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The Alienation of Fathers

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THE ALIENATION OF FATHERS

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Maternal preference has long been rejected as an unconstitutional vehicle responsible for perpetuating outdated and inaccurate stereotypes regarding the parenting ability of mothers and fathers.[1] However, little attention is paid to how identical gender biases continue in other legal arenas, such as immigration.[2] Announcing the decision of *Miller v. Albright*[3] in 1998, the Supreme Court upheld a provision of the Immigration and Nationality Act (INA) that refuses citizenship as a matter of *jus sanguinis*, or "right of blood," to a child born-abroad and out-of-wedlock to a United States father and alien mother unless during the child's minority paternity has been established and the father has assumed financial responsibility.[4] By contrast, the statute requires no similar post-birth affirmative action of a citizen mother in order for her child's United States citizenship to be recognized.

In the United States, the statutory privilege of *jus sanguinis* theoretically may underpin the citizenship of children born abroad or in the United States to United States parents. However, for a child born on United States soil, the principle is not required. That child, born on United States soil, whether born to alien or United States citizen parents, is constitutionally recognized as a citizen by the Fourteenth Amendment's protection of the doctrine of *jus soli*—or "right of soil."[5] Accordingly, given the plenary

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1. For a discussion of the rejection of maternal preference or the "tender years" doctrine, see LESLIE J. HARRIS & LEE E. TEITELBAUM, FAMILY LAW 728–34 (2nd ed., 2000). The failure of this reform, though, to effect the equal treatment of parents is routinely made in custody law. For a discussion of the perpetuation of maternal preference through more neutral custody rules, such as the "best interests" standard, see *infra* note 28 and accompanying text.

2. *See, e.g.*, Gabriel J. Chin, *Is There A Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000) (Focusing on how the plenary power doctrine's strength may be undercut, Professor Chin has recently discussed the racial and gender biases in immigration law.); Linda Kelly, *Republican Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 557 (2000) (focusing on the history of gender biases in immigration law).

3. 523 U.S. 420 (1998).

4. *See id.* For a further discussion of Miller, see *infra* notes 10, 47 and accompanying text.

5. "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." U.S. CONST. AMEND. XIV, § 1.

For a further discussion of the application of the principles of *jus sanguinis* and *jus soli* in the United States see STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW

power wielded by the political branches over matters affecting our borders, the *Miller* decision's limit on an unwed father's statutory ability to confer citizenship by blood might simply be dismissed as yet another "immigration aberration." Since the earliest cases of *Chae Chan Ping v. United States*[6] and *Fong Yue Ting v. United States*,[7] the notion of sovereignty is recognized to give the political branches absolute control over matters affecting the admission and deportation of aliens. Consequently, whenever the immigration card is played, individual constitutional rights otherwise protected are trumped.[8] Given this marginalization of rights, it comes as no surprise that "immigration scholars love to hate the plenary power doctrine."[9]

AND POLICY 1030–39 (2d ed. 1997). For critical perspectives on the principle of *jus soli* see PETER H. SCHUCK & ROGERS SMITH, CITIZENSHIP WITHOUT CONSENT—ILLEGAL ALIENS IN THE AMERICAN POLITY (1985) (questioning the constitutional protection underpinning the principle of *jus soli*); *cf.* Gerald L. Neuman, *Back to Dred Scott?*, 24 SAN DIEGO L. REV. 485 (1987) (attacking position of Schuck and Smith).

6. 130 U.S. 581 (1889). Petitioner had been a lawful permanent resident for 12 years. After Ping left the United States with a certificate to re-entry, Congress amended the Chinese Exclusion Act, thereby declaring these certificates void and of no effect. The legislation was upheld upon the Supreme Court's rationalization that just as Congress had the right to protect the country from invading armies it surely had an inherent right to protect against "the vast hordes of people crowding in upon us." *Id.* at 606.

7. 149 U.S. 698 (1893). Through an amendment to the Chinese Exclusion Act, a Chinese resident could be deported if he had not obtained a certificate of residence or could not show through the testimony of "one credible white witness" that he was a lawful resident. *Id.* at 727. Upholding the provision, the Court found that the right to deport foreigners, like the right to exclude them, was "an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare." *Id.* at 711.

