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Thinking Small: The Need for Big Changes in Immigration Law's Treatment of Children

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Thinking Small: The Need for Big Changes in Immigration Law's Treatment of Children

DAVID B. THRONSON*

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Introduction

U.S. immigration law and policy employs assumptions and attitudes regarding children that are critical in shaping the lives of child migrants and children of migrants alike. Children themselves comprise a substantial portion of the population of migrants in the United States, sometimes unaccompanied, but more often with families. Some children lack authorization to remain in the United States. Other children may themselves have legal permission to remain in the United States, but still lead lives shaped and influenced by the application of immigration law to family members. Immigration law's treatment of children across these divides – alone or with family, with papers and without – is in some respects quite different. Yet across the differences, immigration law has been consistent in the devaluation of children and their interests in a manner that impacts children both individually and in families.

U.S. immigration law and policy fail to align paths to legal status with the motivations of unauthorized migrants to arrive and remain in the United States. The peculiar treatment of children in immigration law is a significant factor in this misalignment. Indeed, the treatment of children creates a structural imbalance in immigration law that perpetuates a large block of unauthorized migrants and hampers the integration of immigrant children and the children of migrants into U.S. society. Small and simple changes to immigration law could fundamentally alter its treatment of children and bring immigration law closer to mainstream legal and social values regarding children.

Section I of this article describes the demographics of migrant children and children in migrant families, and details the rise of mixed status families. In Section II of this article, the social and economic realities that confront mixed status in an age of increased immigration enforcement are examined. Section III explains the ways in which immigration law devalues children and contributes to the perpetuation of parents having unauthorized immigration status. Finally, Section IV considers alternatives to current immigration law

that would reverse the devaluation of children. Resolution of the treatment of children and their interests in immigration law is a necessary step in any effort to meaningfully resolve the broken state of immigration law.¹

I. Children Impacted by Migration

Thousands of children arrive alone in the United States each year, but these children are only one piece of the international migration of children.² In contrast, millions of children have made the journey with family or to reunite with family. Millions more are born in the United States into migrant families. In working to better the situation of unaccompanied minors, it is important to not lose sight of other children intimately impacted by migration. Indeed, it is impossible to have a complete picture of the role of children in immigration flows without looking closely at the situation of children who remain with their families.

A. Children as Migrants and Children of Migrants

Children form a substantial portion of both authorized and unauthorized immigrant populations settled in the United States. Children also form a substantial part of the flow of authorized immigrants into the United States, constantly replenishing the cohort of child immigrants living in the United States, which is simultaneously diminished by the inevitable aging of children into adulthood.³ About 6% of

¹In addition to efforts to put our own national house in order, it is worth noting that resolution has implications on international fronts as well. Ann Laquer Estin, *Families Across Borders: The Hague children's Conventions and the Case for International Family Law in the United States*, 62 FLA. L. REV. 47, 48 (2009) ("As the scale and frequency of global movement has increased, family and children's issues have also taken on a new relevance in foreign relations.").

²Immigration officials apprehend approximately 80,000 children annually. CONGRESSIONAL RESEARCH SERVICE, UNACCOMPANIED ALIEN CHILDREN: POLICIES AND ISSUES 1 (2009). In fiscal year 2007, the Department of Homeland Security detained 8,227 unaccompanied children. *Id.* at 18.

³For example, 29% of new permanent residents via family-sponsored immigration provisions were children in 2005. OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SECURITY, 2005 YEARBOOK OF

authorized immigrants and 13% of unauthorized immigrants in the United States are children.⁴ While some of these children who lack legal immigration status are unaccompanied minors, many more live with their families. In 2008, approximately 1.5 million unauthorized children lived in the United States with their parents.⁵ There has been “little change in number of unauthorized children since 2003”⁶ because even as children become adults and cease to be children, new arrivals augment the group.

Many children are intimately affected by immigration even if they are not themselves immigrants. In 2008, 16.3 million children in the United States, or 23.2% of the total population of U.S. children, had at least one immigrant parent.⁷ This percentage varies widely by region and state, from 3% in Mississippi to 48% in California.⁸ The national percentage of children with immigrant parents has risen sharply, up from 13.4% of the total population of U.S. children in 1990. In fact, children in immigrant families form

IMMIGRATION STATISTICS 20-23, tbl.7 (showing 212,000 of 649,201 family-sponsored immigrants in derivative child classifications).

⁴ JEFFREY S. PASSEL & D’VERA COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 5 (Pew Hispanic Center 2009).

⁵ *Id.* at 6-7. Children in immigrant families live with two parents 82% of the time, compared with 71% of the time for native families; DONALD J. HERNANDEZ, GENERATIONAL PATTERNS IN THE U.S.: AMERICAN COMMUNITY SURVEY AND OTHER SOURCES (2009), available at <http://www.brown.edu/Departments/Education/paradox/documents/Hernandez.pdf>.

⁶ PASSEL & COHN, *supra* note 4, at 4. The population of undocumented children was estimated at 1.8 million in 2005. JEFFREY S. PASSEL, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 7 (Pew Hispanic Ctr. 2006), available at <http://pewhispanic.org/files/reports/61.pdf>.

⁷ Aaron Terrazas and Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, Migration Policy Institute, Oct. 2009, <http://www.migrationinformation.org/USfocus/display.cfm?ID=747#7>.

