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Beyond Status: Seeing the Whole Child

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ABSTRACT

Competing values underlie U.S. immigration law and child welfare law. Immigration law often operates in ways that intentionally hinder family unity, which in the child welfare context enjoys tremendous constitutional protection. First, the operation of immigration law undermines family unity by failing to recognize the variety of family structures that exist, which has profound implications for millions of mixed status families, that is, families in which all family members do not hold the same immigration status. Second, immigration law hinders family unity because it does not recognize children's interests as a valid factor in immigration decisions, thereby failing to take into account the best interests of the child, a concept that otherwise is universally recognized in child welfare law.

Despite the U.S. immigration system's exceptional disregard for family unity and the best interests of the child, immigration status can become an issue in many contexts outside of immigration proceedings, from state intervention through child protection agencies to state court decisions in parent custody disputes. Therefore, systems and policies that affect immigrant children and their families must recognize the competing values underlying immigration law and child welfare law or risk importing improperly the immigration systems' values into other contexts in ways that discourage family unity and negatively impact children.

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Competing values underlie U.S. immigration law and child welfare law. Immigration law often operates in ways that intentionally hinder family unity, which in the child welfare context enjoys tremendous constitutional protection. First, the operation of immigration law undermines family unity by failing to recognize the variety of family structures that exist, which has profound implications for millions of mixed status families, that is, families in which all family members do not hold the same immigration status. Second, immigration law hinders family unity because it does not recognize children's interests as a valid factor in immigration decisions, thereby failing to take into account the best interests of the child, a concept that otherwise is universally recognized in child welfare law.

Despite the U.S. immigration system's exceptional disregard for family unity and the best interests of the child, immigration status can become an issue in many contexts outside of immigration proceedings, from state intervention through child protection agencies to state court decisions in parent custody disputes.¹ Therefore, systems and policies that affect immigrant children and their families must recognize the competing values underlying

immigration law and child welfare law or risk importing improperly the immigration systems' values into other contexts in ways that discourage family unity and negatively impact children.

This article will look at one case example, a federal district court case, *Mendoza v. Miranda*,² as a vehicle to examine how a court's reaction to family members' immigration status can impact outcomes improperly. Although ultimately overturned by the Appeals court and not itself an immigration law case or domestic child welfare law case, *Mendoza* illustrates key issues that arise when courts import immigration values into other contexts and misapprehend the meaning of immigration status.

1. *Mendoza v. Miranda*

Eleven-year-old Brianna is at the center of a transboundary custody dispute between her unmarried parents. In many ways, the factual allegations at the center of the custody dispute are typical of the kinds of factual allegations that parties regularly raise in custody disputes. However, Brianna's family is of mixed status, i.e., all family members do not share the same immigration status or citizenship. As such, Brianna's situation is illustrative of many issues that arise for transborder families. Brianna, her mother, and

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¹ 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 (2005).

² *Mendoza v. Miranda*, 525 F. Supp. 2d 1182 (C.D. Cal. 2007), *rev'd*, No. 08-55067, --- F.3d --- (9th Cir. 2009).

her father are all Mexican citizens and do not have legal immigration status in the United States. Brianna's extended family includes U.S. citizen relatives, including her younger half-brother, her maternal grandmother, and her paternal grandmother.³

Although Brianna's father lived in the United States for eight years, he was deported to Mexico before Brianna was born. After she was born, Brianna lived with her mother, father, and paternal grandmother in Mexico. When Brianna was four, her mother moved back to the United States. Brianna went with her mother while her father remained in Mexico. Because she could not afford to support Brianna and could not enroll her in a pre-kindergarten program in the United States, Brianna's mother sent her to Mexico to live with Brianna's father and her paternal grandmother again.⁴

Less than a year later, Brianna returned to the United States and has remained in the United States since her return. As a result, Brianna has lived in the United States over half of her life. At times she has lived with her mother, and, at other times, she has lived with her mother and her maternal grandmother. She also visits with other relatives in the United States and interacts with them at family gatherings. Besides her family ties to the United States, Brianna has other ties. Brianna attended first through fourth grades at the same elementary school in the United States and did well academically.⁵ She also has made a number of friends, and is "very active in extra-curricular activities."⁶

Brianna's father has been unable to visit her in the United States because he does not have a visa or other authorization to enter the United States.⁷ Brianna's mother and father dispute which parent should have custody of Brianna and in which country a determination of custody should take place.⁸ As a result, Brianna's father filed a petition in the United States District Court for the Central District of California pursuant to the Hague Convention on the Civil Aspects of International Child Abduction.⁹ Such a petition is not to determine the merits of a custody dispute, but rather "merely seeks to establish in which country that custody proceeding may take place."¹⁰

Her father's petition requested Brianna's return to Mexico for disposition of the child custody case and alleged Brianna's mother had wrongfully retained Brianna in the United States.¹¹ Her mother opposed Brianna's return to Mexico for disposition of the child custody case, in part, because "Brianna had since become settled in her new environment."¹² Whether a child is settled in a particular location is a parental defense to a wrongful retention under the Hague Convention and allows the child custody case to proceed in the child's new environment, in this case the California state court.

