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Articles

Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody

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The Border Patrol arrested and processed for repatriation an undocumented father who was detained along with his U.S. citizen daughter who was in his care.¹ As the moment of repatriation approached, the daughter's U.S. citizen mother appeared at the Border Patrol station and demanded the child.² In the absence of a state court order awarding her custody, the Border Patrol refused to turn over the child to the mother.³ Later that day the child accompanied her father as he was removed to Mexico, where she remained for three years.⁴ In subsequent litigation regarding this matter, the U.S. government asserted that it had "no policies, rules or statutes governing the apprehension and detention of a foreign national [exercising] lawful custody of his or her U.S. juvenile child."⁵

In a contested child custody proceeding regarding undocumented children, a state family court judge noted that the mother "is in this country illegally. There's no way around that."⁶ Ordering primary physical custody

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1. See *Castro v. United States*, No. C-06-61, 2007 U.S. Dist. LEXIS 9440, at *8 (S.D. Tex. Feb. 9, 2007).

2. See *id.*

3. See *id.* at *9-10.

4. *Id.* at *10-11.

5. *Id.* at *26 n.11.

6. Transcript of Record at 3, *Rodriguez v. Rico* (Nev. Jud. Dist. Ct. Fam. Div. Oct. 15, 2003) (No. D303041) (on file with the Hastings Law Journal).

of the undocumented children to their permanent resident father, the court declared that:

One of the Court's reasons and rationale and logic behind its decision is the fact—and neither counsel seem to disagree on that and, if anything, they agreed [that] the designation of [father] as primary shortens the immigration time [for the children] by as much as five years, if that was my understanding. So that was tantamount in the Court's decision.⁷

In actuality, the agreed upon immigration analysis was nonsense, such that a reviewing court found that "the district court improperly considered [the father's] erroneous explanation of a repealed immigration statute."⁸

INTRODUCTION

Without analysis or rationale, federal decisions enforcing immigration law routinely function as child custody determinations and immigration issues prove influential or even determinative in state court rulings on child custody. The custody of many children and the composition of many families are profoundly influenced by the unexamined convergence of immigration and family laws. Demographic trends indicate these will not be isolated events and the need for deep examination of the intersection of family law and immigration law is growing precipitously.

As the number of immigrants and children of immigrants in the United States grows,⁹ it is increasingly common to find "mixed-status" families in which all family members do not share a single immigration or citizenship status.¹⁰ Today, one of every ten children now lives in a mixed-status family.¹¹ Millions of children in mixed-status families are themselves U.S. citizens living with parents who are not, and, in a portion of these families, with parents who are not authorized to remain in the United States.¹² At the same time, approximately 1.8 million children live

7. *Id.* at 4.

8. *Rico v. Rodriguez*, 120 P.3d 812, 814 (Nev. 2005) (upholding disposition of the case on unrelated grounds).

9. One in five children in the United States lives in an immigrant family, i.e. a family in which one or more parent is an immigrant. See FEDERAL INTERAGENCY FORUM ON CHILD AND FAMILY STATISTICS, AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING 58 (2002), available at http://www.childstats.gov/pdf/ac2002/ac_02.pdf.

10. In fact, 85% of families with children and headed by a noncitizen are mixed-status families. See MICHAEL E. FIX ET AL., IMMIGRATION STUDIES: THE INTEGRATION OF IMMIGRANT FAMILIES IN THE UNITED STATES 15 (2001), available at http://www.urban.org/UploadedPDF/immig_integration.pdf.

11. *Id.*

12. More than three million U.S. citizen children in the United States live in approximately two million families where at least one parent is not authorized to remain in the country. See JEFFREY S. PASSEL, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. 8 (2006), available at <http://pewhispanic.org/files/reports/61.pdf>.

in the United States without authorization, including some undocumented children whose parents have legal immigration status or U.S. citizenship.¹³ Among various combinations of immigration and citizenship status that make up this country's families, one is particularly widespread: in 41% of mixed-status families, parents have different citizenship statuses.¹⁴ Differences in immigration status within families and between parents can create difficulties in the best of times, but they present special challenges when families break apart.

When parents in a child custody dispute do not share the same immigration or citizenship status, it is not unusual for the parent holding a status perceived as superior to attempt to highlight the status of the other.¹⁵ While parties and courts often reflexively assume there is legal significance or advantage in the distinction, the logic of this presumed relevance rarely is explained. Arguments by attorneys and pro se litigants alike feature a troubling prevalence of innuendo and outright bigotry.

Yet at other times, parties without legal immigration status seek to raise concerns related to immigration concerns in family courts, asking courts to accommodate realities related to their situations or to tailor decisions to facilitate desired immigration outcomes. Because immigration status is an influential force that shapes the life experiences of many immigrants and immigrant families, the immigration status of parents and children forms an understandably tempting area of inquiry for family judges struggling to make difficult determinations about the interests of children on the basis of family law's vague and indeterminate criteria.

Only a handful of courts have published opinions that formally endorse the consideration of immigration status in making child custody determinations.¹⁶ These decisions rely on conclusory statements

13. *Id.* Children constitute 16% of the unauthorized migrant population in the United States. See *id.*; see also Javier C. Hernandez, *Tiny Deportee? Girl, 5, Faces Immigration Hearing That Could Separate Her from Her Family If She Is Ordered to Return to El Salvador*, BOSTON GLOBE, July 7, 2007, at B1, available at http://www.boston.com/news/local/articles/2007/07/07/tiny_deportee.

14. Valerie Leiter et al., *Challenges to Children's Independent Citizenship: Immigration, Family, and the State*, 13 CHILDHOOD 11, 17 (2006).

15. See David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45, 53 (2005).

16. See, e.g., *In re Cardoso Vidal*, No. 6-497/05-1751, 2006 Iowa App. LEXIS 1286, at *9 (Iowa Ct. App. Nov. 16, 2006) (noting that "the district court indicated Ana's undocumented status complicates the custody issue"); *Rico v. Rodriguez*, 120 P.3d 812, 818-19 (Nev. 2005) ("[T]he district court has the discretion to consider a parent's immigration status to determine its derivative effects on the children."); *Florentino v. Woods (In re parentage of Florentino)*, No. 25966-4-II, 2002 Wash. App. LEXIS 1896, at *19 (Wash. Ct. App. Aug. 9, 2002) ("[T]he trial court has the discretion to consider the undocumented status of a parent as a factor in the overall determination of the best interest of the

regarding the permissibility of inquiries into immigration status and provide little guidance as to the motivations and parameters of such consideration. The impulse to consider immigration status in many cases is dubious at best.¹⁷ Other courts have incorporated immigration status considerations into decisions without open acknowledgement or comment, leaving room to wonder if the court has acted from unstated bias or misinformation. Regardless of the motivation for the consideration of immigration issues in child custody matters, its execution by family court judges unversed in immigration law can be misdirected and mistaken.¹⁸ In short, courts have demonstrated willingness to consider immigration status issues in child custody disputes but have yet to articulate a rationale for whether this engagement is proper and to develop a workable framework for competent analysis if it is.

One reason this interrelationship has not received more attention is that immigration law and family law traditionally are viewed as extreme opposites on the spectrum of state and federal power. In the common understanding of the allocation of power between state and federal courts, it is routine to acknowledge the plenary nature of federal authority regarding matters of immigration.¹⁹ Likewise, the primacy of the states in matters of family law has long been accepted.²⁰ Federal courts have long been quick to invoke the “domestic relations exception” that “divests the federal courts of power to issue divorce, alimony, and child custody decrees.”²¹ Touting this division, the Supreme Court declared that the states “possess ‘special proficiency’ in the field of

child.”).

17. See *In re M.M.*, 587 S.E.2d 825, 831 (Ga. Ct. App. 2003) (quoting the trial judge as stating that he had a “problem” with father’s immigration status).

18. See e.g., *Rico*, 120 P.3d at 814 (noting that trial court accepted “erroneous explanation of a repealed immigration statute”).

19. See *Galvan v. Press*, 347 U.S. 522, 531 (1953) (“[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.”).

20. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (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 States.’” (quoting *In re Burrus*, 136 U.S. 586, 593 (1890))).

21. *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992); see also *In re Burrus*, 136 U.S. at 596 (“[T]he relations of the father and child are not matters governed by the laws of the United States . . .”).

domestic relations, including child custody.”²²

But simply repeating the mantra that federal law does not encompass family law does not make it so. In a number of areas, there is increasing recognition “that the axiom that family law belongs exclusively within the state domain is both empirically untrue and theoretically unsound.”²³ As they regulate family relationships and determine rights between family members, “federal social security law, employee benefit law, immigration law, tax law, Indian law, military law, same-sex marriage law, child support law, adoption law, and family violence and abuse law are also forms of family law.”²⁴ Scholarly exploration of the ways in which federal law operates as family law is emerging in a number of contexts.²⁵ In the context of immigration, recent scholarship demonstrates the manner in which immigration law functions as family law in the regulation of marriage.²⁶ An analysis of immigration law as family law in the context of child custody is overdue.

In earlier writing, I identified patterns in the responses of family courts when immigration status issues arise across a broad spectrum of issues in family law²⁷ and examined the tensions between children’s and parents’ rights in situations where immigration law reaches differing conclusions about the legal rights of parents and children to remain in the United States.²⁸ To date, very little attention has been directed at the use of immigration status in family court generally, and even less toward the prevalent context of child custody determinations.²⁹ In this Article, I

22. *Reno v. Flores*, 507 U.S. 292, 310 (1993) (quoting *Ankenbrandt*, 504 U.S. at 704); see also *Bagot v. Ashcroft*, 398 F.3d 252, 260 (3d Cir. 2005) (“These are all matters of state law, as no federal courts or statutes grant child custody.”); Judith Resnik, “Naturally” Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682, 1746 n.337 (1991) (describing line of federal cases disclaiming power over child custody).

23. Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197, 255 (1999); see also Kristin A. Collins, *Federalism’s Fallacy: The Early Tradition of Federal Family Law and the Invention of States’ Rights*, 26 CARDOZO L. REV. 1761, 1814 (2005).

24. Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 875 (2004).

25. See, e.g., Patricia A. Cain, *Dependency, Taxes, and Alternative Families*, 5 J. GENDER RACE & JUST. 267, 267–68 (2002) (describing federal tax law’s impact on dependent children in non-traditional families); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform’s Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647 (2005) (exploring federal welfare law’s promotion of marriage).

26. See generally Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625 (2007); Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005).

27. See Thronson, *supra* note 15, at 45.

28. See David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1189–1213 (2006).

29. See Kerry Abrams, *Immigration Status and the Best Interests of the Child Standard*, 14 VA. J. SOC. POL’Y & L. 87, 87–89 (2006). In fact, most scholarship related to children and immigration

seek to explore in depth this area that has received only limited scholarly focus.

Part I of this Article evaluates, from a family law perspective, the propriety of immigration status considerations in the determination of child custody. It cautions that consideration of immigration status per se is discriminatory and irrelevant to the best interests of the child, yet rejects a bright line prohibition on raising immigration concerns in child custody matters in light of the persistent and pervasive collateral impact of immigration status on some children and families. In suggesting parameters for the cautious evaluation of immigration related matters on a case-by-case basis, the analysis is attuned to the ways in which immigration status influences the lives of many immigrants and immigrant families in a variety of predictable and unpredictable ways. In particular, it considers the frequent contention that the determination of child custody itself will play a critical role in the child's own immigration or nationality status.

With evaluation of this potential interplay of child custody and a child's immigration status in mind, Part II of the Article turns to immigration law. Only with an understanding of the actual impact of a child custody determination in immigration law is it possible to evaluate truly how immigration law might impact the best interests of the child in a child custody dispute. This section therefore undertakes a deep analysis of the erratic and unprincipled role of child custody in immigration and nationality law. It examines how the interrelated immigration and nationality laws exhibit a remarkable lack of consistency in the import of child custody and reveals a haphazard and capricious framework that devalues children.

Part III builds on the preceding family law and immigration law analyses by exploring the notion of immigration law as family law and family law as immigration law. Looking at immigration law as family law provides a critical perspective to review its treatment of children and child custody. Likewise, critiquing the manner in which family law can function as immigration law provides fresh insights regarding the

addresses the plight of unaccompanied minors. *See, e.g.*, Jacqueline Bhabha, "Not a Sack of Potatoes": *Moving and Removing Children Across Borders*, 15 B.U. PUB. INT. L.J. 197, 205 (2006); Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INT'L J. REFUGEE L. 84 (1999); Gregory Zhong Tian Chen, *Elian or Alien? The Contradictions of Protecting Undocumented Children Under the Special Immigrant Juvenile Statute*, 27 HASTINGS CONST. L.Q. 597, 600 (2000); Angela Lloyd, *Regulating Consent: Protecting Undocumented Immigrant Children from Their (Evil) Step-Uncle Sam, or How to Ameliorate the Impact of the 1997 Amendments to the SIJ Law*, 15 B.U. PUB. INT. L.J. 237 (2006); Christopher Nugent, *Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT. L.J. 219 (2006).

appropriate parameters for the consideration of immigration-related issues in child custody matters. This analysis provides unique perspectives from which to explore the significant tensions, and occasional common ground, between the conflicting values and contradictory policies of immigration law and family law.

I. CONSIDERING IMMIGRATION STATUS IN CHILD CUSTODY DETERMINATIONS—MAINTAINING THE CENTRALITY OF CHILDREN'S INTERESTS

Almost universally, “nations are guided by the precept that the primary consideration underlying any [child] custody decision must be the best interests of the child.”³⁰ Certainly, in the domestic context the “custody law in every state in the United States . . . embraces the ‘best interests’ standard.”³¹ Courts emphasize that

custody determinations subordinate a parent’s interests and allocate custody according to a determination of the best interests of the child, that the welfare of the child is the determining factor in establishing child custody, that whatever claim parents may make for either custody or visitation rights, is to be tested by what is in the best interest of the child.³²

This approach places children and their interests at the center of the matter.³³

Still, “best interests” can take on many meanings. Some states make no statutory attempt to clarify its meaning while others provide specific criteria or guidelines for determining a child’s best interest.³⁴ Across the board, however, family courts characteristically exercise tremendous latitude in the application of this expansive standard.³⁵ As one court put

30. D. Marianne Blair & Merle H. Weiner, *Resolving Parental Custody Disputes—A Comparative Exploration*, 39 FAM. L.Q. 247, 247 (2005).

31. *Id.*

32. Hasday, *supra* note 24, at 849 (internal quotation marks and footnotes omitted).

33. See generally Mary Ann Mason, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES I (1994).

34. See Katherine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL’Y & L. 5, 16 (2002).

35. See *Bonjour v. Bonjour*, 592 P.2d 1233, 1238 (Alaska 1979) (“A court’s task in a child custody case is to determine which parent will better serve the best interests of the child. Myriad factors may be considered in working toward this goal. To hold that a court may not consider religious factors under any circumstances would blind courts to important elements bearing on the best interests of the child. The constitution is not so inflexible as to foreclose all inquiry into this sensitive area.”); Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Parentage and Assisted Reproduction Problems Take Center Stage*, 39 FAM. L.Q., 879, 894 (2006) (“Louisiana finds that the trial court is not bound to make a mechanical evaluation of all statutory factors or to give more weight to one factor over another; the factors are not exclusive.” (citing *In re Ricard*, 906 So. 2d 544 (La. Ct. App. 2005))); Robert D. Zalsow, *Child Custody, Visitation, and the HIV Virus: Revisiting the Best Interests Doctrine*

it: "The family court 'may draw upon its own common sense and experience in reaching a reasoned judgment' as to the best interests of the child."³⁶ This equitable flexibility in the exercise of broadly stated mandates stands in stark contrast to the unyielding application of a rigid statutory framework in immigration law.

The flexibility of family court judges may be near its zenith in the context of child custody disputes between parents. While parents have interests of constitutional dimension in their relationships with their children that limit the state's ability to intervene in families,³⁷ in disputes between parents it is not unusual for judges to interpret the presence of strong constitutional interests on the part of both parents as license to exercise particularly unfettered discretion. As one court articulated its reasoning, where "both parents seek custody, each parent proceeds in possession, so to speak, of a constitutionally-protected fundamental parental right. Neither parent has a superior claim to the exercise of this right to provide care, custody, and control of the children."³⁸ In this view, "each fit parent's constitutional right neutralizes the other parent's constitutional right, leaving, generally, the best interests of the child as the sole standard to apply to these types of custody decisions."³⁹

It is precisely in such custody disputes, with the perceived absence of a confining structure of constitutional interests, that family courts are most prone to grasp at imagined and real distinctions between parents, including distinctions related to the immigration status of parents and children. Whether this practice of permitting the broad reach of the family court to include immigration status is appropriate turns in large part on the purpose for which immigration status is considered and how

to Ensure Impartial Parental Rights Determinations for HIV-Infected Parents, 3 J. PHARMACY & L. 61, 68 (1994) ("Whether or not a particular jurisdiction has statutory guidelines upon which to determine a child's best interests, all custody and visitation laws . . . grant judges tremendous leeway to formulate a decree as he/she may see fit.").

36. *Osmanagic v. Osmanagic*, 872 A.2d 897, 899 (Vt. 2005) (quoting *Payrits v. Payrits*, 757 A.2d 469, 472 (2000)).

37. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (finding that it is "cardinal . . . that the custody, care and nurture of the child reside first in the parents"). In fact, "the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized" by the Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

38. *McDermott v. Dougherty*, 869 A.2d 751, 770 (Md. 2005) (internal quotation marks omitted).

39. *Id.* (emphasis omitted); see also *Baker v. Baker*, 682 N.E.2d 661, 664 (Ohio Ct. App. 1996) ("Since both parents have a 'right' to custody, those conflicting rights cancel each other out, and the best interest of the child is determinative."); *Peterson v. Ransome*, 8 Phila. Cty. Rptr. 461, 490-91 (Pa. Ct. Com. Pl. 1983) ("In approaching the delicate question of child custody, the burden of proof between natural parents is generally equal. . . . Given the equal standing of the parties, our analysis shifts to the standard for determining custody matters. The polestar in deciding all custody and visitation cases is the best interests and welfare of the child." (citation omitted)).

it is utilized.

