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# Is Immigration Law Family-Friendly?

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# Is Immigration Law Family-Friendly?

Mary Holper

At first glance, the U.S. immigration system seems very family-friendly. The majority of lawful immigration occurs through family petitions,<sup>1</sup> reflecting family reunification as one of the core principles of immigration policy. However, a closer look at the immigration system calls into question the idea that immigration law is family-friendly. Immigration law's definition of who fits within family relationships and thus deserves sponsorship to join a relative in the U.S. does not include relationships that, in many other parts of the world, are valued (such as grandparents, cousins, and, in some cases, siblings). More importantly, the immigration system's heavy-handed enforcement mechanisms only serve to separate well-functioning families by detaining and deporting thousands of people each year.

This article seeks to answer the question of whether immigration law is family-friendly by pointing to certain policies that seem family-friendly but that, once examined further, reveal that they serve to keep families apart. The same can be said for the immigration policies of the Obama administration, which has made strides towards implementing more family-friendly immigration laws, but also has maintained a system that tears families apart.

## Family Petitions: The Supposed “Family-Friendly” Immigration System

To understand the place that family relationships occupy in the immigration system, it is important to first understand how people immigrate

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<sup>1</sup> See Office of Immigration Statistics, U.S. Dep't of Homeland Security, *Persons Obtaining Lawful Permanent Resident Status by Broad Class of Admission and Selected Demographic Characteristics: Fiscal Year 2013*, 2013 YEARBOOK OF IMMIGRATION STATISTICS (2014); see also WILLIAM KANDEL, CONG. RESEARCH SERV., R43145, U.S. FAMILY-BASED IMMIGRATION POLICY 1 (2016) (describing how “[f]amily-based immigration currently makes up two-thirds of all legal permanent immigration”).

to the United States. The current U.S. immigration system recognizes four categories of immigrant visas:<sup>2</sup> 1) employment-based;<sup>3</sup> 2) family-sponsored;<sup>4</sup> 3) diversity lottery;<sup>5</sup> and 4) humanitarian admissions.<sup>6</sup> Family-sponsored immigration allows for U.S. citizens or lawful permanent residents (“greencard holders”) to petition for certain family members by documenting the relationship (and, in the case of marriage, the bona fides of that relationship). The family members who can immediately immigrate to the U.S. based on a family petition are called “immediate relatives” and include spouses, children,<sup>7</sup> and parents of U.S. citizens.<sup>8</sup> Other family members have the option of immigrating to the U.S. by way of a family petition, although they must wait often years or decades for visas to become available.<sup>9</sup> These other family members are unmarried sons or daughters of U.S. citizens; spouses, children, and unmarried sons or daughters of permanent residents; married sons or daughters of U.S. citizens; and brothers or sisters of U.S. citizens.<sup>10</sup>

These mechanisms for allowing families to reunite seem, at first glance, to value the importance of family reunification.<sup>11</sup> Indeed, family reunification was the reason that Congress expanded the family preference categories in 1965.<sup>12</sup> However, as many scholars have noted, the

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<sup>2</sup> See THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 273 (7th ed. 2012). Immigrant visas are distinguishable from the widely available non-immigrant visas, which only permit people to come to the U.S. for a limited time or purpose. See, e.g., 8 U.S.C. § 1101(a)(15)(F) (student visas); § 1101(a)(15)(B) (tourist visas).

<sup>3</sup> See 8 U.S.C. § 1153(b).

<sup>4</sup> See 8 U.S.C. § 1153(c).

<sup>5</sup> See 8 U.S.C. § 1153(a).

<sup>6</sup> For example, refugees and asylees can petition to become lawful permanent residents within one year. See 8 U.S.C. § 1159. Victims of trafficking and of violent crime who have helped law enforcement in the investigation or prosecution of those crimes can petition for permanent residence. See 8 U.S.C. §§ 1101(a)(15)(T), (U). Also, children whose reunification with one or both parents is not viable in the home country due to abuse, abandonment, or neglect can become permanent residents via special immigrant juvenile status. See 8 U.S.C. § 1101(a)(27)(J).

<sup>7</sup> See 8 U.S.C. § 1101(b) (defining the term “child” for immigration purposes as a qualifying offspring who is younger than twenty-one and unmarried).

<sup>8</sup> See 8 U.S.C. § 1151(b)(2)(A) (requiring that the petitioning daughter or son be at least twenty-one years old).

<sup>9</sup> See 8 U.S.C. §§ 1153, 1151(c).

<sup>10</sup> See 8 U.S.C. § 1153(a).

<sup>11</sup> See Carol Wotchok, *Family-Sponsored Immigration Symposium: Legal Immigration Reform*, 4 GEO. IMMIGR. L.J. 201, 201 (1990) (“The family based immigration system is the cornerstone of our immigration policy.”).

