Who's Bringing the Children?: Expanding the Family Exemption for Child Smuggling Offenses

Rebecca M. Abel
UCLA School of Law

Follow this and additional works at: http://repository.law.umich.edu/mlr_fi

Part of the Immigration Law Commons, Juvenile Law Commons, and the Legislation Commons

Recommended Citation
Available at: http://repository.law.umich.edu/mlr_fi/vol110/iss1/4
WHO’S BRINGING THE CHILDREN?:
EXPANDING THE FAMILY EXEMPTION
FOR CHILD SMUGGLING OFFENSES

Rebecca M. Abel*

I. INTRODUCTION AND STATUTORY FRAMEWORK

Under immigration law, an alien smuggling offense takes place when one knowingly encourages, induces, assists, abets, or aids an alien to enter or to try to enter the United States.\(^1\) Committing this offense is cause for either removal\(^2\) or inadmissibility\(^3\) charges under the Immigration and Nationality Act (“INA”). In addition, a federal criminal conviction for alien smuggling under INA section 274(a)(1)(A) or 274(a)(2) classifies the immigrant as an aggravated felon,\(^4\) leading to near certain deportation.\(^5\)

Although the INA levies harsh penalties against smugglers, the practice has not showed any signs of slowing. In 2010, the United States Border Patrol apprehended 463,382 individuals smuggled across the border, including 8,905 smugglers.\(^6\) Of the smugglers, 3,027 were deemed deportable under the INA.\(^7\) The types of smugglers who are seized vary “from self-smugglers [that is, migrants illegally crossing the border on their own] . . . , to local-level individual smuggling entrepreneurs [family-based smugglers] . . . , to highly organized and sophisticated transnational smuggling networks . . . .”\(^8\)

Despite the severe penalties imposed on most categories of smugglers, a small refuge exists for some family-based smugglers. All three of the major INA sections punishing alien smuggling include either a discretionary waiver or an outright exception for a smuggler who is the spouse, child, or parent

---

* J.D. Candidate, May 2012, UCLA School of Law.


2. INA § 237(a)(1)(E).

3. INA § 212(a)(6)(e).

4. INA § 101(a)(43)(N). Conviction of any crime described in INA § 101(a)(43) will result in an immigrant’s classification as an aggravated felon. The immigration consequences of an aggravated felony conviction are numerous and include mandatory immigration detention following penal custody (INA § 236 (c)(1)(B)), permanent bar from becoming an American citizen (INA § 101(f)(8)), and deportation (INA § 237(a)(2)(A)(iii)).


7. Id.

of the smugglee. These nuclear family exemptions provide a safe haven for some immigrants; however, strictly limiting this waiver to three relationship categories fails to protect all aliens deserving of congressional exemption.

This paper argues that in order for the U.S. Congress to faithfully carry out the purposes behind these exemptions, it must expand the family exception and waivers to include all close genetic relatives when the smugglee is a minor child. Using the procedural history and legislative framework of the current exemptions, Part II defines the three primary purposes for excluding parents, spouses, and children from immigration smuggling prosecutions. Part III examines the current enforcement practices in the area of family-based alien smuggling, drawing on empirical data from recent case law, anecdotal accounts, and prosecutorial policies established by the Department of Homeland Security and United States Attorneys Offices. Finally, Part IV suggests a statutory or regulatory modification to the current exemptions that would better serve Congress’s stated goals for these statutory exclusions.

II. PROCEDURAL HISTORY AND LEGISLATIVE PURPOSES: CONGRESS’S CONCERN FOR FAMILIES, CHILDREN, AND DANGEROUS OFFENDERS

A close examination of the legislative and procedural history leading up to the enactment of the nuclear family exemptions uncovers three recurring congressional purposes. First, Congress wanted to encourage the unity of families living across borders. Second, U.S. House and Senate members were interested in protecting and supporting the needs of all children. Finally, Congress sought to restrain the Department of Homeland Security (“DHS”) and the United States Attorneys Office (“USAO”) from prosecuting small-time offenders, and instead to encourage these agencies to focus on large-scale, dangerous crimes.