Several years ago, I conducted a systemic review of family court decisions and described four approaches that family courts adopt when considering immigration related issues.⁴⁰ These patterns emerged across a range of underlying family law issues and bridged jurisdictions.⁴¹ The first approach is explicit discrimination, where courts and parties openly indicate bias or where outcomes turn on immigration status per se.⁴² Second, and closely related, some family courts less convinced of the propriety consideration of immigration status adopt the approach of obfuscation.⁴³ In such instances, courts articulate reasons purportedly unrelated to immigration status in reaching decisions, but in actuality their rationales are a pretext for immigration status considerations.⁴⁴ Third, many courts choose or feel forced into accommodation, responding to the unavoidable collateral consequences and challenges that sometimes accompany a party's immigration status.⁴⁵ Finally some courts employ a utilitarian approach of manipulation, or tailoring family court outcomes in an effort to facilitate particular immigration outcomes.⁴⁶

Mapping the possible use of immigration considerations in child custody matters onto this framework proves a useful method to evaluate the appropriateness of such consideration.

A. DISCRIMINATION AND OBFUSCATION—RESISTING A SHIFT AWAY FROM CHILDREN'S INTERESTS

Immigrants are routinely fearful that their immigration status will result in unfair treatment in child custody proceedings. The notion that the flexibility of the best interests of the child standard can become a vehicle for discrimination is not unique to immigrants and is shared by parents and children from a variety of vulnerable populations.⁴⁷ As anti-

40. See Thronson, *supra* note 15, at 53.

41. *Id.*

42. *Id.* at 54–60.

43. *Id.* at 64–68.

44. *Id.*

45. *Id.* at 68–71.

46. *Id.* at 60–64.

47. See, e.g., 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); 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) (discussing criticism that the best interests standard "can mask all manner of biases, views, political interest, misconceptions, and . . . plain ignorance" (quoting Judith G. Fowler, *Homosexual Parents: Implications for Custody Cases*, 33 FAM. & CONCILIATION CTS. REV. 361, 362 (1995))); Eugene Volokh, *Parent-Child Speech and Child Custody*

immigrant ordinances and failed attempts at comprehensive immigration reform make headlines, a strong societal narrative that immigrants are undeserving and unworthy prevails.⁴⁸ Indeed, loud voices call expressly for worse treatment of immigrants in their daily interactions with the world, spouting a cynical and farfetched belief that rather than reforming or enforcing immigration law, the United States can induce mass self-deportation by imposing misery on immigrant families.⁴⁹ In mixed-status families, the societal marginalization of unauthorized immigrants has serious spillover repercussions for other family members, without regard to their individual immigration or citizenship status.⁵⁰ Concerns of judicial bias are exacerbated by unrestrained calls for outright discrimination from opposing parties in child custody matters. Given this pervasive social narrative and the reality of formal and informal marginalization, it is not surprising that discrimination against immigrants in the courtroom is widely anticipated.

Some courts confirm these fears by openly expressing discrimination on the basis of immigration status⁵¹ or through more subtle or unconscious bias against immigrants.⁵² The struggles of immigrants in

Speech Restrictions, 81 N.Y.U. L. REV. 631, 656 (2006) (discussing vagueness of best interests of the child standard in context of the First Amendment and unpopular speech); Zalsow, *supra* note 35, at 68 (discussing “fear that judges may abuse the tremendous leeway to sculpt custody determinations in line with their personal views, idiosyncrasies, and prejudices”).

48. See, e.g., BILL ONG HING, *DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY* 2 (2006) (“Unfortunately, the heartless side of U.S. immigration policy is on full display today; anti-immigrant fervor has been quite effective of late. . . . The anti-immigrant movement in the United States is as strong as ever. Immigrant bashing is popular among politicians, talk radio hosts, private militiamen, and xenophobic grassroots organizations.”).

49. See, e.g., Mark Krikorian, *Immigration Problem Needs an Attrition Policy*, ARIZ. REPUBLIC, Aug. 28, 2005, <http://www.azcentral.com/arizonarepublic/viewpoints/articles/o828krikoriano828online.html> (“This would involve both conventional measures, like arresting and deporting more illegals. But an attrition strategy would also involve other measures—firewalls, you might say—to make it as difficult as possible for illegal aliens to live a normal life here. This would entice fewer to come in the first place and persuade millions who are already here to give up and deport themselves. . . . Over a period of several years, such an attrition strategy would serve to shrink the illegal population to a manageable nuisance . . .”).

50. See MICHAEL E. FIX & WENDY ZIMMERMAN, *ALL UNDER ONE ROOF: MIXED-STATUS FAMILIES IN AN ERA OF REFORM* 2 (1999); Randy Capps et al., *A Profile of Low-Income Working Immigrant Families*, in *NEW FEDERALISM: NATIONAL SURVEY OF AMERICA’S FAMILIES*, at 2 (The Urban Inst. Series B., No. B-67, 2005); David B. Thronson, *You Can’t Get Here from Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL’Y & L. 58, 77–80 (2006).

51. Cf. Leslye Orloff et al., *Countering Abuser’s Attempts to Raise Immigration Status of the Victim in Custody Cases*, in *BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS* ch. 6.I, at 1 (2004), available at <http://www.legalmomentum.org/site/DocServer/counteringabuserattempts.pdf?docID=289> (“Some judges may have strong negative feelings about immigrants that will greatly influence their decision-making.”).

52. Thronson, *supra* note 15, at 67 (“Family courts routinely set conditions that parties must meet before the court makes decisions regarding child custody. . . . Occasionally, however, courts

high profile cases can reinforce fears and expectations of bias.⁵³ Unfortunately, the flexibility afforded judges under the best interests standard “mask[s] all manner of biases, views, political interest, misconceptions and, indeed, plain ignorance.”⁵⁴

Concerns regarding discrimination through the introduction of immigration status in child custody matters have been raised most prominently in the context of domestic violence. Domestic violence advocates are acutely attuned to the issue because misinformation about the role of immigration status in determining child custody usually begins long before a court comes into the picture. Abusers can use “control over immigration status to stop their spouses from reporting or fleeing from the abuse . . . by threatening deportation and loss of ability to work and loss of child custody because of deportation.”⁵⁵ More pointedly, abusers often convince victims that child custody proceedings would disfavor parents without immigration authorization:

Fear of losing custody of or access to children is a significant factor that keeps battered women from leaving their abusers or seeking help to stop the abuse. This fear is substantiated by the fact that, in many child custody cases, abusers of immigrant victims raise the issue of the victims’ lack of legal immigration status in order to tip the custody scales in their favor. Abusers use child custody litigation as a vehicle to maintain control over the victims.⁵⁶

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.”).

53. See Woody Baird, *Girl, 8, Back with Chinese Parents*, USA TODAY, July 23, 2007, http://www.usatoday.com/news/topstories/2007-07-23-271460173_x.htm (“A Chinese couple regained legal custody of their 8-year-old daughter Monday after a seven-year fight to get her back from what was supposed to be temporary foster care.”).

54. Ball & Pea, *supra* note 47. (quoting Judith G. Fowler, *Homosexual Parents: Implications for Custody Cases*, 33 FAM. & CONCILIATIONS CTS. REV. 361, 362 (1995)).

55. Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture’s Diminishment, but Not Its Demise*, 24 N. ILL. U. L. REV. 153, 167–68 (2004); see also ORLOFF ET AL., *supra* note 51, at 6 (“Threatening an immigrant victim that the police will turn her into USCIS if she calls the police for help isolates the immigrant victim and her children from police and justice system protection and shields the abuser from prosecution for his violence.”); Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 680 (1998) (“Abusive husbands routinely threaten to call INS and report their undocumented wives if there is any attempt to report the beatings.”).

56. ORLOFF ET AL., *supra* note 51, at 2 (footnotes omitted); see also Felicia E. Franco, *Unconditional Safety for Conditional Immigrant Women*, 11 BERKELEY WOMEN’S L.J. 99, 136 (1996); Margot Mendelson, *The Legal Production of Identities: A Narrative Analysis of Conversations with Battered Undocumented Women*, 19 BERKELEY WOMEN’S L.J. 138, 182 (2004) (describing interviews with undocumented women in which 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”).

The stakes in child custody disputes are high and misinformation, distrust, and fear of discrimination persist, despite immigration law reforms that ameliorate aspects of an abuser's control in the immigration system.⁵⁷ Indeed, "48.2% of battered immigrant women who reported still living in an abusive relationship cited the fear of losing child custody as an obstacle to leaving that relationship."⁵⁸ This means that "many battered immigrant mothers are reluctant to pursue a civil order of protection, divorce, custody, or child support proceeding Since their mothers are legally incapacitated, these children lose their natural advocates."⁵⁹ In this milieu, even before arriving in court, fear of discrimination in the determination of child custody creates a strong barrier to battered women and children accessing the justice system.

In response to this situation, advocates for immigrant domestic violence victims have long advanced strong opposition to the consideration of immigration status in child custody disputes. One American Bar Association publication flatly concluded that "parties should not be able to raise, and courts should not consider, immigration status of domestic violence victims and their children in civil protection order, custody, divorce or child support proceedings."⁶⁰ Such a bright line articulation is a lucid reaction to the familiar misuse of immigration status by abusers.

Of course, the reason to resist the introduction of immigration status considerations in child custody matters cannot be that the feared discriminatory use of immigration status is appropriate and has merit. Implicit in the desire of abusers to raise immigration status issues is the

57. See, e.g., 8 U.S.C. § 1154(a)(1)(A)(iii), (B)(iii) (2000) (detailing provisions of the Violence Against Women Act under which spouses and children who have been battered or subjected to extreme cruelty may qualify to "self-petition"); see also *id.* § 1101(a)(15)(U) (2000) (providing the possibility of visas to those who suffer substantial physical and mental abuse as the result of certain crimes). Moreover,

in no case may the Attorney General, or any other official or employee of the [government] . . . make an adverse determination of admissibility or deportability of an alien under the Immigration and Nationality Act using information furnished solely by . . . a spouse or parent who has battered the alien or subjected the alien to extreme cruelty.

Id. § 1367(a)(1)(A) (2000).

58. ORLOFF ET AL., *supra* note 51, at 7; accord Franco, *supra* note 56, at 135-36 (concluding that "[m]any immigrant women remain in physically and/or psychologically abusive relationships because they fear that leaving their husbands will mean losing their children").

59. Franco, *supra* note 56, at 137.

60. HOWARD DAVIDSON, AMERICAN BAR ASSOCIATION, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN, A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION 20 (1994); accord ORLOFF ET AL., *supra* note 51, at 5 (noting that a "non-abusive parent's immigration status should not be raised nor should it be considered pertinent in custody, protection order, divorce, or other family law proceedings").

“claim[] that it is better for children to live with an abusive person rather than with a non-abusive parent who may lack legal immigration status or permanent legal immigration status.”⁶¹ Even in the absence of domestic violence, those seeking to introduce immigration status into child custody proceedings often expect that some real or perceived difference in immigration status, standing alone, can and should provide advantage in the indeterminate child custody calculus.⁶² There often may be good reason to confront parties and courts that openly or tacitly accept this premise.

Complete avoidance of the issue of immigration status in family court may allow the persistence of the misinformation and fear that keeps immigrants away from courts designed to protect their interests. Parties are certain to ask courts to discriminate, and in a world where immigrants and those around them are uncertain of their rights, it is worth articulating reasons that discrimination based on immigration status must be rejected. At times, open engagement on the merits is the best way to keep a court from obfuscating its unexamined discriminatory assumptions and conclusions.

Though “nobody argues that aliens are treated identically with citizens in every circumstance,”⁶³ popular conceptions that parents without authorized immigration status have lesser interests in the parent-child relationship⁶⁴ are simply false. The rare courts that have actually commented on whether immigration status per se might validly impact child custody have rejected the notion, tersely yet unequivocally. Dismissing in a footnote the argument that a father “should be denied custody solely because of his immigration status,” an appellate court in Washington observed that “[t]he due process and equal protection provisions prevent denying an illegal immigrant custody based on that ground.”⁶⁵ Persons who knowingly “enter this country without legal

61. ORLOFF ET AL., *supra* note 51, at 5.

62. See, e.g., *Florentino v. Woods* (*In re* parentage of Florentino), No. 25966-4-II, 2002 Wash. App. LEXIS 1896, at *17 (Wash. Ct. App. Aug. 9, 2002) (noting that in appeal mother assigned error to the trial court’s “failure to in any way consider the fact that the Respondent father is not a U.S. citizen and is not a legal permanent resident of the United States”).

63. Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1063 (1994). In the United States, the law is “deeply divided about the significance of the status of alienage for the allocation of rights and benefits in our society.” *Id.* at 1055.

64. See John Brummett, *Can't We All Meet at the Southern Border?*, PAHRUMP VALLEY TIMES, Mar. 31, 2006, <http://www.pahrumpvalleytimes.com/2006/03/31/opinion/brummett.html> (“We’ll put the illegal parents in the van bound for Mexico and the American kids in the van bound for the social services agencies.”).

65. *Florentino*, 2002 Wash. App. LEXIS 1896, at *18 n.11; see also *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (recognizing that “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”); *Kelson v. City of Springfield*, 767 F.2d 651, 654 (9th Cir. 1985) (“[P]arents have a fundamental liberty

authorization are not stripped immediately of all their rights because of this single illegal act.”⁶⁶

In a similar vein, the Supreme Court of Nevada concluded that among the “fundamental interests [that] apply to individuals regardless of their immigration status” is “the interest of parents in the care, custody, and control of their children.”⁶⁷ As such, without regard to their immigration status, parents stand “on equal footing . . . when asserting their right to custody of their children.”⁶⁸

Certainly trepidation about and vigilance for discrimination in child custody disputes on the basis of immigration status is prudent, but hesitation to inject immigration status issues must never arise from any sense of ambiguity that a parent or child’s rights regarding custody might be diminished merely on the basis of their immigration status.⁶⁹ A parent’s immigration or citizenship status per se is irrelevant to the determination of a child’s best interests because it says absolutely nothing about the parenting of any person or rights of that person in the parent-child relationship.

Indeed, any conclusions related to parenting, character, or a child’s best interests made on the basis of a parent’s failure to emerge at a particular exit from the daunting maze that is U.S. immigration law would be misplaced. Commonly advanced comparisons of past generations of “legal” immigrants with immigrants currently lacking authorization are tenuous given the proliferation of barriers to legalizing status that simply did not exist for previous cohorts.⁷⁰ Intergenerational

interest in maintaining a relationship with their children which is protected by the Fourteenth Amendment.”).

66. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 498 (M.D. Pa. 2007). The court further noted:

[T]he contemporary concern with and opprobrium towards undocumented aliens does not lead us to the conclusion that those who violate the laws to enter the United States can be subject without protest to any procedure or legislation, no matter how violative of the rights to which those persons would normally be entitled as persons in the United States.

Id. at 499 n.19.

67. *Rico v. Rodriguez*, 120 P.3d 812, 818 (Nev. 2005) (citation omitted); *see also Troxel v. Granville*, 530 U.S. 57, 65 (2000) (noting that “the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests”); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981) (“This Court’s decisions have by now made plain beyond the need for multiple citation that a parent’s desire for and right to ‘the companionship, care, custody, and management of his or her children’ is an important interest that ‘undeniably warrants deference.’” (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972))).

68. *Rico*, 120 P.3d at 818.

69. *See Thronson*, *supra* note 15, at 59–62.

70. *See Mae M. Ngai, How Grandma Got Legal*, L.A. TIMES, May 16, 2006, at B13 (noting that “[t]he government excluded a mere 1% of the 25 million immigrants who landed at Ellis Island before World War I, mostly for health reasons” and that the “Chinese were the exception, excluded on

comparisons often are not only misguided but also misinformed.⁷¹ Of those who successfully navigate the current law to become permanent residents, almost one-third lived without authorization in the United States at some point.⁷²

Certainly immigration law itself does not find a lack of authorized immigration status to be remotely indicative of either parenting ability or moral character. For example, persons without authorized immigration status who face removal from the United States may seek a form of relief in immigration court known as cancellation of removal.⁷³ This requires them to prove, among other things, that they have simultaneously “been physically present in the United States for a continuous period of not less than 10 years”⁷⁴ and have “been a person of good moral character during [that] period.”⁷⁵ In fiscal year 2006, 3,672 persons were granted cancellation of removal: each of these persons necessarily established that their unauthorized immigration status was consistent with a positive determination of good moral character.⁷⁶ The absence of authorized immigration status is not intended as a measure of a person’s character.

For another example, the government routinely facilitates the removal of children, including U.S.-citizen children, together with parents who face removal from the United States pursuant to immigration law. Throughout the removal process, parents are charged with making critical decisions about the care and custody of their children. Indeed, Board of Immigration Appeals case law explicitly presumes that parents removed from the United States will continue as their caretakers after removal.⁷⁷ Thus even when immigration law has

grounds of ‘racial unassimilability’”).

71. See Brian Donohue, *Many Immigrants Were Legal Only Because There Were No Rules*, STAR-LEDGER (Newark, N.J.), July 22, 2007, at 1 (noting that “if everyone’s grandparents said they immigrated legally, someone’s grandparents were lying” and that government statistics showed 1.4 million unauthorized immigrants in 1925 when numerical restrictions on immigration were relatively new).

72. MICHAEL E. FIX & JEFFREY S. PASSEL, IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT 21 (1994); see also Lenni B. Benson, *The Invisible Worker*, 27 N.C.J. INT’L L. & COM. REG. 483, 484 (2002) (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).

73. See 8 U.S.C. § 1229b(b) (2000).

74. *Id.* § 1229b(b)(1)(A).

75. *Id.* § 1229b(b)(1)(B).

