenile court's jurisdiction if: (1) it appears that the juvenile will be eligible for SIJ status if a dependency order is issued; and (2) in the judgment of the [INS] district director, the dependency proceeding would be in the best interest of the juvenile."[171] As discussed below, it is in the INS's implementation of both the general and jurisdictional consent provisions that the influence of the dominant modes of thinking about children in immigration law is most distinctly visible.

Finally, the special immigrant juvenile statute provides that "no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter."[172] In other words, if a child is accorded immigration status on the basis of state dependency and the improbability of reunification with parents, the parents may not profit from this when the child becomes an adult and perhaps would like to sponsor them for immigration status.

This statute represents a significant first step toward a more child-centered approach to thinking about children in immigration law. Merely acknowledging the reality of children existing separately from parents who are in need of protection is critical. The statute is strongly grounded in a child-centered perspective by expressly incorporating the best interests standard as an eligibility criteria—the statute requires consideration of children's perspectives, necessary to truly determine their best interests.[173] Yet the statute also strikes a workable balance between acting in the best interests of children and the need for meaningful control of immigration by leaving the decisions about the applicability of grounds of inadmissibility and waivers to the INS.

Perhaps as importantly, the statute locates decisions about the best interests of the child in juvenile courts, which are far better suited than the INS to ascertain the best interests of the child and are generally trained and experienced at listening to children's voices and implementing a child-centered approach to decision-making. Moreover, most juvenile courts have procedures in place to ensure that, when needed, a child will have an appointed counsel or guardian ad

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[170] *Id.* at 2. In the cases of children not in INS custody, "[j]uvenile courts do not need the Attorney General's consent to take jurisdiction to issue dependency orders for these juveniles" and "INS officials should not become involved in juvenile court proceedings in order to consent to the dependency orders." *Id.*

[171] *Id.*

[172] Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J)(iii)(II) (2000).

[173] *See supra* Part II.

HeinOnline -- 63 Ohio St. L.J. 1008 2002

litem to facilitate the consideration of the child's perspectives.[174] In this framework, children are not only recognized as rights holders, but also are provided a forum with the supports they need to exercise their rights.

B. *Special Immigrant Juvenile Status as Implemented*

The INS has recognized, in theory at least, the crucial distinction in roles between it and the juvenile courts and the differences in expertise underlying that distinction. In promulgating its initial regulations regarding special immigrant juvenile status, the INS commented that "the decision concerning the best interest of the child may only be made by the juvenile court."[175] The INS acknowledged "that it would be both impractical and inappropriate for the Service to routinely readjudicate judicial or social service agency administrative determinations as to the juvenile's best interest."[176] Further, the INS noted that it:

> does not intend to make determinations in the course of deportation proceedings regarding the 'best interest' of a child for the purpose of establishing eligibility for special immigrant juvenile classification.... [I]t would be impractical and inappropriate to impose consultation requirements upon the juvenile courts or the social service system, especially requirements which could possibly delay action urgently needed to ensure proper care for dependent children.[177]

In practice, however, the INS has failed to break free of its dominant modes of thinking about children. The result has been a usurpation of the juvenile court role and the creation of substantial barriers for abused, neglected, and abandoned children seeking immigration relief.[178]

This failure is most apparent when children are in INS custody, though it is not limited to this context.[179] In this circumstance, the INS wields tremendous power via its decision whether to consent to juvenile court jurisdiction.[180] In its guidelines, the INS states that it "should consent to the juvenile court's jurisdiction if: (1) it appears that the juvenile will be eligible for SIJ status if a

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[174] Guggenheim, *supra* note 55, at 305 ("Every state requires that some kind of adult represent children when their parents or guardians are respondents in local child protection proceedings.").

[175] Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court, Final Rule, Department of Justice, Immigration and Naturalization Service, Supplementary Information, 58 Fed. Reg. 42,847 (Aug. 12, 1993).

[176] *Id.*

[177] *Id.*

[178] Chen, *supra* note 126, at 643 ("The SIJ statute removes from the INS the authority for assessing the minor's personal experience of abuse, neglect or abandonment.").

[179] *Id.* at 613 (noting that "the INS has frequently denied child welfare protection to minors who are in INS legal custody, despite the fact that they could be eligible for SIJ relief").

[180] Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J)(iii)(I) (2000).