While exploring the procedural history leading up to the current nuclear family exemptions, it is useful to focus specifically on the aggravated felony exception, as opposed to the two discretionary waivers. The aggravated felony exception is the only one that applies as of right, without any exercise of discretion by the Attorney General. Moreover, this exception protects against the most severe sanctions, including mandatory detention and immediate deportation. Therefore, it is likely that Congress would have been extremely deliberate in its wording of the exemption and in articulating its reasons for enactment.

The analysis begins with an examination of the plain language of INA section 101(a)(43)(N)—the statutory provision that defines alien smuggling

9. See INA § 101(a)(43)(N) (exception to aggravated felony classification); INA § 237(a)(1)(E)(iii) (discretionary waiver of deportability); INA § 212(d)(11) (discretionary waiver of inadmissibility).

10. See supra note 4.
as an aggravated felony.\footnote{11} Initially, the definition provided that “an offense . . . relating to alien smuggling[] for the purpose of commercial advantage” was an aggravated felony.\footnote{12} Two years later, the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) deleted the phrase “for the purpose of commercial advantage” and added the requirement that the smuggler receive a term of imprisonment of at least five years.\footnote{13} Shortly thereafter, Congress again amended section 101(a)(43)(N) by removing the term of imprisonment requirement and including the parent, spouse, and child exemptions.\footnote{14} Since 1996, the statutory language has remained relatively unchanged and currently states that an alien smuggler is exempt from classification as an aggravated felon if “the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien’s spouse, child, or parent (and no other individual) . . . .”\footnote{15}

The plain language of the current statute clearly supports the first purpose of family reunification, as it ignores smuggling when the offenders have a close family relationship. In regard to the second goal, the inclusion of both parent and child as two of the three exemptions expresses Congress’s special concern for minors and their need for a strong family unit. Finally, at each point in its modification, Congress sought to limit the number of offenders who could be labeled aggravated felons to only the most severe criminals: those who were paid off, jailed, or lacked a family relationship. Thus, since at least 1994, Congress expressed its intent to reserve alien smuggling prosecutions for large-scale, dangerous offenders.

This third purpose is buttressed by the legislative history, which includes a House Judiciary Committee Report stating that when alien smuggling is “carried out by so-called coyotes ([paid] smugglers) . . . or through sophisticated organized crime rings, . . . [it] increases the financial and other incentives for such trafficking to continue.”\footnote{16} Other sections of the alien smuggling statutes also support recognizing a congressional focus on for-profit smuggling rings. For example, the federal criminal statute making alien smuggling a felony assigns the harshest penalties to smugglers who commit the offense for the purpose of commercial advantage or in a manner that endangers lives.\footnote{17} Finally, the Obama Administration, applying Congress’s focus on large-scale offenders, has made it clear that its immigration

\footnotesize{\textit{Michigan Law Review First Impressions}} [Vol. 110:52]

\begin{itemize}
\item[A.11.] See \textit{INS v. Cardoza-Fonseca}, 480 U.S. 421, 432 n.12 (1987) (noting that there is a “strong presumption that Congress expresses its intent through the language it chooses”).
\item[A.15.] \textit{INA} § 101(a)(43)(N).
\item[A.17.] \textit{See} \textit{INA} § 274(a)(4) (providing for sentence increases of up to ten years for smugglers who were part of large-scale commercial smuggling enterprises).}

\end{itemize}
priority is the removal of adults convicted of “serious crimes,” and not minors or those with close family ties to the United States. In sum, the legislative history, companion statutes, and Obama Administration priorities support the conclusion from the plain language that Congress’s intent was to focus on prosecuting serious criminals, particularly those acting for financial gain or in concert with other offenders.

The legislative history also supports the congressional purposes of family reunification and child protection. INS Commissioner Doris Meissner testified before Congress on the platform that “the reunification of U.S. citizens with . . . minor children is legal immigration’s top priority.” Moreover, the Board of Immigration Appeals (“BIA”) wrote that “the legislative history . . . 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.” Throughout the historical development of immigration law, family unity and child welfare have consistently remained top priorities for Congress, particularly as they relate to alien smuggling.

