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Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts

David B. Thronson
Michigan State University College of Law, david.thronson@law.msu.edu

ARTICLE

OF BORDERS AND BEST INTERESTS: EXAMINING THE EXPERIENCES OF UNDOCUMENTED IMMIGRANTS IN U.S. FAMILY COURTS*

DAVID B. THRONSON**

SUMMARY

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**. Associate Professor of Law, William S. Boyd School of Law at the University of Nevada Las Vegas; J.D., Harvard Law School, 1994. The author would like to thank Veronica Tobar Thronson for her support and insight in preparing this article and Christina DiEdoardo for her research assistance.

> "If the child was born in Mexico, . . . alright, and mom's here illegally, alright there'd be no doubt in the court's mind. Then the child is here illegally and I'd have to grant the U.S. citizen plaintiff custody."[1]

I. INTRODUCTION

The decisive role that immigration status frequently plays in family law matters is widely overlooked. A systemic review of family court decisions, however, reveals that judges and advocates are all too eager to attach exaggerated legal significance to immigration status with little explanation and no analysis. While immigrants are historically no strangers to family court, demographic changes in the composition of families and shifts in the nation's immigration laws suggest an increase in the frequency and complexity of immigration status issues confronted in family court.[2] As decision makers and practitioners seek guidance in responding to the emergence of immigration status as an issue in family law,[3] there is urgent need for thoughtful assessment and creative thinking on this neglected topic.

Though they are in constant and critical contact, immigration law and family law form a peculiar and conflicted mix. There is no area of law in which the federal government's power is more robust than in immigration[4] and there is no area of law more fully reserved to the states than domestic relations.[5] One result of this divide is that few practitioners and adjudicators develop

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1. Nuñez v. Alonso, No. 04-D-311872-C (Nev. Eighth Jud. Dist. Ct. Fam. Div. hearing Feb. 25, 2004) (recording on file with author).

2. *See* Kevin R. Johnson, *The End of "Civil Rights" As We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1483 (2002) (discussing the impact of demographic changes on the increasing overlap between immigration law and civil rights law) [hereinafter *End of Civil Rights*].

3. Vicky Albert and David B. Thronson, Focus Group of Department of Human Resources Nevada Division of Child and Family Services Supervisors in Las Vegas, Nev. (June 29, 2004) (transcript on file with author); Interview with Thomas Leeds, Child Support/Paternity Hearing Master, Eighth District of Nevada Judicial Court, Family Division (Mar. 8, 2004); Interview with Frank Sullivan, Domestic Violence Commissioner, Eighth District of Nevada Judicial Court, Family Division (Apr. 5, 2004); Interview with Jane Femiano, Clark County Office of the Special Public Defender (Aug. 12, 2004); Interview with Veronica Tobar Thronson, Directing Attorney, Domestic Violence Unit, Clark County Legal Services (Jan. 23, 2004).

4. *See* Galvan v. Press, 347 U.S. 522, 531 (1954) ("[T]hat the formulation of . . . policies [pertaining to the entry of noncitizens and their right to remain here] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government."). *See also* Kleindiest v. Mandel, 408 U.S. 753, 769-70 (1972) ("[P]lenary congressional power to make policies and rules for exclusion of aliens has long been firmly established.").

5. *See* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2309 (2004) ("One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations. Long ago we observed that '[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United

expertise in the complexities of both areas. Decisions in one area frequently do not display a sophisticated understanding of decisions in the other. Moreover, family law and immigration law are motivated by divergent and often conflicting policies which are difficult, and on occasion impossible, to reconcile.

This article considers the intersection of family law and immigration law from a perspective that has been, to a great extent, ignored. Given the express role of family relationships in determining the fate of immigration petitions,[6] the impact of family law determinations on immigration outcomes is widely discussed and analyzed.[7] Little scholarship, however, considers the reverse, *i.e.*, the pronounced influence that a person's immigration status can have on a diverse range of family law determinations including child protection, divorce, child custody, and child support.[8]

Part II of this article identifies the confluence of demographic trends and immigration law that results in the creation of mixed status families. The rise in mixed status families is a strong force, generating an increase in the frequency and complexity of immigration status issues confronted in family court matters.

Part III of this article surveys available family court opinions evidencing the impact of immigration status on family law. Drawing from this body of cases, the article develops a classification of the approaches that family courts adopt when presented with immigration status issues. Identifying and analyzing several key issues that arise from each classification serves to highlight flaws in current family court practices and suggest needed reforms.

Part IV suggests an agenda for further research and guidelines for addressing immigration status issues in family court. This article is purposefully broad and exploratory. As a prelude to further study of a neglected area of inquiry, the article seeks to provide a framework to identify and highlight issues and areas that deserve further exploration and development.

States.'") (quoting *Ex parte* Burrus, 136 U.S. 586, 593-94 (1890) (Brewer, J., dissenting)); *see also* Mansell v. Mansell, 490 U.S. 581, 587 (1989) ("[D]omestic relations are preeminently matters of state law . . . ."); Moore v. Sims, 442 U.S. 415, 435 (1979) ("Family relations are a traditional area of state concern.").

6. MICHAEL F. FIX, WENDY ZIMMERMAN & JEFFREY S. PASSEL, THE URBAN INST., THE INTEGRATION OF IMMIGRANT FAMILIES IN THE UNITED STATES 13 (2001), *available at* http://www.urban.org/UploadedPDF/immig_integration.pdf (last visited June 1, 2005) (stating that approximately eighty percent of legal immigration is expressly based on family relationships).

7. For insightful articles in this vein, *see generally* Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 AM. J. COMP. L. 511 (1995); Linda Kelly, *Family Planning, American Style*, 52 ALA. L. REV. 943 (2001).

8. Linda S. Bosniak, *Membership, Equality and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1076 (1994) ("[I]mmigration analysts have more often focused on matters of entry and exclusion than on the general status of aliens who are already present."); *see also* Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage? Immigration Law's Conflicted Answer*, 32 HOFSTRA L. REV. 273, 276 (2003) ("Much of the analysis of immigration law tends to focus on how immigration rules regulate and channel immigration of individuals, rather than on the impact they have on the migration of families and couples."). *But see* Peter Margulies, *Children, Parents and Asylum*, 15 GEO. IMMIGR. L. REV. 289 (2001) (seeking to synthesize family and refugee law by "distill[ing] values from asylum law and family law that will clarify the substance and process of decisions regarding children and asylum").

II. "ILLEGAL" IMMIGRATION AND THE RISE OF MIXED STATUS FAMILIES

An important characteristic of the immigrant population today is the increase in the number of "mixed status" families, that is families in which all family members do not share the same immigration status or citizenship. The creation and persistence of mixed status families is heavily impacted by a confluence of high immigration levels and harsh immigration laws. The resulting increase in the number of mixed status families contributes to the emerging prominence of immigration status issues in family court proceedings.

A. Growth and Dispersal of the Immigrant Population

Current levels of immigration are high, and annual immigration flows have tripled over the past generation.[9] The share of the total U.S. population that is foreign born now stands at about ten percent, nearly double the level of 1970.[10] This figure is higher in traditional receiving states,[11] but a remarkable aspect of the growth is the increased dispersal of the immigrant population to areas previously unaccustomed to immigration growth.[12] In fact, during the 1990s the immigrant population in "new immigrant states" grew twice as fast as the immigrant population in the six states that traditionally have been home to the largest numbers of immigrants.[13]

Also striking is the importance of family to immigrant populations. Households headed by immigrants are significantly more likely to contain children.[14] Further, children of immigrants, for example, are more likely to live in a home with two parents than are children in entirely native families.[15] Unfortunately, "immigrants' cross-generational gains and economic integration are paralleled by an all-too-American pattern of immigrant family disintegration."[16] The share of

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9. FIX, ZIMMERMAN & PASSEL, *supra* note 6, at 8.

10. *Id.* at 9. While higher than it has been recently, this is significantly lower than the fifteen percent of the total U.S. population that was foreign born at the beginning of the last century. *Id.*

11. One in five people in New York and one in four people in California are foreign born. *Profile of the Foreign-Born Population in the United States,* 2000, (U.S. Census Bureau Dec. 2001) at 14, *available at* http://www.census.gov/prod/2002pubs/p23-206.pdf (last visited June 1, 2005).

12. FIX, ZIMMERMAN & PASSEL, *supra* note 6, at 9; *see also End of Civil Rights, supra* note 2, at 1493 (noting that "migration today affects the entire United States, not just any one particular region").

13. FIX, ZIMMERMAN & PASSEL, *supra* note 6, at 9; *see also End of Civil Rights, supra* note 2, at 1493-94 (describing diversification of immigration and its national impact). States newly experiencing high immigrant growth include North Carolina, Georgia, Nevada, Utah, Nebraska, and Tennessee. *See generally,* SYLVIA R. LAZOS AND STEPHEN C. JEANETTA, CAMBIO DE COLORES: IMMIGRATION OF LATINOS TO MISSOURI (University of Missouri-Columbia Extension 2002).