8. *See, e.g.*, Reno v. American-Arab Anti-Discrimination Committee, 525 US 471 (1999) (holding no selective prosecution defense available for undocumented aliens in deportation proceedings); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding no Fourth Amendment warrantless "search and seizure" protection for nonresident aliens against United States government conduct outside the United States); Fiallo v. Bell, 430 U.S. 787 (1977) (limiting equal protection scrutiny available to unwed fathers challenging an immigration provision that affords mothers a greater opportunity to petition for alien children); Kleindienst v. Mandel, 408 U.S. 753 (1972) (limiting consideration of First Amendment rights when Attorney General denied visa to Marxist advocate seeking admission).

9. Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 7 (1998). Despite the absence of an explicit constitutional delegation of power to the federal government over immigration matters, the power, per se, is not generally disputed. Rather, it is the breadth of the power that is the subject of much analysis and critique. For a sampling from the wealth of scholarship assessing the plenary power doctrine, particularly its influence upon individual rights not traditionally associated with questions of border control, see e.g., Linda S. Bosniak, *Membership, Equality and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994) (discussing difference in rights accorded aliens inside and outside of immigration law); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural*

However, despite the authority of the plenary power doctrine, *Miller* advances perhaps an even more unsettling position. Announcing the judgment of the court, Justice Stevens, joined by Justice Rehnquist, rejected reliance upon the plenary power doctrine and determined that the statute did not violate the heightened scrutiny given gender claims.[10]

How did the INA gender disparity survive an equal protection challenge? We may comfortably believe we live in an age when sex-based classifications are routinely prohibited. Recent decisions such as that ending the gender bias of the male-only admission policy of the Virginia Military Institute support this belief.[11] Yet, like child custody, immigration jurisprudence reveals an ongoing pattern of gender disparity. Fathers, particularly unwed fathers, remain our "debtors and criminals."[12] As this Essay goes to press, a Supreme Court decision is being awaited in *Nguyen v. INS*.[13] *Nguyen* effectively rechallenges the immigration provision at issue in *Miller* and raises similar arguments against it. However, regardless of the outcome in *Nguyen*, immigration law may maintain a disparate treatment of mothers and fathers. The reduction of a father's parenting role to a financial obligation as represented by *Miller* affirms the marginalization of unwed fathers otherwise endorsed by the Court in the immigration context.

Surrogates for Substantive Constitutional Rights, 92 COLUM. L. REV. 1625 (1992) (examining difference between substantive and procedural rights afforded aliens); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996) (asserting that the plenary power over immigration enjoyed by the political branches should be limited to matters of communal formation); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087 (1995) (discussing conflict between the plenary power doctrine and the aliens' rights tradition). For a recent exchange on whether the plenary power doctrine use in the immigration law context has simply served as a proxy to limit individual rights consistent with the protection historically afforded them outside of the sphere of immigration law, see Chin, *supra* note 2. *Cf.* Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 289 (2000).

10. Miller v. Albright, 523 U.S. 420, 434 n.11 (1998) (plurality opinion). The majority position in *Miller* was comprised of three separate opinions, while there were two dissenting opinions. For an analysis of the opinions and their significance in immigration law see Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1999 SUP. CT. REV. 1; Kelly, *supra* note 2.

11. United States v. Virginia, 518 U.S. 515 (1996); *see also* Craig v. Boren, 429 U.S. 190 (1976) (striking down gender disparity in alcohol consumption laws).

12. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA 215 (1985).

13. Nguyen v. INS, 208 F.3d 528 (5th Cir. 2000) (holding that statute does not violate the Equal Protection Clause), *cert. granted*, 121 S.Ct 29 (2000). Oral arguments were heard on January 9, 2001. For more on *Nguyen*, see *Supreme Court Hears Arguments in Transmittal of Citizenship Case*, 78 INTERPRETER RELEASES 229 (2001).

By evaluating immigration and custody law from a father's perspective and thereby uncovering and addressing the biases held against men, both fathers and mothers will achieve greater recognition. Beyond revealing gender discrimination, such a study also demonstrates the disparate views still harbored toward unmarried parents. Examining custody and immigration law with an emphasis on these issues will hopefully foster a dialogue that brings the law in line with the reality of today's families and promotes each family member's individual potential.

I. THE HISTORY OF FATHERS AND CUSTODY

While the "natural" parental duties of each sex have evolved with societal developments, fathers have never been recognized to have the nurturing ability that is thought to be inherent to women. This inability to care is a characteristic particularly attributed to unwed fathers.