<sup>12</sup> See HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 133 (Oxford Univ. Press 2006) (describing new immigration categories from the 1965 amendments to the Immigration and Nationality Act,

current U.S. categories reflect very traditional concepts of who belongs together as a family unit. These concepts are no longer the norm in U.S. society and certainly not the norm in the societies from which many seek to emigrate.<sup>13</sup> For example, many clients of the Immigration Clinic I direct at Boston College Law School were raised by grandparents after their parents left for the U.S. when the clients were young.<sup>14</sup> For myriad reasons, their grandparents never formally adopted them, which, if accomplished before the age of sixteen and with the requisite amount of time living together, would convert this relationship into a “parent-child” relationship for the purposes of U.S. immigration law.<sup>15</sup> Although these children regard their grandparents as parents, even if the children obtain U.S. citizenship, they will be prohibited from ever

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which permitted citizens to petition for their siblings and new lawful permanent residents to petition for their spouses and children).

<sup>13</sup> See, e.g., Jessica Feinberg, *The Plus One Policy: An Autonomous Model of Family Reunification*, 11 NEV. L.J. 629, 634-35 (2011) (“If a citizen’s most valuable relationship does not fit within one of the governmentally created family reunification admission subcategories, no reunification will occur. Thus, under the current model of family reunification, citizens are completely bound by the established categories as to with whom they can reunite.”); Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward A Functional Definition of Family That Protects Children’s Fundamental Human Rights*, 41 COLUM. HUM. RTS. L. REV. 509, 510 (2010) (“But even where the United States aims to further family unity, it fails to do so because U.S. immigration law reflects a legal construction of the ‘family’ concept that is largely premised on biology, is grounded in the traditional conception of a nuclear family, and excludes what this Article calls ‘functional’ families: formations which may not satisfy this narrow conception of family, but satisfy the care-taking needs of children.”); Monique Lee Hawthorne, *Family Unity in Immigration Law: Broadening the Scope of “Family”*, 11 LEWIS & CLARK L. REV. 809, 818 (2007) (“U.S. immigration law incorrectly focuses on a static concept of family that excludes other presently-existing U.S. family models. The scope of the word ‘family’ is different for different cultures, and even varies from family to family. One[’s] own experience is what shapes one’s understanding of what is ‘family.’”); Wotchok, *supra* note 11, at 202 (“It is not possible to bring anyone else who might be important to you. You cannot bring a grandparent, even if he or she is part of your nuclear family. You cannot bring a niece or a nephew, who you may have raised, unless they have been legally adopted as your own child before age sixteen. The point I am making is that family-related immigration is a highly restrictive system.”).

<sup>14</sup> In her novel, *Enrique’s Journey*, Sonia Nazario chronicles the journey to the U.S. of a young boy named Enrique who never really knew his mother because she left for the U.S. when he was five years old. Enrique’s mother, in order to not burden her own mother, decides to split up her children and place them in the care of separate relatives. Enrique lives with his father, while his sister lives with their maternal grandmother. This novel provides an excellent perspective on the journey that unaccompanied minors undertake to reach the U.S. and the complicated family lives in which they live if they are fortunate enough to be reunited with parents in the United States. See SONIA NAZARIO, *ENRIQUE’S JOURNEY* (Random House 2007).

<sup>15</sup> See 8 U.S.C. § 1101(b)(1)(E).

petitioning for their grandparents. Though the grandparent as parent arrangement is becoming increasingly common in U.S. society,<sup>16</sup> immigration law still does not give full value to this nontraditional parenting.

In another example, other clients of the Boston College Immigration Clinic were raised by siblings when their parents left for the United States. Although the law allows them to petition for siblings if they obtain U.S. citizenship,<sup>17</sup> the current wait for reunification of siblings is approximately thirteen years, and almost twenty years if the sibling is from Mexico.<sup>18</sup> The long waits to reunify with those whom the U.S. citizen siblings may view as *de facto* parents runs counter to how they value these relationships. There are still other types of relationships that other societies value, yet do not appear in the U.S. family preference categories. For example, cousins cannot immigrate to the U.S. based on a family petition even though, in many parts of the world, extended families grow up together such that cousins are viewed as siblings.<sup>19</sup>

Of course, one may argue that there is no need for the U.S. immigration system to recognize or value the family relationships that are more highly valued in other societies; rather, Congress should have an immigration system focused on reuniting those in relationships that Americans view as important. Yet, as one scholar has noted, “immigration law’s strict adherence to the traditional conception of family, even while domestic law continues to increasingly recognize