Despite Brianna's ties to the United States, the district court found that "Brianna's unlawful immigration status precluded her from being settled in the United States."¹³ How the district court reached this decision in which Brianna's immigration status absolutely precluded consideration of any of Brianna's other ties or interests in family unity may be explained by the importation of immigration's values into a different context. Accordingly, an understanding of the competing values underlying U.S. constitutional law and child welfare law on one side, and U.S. immigration laws on the other will aid in understanding the district court's assumptions and misapprehensions in *Mendoza*.

2. Valuing the child in family law

The right to family unity is not enumerated specifically in the U.S. Constitution. Nonetheless, the Supreme Court consistently has recognized that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."¹⁴ The primary vehicle to ensure family integrity has been to emphasize parents' role in raising children.¹⁵ "[T]he 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]."¹⁶

Determinations regarding the custody of children and the law governing those determinations, "ha[ve] dramatically changed over the course of our history."¹⁷ Until the early twentieth century, family law in the United States viewed children as a paternal asset and treated them as property, always bound to their parents and under parental control. Within the family unit, wives were subjected to the control of husbands, and children, which included servants and other household dependents, to the control of their parents.¹⁸ Under this view, fathers virtually "had an absolute right to their children, 'owning' them as if they had 'title to them.'"¹⁹

Beginning in the late nineteenth century, "reformist discourse viewed children not so much as individual property. . . but as a form of social investment in which custody produced concomitant social duties on the part of each parent, the performance of which the state could supervise."²⁰ During this period, the state imposed limits on the absolute rights of the parent by legislating compulsory education, regulating child labor, and establishing standards for parental competence.²¹ This resulted in changes in the law governing child custody determinations: "[f]irst, through the best interests of the child standard, the law focused on the children of divorce, usually middle class children[and;]. . . [second], the law recognized the rights of poor children whose parents could not support them."²² But the new shift towards the best interests of the child often presumed that mothers would better serve children's best interests.²³ A final shift in the law occurred in the latter half of the twentieth century when "[t]he best interests of the children were reinterpreted to include either or both parents, not always the mother."²⁴

When circumstances require that the state becomes involved in custody determinations, parental choice becomes just one factor in making such decisions. Universally, child custody law "in every state in the United States. . . embraces the 'best interests'

¹⁴ Moore v. City of East Cleveland, 431 U.S. 494, 503–04 (1977).

¹⁵ David B. Thronson, *Choiceless Choices: Deportation and the Parent–Child Relationship*, 6 Nev. L.J. 1165, 1175 (2006).

¹⁶ Troxel v. Granville, 530 U.S. 57, 65 (2000); see also Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

¹⁷ Mary Ann Mason, *From Father's Property to Children's Rights: The History of Child Custody in the United States* xii (1994).

¹⁸ Barbara Bennett Woodhouse, "Who Owns the Child?: Meyer and Pierce and the Child as Property," 33 Wm. & Mary L. Rev. 1037 (1999); Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents' Rights*, 5 GEO. J. on Fighting Poverty 313, 313–14 (1998); Daniel Blake Smith, *Inside the Great House: Planter Family Life in Eighteenth-Century Chesapeake Society* 285 (1986); Mary Beth Norton, *Founding Mothers & Fathers: Gendered Power and the Forming of American Society* 49, 97 (1996).

¹⁹ Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 Harv. L. Rev. 727, 737 (1988).

²⁰ *Id.*

²¹ Mason, *supra* note 17, at xiii–xiv.

²² *Id.* at 188.

²³ *Id.*

²⁴ *Id.* at 189; for a fuller discussion regarding changes in the conception of children's rights throughout United States' history and how those changes relate to immigration law see David B. Thronson, *Kids Will be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 Ohio St. L.J. 979 (2002).

³ *Id.* at 1184–85; *Mendoza*, No. 08–55067, --- F.3d ---, slip op. at 3459, 3.

⁴ *Mendoza*, 525 F. Supp. 2d at 1184–86.

⁵ *Id.* at 1186–87, 1194–95.

⁶ *Id.* at 1195.

⁷ *Id.* at 1185.

⁸ *Mendoza*, No. 08–55607, --- F.3d ---, slip op. at 3461.

⁹ *Id.* at 3462.

¹⁰ *Id.* at 3474.

¹¹ *Mendoza*, 525 F. Supp. 2d at 1184.

¹² *Mendoza*, No. 08–55607, --- F.3d ---, slip op. at 3462.

¹³ *Id.* at 3462.

standard.”²⁵ Calculation of a child’s best interests is far from exact and subject to manipulation, but courts generally weigh a number of factors in reaching decisions about what is in the best interests of children. Among factors commonly considered are:

- the wishes of the child’s parent;
- the wishes of the child;
- the interaction and relationship of the child with the child’s parents, siblings, and other important people in the child’s life;
- the child’s adjustment to home, school, and community;
- the mental and physical health of the parents and children;
- the ability of one parent to allow frequent and meaningful contact with the other;
- which parent has provided primary care for the child;
- the nature and extent of any duress used in obtaining an agreement regarding
- custody, the health, safety, and welfare of the child generally;
- the developmental needs of the child;
- the capacity of the parent to take into account and meet the needs of the child
- the length of time the child has spent in a stable environment;
- and potential disruption of the child’s life.²⁶

In making child custody determinations, parental choice is merely one factor in determining which custody arrangements are in the best interest of the child. As a result, despite parents’ constitutional interests that limit the state’s ability to intervene in the parent–child relationship, “custody determinations subordinate a parent’s interests and allocate custody according to a determination of the best interests of the child... that whatever claim parents may make for either custody or visitation rights, is to be tested by what is the best interest of the child.”²⁷ Although imperfect,²⁸ the best interests standard places children’s interests as central to any conception of family in family law.