⁸ National Kids Count Program, *Children in Immigrant Families (Percent) 2008*, The Annie E. Casey Foundation, 2008), <http://datacenter.kidscount.org/data/acrossstates/Rankings.aspx?ind=115>

“the fastest growing segment of the [United States] child population”.⁹

As detailed below, having a child in the United States does nothing to alter the parents’ immigration status, and in all but the most extreme situations, it has no impact on parents’ immigration options. This contributes to the rising number of mixed status families in the United States. A mixed status family is one in which all family members do not share the same immigration or citizenship status.¹⁰ A mixed family status can include families in which some family members are authorized to remain in the United States, while others are not.

The majority of children in immigrant families, 59%, have at least one parent who is a U.S. citizen.¹¹ Still, about 5.5 million children have at least one parent who is an unauthorized immigrant.¹² This group grew by approximately 1.2 million children between 2003 and 2008.¹³ Given that the population of undocumented children has remained relatively stable, this growth represents an additional 1.2 million U.S. citizen children born in the United States to at least one parent who lacks lawful immigration status. In 2008, “of the 5.5 million children of unauthorized immigrants, 4 million, or 73%, were born in the United States.”¹⁴ In addition to differences in status between parents and children, there are also divides within families among siblings. Adolescent children in families with unauthorized parents are more likely to be unauthorized than their younger siblings.¹⁵ This is due to the fact that because more “younger children were born here, there are many mixed-status families in which the

⁹ Valerie Leiter et al., *Challenges to Children’s Independent Citizenship: Immigration, Family and the State*, 13 *Childhood* 11, 11 (2006).

¹⁰ MICHAEL E. FIX & WENDY ZIMMERMANN, *ALL UNDER ONE ROOF: MIXED-STATUS FAMILIES IN AN ERA OF REFORM 2* (Urban Institute 1999).

¹¹ HERNANDEZ, *supra* note 5.

¹² Terrazas & Batalova, *supra* note 7.

¹³ PASSEL & COHN, *supra* note 4, at 7.

¹⁴ *Id.*

¹⁵ RANDY CAPPS ET AL., *PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA’S CHILDREN* 17 (Urban Institute 2007), *available at* http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf.

younger children are citizens but the older children—like their parents—are noncitizens.”¹⁶

Almost 9 million people live in families with at least one unauthorized immigrant.¹⁷ Included in the population of unauthorized immigrants are 3.8 million parents of U.S. citizen children.¹⁸ Parents of U.S. citizen children, therefore, make up 37% of the adult population of unauthorized immigrants.¹⁹ By any measure, this is a significant population.

B. Mixed Status Families and the Challenge of Immigration Reform

The rise of mixed status families must be a central concern in any effort to meaningfully reform immigration law. When families are stranded across a divide of immigration legal status, many nuances arise in addressing the situation. However, they essentially present two stark options. The first option is to provide possible avenues to legalize the immigration status of those family members without lawful status. Alternatively, the United States may fail to provide such avenues, resulting in mixed status families continuing to live under the radar of immigration enforcement or facing the deportation of a family member. When a family member faces deportation, the family is often presented with the difficult choice of living together in exile, if possible, or living separately with some family members left behind in the United States. To date, as discussed below, U.S. immigration law and policy has been firmly in the latter camp of not providing avenues to legalization flowing from children.

The puzzle presented by mixed status families is not amenable to a one time fix. Even a sweeping, backward-looking amnesty like that of the Immigration Reform and

¹⁶ THE URBAN INSTITUTE, CHILDREN OF IMMIGRANTS: FACTS AND FIGURES (2006), available at http://www.urban.org/uploadedpdf/900955_children_of_immigrants.pdf at 2.

¹⁷ PASSEL & COHN, *supra* note 4, at 8.

¹⁸ *Id.*

¹⁹ *Id.*

Control Act of 1986, an act that would legalize an extant cohort of immigrants, would have little effect on this population in the longer term.²⁰ Simply put, it is difficult to conceive of a time when there will not be any U.S. citizen children born of parents who are not themselves U.S. citizens.²¹

As detailed later in this article, the perpetual “illegality” of parents is very much the result of conscious policy choices regarding children deeply embedded in the structure of immigration law. These choices result in an immigration law structure in which the treatment of children is strikingly misaligned with broader law and values regarding children. An understanding of the precise manner in which immigration law’s structure devalues children and contributes to this problem provides a necessary platform from which to examine alternatives to current immigration law.

First, a brief digression is warranted as a reminder of what is at stake for immigrant children and children in immigrant families. Barriers to legalizing the immigration status of all immigrant family members are not benign and children bear the brunt.

II. The Unacceptability of the Status Quo

The children of unauthorized immigrants often fail to receive the full promise of their citizenship. They find themselves effectively stateless because they face barriers not encountered by children in nonimmigrant families. Many “policies that advantage or disadvantage noncitizens are likely to have broad spillover effects on the citizen children who live

²⁰ See Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

²¹ Under the Fourteenth Amendment, “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV, § 1. This constitutional language is incorporated into statute at 8 U.S.C. § 1401. While proposals for either statutory reform or constitutional amendment to limit the application of the *jus soli* principle in order to restrict the acquisition of citizenship by the children of undocumented immigrants are often advanced, none have gained sufficient support to have any realistic chance of enactment.