HeinOnline -- 63 Ohio St. L.J. 1009 2002

dependency order is issued; and (2) in the judgment of the [INS] district director, the dependency proceeding would be in the best interest of the juvenile."[181] The approach set out in the guidelines undermines the statute's carefully crafted balance of state and federal decision-making in two ways. First, under this approach, the INS prejudges precisely the issues that the statute places before the juvenile court. Second, the guidelines place the INS in the role of making a best interest determination, a task specifically assigned to the juvenile court and outside the scope of INS expertise. The INS often confuses these, blending one into the other as demonstrated below.

Z.Q.L., a seventeen-year-old Chinese girl who claimed to have been subjected to forced labor, sexual assault, and physical abuse perpetrated by her mother and other family members, was apprehended by immigration authorities while attempting to enter the United States.[182] She obtained pro bono counsel who requested consent for juvenile court jurisdiction to determine if she met the requirements for special immigrant juvenile status. While in INS detention over a period of nearly six months, Z.Q.L. made eight short phone calls to her home, speaking for a total of eighty-three minutes.[183] Without requesting any submission of documentary evidence or holding any sort of hearing to judge the veracity of Z.Q.L.'s claims, the INS concluded that:

> the evidence submitted is insufficient to support that [Z.Q.L.] is abused, neglected or abandoned. Additionally, the evidence does not reveal that family reunification is no longer a viable option. [Z.Q.L.] has been in constant contact with her family in China by initiating frequent phone calls to her mother. For these reasons, [Z.Q.L.] is not eligible for long-term foster care; a requirement for SIJ status. Therefore, the district director cannot conclude that a dependency proceeding would be in the best interest of the juvenile.[184]

The determinations made by the INS, without a hearing and without explanation, are precisely the type of complex child welfare decisions statutorily assigned to the juvenile court.

The decision that an abused teenage girl, detained in a foreign country, is not in need of foster care simply because she called her mother, reflects a particularly unsophisticated understanding of child welfare issues, even without the complications inherent in the immigration context. As discussed above, the

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[181] Cook Memorandum 2, *supra* note 169, at 2.

[182] *See Z.Q.L. v. Perryman*, Verified Complaint at ¶¶ 8–11 (May 30, 2001) (on file with author); Memorandum from Brian R. Perryman, District Director, U.S. Department of Justice, Immigration and Naturalization Service, Regarding Z.Q.L., Decision on Consent for Jurisdiction in Juvenile Court 1 (May 21, 2001) (on file with author).

[183] *See* Memorandum from Brian R. Perryman, *supra* note 182, at 2. As a standard practice, the INS requires children to contact their parents if the parents are reachable. Telephone Interview with Lisa Frydman, Florida Immigrant Advocacy Center (July 26, 2001).

[184] Memorandum from Brian R. Perryman, *supra* note 182, at 5.

HeinOnline -- 63 Ohio St. L.J. 1010 2002

motives underlying decisions to immigrate are complex.[185] Whether the decision of Z.Q.L. was voluntary or coerced was unclear. The motives of her parents, if they were involved in the decision at all, were obscure and certainly could range from well-intentioned to exploitative. The record contained no evidence regarding their attitude towards Z.Q.L.'s possible return. Mere contact with parents was manifestly insufficient to make a determination that reunification is in a child's best interests or even possible. The difficult and subtle determinations that Z.Q.L.'s situation required are precisely those that the statute assigns to the juvenile court. Through its practice of prejudging issues reserved to the juvenile court, the INS removes these decisions from a child-centered forum, subverting the statute's design to assure that the voices of children are considered.

Moreover, the substance of the INS decision treats Z.Q.L. as an object, emphasizing parental possession and control while failing to give any weight to the child's views. The complete disregard of the serious allegations of abuse at the hands of family members demonstrates a reluctance to question the rights of the parents. This is hardly surprising given that INS district directors and other officers who make decisions related to special immigrant juvenile status are not trained in child welfare.[186] Merely inserting the phrase "best interest of the child" into the statute is not sufficient to move these decision makers away from deeply ingrained notions of children and children's rights that are daily reinforced by other aspects of their work with immigration law.

Fortunately for Z.Q.L., her pro bono counsel convinced a federal court to order the INS to consent to juvenile court jurisdiction. Following a hearing, the juvenile court, working from a more child-centered perspective, found that Z.Q.L. was eligible for long-term foster care. Unfortunately, the INS approach to Z.Q.L. was not a singular event.