3. Ignoring the child in immigration law

In contrast to family law, the best interests standard, the hallmark of decisions affecting children, is completely absent in the major frameworks of immigration law.²⁹ Further, immigration law is designed intentionally not just to passively ignore the interests of children but rather to marginalize the role of children and thus the value placed on their interests. U.S. immigration law employs a concept of family that centers not on children, but on parents. Immigration law recognizes parents and their interests, but ignores children and their interests in family integrity. Unlike parents, children are denied agency and the opportunity to extend immigration status to their parents. This is most apparent in the

framework of family-sponsored immigration, the largest source of legal immigration.³⁰

On the surface, the Immigration and Nationality Act has recognized the general principles of family unity.³¹ It supports family relationships through its system of family-sponsored immigration, derivative immigration for the family members of certain immigrants, and waivers of bars of admissibility and cancellation of removal based on hardship to certain family members.³² But, “to the extent the statutory scheme of immigration law promotes the goal of family integrity, it does so only by providing parents with opportunities to align their children’s status with their own.”³³

The INA’s family-sponsored immigration framework allows legal permanent residents and citizens to petition for immigrant visas for certain family members.³⁴ The person having legal immigration status is the “petitioner,” and the person wishing to immigrate and who the law presumes is waiting outside the country is the principal “beneficiary.” If the principal beneficiary has a spouse or children, in some instances the spouse or children may acquire immigration status as derivatives.³⁵

The law assigns various levels of priority to the petitions, depending on both the immigration status of the sponsoring petitioner, and the familial relationship between the beneficiary and the petitioner.³⁶ Not all family relationships are recognized. U.S. citizens only can petition for their spouses, children, siblings, and parents.³⁷ The ability of legal permanent residents is restricted further. They may petition only for their spouses and unmarried children.³⁸

The petitions of U.S. citizens receive priority over those of legal permanent residents and petitions based on the parent–child and spousal relationships of traditional nuclear families are privileged over other family relationships.³⁹ Petitions filed by U.S. citizens for

³⁰ In 2008, 64.7% of all legal permanent resident flow was due to family-sponsored immigration, as compared to only 15% for employment-based, 3.8% for the diversity program, and 15% for refugee and asylee adjustment. R. Monger & N. Rytina, U.S. Dep’t of Homeland Sec., Annual Flow Report, U.S. Legal Permanent Residents: 2008 3 (2009).

³¹ Carol Sanger, *Immigration Reform and Control of the Undocumented Family*, 2 Geo. Immigr. L.J. 295, 296–97 (1988). “Families composed of aliens and citizens have received special attention as [t]he legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united.” *Id.* (quoting House Judiciary Comm., Facilitating Entry into the United States of Certain Adopted Children, and Other Relatives of United States Citizens, H.R. Rep. No. 1199, 85th Cong., 1st Sess. 7, reprinted in 1957 U.S. Code Cong. & Admin. News 2016, 2020).

³² Thronson, *supra* note 15, at 1180 (2006); see also INA § 203(a), 8 U.S.C.A. § 1153(a) (West 2008) (setting forth preference allocation for family-sponsored immigrants); INA § 201(b)(2)(A)(i), 8 U.S.C.A. § 1151(b)(2)(A)(i) (excluding “immediate relatives” of U.S. citizens from direct numerical limitations on immigrant visas); INA § 201(c), 8 U.S.C.A. § 1151(c) (setting worldwide levels of family-sponsored immigrants); INA § 203(d), 8 U.S.C.A. § 1153(d) (defining who may receive accompanying or following to join immigration visas based on a family member’s immigrant visa); INA § 240A, 8 U.S.C.A. § 1229(b) (allowing cancellation of removal for lawful permanent residents or nonpermanent residents based on, among other things, a qualifying familial relationship with a U.S. citizen or lawful permanent resident).

³³ Thronson, *supra* note 15, at 1181.

³⁴ See INA § 201(b)(2)(A)(i), 8 U.S.C.A. § 1151(b)(2)(A)(i), INA § 203(a), 8 U.S.C.A. § 1153(a).

³⁵ See INA § 203(d), 8 U.S.C.A. § 1153(d).

³⁶ See INA § 203(a), 8 U.S.C.A. § 1153(a).

³⁷ *Id.*; INA § 201(b)(2)(A)(i), 8 U.S.C.A. § 1151(b)(2)(A)(i).

³⁸ INA § 203(a), 8 U.S.C.A. § 1153(a).

³⁹ See generally Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage? Immigration Law’s Conflicted Answer*, 32 Hofstra L. Rev. 273 (2003); Linda Kelly, *Family Planning, American Style*, 52 Ala. L. Rev. 943, 955–60 (2001); Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 Am. J. Comp. L. 511, 528 (1995); Victor C. Romero, *Asians, Gay Marriage and Immigration: Family Unification at a Crossroads*, 15 Ind. Int’l & Comp. L. Rev. 337 (2005).

²⁵ D. Marianne Blair & Merle H. Weiner, *Resolving Parental Custody Disputes—A Comparative Exploration*, 39 Fam. L.Q. 247, 247 (2005).