in the great majority of immigrant families.”²² Unsurprisingly, immigration status has an impact on the economic situation of children and families: nearly half of all immigrant families live below 200% of the poverty line.²³ A third of the children of unauthorized migrants live in poverty.²⁴ Unauthorized migrants and their U.S. citizen children together account for 11% of people below poverty level, twice their percentage of the total population.²⁵ Nearly half of all unauthorized migrant children and a quarter of U.S. citizen children of unauthorized migrants are uninsured.²⁶ Overall, “children of immigrants are substantially more likely than children with U.S.-born parents to be poor, have food-related problems, live in crowded housing, lack health insurance, and be in fair or poor health.”²⁷

Citizen children of immigrant parents access public benefits at a lower rate than children born to citizen parents.²⁸ This undermines myths that immigrants are drawn to the United States by the availability of public assistance.²⁹ Since the passage of welfare reform legislation in 1996, many social benefits laws differentiate between citizens and noncitizens, including those noncitizens with legal immigration status, reducing the overall availability of benefits to immigrant families.³⁰ When citizenship status limits eligibility and only

²² FIX & ZIMMERMANN, *supra* note 10.

²³ Hernandez, *supra* note 5, at 31.

²⁴ Passel & Cohn, *supra* note 4, at 17.

²⁵ *Id.*

²⁶ *Id.* at 18.

²⁷ RANDY CAPPS, ET AL., A PROFILE OF LOW-INCOME WORKING IMMIGRANT FAMILIES, NEW FEDERALISM: NAT’L SURV. AM. FAMILIES 1 (Urban Institute 2005), (citation omitted), available at <http://www.urban.org/publications/311206.html>.

²⁸ MICHAEL E. FIX & JEFFREY S. PASSEL, LESSONS OF WELFARE REFORM FOR IMMIGRANT INTEGRATION (Urban Institute 2002), available at <http://www.urban.org/url.cfm?ID=900497>.

²⁹ *Id.*

³⁰ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 412, 110 Stat. 2105, 2269–70 (1996) (granting authority to states to determine eligibility of certain noncitizens for some public benefits such as Temporary Assistance for Needy Families and Food Stamps). See Leiter, *supra* note 9, at 17 (citation omitted)

some family members are eligible for benefits, citizen children who live “in households with noncitizens ... suffer [] the disadvantage of ... reduced overall household resources.”³¹

In some instances, citizen children in immigrant families do not receive the needed benefits for which they are eligible as individuals. Benefits for children often are obtained only through a parent’s initiative, and parents who are themselves ineligible may be inhibited in seeking benefits for which their children qualify.³² When parents are less likely to seek benefits for their children, “inequalities in access within families have been created informally through the actions of parents and public program staff ... resulting in a hierarchy of citizen children’s access to social benefits, which is ordered by their parents citizenship and immigration status.”³³ In such instances, children’s formal rights to social benefits are trumped by parents and program personnel who act upon misguided beliefs that the parents’ immigration status make these children ineligible. While “citizen children of immigrant parents are formally ‘insiders’ and therefore are fully eligible for social benefits, their parents’ non-citizen, ‘outsider’ status may eclipse their children’s citizenship, resulting in citizen children informally taking on their parent’s citizenship status.”³⁴ Citizen children in mixed status families thus often take on the status of undocumented children.

Recent shifts in immigration enforcement, from border enforcement to home and workplace raids in the interior, further impact immigrant children and children in mixed status families. Workplace raids often are large scale, dramatic events that impact hundreds of immigrants and their families and disrupt entire communities.³⁵ Home raids are of a smaller

(noting that 1996 legal reforms “‘target’ social benefits to a more restricted scope of beneficiaries, and citizenship status is now one of the screens that is now used to determine eligibility” (citation omitted)).

³¹ *Supra* note 22.

³² *Id.* at 3.

³³ *Supra* note 9, at 18.

³⁴ *Id.*

³⁵ *See generally*, CAPPS, ET AL., *supra* note 15.

scale, but often no less dramatic in nature.³⁶ The use of home and workplace raids can be traumatic for those arrested and witnesses alike, especially children who witness the arrests of parents and other relatives.³⁷ The raids contribute to a climate of fear among immigrants who previously might not have felt targeted by immigration law enforcement. The larger workplace raids cause “crisis scenarios in terms of the care arrangements for the hundreds of children who temporarily los[e] their parents . . . [and lead] ‘to a general sense of chaos and fear.’”³⁸ Reports of one major raid indicate that at times the “situation deteriorated further toward outright panic” and families hid “in their basements or closets for days.”³⁹ Living with family members who lack authorized immigration status means living with the constant fear that a family member will face deportation.⁴⁰

Immigration raids have a heightened impact on children in immigrant families because “many children face [] traumatic circumstances and insecure care . . . in the period after the raids.”⁴¹ The Department of Homeland Security’s Office of Inspector General reports that it does not require the collection of data on the status of children of those removed, which is remarkable in itself.⁴² Nevertheless, existing data

³⁶ See Julia Preston, *Immigration Quandary: A Mother Torn From Her Baby*, N.Y. TIMES, Nov. 17, 2007 (discussing issuance of government guidelines following raid in which a nursing mother was separated from her infant daughter).

³⁷ See, e.g., *id.* at A1.

³⁸ CAPPS ET AL., *supra* note 15, at 34.

³⁹ *Id.*

⁴⁰ See KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 46 (2007) (“The fear of deportation haunts many immigrants. They know that they can be torn away from established lives, family, friends, and community in an instant for lacking the proper immigration papers or for even something as minor as failing to file a change of address form with the U.S. government within ten days of moving.”).

⁴¹ CAPPS ET AL., *supra* note 15, at 37.