14. FIX, ZIMMERMAN & PASSEL, *supra* note 6, at 14 (Fifty-five percent of immigrant families have children, compared with thirty-five percent of nonimmigrant families.).

15. Press Release, The Urban Institute, Low Income Children of Immigrants More Likely to Live in Two-Parent Families (Nov. 26, 2002), *available at* http://www.urban.org/Template.cfm?Section=Research&NavMenuID=141&template=/TaggedContent/ViewPublication.cfm&PublicationID=7993 (last visited June 1, 2005).

16. FIX, ZIMMERMAN & PASSEL, *supra* note 6, at 20.

immigrant families that are divorced or separated doubles from first to second generation.[17] As more immigrants and immigrant families arrive at family courts, voluntarily or not, they bring immigration related issues with them.

B. *Immigration Laws and "Illegal" Immigration*

The growth and dispersal of the immigrant population is accompanied by a rise in the portion of the immigrant population that lacks legal immigration status. This is a result not only of increased immigration, but also of immigration laws that bar many immigrants from achieving legal status. This, in turn, contributes to the creation of mixed status immigrant families.

Immigration laws "not only define who is a legal immigrant but also, by necessity, create the converse – the 'illegal' or undocumented [immigrant]."[18] The illegality of an immigrant is, therefore, entirely a social and legal construction, created by "a body of rules passed by Congress and reinforced by popular culture."[19] The categorization of some immigrants as illegal "is neither inherent nor natural, but rather legal and political."[20] Any discussion of the rise of the undocumented population, therefore, must take into account expansions in the way that immigrants are placed or kept in a category characterized as illegal.

Immigration laws and policies a century ago allowed relatively easy access to lawful immigration status. Thus while the share of the U.S. population that was foreign-born in the early 1900s was much higher than it is today,[21] most foreign-born U.S. residents at that time either had legal immigration status or at least the prospect of attaining it. As discussed more fully below, the importance that is now attached to the "illegality" of a person's immigration status is a relatively new phenomenon.

Estimates for the size of the undocumented population range from seven million[22] to eleven million.[23] Notably, the undocumented population has risen not only in sheer numbers, but also as a

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17. *Id.*

18. Lenni B. Benson, *The Invisible Worker*, 27 N.C. J. INT'L L. & COM. REG. 483, 484 (2002).

19. Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 268 (1997) [hereinafter *Aliens and U.S. Immigration Laws*]; *see also* Margot Mendelson, *The Legal Production of Identities: A Narrative Analysis of Conversations with Battered Undocumented Women*, 19 BERKELEY WOMEN'S L.J. 138, 203 (2004) ("The concept of 'illegal alien' or 'undocumented immigrant' is a legal categorization created and made meaningful by U.S. immigration laws.").

20. Mendelson, *supra* note 19, at 203.

21. FIX, ZIMMERMAN & PASSEL, *supra* note 6, at 9.

22. OFFICE OF POLICY AND PLANNING, U.S. IMMIGRATION AND NATURALIZATION SERVICE, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 TO 2000 (January 2003), *available at* http://uscis.gov/graphics/shared/aboutus/statistics/Ill_Report_1211.pdf (last visited June 1, 2005). It should be noted that counting the understandably wary undocumented population is not easy. *See, e.g.*, Benson, *supra* note 18, at 484 ("[E]ven when people can be counted, accurately characterizing their legal status requires legal sophistication.").

23. FEDERATION FOR AMERICAN IMMIGRATION REFORM (FAIR), How Many Illegal Aliens? (January 2002), *available at* http://www.fairus.org/ImmigrationIssueCenters/ImmigrationIssueCenters.cfm?ID=1183&c=13 (last visited June 1, 2005).

percentage of the foreign born population. In 1994, thirteen percent of the foreign-born population was undocumented and by 2000 this figure had risen to twenty-eight percent.[24] The rapid rise in the percentage of foreign-born without legal immigration status greatly influenced by changes in immigration law making it more difficult for undocumented immigrants to cure the illegality of their immigration status.

In contrast to the immigration laws of the past, more recent reforms not only label more immigrants "illegal," but also increasingly generate barriers that prevent undocumented immigrants from regularizing their immigration status. To give but one example, some immigrants who otherwise qualify for legal permanent residence status are permitted to "adjust" status, that is to process their applications in the United States rather than being forced to leave this country and file their application for a Visa at the United States embassy in their home country.[25] The option to adjust, however, is prohibited for persons with certain present or past violations of immigration law such as unlawful presence, illegal entry, and unauthorized work.[26] In 2001, Congress removed a provision of immigration law that had permitted the government to overlook such violations and adjust status of persons who paid a $1,000 fine.[27] Without this penalty provision, any person who is barred from adjustment can only process an application for legal permanent residence only outside the United States.

Those who attempt to process abroad often run afoul of another immigration law provision. In 1996 Congress added a provision that bars the reentry of people who leave the United States after remaining here unlawfully for more than 180 days.[28] Working in tandem, these provisions completely prevent otherwise eligible immigrants from obtaining legal permanent resident status: the laws bar adjustment of status within the United States and bar the reentry of applicants who leave.

As a result of these provisions, undocumented immigrants routinely find themselves not only without means to regularize their immigration status, but also facing even more barriers if they leave. "Perversely, the statutory provisions meant to encourage compliance with the law may have encouraged the opposite: People wait in the United States hoping for a method of legalizing or adjusting status rather than leaving the United States and triggering the bar."[29] Contrary to popular myth, current immigration law simply does not provide an avenue to legal immigration status for any person willing to wait long enough in some mythical line.

Moreover, as heightened security concerns increase spending and effort to control U.S. borders, crossings have become more difficult and risky.[30] Further, interior enforcement of

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24. FIX, ZIMMERMAN & PASSEL, *supra* note 6, at 12.

25. *See* 8 U.S.C. § 1255(a) (2005).

26. 8 U.S.C. § 1255(c) (2005).

27. 8 U.S.C. § 1255(i) (2005).

28. 8 U.S.C. § 1182(a)(9)(B)(i)(I) (2005).

29. Benson, *supra* note 18, at 488.

30. *See* Press Release, Department of Homeland Security, DHS Announces Expanded Border Control Plans (Aug. 10,

immigration laws is not a high priority for the Department of Homeland Security, meaning that the risks of deportation after arrival are not as high as the risks of being caught crossing a border.[31] This combination discourages past patterns of seasonal migration and results in a more permanent pattern of settlement for undocumented immigrants.

In contrast to past generations in which many undocumented immigrants gradually moved into legal immigration status or maintained a less permanent presence in the United States, today's undocumented population is notable for both its lack of prospects for legalization under current law and its relative stability. This has profound implications for the increase in mixed status families.

C. *Mixed Status Families and Their Implications for Family Courts*

As the United States increasingly becomes home to a long-term undocumented population, it is not surprising that members of this population marry and have children, creating mixed-status immigrant households in which family members do not share the same immigration status or citizenship. The formation of family ties between undocumented immigrants and persons with legal immigration status in turn influences the decisions of undocumented immigrants to remain in this country.

The inability of some immigrants to regularize their immigration status does not mean that their family members are similarly disabled. Despite the importance of family in immigration law, "immigrant families are not viewed as a unit, and individual family members are not equal."[32] Undocumented immigrants with no means of achieving legal immigration status often form families with persons who have different immigration histories or who already have legal immigration status or citizenship. Moreover, children born in the United States are U.S. citizens at birth, regardless of the status of their parents.[33]

Given the difficulties in changing status discussed above, many families that in the past eventually would be composed of citizens now have family members who remain without legal immigration status and without prospects of attaining it. As a result, it is exceedingly common that family members do not share a single immigration status. Indeed, of families with children and headed by a noncitizen, eighty-five percent are mixed-status families.[34] Even more striking, looking at the entire population of the United States, one of every ten children lives in a mixed-status

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2004), *available at* http://www.dhs.gov/dhspublic/display?content=3930 (last visited June 1, 2005).

31. H.G. Reza, *Border Patrol Faces New Limits in Inland Empire*, L.A. TIMES, Aug. 4, 2004, at B1 (reporting that "[d]ocuments and interviews show that Department of Homeland Security officials want to concentrate Border Patrol agents at the borders and limit their inland activity to arresting illegal immigrants while they are traveling from the border and at transportation centers such as Los Angeles International Airport and highway checkpoints such as those at Temecula and San Clemente").

32. David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 993 (2002).

33. *See* U.S. Const. amend. XIV, §1 (All 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.) (codified at 8 U.S.C. §1401(a) (2004)).