²⁶ See J. Kremer, K. Moccio & J. Hammel, *Severing a Lifeline: The Neglect of Citizen Children in America’s Immigration Enforcement Policy 92–93* (2009) (internal citations and notes omitted) (surveying various factors state courts use to determine the best interest of the child in custody determinations), available at http://www.dorsey.com/files/upload/DorseyProBono_SeveringLifeline_web.pdf.

²⁷ Jill Elaine Hasday, *The Canon of Family Law*, 57 Stan. L. Rev. 825, 849 (2004) (internal quotation marks and footnotes omitted).

²⁸ For critiques of the best interests standard as not adequately protecting children’s rights see, e.g., Mason, *supra* note 17, 187–193; Woodhouse, *The Child as Property*, *supra* note 15; Robert Mnookin, “*The Enigma of Children’s Interests*,” in *In the Interest of Children: Advocacy, Law Reform, and Public Policy* 16–24 (1996).

²⁹ The best interests of the child appears in immigration law with respect to special immigrant juveniles, i.e., children dependent upon a juvenile court and for whom family reunification is not a viable option. Immigration & Nationality Act (INA) § 101(a)(27)(J), 8 U.S.C.A. § 1101(a)(27)(J). The concept of “best interests of the child” is so unusual in immigration law that special factual findings with regard to the child’s interest are made not in immigration proceedings but are delegated to state juvenile courts. *Id.*

their spouses and unmarried minor children are not subject to numerical limits and are immediately available.⁴⁰ Less favored relationships, such as that between a legal permanent resident parent and a child, are subject to numerical limitations which result in backlogs that can extend years.⁴¹ The relationship between adult citizens and their siblings, the recognized relationship given lowest priority by immigration law, includes backlogs in excess of twenty years.⁴²

Parent–child relationships are favored in this statutory framework, but only if the parent holds legal immigration status. In contrast to citizen and legal permanent resident parents who can petition for their children, children may never petition for their parents. In fact, U.S. citizens are permitted to petition for their parents only after they reach age twenty-one and are no longer children.⁴³

Under this framework, therefore, immigration law subordinates children's status to that of their parents. When parents are successful in navigating the immigration system, they may include their children with them or may petition later for their children to join them. But when parents' attempts to immigrate fail, the attempts of their derivative children fail with them. Children are passively advanced through the process by successful parents and are held back by unsuccessful parents.

In contrast to its treatment of parents, immigration law does not permit children with legal immigration status, such as children who are U.S. citizens based on their births in the United States, to extend family based immigration benefits to a parent or other family members. Immigration law assimilates children's status to that of their parents, but does not allow the assimilation of parents' status to that of a child.⁴⁴

Given that the same family relationship may allow an extension of immigration status if the legal status holder is the parent, not the child, this asymmetry is not a reflection of the value placed upon the parent–child relationship.⁴⁵ Yet throughout immigration law children who hold legal immigration or citizenship status simply are not permitted to extend that status to other family members in the manner that adults can. For example, a child cannot include a parent as a derivative if the child obtains legal immigration status.⁴⁶ Indeed, derivative status extends only one generation, so that young parents who otherwise would qualify as derivatives cannot even extend that immigration status to their own children.⁴⁷ While adult asylees and refugees may obtain derivative status for their spouses and children, child asylees and refugees cannot petition for derivative status for their parents.⁴⁸ Similarly, there is no statutory provision for a child granted protection from removal pursuant to the Convention Against Torture to reunify with a parent.⁴⁹

⁴⁰ See INA § 201(b), 8 U.S.C.A. § 1151(b). The immediate availability of an immigration visa should not be confused with the ability to immigrate immediately given processing times and bureaucratic delays that can be extensive.

⁴¹ For example, a lawful permanent resident parent who has petitioned for his or her Mexican child would have needed to file the petition on April 1, 2002, for a visa to be available now. U.S. Dep't of State, Visa Bulletin, Vol. IX, No. 8 (May 2009), available at http://travel.state.gov/visa/frvi/bulletin/bulletin_4454.html#.

⁴² Visas for Filipino siblings of adult U.S. citizens that were filed on July 8, 1986 are being processed now, a wait time of twenty-three years. *Id.*

⁴³ INA § 201 (b)(2)(A)(i), 8 U.S.C.A. § 1151(b)(2)(A)(i).

⁴⁴ See Thronson, *supra* note 15.

⁴⁵ See Jacqueline Bhabha, *The "Mere Fortuity" of Birth? Are Children Citizens*, 15(2) 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").

⁴⁶ INA § 203(d), 8 U.S.C.A. § 1153(d). For example, if a child immigrates on the basis of a parent–child relationship with one parent, immigration law does not then permit status to extend to this child's other parent or siblings.

⁴⁷ *Id.*

⁴⁸ See INA §§ 207(b)(3), 208(c)(2), 8 U.S.C.A. §§ 1158(b)(3), 1157(c)(2).

⁴⁹ See generally Lori A. Nessel, *Forced to Choose: Torture, Family Reunification and United States Immigration Policy*, 78 Temp. L. Rev. 897 (2005).