⁴² U.S. DEP’T OF HOMELAND SEC., OFFICE OF INSPECTOR GENERAL, REMOVALS INVOLVING ILLEGAL ALIEN PARENTS OF UNITED STATES CITIZEN CHILDREN 5 (2009), available at http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_09-15_Jan09.pdf.

indicates at least 108,434 parents of U.S. citizen children were deported between fiscal years 1998 and 2007.⁴³ According to “[c]hild psychology experts . . . children suffer most from the disruption of armed agents coming into their homes and taking away their parents – and sometimes themselves. Children can experience stress, depression and anxiety disorders”⁴⁴ “The most destabilizing impact on the children of arrestees following worksite enforcement actions come from the separation and fragmentation of families.”⁴⁵ For children, “emotional trauma . . . followed separation from one or both parents.”⁴⁶ Young children do not understand the concept of immigration law and “sudden separation [is] considered personal abandonment.”⁴⁷ Moreover, “children who witness their parents being taken into custody lose trust in their parents’ ability to keep them safe and begin to see danger everywhere.”⁴⁸

Aside from the initial trauma, a parent’s detention or deportation removes that parent’s earnings from the household, creating “a more unstable home environment and remov[ing] one of the main strengths in immigrant families—the presence of two parents.”⁴⁹ Furthermore, the parent who is arrested in a workplace raid is the person in the family who is

⁴³ *Id.*

⁴⁴ Tyche Hendricks, *The Human Face of Immigration Raids in Bay Area: Arrests of Parents Can Deeply Traumatize Children Caught in the Fray, Experts Argue*, S.F. CHRON., Apr. 27, 2007, at A1.

⁴⁵ CAPPS ET AL., *supra* note 15, at 42.

⁴⁶ *Id.* at 50.

⁴⁷ *Id.* at 51.

⁴⁸ Hendricks, *supra* note 44. The deep impact on the parent-child relationship that flows from forced separation is not a new phenomena and is not confined to the context of immigration. For example, “messages of parental vulnerability and subordination were repeatedly burned into the consciousness of slave parents and children, undermining their sense of worth, diminishing the sense of family security and authority, eroding the parents’ function as a model of adult agency and independence” PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 98 (1997).

⁴⁹ CAPPS ET AL., *supra* note 15, at 41.

most integrated into U.S. society, so that connection with broader society is diminished.⁵⁰

In the wake of mass raids, children exhibit increased absenteeism in schools.⁵¹ In many instances, immigration raids cause “some degree of polarization between Latino immigrants and other community residents.”⁵² Children experience social isolation when they are “harassed by other children or branded as criminals because their parents were arrested.”⁵³ Following one raid, at school “[m]any children exhibited outward signs of stress . . . [and] lost their appetites, ate less, and lost weight.”⁵⁴

These profound impacts on children are troubling, yet they are hardly unexpected. This is the reality that our current immigration law has created.

III. Immigration Law’s Devaluation of Children

At first glance, U.S. immigration law appears oriented toward advancing children’s interests and general notions of family unity.⁵⁵ It seems to support family relationships through a system of family-sponsored immigration, derivative immigration for the family members of certain immigrants, and waivers of bars of admissibility, as well as cancellation of

⁵⁰ *Id.*

⁵¹ *School Enrollment Down Following Swift Raids*, WCCO, Feb. 12, 2007, available at <http://wcco.com/local/Swift.Co.meatpacker.2.365145.html>.

⁵² CAPPS ET AL., *supra* note 15, at 51.

⁵³ *Id.* at 52.

⁵⁴ *Id.*

⁵⁵ Carol Sanger, *Immigration Reform and Control of the Undocumented Family*, 2 GEO. IMMIGR. L.J. 295, 296-97 (1988). “Families composed of aliens and citizens have received special attention as ‘[t]he legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united.’” *Id.* (quoting *Facilitating Entry Into the United States of Certain Adopted Children, and Other Relatives of United States Citizens Before the H. Comm. on the Judiciary*, 85th Cong., 1st Sess. H.R. Rep. No. 1199, 85th Cong., 1st Sess. 7, reprinted in 1957 U.S.C.C.A.N. 2016, 2020).

removal based on hardship to certain family members.⁵⁶ A substantial number of children do legally immigrate under the provisions of immigration law.⁵⁷ Upon closer inspection, however, the limited and often antagonistic approach to children in immigration law is revealed.

First, immigration law employs a highly technical and restrictive definition of who qualifies as a “child.” This definition emphasizes the conceptualization of children as passive objects in relation to adults, rather than independent persons exercising autonomy. In immigration law, a “child” is defined with circularity as a “child” who also meets other qualifying conditions, such as being born in wedlock or having a father who has taken specified steps to “legitimate” the child.⁵⁸ As a result, not all children are children for immigration purposes, and parents have great control over whether immigration law will recognize their children as “children.” In this scheme, “[p]arents 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.”⁵⁹

Even when a family relationship is satisfactorily established under immigration law, children are treated less favorably than adults in their ability to exercise agency and extend

⁵⁶ See also Immigration and Nationality Act § 203(a), 8 U.S.C.A. § 1153(a) (setting forth preference allocation for family-sponsored immigrants); Immigration and Nationality Act § 201(b)(2)(A)(i), 8 U.S.C.A. § 1151(b)(2)(A)(i) (excluding “immediate relatives” of U.S. citizens from direct numerical limitations on immigrant visas); Immigration and Nationality Act § 201(c), 8 U.S.C.A. § 1151(c) (setting worldwide levels of family-sponsored immigrants); Immigration and Nationality Act § 203(d), 8 U.S.C.A. § 1153(d) (defining who may receive accompanying or following to join immigration visas based on a family member’s immigrant visa); Immigration and Nationality Act § 240A, 8 U.S.C.A. § b(a)1229(b) (allowing cancellation of removal for lawful permanent residents or nonpermanent residents based on, among other things, a qualifying familial relationship with a U.S. citizen or lawful permanent resident).