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<sup>16</sup> See Renee E. Ellis and Ravia Simmons, *Coresident Grandparents and Their Grandchildren: 2012* (October 2014), available at [http://www.census.gov/content/dam/Census/library/publications/2014/demo/p20-576.pdf?eml=gd&utm\\_medium=email&utm\\_source=govdelivery](http://www.census.gov/content/dam/Census/library/publications/2014/demo/p20-576.pdf?eml=gd&utm_medium=email&utm_source=govdelivery) (noting that about 2.7 million grandparents in the U.S. had primary responsibility for children under the age of 18 with whom they lived); see also Feinberg, *supra* note 12, at 640 (discussing studies finding that extended families, including families where grandparents act as the primary caretakers, are becoming increasingly common in U.S. society); Marcia Zug, *Deporting Grandma: Why Grandparent Deportation May Be the Next Big Immigration Crisis and How to Solve It*, 43 U.C. DAVIS L. REV. 193, 199-200 (2009) (“More than 4.4 million children live in grandparent-headed households. Of these, more than 1.5 million are being raised exclusively by grandparents. This represents a 50 percent increase since 1990.”); *id.* at 204 (“Even though the majority of children being raised by grandparents are Caucasian, the fastest growing group of children being raised exclusively by grandparents are Hispanic. Hispanic grandparents are nearly twice as likely to be caring for grandchildren.”).

<sup>17</sup> See 8 U.S.C. § 1153(a)(4).

<sup>18</sup> See U.S. Dep’t of State, Bureau of Consular Affairs, Visa Bulletin for April 2016, available at <http://travel.state.gov/content/visas/en/law-and-policy/bulletin/2016/visa-bulletin-for-april-2016.html>.

<sup>19</sup> See 8 U.S.C. § 1153; see also Feinberg, *supra* note 13, at 635-40.

non-traditional family forms, makes the United States' commitment to family reunification appear disingenuous both to its own citizens and to the rest of the world."<sup>20</sup> Also, maintaining a system that does not match the values of those subject to it may create a perverse incentive for the beneficiaries to circumvent it.<sup>21</sup> One way to circumvent the system is through document fraud.<sup>22</sup> Anne Fadiman, in her excellent novel *The Spirit Catches You and You Fall Down*, chronicles the plight of the Hmong refugees from Laos. Discussing how many Hmong lied about their family relationships (for example, by calling cousins siblings in order to reunite with them in the U.S.), she describes this behavior as not *unethical*, but *differently ethical* – reflecting a

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<sup>20</sup> See Feinberg, *supra* note 13, at 635; see also Hawthorne, *supra* note 13, at 826 (“A question to ask ourselves is why we seem to hold immigrants seeking admission into the United States to a narrower] standard of “family” than we do our own native families already living the U.S.? If our own American society cannot reflect the ideals of our laws, how can we expect others to conform to our idealized standards?”).

<sup>21</sup> See Hawthorne, *supra* note 13, at 819 (“For families whose members do not fall within the defined terms of the statute, the goal of legal family reunification can seem impossible and hopeless. This hopelessness for a complete legal family reunification—some family members will be admitted legally while others will be denied admission—drives some families toward finding avenues for illegal immigration and, as a result, creates mixed-status families.”).

<sup>22</sup> See Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 680 (2014) (“By failing to create a mechanism for functional family members to seek family reunification, the government encourages them to fraudulently claim genetic or marital relationships instead.”). A family preference system that creates incentives to circumvent it sets up a vicious cycle of fraud, for those who choose to lie about relationships, and suspicions of fraud, even when it does not exist. In countries that have suffered war, natural disaster, or government inefficiency and corruption, basic documents proving birth, parentage, or marriage can be impossible to obtain. See Liilda P. Barata et. al., *What DNA Can and Cannot Say: Perspectives of Immigrant Families About the Use of Genetic Testing in Immigration*, 26 STAN. L. & POL'Y REV. 597, 614 (2015) (“Providing adequate documentation to prove familial relations can be difficult for a number of reasons, including war or other forms of civil disturbance, lack of governmental infrastructure, corruption, and poverty.”). Even if they can be obtained, once placed under the radar screen of the U.S. immigration officials, any errors that may be honest mistakes by imperfect legal systems can seem highly suspicious. See *Hor v. Gonzales*, 421 F.3d 497, 501 (7th Cir. 2005) (“The notion that documentation is as regular, multicopied, and ubiquitous in disordered nations as in the United States, a notion that crops up frequently, is unrealistic concerning conditions actually prevailing in the Third World.”); Abrams & Piacenti, *supra* note 22, at 667 (noting that an immigrant's native country may have unclear or inconsistent rules governing identification documents and that “it is understandable that USCIS officials might view documents from such a country with a more jaundiced eye than those from a country with more consistently applied rules and frequent birth registration”). Thus, those who seek to prove family relationships in order to immigrate to the U.S. find themselves in a bind—the U.S. immigration system requires proof of this relationship, yet the proof, if available, can make the applicant look like a liar if it contains any irregularities.

different set of values.<sup>23</sup> The U.S. immigration system values truth above all; the Hmong refugees who lied to U.S. officials valued family unity above all and were willing to fudge the truth to be reunified with their extended families in the United States.<sup>24</sup>

