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LEFT BEHIND: THE DYING PRINCIPLE OF FAMILY REUNIFICATION UNDER IMMIGRATION LAW

Anita Ortiz Maddali*

A key underpinning of modern U.S. immigration law is family reunification, but in practice it can privilege certain families and certain members within families. Drawing on legislative history, this Article examines the origins and objectives of the principle of family reunification in immigration law and relies on legal scholarship and sociological and anthropological research to reveal how contemporary immigration law and policy has diluted the principle for many families—particularly those who do not fit the dominant nuclear family model, those classified as unskilled, and families from oversubscribed countries—and members within families. It explores the ways in which women and children, integral members of a family, are often placed in dependent roles. From this perspective, it suggests that the much-discussed increase of unaccompanied minors and women with children crossing the Southern border has been exacerbated by immigration laws, enforcement, and policy which have confined them to dependent roles, directly affecting family integrity. The failure of immigration law and policy to recognize the social agency of women and children can fracture family integrity when a woman, particularly one who is classified as “unskilled,” or a child heads the migration for a family unit.

INTRODUCTION

The increase in the number of unaccompanied minors and women with children crossing the U.S.–Mexico border highlights the social agency¹ of women and children in the migration process and the ways in which immigration law and policy fail to recognize this agency. This policy undermines family integrity. In fiscal year 2014 over 68,000 children crossed the U.S.–Mexico border on their

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1. “Social agency’ . . . refers to the actions and choices that individuals . . . often make of their own free will. Shaped by upbringing, cultural beliefs and norms, and social status, among other factors, social agency may be conscious, intentional actions or unconscious, involuntary behaviors.” LAUREN HEIDBRINK, *MIGRANT YOUTH, TRANSNATIONAL FAMILIES AND THE STATE* 16 (2014).

own.² Between 2009 and 2012 approximately 20,000 unaccompanied children crossed each year.³ The number of unaccompanied child crossings doubled from 2013 to 2014. In 2014, over 68,000 “family units”⁴ were apprehended at the border compared to 14,855 the prior year.⁵ “Family unit” apprehensions consist primarily of mothers with children,⁶ including some pregnant women.⁷ After 2014 the number decreased, but in August 2015 there were 10,000 border crossings by unaccompanied minors and adults with children. This represented a fifty-two percent increase from the previous year, during a time of the year when border crossings normally decline.⁸

The reasons for the dramatic rise in the number of children—and mothers with children—coming to the United States are multifaceted. Increased violence in the Central American region and a

2. Jerry Markon, *Influx of Unaccompanied Immigrant Children Slowed Again in September*, WASHINGTON POST (Oct. 9, 2014), <https://www.washingtonpost.com/news/federal-eye/wp/2014/10/09/influx-of-unaccompanied-immigrant-children-slowed-again-in-september/>.

3. Ian Gordon, *70,000 Kids Will Show Up Alone at Our Border This Year. What Happens to Them?*, MOTHER JONES (July/Aug. 2014), <http://www.motherjones.com/politics/2014/06/child-migrants-surge-unaccompanied-central-america>.

4. *Programmatic Environmental Assessment for Actions to Address an Increased Influx of Unaccompanied Alien Children and Family Units Across the Southwest Border of the United States*, DEP'T OF HOMELAND SEC. 2 (Aug. 2014), https://www.dhs.gov/sites/default/files/publications/PEA_UAC%26FamUnits_20140812.pdf (defining family unit as “a group of detainees that includes one or more non-United States citizen juvenile(s) accompanied by his/her/their parent(s) or legal guardian(s)”).

5. *Southwest Border Unaccompanied Alien Children FY 2014*, U.S. CUSTOMS AND BORDER PROTECTION, <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2014> (last visited Sept. 22, 2016).