In May 2000, when INS airport officials determined that a six-year-old girl nicknamed Fega had arrived alone in New York City from Nigeria with false documents, they took her into detention and placed her in removal proceedings.[187] Fega's father had put her on the plane, to be met by her mother in New York.[188] Fega's mother, however, did not come forward, reportedly because she lacked legal immigration status and feared that she would be placed in removal proceedings herself.[189] Fega remained in INS detention in Miami for more than a

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[185] *See supra* notes 123–25 and accompanying text.

[186] For example, the INS official charged with overseeing juvenile matters in Miami is a deportation officer whose previous experience is limited to work as a sports trainer and Marine Corps security guard. Eric Schmitt, *INS Both Jailer and Parent to Child Without Nation*, N.Y. TIMES, June 24, 2001, at A1.

[187] *Id.*

[188] *Id.*

[189] *Id.*

HeinOnline -- 63 Ohio St. L.J. 1011 2002

year.[190] Her father sent messages to the INS through a series of relatives, refusing her return and creating confusion about his whereabouts.[191] Meanwhile, a contradictory series of contacts with purported aunts, uncles, and cousins left the INS confused and suspicious about the parents' motives in abandoning the girl.[192] Faced with conflicting information regarding possible placements of the child, the INS simply left her in detention.[193]

Through pro bono counsel, Fega sought consent of the INS to juvenile court jurisdiction so that it might make findings establishing her eligibility for foster care and special immigrant juvenile status.[194] As was the case of Z.Q.L., this is precisely the type of complex situation that requires expertise in child welfare to unravel. The INS, however, denied consent, stating that "the evidence demonstrates that the parents decided to abandon the child mainly to suit two immigration purposes: obtain lawful permanent resident status for the minor and allow the mother to evade removal proceedings by the [INS]."[195] The district director found that the mother's failure to come forward due to fear of removal "does not . . . constitute abandonment. . . . The district director believes that, in this case, family reunification will follow as soon as the child is released from INS custody since that is the only reason they are now separated."[196] In other words, Fega is abandoned by her parents, but since the cause of her abandonment is detention by the INS and the mother's fear of the INS's law enforcement role, the INS will not recognize this as abandonment.

In its decision, the INS all but labeled Fega an object. The actions and motives of the INS and her parents, not her own interests, determined her fate. After more than a year in detention, essentially as bait to lure her undocumented mother into immigration proceedings, the INS finally released Fega to a cousin.[197] The INS still has not consented to juvenile court jurisdiction that might permit her to obtain stable immigration status.[198] The failure of the INS to recognize Fega as a person and consider her interests means that she suffered prolonged detention and faces an uncertain future.

Fega's situation highlights the conflict inherent in the multiple roles played

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[190] *Nigerian Girl, 8, Released to Family in Hartford*, ASSOCIATED PRESS NEWSWIRES, Aug. 10, 2000, WL APWIRES File [hereinafter *Released to Family*].

[191] Eric Schmitt, *Case of Detained Nigerian Girl Takes U.S. Agency to London*, N.Y. TIMES, June 26, 2001, at A15.

[192] Schmitt, *supra* note 186, at A1; *see also* Memorandum from James J. Minton, Acting Assistant District Director, U.S. Department of Justice, Immigration and Naturalization Service, Regarding Jane Doe, Decision on Consent for Jurisdiction in Juvenile Court 2–5 (January 10, 2001) (on file with author).

[193] *See* Eric Schmitt, *supra* note 186, at A1.

[194] *Id.*

[195] Memorandum from James J. Minton, *supra* note 192, at 8.

[196] *Id.* at 9.

[197] *Released to Family*, *supra* note 190.

[198] *Id.*

HeinOnline -- 63 Ohio St. L.J. 1012 2002

by the INS. Commentators have long decried the conflict in having a single agency that adjudicates claims for immigration benefits while protecting the borders and prosecuting violations of immigration laws.[199] This conflict is at its height when the INS is not only adjudicator and enforcer, but guardian and enforcer.[200] Practice has demonstrated that, in reconciling these roles, the role of immigration law enforcer is dominant and hampers the ability of the INS to serve as a guardian looking out for the best interests of the child. As one judge wondered, "What kind of a guardian is the INS where 'the guardian' wants to deport [the child] and his so-called 'non-guardians,' his foster parents, want to help him in this country and not deport him. Who is really guarding whom?"[201] This conflict in detention situations makes the INS practice of appropriating the role of the juvenile court in deciding best interests all the more improper. The dominant law enforcement role, with its emphasis on authority and control, reinforces the INS's dominant mode of thinking about children as objects. The role conflict thus inhibits the INS from hearing children's voices and stands as a significant barrier to the adoption of a child-centered approach in reaching immigration benefit decisions.