Conversely, Congress’s repeated insistence on the importance of children and family could be read as being limited to the importance of one’s immediate or nuclear family, and not one’s extended family. For example, several sections of the INA, including the three relating to alien smuggling, restrict exemptions to only direct relatives. Nevertheless, since 1965 the INA has granted visa preferences to extended family members including adult brothers and sisters and their spouses and children, signaling Congress’s concern for family outside the nuclear context. Moreover, in other immigration contexts, Congress has expressed willingness to grant benefits to those who share no genetic or marital relationship and would only fit un-


19. See, e.g., Alien Smuggling: Hearing Before the Subcomm. on International Law, Immigration, and Refugees of the H. Comm. on the Judiciary, 103rd Cong. (1993) (debating changes to the alien smuggling and asylum laws following the arrival of several boats of Chinese immigrants confined in deplorable conditions, and focusing primarily on penalizing smugglers profiting from, enslaving, or mistreating smugglees).


22. See, e.g., INA § 212(h)(1)(B) (waiving ground of inadmissibility if the immigrant has a U.S. citizen or legal permanent resident spouse, parent, son or daughter who will suffer extreme hardship); INA § 237(a)(3)(C)(ii) (waiving grounds of removability if the offense was committed solely to support the immigrant’s spouse or child).

23. See INA § 203(a); see also PATRICIA STRACH, ALL IN THE FAMILY: THE PRIVATE ROOTS OF AMERICAN PUBLIC POLICY 82–88 (2007) (detailing several unsuccessful congressional attempts to eliminate nonnuclear family visa preferences, and arguing that the bills failed to gain traction, in part, because of the ill effects the changes would have on family unity).
der a much looser definition of family. For example, Congress has acquiesced to extending citizenship benefits to nonbiological children of citizen and legal permanent resident parents based on policy rationales nearly identical to those expressed here.\(^\text{24}\) If Congress is willing to extend immigration preferences to extended family members and to those with no genetic links, than it is reasonable to assume it may be willing to exempt smugglers with a wider range of relationships to their smugglees. This supposition gains additional legitimacy when examined in cases involving children, where as shown, Congress is willing to be more lenient.

III. Who’s the Target? Cases and Stories from the Border

Given the three policy rationales for crafting these exemptions and the Obama Administration’s prosecutorial priorities, it is useful to examine how these smuggling statutes are realistically enforced. Although Congress only included three exceptions for parents, children, and spouses, it is possible that DHS and USAO selectively prosecute so as to bolster the true purposes of the legislation: to punish serious offenders with no family ties to the children they smuggle. However, this has not been the case. Instead, DHS and USAO prosecute offenders, in both immigration and criminal court, who Congress may not find to be worth the federal government’s time and resources. As such, a substantive change to the statutory framework or a set of guiding regulations is necessary to ensure the executive enforcement mechanisms stay true to the letter and spirit of Congress’s law.

Initially, it is useful to detail the facts of a case that typifies the overinclusiveness identified in this paper. The Ninth Circuit case *Gonzalez v. Mukasey*\(^\text{25}\) provides a model example of the category of cases that Congress should seek to exclude from immigration prosecution.

Modesta Gonzalez entered the United States as a legal permanent resident in 2000. On October 23, 2003, Modesta’s father told her of his plan to bring two undocumented infant nephews into the United States from Mexico. He asked to use Modesta’s son’s birth certificate for one of the infants and told her it would be easier to get through inspection if the child’s “mother” was with them.\(^\text{26}\) Twice she refused. When asked a third time, she “reluctantly said yes.”\(^\text{27}\) Modesta and her father drove to Mexico. Upon their return, DHS referred their vehicle to secondary inspection, and Modesta was charged with alien smuggling and placed in removal proceedings. At the time of arrest, Modesta was a steadily employed single


\(^{25}\) *Gonzalez*, 534 F.3d 1204 (9th Cir. 2008).