6. See Josh Siegel, *What's Driving the Latest Surge of Illegal Immigration from Central America*, THE DAILY SIGNAL (Dec. 29, 2015), <http://dailysignal.com/2015/12/29/whats-driving-the-latest-surge-of-illegal-immigration-from-central-america/>; Marc R. Rosenblum, *Top 10 of 2014—Issue #5: New Era in Immigration Enforcement at the U.S. Southwest Border*, MIGRATION POLICY INST.: MIGRATION INFORMATION SOURCE (Dec. 16, 2014), <http://www.migrationpolicy.org/article/top-10-2014-issue-5-new-era-immigration-enforcement-us-southwest-border> (describing the increase of family unit apprehensions in 2014 consisting mostly of women with children); Hannah Rappleye & Lisa Riordan Seville, *Flood of Immigrant Families at Border Revives Dormant Detention Program*, NBC NEWS (July 25, 2014, 6:17 AM) <http://www.nbcnews.com/storyline/immigration-border-crisis/flood-immigrant-families-border-revives-dormant-detention-program-n164461> (noting that mostly women and children were detained in family detention facilities after being apprehended at the border).

7. See Rick Jervis, *Immigrant Moms Crossing Texas Border at Alarming Rate*, USA TODAY (July 5, 2014, 2:03 PM), <http://www.usatoday.com/story/news/nation/2014/07/05/immigrant-moms-border-texas/12207667/>.

8. *U.S. Border Arrests of Children, Families Surge 52 percent in August*, WALL STREET JOURNAL (Sept. 21, 2015, 9:20 PM), <http://www.wsj.com/articles/u-s-border-arrests-of-children-families-surge-52-in-august-1442884799>.

lack of economic opportunities are both push factors leading to migration.⁹ Some have speculated that certain recent executive actions¹⁰ issued by the President motivated children to make the journey, presumably believing that immigration policy toward children had become more lenient.¹¹

Another factor, and one less fully explored, is family reunification.¹² Migration patterns and immigration laws have shaped and reshaped family composition and have resulted in the prevalence of transnational families in the United States—family members who are separated by borders. Historically, the typical pattern, particularly for Mexicans,¹³ had been for a male head of household to come to the United States while his wife and children remained in their country of origin.¹⁴ The wife and child might be brought to the United States at a later date as dependents on his visa, or a migrant worker might make return trips home.¹⁵ As this Article will

9. William A. Kandel, Peter Meyer, Clare Ribando Seelke, Maureen Taft-Morales & Ruth Ellen Wasem, *Unaccompanied Alien Children: Potential Factors Contributing to Recent Immigration*, CONGRESSIONAL RES. SERV. 3–9 (July 3, 2014), <https://fas.org/sgp/crs/homesec/R43628.pdf>; see generally Gordon, *supra* note 3.

10. These Executive Orders included DACA, the expansion of DACA, and allowing parents of U.S. citizens and lawful permanent residents (LPRs) to apply for deferred action and employment authorization for three years. For more information about the Executive Orders, see *Executive Actions on Immigration*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. (last updated Apr. 15, 2015), <https://www.uscis.gov/immigrationaction>.

11. *But cf.* Dan Restrepo & Ann Garcia, *The Surge of Unaccompanied Children from Central America: Root Causes and Policy Solutions*, CTR. FOR AM. PROGRESS (July 24, 2014), <https://www.americanprogress.org/issues/immigration/report/2014/07/24/94396/the-surge-of-unaccompanied-children-from-central-america-root-causes-and-policy-solutions/> (noting that the recent surge is the result of organized crime and poverty, not due to the administration's immigration policies).

12. Rosenblum, *supra* note 6, at 14–16; see generally *Why So Many Migrant Children are Braving the Journey Across the U.S. Border Alone*, PBS NEWSHOUR (June 20, 2014, 6:19 PM), <http://www.pbs.org/newshour/bb/many-migrant-children-braving-journey-across-u-s-border-alone/>.

13. See Katharine M. Donato, *U.S. Migration from Latin America: Gendered Patterns and Shifts*, 630 ANNALS OF THE AM. ACAD. POL. & SOC. SCI. 78, 82 (2010) (noting that this is not necessarily the case for the Dominican Republic, where migration is female-led and more likely to be documented. After the assassination of President Trujillo, the U.S. embassy provided immigrant visas to leftist students and because of fewer traditional patriarchal norms in the Dominican Republic, it led to greater out-migration of women).