⁵⁷ See *infra* note 1 and accompanying text.

⁵⁸ Immigration and Nationality Act § 101(b)(1), 8 U.S.C.A. § 1101(b)(1).

⁵⁹ David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 992 (2002).

status to other family members. The Immigration and Nationality Act's family-sponsored immigration framework allows legal permanent residents and citizens to petition for immigrant visas for certain family members.⁶⁰ The person having legal immigration status is the "petitioner," and the person wishing to immigrate, and whom the law presumes is waiting outside the country, is the principal "beneficiary." If the principal beneficiary has a spouse or children, in some instances the spouse or children may acquire immigration status as derivatives.⁶¹ Through this framework, petitioners with lawful immigration status control the flow of immigration status from themselves to their qualifying relatives and dependents.

Immigration law assigns various levels of priority to family-sponsored immigration petitions depending on both the immigration status of the sponsoring petitioner and the familial relationship between the beneficiary and the petitioner.⁶² Not all family relationships are recognized. U.S. citizens can petition for their spouses, children, siblings, and parents.⁶³ The ability of legal permanent residents to petition for relatives is restricted further and they may petition only for their spouses and unmarried children.⁶⁴

Petitions of U.S. citizens receive priority over those of legal permanent residents and petitions based on the parent-child and spousal relationships of traditional nuclear families are privileged over other family relationships.⁶⁵ Petitions filed by

⁶⁰ See Immigration and Nationality Act §201(b)(2)(A)(i), 8 U.S.C.A. § 1151(b)(2)(A)(i), Immigration and Nationality § 203(a), 8 U.S.C.A. § 1153(a).

⁶¹ See Immigration and Nationality Act § 203(d), 8 U.S.C.A. § 1153(d).

⁶² See Immigration and Nationality Act § 203(a), 8 U.S.C.A. § 1153(a).

⁶³ *Id.*; see also Immigration and Nationality Act § 201(b)(2)(A)(i), 8 U.S.C.A. § 1151(b)(2)(A)(i).

⁶⁴ Immigration and Nationality Act § 203(a), 8 U.S.C.A. § 1153(a).

⁶⁵ See generally Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage? Immigration Law's Conflicted Answer*, 32 HOFSTRA L. REV. 273 (2003); Linda Kelly, *Family Planning, American Style*, 52 ALA. L. REV. 943, 955-60 (2001); Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 AM. J. COMP. L. 511, 528 (1995); Victor C. Romero, *Asians, Gay Marriage and Immigration: Family Unification at a Crossroads*, 15 IND. INT'L & COMP. L. REV. 337 (2005); Marcia Zug, *Deporting Grandma: Why Grandparent*

U.S. citizens for their spouses and unmarried minor children are not subject to numerical limits and are immediately available.⁶⁶ Less favored relationships, such as the relationship between a legal permanent resident parent and a child, are subject to numerical limitations which result in lengthy backlogs.⁶⁷ Immigration petitions relying on the relationship between adult citizens and their siblings, the recognized relationship given lowest priority by immigration law, can be backlogged for periods in excess of twenty years.⁶⁸

Under this statutory framework, parent-child relationships receive favored treatment, but only if the parent holds legal immigration status. Citizen and legal permanent resident parents can petition for their children; however, children may never petition for their parents. In fact, U.S. citizens are permitted to petition for their parents only after they reach age twenty-one.⁶⁹

Immigration law thus subordinates children's status to that of their parents. When parents successfully navigate the immigration system, they may include their children with them or may petition later for their children to join them. But when parents' attempts to immigrate fail, the attempts of their children fail with them. Children are objectified, passively advanced through the process by successful parents or held back by unsuccessful parents.⁷⁰

Deportation May Be the Next Big Immigration Crisis and How to Solve It, 43 U.C. DAVIS L. REV. 193 (2009).

⁶⁶ See Immigration and Nationality Act § 201(b), 8 U.S.C.A. § 1151(b). The immediate availability of an immigration visa should not be confused with the ability to immigrate immediately given processing times and bureaucratic delays that can be extensive.

⁶⁷ See U.S. Dep't of State, Visa Bulletin, http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html.

⁶⁸ *Id.*

⁶⁹ Immigration and Nationality Act § 201(b)(2)(A)(i), 8 U.S.C.A. § 1151(b)(2)(A)(i).

⁷⁰ See Bridgette A. Carr, *Incorporating a 'Best Interests of the Child' Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 133 (2009) (noting children's "invisibility is due to the fact that in most cases there is no avenue for immigration decision-makers to take their interests into account").

In contrast to its treatment of parents, immigration law does not permit children with legal immigration status, such as children who are U.S. citizens based on their births in the United States, to extend family based immigration benefits to a parent or other family members. Immigration law assimilates children's status to that of their parents, but does not allow the assimilation of parents' status to that of a child.