76. See U.S. DEP’T OF JUSTICE, OFFICE OF PLANNING, ANALYSIS, & TECHNOLOGY, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2006 STATISTICAL YEARBOOK, at R3 tbl.15 (2007) [hereinafter YEARBOOK], available at <http://www.usdoj.gov/eoir/statspub/fy06syb.pdf>.

77. See *In re Ige*, 20 I. & N. Dec. 880, 885 (B.I.A. 1994) (“The claim that the child will remain in the United States can easily be made for purposes of litigation, but most parents would not carry out such an alleged plan in reality. Therefore we will require, at a minimum, an affidavit from the parent

reached its harshest judgment and imposed removal from the United States, immigration law provides no indication that a parent's relationship to his or her child warrants any less respect due to lack of immigration status.⁷⁸

Ostensibly, "a custody decree is not meant to punish a parent, or anyone else; its only purpose is to help the children."⁷⁹ Placing weight on a parent's immigration status per se improperly moves the focus of child custody proceedings away from the best interests of the child. Parental rights are not affected by immigration status; neither are children's interests. A child has no less interest in maintaining a relationship with a parent on the basis of the parent's immigration status. Any attempt to argue that immigration status alone is relevant to the best interests of the child should be rejected out of hand as discriminatory and irrelevant.

A bright line prohibition against any consideration of immigration status in child custody proceedings would stand as a firewall against discrimination and the intimidation inherent in parties' attempts to raise immigration status matters. This does not necessarily mean, however, that the call for an absolute bar on the consideration of immigration status is the answer. While a strict prohibition on any mention of immigration status admittedly has appeal as one way of avoiding discrimination, it has significant downsides as well. One of these is the possibility that discrimination is simply converted to obfuscation. Another is that, quite apart from impermissible bias, immigration status does sometimes have real and tangible impacts on the lives of children.

B. ACCOMMODATION — ADDRESSING THE DISCONNECT BETWEEN IMMIGRATION STATUS AND EVERYDAY REALITY

A strict prohibition on raising immigration status issues in child custody matters would be difficult to maintain because immigration status does have an impact on the experiences of many immigrants and their families. This is especially true for mixed-status families that face

or parents stating that it is their intention that the child remain in this country, accompanied by evidence demonstrating that reasonable provisions will be made for the child's care and support (such as staying with a relative or in a boarding school).").

78. See *Acosta v. Gaffney*, 558 F.2d 1153, 1158 (3d Cir. 1977) (determining that parents can decide where the child will live after parents' deportation and assuming that parents generally will decide to keep their children with them); see also *Salameda v. INS*, 70 F.3d 447, 451 (1995) ("In order to economize on its limited resources, the INS usually does not bother to institute a formal deportation proceeding against an alien who is likely to depart anyway, such as the minor child of parents who are being deported.").

79. *In re Custody of Temos*, 450 A.2d 111, 125 (Pa. Super. Ct. 1982); see also *Gaskill v. Gaskill*, 936 S.W.2d 626, 630 (Tenn. Ct. App. 1996) ("Custody should never be used to punish or reward the parents . . .").

daily conundrums as they interface with societal institutions unsure of the implications associated with the array of statuses that such families present. The influence of immigration status in shaping daily life can be logistical and practical, or it can be much more significant. In some cases, the influence of immigration status is vitally relevant to the determination of a child's interests.

For example, as discussed above, immigration status can play a central role in establishing and perpetuating dynamics of family violence. In such instances, ignoring the power and influence of immigration status may be among the least appropriate choices. Any examination of families where immigration status is a strong negative force would be incomplete and misleading without reference to concerns related to immigration. Indeed, the very same American Bar Association report that calls for an absolute prohibition on raising immigration status in family court also notes that

[o]ffering battered immigrant parents and their children a way out of violent homes requires that attorneys, judges, police, child protective service workers and advocates develop an understanding of immigrant parents' life experience, so that they may craft legal relief that will be effective in stopping violence while being respectful of their cultural experiences.⁸⁰

It is important for family judges to realize that "[i]n many instances, the fact that battered immigrant women have no legal immigration status or documentation in the U.S. is a result of the batterer's use of the victim's immigration status as a weapon of abuse."⁸¹ Moreover, it may well be the case that in some instances "[a]n abuser's attempt to raise the other parent's immigration status . . . [itself] is evidence of on-going abuse."⁸² If this is the case, a court's inquiry into the abuser's motives and rationale for attempting to inject the issue of immigration status into the proceeding may be especially telling. Further, the strategic decision of a party or attorney in a particular case to educate a judge regarding the true impact of immigration status ought to not be prohibited or even discouraged.⁸³ In such instances it may well be a person lacking

80. DAVIDSON, *supra* note 60, at 19.

81. Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 55 (2003).

82. ORLOFF ET AL., *supra* note 51, at 6; *see also* *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002) ("Courts have generally recognized the *in terrorem* effect of inquiring into a party's immigration status when irrelevant to any material claim.").

83. *See* Orloff, *supra* note 81, at 46 ("The pervasive lack of understanding of the life experiences of battered immigrant women by the systems designed to protect battered women and immigrant victims greatly reduces the likelihood that immigrant victims will be able to escape the violence in their lives.").

immigration authorization who seeks to bring immigration concerns that are highly relevant to the child's best interests to the court's attention.

The appropriate line in child custody matters cannot be, or at least cannot always be, drawn to enforce absolute silence about immigration status. This conclusion extends outside the realm of domestic violence, as immigration status unquestionably influences the lives of many immigrants and immigrant families in a variety of predictable and unpredictable ways. To argue that concerns related to immigration never impact the interests of children in any situation is not credible, and it is unrealistic to think that judges will or should completely ignore the persistent and pervasive collateral impact of immigration status on some children and families. Practically significant examples include establishing levels of child support or enforcing child support when parties are not unauthorized to work.⁸⁴ Eligibility restrictions for important benefits, such as Supplemental Security Income, food stamps, and Temporary Assistance for Needy Families may be highly relevant to some families.⁸⁵ If an affidavit of support is executed in support of an immigration application, this may have relevance to support issues.⁸⁶

It is important, however, to articulate limits on the court's consideration of immigration concerns to prevent the introduction of irrelevant stereotypes. For example, claims related to the insecurity and precariousness of immigrants' continuing presence in the United States are easily overstated.⁸⁷ Millions of immigrants, without regard to immigration status, have regular employment and established homes in the United States. As the Supreme Court has remarked, the presence of a population lacking authorized immigration status in the United States is quite established.⁸⁸ Even with occasional spikes in the enforcement of immigration laws, most unauthorized immigrants are unlikely to face

84. See Thronson, *supra* note 15, at 70.

85. See *In re Kittridge*, 714 N.Y.S.2d 653, 654 (N.Y. Fam. Ct. 2000); see also NATIONAL IMMIGRANT LAW CENTER, IMMIGRATION & NATIONALITY LAW HANDBOOK, IMMIGRANT ELIGIBILITY FOR PUBLIC BENEFITS 759 (2005-06 ed.), available at http://www.nilc.org/immspbs/special/imm_elig_for_pub_bens_aiala_0305.pdf.

86. See 8 U.S.C. § 1182(a)(4)(C) (2000) (requiring affidavits of support in the context of family-sponsored immigration); Abrams, *Immigration Law*, *supra* note 26, at 1700-07 (discussing enforceability of affidavits of support in the context of immigration based on marriage).

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

88. See Plyler v. Doe, 457 U.S. 202, 218-19 (1982) (commenting on "the creation of a substantial 'shadow population' of illegal migrants—numbering in the millions—within our borders" which "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").

removal.⁸⁹ Even those in removal proceedings may be eligible for relief, such that “a State cannot realistically determine that any particular undocumented [person] will in fact be deported until after deportation proceedings have been completed.”⁹⁰ Immigrants in removal proceedings are entitled to due process protections that provide time from the initiation of proceedings to avenues of appeal to possible removal.⁹¹ In sum, a person’s presence in the United States without authorized immigration status is not in and of itself evidence of instability.

Similarly, many immigrants may face economic challenges and insecurities that impact their children’s interests; mixed-status families “are more likely to be poor than other families.”⁹² “Children in low-income working immigrant families were more than twice as likely as those in comparable native families to lack health insurance coverage in 2002”⁹³ and children of immigrants are “significantly less likely to be in any regular nonparental child care arrangement.”⁹⁴ The list could go on, but general statistics are irrelevant to child custody decisions.

It is well established that “child custody disputes, by their very nature, must be analyzed on a case-by-case basis.”⁹⁵ Stereotypes and statistics are ill equipped to replace case-by-case inquiries about the lives of children required under the best interests standard. Millions of immigrants, with and without authorization, have unique experiences of life in the United States. Constant vigilance is required to combat

89. In fiscal year 2006, 220,057 persons were ordered removed by immigration judges. See YEARBOOK, *supra* note 76, at D2. This represents just 1.8% of the estimated twelve million unauthorized immigrants in the United States. See MICHAEL HOEFER ET AL., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2006, at 1 (2007), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf. Given the immigration enforcement focus on criminal noncitizens, the noncriminal immigrant faces a remarkably low probability of formal removal. In fact, for some demographic groups, statistical probability of removal generally is well less than the probability of incarceration for a crime. See Abrams, *Immigration Status*, *supra* note 29, at 9.

90. *Plyler*, 457 U.S. at 226.

91. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (noting that persons “who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law”).

92. *Fix*, *supra* note 50.

93. *Capps et al.*, *supra* note 50, at 4.

94. *Id.* at 5.

95. *John A. v. Bridget M.*, 791 N.Y.S.2d 421, 429 (N.Y. App. Div. 2005); see also *Hicks v. Hicks*, 868 A.2d 1245, 1247–48 (Pa. Super. Ct. 2005) (“It is well-established . . . that custody and visitation matters are to be decided on the basis of the judicially determined ‘best interests of the child’ standard, on a case-by-case basis, considering all factors which legitimately have an effect upon the child’s physical, intellectual, moral, and spiritual well-being.” (citation omitted)); see also *Rico v. Rodriguez*, 120 P.3d 812, 817 (Nev. 2005) (“Child custody determinations are by necessity made on a case-by-case basis.”).

attempts to essentialize their experiences and replace individualized fact finding with assumption and stereotypes.

As such, a critical limit must be placed on the consideration of immigration concerns in child custody, restricting such consideration to instances where immigration concerns are demonstrably relevant on an individualized basis to the best interests of the child. The proponent of considering immigration status or concerns must have the burden of establishing specific facts and their relevance to the best interests of the child. Forcing the proponent to articulate a rationale for the consideration of immigration status brings transparency to the best interest determination and reduces opportunities for discrimination and obfuscation. At the same time, this approach maintains flexibility in responding to the myriad unseen ways in which immigration law impacts lives.⁹⁶ It may well be that attempts to inject immigration-related concerns into child custody matters will rarely succeed, but the rejection of irrelevant bias based on immigration status per se does not preclude carefully delineated factual analysis of the collateral consequences of the workings of immigration law on children.

Opening the door to considering the collateral consequences of immigration status creates a tremendous challenge for immigrants and their advocates to combat stereotypes and assumptions, lest discrimination simply take the guise of fact-finding. This approach, however, is in accord with a growing consensus that the potential complications of immigration law in the lives of children and families must be acknowledged, understood, and, when appropriate, affirmatively addressed in legal representation.⁹⁷

C. MANIPULATION—KEEPING PERSPECTIVE AND GETTING IT RIGHT

All persons working in family courts “need to understand certain aspects of immigration law simply because in the process of conducting normal business they may unknowingly make decisions with far-reaching immigration consequences.”⁹⁸ Understanding the impact that will result is

96. The unpredictability of immigration law's impact in the lives of children and families makes a more rigid barrier to use of immigration status less appealing. *But see* Abrams, *supra* note 29, at 98 (proposing “a presumption that immigration status is not relevant in child custody disputes, coupled with specific classes of cases in which the presumption could be rebutted”).

97. *See, e.g., Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 Nev. L.J. 592, 597 (2006) (“In juvenile justice and child welfare proceedings, children’s attorneys should understand the interconnections to other related substantive areas, such as health, housing, public benefits, education, domestic violence, immigration, and transnational issues . . .”).

98. KATHERINE BRADY & SALLY KINOSHITA, IMMIGRATION BENCHMARK FOR JUVENILE AND FAMILY COURT JUDGES 2 (2005), available at www.ilrc.org/resources/sijs/2005%20SIJS%20benchmark.pdf.

one thing, yet consciously adjusting family law determinations to tailor immigration impact is a step further. A final approach by which parties and courts inject considerations of immigration status into child custody matters is by manipulating proceedings and outcomes to facilitate particular immigration outcomes. Requests for the court to consider immigration status for such a purpose frequently originate with or on behalf of persons lacking immigration status. For example, because an adoption finalized after a child reaches the age of sixteen is not recognized for immigration purposes,⁹⁹ expediting an adoption proceeding may be in the best interests of the child. In such instances, an open request for the court to consider immigration status in the proceeding often is made. The requested manipulation only remotely implicates the rights of other parties and likely is unobjectionable.

Going further, one court decided that it was in the best interests of a child to remain with his mother in the United States, where his father also resided and a family support network existed, then it refused to divorce the child's parents in favor of a legal separation with the hope that it would entice the father to follow through with a petition necessary for the mother to obtain legal immigration status.¹⁰⁰ After determining that it was in the child's best interests to remain with his mother in the United States, the court logically concluded that it was in the child's interest for his mother to obtain the immigration authorization that she desired.¹⁰¹ In attempting to facilitate this result, however, the court impinged greatly on the father's right to divorce.¹⁰² In such a case, manipulation is done "with sympathetic intent, but it can make outcomes inconsistent, unpredictable and, at least from the perspective of some parties, unfair."¹⁰³

In the case described at the outset of this Article, a family court judge expressed concern that two undocumented children faced "too many dangers . . . specifically a threat of deportation or whatnot to have the children continue to reside with [their undocumented mother]."¹⁰⁴ The court was convinced by the father's attorney that naming the father as primary custodian of the children would shorten the time for the children to obtain legal immigration status "by as much as five years."¹⁰⁵

99. See 8 U.S.C. § 1101(b)(1)(E) (2000); see also *infra* note 161 and accompanying text.

100. See *Velez v. Velez*, No. 10-41-81, 1994 Conn. Super. LEXIS 3139, at *10 (Conn. Super. Ct. Dec. 7, 1994).

101. *Id.* at 6-7, 9 n.1.

102. See *id.* at 10.

103. David B. Thronson & Veronica Tobar Thronson, *Immigrants and the Family Courts*, *NEV. LAWYER*, Jan. 2006, at 30.

104. See Transcript of Record, *supra* note 6, at 3.

105. *Id.* at 4.

In fact, the legal authority relied upon for this proposition was a citizenship statute that had been repealed three years earlier and which, even when in effect, had no applicability to undocumented children who were not yet permanent residents.¹⁰⁶ In other words, the legal analysis that “was tantamount in the Court’s decision”¹⁰⁷ was fatally flawed. In fact, the assignment of custody to the father made no difference in the timing or range of options for the children to obtain immigration status.

These cases highlight several concerns that appear when courts attempt to manipulate immigration results in the child custody context. First, manipulation may fail to account for the rights of all parties. Manipulation in favor of one may be benign or may discriminate against another party. Second, judges may put unwarranted emphasis on the importance of children obtaining legal immigration status or citizenship. Actions that promote the acquisition of legal immigration status and citizenship may be positive, but this is not universally true. Moreover, achieving a different immigration or citizenship status is but one piece of a larger puzzle. Trading daily contact with a mother for the sake of a green card is a questionable proposition for most children. Third, it is vital that family courts that attempt to engage in tailoring family court rulings to facilitate immigration outcomes understand the relevant immigration law. In the unforgiving world of immigration law, manipulation gone wrong can be disastrous. Moreover, even if no harm is caused on the immigration front, there is harm if a child custody determination is warped by an inaccurate reading of immigration law. Most family court judges and attorneys are not especially familiar with immigration law, and it is easy for misunderstandings to arise. More is needed than mere mechanical knowledge of how child custody might influence immigration outcomes. If immigration law considerations are to have any place in child custody proceedings, an exploration of the nature and values expressed in immigration law’s treatment of children and child custody is in order. With these caveats in mind, the next section of this Article provides an analysis of the role of child custody in immigration and nationality law.

106. See Plaintiff’s Memorandum of Law Regarding Derivative of Citizenship of the Minor Children at 2, *Rodriguez v. Rico*, No. 303041 (Nev. Jud. Dist. Ct. Fam. Div. July 17, 2003) (on file with author); see Plaintiff’s Pre-Trial Memorandum at 7–8, *Rodriguez v. Rico*, No. 303041 (Nev. Jud. Dist. Ct. Fam. Div. Oct. 3, 2003) (citing 8 U.S.C. § 1432 which was repealed by section 103(a) of the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 163) (on file with author).

107. See Transcript of Record, *supra* note 6, at 4.

II. THE ERRATIC ROLE OF CHILD CUSTODY IN IMMIGRATION AND NATIONALITY LAW

One of the more seemingly straightforward pitches for considering immigration and citizenship status that parties in child custody disputes advance is that the assignment of custody to one parent will influence or determine the children's immigration or citizenship status. This section sets out a thorough analysis of the erratic role of child custody in immigration and nationality law. Only when a court understands the impact of a child custody determination in immigration law can it evaluate how immigration law might impact the best interests of the child determination in a child custody dispute. Moreover, determining the significance of child custody in immigration and nationality law requires contextualization in the treatment of children more generally in these frameworks. This examination of the role of child custody in immigration and nationality law therefore also can serve to acquaint judges with the nature and values of the immigration system that they often are asked to take into account.