14. Katharine M. Donato & Blake Sisk, *Children's Migration to the United States from Mexico and Central America: Evidence from the Mexican and Latin American Migration Projects*, 3 J. ON MIGRATION & HUM. SEC. 1, 61 (2015); see also Suzanne M. Sinke, *Gender and Immigration*, in A COMPANION TO AMERICAN IMMIGRATION 301 (Reed Ueda ed., 2011) (describing the Bracero program, which brought Mexican laborers into the U.S.—all men—which “supported a male tradition in Mexico of traveling off for a job, leaving behind women. Because the jobs were for men, the networks that formed also linked primarily to male employment”).

15. See Donato, *supra* note 13, at 81 (explaining that when Mexican women migrated, it was to join their spouses legally, years after the husband had migrated to the United States); see also Douglas Massey, *How a 1965 Immigration Reform Created Illegal Migration*, WASHINGTON POST (Sept. 25, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/09/25/>

show, increased visa backlogs for oversubscribed countries, intensified security at the border, harsher penalties for immigration violations that result in lengthy time bars, and social and economic changes within sending countries have disrupted this pattern. These factors have not only lengthened the time that families remain separated, but have also led to shifts in migration patterns.

One shift is that women and children frequently lead migration for a family unit, which may not consist of a male head of household. This pattern, however, conflicts with the ways in which immigration laws function and the cultural norms of many sending countries, both of which tend to assume that women will be dependent on a male relative, and immigration laws which generally require children's dependence on an adult. For "unskilled" female workers and for children, albeit in different ways and for different reasons, immigration laws fail to recognize their social agency, making lawful migration on their own more difficult and complicated. Children are explicitly precluded from sponsoring a family member for an immigration benefit until the age of 21.¹⁶ While women are not explicitly denied privileges under the law, the operation of the law has resulted in women predominantly deriving immigration benefits through a male relative. As such, women and children are more often confined to roles of dependency, or to roles of protection from abuse that, while important, still create another type of dependency, both on the system and on the prerequisite of specific types of harm to gain an immigration benefit.

Despite the lack of recognition, women and children assume social agency—often outside of the law and frequently in contravention of cultural norms. This agency is, more often than not, exercised within a family structure where the decision to migrate is a collective one.¹⁷ Lawful and unlawful migration to the

[how-a-1965-immigration-reform-created-illegal-immigration/?utm_term=.C5ea8b2aa89b](#) (describing restrictions placed on the Western Hemisphere by the 1965 reforms and increased border enforcement, which made it more difficult for migrants to make return trips to Mexico).

16. Immigration and Nationality Act, 8 U.S.C. § 1151(b)(2)(A) (2012). The only exception is for T and U visas. Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(U)(ii)(I), (T)(ii)(I).

17. See LEISY J. ABREGO, SACRIFICING FAMILIES: NAVIGATING LAWS, LABOR AND LOVE ACROSS BORDERS 18 (2014).

"El Salvador has the highest rate of female-headed households in Central America (thirty-one percent), suggesting that getting women pregnant is a more important source for establishing masculinity than hands-on parenting. Many men, driven by economic opportunities and gender norms, are more likely to move around and become absent fathers, leaving women to be heads of households. It is not surprising, then, that when service jobs targeting women with little formal education—such as domestic work, garment work, and hotel housekeeping—began to rise in the United

United States is often a family decision and is frequently undertaken for the purpose of family reunification—a principle embedded in our immigration laws.

The principle of family reunification, however, is limited. It places hierarchies of importance on certain family relationships at the expense of others, excludes certain family structures, and marginalizes family members by, for example, placing women and children, whether explicitly or in practice, into roles of dependency. This affects family integrity.