### **Deportation and Detention: Tearing Families Apart**

When one takes a surface-level look at our deportation and detention system, one can see some seemingly family-friendly policies embedded within it. Many defenses to deportation favor individuals with family ties, particularly ties to U.S. citizen and lawful permanent resident family members. For example, lawful permanent residents who are deportable (usually because of a criminal conviction) may seek cancellation of removal by asking for an immigration judge to balance the good against the bad in their life.<sup>25</sup> One of the weights on the “good” side of the scale is family ties.<sup>26</sup> Non lawful permanent residents can seek cancellation of removal by proving, among other requirements, that a U.S. citizen or lawful permanent resident spouse, child, or parent would suffer “exceptional and extremely unusual hardship.”<sup>27</sup> Several waivers of inadmissibility, which allow a noncitizen to gain lawful permanent resident status, depend on hardship to U.S. citizen or lawful permanent resident family members.<sup>28</sup> For those who are detained by

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<sup>23</sup> ANNE FADIMAN, *THE SPIRIT CATCHES YOU AND YOU FALL DOWN* 242 (Farrar, Straus, and Giroux 1997) (“I had been trying all day to decide whether I thought the Hmong were ethical or unethical, and now I saw it: they were – in this case, it was a supremely accurate phrase – *differently ethical.*”).

<sup>24</sup> See *id.* at 243 (describing how those who had lied to U.S. immigration officials in order to reunite with their extended families were unashamed: “In fact, the ones who had lied to immigration officials had been amazed, when they reached the United States and discussed their experiences with their American sponsors, to find that their behavior was regarded as unethical. What would have seemed unethical—in fact, unpardonable—to them was leaving their relatives behind.”).

<sup>25</sup> See 8 U.S.C. § 1229b(a); *In re C-V-T*, 22 I&N Dec. 7, 11 (BIA 1998) (adopting a balancing test to guide the exercise of discretion in cancellation of removal cases and requiring that the immigration judge “balance the adverse factors evidencing the alien’s undesirability as a permanent resident with the social and humane considerations presented in his (or her) behalf to determine whether the granting of . . . relief appears in the best interest of this country”) (quoting *In re Marin*, 16 I&N Dec. 581, 584-85 (BIA 1978)).

<sup>26</sup> See *C-V-T*, 22 I&N at 11 (“[F]avorable considerations include such factors as family ties within the United States . . .”).

<sup>27</sup> See 8 U.S.C. § 1229b(b)(1).

<sup>28</sup> See, e.g., 8 U.S.C. § 1182(h) (waiver of inadmissibility for crimes by showing hardship to spouse, child, or parent who is U.S. citizen or lawful permanent resident); § 1182(i) (waiver of inadmissibility for fraud by showing hardship to spouse or parent who is a U.S. citizen or lawful permanent resident).

Immigration and Customs Enforcement (“ICE”), family ties matter when a judge considers whether to release them on bond, since the judge will look to community ties in determining whether they are a flight risk and will return to immigration court for all subsequent deportation proceedings.<sup>29</sup>

A closer look at the deportation system reveals what is probably the most disturbing of all trends in U.S. immigration law and which renders the system wholly unfriendly to families: the massive mechanism of detention and deportation that tears families apart on a daily basis. In fiscal year 2015, ICE deported 235,413 people.<sup>30</sup> In this same year, ICE averaged 26,374 immigration detainees per day.<sup>31</sup> In the yearly bill that funds the Department of Homeland Security (“DHS”), the larger agency in which ICE operates, Congress continues to authorize funding for DHS to maintain 34,000 immigration detention beds.<sup>32</sup> For many years, DHS approached this “bed mandate” from Congress as a requirement to fill those 34,000 detention beds. Only recently has DHS Secretary Jeh Johnson acknowledged that this bed mandate does not require DHS to maintain 34,000 noncitizens in detention every day.<sup>33</sup>

Today, many crimes, including several misdemeanors where the person served no jail time, are now classified by the sinister-sounding immigration category “aggravated felony.” Initially introduced into U.S. immigration law in 1988, the aggravated felony definition included

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<sup>29</sup> See *In re Andrade*, 19 I&N Dec. 488, 489 (BIA 1987) (“In determining the necessity for and the amount of bond, such factors as a stable employment history, the length of residence in the community, the existence of family ties, a record of nonappearance at court proceedings, and previous criminal or immigration law violations may properly be considered.”); see also *In re Urena*, 25 I&N Dec. 140, 141 (BIA 2009) (“[T]he setting of bond is designed to ensure an alien’s presence at proceedings . . . .”); *In Re Mohammad J.A. Khalifah*, 21 I&N Dec. 107, 111 (BIA 1995) (“The Immigration Judge properly based his decision on the finding that the respondent presents a strong risk that he will flee rather than appear for the deportation process.”); see also Bond Worksheet, Immigration Judge Benchbook, Executive Office for Immigration Review, available at <[https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Bond\\_Worksheet.pdf](https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Bond_Worksheet.pdf)>.

<sup>30</sup> Immigration and Customs Enforcement, FY 2015 ICE Immigration Removals, available at <https://www.ice.gov/removal-statistics>.