34. FIX, ZIMMERMAN & PASSEL, *supra* note 6, at 15.

family.[35] Of poor children, fifteen percent live in mixed-status families.[36]

These figures demonstrate how many families are directly touched by immigration laws and issues related to immigration status. While the immigration issues that affect some families may be slight, for many families immigration status will have a major impact. With immigration playing a prominent role in the lives of so many families and children, it is not surprising that immigration status issues are raised more frequently in family courts.

Moreover, the prevalence of mixed-status families means that all the parties in family court proceedings often will not share the same immigration status. Though immigration status issues arise in a number of ways, parties often inject immigration issues in family law proceedings when they perceive, rightly or wrongly, an advantage in highlighting differences in immigration status. As demonstrated in the next section, parties regularly ask courts to infuse differences in status with meaning in the application of malleable and subjective family law standards; and many courts readily comply.

III. IMMIGRATION STATUS IN FAMILY COURT

A systemic review of family court decisions and rulings provides important insights into the range of approaches that family courts adopt in addressing immigration status issues. While drawn from a diverse range of cases, such decisions reveal patterns and commonality in the courts' approaches to immigration status issues that bridge jurisdictions and underlying family law issues.[37]

Four distinct approaches emerge from the cases. When immigration status issues are considered, courts adopt approaches of: (1) Discrimination; (2) Manipulation; (3) Obfuscation; and (4) Accommodation. The discussion below explains and provides examples of each of these approaches. For each classification, the article identifies and analyzes several key issues that spring from the examples.

35. *Id.* In Los Angeles, forty-seven percent of children live in mixed-status families.

36. *Id.* at 16.

37. This section grounds its analysis in a survey of available family court decisions that evidence the impact of immigration status on family law. It is important to acknowledge that such cases can vary greatly in important respects. Family court decisions arise in matters as distinct as child custody disputes between parents, state intervention under the rubric of child protection, actions to enforce child support, and divorce. Each of these areas has its own nuanced legal tests and standards of proof. Further, most family law decisions, like most immigration decisions, are unreported. Malleable family law standards and deferential review make appeals difficult, reducing the availability of appellate decisions. Finally, cases drawn from a number of jurisdictions inevitably invoke variance in the applicable legal standards.

A. *Discrimination – "I Have a Problem With Your Immigration Situation"*[38]

At one extreme, family court judges make statements that openly express bias and base decisions on immigration status *per se*. The opening quote of this article is one example. In another example, a Georgia trial judge refused to grant custody of a child to her undocumented father, remarking that he had a "problem with [the father's] INS situation."[39] After the father petitioned for custody, the court set a number of requirements for the father to demonstrate his capacity to care for his daughter. In particular, the court also ordered the father to "show that he is taking positive steps towards correcting legal status while in United States."[40]

The father made sufficient progress on all other fronts, but he was unable to regularize his immigration status. The record reflects that the father did hire an immigration attorney to review his situation, but that no avenues for immigration relief were available. The judge, however, denied custody and ultimately terminated the father's parental rights, finding that the father had "done nothing to legalize his residency in the United States."[41] Even if the father did later attempt to legalize his status, the court opined that he "would face deportation, [and] the child could then be returned to protective custody or taken with her father to 'an unknown future in Mexico.'"[42] Further demonstrating the importance that the judge placed on immigration status, the court also terminated the parental rights of the child's mother because she "lived with and financially relied upon a man who . . . was an illegal alien."[43]

Though this decision ultimately was reversed on appeal, such outcomes are not isolated and relatively few family court decisions are appealed. In this case, the appellate decision shines a rare light on a trial record demonstrating the bias that many undocumented immigrants experience in family court. And even as it reversed the decision, the appellate court relied on factual disagreements; it did little to discredit the trial court's naked reliance on immigration status as a basis for decision. Together, the ruling of the trial court and the thinly reasoned appellate review serve to highlight a number of aspects critical to the experiences and expectations of undocumented immigrants in the courts.

1. The Dominant Narrative of "Illegality" as a Perceived License to Discriminate

Judges who discriminate on the basis of immigration status reflect acceptance, consciously or otherwise, of a pervasive societal narrative that constructs an expanding notion of unworthiness and "illegality" regarding undocumented immigrants and a diminished popular sense regarding the

38. *In re* M.M., 587 S.E.2d 825, 831 (Ga. Ct. App. 2003).
39. *Id.*
40. *Id.*
41. *Id.* at 832.
42. *Id.*
43. *M.M.*, 587 S.E.2d at 829.

availability of protection from prejudice and discrimination.[44]

Deeply ingrained and consistently reinforced conceptions of undocumented immigrants as "illegal" shape the way they are perceived and treated. As noted above, the concept of "illegal" immigration is a social and legal construct. "Alien" is similarly constructed. As a strictly legal matter, an "alien" is "any person not a citizen or national of the United States."[45] Yet it would seem unusual, though technically correct, if Prime Minister Tony Blair's recent speech to a joint session of Congress were described as "Alien Addresses Congress." In common usage, the term "alien" has been reserved for pejorative use.

Beyond its legal definition, the term "alien" plays a key role in a broader cultural context by accentuating the "otherness" of immigrants. The terms "illegal" and "alien" "go far beyond being mere labels, and instead . . . creat[e] intentional and unintentional interactions with other laws."[46] The term "alien" serves as "a device that intellectually legitimizes the mistreatment of noncitizens and helps to mask human suffering. . . . Persons have dignity and their rights should be respected. Aliens have neither dignity nor rights."[47] Expanding the phrase from "alien" to "illegal alien" deepens the effect, creating a "pejorative term that implies criminality, thereby suggesting that persons who fall in this category deserve punishment, not legal protection."[48]

As society has acted on the impulse to restrict legal protections and privileges available to noncitizens in general and undocumented immigrants in particular, the dominant narrative that undocumented immigrants are unworthy of legal protections is reinforced. For example, the imposition of sanctions against employers hiring undocumented workers accompanied the legalization of the 1980s.[49] This increased the vulnerability of undocumented workers who were now legally excluded from the workplace and able to work only through participation in an underground economy.[50] Similarly, high profile cases contribute to the sense of vulnerability. The Supreme Court's recent *Hoffman Plastic* decision found undocumented immigrants ineligible for a particular narrow form of relief under federal labor law.[51] Though the actual reach of the decision is limited, it has emboldened employers who now aggressively seek discovery regarding the immigration status of complaining workers and argue that the protections of wide swathes of employment and labor law do not apply.[52] Though often unsuccessful, the intimidation of workers

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44. Mendelson, *supra* note 19, at 169 (discussing "the way legality and deportability are constructed, imposed, and internalized in immigrant communities").

45. 8 U.S.C. § 1101(a)(3) (2005).

46. Benson, *supra* note 18, at 484.

47. *Aliens and U.S. Immigration Laws*, *supra* note 19, at 273.

48. *Id.* at 276.

49. Immigration Reform and Control Act, 8 U.S.C. § 1324a (1986).

50. *See* Mendelson, *supra* note 19, at 203.

51. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

52. *See, e.g.*, Rivera v. Nibco, Inc., 364 F.3d 1057 (9th Cir. 2004) (upholding protective order barring discovery into immigration status of workers alleging discrimination based on national origin); *see also* Leticia M. Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303, 315-16 (2004).

makes the legal protection of workers more difficult, and further distances the experiences of undocumented immigrants from those of persons with legal immigration status. Although legal battles regarding worker protection are ongoing, even the fact that courts are debating whether undocumented immigrants might be less deserving of legal protection than their similarly situated colleagues who possess a valid immigration status does not go unnoticed.

Outside the workplace, extensive reforms of welfare laws in 1996 restricted immigrant access to many public benefits.[53] Closer to home for most hardworking immigrants, arguments abound regarding whether the lack of lawful immigration status alone is sufficient to deny a broad range of privileges from drivers licenses[54] to higher education.[55] A matter as seemingly simple as denying a drivers license "exacerbates immigrant fears of arrest and deportation, limits access to jobs, and generally increases immigrant vulnerability to exploitation in the workplace and elsewhere."[56] These distinctions in rights and privileges serve to distance undocumented immigrants from the mainstream population and reinforce the dominant narrative that undocumented immigrants are different, "other" and "illegal" in a sense that extends well beyond immigration status.[57] This narrative can have particularly harmful effects in mixed status families.

Differences in immigration status have long been acknowledged as creating a disparity in power and thus great potential for abuse. It is all too common that a person with legal immigration status uses threats of deportation to intimidate and control those who do not have legal immigration status.[58] But beyond threats specific to deportation, the conception that undocumented immigrants deserve lesser legal protections and privileges is often exploited. It is often a litigant with status who raises immigration issues in family court proceedings.[59] Further, many undocumented

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53. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, tit. IV, §§ 400(3), 400(5), 110 Stat. 2105 (1996) (asserting that "aliens have been applying for and receiving public benefits . . . at increasing rates" and that "[i]t is a compelling government interest to enact new rules for eligibility and sponsorship agreements in order to assure that aliens be self reliant in accordance with national immigration policy"). *See generally* Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection and Federalism*, 76 N.Y.U. L. REV. 493 (2001).