\(^{26}\) *Gonzalez*, 534 F.3d at 1206.

\(^{27}\) *Id.*
mother with a five-month-old son and no criminal record. Eventually, the
Ninth Circuit held that Modesta’s actions were not an affirmative act suffi-
cient to satisfy the charge of alien smuggling under INA section
212(a)(6)(E)(i).

Nevertheless, the full-scale immigration prosecution of Modesta in 
Gonzalez v. Mukasey contravenes all three of the purposes intended by
the family waiver. First, Modesta’s trip to Mexico was expressly for the purpose
of reuniting her family by bringing two infant nephews to live near their
aunt and grandfather in the United States. In addition, the smugglees in this
case not only were children, but infants. Congress has vowed to show leni-
ency toward vulnerable children, and infancy is a tremendously vulnerable
age in which proper care and stability are essential. Lastly, Modesta had no
prior criminal convictions and showed no proclivity toward becoming a re-
peat offender. Her lack of financial gain and appropriate due care for the
children demonstrate that Modesta was not the type of hardened criminal
with which Congress is most concerned.

Modesta’s case is not an isolated incident. An empirical survey of Ninth
Circuit and BIA cases involving child smugglees and close relative smug-
glers yielded a total of seventeen similar cases. Another 124 cases
indicated a close familial relationship between the smugglee and smuggler,

28. Id.
29. Id. at 1211.
2135, 2202 (2002) (assigning responsibility for the care of unaccompanied or separated alien
children and mandating that immigration officers “ensur[e] that the interests of the child are
considered in decisions and actions relating to the care and custody of an unaccompanied alien
child”); see also Jacqueline Bhabha, “Not a Sack of Potatoes”: Moving and Removing Chil-
31. Avina-Renteria v. Holder, 434 F. App’x 626, 630 (9th Cir. 2011) (uncle/niece and
nephew); Diaz Ibarra v. Holder, 440 F. App’x 592, 593 (9th Cir. 2011) (uncle/niece); Valdivio-
nos-Corona v. Holder, 399 F. App’x 214, 215 (9th Cir. 2010) (aunt/niece); Avdalyan v. Holder,
358 F. App’x 809, 810 (9th Cir. 2009) (grandmother/grandson); Siddhu v. Ashcroft, 368 F.3d
1160, 1161 (9th Cir. 2004) (aunt/nephew); United States v. Rivas-Gonzalez, 384 F.3d 1034,
1038 (9th Cir. 2004) (first cousins); In re Rocio Lopez-Olivares, No. A076-375-446, 2010
Immig. Rptr. LEXIS 4810 (B.I.A. Dec. 23, 2010) (aunt/niece and nephew); In re Jose Felipe
Montalvo, No. A079-555-057, 2010 Immig. Rptr. LEXIS 4952 (B.I.A. Nov. 4, 2010) (fa-
ther/stepchildren); In re Alfonso Ramirez Herrera, No. A078-119-847, 2010 Immig. Rptr.
LEXIS 5193 (B.I.A. July 16, 2010) (aunt/niece and nephew); In re Olegario Amezquita, No.
A099-146-137, 2010 Immig. Rptr. LEXIS 3016 (B.I.A. Mar. 4, 2010) (father/stepson); In re
Maria Guadalupe Rojas-De Gallardo, No. A047-253-142, 2009 Immig. Rptr. LEXIS 5504
A090-023-370, 2006 Immig. Rptr. LEXIS 6191 (B.I.A. Sept. 18, 2006) (uncle/niece and
nephew); In re Damalis Rosalina Perez Suriel De Batista, No. A045-874-185, 2006 Immig.
Rptr. LEXIS 652 (B.I.A. July 12, 2006) (uncle/nephew); In re Knauhtl Gutierrez-Hernandez,
No. A075-606-126, 2006 Immig. Rptr. LEXIS 12201 (B.I.A. May 31, 2006) (uncle/niece and
nephew); In re Adalberto Delgado, No. A073-824-186, 2006 Immig. Rptr. LEXIS 7929
but the facts of the cases did not indicate the age of the smugglee. It is likely that a portion of these cases involved a minor smugglee who would also be exempted under the proposed statutory or regulatory changes. In addition, it is reasonable to conclude that if the search were expanded to include all federal courts of appeals, the number of similar immigration cases would dramatically increase, perhaps particularly in Circuits bordering Mexico.