<sup>31</sup> See Michelle Ye Hee Lee, *Clinton’s Inaccurate Claim That Immigrant Detention Facilities Have a Legal Requirement to Fill Beds*, Washington Post (May 15, 2015), available at <<https://www.washingtonpost.com/news/fact-checker/wp/2015/05/15/clintons-inaccurate-claim-that-immigrant-detention-facilities-have-a-legal-requirement-to-fill-beds/>>.

<sup>32</sup> Department of Homeland Security Appropriations Act of 2015, Pub. L. No. 114-4, March 4, 2015, 129 Stat. 39 (2015).

<sup>33</sup> See César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CAL. L. REV. 1449, 1453, 1505 (2015); Lee, *supra* note 31.



murder, drug trafficking, and firearms trafficking (or attempts or conspiracies to commit those crimes).<sup>34</sup> Yet, in the words of Stephen Legomsky, “it is now a colossus.”<sup>35</sup> Amendments since 1988 have added “crimes of violence,” theft, receipt of stolen property, fraud, forgery, and obstruction of justice, to name a few offenses that now meet the twenty-one-part definition.<sup>36</sup> With the Illegal Reform and Immigrant Responsibility Act (IIRIRA) in 1996, Congress also reduced the length of sentence necessary to trigger the aggravated felony definition from five years to one year, while at the same time redefining a sentence to include any suspended sentence.<sup>37</sup> As both scholars and practitioners frequently comment, “an ‘aggravated felony’ need no longer be either aggravated or a felony.”<sup>38</sup>

The consequences of classifying one’s conviction as an aggravated felony are quite grave. For example, most long-term permanent residents used to be able to plead their cases to an immigration judge, arguing that the equities in their lives, including their family ties, merited giving them a second chance.<sup>39</sup> In 1996, however, this discretion was stripped away when Congress determined that anyone with an

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<sup>34</sup> See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

<sup>35</sup> Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 484 (2007).

<sup>36</sup> See Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193 § 4(b)(5), 117 Stat. 2875, 2879 (adding peonage, slavery, involuntary servitude, and trafficking in persons); Illegal Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C. § 321, 110 Stat. 3636-37 (adding sexual abuse of a minor and rape); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (adding bribery, forgery, counterfeiting, certain gambling offenses, vehicle trafficking, obstruction of justice, perjury, and bribery of a witness); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305 (adding theft, receipt of stolen property, burglary, trafficking in fraudulent documents, RICO, certain prostitution offenses, fraud or deceit, tax evasion, and human smuggling); Immigration Act of 1990, Pub. L. No. 101-649 § 501(a)(3), 104 Stat. 4978, 5048 (adding “crimes of violence”).

<sup>37</sup> IIRIRA, Pub. L. No. 104-208, Div. C. § 321, 110 Stat. 3636-37 (amending aggravated felony definition); see also *id.* at § 322 (amending “term of imprisonment” definition).

<sup>38</sup> See Legomsky, *supra* note 35, at 485; Nora Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the “War” on Terrorism?*, 51 EMORY L. J. 1059, 1065 (2002) (“Despite the term ‘aggravated felonies,’ not all of the offenses falling under this heading are felonies, nor would most people consider some of them aggravated.”); American Immigration Council, *Aggravated Felonies: An Overview* (March 2012), available at <http://www.immigrationpolicy.org/just-facts/aggravated-felonies-overview> (“[D]espite what the ominous-sounding name may suggest, an ‘aggravated felony’ need not be ‘aggravated’ or a ‘felony’ to qualify as such a crime.”).

<sup>39</sup> See *INS v. St. Cyr*, 533 U.S. 289, 294-97 (2001) (chronicling the history of relief under former Immigration and Nationality Act (INA) § 212(c)).

aggravated felony could no longer seek such a second chance.<sup>40</sup> Additionally, the aggravated felony label prevents immigrants from seeking asylum<sup>41</sup> and other waivers of inadmissibility,<sup>42</sup> and also creates a permanent bar to ever returning to the U.S. on an immigrant visa.<sup>43</sup>

In addition to being a bar to much relief, the aggravated felony label also mandates detention during deportation proceedings. The law authorizing “mandatory detention” is another product of the 1996 legislation.<sup>44</sup> Those who are deportable for several categories of immigration crimes, including aggravated felonies, crimes “involving moral turpitude,” drug crimes, and firearms crimes, cannot ask for bond, which is the immigration equivalent of bail.<sup>45</sup> In yet another example of Congress stripping significant discretion away from judges, the noncitizen’s crime becomes larger than who they are, and no individualized assessment of their dangerousness, flight risk, or family ties can be made by a neutral immigration judge. In a troubling 2003 decision, the Supreme Court upheld this mandatory detention statute against a due process challenge, ensuring that thousands of noncitizens would remain apart from their families while they fought their cases.<sup>46</sup>

To put a human face on these harsh laws, my clinic represented a woman from the Dominican Republic who entered the U.S. as a lawful permanent resident *forty* years prior to when she was detained and placed in removal proceedings. She was the mother of five U.S. citizens and the grandmother of fourteen U.S. citizens. During a rough time in her life, she was twice convicted for possession of controlled substances. At the age of sixty, she was detained for almost two years in a local

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<sup>40</sup> See 8 U.S.C. § 1229b(a) (providing for cancellation of removal for those who have been lawfully admitted for permanent residence for at least five years, have resided in the U.S. for at least seven years, and who have not been convicted of an aggravated felony); IIRIA, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

<sup>41</sup> See 8 U.S.C. § 1158(b)(2)(A), (B).