A. IMMIGRATION AND CITIZENSHIP DISTINGUISHED

Understanding the role of child custody in immigration law requires a basic conception of the structure of U.S. immigration and nationality laws, especially as the laws apply to children. First, it is important to distinguish between immigration law and citizenship or nationality law. While closely related, the distinction is important because the two areas treat children distinctly. Indeed, the term "child" is even defined differently for purposes of immigration law and citizenship law, and child custody plays a distinct role in each context.¹⁰⁸

Immigration and nationality laws are set out in separate statutory chapters of the Immigration and Nationality Act. Traditionally, immigration law concerns which noncitizens¹⁰⁹ may be admitted to the United States, how long they may remain, and the process by which persons unable to remain are removed.¹¹⁰ These provisions are set out in

¹⁰⁸. See 8 U.S.C. § 1101(b)(1) (2000) (defining child for immigration purposes); see also 8 U.S.C. § 1101(c)(1) (2000) (defining child for nationality purposes).

¹⁰⁹. Immigration statutes refer to all noncitizens by the term "alien," defined as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (2000). The persistent use of "alien" as a pejorative for the smaller population of persons lacking authorization to remain in the United States blurs its more precise technical meaning as anyone not a U.S. citizen. See generally 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). In this Article I use the term "noncitizen" except in direct quotation.

¹¹⁰. Immigration law defines "immigrant" in the negative as "every alien except an alien who is within one of the following classes of nonimmigrant aliens." 8 U.S.C. § 1101(a)(15) (2000) (setting

Title II of the Immigration and Nationality Act.¹¹¹

Immigration laws set forth a multitude of temporary visa statuses as well as the status of lawful permanent resident.¹¹² Immigrants granted permanent resident status presumptively are permitted to remain indefinitely in the United States.¹¹³ Additionally, permanent residents may work in the United States,¹¹⁴ travel outside the country and return,¹¹⁵ sponsor specified relatives for immigration status¹¹⁶ and, in some instances after statutory waiting periods that can last many years, receive many forms of public benefits.¹¹⁷ Still, permanent residents are subject to removal from the United States based upon commission of certain acts designated by statutes. These statutes have been subject to frequent modifications that, in some instances, are applied retroactively.¹¹⁸ Permanent residents also may abandon their status by leaving the United States for too long a period.¹¹⁹ In addition to the uncertainties that can accompany legal permanent resident status, noncitizens receive much less favorable treatment under immigration laws in petitioning for their relatives to receive immigration benefits. Permanent residents, moreover, are not permitted the full voting and participation rights in the political process that are available to U.S. citizens.

Title III of the Immigration and Nationality Act sets out the statutory framework for becoming a U.S. citizen.¹²⁰ Becoming a U.S. citizen is most commonly achieved through birth within the United

forth categories of nonimmigrant visas). Moreover, the law mandates that "[e]very alien . . . shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, . . . that he is entitled to a nonimmigrant status under [8 U.S.C. § 1101(a)(15)]." 8 U.S.C. § 1184(b) (2000). It is thus entirely accurate to use the term "immigrant" for many noncitizens who lack legal authorization to remain in the United States.

111. See 8 U.S.C. §§ 1151-1363a (2000).

112. This status is variously referred to as lawful permanent resident, legal permanent resident, having a green card, LPR, and permanent resident. These variations in name and usage reflect no difference in legal status and this article will adopt the term permanent resident.

113. See 8 U.S.C. § 1181 (2000). Some other forms of immigration relief are potentially of indefinite duration, subject to other considerations such as shifting country conditions. See, e.g., 8 U.S.C. § 1158 (2000) (asylum); *id.* § 1231 (2000) (withholding of removal); 8 C.F.R. § 208.16 (2007) (relief from removal pursuant to the Convention Against Torture).

114. See 8 U.S.C. § 1324a(b)(1)(B)(ii) (2000).

115. See *id.* § 1101(a)(13)(C).

116. See *id.* § 1154(a).

117. See, e.g., Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (introducing distinctions in the availability of public benefits between citizens and legal permanent residents).

118. See 8 U.S.C. § 1227(a) (2000) (setting out general "classifications of deportable aliens").

119. *Id.* § 1101(a)(13)(C)(ii).

120. See *id.* §§ 1401-1504.

States, or *jus soli* citizenship.¹²¹ Citizenship also is extended by statute to persons not covered by the geographic reach of the Fourteenth Amendment, such as children born abroad to a U.S. citizen parent who meets certain other requirements.¹²² Persons not born with U.S. citizenship may qualify to naturalize as citizens after obtaining and holding permanent resident status for a requisite number of years and meeting a host of other requirements.¹²³ Finally, and importantly, under certain circumstances children may “derive” U.S. citizenship from their parent’s naturalization or citizenship.¹²⁴

Generally, when a person is not a permanent resident, immigration law is much more present than nationality law. For those who were not born as U.S. citizens, the intermediate step of permanent residency, however briefly held in the case of some children who derive citizenship, is a necessary step on the path to becoming a citizen.¹²⁵ For those granted permanent residency, nationality law takes on new relevance in regulating naturalization.¹²⁶

With this framework of immigration and nationality laws in mind, the role of child custody in each setting can be explored. As will be seen, the related and sometimes interwoven laws of immigration and nationality exhibit a striking lack of consistency in the treatment of children and the importance of child custody. What emerges is not a thoughtful and reasoned pattern but rather a haphazard scheme, occasionally to the random benefit of children yet often capriciously harmful.

B. CHILD CUSTODY IN PARENT-CENTERED IMMIGRATION LAW

In reviewing immigration law’s treatment of children, child custody is revealed as a bit player in support of the star: immigration law’s peculiar notion of the parent-child relationship. Even in its relatively minor role, however, child custody is ever-present and takes on

121. 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.”); see also *infra* note 235 and accompanying text.

122. See 8 U.S.C. §§ 1401, 1409 (2000); see also *infra* notes 242–43, 246–47, 250 and accompanying text.

123. See 8 U.S.C. § 1421 (2000); see also *infra* note 255 and accompanying text.

124. See 8 U.S.C. §§ 1431, 1433 (2000); see also *infra* notes 256, 258–59, 262, 284, 285 and accompanying text.

125. See, e.g., 7 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 98.03[3][f] (2000) (“A basic requirement for the transmission of derivative citizenship is that the child must become a lawful permanent resident of the United States before attaining the prescribed age of maturity.”)

126. One error in the legal analysis of the *Rico v. Rodriguez* case discussed above was putting the cart ahead of the horse in turning to nationality law for children who were not yet permanent residents. See discussion *supra* at note 67 and accompanying text.

undeniable and, in some instances, indefensible importance. The discussion below explains how the parent-child role mediates children's access to immigration benefits and then describes the curious role of child custody in processes by which immigration law recognizes a parent-child relationship.

I. *The Right Parent—The Central Role of the Parent-Child Relationship in Immigration Law*

The parent-child relationship is central to children's access to the three primary avenues for permanent immigration to the United States: family-sponsored immigration, employment-based immigration, and diversity immigration.¹²⁷ Though other provisions make immigration relief available to smaller numbers in response to particular situations, such as provisions that prohibit the return of persons to countries where they would face torture¹²⁸ or where they have a well-founded fear of persecution on account of specified grounds,¹²⁹ the above three primary avenues encompass the vast bulk of legal immigration.

Of the three primary avenues, family-sponsored immigration is directly responsible for the largest portion of legal immigration, accounting for 63% of legal immigration in fiscal year 2006.¹³⁰ Under the family-sponsored immigration scheme, adult U.S. citizens and permanent residents (petitioners) are permitted to file papers requesting that family members who have designated relationships (beneficiaries) be allowed to immigrate to the United States.¹³¹ Applications are categorized based on both the immigration and citizenship status of petitioners and their relationship to beneficiaries. Citizen petitioners are granted priority over

127. See 8 U.S.C. § 1151(a) (2000); STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 241 (4th ed. 2005). The diversity program awards a fixed number of visas via a lottery to applicants from "low admission states" and "low admission regions." Ostensibly, the visa lottery is intended to diversify the flow of immigrants, which in practice has meant that "the so-called diversity visa system favors white immigrants by preferring noncitizens from 'low-immigrant countries' in the allocation of visas." Kevin R. Johnson, *Open Borders?*, 51 *UCLA L. REV.* 193, 220 (2003); see also Bill Ong Hing, *No Place for Angels: In Reaction to Kevin Johnson*, 2000 *U. ILL. L. REV.* 559, 587-89 (describing effective exclusion of Asians and Latinos from diversity lottery scheme); Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 *COLUM. J. TRANSNAT'L L.* 319, 321, 329-30 (1993); Victor C. Romero, *Critical Race Theory in Three Acts: Racial Profiling, Affirmative Action, and the Diversity Visa Lottery*, 66 *ALB. L. REV.* 375, 382-83 (2002).

128. See 8 C.F.R. § 208.16 (2000) (relief pursuant to the Convention Against Torture).

129. See 8 U.S.C. § 1158 (2000) (asylum); *id.* § 1231 (2000) (withholding of removal).

130. KELLY JEFFERYS, U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, *ANNUAL FLOW REPORT: U.S. LEGAL PERMANENT RESIDENTS: 2006 1* (2007), http://www.dhs.gov/xlibrary/assets/statistics/publications/IS-4496_LPRFlowReport_04vaccessible.pdf. Of the 1,266,264 total admissions as permanent residents, 803,335 were through the family-sponsored program. *Id.*

131. See 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a) (2000). *But cf.* BILL ONG HING, *DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY* 119 (2006) ("Once Asian and Latin immigrants began to dominate the family categories, the kinship system was attacked.").

legal permanent resident petitioners, and traditional nuclear family relationships are granted priority over family relationships that immigration law deems less important.¹³² The parent-child relationship is prominent in this hierarchy, and even the sibling relationship requires evidence of shared parentage. This framework is rigidly followed and family relationships not specified by statute do not qualify.¹³³

The family-sponsored immigration system permits U.S. citizen or permanent resident parents to petition for the permanent residency of their children under age twenty-one.¹³⁴ Further, children of parents who are direct beneficiaries of spousal, adult son or daughter, or sibling petitions sometimes may benefit derivatively from the primary petition.¹³⁵ The most preferred category, which includes U.S. citizens petitioning for children, has no numerical limits and thus no backlog except that arising from bureaucratic delay.¹³⁶ Other categories are numerically limited and backlogs of many years have developed, such as a delay of more than five years for a permanent resident petitioning for a child or spouse.¹³⁷ In total, children comprised 29% of new permanent residents via family-sponsored immigration provisions in fiscal year 2005.¹³⁸

Additionally, family relationships are responsible for significant portions of the other two primary immigration avenues as children and

132. See HING, *supra* note 131, at 1. Immigration law continues its reliance on the model of traditional nuclear families despite their diminished dominance and the increasing prevalence of alternative families. See Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage? Immigration Law's Conflicted Answers*, 32 HOFSTRA L. REV. 273, 276 (2003).

133. See *Suriel de Batista v. Gonzalez*, 494 F.3d 67, 70 (2d Cir. 2007) (rejecting argument that nephew raised as a son qualified as child); *Moreno-Morante v. Gonzalez*, 490 F.3d 1172, 1176-78 (9th Cir. 2007) (holding that grandparent with legal guardianship of grandchildren was not parent of "de facto" children).

134. See 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a) (2000).

135. See *id.* § 1153(d).

136. See *id.* § 1151(b). The absence of a backlog related to numerical limitation does not mean that bureaucratic delays in processing are insignificant. They generally last many months and sometimes years.

137. According to the July 2007 Visa Bulletin issued by the Department of State, the government then was processing visas for the spouses and minor children of legal permanent residents who applied in June 2002, a wait of slightly more than five years. U.S. Dep't of State, *Visa Bulletin for July 2007*, http://travel.state.gov/visa/frvi/bulletin/bulletin_3258.html (last visited Jan. 1, 2008). Due to per country limits, the wait is longer for countries of high immigration—in this same month the government began processing applications filed nearly six years earlier in August 2001 for the spouses and minor children of legal permanent residents coming from Mexico. *Id.* The longest backlog was for the lowest priority category, siblings of U.S. citizens, from the Philippines—in July 2007 the government began processing applications filed twenty-two years earlier in April 1985.

138. U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 2005 YEARBOOK OF IMMIGRATION STATISTICS 20-23 tbl.7 (2006), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005_Yearbook.pdf (showing 187,949 of 649,201 family-sponsored immigrants in derivative child classifications).

spouses often may be included as “derivatives” of principal immigrants granted employment-based visas and diversity visas.¹³⁹ As derivatives, in fiscal year 2005 children comprised 24% of new permanent residents via the employment-based avenue¹⁴⁰ and 24% of new permanent residents via the diversity route.¹⁴¹ Overall, 26% of new permanent residents were under age twenty-one in fiscal year 2006.¹⁴²

Given the numbers of children who benefit from this scheme, it is easy to perceive the immigration system as one designed with children’s interests in mind. However, immigration law devalues children’s interests and their roles in families. The primary mechanism to accomplish this is by subordinating children’s interests to those of their parents. Children only benefit from major immigration programs if their parents benefit and then only if their parents choose to share this benefit with them.

When parents have or achieve legal immigration status or citizenship, they may be able to include children or extend this benefit to them.¹⁴³ Even if legally entitled, parents may choose not to do so and an “unfortunately common problem with the family-based immigration regime . . . [is that] [d]erivative beneficiaries are just that—derivative—meaning that they have few rights of their own and instead depend on the competence and cooperation of the principal immigrant.”¹⁴⁴ Even if parents are cooperative, not all are competent. Children are held back in this system by parents who do not qualify, are disqualified by some aspect of their background such as a criminal record or immigration violation, or are simply unsuccessful in steering a course through the minefield of immigration by, for example, not using an attorney but rather trusting a “notario” who files botched papers.¹⁴⁵

139. See 8 U.S.C. § 1153(d) (2000). For example, the spouse and minor children of the recipient of a diversity immigrant visa may qualify to accompany the principal immigrant.

140. Of 246,877 employment-based admissions to legal permanent residents, 60,181 or 24% were issued to children of the principal immigrant worker. See U.S. DEP’T OF HOMELAND SEC., *supra* note 138, at 21–22 at tbl.7 (2006).

141. *Id.* (showing 10,987 of 46,234 diversity visas issued to children).

142. U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 2006 YEARBOOK OF IMMIGRATION STATISTICS 25 tbl.8 (2007), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/OIS_2006_Yearbook.pdf (showing 329,599 of the total 1,266,264 legal permanent residents under age twenty-one).

143. See 8 U.S.C. § 1151(b)(2)(A)(i) (2000) (relating to petitions for children by U.S. citizen parents); *id.* § 1153(a)(2) (relating to petitions for children by permanent resident parents).

144. *Fornalik v. Perryman*, 223 F.3d 523, 527–28 (7th Cir. 2000) (describing abusive father’s failure to include his seventeen-year-old son in an immigration petition for other family members which led to determination to deport him alone back to Poland while leaving his mother and siblings in the United States).

145. See Thronson, *supra* note 28, at 1182 (“To the extent that the framework for family-sponsored and derivative immigration tends to achieve family integrity, it does so by ceding control over a child’s status to parents and by denying opportunities for children to achieve legal status as children without

In contrast, when children rather than parents have legal immigration status or citizenship, they are not able to petition for parents or siblings.¹⁴⁶ The result is an asymmetric system, “geared to assimilate children’s status to that of their parents, not the other way around.”¹⁴⁷ Immigration law’s view of family is entirely parent-centered, as “the family immigration provisions of immigration law turn a blind eye to families in which only children hold legal immigration status. Children’s interests in family integrity do not serve as a basis for possible extension of immigration status.”¹⁴⁸

Immigration law, therefore, does not provide any benefit on the basis of being a child generally, but rather only on the basis of being someone’s child.¹⁴⁹ More specifically, the key to accessing immigration benefits as a child lies in having the right parent, i.e. a successful immigrant or U.S. citizen. Moreover, children must have a parent-child relationship that immigration law will recognize.

2. “Some but Not All”—Child Custody and the Definition of a “Child”

Immigration law provides benefits as “children” only to those who happen to be the children of parents who competently navigate the immigration and nationality system. Children who lack such a parent are

their parents.”).

146. U.S. citizens may petition for their parents, but not until they reach age twenty-one. 8 U.S.C. § 1151(b)(2)(A)(i) (2000).

147. Thronson, *supra* note 50, at 71; see Thronson, *supra* note 28, at 1182 (“If the parents’ attempts to immigrate fail, the attempts of their derivative children will fail as well. In other words, this framework is set up in a manner that seeks to ensure that children will not acquire any immigration rights denied to parents through family related immigration.”); see also Jacqueline Bhabha, *The “Mere Fortuity” of Birth? Are Children Citizens?*, 15 DIFFERENCES: J. FEMINIST CULTURAL STUD., Summer 2004, at 91, 95 (discussing the “striking asymmetry in the family reunification rights of similarly placed adults and minor children”).

148. Thronson, *supra* note 50, at 72.

149. Though not able to claim an immigration benefit based on being a child and not accorded procedural or substantive accommodation as a child, unaccompanied children may apply in the same manner as adults for other forms of immigration relief for which they might qualify, including as asylum or protection from removal pursuant to the Convention Against Torture. See, e.g., *Gonzalez v. Reno*, 212 F.3d 1338, 1347 n.8 (11th Cir. 2000) (affirming that any person, regardless of age, may apply for asylum); Christopher Nugent, *Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT. L.J. 219, 219 (2006). In immigration law the dominant view of children as objects often improperly inhibits children from advancing their individual rights and perspectives, especially when they are not alone. Cf. *Don v. Gonzalez*, 476 F.3d 738, 739 n.1 (9th Cir. 2007) (“Don is the principal or lead petitioner; his wife’s and child’s petitions are derivative of his petition. Therefore, their asylum claims succeed or fail with Don’s claims.”). Finally, a form of immigration relief known as special immigrant juvenile status is available to some undocumented children who are dependent upon a juvenile court. See 8 U.S.C. § 1101(a)(27)(J) (2000); David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 998 n.116 (2002).

excluded from any benefit under dominant avenues of legal immigration. Even children with the "right" parent face another barrier: for purposes of immigration law, a child is recognized as a "child" only by conforming to a statutory definition the Supreme Court has described as "particularly exhaustive."¹⁵⁰

Whether a child fits the legal definition of a "child" under immigration law determines whether even a willing parent with qualifying immigration or citizenship status can petition for the child to receive an immigration benefit on the basis of being a child. Child custody plays a fickle role in this definition, always present and sporadically prominent. As perhaps should be expected given the parent-centered nature of the family-sponsored immigration system, notions of dependency are pervasive in immigration law's definition of a "child," with roots that run deep.