54. NAT'L IMMIGRATION LAW CTR., IMMIGRANTS AND PUBLIC BENEFITS DRIVER'S LICENSES, *available at* http://www.nilc.org/immspbs/DLs/index.htm (last visited June 1, 2005).

55. *See* Michael A. Olivas, *IIRIRA, The DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435 (2004).

56. *End of Civil Rights*, *supra* note 2, at 1504.

57. *Aliens and U.S. Immigration Laws*, *supra* note 19, at 264 (arguing that terminology has "significant legal, social and political importance").

58. Indeed, this is one of the reasons Congress passed the Violence Against Women Act of 1994, which provides foreign nationals a limited ability to "self-petition" for immigration benefits if they have been a victim of domestic abuse by a U.S. citizen or lawful permanent resident. *See* 8 U.S.C. § 1154(a)(1)(A)(iii) (2002); *see also* Topo v. Dhir, 210 F.R.D. 76, 78 (S.D.N.Y. 2002) ("courts have noted that allowing parties to inquire about the immigration status of other parties, when not relevant, would present a 'danger of intimidation [that] would inhibit plaintiffs in pursuing their rights.'") (quoting Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002)); U.S. Citizenship and Immigration Services, *How Do I Apply For Immigration Benefits as a Battered Spouse or Child?* (Oct. 31, 2003), *available at* http://uscis.gov/graphics/howdoi/battered.htm (last visited June 1, 2005).

59. *See, e.g.*, *In re* Florentino, No. 25966-4-II, 2002 Wash. App. LEXIS 1896, at *17 (Wash. Ct. App. Div. 2 Aug. 9, 2002) (claiming that the trial court erred through "failure to in any way consider the fact that the Respondent father is not a U.S.

immigrants have themselves internalized the message that lack of legal status will preclude a favorable judgment and are therefore hesitant to pursue their rights.[60]

This is particularly true in the family court context. Margot Mendelson conducted a series of interviews with undocumented women and found that they "all regarded the courts and the custody laws as adversarial to their interests. . . . The women shared an overriding sense of their own vulnerability in the legal setting."[61] The women "unanimously accepted their [documented] husbands' threats to separate them from their children. Not a single woman I met said that she ignored, dismissed or rolled her eyes at her husband's threats."[62] Further, they "all considered legalization to be their only means of responding to or fighting against their husbands' threats."[63] When the sense of disentitlement extends to the parent-child relationship, it is a profound statement of the success of the dominant narrative in distancing undocumented immigrants from mainstream society and, indeed, humanity.[64]

It is in this context that judges must recognize and reject discriminatory arguments. But countering a dominant societal narrative is not always easy. Indeed, as Justice Stevens noted, "[h]abit, rather than analysis, makes it seem acceptable to distinguish between . . . alien and citizen. . . ."[65] As discussed in the next section, the pervasive sense that the law permits differential treatment of immigrants is accurate only to a limited point. Greater sensitivity and understanding are required to counter the dominant narrative. Judges must reject habit in favor of analysis.

2. Fundamental Rights and Equal Protection

American law is "deeply divided about the significance of the status of alienage for the allocation of rights and benefits in our society."[66] In general, "state anti-immigrant discrimination . . . has been subject to strict scrutiny (and therefore invalidated), but . . . identical federal discrimination has been subject only to rational basis review (and therefore upheld)."[67] Congress, then, may distinguish between citizens and noncitizens in the exercise of its power over immigration. In the area of immigration law, distinctions applied to noncitizens have been upheld even though they would not survive constitutional scrutiny in any other context.[68] Even beyond the

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citizen and is not a legal resident of the United States").

60. Mendelson, *supra* note 19, at 182.

61. *Id.*

62. *Id.*

63. *Id.*

64. PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 91 (Lawrence Hill Books 1998) (noting that "as a tool of subordination and a disavowal of common humanity, denial of the right to marry was secondary to the denial of parental ties").

65. Mathews v. Lucas, 427 U.S. 495, 520 (1976) (Stevens, J., dissenting).

66. Bosniak, *supra* note 8, at 1055. "[N]obody argues that aliens are treated identically with citizens in every circumstance." *Id.* at 1064.

67. Michael J. Wishnie, *Laboratories of Bigotry? Devolution of Immigration Power, Equal Protection and Federalism*, 76 N.Y.U. L. REV. 493, 496 (2001).

68. *See generally* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (upholding racially based deportation law

border, Congress has great leeway to treat alienage as a basis for less favorable treatment in a variety of contexts as long as such treatment is not wholly irrational.[69] Yet the reach of the federal immigration power does have limits, and beyond "matters of admission, exclusion, and deportation . . . the alien inhabits the domain of territorially present persons where different and more protective rules against government power apply."[70] For example, in *Wong Wing v. United States*, the Court rejected the government's attempt to punish violations of immigration without a trial.[71]

States, on the other hand, are much more limited in their ability to treat alienage as a basis of distinction. The Supreme Court has long recognized that noncitizens are protected against invidious state action by the Due Process and Equal Protection clauses:

> The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.[72]

In the exercise of state power, then, distinctions "based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."[73] Noncitizens "as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."[74]

Indeed, "even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."[75] The fact that "a person's initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State's

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directed at Chinese laborers); Fiallo v. Bell, 430 U.S. 787, 799-800 (1977) (finding that Congress may discriminate between mothers and fathers in setting parameters for family-based immigration); Matthews v. Diaz, 426 U.S. 67, 79-80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").

69. *Matthews*, 426 U.S. at 83 (1976) (upholding Congressional denial of Medicaid benefits to certain noncitizens as an extension of the federal power over immigration).

70. Bosniak, *supra* note 8, at 1097-98.

71. Wong Wing v. United States, 163 U.S. 228, 239 (1896).

72. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). *See also* Plyler v. Doe, 457 U.S. 202, 210 (1982) (explaining that the Supreme Court has noted similar protection against federal action) ("[W]e have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government.").

73. Graham v. Richardson, 403 U.S. 365, 371 (1971) (internal citations omitted).

74. *Id.* (citing U.S. v. Carolene Prods. Co., 304 U.S. 144, 152-53, n. 4 (1938)).

75. *Plyler*, 457 U.S. at 210.

territorial perimeter."[76] Until an undocumented immigrant "leaves the jurisdiction – either voluntarily, or involuntarily in accordance with the Constitution and laws of the United States – he is entitled to the equal protection of the laws that a State may choose to establish."[77]

Asserting that undocumented immigrants are entitled to due process and equal protection "only begins the inquiry. The more difficult question is whether the Equal Protection Clause has been violated[78]. . . . States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal."[79] Yet when constitutional protections are denied, states rarely can present sufficient justification to withstand constitutional scrutiny.[80] When the rights in question are fundamental constitutional rights, differential applications of state power on the basis of immigration status will violate the Equal Protection Clause.

Moreover, "the interests of parents in the care, custody and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by the Court."[81] Although family law is generally a state realm, "the U.S. Constitution provides parameters that limit the states' ability to define and regulate family rights and obligations."[82]

In *Meyer v. Nebraska*, the Court recognized "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy these privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[83] The Court further emphasized the special protection afforded the relationship between parents and children in *Pierce v. Society of Sisters* when it noted that "[t]he child is not the mere creation of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[84] Although the Court occasionally is in disagreement regarding the constitutional rationale for extending protection to the parent-child relationship, there is no question of the Court's continued affirmation of limits on state action regarding this relationship.[85]

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76. *Id.* at 215.

77. *Id.*

78. *Id.*

79. *Id.* at 225.

80. Cases where equal protection challenges have generally been rejected involve the use of citizenship as a means of determining which persons are allowed to participate "in the political community." *See* Cabell v. Chavez-Salido, 454 U.S. 432, 438 (1982) (upholding denial of jobs as probation officers to noncitizens).

81. Troxel v. Granville, 530 U.S. 57, 65 (2000); *see also* Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Santosky v. Kramer, 455 U.S. 745 (1982).

82. Annette Ruth Appall, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 688 (2001).

83. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

84. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

85. Appall, *supra* note 82, at 704-05 (citing Troxel v. Granville, 530 U.S. 57 (2000)) ("[A]t least eight justices affirmed that the Constitution protects the parent-child relationship from undue governmental interference, although a majority of justices

Finally, the "vast majority of today's immigrants are people of color."[86] As such, "terms like 'alien' . . . have racial connotations in the modern United States."[87] Courts, therefore, "should be sensitive to the fact that alienage in certain circumstances may substitute for race."[88]

B. Manipulation – Tailoring Family Court Outcomes to Achieve Immigration Outcomes

More common than decisions based on simple discrimination against undocumented immigrants are utilitarian decisions that manipulate family court outcomes to facilitate particular immigration results. Generally, these courts invoke the flexible equitable power of the family court in ways that will assist immigrants in reaching legal status.