Consistent with the notion of coverture, the earliest treatment of the family in American law allowed a man's wife as well as his legitimate children to be regarded as his property.[14] However, the child born out-of-wedlock was "filius nullius"—the child and heir of no one.[15] While the moral implication of this treatment of illegitimate children may have been an effort to prevent out-of-wedlock relationships, the legal implication was to protect a man's ability to independently control his property and family lineage.[16] Ultimately, the shift toward awarding a mother custody of her children that began in the early nineteenth century was also a by-product of a desire to protect male interests. The "tender-years doctrine" in favor of awarding mothers custody emerged as societal and industrial developments demanded that men work outside the home.[17] The growing recognition that children were not merely small adults whose services could be doled out by the father but that their proper moral and religious upbringing and education required significant attention also contributed to the change.[18] In order for men to run the country, women were charged with caring for children. Consequently, the female image at

14. *See infra* notes 24–28 and accompanying text.

15. HARRIS & TEITELBAUM, *supra* note 1, at 711-13.

16. *See id.* at 196. In this manner, bastardy law may be seen to complement liberalism's promotion and safeguard of individualism and the public/private dichotomy. However, for the basic criticism of liberalism as a means to mask male dominance through neutral principles, abstract rules, and rights talk, see MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991).

17. MARY FRANCES BERRY, THE POLITICS OF PARENTHOOD: CHILD CARE, WOMEN'S RIGHTS AND THE MYTH OF THE GOOD MOTHER 51–54 (1993); Carol Sanger, *Separating from Children*, 96 COLUM L. REV. 375, 399–403 (1996).

18. *See* BERRY, *supra* note 17, at 54; *see also* GROSSBERG, *supra* note 12, at 235–37, Sanger, *supra* note 17, at 399–403.

coverture as "devious, sexually voracious, emotionally inconstant, and physically and intellectually inferior," was replaced with the image of women as the model of virtue and care.[19] While social demands and the transformed image of women allowed women to be viewed as the primary caretakers and awarded women custody as the number of custody disputes grew with the growing number of cases of separation and divorce, illegitimate children were also affected. In keeping with the changing gender roles, women could now also be recognized as the "natural" caretakers of illegitimate children.[20] Fathers, on the other hand, would be charged with the financial expectation of keeping their illegitimate children off the public dole.[21]

While such developments in the treatment of illegitimate children marked the beginnings of the limited expectations of unwed fathers, the interest in both maintaining the virtuous image of women and the desire to protect the "nuclear family" of a husband, wife, and their legitimate children together also impacted married fathers.[22] For example, through the doctrine barring spousal testimony, a husband was prevented from proving that his wife's child belonged to another. As one court, quoting Montesquieu, stated, "[T]he wickedness of mankind makes it necessary for the laws to suppose [men] better than they really are. Thus we judge

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19. BERRY, *supra* note 17, at 51.

20. GROSSBERG, *supra* note 12, at 208.

21. *Id.* at 207–18.

22. For more recent jurisprudential recognition of marital and familial privacy, see, e.g., Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Roe v. Wade, 410 U.S. 113 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Wisconsin v. Yoder, 406 U.S. 205 (1972); Ginsberg v. New York, 390 U.S. 629 (1968); Griswold v. Connecticut, 381 U.S. 479 (1965); Prince v. Massachusetts, 321 U.S. 158 (1944), Meyer v. Nebraska, 262 U.S. 390 (1923). This perception of the marital unit as an inviolable entity is today a common target of feminists. Catherine MacKinnon's work perhaps represents the leading and most exhaustive feminist effort to "explode" the violence of privacy and the effect of the public/private distinction on issues ranging from abortion to sexual harassment to pornography. *See, e.g.*, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 100 (1987). Similarly, a great deal of work has been done by feminists seeking to end domestic violence by transforming it from being treated as a private issue to being recognized as a public harm. *See, e.g.*, Reva B. Siegel, *"The Rule of Love"; Wife Beating as Prerogative*, 105 YALE L.J. 2117 (1996) (arguing that domestic violence once perpetuated as a right of marital privacy persists through today's gender-neutral domestic violence statutes); Elizabeth M. Schneider, *The Violence of Privacy*, *in* THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE 36, 49–53 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994); Elizabeth Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991); Malinda L. Seymore, *Isn't it a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NW. U. L. REV. 1032, 1070–73 (analyzing the interplay of spousal immunity and domestic violence).