The marginalization of children is pervasive in immigration law as children also face barriers in other major immigration law programs that are not directly related to family. For example, children generally are ineligible under a program known as the diversity visa lottery because applicants must be high school graduates or have equivalent education or work experience.⁵⁰ And, while children are not directly prohibited from applying for employment-based immigrant visas, it is highly unlikely that they would have the requisite education or job experience to qualify.⁵¹

Similarly, U.S. immigration laws fail to recognize the best interests of the children in the context of waivers of grounds of inadmissibility and in cancellations of removal. Even if an immigration visa is available, certain grounds of inadmissibility may preclude a beneficiary from being able to immigrate to the United States.⁵² In some instances, grounds of inadmissibility may be overcome by showing hardship to adult family members, i.e., spouses and parents.⁵³ But the immigration statutes make hardship to children irrelevant.⁵⁴ Not only are the best interests of the child ignored, the child's interests are consciously excluded from the equation.

The failure to provide real consideration of children's best interests extends to immigration removal proceedings. In this context, an individual facing removal may seek cancellation of the removal based, in part, on "exceptional and extremely unusual hardship" to his or her legal permanent resident or U.S. citizen spouse, parent, or child.⁵⁵ Although children may be considered in determining cancellation of removal, the standard for relief is high and looks not to children's best interests but rather whether they would be subjected to exceptional and extremely unusual hardship.⁵⁶ To qualify for relief, parents must demonstrate hardship to children "substantially different from, or beyond that which normally be expected from the deportation of an alien with close family members here."⁵⁷

In theory, parents facing removal can argue hardship to their children in two basic ways.⁵⁸ First, they can assert that if children are left behind, separation will cause hardship.⁵⁹ But courts are unlikely to find "exceptional and extremely unusual hardship" because harm is a typical result of removal as "[d]eportation rarely occurs without personal distress and emotional hurt."⁶⁰ Moreover, separation from family members is "simply one of the 'common results of deportation or exclusion [that] are insufficient to prove extreme hardship.'"⁶¹ Second, parents can argue that if children leave with the parent, the children will face hardship in the destination country.⁶² Such hardship, however, generally is insufficient for relief simply on grounds that children will not have the same levels of education, health care and economic opportunities that they would have in the United States.⁶³

Whether children stay behind or accompany parents out of the country, the interests of the children involved are not relevant to the immigration law determination unless they rise to exceptional and difficult to prove circumstances of hardship. Family separation and "common" harm to children are an anticipated and accepted

⁵⁰ INA § 203(c)(2), 8 U.S.C.A. § 1153(c)(2).

⁵¹ See INA § 203(b), 8 U.S.C.A. § 1153(b).

⁵² INA § 212, 8 U.S.C.A. § 1182.

⁵³ INA § 212(a)(9)(B)(v), 8 U.S.C.A. § 1182(a)(9)(B)(v).

⁵⁴ *Id.*

⁵⁵ INA § 240A, 8 U.S.C.A. § 1229b.

⁵⁶ Thronson, *supra* note 15, at 1172.

⁵⁷ *Id.* (quoting *In re Monreal-Aguinaga*, 23 I & N December 56, 65 (B.I.A. 2001)).

⁵⁸ *Id.* at 1171.

⁵⁹ *Id.*

⁶⁰ *Id.* (quoting *Sullivan v. INS*, 772 F.2d 609, 611 (9th Cir. 1985)).

⁶¹ *Id.* (quoting *Jimenez v. INS*, No. 96-70169, 1997 WL 349051 at *1 (9th Cir. June 25, 1997) (unpublished decision)).

⁶² *Id.* at 1171.

⁶³ *Id.* (citing *Jimenez*, 1997 WL 349051).

part of the process. This stands in stark contrast to the principles of family unity and the best interest of the child at the center of domestic child welfare law.

Children and their interests are routinely and appropriately at the center of determinations in the child welfare context, but under immigration law children's interests are brushed aside. The parent-centered nature of family and the diminished consideration of children's interests in immigration law has profound implications for millions of children who find themselves in mixed status families. In such circumstances, immigration law hinders family unity by failing to recognize the variety of family structures in which children live and discounting children's interests.

Given the failure to recognize the variety of family structures that exists and the inability to assert children's interests, the reality in many U.S. families is that one or more family members do not share the same immigration or citizenship status. Children in immigrant families form "the fastest growing segment of the [United States] child population"⁶⁴ and if current demographic trends persist, "children of immigrants will represent at least a quarter of all U.S. children by 2010."⁶⁵ At least one child in ten in the United States lives in a mixed status family.⁶⁶

Mixed status families often include parents who lack authorization to remain in the United States. In the United States, there are currently "over 5 million children living with unauthorized parents."⁶⁷ In fact, in the 6.6 million families with a parent who is not authorized to remain in the United States, two-thirds of all children are U.S. citizens.⁶⁸ Of these "unauthorized" parents, 1.5 million have exclusively U.S. born children.⁶⁹ Added to these children of immigrants are nearly two million children in the United States who themselves lack authorization to remain in the country.⁷⁰ In comparison with younger children, adolescent children in families with unauthorized parents are more likely to be unauthorized themselves.⁷¹ Because more "younger children were born here, there are many mixed-status families in which the younger children are citizens but the older children—like their parents—are noncitizens."⁷² In sum, millions of children are directly affected by decisions regarding immigration law and policy that control the immigration fate of close family members. Children often pay a steep price for the happenstance of being born into a mixed status family.

The circumstances of Brianna and her family illustrate the price which many children in mixed status families pay because of U.S. immigration policy's failure to value family unity by not recognizing the variety of family structures in which children live and not considering the best interests of the child. Ideally, a system that valued family unity through the recognition of the variety of family structures that exist would allow both Brianna and her mother to obtain immigration status through Brianna's extended family members who are U.S. citizens.