In 1882 the first general immigration law enshrined the nation's disfavor of poor immigrants by specifically excluding from admission to the country any person likely to become a public charge.¹⁵¹ This restriction on admission to the United States has survived every revision of immigration law and remains in place today.¹⁵² One way persons may demonstrate that they will not become a public charge is by establishing their dependency upon someone else: when Congress reaffirmed the exclusion of the poor in an 1891 statute it added the proviso that "this section shall not be held to exclude persons living in the United States from sending for a relative."¹⁵³ This early pattern of allowing a relative established in the United States to extend an immigration benefit persists in modern immigration law in the United States.

Though not at first explicit, the law and attitudes of the late nineteenth century certainly contemplated that those able to extend an immigration benefit to their relatives would be husbands and fathers, not wives, mothers and children. In 1903, immigration law was amended to provide that when a noncitizen

send[s] for his wife or minor children to join him, if said wife, or either of said children, shall be found to be affected with any contagious

150. *INS v. Hector*, 479 U.S. 85, 88 (1986) (per curiam).

151. See Act of Aug. 3, 1882, ch. 376, § 3 ("[I]f on . . . examination there shall be found among such passengers . . . any person unable to take care of himself or herself without becoming a public charge . . . such persons shall not be permitted to land."). Those likely to become a public charge were joined in the excluded category by "idiots," "lunatics," and "convicts." *Id.*

152. See 8 U.S.C. § 1182(a)(4) (2000) ("Any alien who, in the opinion of the consular officer at the time of the application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.").

153. Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1084, 1084.

disorder, and if it is proved that said disorder was contracted on board the ship in which they came . . . such wife or children shall be held . . . until it shall be determined whether the disorder will be easily curable, or whether they can be permitted to land without danger to other persons; and they shall not be deported until such facts have been ascertained.¹⁵⁴

This small protection from deportation is an example of another lasting pattern in immigration law in which family relationships may be the basis for relief from deportation that the law otherwise would require. As is still the case, the benefit flows from parent to child and not in the other direction.

Lest there was any doubt that children were viewed as those to be sent for and not those doing the sending, immigration law soon specifically excluded “all children under sixteen years of age, unaccompanied by one or both of their parents.”¹⁵⁵ Children, therefore, were admissible only as dependents and not as individuals; as objects not agents. In this respect, before any numerical restrictions on immigration were put in place and long before family relationships formally were enconced as the dominant means to immigrate to the United States, immigration law embraced a limited view of children as dependents. This devaluation of children persists today in immigration law.

For the purposes of immigration law as set out in Title II of the Immigration and Nationality Act, “child” is an evolving term of art limited to “an unmarried person under twenty-one years of age” who falls into one of six¹⁵⁶ precisely delimited categories, the relevant portions of which are set out below:

1. A “child born in wedlock”;¹⁵⁷
2. A “stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred”;¹⁵⁸
3. A “child legitimated under the law of the child’s residence or

154. Act of Mar. 3, 1903, ch. 1012, § 37, Pub. L. No. 59-96, 34 Stat. 898, 899.

155. Act of Feb. 20, 1907, ch. 1134, § 2, Pub. L. No. 57-162, 32 Stat. 1213, 1221.

156. See Intercountry Adoption Act of 2000, Pub. L. No. 106-279, Title III, § 302(a), Title V, § 505(a)(2), (b), 114 Stat. 838, 844 (2000) (noting that a seventh category related to adopted children “shall take effect upon the entry into force of the Convention [on Protection of Children and Cooperation in Respect of Intercountry Adoption done at The Hague on May 29, 1993] for the United States pursuant to Article 46(2)(a) of the Convention”). For the U.S. Department of State’s description of the convoluted ratification saga of this convention, see http://travel.state.gov/family/adoption/convention/convention_2290.html. The future language that potentially will be incorporated by this pending amendment to the definition of child does not alter the analysis in this article.

157. 8 U.S.C. § 1101(b)(1)(A) (2000).

158. *Id.* § 1101(b)(1)(B).

domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation";¹⁵⁹

4. A "child born out of wedlock, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother or to its natural father if the father has or had a bona fide parent-child relationship with the person";¹⁶⁰

5. A "child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years";¹⁶¹

6. A "child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 1151(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence."¹⁶²

The circularity inherent in defining a "child" for immigration purposes by using the term "child" in each subpart is the first indication that this definition is designed to exclude many children. Not every child will be a "child" for immigration purposes.

The parameters of these categories are construed quite literally and functional equivalents are rejected. Relationships falling outside the precise language of the statute that mimic, approximate or functionally match these categories are not sufficient to establish a parent-child

159. *Id.* § 1101(b)(1)(C).

160. *Id.* § 1101(b)(1)(D).

161. *Id.* § 1101(b)(1)(E)(i). Additionally, a natural sibling of a child adopted while under age sixteen may qualify as a child for immigration purposes on the basis of an adoption finalized while under age eighteen. *See id.* § 1101(B)(1)(E)(ii).

162. *Id.* § 1101(b)(1)(F)(i).

relationship for immigration purposes.¹⁶³ For example, “even if [an aunt’s] relationship with her nieces closely resembles a parent-child relationship, we are constrained to hold that Congress, through the plain language of the statute, precluded this functional approach to defining the term ‘child.’”¹⁶⁴ Similarly, without regard to the actual assumption of parenting responsibilities, a parent-child relationship for immigration purposes is not formed between a man and the young son of the woman with whom he lives for many years,¹⁶⁵ between a grandfather and his grandchildren—although he is their legal guardian,¹⁶⁶ or between a woman and a nephew raised as a son.¹⁶⁷

In tightly construing this statutory language, courts are not unaware of the resulting harsh results. “To be sure, the [Immigration and Nationality Act’s] definition of ‘child’ may be far out of step with the times, and may have particularly deleterious effects on aliens whose culture’s definition of ‘family’ is legitimately broader than the traditional definition of those related by blood or adoption.”¹⁶⁸ Still, “[a]s we have explained with the technical definition of ‘child’ contained within this statute: . . . ‘it could be argued that the line should have been drawn at a different point . . . [but] these are policy questions entrusted exclusively to the political branches of our government.’”¹⁶⁹

In establishing a parent-child relationship for immigration purposes, therefore, the fine print is critical and implicates child custody in a variety of ways. The precise requirements of the statutory definition are sometimes in accord with baseline principles and broader trends in family law, but often they are out of step with family law precepts, thus warranting serious constitutional scrutiny if not arising in the immigration and nationality context. In carving out statutory subsets of the definition of “children,” child custody plays a quirky and inconsistent part.

163. Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 AM. J. COMP. L. 511, 529 (1995) (noting that the Immigration and Nationality Act “enumerates recognized family relationships, and the courts have consistently rejected attempts to use surrogate family relationships to meet statutory requirements”).

164. *INS v. Hector*, 479 U.S. 85, 90 (1986) (per curiam) (reversing decision that that nieces aged ten and eleven in the care of aunt for three years were the “functional equivalent” of children under the Immigration and Nationality Act).

165. See *Dorado v. Gonzalez*, 202 F. App’x 898, 899 (6th Cir. 2006).

166. See *Moreno-Morante v. Gonzalez*, 490 F.3d 1172, 1176–78 (9th Cir. 2007) (rejecting argument that grandchildren were “de facto” children).

167. See *Perez Suriel de Batista v. Gonzalez*, 494 F.3d 67, 70 (2d Cir. 2007).

168. *Dorado*, 202 F. App’x at 902.

169. *INS*, 479 U.S. at 89 (quoting *Fiallo v. Bell*, 430 U.S. 787, 798 (1977)).

a. Child Custody, Gender, and Legitimacy

When a child is born to unmarried parents, for immigration purposes the child is and remains a "child" of the "natural" mother without regard to the subsequent relationship between the mother and child.¹⁷⁰ The same is not true between children and fathers. With respect to fathers, immigration law is more concerned with legitimacy than with biology.¹⁷¹ Establishing paternity is just the starting point for children born out of wedlock: under immigration law, creation of a parent-child relationship with a father requires that the father either has formally "legitimated" the child or "has or had a bona fide parent-child relationship" with the child.¹⁷²

Legitimacy has played an important role in immigration law even without the gender distinction that triggers its relevance today. In 1952, the original statutory definition of "child" for immigration purposes included, along with stepchildren, only "legitimate" or "legitimated" children.¹⁷³ Applying this early statutory definition resulted in denial of an immigration petition from a U.S. citizen woman for her daughter "fathered by a man other than the man the petitioner subsequently married."¹⁷⁴ This harshness was ameliorated in 1957 by adding to the definition of "child" those "illegitimate child[ren], by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother."¹⁷⁵ Short of legitimation, however, a child still could not establish a parent-child relationship with a biological father.

In *Fiallo v. Bell*, the Supreme Court rejected a constitutional

170. See 8 U.S.C. § 1101(b)(1)(A) (2000) (if born in wedlock); see *id.* § 1101(b)(1)(D) (if born out of wedlock).

171. See THE EFFECTS OF GENDER IN THE FEDERAL COURTS: THE FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE 114 (1993) ("An overt gender distinction is made in the definition of the term 'illegitimate' child under the immigration and nationality laws."). In 1995, Congress shifted from use of the term "legitimate" to "born in wedlock" in parts of the statutory definition of child, but left the term in other parts. Compare 8 U.S.C. § 1101(b)(1)(A) (2000) (using the term "born in wedlock"), with 8 U.S.C. § 1101(b)(1)(C) (2000) (using the term "legitimate").

172. 8 U.S.C. § 1101(b)(1)(D) (2000).

173. The relevant version of the statute defined a child as unmarried and

(A) A legitimate child; or (B) A stepchild, provided the child had not reached the age of 18 years at the time the marriage creating the status of stepchild occurred; or (C) A child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of 18 years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation.

Act of June 27, 1952, ch. 477, Pub. L. No. 82-414, 66 Stat. 163, 171 (1952).

174. *Matter of A*, 5 I. & N. Dec. 272, 284 (B.I.A. 1953).

175. Act of Sept. 11, 1957, § 2, Pub. L. No. 85-316, 71 Stat. 639, 639.

challenge to this “double-barreled” discrimination “based on sex and illegitimacy” in the definition of “child.”¹⁷⁶ The Court found the statute’s distinctions between fathers and mothers and between children born in and out of marriage among “many drawn by Congress pursuant to its determination to provide some—but not all—families with relief from various immigration restrictions that would otherwise hinder reunification of the family in this country.”¹⁷⁷ There “is good reason to think that *Fiallo*, decided in 1977, would come out similarly today” given the Court’s more recent pronouncement in the citizenship context upholding the “constitutionality of requirements that discriminated against illegitimate children born abroad to U.S.-born fathers who sought *citizenship* rather than *immigration* status.”¹⁷⁸

In other contexts, the troubling notion of devaluing children as “illegitimate” based on their parents’ marital options and decisions is plainly in disfavor.¹⁷⁹ The Supreme Court has observed that

[t]he status of illegitimacy has expressed through the ages society’s condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.¹⁸⁰

176. 430 U.S. 787, 794 (1977). At the time, the statutory definition of “child” contained no provisions regarding fathers with bona fide relationships with their children. See 8 U.S.C. § 1101(b)(1)(D) (1977).

177. *Fiallo v. Bell*, 430 U.S. 787, 797 (1977); cf. Patricia A. Cain, *Dependency, Taxes, and Alternative Families*, 5 J. GENDER RACE & JUST. 267, 269 (2002) (observing that through federal tax law “the government only supports some children” and “[t]he children it supports most—either directly or indirectly—are children in family settings that include marriage”).

178. *Abrams, Immigration Law*, *supra* note 26, at 1643 (discussing *Nguyen v. INS*, 533 U.S. 53 (2001)). *Abrams* goes on to note that “[t]he government has a legitimate interest, the Court found, in giving citizenship status to children who have a genuine relationship with their citizen parent, and because women are ‘present’ at the birth of their children, they are more likely than men to develop such a relationship.” *Id.*

179. For example, the Supreme Court has “reiterated that a statute completely disinheriting a nonmarital child from its father’s estate unless the child is subsequently legitimated by the marriage of its parents is unconstitutional.” Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 112 n.64 (citing *Reed v. Campbell*, 476 U.S. 852, 854–55 (1986)). Brashier also comments that “[t]he decreasing stigma attached to a nonmarital child’s status is perhaps implicitly reflected in the *Reed* opinion in which the Court refers to the protection of *children born out of wedlock* rather than to *illegitimates*.” *Id.*; see also Richard L. Brown, *Disinheriting the “Legal Orphan”: Inheritance Rights of Children After Termination of Parental Rights*, 70 MO. L. REV. 125, 148–52 (2005).

180. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972); accord *N.J. Welfare Rights Org. v.*

Federal power regarding immigrants is not unlimited. At the least, outside "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."¹⁸¹ Still, distinctions in federal laws directly regulating immigration admissions and nationality have demonstrated a resistance to constitutional challenge surpassing that seen in any other context.¹⁸²

Under the current statute, therefore, children of unmarried parents are not necessarily the children of their fathers for immigration purposes. The statutory criteria to establish a parent-child relationship between fathers and children born out of wedlock presents challenges that implicate issues of child custody.

i. Child Custody and Legitimation

In evaluating if a child is a "child" for immigration purposes via the legitimation prong, child custody is always at issue but rarely in a way that would not be satisfied with a broad range of child custody arrangements. The definition reaches a

child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation.¹⁸³

The term "legitimated" includes "those children who were illegitimate at birth, but who thereafter through legally recognized means attained the full legal status of legitimate children."¹⁸⁴

First, child custody may accompany a variety of acts and relationships that help establish legitimation under the laws of some

Cahill, 411 U.S. 619, 620 (1973).

181. Bosniak, *supra* note 63, at 1097-98; accord *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); see also *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("[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."); *Wong Wing v. United States*, 163 U.S. 228, 239 (1896) (rejecting punishment of noncitizens without trial).

182. See *Fiallo*, 430 U.S. at 792 ("This Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of the Congress more complete than it is over' the admission of aliens.") (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)); *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."); see also *Fong Yue Ting v. United States*, 149 U.S. 698, 732 (1893) (upholding racially based deportation law directed at Chinese laborers).

183. 8 U.S.C. § 1101(b)(1)(C) (2000).

184. *Matter of Goorahoo*, 20 I. & N. Dec. 782, 784-85 (B.I.A. 1994).

jurisdictions. Unless the residence and domicile of both the child and father are the same, the legitimation laws of multiple jurisdictions will be relevant.¹⁸⁵ The statutory use of the disjunctive clarifies that legitimation under any one applicable law suffices for immigration purposes and legitimation need not be established under the laws of all relevant jurisdictions.¹⁸⁶ This means that if a child is legitimated for immigration purposes in one jurisdiction, any argument that a particular custody ruling in family court is needed to establish legitimacy in another is overreaching.

Requirements for legitimation vary greatly by jurisdiction and child custody is not relevant in many instances. At one end of the spectrum immigration law recognizes universal legitimation based on adoption of a law that sweepingly eliminates all legal distinctions between legitimate and illegitimate children.¹⁸⁷ At the other, "an illegitimate child cannot be made legitimate for general purposes" and thus under the laws of that jurisdiction cannot obtain the full legal status of legitimate children that immigration law requires.¹⁸⁸ In between are a bewildering variety of provisions¹⁸⁹ under which legitimation might be completed by simply acknowledging a child or establishing paternity¹⁹⁰ or by judicial proceedings resulting in formal declarations of legitimacy.¹⁹¹ The requirements for legitimation in many jurisdictions include intermarriage of the natural parents, sometimes as the only possible avenue to

185. *Id.*

186. See 8 U.S.C. § 1101(b)(1)(C) (2000); see also *Matter of Martinez*, 18 I. & N. Dec. 399 (B.I.A. 1983).

187. *Matter of Clahar*, 18 I. & N. Dec. 1 (B.I.A. 1981) (regarding Jamaican law eliminating all legal distinctions based on birth in or out of wedlock).

188. In Indiana, for example, "[u]nder the present law, an illegitimate child cannot be made legitimate for general purposes, but may, if the proper prerequisites are met, be treated as legitimate for purposes of inheritance." J. ERIC SMITHBURN, 14 IND. PRACTICE SERIES § 4.13 (2006).

189. In its Foreign Affairs Manual, the U.S. Department of State has created, yet rarely updates, a listing of some legitimation information by jurisdiction, foreign and domestic. See 7 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 1133.4-2a (2007) [hereinafter FOREIGN AFFAIRS MANUAL], available at <http://www.state.gov/documents/organization/86757.pdf>. Unofficial compilations also exist. See DANIEL LEVY, U.S. CITIZENSHIP AND NATURALIZATION HANDBOOK, app. 4-26 (2006).

190. See, e.g., *In re Moraga*, 23 I. & N. Dec. 195, 199 (B.I.A. 2001) (recognizing that in El Salvador a child is legitimated once paternity is established and overturning prior case law reaching opposite conclusion).

191. In North Carolina, for instance,

[t]he putative father of any child born out of wedlock, whether such father resides in North Carolina or not, may apply by a verified written petition, filed in a special proceeding in the superior court of the county in which the putative father resides or in the superior court of the county in which the child resides, praying that such child be declared legitimate.

N.C. Gen. Stat. § 49-10 (2005).

legitimation.¹⁹² Some jurisdictions provide legitimation via actions that children can initiate, but the majority empower the father to legitimate or not without regard for the child's interests.