that every child conceived in wedlock is legitimate, the law having a confidence in the mother as if she were chastity itself."[23]

II. THE PARALLELS OF CUSTODY AND CITIZENSHIP

The right to confer citizenship upon one's children through *jus sanguinis* tracks the gender distinctions of custody law. With the initial treatment of children as a father's property, it is not surprising that the first blood right citizenship laws of 1790 required an alien child to depend upon his father's citizenship in order to become a citizen.[24] While the gender disparity within bloodright citizenship laws was clearly evident, the issue proved a divisive one for early feminists, as it raised the fundamental question of whether the feminist agenda should focus solely on political rights or concentrate on ameliorating both political and non-political inequalities.[25] Yet despite the movement's own division on the issue, sufficient attention was brought to the matter. In 1934, legislation was passed that would allow the United States citizenship of either the mother or father to entitle the child to become a United States citizen, regardless of marital status.[26] While the notion of women as the natural caretakers was instrumental in promoting this achievement for citizen mothers, the negative image of the unwed father remained strong. Six years later, in 1940, legislation was passed that first introduced the question of legitimacy into citizenship law. The legislation challenged an unwed father to redeem his negative, scoundrel image by entitling his child to citizenship only if the father's paternity was legally established

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23. Egbert v. Greenwalt, 44 Mich. 245, 249 (1880) (quoting MONTESQUIEU, THE SPIRIT OF THE LAWS); *see also* GROSSBERG, *supra* note 12, at 19.

24.

> The children of citizens of the States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: Provided, That the right of citizenship shall not descent to persons whose fathers have never been resident in the United States.

Act of Mar, 26, 1790, ch. 3, 1 Stat. 104.

25. The issue of bloodright citizenship for foreign-born children proved divisive within the feminist movement as it raised the fundamental question of whether the feminist agenda should focus solely on political rights or have an encompassing political, social, and civil rights vision. For an historical account of the controversy over bloodright citizenship within the feminist movement, see CANDACE LEWIS BREDBENNER, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP 151–71 (1998).

26. Act of May 24, 1934, 48 Stat. 797. At about the same time, the Senate ratified an equal-nationality treaty produced at the Pan-American Conference at Montevideo in December, 1933. Consistent with the 1934 legislation addressing *jus sanguinis* citizenship, the treaty promoted gender equality in all civil and political matters. For further discussion of such events, see BREDBENNER, *supra* note 25, at 238–41.

during the child's minority.[27] Of course, the mother as "natural caretaker" required no legislative encouragement. Consistent with the custody doctrine of "tender years," she was naturally presumed to care for her child.[28]

Such historic minimal expectations of fathers in both custody and immigration law are consistent with more recent societal developments. In custody, while the "best interests" standard is one of gender neutrality, as a practical matter, mothers are still disproportionately awarded custody.[29] Accordingly, as a result of mothers generally receiving custody, visitation rights are typically awarded to fathers. However, there is no widely used legal mechanism or social pressure for requiring a father to visit with his child.[30] This lack of visitation enforcement is consistent with the historic treatment of fathers as simply providers of financial support. Indeed, in contrast to the legal indifference to a non-custodial parent's unwillingness to visit with his child, the non-custodial parent's financial obligation is a duty that is strictly enforced.[31] Legal child support enforcement units as well as the societal attitude toward "deadbeat dads" reaffirm that a father's sole duty is to financially provide for his child.

Other custodial issues brought before the Supreme Court reaffirm that unwed fathers will only be recognized if "something more" than a blood connection has already been demonstrated.[32] For example, in *Stanley v. Illinois*,[33] while an Illinois statute prohibiting an unwed father from gaining custody of his children upon the mother's death was struck down as a violation of equal protection, it was done so only after the father was found to have had a pre-existing relationship with his children.[34] The court could therefore conclude that he had a "substantial interest" in retaining custody.[35] As the *Stanley* decision suggests, unwed fathers are unsuccessful in bringing equal protection challenges if no relation to their

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27. Nationality Act of 1940, Pub. L. No. 76-876, § 205, 54 Stat. 1137, 1139.