Only allowing an extension of immigration status if the legal status holder is the parent, and not the child, is a reflection of the asymmetrical value placed upon the parent-child relationship.⁷¹ It demonstrates a central characteristic of immigration law that trumps even the prominence of the parent-child relationship. For example, a child cannot include a parent as a derivative if the child obtains legal immigration status through a family petition.⁷² Similarly, there is no statutory provision for a child granted protection from removal pursuant to the Convention Against Torture to reunify with a parent.⁷³ Indeed, young parents who qualify as derivatives cannot even extend that immigration status to their own children because derivative status extends only one generation.⁷⁴ While adult asylees and refugees may obtain derivative status for their spouses and children, child asylees and refugees cannot petition for derivative status for their parents.⁷⁵

Similarly, U.S. immigration law fails to give weight to the interests of the children in the context of waivers of grounds of inadmissibility and in cancellations of removal. Even if an immigration visa is available, certain grounds of inadmissibility may preclude a beneficiary from being able to

⁷¹ See Jacqueline Bhabha, *The "Mere Fortuity" of Birth? Are Children Citizens*, in 15(2) DIFFERENCES: A JOURNAL OF FEMINIST CULTURAL STUDIES 91, 95(2004) (discussing the "striking asymmetry in the family reunification rights of similarly placed adults and minor children").

⁷² Immigration and Nationality Act § 203(d), 8 U.S.C.A. § 1153(d).

⁷³ See generally Lori A. Nessel, *Forced to Choose: Torture, Family Reunification and United States Immigration Policy*, 78 TEMP. L. REV. 897 (2005).

⁷⁴ Immigration and Nationality Act I § 203(d), 8 U.S.C.A. § 1153(d).

⁷⁵ See Immigration and Nationality Act I §§ 207(b)(3), 208(c)(2), 8 U.S.C. A §§ 1158(b)(3), 1157(c)(2).

immigrate to the United States.⁷⁶ In some instances, grounds of inadmissibility may be overcome by showing hardship to adult family members, i.e., spouses and parents.⁷⁷ However, the immigration statutes make hardship to children irrelevant.⁷⁸ Children's interests are consciously excluded from the equation.

This failure to provide meaningful consideration of children's best interests extends to immigration removal proceedings. In this context, an individual facing removal may seek cancellation of the removal based, in part, on "exceptional and extremely unusual hardship" to his or her legal permanent resident or U.S. citizen spouse, parent, or child.⁷⁹ This standard, in practice, is remarkably difficult to meet. To qualify for relief, parents must demonstrate hardship to children "substantially different from, or beyond that which would normally be expected from the deportation of an alien with close family members here."⁸⁰

Parents facing removal generally can argue hardship to their children in two ways. First, they can assert that if children are left behind, separation will cause hardship. However, courts are unlikely to find "exceptional and extremely unusual hardship" because harm is a typical result of removal as "[d]eportation rarely occurs without personal distress and emotional hurt."⁸¹ Moreover, separation from family members is "simply one of the 'common results of deportation or exclusion [that] are insufficient to prove extreme hardship.'"⁸² Second, parents can argue that if children leave the United States with the parent, the children will face hardship in the destination country. However, the fact that children will not have the same levels of education,

⁷⁶ Immigration and Nationality Act § 212, 8 U.S.C.A. § 1182.

⁷⁷ Immigration and Nationality Act § 212(a)(9)(B)(v), 8 U.S.C.A. § 1182(a)(9)(B)(v).

⁷⁸ *Id.*

⁷⁹ Immigration and Nationality Act § 240A, 8 U.S.C.A. § 1229b.

⁸⁰ *In re Monreal-Aguinaga*, 23 I & N Dec. 56, 65 (BIA 2001).

⁸¹ *Sullivan v. INS*, 772 F.2d 609, 611 (9th Cir. 1985).

⁸² *Jimenez v. INS*, No. 96-70169, 1997 WL 349051 at 1 (9th Cir. June 25, 1997) (unpublished decision).

health care and economic opportunities that they would have in the United States also is a common result of deportation, and thus, insufficient to meet the “exceptional and extremely unusual hardship” standard.⁸³ Whether children stay behind or accompany parents abroad, the interests of the children involved are not relevant to the immigration law determination unless they rise to exceptional and extremely unusual circumstances of hardship. As a practical matter, this is very difficult to prove. Therefore, family separation and potentially significant levels of harm to children are an expected and accepted part of the process.

The devaluation of children in immigration law is deeply embedded and permeates throughout immigration law. The failure to recognize children’s interests in family integrity as a basis for possible extension of immigration status contributes directly to the perpetuation of mixed status families.

IV. Emerging Exceptions to the Rule

It certainly is not inevitable that immigration law continue to incorporate an asymmetrical approach to the flow of immigration status between parents and children. Indeed, the “assumption that children’s immigration status must derive from that of their parents rather than vice versa recalls an earlier set of gendered assumptions – that women traveled with or followed their husbands, but not vice versa.”⁸⁴ It was not until 1922 that “marriage to an alien no longer stripped a woman of her citizenship automatically.”⁸⁵ Just as it once was deemed natural that a woman’s immigration and citizenship status followed that of their husband, the “one-way descending flow of familial transmission of citizenship, from parent to child rather than from child to parent, is accepted as a natural rather than a constructed asymmetry.”⁸⁶ The restriction on

⁸³ *Id.*

⁸⁴ Jacqueline Bhabha, *The “Mere Fortuity” of Birth? Are Children Citizens?*, in 15(2) DIFFERENCES: A JOURNAL OF FEMINIST CULTURAL STUDIES 91, 96 (2004).