Yet child custody remains a relevant consideration in every claim to establish a parent-child relationship for immigration purposes because the statute requires not only legitimation, but also that "the child is in the legal custody of the legitimating parent or parents at the time of such legitimation."¹⁹³ This requirement, however, is easily met.

According to the Board of Immigration Appeals, "where a child born out of wedlock has been properly legitimated, neither parent will be presumed to have a greater right than the other to the legal custody of that child."¹⁹⁴ Prior to this ruling, a father had to obtain a legal decree of custody prior to legitimation to establish that the child was in his custody at the moment of legitimation. Under the current understanding, "a father of an illegitimate child will no longer have to know in advance of [8 U.S.C. § 1101(b)(1)(C)'s] legal custody requirement in order to satisfy that requirement."¹⁹⁵ At the time of legitimation, therefore, "[u]nless there is evidence to show that the father of a legitimated child has been deprived of his natural right to custody, he will be presumed to share custody with the mother, and to satisfy the legal custody requirement of [8 U.S.C. § 1101(b)(1)(C)]."¹⁹⁶

Unless there is formal action depriving a father of custody, the role of child custody in meeting the requirements for recognition as a "child" via legitimation becomes largely pro forma. The specific mention of legal custody in the definition makes for a facially tempting argument that children might not qualify in the absence of an assignment of custody to their fathers, but this collapses on closer scrutiny.

More generally, legitimation litigation is most common after the fact, in trying to prove that legitimation took place at some time in the past. The U.S. Department of State advises its consular officers that

192. Nebraska is one such jurisdiction. See Neb. Rev. Stat. § 43-1406 (2004). Interestingly, immigration regulations indicate that marriage of natural parents is sufficient, without regard to additional requirements for legitimation, such as acknowledgement, that many jurisdictions impose. 8 C.F.R. § 204.2(d)(2)(ii) (2007) ("A child can be legitimated through the marriage of his or her natural parents."). Of course, this avenue for legitimation excludes children of same sex partners.

193. 8 U.S.C. § 1101(b)(1)(C) (2000).

194. *Matter of Rivers*, 17 I. & N. Dec. 419, 421 (B.I.A. 1980) (rejecting holding that legal custody would vest only by virtue of either a natural right or a court decree); see also 7 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 98.03[3][f] (1997) (noting that "while the mother of a child born out of wedlock ordinarily is regarded as having legal custody, the father will be regarded as having equal right to legal custody at the time of legitimation").

195. *Matter of Rivers*, 17 I. & N. Dec. at 423.

196. *Id.*

“[l]egitimation is best used to establish relationship only in cases where the legitimating act has already taken place and evidence is readily available.”¹⁹⁷ Further, it cautions not to “inconvenience applicants by requiring them to submit extensive evidence of legitimation or expend resources to research or interpret foreign legitimation laws.”¹⁹⁸ Moreover, in immigration law proving “a child legitimate or legitimated generally benefits the child for purposes of preference classification,”¹⁹⁹ so it is ironic that in the citizenship context this same “determination that accords a benefit in visa petition proceedings may become a detriment.”²⁰⁰ Given the complexity and potential harm, establishing compliance with the “child” definition via legitimacy generally is not the first, best option. Especially if a child is under age eighteen, the cutoff age for legitimation to count, there usually are easier ways to establish a parent-child relationship for purposes of immigration law.

ii. Child Custody and Bona Fide Parent-Child Relationships

Instead of establishing legitimation, a “purported father of a child or son or daughter born out of wedlock” who seeks to petition for his child, can “show that he is the natural father and that a bona fide parent-child relationship was established when the child or son or daughter was unmarried and under twenty-one years of age.”²⁰¹ Meeting this is not particularly onerous, though it does require “more than merely a biological relationship.”²⁰² By regulation, a bona fide parent-child relationship “will be deemed to exist or to have existed where the father demonstrates or has demonstrated an active concern for the child’s support, instruction, and general welfare.”²⁰³

Establishing a bona fide relationship thus does not require a formal finding of legal custody or any particular allocation of parenting responsibilities. The requirement can be met by evidence of “[e]motional and/or financial ties or a genuine concern and interest by the father.”²⁰⁴

197. FOREIGN AFFAIRS MANUAL, *supra* note 189, § 1133.4-2(4)(a)(v) (2007).

198. *Id.* The Adjudicator’s Field Manual for U.S. Citizenship and Immigration Services warns its officers, who generally are not attorneys, that “[y]ou may also consult the Foreign Affairs Manual or inquire with the Library of Congress if there are questions that still need to be resolved regarding the legitimation requirements of a particular country.” U.S. CITIZENSHIP & IMMIGRATION SERVICES, ADJUDICATOR’S FIELD MANUAL—REDACTED PUBLIC VERSION § 71.1(d)(2) (2007) [hereinafter FIELD MANUAL], <http://www.uscis.gov/propub/DocView/afmid/1#0-0-0-350> (follow “71.1” hyperlink).

199. *In re Rowe*, 23 I. & N. Dec. 962, 965 (B.I.A. 2006).

200. *Id.*

201. 8 C.F.R. § 204.2(d)(2)(iii) (2007).

202. *Id.*

203. *Id.*

204. *Id.*

Given the reality that many immigration petitions involve years of backlogs and family separation, immigration regulations specifically acknowledge the possibility that the children and the father might have never “actually lived together” and provide that where they did not live together there simply should be evidence that “the father held the child out as his own, that he provided for some or all of the child’s needs, or that in general the father’s behavior evidenced a genuine concern for the child.”²⁰⁵

Immigration law’s dominant view of children as dependents and potential public charges is evident in the details of possible ways to demonstrate genuine concern, including but not limited to “money order receipts or cancelled checks showing the father’s financial support of the beneficiary [child]; the father’s income tax returns; [and] the father’s medical or insurance records which include the beneficiary as a dependent.”²⁰⁶ Other evidence might include “school records for the beneficiary; correspondence between the parties; or notarized affidavits of friends, neighbors, school officials, or other associates knowledgeable about the relationship.”²⁰⁷

A family court order establishing the father’s custody would be relevant to establishing a parent-child relationship but it is not necessary. At the same time, if establishing a parent-child relationship benefits the child, without regard to child custody, a family court determining the custody of a child certainly could exercise its equitable powers to require financial support and other indicia of a bona fide parent-child relationship.

b. Child Custody and Stepparents

Surprisingly, given the complexity of establishing a parent-child relationship for fathers generally, immigration law recognizes a stepchild as a “child” for immigration purposes quite readily, as long as the child has “not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred.”²⁰⁸ Ironically, the bar is much lower to establish a stepparent-child relationship under immigration law than it is to establish a parent-child relationship.²⁰⁹ Evidentiary requirements to establish a stepchild relationship include only the birth certificate of the stepchild naming the biological parent, the marriage certificate of biological parent and stepparent, and evidence of

^{205.} *Id.*

^{206.} *Id.*

^{207.} *Id.*

^{208.} 8 U.S.C. § 1101(b)(1)(B) (2000).

^{209.} As will be discussed below, however, a stepparent relationship is not recognized for citizenship purposes. *See id.* § 1101(c)(1); *see also infra* note 212 and accompanying text.

termination of any previous marriages of the parents.²¹⁰

Relying on the simple language of the statute, the Ninth Circuit firmly rejected a government attempt to require that a stepparent have an "active parental interest" or show that that stepparent and stepchild be part of a "close family unit."²¹¹ Therefore, without regard to the nature of the relationship, "persons who become stepchildren through the marriage of a natural parent prior to their eighteenth birthday are entitled to visa preference as a class under section 101(b)(1)(B) without further qualification."²¹² Thus, a child's custody has no impact on qualifying as a "child" of the natural parent's spouse for immigration purposes as a stepchild. Any immigration petition that the natural parent could file on behalf of the child could then be filed by the stepparent without regard to the existence of any real relationship.²¹³

A stepparent relationship normally ceases upon divorce of the natural parent and stepparent.²¹⁴ However, "under certain circumstances a step relationship may continue after the death of the natural parent or even after the legal separation or divorce of the stepparent and natural parent if there is an ongoing relationship between the stepparent and stepchild."²¹⁵ In such instances, "the appropriate inquiry is whether a family relationship has continued to exist as a matter of fact between the stepparent and stepchild."²¹⁶ "If the marriage ends in annulment, however, the step relationship is deemed to have never existed because legally the marriage never existed."²¹⁷ If a child's immigration status is reliant on a stepparent, these considerations might have bearing on family court proceedings regarding the dissolution of the marriage even though no particular custody arrangement is required.

c. *Child Custody and Adopted Children*

Immigration law has always been skeptical of adoption. The first

210. See 8 C.F.R. § 204.2(d)(2)(iv) (2007). This is, of course, "assuming that the marriage is not a sham or does not violate the Defense of Marriage Act." FIELD MANUAL, *supra* note 198, § 21.4(d)(2)(A) (2007); see also *Matter of Awwal*, 19 I. & N. Dec. 617, 621-22 (B.I.A. 1988) (holding that even where there is an ongoing actual family relationship between stepparent and child, the relationship cannot be recognized where the marriage creating the step-relationship was a sham).

211. *Palmer v. Reddy*, 622 F.2d 463, 464 (9th Cir. 1980); accord *Matter of McMillan*, 17 I. & N. Dec. 605, 606 (B.I.A. 1981) (extending the Ninth Circuit rule nationwide).

212. *McMillan*, 17 I. & N. Dec. at 606.

213. FIELD MANUAL, *supra* note 198, § 21.4(d)(2)(B) (2007) ("The creation of a step relationship in no way terminates the relationship between the child and his or her other natural parent (i.e., the one who did not marry the stepparent).") The child may later in life petition for the natural parent, but the child cannot do so until reaching age twenty-one. See 8 U.S.C. § 1151(b)(2)(A)(i) (2000).

214. *Matter of Simicevic*, 10 I. & N. Dec. 363, 364-65 (B.I.A. 1963).

215. FIELD MANUAL, *supra* note 198, § 21.4(d)(2)(B) (2007).

216. *Matter of Mourillon*, 18 I. & N. Dec. 122, 125 (B.I.A. 1981).

217. FIELD MANUAL, *supra* note 198, § 21.4(d)(2)(B) (2007).

statutory definition of the term "child" in immigration law was in the negative, proclaiming only that "[t]he terms 'child,' 'father,' and 'mother,' do not include a child or parent by adoption."²¹⁸ Similarly, the first attempt at a positive statutory definition of child, the original version of today's definition, did not include adopted children.²¹⁹ Not until 1957 was the possibility of an adopted child becoming a "child" for immigration purposes incorporated into immigration law.²²⁰

Today's statute contains two separate provisions delineating when adopted children can be recognized as children for immigration purposes.²²¹ One of these is aimed at "orphans" who have "been adopted abroad" and is the provision that covers most overseas adoptions.²²² This provision only applies to U.S. citizen parents who are eligible to bring the adopted child to the United States without years of backlog in the immigration process.²²³ Immigration of the child to the United States through this provision follows an extensive pre-adoption qualification process and subsequent child custody determinations are not normally relevant for immigration law purposes because arranging a visa for the child is part of this process. Further, when children arrive as permanent residents under this provision they generally will become U.S. citizens upon arrival, as discussed below.

In contrast, child custody plays an express and central role in establishing a parent-child relationship under other adoption provisions. This portion of the statutory definition of child reaches a "child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years."²²⁴ This provision applies without regard to place. It provides an avenue to establish a parent-child relationship for

218. Immigration Act of 1924, ch. 190, § 28, Pub. L. No. 68-139, 43 Stat. 153, 169 (1924); see *Matter of A*, 5 I. & N. Dec. 272, 273 (B.I.A. 1953).

219. Act of June 27, 1952, ch. 477, Pub. L. No. 82-414, 66 Stat. 163, 171 (1952); see *Matter of Repuyan*, 19 I. & N. Dec. 119, 121-22 (B.I.A. 1984) ("Adoptees were not included as children in the 1952 revision of the immigration laws, despite a recommendation to do so by the Senate Judiciary Committee.").

220. Act of Sept. 11, 1957, § 2, Pub. L. No. 85-316, 71 STAT. 639, 639 (1957).

221. As noted above, a third is pending entry into force of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. See *supra* note 156.

222. 8 U.S.C. § 1101(b)(1)(F) (2000).

223. The definition reaches a "child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 1151(b) of this title." *Id.* The referenced petition is an immediate relative petition that only a U.S. citizen can make. See *Moreno-Morante v. Gonzalez*, 490 F.3d 1172 (9th Cir. 2007) (noting the impossibility of establishing a parent-child relationship between an unauthorized-immigrant adopting parent and adopted U.S.-citizen children who cannot file such a petition).

224. 8 U.S.C. § 1101(b)(1)(E) (2000).

immigration purposes for children already here in the United States who cannot meet the “adopted abroad” criteria of the other adoption provision. It also applies to children adopted abroad. As such, both the legal custody and residence requirements may be implicated in child custody determinations.

For purposes of this provision, “legal custody” is defined to mean “the assumption of responsibility for a minor by an adult under the laws of the state and under the order or approval of a court of law or other appropriate government entity.”²²⁵ In contrast to the easy assumption of custody discussed in the legitimation context, informal care arrangements are insufficient here, and “[t]his provision requires that a legal process involving the courts or other recognized government entity take place.”²²⁶ The adoption decree may be satisfactory to establish custody, though other determinations of custody may have relevance given that “[l]egal custody and residence occurring prior to or after the adoption will satisfy both requirements.”²²⁷ The duration of both legal custody and residence is “accounted for in the aggregate. Therefore, a break in legal custody or residence will not affect the time already fulfilled.”²²⁸ The child must be under age sixteen at the time the adoption is finalized, but the duration of legal custody and residence requirements can be met later.

The residence requirement “implies that the child resides in a home established by the adopting parent.”²²⁹ This means that “mere periodic visits by an adopting parent in the home of the child do not satisfy the residence requirement.”²³⁰ Although residence is accumulated in the aggregate, the time that counts is the child’s time in the parent’s home, not the parent’s time in the child’s home elsewhere.

Moreover, the residence requirement can require “more than simply that the adopted child and adoptive parent live together in the same residence for 2 years.”²³¹ To avoid the conclusion that an adoption is a sham, when an “adopted child continues to reside in the same household with the natural parent or parents . . . the petitioner has the burden of establishing that the adoptive parent exercised primary parental control

225. 8 C.F.R. § 204.2(d)(2)(vii)(A) (2007).

226. *Id.*

227. *Id.* § 204.2(d)(2)(vii)(C).

228. *Id.*; see also *Matter of M*, 8 I. & N. Dec. 118 (B.I.A. 1958).

229. *Matter of Repuyan*, 19 I. & N. Dec. 119, 120–21 (B.I.A. 1984); accord *Moge v. Morris*, 470 F. Supp. 556, 559 (D.C. Pa. 1979) (noting that an “adoption is not recognized as valid for the purposes of the immigration laws [where] the children are not residing with the adoptive parents”).

230. *Repuyan*, 19 I. & N. Dec. at 121.

231. *Matter of Marquez*, 20 I. & N. Dec. 160, 164 (B.I.A. 1990).

during the period of residence."²³²

Until this point, child custody's role in establishing a parent-child relationship has been relevant, but hardly of great significance. In the context of adopted children, however, it takes on real importance. The legal formalities of establishing custody matter, as do living arrangements. More analysis of this distinction will follow, but first it is important to discuss the treatment of children and child custody in citizenship law.

C. CHILD CUSTODY IN CITIZENSHIP

As noted at the outset of this exploration of immigration and nationality law, the statutory framework for determining who is or may become a U.S. citizen is distinct from, though interrelated with, immigration laws governing the admission and removal of immigrants.²³³ Eschewing consistency, the Immigration and Nationality Act introduces a new definition of "child" for its citizenship laws:

The term "child" means an unmarried person under twenty-one years of age and includes a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere, and, except as otherwise provided in sections 1431 and 1432 of this title, a child adopted in the United States, if such legitimation or adoption takes place before the child reaches the age of 16 years (except to the extent that the child is described in subparagraph (E)(ii) or (F)(ii) of subsection (b)(1) of this section), and the child is in the legal custody of the legitimating or adopting parent or parents at the time of such legitimation or adoption.²³⁴

Much here is familiar, though several distinctions between this definition and that of immigration law are worth noting.

First, two avenues that are available to establish parent-child relationships under immigration law are missing here. Citizenship law does not recognize a "child" on the basis of a stepparent relationship or via demonstrating a bona fide parent-child relationship. The absence of these avenues, as will be discussed below, perhaps is somewhat mitigated at points by citizenship law's occasional use of the term "person" instead

²³² *Matter of Cuello*, 20 I. & N. Dec. 94, 97 (B.I.A. 1989); accord 8 C.F.R. § 204.2(d)(2)(vii)(B) (2007) ("When the adopted child continued to reside in the same household as the natural parent(s) during the period in which the adoptive parent petitioner seeks to establish his or her compliance with this requirement, the petitioner has the burden of establishing that he or she exercised primary parental control during that period of residence.").

²³³ Citizenship laws are set out primarily in Title III of the Immigration and Nationality Act and codified at 8 U.S.C. §§ 1401, 1504 (2000).

²³⁴ *Id.* § 1101(c)(1).

of “child,” reducing the importance of qualifying as a child in some contexts.

Second, the requirements for establishing a parent-child relationship via legitimation are similar to those in the immigration definition, with the slightly different age requirement that legitimation occur before the child reaches age sixteen. The requirement of legal custody at the time of legitimation tracks the language found in the immigration definition.

Third, the adoption portion of the definition contains the same age limit of sixteen years, but does not include the requirement of two years of legal custody and residence found in the immigration definition. Instead, it requires legal custody at the time of adoption, mirroring the legitimacy provision, without specifying any particular duration. Also, this definition reaches only “a child adopted in the United States,” so that children adopted abroad are not children for citizenship purposes. They still qualify for certain citizenship benefits, however, through a statutory fix that will be discussed below.