<sup>42</sup> See 8 U.S.C. § 1182(h) (“No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony . . .”).

<sup>43</sup> See 8 U.S.C. § 1182(a)(9)(A)(i).

<sup>44</sup> See IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

<sup>45</sup> See 8 U.S.C. § 1226(c).

<sup>46</sup> See *Demore v. Kim*, 123 S.Ct. 1708 (2003); see also Margaret Taylor, *Demore v. Kim: Judicial Deference to Constitutional Folly*, in IMMIGRATION STORIES 345 (Foundation Press 2005) (“[T]he case [*Demore v. Kim*] is best understood as a post-9/11 decision, rendered at a time when a majority of the Court was reluctant to scrutinize the political branches’ claimed authority to detain noncitizens who are perceived as a threat.”).

county jail where ICE rents space to house detainees. She was finally released after petitioning a federal district court that mandatory detention could not apply because she had been detained for too long while she fought her case. Although she is now out from under the threat of deportation, it took four volunteer lawyers, who filed petitions in four different courts on her behalf, for her to return to her family. The remaining 86% of detainees who have no representation are not quite so lucky.<sup>47</sup> The government gives them no free lawyer, justifying this by calling deportation “civil.”<sup>48</sup> In the words of Daniel Kanstroom, who facetiously characterizes the government’s position, “[t]hey are not being punished; they are simply being regulated.”<sup>49</sup>

### Immigration under the Obama Administration

Has the Obama administration made immigration law more family-friendly? First, it is important to note what Obama has *not* done, which is pass comprehensive immigration reform. Many advocates had hoped he would follow through on his election-year promises to get legislation passed that would legalize the eleven million undocumented non-citizens.<sup>50</sup> Instead, he passed a series of executive actions; his most famous immigration-related executive actions were Deferred Action for

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<sup>47</sup> See Ingrid Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV. 1, 6, 8 (Dec. 2015) (reporting finds from a study based on an independent analysis of over 1.2 million immigration removal cases decided during the six-year period between 2007 and 2012 and finding that of those who were detained during this period, 86% of detainees did not have counsel).

<sup>48</sup> See *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings New York Immigrant Representation Study Report: Part 1*, 33 CARDOZO L. REV. 357, 359 (2011) (“A noncitizen arrested on the streets of New York City for jumping a subway turnstile of course has a constitutional right to have counsel appointed to her in the criminal proceedings she will face, notwithstanding the fact that it is unlikely she will spend more than a day in jail. If, however, the resulting conviction triggers removal proceedings, where that same noncitizen can face months of detention and permanent exile from her family, her home, and her livelihood, she is all too often forced to navigate the labyrinthine world of immigration law on her own, without the aid of counsel. This is the current state of the law and has been for over a century.”).

<sup>49</sup> Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1895 (2000). Kanstroom argues that classifying deportation is civil is tautological, counterintuitive, and historically inconsistent. See *id.*

<sup>50</sup> Kevin Liptack, *Obama confronts his political failure on campaign anniversary*, CNN POLITICS (Feb. 10, 2016, 5:36 PM) (“Big-ticket legislative items like comprehensive immigration reform and tax code reform have gone by the wayside, mired in partisan arguments that Obama has shown little ability to mitigate.”).

Childhood Arrivals (“DACA”) in 2012,<sup>51</sup> which would protect the so-called “DREAMers”<sup>52</sup> from deportation and give them work permits, and Deferred Action for Parental Accountability (“DAPA”) in 2014, which would stop the deportations of and give work permits to approximately five million noncitizens who are parents of U.S. citizens or lawful permanent residents.<sup>53</sup> In his remarks announcing DAPA, President Obama cited the importance of keeping families together, asking: “[a]re we a nation that accepts the cruelty of ripping children from their parents’ arms? Or are we a nation that values families, and works together to keep them together?”<sup>54</sup> This DAPA Program, however, has yet to be implemented, since several states brought a legal challenge asking the courts to block the roll-out of the program.<sup>55</sup>

The Obama administration made other less high-profile changes to make immigration law more family-friendly. For example, in a 2013 regulation, DHS announced a provisional waiver program. This waiver addressed a procedural quirk of immigration law: those who entered

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<sup>51</sup> Memorandum from Janet Napolitano, Sec’y of Homeland Security, DHS, Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children 1 (June 15, 2012), *available at* <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

<sup>52</sup> “DREAMers” are the beneficiaries of the Development, Relief, and Education for Alien Minors (DREAM) Act, which would legalize undocumented teenagers who were on their way to college. See *What Is The Dream Act And Who Are The Dreamers?*, The Current Events Classroom, ANTI-DEFAMATION LEAGUE, *available at* <http://www.adl.org/assets/pdf/education-outreach/what-is-the-dream-act-and-who-are-the-dreamers.pdf>.