28. Such legislation did, however, impose some limitations on unwed mothers. A child of an unwed citizen mother would be entitled to United States citizenship only provided paternity was not established during his minority. Nationality Act of 1940, Pub. L. No. 76-876, §§ 201, 205, 54 Stat. 1137, 1138–40.

29. For a discussion of this practical result and its implications, see Nancy E. Dowd, *Rethinking Fatherhood*, 48 FLA. L. REV. 523 (1996); Linda Kelly, *The Fantastic Adventure of Supermom and the Alien: Educating Immigration Policy on the Facts of Life*, 31 CONN. L. REV. 1045, 1049–56 (1999).

30. Of course, the legal system's failure to respond when a non-custodial parent does not take advantage of his visitation opportunity must be distinguished from the legal system's clear efforts to guarantee that a non-custodial parent's desire to visit with his child not be thwarted by the custodial parent or other forces.

31. For a discussion of the legal tools of enforcement see HARRIS & TEITELBAUM, *supra* note 1, at 664–89.

32. Dowd, *supra* note 29, at 526.

33. 405 U.S. 645 (1972).

34. *See id.*

35. *Id.*

children other than biological can be proven. As a result, in *Lehr v. Robertson*,[36] the Supreme Court was able to reject an unwed father's claim for an absolute right of notice prior to his child's adoption, finding that the father's lack of relationship with his children prevented this right.[37] The result of *Michael H*[38] is no different. While denying an unwed father (with a 98% scientific certainty of being the father) standing to establish himself as the father of a child born to a married woman, the Supreme Court presumed that the unwed biological father could not have a valuable relationship with his child.[39] The minimal financial obligation normally required would in this instance presumptively be assumed by the married woman's husband. In making this decision, the Court not only reaffirmed its minimal expectation of unwed fathers but also observed "the historic respect—indeed, sanctity would not be too strong a term" for having a child raised within a traditional nuclear family of two parents and dependent children.[40]

These minimal expectations of fathers, particularly the image of unwed fathers and the "deadbeat dad image" that remain in custody law, help explain why, in 1986, further challenges were added to the blood-right citizenship laws for unwed fathers. In addition to requiring a legal showing of paternity, the law was amended to demand that an unwed father assume a financial obligation for his out-of-wedlock, foreign-born child.[41] Again, no similar financial obligation is placed upon an unwed mother in order for her foreign-born child to become a citizen.

Consistent with the negative image of fathers evident in our citizenship laws, laws allowing a father to petition for his child to become a lawful permanent resident—that is, a "green card holder"—also reflect a certain contempt. Deciding the *Fiallo v. Bell*[42] case in 1977, the Supreme Court upheld a provision of the Immigration and Nationality Act that completely prohibited an unwed father from petitioning for the residency of his child.[43] In upholding this provision, the Court conceded that Congress' bias against unwed fathers was motivated, at least in part, by "a

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36. 463 U.S. 248 (1983).

37. *See id.*

38. Michael H. v. Gerald D., 491 U.S. 110 (1989).

39. *See id.*

40. *Id.* at 123.

41. Act of Nov. 14, 1986, sec. 13, § 309(a) (3)–(4), 100 Stat. 3655 (1986) (codified as amended at 8 U.S.C. § 1409(a) (3)–(4)). Another limitation added was the reduction of the child's age (from 21 to 18) by which time paternity must be established. However, in addition to the 1940 legislation's basis for proving paternity by legitimation or court adjudication, it may now also be established by a father's writing under oath. *See id.* The 1986 amendments also now place a one year United States residency requirement on a mother prior to the child's birth. *See id.*

42. 430 U.S. 787 (1987).

43. *See id.* (upholding INA §§ 101(b) (1) (D), 101(b) (2) (1952)).

perceived absence of close family ties" between a father and his child.[44] Reacting to *Fiallo*, Congress indicated that it wanted unwed fathers to have relationships with their children—it just did not expect them to do so without some legal prodding.[45] The amended statute now requires that for an unwed father to petition for the residency of his alien child, he must affirmatively show that he "has or had a bona fide parent-child relationship."[46] Again, no demands are placed upon mothers other than showing their natural, biological connection. As the Court had stated in *Miller*, a statute requiring a mother to demonstrate her relationship with her child would be "superfluous."[47] Unlike fathers, the caring ability of mothers is presumed.