⁸⁵ *Miller v. Albright*, 523 U.S. 420, 464 (1988).

⁸⁶ *Supra* note 84.

children as the source of immigration status is no more natural than the restriction that was imposed upon women.

Similarly, it should not be remarkable to suggest that consideration of the interests of a U.S. citizen child should impact a parent's eligibility to remain in the United States. Immigration law creates such eligibility based on the interests of a spouse or an employer. Ironically, immigration law's eligibility criteria are built around a responsiveness to the desires of private persons and entities, yet ignore needs based on the most intimate of all relationships, that of a child with a parent. What might happen if immigration law did allow for status to flow from a child to a parent?

A. A New World - T and U Visas

In a limited context, the provision of non-immigrant T and U visas to victims of human trafficking and certain other crimes has moved immigration law into hitherto uncharted territory by permitting status for parents and siblings to derive from the status of children. The T visa is generally available to a "victim of a severe form of trafficking in persons" who, among other qualifications, has "complied with any reasonable request for assistance" from law enforcement.⁸⁷ U visas are for persons who have "suffered substantial physical or mental abuse as a result of having been a victim of [specified] criminal activity" and who, among other qualifications, are certified by law enforcement as having been or are likely to be helpful in investigating or prosecuting the crime.⁸⁸ Although technically non-immigrant visas, both T and U visas provide for the possibility of adjustment of status to lawful permanent residence after three years if other requirements are met.⁸⁹

These provisions are relatively new, and in practical effect, even newer given the substantial delays in the

⁸⁷ Immigration and Nationality Act § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T).

⁸⁸ Immigration and Nationality Act § 101(a)(15)(T); 8 U.S.C. § 1101(a)(15)(U).

⁸⁹ Immigration and Nationality Act § 245(l)(m); 8 U.S.C. § 1255(l) and (m).

promulgation of implementing regulations.⁹⁰ The provisions for derivative status are of particular importance because remarkably, and contrary to the rest of immigration law, they provide a means through which immigration status originating with a child can flow from a child to a parent and from a child to siblings.⁹¹

When a person granted a T visa or a U visa is under age 21, that visa status also becomes available to the person's "spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents."⁹² This means that when a child qualifies for a T or U visa, the child's nuclear family members also may qualify, including the child's parents. This places the child recipient of a T or U visa in a unique position, even when compared with children granted other forms of relief on their own behalf such as child refugees, asylees, or special immigrant juveniles. For example, special immigrant juveniles, granted status as court dependents, are specifically prohibited from ever extending an immigration benefit to their parents, even after becoming adults.⁹³ Asylee and refugee

⁹⁰ See New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status; 8 C.F.R. §103 (2010), 8 C.F.R. §212 (2010), 8 C.F.R. §214 (2010), 8 C.F.R. §248 (2010), 8 C.F.R. §274a (2010) and 8 C.F.R. §299 (2010). As of January 2010, less than 9,000 U visas had been granted. In the five fiscal years from 2005 through 2009, only 2094 T visas were granted. USCIS Office of Public Engagement, National Stakeholder Meeting Questions and Answers, January 26, 2010, AILA InfoNet Doc. No. 10012963.

⁹¹ Provisions enacted as part of the Violence Against Women Act do provide for a parent to obtain status in some situations based on the abuse of a child by the other parent, but in such instances the ultimate source of immigration status is the abusive parent. See, e.g., 8 U.S.C. § 1154(a)(1)(B)(ii)(bb). Though beyond the scope of this article, it is worth noting that in addition to their positive attributes, many aspects of these visas are more problematic, such as the often conflicting humanitarian and law enforcement objectives at play, the strange federalism concerns inherent in the role for local and state law enforcement in a federal immigration scheme, and certainly the expansion of visa eligibility criteria centered on essentialized conceptions of persons as "victims." [0]

⁹² Immigration and Nationality Act § 101(a)(15)(T)(ii)(I); 8 U.S.C. § 1101(a)(15)(U)(ii)I.

⁹³ Immigration and Nationality Act § 245(h), 8 U.S.C. § 1255(h).

children likewise cannot extend derivative status to parents when they are children or even later when they become adults.⁹⁴

The derivative provisions place the child eligible for a T or U visa in a unique position in immigration law, with benefits both in and out of the child's family. For the child, the availability of the visa not only to themselves, but often to the entire family, means that it is more likely that eligible children will apply for and obtain legal immigration status. Without the ability to extend status to parents, unauthorized parents might advisably be wary of an immigration process that could assist one child individually but potentially put others in the family at risk of exposure to immigration officials. The parents, under these provisions, are able to come forward to assist the child with the intricacies of the immigration process. The stabilization of the entire family's immigration status avoids the creation of even more differences in immigration status between children and parents.

Increasing the likelihood that eligible children will apply also means that other goals of the visas, such as those related to the investigation of trafficking and other crimes are promoted. Further, the humanitarian goals of the visas are advanced when those eligible for relief take full advantage of the opportunity for immigration status.