<sup>53</sup> Memorandum from Jeh Johnson, Sec’y of Homeland Security, DHS, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (November 20, 2014), *available at* [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf). The DAPA Memo would also expand eligibility for DACA by removing the age cap, making it available to more recent entrants, and granting work permits for three years instead of two.

<sup>54</sup> Remarks by the President in Address to the Nation on Immigration, The White House Office of the Press Sec’y (Nov. 20, 2014), *available at* <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

<sup>55</sup> A U.S. district court in Texas in February 2015 granted a preliminary injunction to a group of states who complained, among other things, that they would suffer irreparable harm if they had to bear the cost of issuing drivers’ licenses to the beneficiaries of the program. See *TX v. US*, 86 F.Supp.3d 591 (Dist. Ct. S. D. Tx. 2015). The Fifth Circuit Court of Appeals upheld the injunction. See *TX v. U.S.*, 809 F.3d 134 (5th Cir. 2016). The Supreme Court granted certiorari, but commentators believe that if Justice Scalia is not replaced, the Court will split 4-4, which will affirm the lower court’s decision. See Adam Liptak, *Scalia’s Absence is Likely to Alter Court’s Major Decisions This Term*, N.Y. TIMES (Feb. 14, 2016), *available at* [http://www.nytimes.com/2016/02/15/us/politics/antonin-scalias-absence-likely-to-alter-courts-major-decisions-this-term.html?\\_r=0](http://www.nytimes.com/2016/02/15/us/politics/antonin-scalias-absence-likely-to-alter-courts-major-decisions-this-term.html?_r=0).

the country illegally and later marry U.S. citizens, thus making them “immediate relatives,” cannot gain the benefit of adjustment of status, which permits them to change to lawful permanent resident status without leaving the U.S.<sup>56</sup> They could leave the country and seek to come back on an immigrant visa, yet if they accrued six months of unlawful presence in the U.S., they would be subject to a three-year bar to returning; accruing one year of unlawful presence would subject them to a ten-year bar to returning to the United States.<sup>57</sup> Although this three or ten-year bar could be waived by showing hardship to a U.S. citizen or lawful permanent resident parent or spouse,<sup>58</sup> non-citizens would leave the U.S. without any promise of having the waiver granted and potentially be stuck outside of the U.S. and away from their families for up to ten years. The 2013 regulation allowed for immediate relatives to ask for that waiver before leaving the United States.<sup>59</sup> Thus, they could ensure reunification with their families in the U.S. by a provisional grant of the waiver of unlawful presence before traveling to their home country to complete the process of obtaining lawful permanent resident status.

In another Obama administration attempt to make the immigration detention and deportation system more family-friendly, in 2013, ICE announced the Parental Interests Directive, which sought to increase access to child welfare and custody proceedings for parents who were detained or deported.<sup>60</sup> This ICE directive responded to a growing problem that was documented in a 2011 report:<sup>61</sup> child welfare agencies would remove children from the home when a parent was detained by ICE or deported, the parent would get lost into the black hole of immigration detention, and the child welfare case would proceed without participation by the parent. Thus, it became too easy for detained or deported parents to lose parental rights because they could not participate in the proceedings.<sup>62</sup> The Parental Interests Directive states that,

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<sup>56</sup> See 8 U.S.C. § 1255(a) (requiring that a noncitizen have been inspected and admitted in order to adjust status).

<sup>57</sup> See 8 U.S.C. § 1182(a)(9)(B)(i).

<sup>58</sup> See 8 U.S.C. § 1182(a)(9)(B)(v).

<sup>59</sup> Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 78 FR 536 (Jan. 3, 2013) (8 C.F.R. §§ 103, 212).

<sup>60</sup> U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FACILITATING PARENTAL INTERESTS IN THE COURSE OF CIVIL IMMIGRATION ENFORCEMENT ACTIVITIES (2013) [hereinafter PARENTAL INTERESTS DIRECTIVE], available at [https://www.ice.gov/doclib/detention-reform/pdf/parental\\_interest\\_directive\\_signed.pdf](https://www.ice.gov/doclib/detention-reform/pdf/parental_interest_directive_signed.pdf).

<sup>61</sup> *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, APPLIED RESEARCH CTR. 22 (2011).