Looking beyond custody law and uncovering the disparate treatment of fathers and mothers in immigration and nationality laws remind us that defining parenthood, an issue central to achieving gender equality, remains unresolved.[48] However, this observation is not made to suggest that fathers and mothers now parent in an equal fashion.[49] Nor is it made to suggest that financial support obligations should be reduced, or to suggest that the financial obligations should not be enforced, perhaps even more strictly than they already are.[50] Rather, my argument is that *more* than financial support should be expected from men in their roles as fathers. And, as a corollary, attitudes regarding women and their role as mothers should change. Legitimate debates may continue as to whether mothers and fathers should follow a gender-neutral model of parenting or whether gender may dictate specific roles.[51] However, regardless of one's position

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44. *Id.* at 787.

45. IRCA § 315(a) (1986).

46. 8 U.S.C. § 1101(b) (1) (D) (1999).

47. Miller v. Albright, 523 U.S. 420, 439 (1988).

48. While it is beyond the scope of this paper, it must at a minimum be recognized that disagreement continues on the question of what constitutes "true" gender equality. For example, like the feminists of the 1930s, feminists today continue to debate the definition of equality, the differences between men and women, and the role of the government in resolving this timeless question. For an analysis of this fundamental dilemma within feminism, see, e.g., *Williams*, *supra* note 16.

49. A recent study, released in 1998 by the Families and Work Institute, reports that while working men are spending more time with their children than in the past, working women continue to spend more time with their children. Tamar Lewin, *Men Assuming Bigger Share at Home, New Survey Shows*, N.Y. TIMES, Apr. 15, 1998, at A18; *see also* Naomi R. Cahn, *Gendered Identities: Women and Household Work*, 44 VILL. L. REV. 525, 530 (1999); Dowd, *supra* note 29, at 523–24.

50. For a discussion of the host of issues raised by child support, ranging from the fundamental problems encountered in child support determinations, modification, and enforcement to challenges created by second families, bankruptcy, and taxes see HARRIS & TEITELBAUM, *supra* note 1, at 561–710.

51. For a comparison of the gender-neutral and gender-specific models of parenting and the problems raised by each see Dowd, *supra* note 29, at 530–33. For advocacy of

as to such, both fathers and mothers should be viewed as equal parents, both possessing emotional and economic obligations.

III. DEFINING FATHERS AS PARENTS

In the custody setting, the minimal expectation and negative image of fathers is finally beginning to receive attention. Changing attitudes toward male parenting is evident in the growing use of joint custody awards and the strengthening of the fathers' rights movement.[52] At the American Association of Law Schools 2000 Annual Meeting, a panel of advocates for fathers at the national and grassroots level as well as academicians was dedicated to the topic of "rethinking fatherhood."[53] While the group was not without controversy and members advocated varying approaches, the panel was united in recognizing that the message "fathers matter" needed to be heard and supported.[54]

Leading the charge on the academic front, Professor Nancy Dowd argues that "rethinking fatherhood" beyond limited biological and financial ties requires recognizing the positive impact of casting fathers as nurturers.[55] Such recognition would emphasize that fathers can and already do parent. Observing that "[g]ood parenting is not sex-specific nor sex-related," Professor Dowd's attention to fathers also reminds us that mothers are perhaps recognized as better parents, not because of biology, but

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adopting motherhood as the parenting model for both mothers and fathers see MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 233–36 (1995).

52. *See* Dowd, *supra* note 29, at 523. For a further discussion of the growing use of joint custody see HARRIS & TEITELBAUM, *supra* note 1, at 783–804.

53. Rethinking Fatherhood: Legal, Social and Economic Perspectives, Program delivered at the AALS Annual Meeting, Washington D.C. (January 6, 2000) (transcript on file with author and available from AALS) (program to be published by the *Maryland Law Review*).

54. Six panelists presented varying perspectives on fatherhood. For example, in his presentation, Wade F. Horn, President and Co-Founder of the National Fatherhood Initiative, advocated marriage as the best solution to promoting fatherhood. As a result of field research on the behavior of new fathers to children born out-of-wedlock, Sara S. McLanahan, a professor of sociology, argued that fathers' increased involvement with children was dependent upon early involvement with their children. Joe Jones, Director of Strive Baltimore, supported reaching fathers in poorer neighborhoods through more grassroot tactics of physically going door-to-door and providing education and job skills. Law professors Joan Williams and Michael L. Selmi focused on making workplace conditions supportive of parenting. Finally, Nancy Dowd concentrated on both economic and social forces that affect how fatherhood is defined. For the opinions presented see Rethinking Fatherhood, *supra* note 53.