In contrast to discrimination cases, in manipulation cases the request that the court calculate immigration status into the outcome often originates with the person who lacks legal immigration status. Manipulation can be tricky and courts that try it do so with decidedly mixed results.

For example, in *Velez v. Velez* a Connecticut divorce court agreed with the parties that it was in the best interests of the litigants' U.S. citizen child to live with his undocumented Colombian mother in New York City where "they would have a support network of extended family and friends."[89] The ongoing interaction of the two parents was relatively stable, with no visitation difficulties and current child support payments.[90]

But the husband, a naturalized U.S. citizen born in Colombia, refused to continue an immigration petition that he had filed prior to the breakdown of the marriage and that would permit the wife to obtain legal permanent resident status.[91] In particular, he refused to execute an affidavit of financial support that was required by the immigration service.[92] The court criticized this refusal, noting that the husband "appears not to appreciate the quandary in which this places the wife and child."[93] Further, said the court,

> he does not acknowledge the effects of his failure to cooperate with [his wife's] citizenship or residency application, should she be deported, would have on his relationship with his son. He does not consider the effect on the son, an American citizen, if the child were required to reside

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could not agree on a rationale for the decision.").

86. *End of Civil Rights, supra* note 2, at 1505.

87. *Id.* at 1508. Of course, race, like alienage, is socially and legally constructed.

88. *Id.* at 1507.

89. Velez v. Velez, No. 10 14 81, 1994 Conn. Super. LEXIS 3139, at *5 (Conn. Super. Ct. Dec. 7, 1994).

90. *Id.* at *3.

91. *Id.* at *6.

92. *Id.* The requirements for a person petitioning for a family member became more onerous through provisions introduced in 1996 and now codified at 8 U.S.C. § 1182(a)(4) (2005). The new financial obligations also are designed to create long lasting financial responsibility for sponsored immigrants such that many financial obligations survive dissolution of the marriages that prompted them.

93. *Id.*

> in Columbia [sic] when he has the opportunity to reside here, a priceless right, many risk much for. Nor does he appear to show concern for the impact and effect upon his son were the mother to be deported and separated from the child.[94]

The court labeled the husband's position "illogical" and inferred "that his motive can only be spite and vindictiveness."[95]

In its ruling, the court balked at the wife's request that it enter a broad order that the husband cooperate in resolving the wife's immigration status, but instead the court refused to grant a divorce. The court entered only a separation in hopes that perpetuation of the marriage "may . . . enhance the wife's claim for legal residency status and provide her some insulation from the threat of deportation."[96] The court also ordered the payment of alimony because the wife, "being legally unable to work, cannot exploit her demonstrated earning capacity and is in need of continued support from the husband."[97] The court did note, however, that the wife's "[l]egal residence in the United States or legal employment of the wife shall be deemed a substantial change of circumstances justifying a modification of the alimony award."[98]

Though the court's impulse here is to be helpful to an undocumented immigrant, the court's ultimate decision is unabashedly based on immigration status. There is no question that the court would have granted the divorce and would not have ordered alimony but for the wife's lack of legal immigration status. The result is expressly tailored in an attempt to lead to the wife's acquisition of legal immigration status. A discussion of some considerations and dangers of such manipulation follows.

1. The Best Interests of the Child

The ability of a family court to manipulate the outcome of a family court proceeding to facilitate an immigration outcome is a reflection of the flexible and equitable nature of many family court proceedings. While the outcome sought by the courts in these cases are generally sympathetic, manipulation can make outcomes inconsistent, unpredictable and, at least from the perspective of some parties, unfair.

In some cases, the requested manipulation may require only an awareness of immigration law and sensitivity to its requirements. For example, parties might request that an adoption proceeding be expedited since an adoption that is finalized after the child reaches age 16 is not recognized for immigration purposes.[99] Similarly, seeking to take advantage of a provision of immigration law that provides an opportunity for court dependents to acquire legal status, parties

94. *Velez*, 1994 Conn. Super. LEXIS 3139, at *6.

95. *Id.* at *6-*7.

96. *Id.* at *10.

97. *Id.*

98. *Id.* at *12-*13.

99. 8 U.S.C. § 1101(b)(1)(E) (2005).

might seek a guardianship and request that the family court make special findings.[100] The parties in such instances plainly ask for special consideration to achieve immigration consequences. In such cases, the requested manipulation does not implicate the rights of adverse parties, but not all requested manipulations are so straightforward.

From the *Velez* example above, Mr. Velez certainly could complain that denying him a divorce based on his wife's immigration status constitutes discrimination on the basis of immigration status. Imagine for a moment that Mrs. Velez sought the divorce – if she had been denied because of her lack of immigration status, the discrimination would be readily apparent. In either case, the judge is reaching a decision on the basis of immigration status that would not have resulted if the parties were all U.S. citizens.

Possibly the *Velez* court grounded justification for such an outcome in its mandate to consider the best interests of the child involved. From the decision, it is apparent that the court did ponder the consequences for the child if the mother was not able to achieve legal immigration status. In contrast to *Velez*, a Tennessee court rejected a wife's request, similar to that in *Velez* for separation in lieu of divorce, despite the "collateral consequence" that divorce would result in the wife's loss of lawful immigration status.[101] It is appealing to posit the child's best interest as reason to support differentiation on the basis of immigration status, at least where the outcome, as in *Velez*, did not interfere with rights of either parent to the care and custody of the child.[102] But the right to form and dissolve marriage bonds is also constitutionally protected, and Mr. Velez's right to dissolve his marriage is certainly burdened on the basis of his wife's immigration status.[103]

The consideration of the child's best interests in *Velez* also highlights the absence of such considerations in immigration law. With one discrete exception, immigration law is completely unconcerned with the best interests of a child in an immigrant family.[104] Indeed, immigration law treats children as objects, and their voices and concerns are largely ignored.[105] Immigration law concentrates power in the hands of sponsors, *i.e.*, persons with legal immigration status, not the people who they might sponsor, *i.e.*, beneficiaries.[106] In immigration law, children may be beneficiaries, but never sponsors. Mrs. Velez needed her husband's cooperation because immigration law did not allow her U.S. citizen child to sponsor her. Mrs. Velez turned to the family court in her effort to force her husband's cooperation precisely because immigration law provided her with no recourse.

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100. 8 U.S.C. § 1101(a)(27)(J) (2005); *see also* Thronson, *supra* note 32, at 1003-13 (examining special immigrant juvenile status).

101. Madu v. Madu, No. M1999-02302-COA-R3-CV, 2000 Tenn. App. LEXIS 708, at *21 (Tenn. Ct. App. Oct. 25, 2000).

102. *See* Troxel v. Granville, 530 U.S. 57, 72-73 (2000) ("The Due Process Clause does not permit a state to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made.").

103. *See* Boddie v. Connecticut, 401 U.S. 371 (1971).

104. *See* 8 U.S.C. § 1101(a)(27)(J) (2005) (providing special immigrant juvenile status for court dependents and incorporating a best interests of the child standard into its eligibility requirements).

105. Thronson, *supra* note 32, at 990-92.

106. *Id.* at 992-94.

2. Don't Know Much About Immigration

Getting immigration law wrong can have severe consequences on both the immigration front and the family front. For family judges tempted to engage in even the most benign manipulation, it is important that the quirks of unforgiving immigration laws be understood not only to avoid harm on the immigration front, but also to ensure that there is actually any reason to support the requested manipulation of the outcome in the family law case.

Given the relative unfamiliarity with immigration law of most family court judges, it is easy for careless judges to be duped.[107] In a disastrous case, a family court judge transferred custody of two undocumented children from an undocumented mother to a biological father with legal permanent resident status. Even though the father had not contacted the children for the last seven years, the court found that the best interests of the children were served by the transfer of the children to the father's out-of-state home. The only stated reason for this decision was that the father "can lawfully immigrate (sic) both minor children and obtain the status of a United States Citizen on their behalf."[108] The judge had accepted the argument of the father's attorney, which was not challenged by the mother's attorney, that the children had to be in the father's custody to obtain legal status.

But immigration law does not require that the father have custody to petition for his children.[109] In fact, the only immigration law provision that had been argued to the court was a citizenship provision that Congress had repealed three years earlier, which even prior to repeal would not have been applicable to the situation at hand. The judge's rationale for imposing drastic consequences on the family was completely unfounded.

In a similar vein, although the *Velez* decision gives few precise details of the wife's pending immigration matter, it provides enough information to infer that the husband had filed a petition for his wife. It is true, as the judge assumed, that in such circumstances, with a few exceptions related to domestic violence,[110] the petition could not be approved after the termination of the marriage. Unfortunately for Mrs. Velez, simply being married to a U.S. citizen is not sufficient – immigration law vests enormous power in the person with legal status and relegates the beneficiaries of immigration petitions, like Mrs. Velez, to a passive status.[111] As such, without the active participation of her husband in pursuing the petition, the continued marriage may serve no purpose.