As described above, however, the reality is quite different. Instead, this family that does not meet the U.S. immigration system's ideal of a traditional, parent-centered family⁷³ is forced to straddle international boundaries in ways that mean a forced separation at the least. For example, even though Brianna's half-brother is a U.S. citizen, because he is a child, he is unable to petition for his mother or his sister, Brianna.⁷⁴ Further, even if Brianna's half-brother were an adult and was able to petition for her, the wait for a visa could be as long as nineteen years, due to the priority level assigned sibling petitions for Mexican beneficiaries.⁷⁵ Brianna's grandmothers cannot petition for her because U.S. immigration law does not view the grandparent–grandchild relationship as valid for immigration purposes, even though in 2007, it is reported that 2,607,152 children lived with grandparents who were responsible as caregivers for them, and 4,752,751 children lived in the same household as a grandparent.⁷⁶ In this way, U.S. immigration law utterly fails to recognize real family relationships in ways that take into account the family structures in which children actually live.

Likewise, a system that recognized Brianna's interests might permit her to petition for her father or mother should she gain legal status. At the least, with legal immigration status Brianna could visit family freely on both sides of the border. Such a system would facilitate parental rights to make basic choices, such as where Brianna should live and visitations with Brianna, while taking into account Brianna's best interests.

Instead, other provisions of the INA create a situation in which members of mixed status families are forced to remain without authorization in the United States or face lengthy separations from their families. A provision of the INA generally makes inadmissible for a period of ten years individuals who have resided in the United States without authorization longer than one year.⁷⁷ Another provision in the INA also makes inadmissible immigrants who entered the United States without inspection.⁷⁸ And, as discussed above, although there are waivers of inadmissibility based on hardship to a spouse or parent, individuals may not seek a waiver based on hardship to a child.⁷⁹ Unlike domestic child welfare law, U.S. immigration law fails to recognize children's best interests by discounting "the interaction and relationship of the child with the child's parents, siblings, and other important people in the child's life," "the wishes of the child's parent[,] "the ability of one parent to allow frequent and meaningful contact with the other[,] and "potential disruption of the child's life."⁸⁰ Families routinely are forced to either live apart or risk violating U.S. immigration laws, especially when one family member has been deported. The result is a system which presents untenable choices on immigrant

⁶⁴ Valerie Leiter et al., *Challenges to Children's Independent Citizenship: Immigration, Family and the State*, 13 *Childhood* 11, 11 (2006) (citation omitted).

⁶⁵ The Urban Inst., *Children of Immigrants: Facts and Figures 1* (2006), available at http://www.urban.org/uploadedpdf/900955_children_of_immigrants.pdf.

⁶⁶ Michael Fix, et al., *The Urban Inst., The Integration of Immigrant Families in the United States 15* (2001), available at http://www.urban.org/UploadedPDF/immig_integration.pdf.

⁶⁷ *Id.* at 2.

⁶⁸ Jeffrey S. Passel, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey ii* (Pew Hispanic Ctr. 2006), available at <http://pewhispanic.org/files/reports/61.pdf>.

⁶⁹ *Id.* at 8.

⁷⁰ *Id.* at 7.

⁷¹ Randy Capps et al., *Nat'l Council of La Raza, Paying the Price: The Impact of Immigration Raids on America's Children 17* (Urban Inst. 2007), available at http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf.

⁷² The Urban Inst., *supra* note 57, at 2.

⁷³ An ideal, as noted *supra* at page 7 and at note 32, that does not exist across the board in U.S. households. Indeed only 51.7% of households in the United States in 2000, were a married-couple household. Tava Simmons & Grace O'Neill, U.S. Census Bureau, *Households & Families: Census 2000 Brief 2* (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-8.pdf>.

⁷⁴ See pp. 7–8 *supra*. Brianna's brother most likely attained citizenship through *jus soli*, that is, being born on United States soil. "*Jus Soli* is embodied in the first sentence of the fourteenth amendment to the U.S. Constitution: '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.'" Hiroshi Motomura, *We Asked for Workers but Families Came: Time, Law, and the Family in Immigration and Citizenship*, 14 *Va. J. Soc. Pol'y & L.* 103, 108 (2006).

⁷⁵ U.S. Dep't of State, *Visa Bulletin for May 2009*, Vol. IX, No. 8 (May 2009), available at http://travel.state.gov/visa/frvi/bulletin/bulletin_4454.html.

⁷⁶ U.S. Census Bureau, *2007 American Community Survey 1-Year Estimates, Grandchildren Characteristics* (2007), available at http://factfinder.census.gov/servlet/STTable?_bm=y&-qr_name=ACS_2007_1YR_G00_S1001&-geo_id=01000US&-ds_name=ACS_2007_1YR_G00_-&-lang=en&-format=&-CONTEXT=st.

⁷⁷ INA § 212(a)(9)(B), 8 U.S.C.A. § 1182(a)(9)(B).

⁷⁸ INA § 212(a)(6)(A), 8 U.S.C.A. § 1182(a)(6)(A).

⁷⁹ *Supra* pp. 9–10.

⁸⁰ See discussion *supra* p. 4–5 which sets forth the factors that domestic courts use to determine the best interest of the child.

families solely due to their immigration status. Any consideration of Brianna and her family's immigration status, then, must start with the acknowledgement that their status is predicated on an immigration system that does not recognize their right to live in the family structure of their choice and does not even consider the best interests of children.