55. Dowd, *supra* note 29; *see also* NANCY E. DOWD, REDEFINING FATHERHOOD (2000).

because of culture.[56] Professor Dowd acknowledges the difficulties in reconstructing fatherhood in the nurturing image. The reality of male violence toward women and children is a legitimate reason for being apprehensive about entitling males to another source of power by routinely awarding men custody.[57] Additionally, homophobia and male machismo prevent men from easily assuming the nurturing role that has been culturally identified as feminine.[58]

Compounding such difficulties is the resistance women demonstrate to the notion of altering their roles as mothers. Because the female identity has become so inextricably linked with motherhood and nurturing, allowing men to assume a greater parenting role is perceived to threaten the core female identity.[59] Men, it is feared, cannot be better parents unless women relinquish some of their duties.[60] Such fears are both exaggerated and flawed. Parenting is not a "zero-sum" game. Assigning fathers a substantial parenting role should not threaten women. At the most basic day-to-day level, only one parent may be required to pick up a child from school, to make supper, or to read a bedtime story. However, we surely think that true parenting, by a mother or father, is comprised of more than a collection, albeit exhausting, of daily activities. Moreover, equalizing the daily, physical duties of fathers and mothers provides critical opportunities for women. Statistics reveal that women today remain primarily responsible for such physically laborious child care duties.[61] Yet freeing mothers from some of these duties by sharing them proportionately with fathers does not marginalize the female persona but instead provides the opportunity for true expression. Women will be able to use the energy and time otherwise allotted to child care to compete more

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56. Dowd, *supra* note 29, at 531. Indeed, my historical outline of how mothers came to be associated with "nurture" and fathers with the image of "debtors and criminals" affirms this impression. *See supra* notes 12–23 and accompanying text.

57. *See* Dowd, *supra* note 29, at 533.

58. *Id.* at 533.

59. For a sampling from the legal literature that reviews the problems raised by the notion that a woman's paramount achievement and responsibility is to bear and raise children, see e.g., FINEMAN, *supra* note 51 (discussing the significance of motherhood for women and application of the notion to men); Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688 (1998) (looking at treatment of mother in welfare, family, and criminal law settings); SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 134–69 (1989) (acknowledging how women are conditioned to make child-rearing their primary function before, during, and after marriage); Sanger, *supra* note 17 (discussing how various forces, including legal and cultural, have combined to promote motherhood).

60. Cahn, *supra* note 49, at 530.

61. Lewin, *supra* note 49; *see also* Cahn, *supra* note 49, at 530; Dowd, *supra* note 29, at 523–24.

effectively with men in the marketplace.[62] Accordingly, as female and male employees increasingly share such family responsibilities, the market will be forced to alter its traditional demand for "ideal workers," unconstrained by child care responsibilities.[63] Responding to the real needs of employees may include such improvements as on-site child care and more significant parental leave policies. Ultimately, such changes would receive state and federal support.[64]

Of course, none of these aspirations for working mothers can be realized without emphasizing that not all mothers want to compete aggressively in the market. Despite a possible future of improved working conditions for parents, many mothers may still choose to prioritize child care responsibilities to employment. Such women should not be accused of false consciousness. Provided an atmosphere exists in which both women and men can individually resolve the challenge of work and family without being restricted (in either setting) by their gender, all choices—from childless working women, to working mothers and fathers, to stay-at-home dads—should be celebrated. Ultimately, it is only by addressing both the male and female halves of the gender equation that true gender neutrality can be actualized.

IV. REDEFINING THE FAMILY IDEAL

Returning our attention to championing the cause of fathers, specifically never-wed fathers, the elimination of another bias that exists both in custody and immigration law could be achieved. Despite the present and growing existence of children born out-of-wedlock and "alternative" family structures, the "nuclear family" of two spouses and dependent children remains the ideal.[65] The increasing rates of divorce, number of

62. On the "vicious cycle" created when overwhelming domestic duties prevent women from being able to compete effectively in the workplace and as a result lead to inferiority in the labor market and at home see OKIN, *supra* note 59, at 134–69.