All seventeen of these cases met the three congressional purposes outlined above. In each, there were no more than three children being smuggled; where there were two or more children smuggled, the children were siblings. As such, the scale of the offenses was small and the smuggling incidents served to preserve family unity. Moreover, in no instance was any money exchanged as payment for the smuggling services, further indicating the secure nature of the relocation and the improbability of a malicious motive or intent to harm the smugglee.

Anecdotal accounts from U.S. Attorneys confirm the frequency with which these cases are brought and fully prosecuted in federal criminal courts. Serra Tsethlikal, a U.S. Attorney in Tucson, Arizona, described the office’s zero-tolerance policy established in 2003 to combat child smuggling along the border. The 2003 policy superseded the prior practice of releasing the smugglers and returning the children to Mexico. Within four years of implementation, federal attorneys in Arizona prosecuted more than 140 child smuggling cases and sought mandatory prison sentences in every case. Paul Charlton, another U.S. Attorney for the District of Arizona, described that “most of the suspects arrested on charges of smuggling children . . . along this part of the border have been women with no criminal records.” He characterized these women as “small-time operators.” The experiences of federal prosecutors echo the frequency of cases involving related children smugglees and should encourage Congress to consider the harsh unintended consequences on families and children of incomprehensive statutory exemptions.

DHS and USAO policy directives confirm these anecdotal accounts, signaling a systemwide failure to heed Congress’s intent and the Obama

32. See, e.g., Rodriguez v. Holder, 401 F. App’x 212, 213 (9th Cir. 2010) (brother); Milicich v. Holder, 402 F. App’x 321, 322 (9th Cir. 2010) (niece); Blanco v. Holder, 386 F. App’x 734, 734 (9th Cir. 2010) (sister).


34. Id.

35. Id. (The Tucson U.S. Attorneys Office also “pushed to strip smugglers with green cards of their legal status and deport them.”).


37. Id.
Administration’s priorities. Since the early 2000s, many districts throughout the Southwest have implemented zero-tolerance policies. Cumulatively known as “Operation Streamline,” this program mandates full immigration and criminal prosecution for all undocumented border crossers regardless of age, relationship, or circumstance. “The program channels law enforcement funding and attention toward the apprehension and prosecution of low-level offenders[, such as family-based smugglers], rather than focusing on the crimes that create border violence . . . .” Stripping prosecutorial discretion from individual Border Patrol Agents and U.S. Attorneys who may be more attentive to Congress’s purposes, Operation Streamline ignores congressional intent by diverting resources away from violent crimes along the border and ignoring the powerful ties between families and children.

IV. Recommendations, Counterarguments, and Conclusions

The procedural and legislative history of U.S. immigration law regulating alien smuggling offenses make it clear that, by way of its exemptions of parents, children, and spouses, Congress intended to preserve family unity, support the well-being of children, and focus prosecution resources on the most dangerous, recidivist, and profiteering criminals. However, Congress’s current statutory scheme fails to satisfy these purposes. Instead, the three permissible exemptions are overinclusive, punishing more offenders than necessary to serve Congress’s stated goals. In fact, this overinclusiveness undermines Congress’s stated intent by tearing families apart and putting children at risk while wasting valuable border patrol, attorney, and court resources on small-time offenders.