With these distinctions in hand, it is time to explore the role of child custody in three avenues to U.S. citizenship: birth in the United States, acquisition at birth, and derivation.

I. Child Custody and Jus Soli Citizenship

The most common method of attaining citizenship, through birth within the United States or *jus soli* citizenship, is not affected by child custody determinations. “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.”²³⁵ In 1884, Native Americans born within the United States but within tribal authority were adjudicated “subject to the jurisdiction” of the United States and thus did not acquire U.S. citizenship at birth under the Fourteenth Amendment.²³⁶ The Court later identified the only other persons falling outside the “subject to the jurisdiction” clause as “children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State.”²³⁷ The constitutional mandate of the Fourteenth Amendment now is incorporated into statute and regulation, with the explanation that “[a] child born in the United States is born subject to the jurisdiction of the United States and is a United States citizen if the parent is not a ‘foreign diplomatic officer.’”²³⁸ Calls for reinterpretation

235. U.S. CONST. amend. XIV, § 1.

236. *Elk v. Wilkins*, 112 U.S. 94, 109 (1884). U.S. citizenship at birth is now conferred to affected Native Americans by statute. See 8 U.S.C. § 1401(b) (2000).

237. *United States v. Wong Kim Ark*, 169 U.S. 649, 682 (1898).

238. 8 C.F.R. § 1101.3(b) (2007); see also 8 U.S.C. § 1401(a) (2000).

of the Fourteenth Amendment, or for statutory and constitutional amendment, “to restrict the acquisition of citizenship by the children of undocumented immigrants are often advanced, but none have gained sufficient support to have any realistic chance of enactment.”²³⁹ In the meantime, more than a century of settled interpretation and understanding leaves no doubt about the citizenship of children born in the United States.

Unless their parents are diplomatic officers recognized as such by the United States, all children born in the United States are U.S. citizens without regard to the citizenship or immigration status of their parents and without regard to whether they are in the custody of a U.S. citizen parent.²⁴⁰ Citizenship adheres at birth and subsequent decisions regarding child custody will not alter the child’s citizenship.²⁴¹

2. *Child Custody and Acquisition of Citizenship at Birth*

By statute, citizenship also is extended to certain children born outside the United States to parents who are U.S. citizens at the time of the child’s birth.²⁴² This is generally referred to as “acquisition” of citizenship at birth. To acquire citizenship at birth, generally at least one parent must have been a U.S. citizen at the time of the child’s birth and have been physically present in the United States for a requisite period of time at some point prior to the birth.²⁴³ Child custody potentially plays a role in acquisition because the law employs a distinction between children born in wedlock and those not, similar to that discussed in the immigration context above.²⁴⁴

Though acquisition of citizenship takes place at birth, certain actions

239. Thronson, *supra* note 50, at 83; see also MARGARET MIKYUNG LEE, CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS ORDER CODE: U.S. CITIZENSHIP OF PERSONS BORN IN THE UNITED STATES TO ALIEN PARENTS 10–18 (2005), available at http://assets.opencrs.com/rpts/RL33079_20050913.pdf; Brooke Kirkland, Note, *Limiting the Application of Jus Soli: The Resulting Status of Undocumented Children in the United States*, 12 BUFF. HUM. RTS. L. REV. 197, 197–99 (2006) (describing proposals to limit *jus soli* citizenship).

240. Children born in the United States to diplomats generally are accorded permanent residence status. See 8 C.F.R. § 101.3 (2007).

241. See Peter H. Schuck, *The Re-Evaluation of American Citizenship*, 12 GEO. IMMIGR. L.J. 1, 11 (1997) (“United States citizenship, once acquired, is virtually impossible to lose without the citizen’s express consent.”).

242. See 8 U.S.C. §§ 1401, 1409 (2000).

243. See *id.* § 1401(c)–(g). Because acquisition of citizenship occurs only at birth, its provisions are not applicable for adopted children in relation to an adoptive U.S. citizen parent.

244. See *supra* notes 160, 170–75 and accompanying text. The relevant statutory section for children born out of wedlock is 8 U.S.C. § 1409 and “applies to all persons born on or after November 14, 1986, its effective date and . . . to persons who had not attained age 18 as of November 14, 1986, except those who had previously been legitimated, to whom ‘old’ [8 U.S.C. § 1409] applies.” FOREIGN AFFAIRS MANUAL, *supra* note 189, § 1133.4-2(a)(1) (1998).

are required to prove and retain the U.S. citizenship so acquired. This hopefully happens early, though it may be delayed, and age limits for some of the requirements place the process on a clock. In order for persons²⁴⁵ born out of wedlock to a U.S.-citizen father to establish that they acquired citizenship at birth, among the elements they must demonstrate are that “the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years,”²⁴⁶ and

while the person is under the age of 18 years—

(A) the person is legitimated under the law of the person’s residence or domicile,

(B) the father acknowledges paternity of the person in writing or under oath, or

(C) the paternity of the person is established by adjudication of a competent court.²⁴⁷

These are not particularly onerous requirements, though satisfaction requires action on the part of the father and a child cannot meet these without the father’s participation.

Awareness is essential to formal compliance with these requirements, because it is unlikely for a father to “satisfy [these requirements] incidentally without knowledge of the law.”²⁴⁸ For example, that “the father actually provide financial support is not enough; he must agree in writing to do so.”²⁴⁹ Moreover, the requirements must be met prior to the child reaching age eighteen.²⁵⁰ The result is that the father’s pledge of financial support is absolutely required even though it might be essentially meaningless if entered as the child nears age eighteen.²⁵¹ Even where the agreement is executed while the child is young, if a father “subsequently fails to support the child, the

245. Using the term “person” instead of “child” might indicate that any limitations on the parent-child relationship inherent in the citizenship definition of child and not specifically required in this section are irrelevant. Still, the term “father” is used and is defined solely in relation to the definition of child. See 8 U.S.C. § 1101(c)(2) (2000).

246. *Id.* § 1409(a)(3).

247. *Id.* § 1409(a)(4).

248. David A. Isaacson, *Correcting Anomalies in the United States Law of Citizenship by Descent*, 47 ARIZ. L. REV. 313, 333 (2005).

249. *Id.* at 333-34.

250. *Id.* at 334 n.89 (noting that the “text of [8 U.S.C. § 1409] does not explicitly require that the promise be made before the child turns eighteen at all, though the State Department’s *Foreign Affairs Manual* rules out the possibility of a father signing a meaningless lapsed promise after that time”); see also FOREIGN AFFAIRS MANUAL, *supra* note 189, § 1133.4-2.b(3)(c)(v) (1998).

251. See FOREIGN AFFAIRS MANUAL, *supra* note 189, § 1133.4-2.b(3)(c)(v) (1998) (stating that agreement must be dated any time prior to child’s eighteenth birthday).

child's U.S. citizenship is not taken away.²⁵²

Legitimation, with its occasional requirements involving child custody, may be a part of demonstrating acquisition of citizenship. But with some awareness of the requirements, the quirky requirements of legitimation are avoidable and acquisition likely is much more easily obtained through the other options of acknowledging or adjudicating paternity. Family court judges or attorneys could make an important contribution to a child's interests in a qualifying case by recognizing the need for and benefit from a written agreement and formal adjudication of paternity in a custody dispute.²⁵³ Moreover, if an agreement such as § 1409 contemplates has been executed, it may have relevance regarding child support matters.²⁵⁴

3. *Child Custody and Derivation of Citizenship*

Persons not born as U.S. citizens may qualify to naturalize as citizens after obtaining and holding permanent resident status for a requisite number of years, generally five, and meeting a host of other requirements, including being at least eighteen years of age.²⁵⁵ Although children are prohibited from naturalizing on their own, under certain circumstances children may "derive" U.S. citizenship from a parent's naturalization.²⁵⁶ The distinction between acquisition and derivation is that acquisition involves a parent who was a U.S. citizen at the time of the child's birth, and derivation involves a parent who was not a citizen at the time of birth but later naturalizes.

Derivation of citizenship statutes have changed over time and it is important to look at the relevant effective dates of statutory provisions. For older children and adults, prior versions of derivation statutes may be applicable. Enacted as the Child Citizen Act of 2000,²⁵⁷ the current statute provides:

A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:

252. *Id.* § 1133.4-2.b(3)(e) (noting that while the Department of State "has no authority to obtain payments pursuant to [8 U.S.C. § 1409(a)] . . . [t]his does not mean . . . that it could not be enforced by the child against the father, or pursuant to laws administered by other government entities").

253. *See, e.g., Recommendations, supra* note 97 ("In juvenile justice and child welfare proceedings, children's attorneys should understand the interconnections to other related substantive areas, such as health, housing, public benefits, education, domestic violence, immigration, and transnational issues.").

254. *See Abrams, Immigration Law, supra* note 26, at 1700-07 (discussing affidavits of support executed in the context of immigration based on marriage).

255. *See* 8 U.S.C. § 1421 (2000).

256. *See id.* §§ 1431, 1433.

257. *See* Child Citizen Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (2000).

(1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.

(2) The child is under the age of eighteen years.

(3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.²⁵⁸

Moreover, this section “shall apply to a child adopted by a United States citizen parent if the child satisfies the requirements applicable to adopted children under section 1101(b)(1).”²⁵⁹ This extends the provision to cover many children adopted abroad who are not included in the citizenship definition of “child.”²⁶⁰ The statute put in place by the Child Citizenship Act represented a major revision, shifting from a general requirement that both parents naturalize to a requirement of only one parent and thus significantly liberalizing derivation. The “key to the [passage of the Child Citizenship Act] was the notion that foreign-born adopted children should be granted United States citizenship as efficiently as possible as a way to establish parity between adopted and biological children and to eliminate the possibility of deportation in the future.”²⁶¹

For children of parents who are successful in navigating through the immigration and naturalization system, this statute provides a potentially quick route to citizenship. To be sure, the children must first become permanent residents.²⁶² But if the other requirements are met, the children of U.S. citizens, including those just arriving after an adoption abroad, become U.S. citizens the instant those children become permanent residents.

One of those other requirements is that the “child is residing in the United States in the legal and physical custody of the citizen parent.”²⁶³ There is a glut of litigation regarding legitimation and legal custody in the derivation-of-citizenship context. In contrast to most all of

258. 8 U.S.C. § 1431(a) (2000).

259. *Id.* § 1431(b).

260. *See id.* § 1101(c)(1).

261. Victor C. Romero, *The Child Citizenship Act and the Family Reunification Act: Valuing the Citizen Child as Well as the Citizen Parent*, 55 FLA. L. REV. 489, 500–01 (2003) (“Most adults wanting to adopt in the United States are white, and most children waiting to be adopted, both domestically and internationally, are nonwhite. Thus, many adoptive American families are likely to be ones in which the parents are white and the adopted children are nonwhite. Viewed from this perspective, it is easy to see why the [Child Citizenship Act] was so positively received. Many of the white senators and representatives easily identified with the white United States citizen parents who wanted to make sure their nonwhite adopted children were United States citizens.”).

262. *See* 8 U.S.C. § 1431(a)(3) (2000); *see also* 7 GORDON ET AL., *supra* note 125.

263. 8 U.S.C. § 1431(a)(3).

immigration and nationality law, when all the various requirements to derive citizenship are met, the derivation is complete automatically without the need for formal adjudication and without regard to whether the person who derived citizenship is aware of the derivation.²⁶⁴ This leaves much room for *ex post facto* litigation, often by persons facing removal for criminal conduct who attempt to defeat removal by establishing that they actually are U.S. citizens. With cases frequently arising in this not particularly sympathetic posture, and involving facts from years or decades in the past, a predictable lack of generosity generally reigns in the interpretation of derivation statutes.

Most current litigation is related to the version of this statute that preceded the Child Citizenship Act, affecting persons who reached age eighteen before February 27, 2001. Under this prior relevant statutory provision, derivation of citizenship required the naturalization of both parents or the “naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation.”²⁶⁵ Without delving too deeply, a brief review of these lines of cases gives some insight into how child custody has been interpreted in the derivation-of-citizenship context. Some issues are potentially resolved by the current statute, though some may carry forward.

a. Legitimation Revisited

Turning first to children born out of wedlock, a person seeking to establish derivation of citizenship under the prior statute based on a mother’s naturalization often has the strange goal of proving that legitimation did not take place because under the prior law “a child whose paternity has not been established by legitimation before the age of sixteen may derive citizenship through the mother.”²⁶⁶ If legitimation occurred, then the naturalization of both parents would be required to establish derivation.²⁶⁷

264. For example, Duarnis Saul Perez was deported in 1996 based on a criminal conviction and then arrested “as he attempted to return to the United States. He pleaded guilty to one count of illegal reentry after removal” and “served his entire 57-month sentence before discovering he is an American [citizen] and therefore could not be an illegal alien.” John Caher, *Government Opposes Habeas for ‘Innocent’ Man*, N.Y. L.J., Aug. 16, 2006, at 1. However, “citizenship was automatically conferred on Mr. Perez in 1988, when his mother became a U.S. citizen. Even his mother was not aware of her son’s citizenship, and, in fact, advised both Mr. Perez and his attorneys that the man was not an American.” *Id.*

265. 8 U.S.C. § 1432(a)(3) (1994) (repealed 2000).

266. FIELD MANUAL, *supra* note 198, § 71.1(d)(3) (2007).

267. See *In re Rowe*, 23 I. & N. Dec. 962, 967 (B.I.A. 2006) (“Because the respondent’s parents never married, we agree that his paternity was not established through legitimation. Consequently, we

Given that legitimacy may be established by operation of a general law eliminating distinctions between children born in and out of wedlock,²⁶⁸ children may be deemed legitimate even if they have no relationship with their father, and this can bar derivation based on the mother's naturalization alone. For example, a man "was born out of wedlock in El Salvador, and his father acknowledged paternity on the respondent's birth certificate. [He is] considered a legitimated child under El Salvadoran law. Without proof that his father is deceased, the respondent cannot establish derivative citizenship through the 1986 naturalization of his mother."²⁶⁹

The current statute's requirement of only one parent naturalizing should remove the need to argue against legitimacy for children who are covered by it. There will be, however, persons born out of wedlock who will wish to establish legitimation to derive citizenship under the current statute based on the naturalization of their fathers. Because the citizenship definition of "child" does not include many avenues to establish a parent-child relationship, legitimation may be the only available route.

b. Legal Custody and Separation

The second area of litigation has involved the prior statute's grant of derivative citizenship upon the naturalization of "the parent having legal custody of the child when there has been a legal separation of the parents."²⁷⁰ First, if there has been no marriage there is no legal separation and the case is back in the realm discussed in the previous section. This statutory language has prompted questions about when a child is in a parent's legal custody in the wake of vague language or silence regarding child custody in family court decrees dissolving marriages. Courts have tended to look "to state law to decide who has legal custody of a minor for derivative citizenship purposes"²⁷¹ or to look for a "judicial determination" and if none is found then "the parent in 'actual uncontested custody' is deemed to have legal custody."²⁷² Either of these approaches cautions advocates and family courts to seek clarity in decisions regarding child custody to avoid needless litigation and

hold that the respondent derived United States citizenship under former section 321(a)(3) upon the naturalization of his mother.").

268. See *supra* note 194 and accompanying text.

269. *In re Landaverry-Avelar*, File No. A42 475 573, 2006 WL 3922208, at *1 (B.I.A. Dec. 14, 2006).

270. 8 U.S.C. § 1432 (1994) (repealed 2000).

271. *Bagot v. Ashcroft*, 398 F.3d 252, 258 (3d Cir. 2005). In *Bagot*, the custody order at issue was a two-page form order on which the father's name was typed into the space before the preprinted words "shall have custody of the children" on the form. *Id.* at 254.

272. *Bagot*, 398 F.3d at 259.

unintended results.

By regulatory definition in this context, “[l]egal custody refers to the responsibility for and authority over a child.”²⁷³ Further,

[j]oint custody, in the case of a child of divorced or legally separated parents, means the award of equal responsibility for and authority over the care, education, religion, medical treatment, and general welfare of a child to both parents by a court of law or other appropriate government entity pursuant to the laws of the state or country of residence.²⁷⁴

Under prior law, an award of sole or joint custody can matter, as demonstrated in the next section.

c. Sole Custody and Joint Custody

Recently, the Fifth Circuit reviewed a derivative citizenship claim involving a divorce decree that awarded a “mother ‘sole *physical* custody’ of Petitioner, but awarded both . . . parents ‘joint *legal* custody.’”²⁷⁵ The court held that

§ 1432(a)(3)’s requirement that ‘the parent having legal custody of the child’ be a naturalized citizen of the United States is satisfied only when but one of two living and legally separated parents is a naturalized U.S. citizen and that parent is vested with the *sole* legal custody of the child.²⁷⁶

In reaching this conclusion, the court placed enormous emphasis on the use of “the *singular form* of ‘parent’” in allowing a child to derive citizenship from the naturalization of “*the* parent having legal custody of the child.”²⁷⁷ If, said the court, Congress had intended that the “requirements could be met when two legally separated parents shared *joint* legal custody of a child and only one of those two parents was naturalized, it could have used more inclusive language to signify as much.”²⁷⁸

In reaching its conclusion, the Fifth Circuit adopted a decidedly parent-centered approach, asserting that “Congress meant . . . to protect the rights of *both* parents for as long as each one of them has legal rights over the child.”²⁷⁹ “It makes sense . . . that when the child’s parents are still married, the child does not *automatically* acquire a new citizenship

273. 8 C.F.R. § 320.1 (2007).

274. *Id.*

275. Bustamante-Barrera v. Gonzalez, 447 F.3d 388, 390 (5th Cir. 2006).

276. *Id.* at 398.

277. *See id.* at 396.