<sup>62</sup> See *id.*

to the extent possible, ICE should try to refrain from detaining parents, legal guardians, and primary caretakers of minor children.<sup>63</sup> If ICE priorities mandate detention,<sup>64</sup> ICE should prevent transfer away from children and court proceedings relating to child custody and, if not unduly burdensome and if given notice of hearings, ICE should bring detainees to family courts to participate in the child custody hearings; at the very least, ICE should facilitate participation via videoconferencing.<sup>65</sup> ICE should also facilitate any court-ordered visitation between a detainee and a child.<sup>66</sup> The directive also states that ICE may return deportees to the U.S. to be physically present in family courts for child custody proceedings if the deportee shows compelling circumstances, agrees to safeguards, confirms in writing that he or she will not pursue immigration relief once in the U.S., and pays for all costs of travel back to the United States.<sup>67</sup>

These Obama immigration policies – DAPA, the provision waiver, and the ICE Parental Interests Directive – certainly do not solve all the problems that prevent immigration law from being more family-friendly. In Obama’s speech announcing DAPA, he stated that his enforcement priorities would target “felons, not families,”<sup>68</sup> making his administration seem very family-friendly with respect to its immigration policies. The problem, of course, is that these two groups cannot be so easily differentiated. Felons also have families.<sup>69</sup> As the story of my clinic’s sixty-year old client demonstrates, felons can also be mothers and grandmothers. The enforcement priorities announced on the same day as DAPA instruct DHS to prioritize the detention and deportation of

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<sup>63</sup> See PARENTAL INTERESTS DIRECTIVE, *supra* note 60.

<sup>64</sup> The most recent memo regarding how DHS should exercise its prosecutorial discretion states that parents or caretakers of minor children should not be detained “absent extraordinary circumstances or requirement of mandatory detention.” See Memorandum from Jeh Johnson, Sec’y of Homeland Security, DHS, Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (November 20, 2014) [Johnson Priorities Memo], *available at* [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf). As discussed above, mandatory detention requires many noncitizens who are deportable for criminal conduct to be detained without the opportunity for a bond hearing. See *supra* note 45 and accompanying text; 8 U.S.C. § 1226(c).

<sup>65</sup> See PARENTAL INTERESTS DIRECTIVE, *supra* note 60.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Remarks by the President in Address to the Nation on Immigration, The White House Office of the Press Sec’y (Nov. 20, 2014), *available at* <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

<sup>69</sup> See David Krawczyk, *Felons Have Families Too*, POLITICAL CRITIQUE (Jan. 29, 2016), *available at* <http://politicalcritique.org/world/usa/2016/felons-have-families-too/>.

recent border crossers and criminals,<sup>70</sup> all of whom, of course, may have families in the U.S. This enforcement priorities memo also states that parents or caretakers of minor children should not be detained “absent extraordinary circumstances or requirement of mandatory detention.”<sup>71</sup> Recall that mandatory detention includes many noncitizens who are deportable for criminal conduct.<sup>72</sup> As a result, many parents and caretakers of minor children continue to be detained by ICE, tearing these families apart and leaving them vulnerable to losing parental rights, while ICE can promote its “family-friendly” enforcement policies. Although the Parental Interests Directive promises these parents some access to child custody proceedings, the directive leaves ICE with an uncomfortable amount of discretion to ignore its suggestions. Facilitating participation in child custody proceedings for a detainee can be denied because it is “unduly burdensome;”<sup>73</sup> facilitating return to the U.S. of a deportee to participate in child custody proceedings can be denied for “security and public safety considerations.”<sup>74</sup> The Parental Interests Directive also seems to favor video participation, which, when used in other contexts, has been criticized for failing to protect a litigant’s due process rights.<sup>75</sup> The provisional waiver, while certainly increasing access to the unlawful presence waivers, again reflects the Obama administration’s policy of focusing on “felons not families,” as the Citizenship and Immigration Services, which implements the provisional waiver program, has openly stated that it would deny waivers to anyone who is inadmissible for criminal conduct.<sup>76</sup>

## Conclusion

Is immigration law family-friendly? This short essay has attempted to demonstrate that, when one examines the system on a surface level, it seems to value family reunification. However, even the aspects of

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<sup>70</sup> See Johnson Priorities Memo, *supra* note 64.

<sup>71</sup> *Id.*

<sup>72</sup> See *supra* note 45 and accompanying text; 8 U.S.C. § 1226(c).

<sup>73</sup> PARENTAL INTERESTS DIRECTIVE, *supra* note 60.

<sup>74</sup> *Id.*

<sup>75</sup> See, e.g., *Rusu v. U.S. I.N.S.*, 296 F.3d 316, 322-24 (4th Cir. 2002) (holding that the use of videoconferencing in an asylum hearing violated due process but that the noncitizen did not suffer prejudice as a result of the violation).

<sup>76</sup> Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 78 FR at 547 (“If USCIS determines that there is reason to believe that the alien may be inadmissible to the United States at the time of his or her immigrant visa interview based on another ground of inadmissibility other than unlawful presence, USCIS will deny the request for the provisional unlawful presence waiver.”).

immigration law that are most family-friendly, such as the family petition process, suffer from a restrictive definition of family that does not encompass relationships valued by those subject to the system. The Obama administration, while attempting to make immigration law more family-friendly through its policies, enforcement decisions, and executive actions, has left many families torn apart, largely because of its preference for helping families, not felons. If only felons didn't have families.