The experience of the first few years of implementation of the special immigrant juvenile statute demonstrates the difficulty that lies ahead in attempts to move immigration away from deeply ingrained conceptions of children and children's rights. Despite an innovative statutory design, overcoming dominant modes of thinking about children has not proven easy. Property-influenced conceptions of children's rights have continuing effect on decision making, skewing implementation of the statute so that children are not treated as persons but as objects. This conception of children, reinforced by the INS's primary role as an enforcement agency, creates a significant barrier to meaningful reform. The discussion below turns to the challenges that lie ahead if we are to broaden thinking about children and enhance child-centered perspectives in the special immigrant juvenile statute and in immigration law in general.

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[199] The INS's "primary missions and functions are to enforce immigration law, monitor United States borders and ports of entry, and to remove individuals who do not have lawful immigration status." Chen, *supra* note 126, at 612. As of fiscal year 2000, the "INS was the largest federal law enforcement agency in the United States." Immigration and Naturalization Service, *This Month in Immigration History: August 1997*, *at* http://www.ins.usdoj.gov/graphics/aboutins/history/5Aug1997.htm.

[200] Chen, *supra* note 126, at 612 ("The role of the INS is that of a gatekeeper, not a disinterested party concerned with assessing the needs of children.").

[201] In the Matter of Y.W., 1996 WL 665937, at *5 (Minn. App. Nov. 19, 1996) (Randall, J., concurring specially). This case arose prior to the consent provisions were added to the special immigrant juvenile statute in 1997. The child had been released from the physical custody of INS, but the INS retained legal custody. *Id.* at *1.

IV. LOOKING AHEAD: CONCLUSIONS AND RECOMMENDATIONS

The deeply ingrained conceptions of children's rights that underlie immigration law continue to shape and color the treatment of children in immigration matters. As exemplified in the limited conception of a "child" in immigration law and the resulting treatment of children not fitting in this narrow category as adults, critical frameworks of immigration simultaneously reflect and reinforce discredited approaches to children's rights. These dominant conceptions influence the treatment of children in all immigration matters, limiting children's status as persons and as individual rights holders. These dominant conceptions of children's rights also undermine attempts to inject a more child-centered approach into immigration law.

The experience of implementing the special immigrant juvenile statute highlights the difficulty in giving effect to even explicitly child-centered provisions when those provisions are dissonant with the dominant modes of thinking and practice that form the bulk of the decision maker's work. It is important that we continue to create and support provisions such as the special immigrant juvenile statute that provide new approaches to enhance respect for children's voices and interests. But as long as basic frameworks of immigration law reinforce limited ideas of children's rights, it will be difficult to meaningfully advance child-centered perspectives among immigration law decision makers. This suggests two approaches. First, decisions about children's welfare should be removed from the INS. Second, and more generally, we should reform immigration law to remove elements that reinforce discredited conceptions of children.

Decisions about children's best interests should be located with independent decision makers who have expertise in child welfare. Such decision makers could be found in juvenile courts, as in the design of the special immigrant juvenile statute, but safeguards are required to insure that the INS is not permitted to circumvent the design. An alternate approach is contained in a bill currently pending that would create an Office of Children's Services within the Department of Justice and task it with care and custody of unaccompanied minor children.[202] Calls for INS restructuring are commonplace,[203] and those that have gained the most support suggest separation of the enforcement and adjudication functions of the INS.[204] This proposal approaches this separation by removing a narrow class of decisions about children's welfare from the INS.

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[202] The Unaccompanied Alien Child Protection Act, S.B. 121, 107th Cong. (2001).

[203] *See, e.g.*, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, INS REORGANIZATION ADVOCACY PACKET 1 (July 2, 2001), *available at* http://www.aila.org/newsroom/21IP1005.html ("Since 1990, when the Commission on Immigration Reform recommended breaking up the INS, several reorganization proposals have been introduced in Congress.").

[204] *Id.*

HeinOnline -- 63 Ohio St. L.J. 1014 2002

Either of these approaches would address the more egregious instances of INS failure to consider children's interests, such as those arising from the current conflict inherent in asking the INS to determine a child's best interests while also carrying out its law enforcement or adjudicatory functions. Both would locate decisions about child welfare with decision makers who are trained in such matters, and would provide children with representation independent of the INS. But these reforms reach only a narrow population of unaccompanied children and only a narrow class of decisions that may affect them.