278. *Id.*

279. *Id.* at 397.

upon the naturalization of only one parent.”²⁸⁰ Only with sole custody in one parent established “could the federal courts be confident that the non-custodial, non-naturalized parent truly has no rights over the child.”²⁸¹ The Fifth Circuit drew support from the Ninth Circuit which stated:

[W]e think that Congress generally intended to provide automatic citizenship to children born abroad of alien parents only after the naturalization of *both* biological parents. This policy is rational for at least a few reasons, but we need only discuss one rationale here: the protection of parental rights. If United States citizenship were conferred to a child where one parent naturalized, but the other parent remained an alien, the alien’s parental rights could be effectively extinguished. . . . Thus, [former 8 U.S.C. § 1432] prevents the naturalizing parent from usurping the parental rights of the alien parent.²⁸²

First, this reasoning relies on an effort to inaccurately conflate a parent’s citizen status with parental rights. There is simply no reason to think that by granting U.S. citizenship the “alien’s parental rights could be effectively extinguished.” As discussed above, noncitizen parents have equal parental rights without regard to the status of themselves and that of their children.²⁸³ If the court’s logic were correct, there would be cause for grave concern now that the current statute accomplishes derivation based on the naturalization of one parent.

Second, although the current statute permits derivation when “[a]t least one parent of the child is a citizen of the United States”²⁸⁴ it uses the same language of the prior statute that the child still must reside “in the United States in the legal and physical custody of *the* citizen parent.”²⁸⁵ The limiting “when there has been a legal separation of the parents” language of the old statute is gone, so an interpretation of the same singular “the” that so impressed the *Bustamante* court in the same way would require sole custody before derivation could be complete. This would mean that children of an intact couple with shared custody of their children could not derive citizenship on the basis of one parent’s naturalization. Such an interpretation would undermine the reform most central to the Child Citizenship Act.

To date, the government has agreed that sole custody is not required

280. *Id.* (quoting *Nehme v. INS*, 252 F.3d 415, 425–26 (5th Cir. 2001)) (alteration in original).

281. *Id.* at 398.

282. *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1066 (9th Cir. 2003).

283. *See supra* notes 64–69 and accompanying text.

284. 8 U.S.C. § 1431(a)(1) (2000).

285. *Id.* § 1431(a)(3) (emphasis added).

under the current statute and for children living with both parents, with a surviving parent or with a legitimating parent, with regard to the legal custody requirement, “the [U.S. Citizenship and Immigration Services] will presume that a U.S. citizen parent has ‘legal custody’ of a child . . . absent evidence to the contrary.”²⁸⁶ A “child born out of wedlock who has not been legitimated may acquire citizenship through his or her naturalizing mother.”²⁸⁷ The Code of Federal Regulations states:

In the case of a child of divorced or legally separated parents, [U.S. Citizenship and Immigration Services] will find a U.S. citizen parent to have legal custody of a child, for the purpose of the [Child Citizenship Act], where there has been an award of primary care, control and maintenance of a minor to a parent by a court of law or other appropriate government entity.²⁸⁸

Additionally, U.S. Citizenship and Immigration Services “will consider a U.S. citizen parent who has been awarded ‘joint custody’ to have legal custody of a child.”²⁸⁹

Child custody remains highly relevant in the citizenship context. It also is important to note that the Child Citizenship Act of 2000 introduced the term “physical custody” into the mix for the first time with no mention of the reason for this in the legislative record. There has yet been no attempt to define “physical custody” by regulation or judicial opinion, and it has largely been assumed to be coextensive with residence as used in the adoption context discussed above.

D. REVEALING VALUES

Tracing the role of child custody through immigration and nationality provides insights into the nature and values expressed in immigration law’s treatment of children. It reveals a system fundamentally at odds with the child-centered values of family law. Families are organized around parents and their interests, children are denied agency, and designation as children is expressly reserved for some, but not all, children. The parent-centered nature of immigration law fails to acknowledge the central role of children as organizing forces in families with their own needs and interests.

Even on its own terms, the crazy conglomeration of provisions that determine who is a “child” for immigration law purposes and the erratic role of child custody in this determination are open to criticism. Sheer complexity alone makes the system difficult to administer and creates

286. 8 C.F.R. § 320.1(1) (2007).

287. AUSTIN T. FRAGOMEN ET AL., IMMIGRATION PROCEDURES HANDBOOK § 22:19 (1998).

288. 8 C.F.R. § 320.1(2) (2007).

289. *Id.*

meaningless traps for the unwary and misinformed. Immigration law's inconsistent requirements create an uneven playing field that lacks reasoned justification for its disparate treatment of children and families.

Further, immigration and nationality law's requirements demonstrate unprincipled variation. For just a few examples, "legal custody" is expressly required only for adopted and legitimated children, and the lengthy two-year period for adoption is not matched in the legitimacy provision, which is silent on the required duration of legal custody. Only certain adopted children are expressly required to reside with a parent. Without rational distinction, becoming a "child" by adoption must be accomplished before age sixteen, becoming a "child" as a stepchild or via legitimation must happen before age eighteen, and becoming a "child" through the other provisions must occur before age twenty-one unless interpretation is reliant on some state or foreign law that incorporates an earlier deadline. Cobbled together over decades, the definition of "child" is central to children's access to the primary avenue of immigration yet lacks coherent logic in the rigid distinctions it draws.

By making distinctions based on legitimacy, and then looking to the laws of multiple jurisdictions to determine legitimacy, immigration and nationality law maintain a distinction rejected elsewhere in the law and incorporate a constantly shifting and amorphous body of law which is unnecessarily difficult to ascertain and apply. The result is not just complexity and extensive litigation, but a marked variation in outcome for identically situated people in different jurisdictions. Whether children arrive or are excluded, stay or are removed, can turn on whether they live in Indiana or Ohio. Immigration and citizenship status may turn solely on the effective date of foreign legislation in a country that the children left years ago that eliminates legal distinctions between legitimate and illegitimate children. This approach allows critical determinations to turn on laws whose underlying assumptions and values may not be shared. Immigration and nationality law embrace meaningless distinctions that are not grounded in principle or logic.

The perpetuation of this unprincipled system is at least partially a result of the exceptionalism of immigration law and the notion that immigration law is different with different rules. Exploring the ways in which immigration law functions as family law can provide insights and perspective that reveal the manner in which immigration law is less removed and distinct than it sometimes seems.

III. FROM BOTH SIDES NOW

Having now examined the potential for use of immigration status in child custody matters and traced the role of child custody through

immigration law, it is obvious that there is massive oversimplification in the traditional notion that family law is the exclusive province of the states while immigration law is entirely federal. Without trying to define the full contours of family law, it certainly includes law that regulates the relationship between children and their parents.²⁹⁰ Similarly, whatever the outer boundaries of immigration and nationality law, it certainly encompasses determinations of who is eligible for authorized immigration status and citizenship in the United States.²⁹¹

As it makes judgments that reveal the boundaries of children's access to family-sponsored immigration and thus determines which family members are accorded permission to live within the United States, immigration law is family law.²⁹² By deciding whether a particular relationship between a child and parent is worthy of recognition and assigning this relevance in immigration law, immigration law regulates basic family decisions such as where and with whom children will live. It influences private family decisions and behavior as parents and children conform their actions to qualifications set forth in immigration law. Immigration law also operates indirectly as family law when its conclusions are allowed to influence or determine the outcome of child custody matters in family courts. At the same time, family law functions as immigration law when its conclusions are determinative of immigration rights, when its decisions are manipulated to facilitate immigration outcomes, or simply when its placement decisions involve parents residing outside the United States.²⁹³

Exploring the manner in which immigration law functions as family law in the determination of child custody has real consequence. The federal government "can only regulate the family when it crafts federal laws in ways that purport to embody something other than family law,

290. See Adler, *supra* note 23, at 220 (defining family law as "law which regulates one or more among a cluster of relationships (whether existing or past), including marriage, non-marital intimate partnerships, and parenthood"); Hasday, *supra* note 24, at 871 (adopting a "serviceable" definition of family law as law that "regulates the creation and dissolution of legally recognized family relationships, and/or determines the legal rights and responsibilities of family members").

291. See, e.g., Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1626 (1992) ("Immigration law," which is commonly defined as the federal law governing the admission and expulsion of aliens, did not exist in this country until 1875.") (footnotes omitted).

292. See generally Abrams, *Immigration Law*, *supra* note 26, at 1700.

293. Family law has been described as "'underneath' other legal fields in the sense that its rules about roles and duties between men and women, parents and children, families and strangers historically and conceptually underlie other rules about employment and commerce, education and welfare, and perhaps the governance of the state." Martha Minow, "Forming Underneath Everything That Grows:" *Towards a History of Family Law*, 1985 WIS. L. REV. 819, 819.

such as taxation, social security, pensions, or immigration.”²⁹⁴ Immigration laws, therefore, may provide “Congress an unusual opportunity to engage in extensive regulation of an area that would normally be off limits.”²⁹⁵ For example, immigration law’s distinctions based on legitimacy regulate families by promoting marriage in a manner that would raise objection if attempted directly.²⁹⁶ Similarly, requirements for demonstrating a bona fide parent-child relationship under immigration law or proving two years of shared residency for acquisition of citizenship may shape private choices and behavior otherwise unrelated to immigration.

Masking the regulation of families as immigration law obscures the nature of the federal government’s engagement with families, creating the risk that overreaching extensions of federal power into the lives of immigrants and citizens alike escape notice and challenge. Revealing and exploring the manner in which immigration law functions as family law enhances transparency and serves as a check on possible abuse of federal power. Likewise, examining the manner in which family law functions as immigration law provides fresh insights regarding the appropriate parameters for the consideration of immigration related issues in child custody matters. The intersection of family law and immigration law is a rich space from which to examine the basic tenets and operation of both.

A. IMMIGRATION LAW AS FAMILY LAW—DETERMINING CHILD CUSTODY

Even on its own terms, it is easy to criticize the treatment of children in immigration law. When immigration law is recognized as family law, the critique of immigration law’s treatment of children intensifies as family law provides a fresh perspective from which to consider immigration law’s treatment of children.

Castro v. United States, described at the outset of this Article, demonstrates several aspects of immigration law as family law. Recall that the Border Patrol refused to take a U.S.-citizen child from her father as he was repatriated where the mother did not have any state court order establishing her right to custody as superior, and the child left the

294. Abrams, *Immigration Law*, *supra* note 26, at 1700–07; *see also* Adler, *supra* note 23, at 255; Hasday, *supra* note 24, at 875.

295. Abrams, *Immigration Law*, *supra* note 26, at 1632. Congress cannot enact laws that have “nothing to do with the exclusion of immigrants or the deportation of immigrants, but instead regulates the lives of citizens.” *Id.* at 1646–47. 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.” Bosniak, *supra* note 63, at 1097–98.

296. *See* Brown, *supra* note 179, at 150 (“[T]o the extent that deterring [extra-marital sexual] activity is appropriate public policy, it can hardly be argued that punishing the child who results from the illicit activity, rather than the adults who engaged in that activity, is anything but grossly unfair.”).

country with the father.²⁹⁷ When litigation arose from this case, the court held that the Border Patrol “did not actually make any ‘custody determination’ . . . [because it] issued no custody order and made no determination that [the child] should remain permanently with either her mother or father.”²⁹⁸ Yet plainly, the operation of immigration effectively functioned to determine the custody of the child for the next three years. Moreover, perhaps the father’s lack of authorized immigration status was the result of his U.S.-citizen daughter’s inability to extend an immigration benefit to him. Additionally, the arrest in this case was prompted by a report from the mother who apparently sought to use the blunt instrument of immigration enforcement in the wake of an argument between spouses.²⁹⁹

As a matter of immigration law, this case is hardly remarkable. An unauthorized immigrant was removed along with his child, as happens everyday. When the immigration law here is viewed as family law, however, it appears highly unusual. The custody of a child was effectively determined without process and without any consideration of the interests of the child. This was possible because the father was amenable to removal, a conclusion that immigration law also reached without considering the interests of the child. In fact, immigration law shaped this situation, from the father’s lack of status to the mother’s tactics in settling a dispute. Whatever decision regarding child custody would have resulted from a family law proceeding is unknown because immigration law effectively resolved the issue without consideration of any of the factors that would have been relevant to a court determining the best interests of the child.

Thinking of immigration law as family law also reveals the extent to which it is out of step with deeply held societal values and, in some instances, constitutional principles. Certainly, the decision to make important regulation of children and families turn on the basis of a child’s birth in or out of wedlock likely would face immediate constitutional challenge without the insulating veneer of Congress’s plenary power over immigration. This exceptionalism permits immigration law to avoid the reconsideration of policies often prompted by both successful and unsuccessful constitutional challenges.

Exposing the ways in which immigration law functions as family law brings a new perspective to immigration reform debates. The exceptionalism of immigration law may survive as a constitutional

297. *Castro v. United States*, No. C-06-61, 2007 U.S. Dist. LEXIS 9440, at *2-3 (S.D. Tex. Feb. 9, 2007).

298. *Id.* at *7.

299. *See id.* at *2-5.

matter, but even constitutionally sound immigration laws may be less palatable politically when the manner in which they function as family law is the focus. For example, the liberalization of derivation of citizenship in the Child Citizenship Act of 2000 was legislation prompted largely by concerns over how immigration law operated as family law, reaching into white, middle class families with U.S. citizen parents.

The Child Citizenship Act aimed to “avoid some heartbreaking injustices that have sometimes tragically occurred,” such as a parent’s failure to complete paperwork resulting “in their forced separation from their children under the summary deportation provisions Congress enacted back in 1996.”³⁰⁰ Deporting children to countries “with which they have no contact, no ability to speak the language, and no family known to them is needlessly cruel.”³⁰¹ The Child Citizenship Act of 2000 “enjoyed broad bipartisan support chiefly because it helped bridge the still existing psychological gap between adopted and biological children.”³⁰² This rhetoric draws not from immigration law motivations but rather from family law values. Recasting immigration law as family law shifted the debate and created an avenue to see reforms of harsh immigration law as valuing family rather than as undermining border control.

Family law and immigration law often have fundamentally conflicting values and prioritize contradictory policies, as is apparent in immigration law’s rejection of the most basic premises of family law regarding the treatment of children. Immigration law results in decisions about children that are not motivated in the least by consideration of the children’s best interests. Acknowledging that immigration law functions as family law provides an opportunity to incorporate family law values and sensibilities into the immigration reform conversation.

B. FAMILY LAW AS IMMIGRATION LAW

Family law functions as immigration law in a number of ways and exploration of these can provide fresh insights regarding the appropriate parameters for the consideration of immigration issues in child custody matters.

First, and most obviously, family law functions as immigration law when family courts make child custody decisions that reach across borders. These are *de facto* determinations regarding who may stay in the United States and in this context, family courts “have long done what

300. 146 CONG. REC. H7774, H7777 (daily ed. Sept. 19, 2000) (statement of Rep. Delahunt).

301. *Id.* at H7778 (statement of Rep. Gejdenson).

302. VICTOR C. ROMERO, *ALIENATED: IMMIGRANT RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA* 53 (2005).

no immigration court ever could: order U.S. citizens to leave the United States."³⁰³ In some instances leaving the country with family may be appropriate and in others "reunification may not be the only or the overriding consideration."³⁰⁴ The best interests of the child are not the motivating factor in immigration determinations, and a family court proceeding in this situation is likely the only available forum in which children's voices will be heard and their interests will be taken into account.

Second, family law creates and enforces relationships that have great relevance in immigration and nationality law and often are determinative of immigration and nationality rights. This is true whether the court is aware of the immigration implications or oblivious to the impact of its determinations on immigration law. The semantic characterization of a child custody arrangement may have unanticipated consequences years later. Family law requirements for legitimation may serve to open or foreclose immigration possibilities. Family law functions as immigration regardless of whether it does so intentionally and states cannot claim to adequately serve children's interests with laws and policies if they have no idea of the impact that these have in such an important dimension of many children's lives.

When family courts do consciously manipulate decisions or proceedings to facilitate immigration outcomes, they certainly are complicit in the resulting operation of immigration law. Understanding the immigration law underlying a request to manipulate a family court outcome is critical. In some instances, the family court can serve to ameliorate the absence of a child-centered framework in immigration law. In others, however, the court must be critically aware that the immigration law at issue is motivated by contradictory values and goals.

Thinking about family law functioning as immigration law prompts further hesitancy in considering parents' immigration status in child custody decisions. The negative conclusion of immigration law regarding a parent's status may be based on considerations that are anathema to family law and are the result of a system explicitly geared to serve some, but not all, children. When a parent's unauthorized status is the result of an immigration system that fails to take the best interests of children into account and denies agency to children, incorporating consideration

303. Thronson, *supra* note 28, at 1191. "A key proposition emerges from these cases that children's citizenship or immigration status does not override parental decisions to take children out of the country. In the broader context of the parent-child relationship and the child's emerging autonomy, immigration and citizenship status alone play a limited role in determining whether children remain in the United States." *Id.* at 1193.

304. Bhabha, *Not a Sack of Potatoes*, *supra* note 29, at 205.

related to and arising from the parent's status would validate not only immigration law's conclusion about the parent's status but also the premises and system that led to that conclusion.

Immigration and nationality law may continue to be parent-centered, gender-biased and discriminatory towards children born out of wedlock, but these immigration law throwbacks should never taint state judgments to the contrary. An immigration determination based on objectionable principles is no less objectionable when laundered through a family court.

CONCLUSION

"[F]ew things in the law are as ephemeral as a child custody adjudication."³⁰⁵ Children's interests change, as does the world in which they live. When immigration issues are involved in or impacted by a child custody determination, however, consequences can be profound and lasting. While this Article has articulated an argument that consideration of immigration issues is occasionally appropriate in child custody determinations, it also should serve as a cautionary tale of the complexities and potential disasters that can accompany the mixing of immigration and family law.

Understanding the ways in which immigration and nationality law devalue children gives further reason to exhibit caution in mixing immigration and family law in the determination of child custody. As demonstrated, immigration law can function as family law, yet it does so in a manner that does not take children's interests into account. If family law is to function as immigration law, its own principles and values regarding the centrality of the child's interests must not waver.

305. *Bagot v. Ashcroft*, 398 F.3d 252, 266 (3d Cir. 2005).