Moreover, and perhaps most importantly, with legal immigration status the parents are better able to integrate economically and socially for the benefit and support of the child and the family as a whole. Providing legal immigration status to the family "enhances an individual's ability to integrate and thrive in the U.S. Immigrant families are vital economic, psychological, and cultural resources that shelter and sustain family members.... Stripping away this support would foster social isolation and disconnection among

⁹⁴ See generally Lori A. Nessel, *Forced to Choose: Torture, Family Reunification and United States Immigration Policy*, 78 TEMP. L. REV. 897 (2005).

immigrants rather than acculturation.”⁹⁵ The legalization of families, instead of just individual children, will increase the family’s integration and reduce the possibility that state intervention or support for the child is needed.

B. Bringing Immigration Law into the Mainstream

Changes permitting immigration status to flow from a child to parents would be a fundamental change in the nature of immigration law. However, such a change would be quite simple to implement. This conceptually radical shift in immigration law does not require any vast reworking of the systemic structures or the creation of complex new immigration process mechanisms. This has been demonstrated by the relative ease with which the T and U visa schemes have accommodated the move to permit immigration status to flow from a child. No vast machinery to process millions of amnesty applications would need to be provided. Indeed, with simple changes in eligibility language to ameliorate the omission of children from critical family-sponsored and waiver provisions noted in the preceding section, existing family-sponsored immigration mechanisms would be sufficient.

The changes implemented need not even involve children as sponsors. For example, simply allowing consideration of the hardship faced by children to factor into decisions of whether to waive grounds of inadmissibility⁹⁶ would allow thousands, if not millions, of parents to obtain lawful permanent resident status for which they are eligible on the basis of existing marriages. For example, unauthorized migrants with U.S. citizen spouses are eligible for immigrant visas but frequently cannot act on this eligibility because they will not qualify for a waiver of the 10-year bar on admission that will be imposed on them if they attempt to process their

⁹⁵ Immigration Policy Center, Family Immigration: Repairing our Broken Immigration System, Jan., <http://www.americanimmigrationcouncil.org/just-facts/family-immigration-repairing-our-broken-immigration-system>. Jan. 15, 2010.

⁹⁶ See discussion *supra* INA § 212(a)(9)(B)(v), 8 U.S.C. §1182(a)(9)(B)(v).

application.⁹⁷ The waiver currently looks only to potential hardship to spouses, not children.⁹⁸ Taking the hardship of children into account will make the required waiver more accessible and more reflective of the family values that underlie the waiver's existence.

Even the more radical step of permitting children to serve as the source of visa eligibility could be accomplished with relatively minor tinkering with existing family-sponsored immigration provisions. Provisions modeled on the Violence Against Women Act's self-petitioning process could be created to permit parents to take the lead in navigating the administration of the immigration process.⁹⁹ Pursuant to these provisions, the batterer's role as petitioner is bypassed and victims are able to petition on their own behalf.¹⁰⁰ Parents of battered children often take the lead in assisting children through the application process.¹⁰¹ Requirements related to public charge grounds of inadmissibility might need some revision, but the provisions in place already to permit the inclusion of the income of household members might answer concerns in many instances.¹⁰²

There is little reason to suspect that enhancing the interests of children in immigration law will cause a flood of unauthorized migration. While experience certainly demonstrates the harm current immigration law causes to children, it does not demonstrate that this law leads to a reduction in unauthorized migration. To the extent that alleged floodgate concerns must be addressed, additional controls could be introduced through the institution of temporary or transitory status modeled on the T or U visas as a bridge between unauthorized status and full lawful permanent residency.

The adoption of provisions for regularizing the status of parents is in no way an affront to the rule of law. The rule

⁹⁷ See discussion *supra* notes 71-73 and accompanying text.

⁹⁸ *Id.*

⁹⁹ See, e.g., 8 U.S.C. § 1154(a)(1)(B)(ii)(bb).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See 8 C.F.R. § 213a.2.

of law encompasses much more than punishment for misdeeds. It also requires “proportionality, procedural fairness, and the rejection of Draconian ‘one size fits all’ solutions to complex social problems.”¹⁰³ The unthinking enforcement of inequitable laws does not advance the rule of law, but rather diminishes respect for law. Changes to the role of children in immigration law will bring the law closer to deeply and widely held values and notions of family, and will enhance respect for the rule of law.

While the suggestion of such changes in immigration law seems to be a radical shift, such changes would also serve to correct the massive misalignment of immigration law with the treatment of children in other areas of law. In other words, such shifts would not place immigration law out of sync with other law. Rather, these changes would bring immigration law into the mainstream. Outside the realm of immigration law, the primacy of children’s interests in legal decisions regarding family is ubiquitous.¹⁰⁴ Programs and benefits specifically designed to ensure the well-being of citizen children are undermined by the failure of immigration law to incorporate consideration of children’s interests. If children are to have a productive future in the United States, it makes little sense to force them to start life by imposing barriers to full social citizenship. It makes even less sense to see children separated from parents or leave with deported parents only to return as adults who are unacculturated to life in the United States.

The notion that children’s interests should inform immigration law should not sound like an overly ambitious dream. It is time for immigration law to acknowledge the importance of children’s interests. Until it does so, meaningful and lasting immigration reform will be elusive.

¹⁰³ Daniel Kanstroom, *Two Misunderstandings About Immigration*, GEORGE MASON UNIVERSITY HISTORY NEWS NETWORK, Nov. 12, 2007, <http://hnn.us/articles/44095.html>.

¹⁰⁴ “The custody law in every state in the United States . . . embraces the ‘best interest’ standard.” D. Marianne Blair & Merle H. Weiner, *Resolving Parental Custody Disputes – A Comparative Exploration*, 39 Fam. L.Q. 2, 247 (Summer 2005).