63. For a discussion of the "ideal worker" phenomenon and its impact on women see Kelly, *supra* note 29, at 1051–56; M.M. Slaughter, *The Legal Construction of "Mother," in* MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD 73, 78–82 (Martha Albertson Fineman & Isabel Karpin eds., 1995); Williams, *supra* note 16, at 1596–97.

64. For a discussion of current public child care options see Maria L. Ontiveros, *The Myths of Market Forces, Mothers and Private Employment: The Parental Leave Veto*, 1 CORNELL J.L. & PUB. POL'Y 25 (1992) (discussing the Family Medical Leave Act); Sanger, *supra* note 17, at 474; Eugenia Hargrave, *Income Tax Treatment of Child and Dependent Care Costs: The 1981 Amendments*, 60 TEX. L. REV. 321 (1982) (discussing tax credits and federal subsidies for children).

65. Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive States: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 880–81 (1984); Martha Albertson Fineman, *Our Sacred Institution: The Ideal of Family in American Law and Society*, 1993 UTAH L. REV. 387, 388.

children born out-of-wedlock, popularity of adoption, and acceptance of surrogacy contracts and other technologically supported methods of childbirth all evidence that reality does not conform to the nuclear family ideal.[66] Nevertheless, "alternative" family structures, including single parents, are stigmatized and punished, while those who can best emulate the nuclear family ideal are rewarded.[67] The decision of *Michael H* to ignore an unwed father's claim to paternity of his child against a nuclear family comprised of the child's natural mother and her husband well illustrates this point.[68]

Certainly, in advocating for fathers and alternative families in the immigration context, the plenary power doctrine further complicates matters. As *Fiallo* evidenced in rejecting an unwed father's claim to petition for the residency of his alien child, the plenary power doctrine may be raised to prevent any judicial pressure to change the existing nuclear family ideal and gender-biased approach.[69] Against the combination of these challenges, the ability to "rethink fatherhood" in the immigration context seems more daunting a task than that faced by advocates in the custody reform debate.

Nevertheless, as the Supreme Court cautioned in *Moore v. City of East Cleveland*,[70] when it recognized the fundamental right to family unity for extended family members nearly 25 years ago, the history and tradition of the United States compel a larger conception of family entitled to legal protection.[71] The need to define family beyond a nuclear definition and to recognize the rights of unwed fathers and mothers is even more critical in immigration law as the law directly impacts individuals from

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66. For varying evaluations on the current and historical rates of divorce, the effect of the nationwide adoption of no-fault divorce, and the impact of divorce on children see HARRIS & TEITELBAUM, *supra* note 1, at 359–78. On the treatment of single parents see NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES (1997). On the use of adoption and technological means of child conception see John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991).

67. Fineman, *supra* note 65 (discussing social influences allowing nuclear family to be considered "sacred" and "ideal"); GROSSBERG, *supra* note 12, at 235–85 (discussing historic promotion of the nuclear family); Linda Kelly, *Family Planning, American Style*, 52 AL. L. REV. (forthcoming 2001) (discussing the preference given the nuclear family model in custody cases involving divorcing and never-wed parents, as well as in the adoption and surrogacy settings).

68. Michael H. v. Gerald D., 491 U.S. 110 (1989). For a further discussion of *Michael H*, see *supra* notes 38–40 and accompanying text.

69. Fiallo v. Bell, 430 U.S. 787 (1977). For a further discussion of *Fiallo*, see *supra* notes 42–46 and accompanying text.

70. 431 U.S. 494 (1977) (plurality opinion).

71. *See id.* (invalidating a zoning ordinance that defined family by limiting the relations entitled to live together). For further discussion of *Moore* see Frederick E. Dashiell, *The Right to Family Life: Moore v. City of East Cleveland*, 6 BLACK L.J. 288 (1980).

other cultures. Imposing a "culturally myopi[c]" definition of family upon immigrants from throughout the world flaunts both the reality that exists in the United States and in other countries throughout the world.[72] Consequently, recognizing the gender biases that exist in immigration law is another step toward achieving true gender equality and family integrity.

72. Moore, 431 U.S. at 507–08 (Brennan, J., concurring).