4. Looking beyond status

If a child's status is the result of the application of a legal framework that ignores the real family context in which the child lives and disregards the child's best interests, then any view of that child that fails to look beyond immigration status implicitly adopts the values of the current immigration system. Viewing children and their families only through the prism of their immigration status creates the risk of distorting the viability of immigrant families. In Brianna's case, the district court, in determining that Brianna was not well settled in the United States because her status invalidated her ties, made assumptions about Brianna and her family that fail to look beyond issues of immigration status alone. The district court's assumptions and misapprehensions illustrate the risk of importing the values underlying immigration law into decisions affecting domestic child welfare in other contexts.

The district court determined that Brianna's lack of immigration status "is a constant danger to Brianna's well-being, threatening to undermine each and every connection to her community that she has developed in the past five years."⁸¹ Perhaps tacitly understanding that immigration law works in ways that undermine family stability, the district court assumed that Brianna's lack of lawful status provided grounds to ignore her connections to her family and community, even though "Brianna has developed significant connections to the United States."⁸²

The district court further assumed that, because of their lack of immigration status, Brianna "and her mother are subject to deportation at any time[.]" while at the same time the district court presumed that, upon her return to Mexico, Brianna "will have a full opportunity to apply to return to this country legally, should she so choose."⁸³ While Brianna and her mother lack lawful immigration status in the United States, they have developed substantial ties and equities in this country. One irony of immigration law is that it may indicate that a person should leave the United States while simultaneously creating incentives to remain through provisions that upon exit trigger additional grounds of inadmissibility and obliterate consideration of equities here.⁸⁴

Indeed, the district court's assumption that Brianna will be unable to obtain lawful status in the United States at some point in the future is unfounded. "Between individualized grants of discretionary relief and broad-scale legalization, the history of U.S. immigration law includes occasional episodes during which large groups of previously unlawful migrants were brought into the lawful fold."⁸⁵ And, many of those legalization programs have historically required a showing of continuous presence and ties in the United States for a period of years.⁸⁶

⁸¹ *Mendoza*, 525 F. Supp. 2d at 1195.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See discussion at *supra* page 14; also because inadmissibility generally only becomes an issue once an individual leaves the country and then seeks to reenter it, U.S. immigration law provides a perverse incentive for unauthorized immigrants to remain in the United States without status rather than leave the country and risk being denied admission and thereby be unable to reunite with family members in the United States. Kremer, et al., *supra* note 19, at 72–5.

⁸⁵ Hiroshi Motomura, *Immigration Outside the Law*, 108 Colum. L. Rev. 2037, 2049 (2008) (citing recent examples).

⁸⁶ See, e.g., INA § 245A, 8 U.S.C.A. § 1255a (allowing the adjustment of status of certain individuals who entered the United States prior to January 1, 1982).

Moreover, that undocumented immigrants are here without authorization does not necessarily mean that their deportation is imminent. As the Appeals court wrote: "the reality is that millions of undocumented immigrants are presently living in the United States, many of whom will remain here permanently without ever having contact with immigration authorities...and '[e]ven with occasional spikes in the enforcement of immigration laws, most unauthorized immigrants are unlikely to face removal.'"⁸⁷ The district court's failure to see Brianna and her mother as anything other than people without status, resulted in a decision that ignored Brianna's ties to her family in the United States and imported immigration law's disregard of the real family contexts in which children live.

The district court's linking Brianna's status to that of her mother's also imports the values of parent-child centered immigration law in which benefits flow only from parent to child, and not the other way around. Moreover, the district court's insertion of the status of Brianna's mother does not take into account Brianna's interests. Just as immigration law fails to take into account Brianna's best interests, the district court's approach failed to take into account her best interests, or in the terms of the Hague Convention, "the well-settled defense [which] is intended to prevent harm to the child[.]"⁸⁸ by equating Brianna to her immigration status.

The district court also devalued the parental rights of Brianna's parents which exist independently of immigration status and, as discussed above, serve as a vehicle to promote a child's best interests. The district court assumed that Brianna's father was "unable to...assert his right to shared custody of Brianna" because he "lack[ed] a visa or other authorization to enter the United States."⁸⁹ The implication is that noncitizens may not assert their parental rights in the United States, an implication which contradicts the constitutional protections given parental rights in the United States and which serves to undermine family unity.⁹⁰

By failing to move beyond status, the district court also assumed that Brianna's lack of immigration status would mean diminished future prospects for her, because she would be unable to obtain a driver's license, be limited "to low-wage work[.]" lack access to affordable health care, and unable to receive financial aid if she chose to attend college.⁹¹ The Appeals court rejected this assertion as a basis for finding that Brianna was not settled in the United States because "to the extent that Brianna's unlawful status poses real risks, such risks are most likely to be suffered (if at all) in the indefinite future."⁹² Further, many U.S. citizen children face the prospect of being unable to obtain a driver's license for a variety of reasons, being forced to work in low-wage jobs, and difficulties in attaining financing for college in the indefinite future, but that would not necessarily serve as a basis for determining that child is not well-settled in his or her community. However, by viewing Brianna and her parents solely as people without status, the district court made a decision that did not serve to promote the best interests of Brianna or her family.