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107. *See, e.g.*, Nuñez v. Alonso, No. 04-D-311872-C (Nev. Eighth Jud. Dist. Ct. Fam. Div. hearing Feb. 25, 2004) (recording on file with author) (wherein the presiding family court judge stated, "I'm not an immigration attorney. I don't know a whole lot about it").

108. Rodriguez v. Rico, No. D-303041 at 2 (Nev. Eighth Jud. Dist. Ct. Fam. Div. filed Nov. 6, 2003) (copy on file with author).

109. To petition for his out-of-wedlock child, immigration law requires that a father legitimate the child or establish the existence of a bona fide parent-child relationship. Of these, only the former requires that the legitimating parent have legal custody of the child, and only at the time of legitimation. 8 U.S.C. § 1101(b)(1)(C), (D) (2005).

110. 8 U.S.C. § 1154(a)(1)(A)(iii), (B)(iii) (2005) (permitting self-petitioning by battered spouses and children).

111. 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a) (2005).

Judges who consider manipulation of family court outcomes to achieve particular immigration results need to take great care. Even valid attempts to secure legal immigration status for parties are not justified in every case, as equal protection concerns and the infringement of fundamental rights are implicated.

C. *Obfuscation – Masking the Real Impact of Immigration Status*

Family courts sometimes purport to rely on reasons unrelated to immigration status in reaching their decisions; while in reality their stated reasoning is simply a pretext for a decision based on immigration status. Subjective family law standards such as the best interests of the child "'can mask all manner of biases, views, political interest, misconceptions and, indeed, plain ignorance.'"[112] Courts that obfuscate, intentionally or obliviously, often openly discuss immigration issues but then insist that their stated rationale is not a proxy for a decision based on immigration status.

For example, Margarita T. was ordered to remain with the Department of Social Services after a trial court, applying Nebraska's statutory standard for removal, found that she "lacked proper parental care by reason of the fault or habits of her parents."[113] Shawn, her mother, conceded the fault of drug addiction, but her father James appealed and contested the presence of any fault on his behalf justifying removal of Margarita.[114] On appeal, the court noted that there was "no evidence that Margarita was not properly cared for."[115] In fact, at the time of her removal Margarita was "in good physical condition, properly nourished, with no indication that she had been neglected" and the "home appeared clean."[116] James had taken full responsibility for Margarita's care and had arranged childcare for her while he was working after Shawn's drug use and unreliability escalated.[117]

Still, the appellate court upheld the trial court's removal of Margarita, unsatisfied that the "protection of Margarita is . . . assured."[118] On its face, the court's articulation of James' "fault" under the Nebraska statute was his inability to provide adequate assurance of his availability to protect Margarita. Underlying the court's unwillingness to accept past performance as an indication of James' ability to protect Margarita in the future was the assertion that "James' status as an illegal immigrant [means that] his future presence to provide any supervision of the care of Margarita can

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112. Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 318 (1998) (quoting Judith G. Fowler, *Homosexual Parents: Implications for Custody Cases*, 33 FAM. & CONCILIATIONS CTS. REV. 361, 362 (1995)); *see also* Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race and Class in the Child Protection System*, 48 S.C. L. REV. 577, 608 (1997) (discussing how the best interest standard's subjectivity and indeterminacy disproportionately impacts poor families and families of color).

113. *In re* Margarita T., No. A-95-530, 1995 Neb. App. LEXIS 397, at *6 (Neb. Ct. App. Dec. 19, 1995).

114. *Id.* at *11.

115. *Id.* at *9.

116. *Id.*

117. *Id.* at *10.

118. *Margarita T.*, 1995 Neb. App. LEXIS 397, at *13.

be measured only one day at a time, as he is here only so long as he can avoid deportation."[119] The court denies that it is deciding that lack of legal immigration status is a "fault" but rather insists that it is concerned about James' possible absence. In contrast to its speculation regarding deportation, however, the court was troubled by James' acknowledged absences due to long hours at work, noting that "James could not be with his daughter 24 hours a day" and that "obviously we do not view James' employment as a fault or habit" under the removal statute.[120]

The court purports to look beyond immigration status to factual consequences attached to that status. But in attempting to do this, the court adopts several assumptions and factual errors that are common to courts that are obfuscating the effects of immigration status on their reasoning.

1. Overstating Precariousness – One Day at a Time

The court's articulation of James' "fault" reduces to an assertion that his situation of living in the United States without legal immigration status was an exceedingly precarious, day-to-day existence. Such assumptions by courts are not uncommon. As noted above, a Georgia court found a mother's living situation unstable simply because she "lived with and financially relied upon a man who . . . was an illegal alien."[121] Another court noted that if a party was "gainfully employed, the circumstances of that employment appear precarious at best, because of immigration status issues."[122]

To be sure, noncitizens without legal immigration status generally are removable from the United States.[123] And as noted above, the possibility of removal plays a central role in the way the dominant narrative shapes the lives of undocumented immigrants. But in light of various claims to relief from removal, "a State cannot realistically determine that any particular undocumented [person] will in fact be deported until after deportation proceedings have been completed."[124] But even if a particular immigrant does not "enjoy[] an inchoate federal permission to remain,"[125] this does not mean that imminent deportation is likely.

In fiscal year 2002, removal hearings resulted in the deportation of 148, 619 persons, of whom 77,860 were deported on a basis other than criminal charges.[126] At this rate, accepting the lowest estimate of the undocumented population at seven million, it would take nearly ninety years

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119. *Id.* at *15.

120. *Id.* at *14-*15.

121. *In re* M.M., 587 S.E.2d 825, 829 (Ga. Ct. App. 2003).

122. *In re* Vaughn, No. 3-560/03-0036, 2003 Iowa App. LEXIS 663, at *3 (Iowa Ct. App. Aug. 13, 2003).

123. 8 U.S.C. § 1227(a)(1)(B) (2005) ("Any alien who is present in the United States in violation of the [Immigration and Nationality Act] or any other law of the United States is deportable.").

124. Plyler v. Doe, 457 U.S. 202, 226 (1982).

125. *Id.; see also* Benson, *supra* note 18, at 484 (noting that given the complexities of immigration law, it is not unusual that even the immigrant herself does not fully understand her immigration status and applicable protections from removal).

126. 2002 YEARBOOK OF IMMIGRATION STATISTICS, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Table 46) 194, *available at* http://uscis.gov/graphics/shared/aboutus/statistics/ENF2002.pdf (last visited June 1, 2005).

to remove all current undocumented immigrants not convicted of crimes and thus brought to the attention of immigration officials. This timeline, moreover, would be longer if new arrivals are considered. The relative stability of the undocumented population is not new, and has long been recognized and grappled with by the courts.[127]

Also, current policies prioritize border enforcement over interior enforcement, meaning that persons already in the country who are not involved in criminal activity are exceedingly unlikely to face removal. Further, federal law has provisions designed to ameliorate the power of abusers based on threats of deportation and thus it prohibits an "adverse determination of admissibility or deportability . . . using information furnished solely by . . . a spouse or parent who has battered the alien or subjected the alien to extreme cruelty."[128]

This is not to say that deportations do not happen and that people's lives are not uprooted when they do.[129] The specter of deportation is real for undocumented immigrants and it plays a critical role in their marginalization by broader society. But blanket assumptions and stereotypes regarding precariousness must give way to a factually specific inquiry about the particular immigrant. For example, in a Washington custody matter, the court relied on detailed reports from social workers to conclude that "while Simon . . . is an illegal alien he is not likely to flee as he is employed with a good job and he is married."[130] Removal proceedings against Simon may be initiated tomorrow, but statistically speaking, this is unlikely. Further, even undocumented immigrants who do find themselves in removal proceedings are entitled to due process protections that generally provide some time between the initiation of removal proceedings and actual removal.

Here again, family courts must resist assumptions based on the dominant narrative and make sure that any assumptions hidden in their decisions are based on true assessments of the probabilities and risks involved in particular cases.

2. Imposing Impossible Conditions

In *Margarita T.,* the court implicitly set the condition that James obtain legal immigration status, since nothing short of that would have satisfied the court of his continuing availability to protect Margarita. Since James was not eligible for any form of legal immigration status at the time, this was an impossible condition. The court in *In re M.M.*, similarly set an impossible condition when it ordered a father to "show that he is taking positive steps towards correcting legal

127. *Plyler,* 457 U.S. at 218 (noting "the creation of a substantial 'shadow population' of illegal migrants—numbering in the millions—within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.").

128. 8 U.S.C. § 1367(a)(1)(A) (2005).

129. *See* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1951 (2000) ("The current system of mandatory detention and mandatory deportation seriously undermines . . . family values.").