It is the recommendation of this paper that Congress expand the nuclear family exemptions to include all close genetic family smugglers when the smugglee is a related minor child. It is within Congress’s discretion to decide which categories of family members should receive exemptions. Based on the prevalent smuggler-smugglee relationships appearing in the case law,

---


39. Id.

40. Id. at 8.

41. See id. at 8–9 (cataloging accounts of U.S. Attorneys “lament[ing] their inability to aggressively prosecute the criminal organizations” responsible for serious crimes along the border due to their high caseload of minor immigration offenses). Signaling that, absent Operation Streamline, U.S. Attorneys may be more attentive to Congress’s goal of focusing on large-scale, violent crimes.

42. See id. at 3 (“Most Operation Streamline defendants are migrants from Mexico or Central America who have no prior criminal convictions and who have attempted to cross the border . . . to reunite with family in the United States.”).

43. Cf. id. at 12 (estimating that one implementing district spends $54.5 million per year to detain and represent Operation Streamline defendants).
some suggestions include grandparents, aunts, uncles, stepparents, siblings, and first cousins. If, however, changes to statutory language are not politically possible due to the hostile immigration climate in the current U.S. House and Senate, the Obama Administration could forge a compromise by requesting that DHS issue guiding regulations on this issue. The regulations could include a set of priorities for Border Patrol Agents to follow when deciding whether or not to detain an alien for a smuggling offense. Under this model, the relative smugglers and child smugglees would receive the lowest degree of Border Patrol vigilance.

This expansion would further the goal of family unification by helping families build stronger connections to each other and to the United States with less incentive to return to their home country. Moreover, this change in legislation would further Congress’s commitment to protecting children from parental separation and inadequate supervision. Distant relatives often raise children who are left behind in their home country, and children left with neighbors or friends may end up on the streets or tempted by gangs. This extension would also ensure more time and resources are available to spend on finding and prosecuting smuggling cases involving financial gain, harm to the smugglee, or conspiracy.

Skeptics of this plan may argue that if more smugglers escape punishment through exemptions, then immigration laws pertaining to smuggling would no longer be effective deterents and the rate of human smuggling would increase. In practice, however, our current narrow family exceptions to alien smuggling, which allow very few to earn an exemption, are ineffective deterents to smugglers. The current narrow exemptions have produced years of steady increases in smuggling, with more than 8,000 smugglers detained in 2010. Therefore, it is unlikely a slightly more inclusive list of exceptions will affect the statutes’ deterrence or have any appreciable impact on smuggling rates.

Aside from a functionalist deterrence argument, dissenters may argue that the limited exceptions for parents, children, and spouses should not be expanded because these exceptions make up the core of the nuclear family unit that should be preserved. Moreover, an adult who leaves his native land


47. See supra note 6 and accompanying text; see also Lydgate, supra note 38, at 2 n.8 (“Alien smuggling prosecutions under [INA § 274(a)] in the border district courts went from 2208 cases in 2002 to 3900 cases in 2008.”); Amanda E. Schreyer, Human Smuggling Across the U.S.-Mexico Border: U.S. Laws Are Not Stopping It, 39 SUFFOLK U. L. REV. 795, 796 (2006) (citing a dramatic increase in alien smuggling from 1997 to 2003).
“makes a decision to be separated from brothers and sisters, parents, and adult children,” and he or she must live with that choice. However, these policy arguments fail to consider the diversity of family types that immigrants bring from other countries and cultures. By preserving only the traditional conception of a nuclear family, the immigration laws propagate a narrow understanding of family that ignores the diversity and multiculturalism our nation has historically embraced. In addition, the opposition asserts that immigrants choose separation. This argument overlooks the fact that the consequences of this choice do not fall on the immigrant, but instead are borne by the children left at home who must grow up without the benefit of a close family network. By declaring that immigrants choose to separate from their families, dissenters contradict two of the key rationales behind the family exemption: the protection of vulnerable children and the unification of families.

By adopting these statutory or regulatory changes, Congress and the executive branch would remind the world that the protection of children and the reunification of immigrant families “serves the national interest not only through the humaneness of the policy itself, but also through the promotion of the public order and well-being of the nation.”


49. See Moore v. City of E. Cleveland, 431 U.S. 494, 504 (1977) (“Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.”).