The principle of family reunification espoused in our contemporary immigration system can be traced to the Emergency Quota Act of 1921, later expanded by the McCarran–Walter Act of 1952 and the Hart–Celler Act of 1965.¹⁸ Testimony during the enactment of the Hart–Celler Act acknowledged that the national origins quota system, the system in place since 1924, had resulted in long and sometimes permanent separations of family members, from Southern and Eastern Europe who had been purposefully discriminated against under the system.¹⁹ “There is urgency first of all in terms of simple humanity. Under present law, we are forcing families to be

States, Salvadoran women’s history of working in the paid labor force set the stage for the massive international migration of women.”;

See also HEIDBRINK, *supra* note 1, at 16 (“From my research with child migrants and their families, it is clear that the decision to migrate is often a collective one.”).

18. See Emergency Quota Act of 1921, Pub. L. No. 67-5, § 2(d), 42 Stat. 5 (1921) (giving preference to wives, parents, brothers, sisters, children under eighteen, and fiancées of U.S. citizens and lawful permanent residents present in the United States); McCarran–Walter Act, Pub. L. No. 82-414, § 205, 66 Stat. 163 (1952) (providing for nonquota status for spouses and children of U.S. citizens and giving preference under the quota system for parents of U.S. citizens, spouses and children of lawful permanent residents, and brothers, sisters, sons and daughters of U.S. citizens); Hart–Celler Act, Pub. L. No. 89-236, §§ 201(b), 203, 79 Stat. 911 (1965) (providing that immediate relatives are not subject to numerical limitations and children, spouses and parents of U.S. citizens fall under the “immediate relative” category. Further, the Act gave preference for the following family relationships that were subject to numerical limitation: unmarried sons and daughters of U.S. citizens, spouses, unmarried sons or daughters, and parents of lawful permanent residents, married sons or daughters of U.S. citizens, and brothers or sisters of U.S. citizens).

19. See *Immigration and Nationality Act: Hearing on H.R. 7919 before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 88th Cong. 208 (1964) [hereinafter *H.R. Subcomm. Hearings*] (testimony of Rep. Harold Ryan) (“In addition to many other nationalities, I have thousands of people of Polish and Italian descent in my district, and a good sampling of Ukrainians, Greeks, Lebanese, and other persons of southern European and Asiatic ancestry. Many of them have relatives or loved ones overseas who have been waiting for years to come over to this country. . . . It is unfair—it is unjust—it is pure discrimination for us to stamp a ‘second best’ rating on any individual because of his birthplace.”); see also *id.* at 265–66 (testimony of Representative William Barrett) (“It is perhaps unnecessary for me to reiterate the well-known fact that the national origins quota system which has been in effect for 40 years is based upon an infamous lie—that aliens coming from Northern and Western Europe are better than people coming to this country from Southern and Eastern Europe. Without engaging in recrimination, it should be recalled that the system was founded on the belief, for

separated—indeed, in some cases, forcing mothers to choose between America and their children.”²⁰ This forced separation kept families apart for years.

While these changes did prioritize family integrity, they were predicated upon assumptions that privileged certain types of families. First, Congress prioritized the dominant nuclear family, one that consisted of a married man and woman, with women and children presumed to be dependents of the principal male immigrant. As identified by Professors Olivia Salcido and Cecilia Menjivar in *Gendered Paths to Legal Citizenship: The Case of Latin-American Immigrants in Phoenix, Arizona*, “[I]n legislation, heteropatriarchy, or heterosexuality and patriarchy, [were] made to seem part of the natural order and to intersect.”²¹ Second, Congress privileged highly-skilled workers, who were assumed to be male, and their families.²² Labor seemed to be a stand-in for family, with the

example that Englishmen and Germans were better than Italians. This outrageous and untrue theory, and proven to be such by facts, history, and science, is a black mark on the fair face of the United States in the eyes of the world . . . We must enact statutes which permit families in this country to be united.”)

20. *Immigration and Nationality Act: Hearing on S. 500 before the Subcomm. on Immigration and Naturalization of the S. Comm. on the Judiciary*, 89th Cong. 8 (1965) [hereinafter *Senate Subcomm. Hearings*].