130. *In re* Florentino, No. 25966-4-II, 2002 Wash. App. LEXIS 1896, at *6 (Wash. Ct. App. Div. 2 Aug. 9, 2002).

status while in United States."[131]

Family courts routinely set conditions that parties must meet before the court makes decisions regarding child custody. Employing broad equitable powers, it is an everyday occurrence for a family court to demand actions such as attendance at parenting classes, completion of drug rehabilitation, or payment of child support as family court cases proceed. Occasionally, however, courts illegitimately use this routine device to mask the impact of immigration status on decisions by attaching consequences to conditions that are based on wildly inaccurate assumptions about immigration law and are impossible to meet.

3. Hidden Assumptions Regarding Family Unity

Silently, the *Margarita T.* court made a common and telling assumption regarding what would happen if James actually was removed from the United States. If James took Margarita with him out of the country, he would have no problem remaining available to protect her. His unavailability, therefore, is entirely predicated on the unspoken assumption that Margarita would be separated from him and left behind in the unlikely event of James' removal. This assumption is all too common.[132] This, of course, is an issue that arises only for a mixed status family where a parent's right to remain in the United States is not equal to that of a child.

But children of deported parents commonly leave the country with their parents.[133] In practice, "U.S. citizen children born of alien parents in the United States are easily deportable."[134] While compelling arguments have been advanced that the removal of the parents of U.S. citizens violates the child's constitutional rights against family separation and "de facto deportation,"[135] these arguments have not been successful.[136]

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131. *In re* M.M., 587 S.E.2d 825, 831 (Ga. Ct. App. 2003).

132. *See, e.g., In re* D.R., 2004 Conn. Super. LEXIS 325, at *34 (Conn. Super. Ct. Feb. 9, 2004) (finding that a mother's "return to Honduras renders her effectively unable to serve as a responsible parent"); Interview with Jane Femiano, Clark County Office of the Special Public Defender (Aug. 12, 2004) (explaining that in some jurisdictions, courts simply assume that the parental rights of deported parents will be terminated).

133. In cases involving parents who voluntarily leave the United States, courts routinely award custody or visitation to a foreign parent, even if this means that a U.S. citizen child is forced to leave the United States unwillingly. *See, e.g.*, Tischendorf v. Tischendorf, 321 N.W.2d 405, 410 (Minn. 1982) (rejecting the argument that the constitutional right of a U.S. citizen not to be compelled to leave the United States was violated by a family court order that child visit father in Germany).

134. Jorge A. Vargas, *U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights*, 2 SAN DIEGO INT'L L.J. 1, 15 n.43 (2001).

135. *See generally* Edith Z. Friedler, *From Extreme Hardship to Extreme Deference: United States Deportation of Its Own Children*, 22 HASTINGS CONST. L. QUARTERLY 491 (1995); Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35 (1988); Sonia Starr and Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213 (2003).

136. Leila Rothwell, *VAWA 2000's Retention of the "Extreme Hardship" Standard for Battered Women in Cancellation of Removal Cases: Not Your Typical Deportation Case*, 23 U. HAW. L. REV. 555, 602 (2001); *See also* Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35, 40-41 (1988) (noting that "citizen children . . . have not been successful in pressing the view that the deportation of their undocumented parents is tantamount to the

For example, the Third Circuit found that the undisputed right of a U.S. citizen child to reside wherever she wished did not confer any immigration benefit on her parents because "an infant of . . . tender years cannot make a conscious choice of residence, whether in the United States or elsewhere, and merely desires, if she can be thought to have any choice, to be with her parents."[137] The parents "could decide that it would be best for [the child] to remain in the United States with foster parents . . . [b]ut this would be their decision involving the custody and care of their child, taken in their capacity as her parents . . . ."[138]

In the immigration context, advocates rightly bemoan such decisions for the failure to adequately value children's rights and autonomy, but such decisions have a decidedly more positive aspect when viewed from the perspective of undocumented parents like James facing custody challenges in family court. Decisions upholding *de facto* deportations are validations that fundamental parental rights are not weakened by parents' lack of immigration status or even their imminent deportation.

When courts implicitly determine that a child could not accompany a parent abroad they fail to recognize, or willingly subvert, a parent's fundamental rights. "It is the parents' role to decide what the good life is – how and with whom the child should live."[139] Leaving the United States is not a sign that a parent is unfit, and not a ground to undermine parents' role in their children's lives.

D. Accommodation

If some family courts manipulate the outcomes of family law cases to affect certain immigration outcomes for a party, others simply accommodate the collateral consequences of a party's immigration status in their decisions. In other words, they do not attempt to shape a party's immigration status, but rather simply respond to the consequences of that status. This is the largest, and by far most diverse, of the four categories. The cases in this category exhibit the range of challenges faced by undocumented immigrants.

For example, in *Korn v. Korn* a wife held a temporary immigration status that did not authorize employment in the United States.[140] Her status was derived from her spouse, who was entitled to work under the terms of his Visa.[141] The trial court granted the couple a divorce,

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de facto deportation of the child").

137. Acosta v. Gaffney, 558 F.2d 1153, 1158 (3rd Cir. 1977).

138. *Id.*

139. Appall, *supra* note 82, at 713 ("Unless the parents are unfit to make those decisions or have consented to let others make or share in making them, the state may not second-guess those decisions or sanction the decision-making power of others. Constitutional design and theory do not support the state's exercise of such power.").

140. Korn v. Korn, 867 So. 2d 338, 340-41 (Ala. Civ. App. 2003).

141. *Id.* The husband, who played violin for a symphony orchestra, held an O-1 Visa available to persons with extraordinary abilities. His wife held an O-3 Visa as the "spouse or child" of a person holding an O-1 Visa. Because her status required a marriage to an O-1 Visa holder, dissolution of the marriage would terminate her eligibility. This is not an uncommon

resulting in the wife's loss of her derivative immigration status and of her legal right to remain in the United States. Although the court acknowledged that the wife could return to Israel where she would be able to support herself financially, the court's award of primary physical custody of the child to the wife was conditioned on her remaining in the United States.[142] Acknowledging that the wife would not be authorized to work in the United States, the court ordered the husband to pay substantial alimony provided that she remain in the United States.[143]

Unlike the court in *Velez*, discussed above, the court here did not deny a divorce to achieve a particular effect on a party's immigration status. Still, the court plainly tailored its decision to accommodate the immigration consequences that follow from the family law decision. Such accommodations are common, and arise in a variety of contexts. Some of the more frequent accommodation issues are discussed below.

1. The Lack of Employment Authorization

Restraints on employment related to immigration status are a common source of requests for accommodation. Since 1986, U.S. law has prohibited hiring persons unable to establish their employment authorization by mandating that employers verify the identity and eligibility of all new hires through the examination of specific documents.[144] Laws governing who qualifies for employment authorization are complex and separate from, though related, to the concept of legal immigration status. It is possible to have legal immigration status without qualifying for employment authorization.[145] Alternately, in rare instances it is possible to have employment authorization prior to the acquisition of legal immigration status based on a pending application.[146]

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situation. *See, e.g.*, Aaron Donovan, *After 9/11, Searching For Way to Stay in U.S.*, N.Y. TIMES, July 23, 2002, at B4 (explaining that a number of surviving spouses of immigrant workers who were killed in the September 11, 2001, attack on the World Trade Center received notice that their immigration status was terminated); *see also* Memorandum from Stuart Anderson, Executive Associate Commissioner, Office of Policy and Planning, Immigration and Naturalization Service, U.S. Department of Justice, to Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations (Jan. 31, 2002), *available at* http://uscis.gov/graphics/lawsregs/handbook/PatriotGuidPub.pdf (last visited June 1, 2005) (describing that although the USA Patriot Act conferred some limited immigration benefits on the families of victims, it did little for those whose status in the U.S. was derived from their spouse's nonimmigrant Visa, such as spouses of H-1B Visa holders).

142. *Korn*, 867 So. 2d at 345.

143. *Id.*

144. 8 U.S.C. § 1324a(A)-(B) (2005). Of note, this section of the law directs its prohibitions against employers, not undocumented workers. Other provisions do prohibit undocumented workers from presenting false documents or otherwise circumventing the verification system, such as 8 U.S.C. § 1324c(a) (2005), but the law does not otherwise prohibit undocumented immigrants from working. Immigration law, however, attaches severe consequences to past instances of unauthorized employment, insofar as past unauthorized employment becomes a barrier to obtaining legal status and the opportunity to obtain authorized employment. *See, e.g.*, 8 U.S.C. § 1255(c) (2005). In sharp contrast to the pervasive rhetoric of "illegal aliens" it is rare to hear mention of an "illegal employer."

145. Many immigrants with legal immigration status whose status is derivative, such as Mrs. Korn, do not qualify for employment authorization and are dependent on the "principal" immigrant. *See also* 8 C.F.R. § 274a.12 (providing that holders of most temporary Visas, such as tourist and student Visas, generally do not qualify for employment authorization).