Certainly children in particularly vulnerable situations need, indeed demand, our urgent attention. But changes affecting only relatively small populations of children are not sufficient. As demonstrated in this article, conceptions about children's rights influence a tremendous range of decisions made by the INS in a variety of contexts. Though every decision affecting a child may not expressly be a best interests determination, conceptions of children and children's rights inform and influence decision makers in all matters involving children. Infusing every decision affecting children with an acknowledgement that children's voices must be heard and that children's best interests are a primary consideration, as called for in the Convention on the Rights of the Child, requires more general reform of the treatment of children in immigration law.

The idea that children's rights should inform all mainstream immigration law and debates should not sound as ambitious as it does. Children comprise one-third of the annual immigration total in this country—they are not a miniscule special interest group or an outlier population. We should unabashedly demand that children's perspectives inform larger discussions of immigration law and policy. Only then will it be possible to weed out the dominant conceptions of children's rights lurking in immigration law and practice.

For example, we must reconsider the role of children in family-sponsored immigration. Questions about the role of family are central to discussions of immigration reform.[205] Recently, the Commission on Immigration Reform recommended further strengthening the longstanding bias of immigration law toward traditional nuclear families.[206] Scholars have presented persuasive arguments regarding the importance of considering alternative conceptualizations of family, such as extended or nontraditional families.[207] As the debate about the nature of family in immigration law continues, the role of children in families

[205] *See* Motomura, *supra* note 90, at 511 ("In the immigration debate now raging in Congress, one of the most important questions is how family ties should be taken into account.").

[206] U.S. COMMISSION ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 59–67 (1997) (proposing to phase out family immigration not based on nuclear family relationships).

[207] *See, e.g.*, Kelly, *supra* note 90, at 971–73; *see also* Brian McGloin, Note, *Diverse Families with Parallel Needs: A Proposal for Same-Sex Immigration Benefits*, 30 CAL. W. INT'L L.J. 159 (1999).

HeinOnline -- 63 Ohio St. L.J. 1015 2002

must be central. Many families are organized around children. The reality of family from the perspective of children must receive as much attention as the reality of family from the perspective of parents and other less traditional heads-of-households. Any rethinking of family-sponsored immigration must recognize children as actors in families and not simply objects.

Similarly, as legislators increasingly discuss the idea that immigrants might "earn" legal immigration over time, through past employment or through "guest worker" programs, the perspective of children must not be forgotten.[208] Just as adults grow ties with this country through living and working here, children's experiences growing up and attending school create equal, if not stronger, bonds with this country. One hopeful proposal would permit children who have lived in the United States for more than five years to acquire legal permanent resident status on the basis of their pursuit of higher education.[209] This approach recognizes children as actors who, based on their own actions and ambitions, may qualify for immigration status. Such perspectives should be commonplace in immigration law.

Uncovering the unacknowledged conceptions of children's rights has value in itself, but is only a first step toward engaging in a broader debate about children's rights in immigration law.[210] Other areas of the law that involve children have engaged in furious and protracted debate about the nature of children and children's rights.[211] The very existence of such debates forces serious thought about children and makes it impossible to ignore children's perspectives. In time, such debates can lead to a greater understanding of children and a consensus about aspects of their treatment by the law.[212] To move children from objects to actors in immigration law will require a struggle with the difficult issues of children's rights raised in the context of immigration law.

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[208] *See, e.g.*, Eric Schmitt, *Bush Says Plan for Immigrants Could Expand*, N.Y. TIMES, July 27, 2001, at A14 (discussing proposal that "new workers with temporary visas could earn permanent legal residency over time, based on their job history and length of residency, and so could immigrants already here unlawfully").

[209] *See* The Student Adjustment Act of 2001, H.R. 1918, 107th Cong. (2001), *available at* http://theorator.com/bills107/hr1918.html.

[210] Kelly, *supra* note 90, at 945 (arguing that "uncovering the bias leads to questioning its propriety and working to adapt the law").

[211] *See supra* Part II.

[212] *See, e.g.*, Guggenheim, *supra* note 55, at 310–19 (describing emergence of consensus regarding aspects of the role of attorneys who represent children).

HeinOnline -- 63 Ohio St. L.J. 1016 2002