21. Olivia Salcido & Cecilia Menjivar, *Gendered Paths to Legal Citizenship: The Case of Latin-American Immigrants in Phoenix, Arizona*, 46 L. & Soc’y Rev. 335, 349–50 (2012).

22. See *H.R. Subcomm. Hearings*, *supra* note 19, at 430 (Testimony of Robert F. Kennedy, Att’y Gen. of the United States) (providing that the administration’s proposal would focus on two categories: highly-skilled workers and reuniting families. With regard to the first, he noted, “They will be skilled people who will contribute to the economy of the United States, scientists, engineers, people with special skills which will be particularly valuable, which will help the economy of this country, which will give more jobs in this county because they have these skills.”); *Senate Subcomm. Hearings*, *supra* note 20, at 20 (Statement of Nicholas Katzenbach, Att’y Gen. of the United States) (asking one senator, “Do you think, Senator, that a maid from Ireland really will contribute more to the United States than a trained doctor from an Asian country?”); *id.* at 28–29 (questioning Attorney General Katzenbach’s argument that the country needed to focus on admitting highly skilled immigrants, Senator Ervin stated, “But if we had always said we would have only highly skilled people in the United States, no one could come here, because none would qualify.” The Attorney General responded, “There was a different economy than there is today.” Later, Senator Ervin stated, “Instead of taking those we talk about when we get oratorical, the tired and the poor and the despised, we take the brilliant.”); *H.R. Subcomm. Hearings*, *supra* note 19, at 417 (Statement of Robert F. Kennedy, Att’y Gen. of the United States); *id.* at 389 (Testimony of Dean Rusk, Sec’y of State) (“Present-day immigration is very different in volume and makeup from the older migration on which most of our thinking is still based; and its significance for this country is considerably different. Immigration now comes in limited volume and includes a relatively high proportion of older people, females, and persons of high skill and training.”). *Senate Subcomm. Hearings*, *supra* note 20, at 14 (Statement of Katzenbach, Att’y Gen. of the United States) (explaining, “[o]f this total, all would be consumers but only about a third would be workers. The rest would be wives, children, and elderly parents. Since the ratio of consumers to workers is somewhat higher than our present ratio, the net effect would be to create rather than absorb jobs.”).

assumption that the male head of household would be the laborer and women and children would not. The privileging embedded in these reforms no longer reflects the modern family (perhaps it never did) and is unresponsive to the needs of those families.

Though the eradication of the national origins quota system made it easier for Southern and Eastern European immigrants to bring over family members, Congress also placed a cap on migration from the Western Hemisphere, which had not previously existed and resulted in greater restrictions on the migration of individuals and their families closest to the U.S. border. The year before, in 1964, Congress eliminated the Bracero program, which had brought in 450,000 temporary laborers annually from Mexico.²³ The combination of the eradication of the Bracero program and the ceiling imposed on migration from the Western Hemisphere significantly reduced legal avenues for migration from the Western Hemisphere.

Today, increasingly harsh legislation and policies have left non-privileged families,²⁴ and non-privileged members within families, in the hands of immigration enforcement and have forced families to seek reunification outside of lawful migration. This does not simply affect undocumented persons. Because of the growth of mixed status households—members within a family who have different immigration statuses—it impacts U.S. citizens as well. For example, in 2013, 72,410 persons removed reported that they had at least one U.S.-born child.²⁵ Defending removal, Secretary of Homeland Security Jeh Johnson declared, “[I]f you come here illegally, we will send you back consistent with our laws and our values.”²⁶ Yet, family

23. Douglas S. Massey and Fernando Riosmena, *Undocumented Migration from Latin America in an Era of Rising U.S. Enforcement*, 630 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 295 (2010).

24. In using the term “privilege,” I mean those families who are benefited by immigration laws. Immigration laws, through numerical limitations, family-based and employment-based categories, and grounds of exclusion, place hierarchies around who may be lawfully admitted. These hierarchies represent a value system of what type of immigrants the United States seeks to admit and those who it does not.