146. *E.g.*, 8 C.F.R. § 274a.12(c)(9) (2005) (providing that in the last stages prior to adjudication of an application adjustment to permanent legal resident, employment authorization is available even though legal status has not been formally granted).

Overwhelmingly, though, immigrants who are not eligible for or in possession of legal immigration status simply cannot receive employment authorization.

Not surprisingly, requests that a court take note of a lack of employment authorization generally come from the person lacking that authorization. On occasion, as in *Korn*, courts accept that lack of employment authorization in fact prevents employment and accommodate accordingly in making decisions.[147] At other times, although factual inquiry indicates that a person actually is employed, lack of employment authorization is raised as a shield to some legal obligations. This happens, for example, when an undocumented father asserts that he cannot be ordered to pay child support because he is not authorized to work.[148]

The fact that a worker is employed without authorization can raise a number of complications, particularly with regard to issues dependent on income, such as child support. For example, workers paid in cash under the table rarely have documentary proof of their incomes to establish the appropriate level of child support.[149] At other times, income records are inaccurate due to immigration-related fraud.[150] Moreover, when support obligations are not met, garnishing the wages of an itinerate undocumented worker proves impossible.

2. Eligibility for Benefits and Services

Without doubt, immigration status affects eligibility for some governmental benefits and services. At times this is a direct result of immigration status, and at times an indirect effect based on collateral effects of the lack of immigration status such as lack of official identification. The inability to access benefits and services, in turn, can have profound effects as it may limit the range of services and supports that are available to assist families struggling.

Some limitations are based on the eligibility requirement written into laws governing access by undocumented immigrants and even many legal permanent residents to direct subsistence federal benefits, such as Supplemental Security Income, Food Stamps, and Temporary Assistance for Needy Families.[151] Some barriers to services are less direct, as when an undocumented immigrant facing unmet child support obligations cannot take advantage of a government employment assistance program due to lack of employment authorization.[152] Difficulties in accessing other

147. *E.g.*, Ali v. Tiwana, 2003 Conn. Super. LEXIS 2535, at *7 (Conn. Super. Ct. Sept. 5, 2003) (ordering that "father shall use his best efforts to obtain a green card or otherwise obtain the legal right [to] remain in and to work in the United States" and will not be liable for child support until authorized to work).

148. Gomez v. Fernandez, No. R-120399 (Nev. Eighth Jud. Dist. Ct. Fam. Div. hearing Mar. 22, 2004) (copy on file with author).

149. *Id.*

150. Soto v. Garcia, No. R-100186 (Nev. Eighth Jud. Dist. Ct. Fam. Div. hearing May 26, 2004) (copy on file with author) (respondent in support action testified that income of undocumented coworkers was reported on his social security number).

151. NAT'L IMMIGRATION LAW CTR., IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS (2004), *available at* http://www.nilc.org/immspbs/special/ovrvw_imm_elig_fed_pgms_031904.pdf (last visited June 1, 2005) [hereinafter IMMIGRANT ELIGIBILITY].

152. Morill v. Dias-Cano, No. R-111042 (Nev. Eighth Jud. Dist. Ct. Fam. Div. hearing Mar. 9, 2004) (copy on file with

services and benefits are less obvious and more suspect. For example, a medical lab refused to take samples from one respondent in a paternity action who did not have state-issued identification.[153]

When such barriers arise, family courts struggle to accommodate. But courts also must be aware that the dominant narrative far overstates the extent to which immigrants are ineligible for benefits and services. Immigrants, even undocumented immigrants, do qualify for many state and federal government benefits and services.[154] While a court cannot rewrite federal benefits law, it can use its equitable power to go far in knocking down arbitrary barriers to services such as that of the medical lab. Courts must question assumptions and explore eligibility before rejecting services that it would order and make available to nonimmigrant families and individuals.

Also, even if services are not available in the normal course of the court's experience and practice, other avenues may be available. For example, in *In re Kittridge* the court considered "whether New York City has the authority to remove a child from his mother, an undocumented alien, but then deny social services ordered by the Family Court to rehabilitate and reunite the family because she is an undocumented alien."[155] Relying on the New York Constitution's mandate that the "aid, care and support of the needy are the public concerns and shall be provided by the state and its subdivision,"[156] the court determined that the Department of Social Services "must provide, or arrange for Mrs. Kittridge to receive, all court-ordered services designed to reunite her with her son."[157]

The barriers to needed services that immigration status imposes highlight a fundamental clash between the policies and goals underlying immigration law and family law. Laws stripping benefits and services on the basis of immigration status take no account for the family as a unit, and often inflict harm on U.S. citizen children through harsh treatment of immigrants. Further, immigration law lacks the flexibility that family law often demonstrates to adapt to the particular needs of a family. When society's laws are so completely out of sync, close scrutiny of the reasons for this can be a fertile ground for considerations of reform.

IV. CONCLUSION AND RECOMMENDATIONS

Even this initial examination of available family court decisions makes evident the exaggerated role that immigration status often plays in many family court outcomes. Moreover, the

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153. Doe v. Flores, No. R-12194 (Nev. Eighth Jud. Dist. Ct. Fam. Div. hearing June 9, 2004) (copy on file with author).

154. IMMIGRANT ELIGIBILITY, *supra* note 151; *see also* NAT'L IMMIGRATION LAW CTR., IMMIGRANTS AND PUBLIC BENEFITS: STATE-FUNDED BENEFIT PROGRAMS (2004), *available at* http://www.nilc.org/immspbs/sf_benefits/index.htm (last visited June 1, 2005).

155. *In re* Kittridge, 714 N.Y.S.2d 653, 654 (N.Y. Fam. Ct. 2000).

156. N.Y. CONST. art. XVII, § 1.

157. *Kittridge*, 714 N.Y.S.2d at 657.

patterns that emerge from reviewing family court decisions indicate that the impact of immigration status in family court is not an irregular occurrence. Whether family courts are discriminating, manipulating, obfuscating or accommodating, immigration status influences, sometimes determinatively, the outcome of cases.

The confluence of demographic patterns and immigration law reforms indicate that immigration status implications in family court will grow in frequency and complexity. As decision makers, practitioners and immigrants themselves grapple with arguments regarding immigration status in family court, the need for further research and thoughtful assessment is urgent. The unthinking application of immigration status in family law decisions does violence to immigrant families and it cannot continue.

In particular, empirical study of the impact of immigration status on family court outcomes is needed. Such research would begin to bridge the gap between the vast numbers of people appearing in family courts everyday and the miniscule number of opinions that are reported. For example, what impact does immigration status have on the time that children of undocumented parents remain in foster care? How do perceived limitations on benefits and services for families affect family reunification? Do undocumented women fail to seek child support for their children in the belief that they are not eligible or at risk? These and many more issues warrant further research and scrutiny.

Although much further research is needed, it is possible, from the analysis of available decisions in this article, to begin to posit some guidelines for courts and practitioners in family court when immigration status is at issue. First, courts and practitioners need to be alert to immigration status and its role in proceedings. While immigration status often will be argued openly, such issues and the family power dynamics that accompany them may not be obvious at first glance. Courts must develop sensitivity and awareness to these issues, together with a willingness to engage in them thoughtfully.

Second, recall that immigrants, documented or not, are not total strangers to the Constitution. Especially when fundamental rights such as rights arising from the parent-child relationship are at stake, courts need to consider skeptically the constitutionality of arguments asserting the relevance of immigration status. Rather than sweep issues under the table, courts must acknowledge and explore the civil rights implications of immigration status related arguments.

Third, decision-makers need to resist the dominant narrative regarding immigrants and sweeping negative assumptions based on stereotypes. The documented and undocumented immigrant population is large and incredibly diverse. The facts in individual cases frequently will contradict the broader societal narrative.

Fourth, if immigration law is relevant to the outcome of a family law matter in any way, great care must be taken to see that relevant immigration law and its implications are understood.

This is the task not just of the court, but of attorneys practicing in family courts as well.[158] Just as criminal defense attorneys are learning that they must have knowledge of immigration law to adequately advise their clients, so too will family law attorneys. Professional responsibility may require that a family court attorney in a particular matter learn about a client's immigration situation to serve that client competently.

Finally, the tension between immigration law and family runs deep. At a fundamental level, the immigration and family laws have conflicting goals and prioritize contradictory policies. These differences must be examined as part of any meaningful debate about immigration reform. The intersection of family law and immigration law is a place from which basic tenets of both may be examined and challenged.

Much more exploration of the overlooked role that immigration status frequently plays in family law matters is needed. The family courts are an important institution and will play a key role in the lives of many immigrant children and families. Whether this role is positive will in large part be determined by how family courts respond to the challenges that immigrant families present.

158. Some materials designed specifically to explain relevant immigration law to family court judges are beginning to become available. *See* KATHERINE BRADY & SALLY KINOSHITA, IMMIGRATION BENCHBOOK FOR JUVENILE AND FAMILY COURT COURTS (ILRC Publications 2003).