In overturning the district court's decision, the Ninth Circuit Court of Appeals demonstrates how an awareness of the competing values underlying family law and immigration law can serve to better promote the well-being of immigrant children and their

⁸⁷ *Mendoza*, No. 08-55067, --- F.3d ---, slip op. at 3471–2 (quoting David Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 Hastings L.J. 453, 470–71 (2008)).

⁸⁸ *Mendoza*, 525 F. Supp. 2d at 1195.

⁸⁹ *Id.* at 1185.

⁹⁰ See, e.g., *Rico v. Rodriguez*, 120 P.3d 812, 817–19 (2005).

⁹¹ *Mendoza*, 525 F. Supp. 2d at 1195.

⁹² *Mendoza*, No. 08-55067, --- F.3d ---, slip op. at 3473 (quoting David Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 Hastings L.J. 453, 470–71 (2008)).

families. First, the Ninth Circuit rejected the district court's view that Brianna's immigration status alone determined the outcome of the case. The Court of Appeals wrote that "there is no justification in the [Hague] Convention's text or its subsequent interpretation for holding that a child is not 'settled'... simply because he is not lawfully present in the country."⁹³ Second, the Ninth Circuit explicitly rejected the district court's reasoning that Brianna and her mother's lack of immigration status defeated Brianna's other interests and ties in the United States.⁹⁴ Finally, the Ninth Circuit recognized that the district court misapprehended the tenuousness of Brianna's residency in the United States and repudiated the district court's finding that Brianna was not settled due to the threat of imminent removal. The Ninth Circuit noted "[i]n the ordinary case, then, a child such as Brianna is at minimal risk of removal, as is her mother."⁹⁵

5. Conclusion

Because the U.S. immigration system overrides the principle of family unity by ignoring the real family structures in which children live and systemically devaluing the well-being of children, viewing immigrant children and their families through the lens of their immigration status creates misapprehensions which import immigration's family values into other contexts. For example, a parent with immigration status may attempt to use the other parent's lack of immigration status as a reason to support the latter parent's petition for sole custody, reasoning that the parent without status is at risk of imminent deportation or that the parent with status will be able to achieve immigration status for the children.⁹⁶ State child welfare advocates may seek to use parental immigration status as the basis for terminating parental rights,

arguing that the parents' status will result in instability for the child.⁹⁷ Child welfare policy makers may seek to insert language into statutes that presume a child's best interests are served by remaining in the United States or with a parent who has immigration or citizenship status.⁹⁸ Such assumptions run the risk of harming children rather than helping them. Across the spectrum of ways in which courts or policy makers take action in children's lives, an exploration of those assumptions provides fresh insights regarding the appropriate parameters for the consideration of immigration issues in other contexts.

Children's interests change, as does the world in which they live. When immigration issues are involved in or impacted by courts, states, or policy makers, however, consequences can be profound and lasting. Understanding the ways in which immigration and nationality law devalue children's best interests and fail to recognize all family structures, gives further reason to exhibit caution in mixing immigration and child welfare policy. As demonstrated, immigration law has real impact on families, yet it does so in a manner that does not take existing family contexts and children's interests into account. When creating policy or making decisions that impact immigrant children and their families, it is vitally important that decisionmakers divorce themselves from their own assumptions and misapprehensions about immigration and look beyond status, if they wish to serve the interests of immigrant children and their families.

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⁹³ *Mendoza*, No. 08-55067, --- F.3d ---, slip op. at 3469.

⁹⁴ *Id.* at 3471 ("a child such as Brianna who has five years of stable residence in the United States coupled with academic and interpersonal success here, may be 'settled' within the meaning of [the Hague Convention], despite her unlawful status."); see also *id.* at 3473–74 (discussing Brianna's significant ties to the United States).

⁹⁵ *Id.* at 3472.

⁹⁶ See, e.g., *Rodriguez v. Rico*, No. D-303041 at 2 (Nev. Eighth Jud. Dist. Ct. Fam div. filed November 6, 2003) (copy on file with authors). In *Rodriguez*, despite the father having had no contact with the children for seven years, the court determined that the best interests of the children were served by transferring custody to the out-of-state father because the father had legal permanent residence and "can lawfully immigrate [sic] both minor children and obtain the status of a United States citizen on their behalf." *Id.*

⁹⁷ See Ginger Thompson, *After Losing Freedom, Some Immigrants Face Loss of Custody of Their Children*, N.Y. Times, April 23, 2009, at A15 (discussing one case in which the court terminated parental rights because the parent's "lifestyle, that of smuggling herself into the country illegally and committing crimes in this country, is not a lifestyle that can provide stability for a child... A child cannot be educated in this way, always in hiding or on the run."); see also *In re Margarita T.*, No. A-95-53, 1995 Neb. App. LEXIS 397, at *15 (Neb. Ct. App. Dec. Dec. 19, 1995) (while denying that the father's immigration status was a "fault" leading to termination of the father's parental rights, the court stated that the father's "status as an illegal immigrant [means that] his future presence to provide any supervision of the care of Margarita can be measured only one day at a time, as he is here only so long as he can avoid deportation.").

⁹⁸ See, e.g., Uniform Child Abduction Prevention Act § 7(a)(9)–(10) (2006):

(a) in determining whether there is a credible risk of abduction of a child, the court shall consider any evidence that the petitioner or respondent: (9) is undergoing a change in immigration or citizenship status that would adversely affect the respondent's ability to remain in the United States legally; (10) has had an application for United States citizenship denied[.]