25. Elise Foley, *Deportation Separated Thousands of U.S.-Born Children from Parents in 2013*, HUFFINGTON POST (June 25, 2014, 9:22 PM), http://www.huffingtonpost.com/2014/06/25/parents-deportation_n_5531552.html.

26. *Statement of Secretary Jeh C. Johnson on Southwest Border Security*, DEP’T OF HOMELAND SEC. (Jan. 4, 2016), <http://www.dhs.gov/news/2016/01/04/statement-secretary-jeh-c-johnson-southwest-border-security>; see also *Senate Subcomm. Hearings*, *supra* note 20, at 251 (Testimony [of Seymore Halpern, Senator] (“A nation is known by the codes and tradition by which its people live. It is insupportable to exercise an immigration policy so flagrantly in contradiction to the ideals and principles which the people embrace and by which we wish to be recognized abroad.”)).

reunification is consistent with our values and was, at one time, consistent with our laws.

The immigration system, in its enforcement regime, does seem to recognize the interests of families by treating unaccompanied minors and women who arrive with children differently than adults who arrive without children, but this focus is frequently for short-term protection, rather than to promote family integrity.²⁷ The Department of Health and Human Services' Office of Refugee Resettlement (ORR),²⁸ which oversees the care and custody of unaccompanied minors to ensure their safety and well-being once they are apprehended in the United States, may in the interests of family integrity release children from ORR custody to family members who are present in the United States but who may also be undocumented while the child's immigration case is pending. Likewise, detention centers that house mostly women and children have been called "family residential centers," presumably to reflect an interest in protecting the family. While these governmental actions arguably offer care and protection to more vulnerable immigrants, the very notion of detaining them demonstrates conflicting interests—enforcement versus promoting family integrity—with enforcement usually winning.²⁹ Immigration enforcement remains the priority because immigration law will effectuate removal rather than permanently reunify the family if no avenues of relief are available to children or their parents, even though children may be seeking to reunite with family members. Even if a child is eligible for relief, in most circumstances, she cannot sponsor a parent in order to seek reunification.³⁰

27. Children arriving from contiguous countries—Mexico and Canada—must be screened within 48 hours to determine whether they are able to make independent decisions, are a victim of trafficking, or fear persecution in his/her country of origin. If not, these children may be voluntarily returned to their country of origin. H.R. 7311, 110th Cong. § 235(a)(2) (2008).

28. *Unaccompanied Children's Services*, OFFICE OF REFUGEE RESETTLEMENT, <http://www.acf.hhs.gov/programs/orr/programs/ucs> (last visited Sept. 22, 2016).

29. See generally HEIDBRINK, *supra* note 1, at 38–62 (discussing the competing humanitarian and law enforcement regimes related to unaccompanied minors).

30. A child, for example, cannot sponsor a parent if she is granted asylum, and Special Immigrant Status prohibits her from doing so as well. Under a U and T visa, however, she can sponsor a parent. See Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J)(II) (2012) (noting "no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter"); 8 U.S.C. § 1158(b)(3)(A) (2012) (only allowing the spouse or child of someone granted asylum may be granted the same status); 8 U.S.C. § 1101(a)(15)(U)(ii)(I) (2012) (allowing the parents of a child granted U visa status to accompany or follow to join); 8 U.S.C. § 1101(a)(15)(T)(ii)(I) (2012) (allowing the parents of a child granted T visa status to accompany or follow to join).

The privileging that is embedded within the original family reunification principle does not respond to the needs of modern families. As Professor Jacqueline Bhabha explains in *The “Mere Fortuity” of Birth? Are Children Citizens?*, “The assumption of a unitary family, all of whose members share the same nationality, live in the same country, travel together or following the (male) breadwinner, have the same short- or long-term interests, and have easy access to each other, is outmoded.”³¹ Understanding this privileging requires recognition of the assumptions about the roles of family members that are embedded within the system, such as who should be the breadwinner and who is considered vulnerable and who is not. It also challenges our assumption about childhood—that childhood is strictly about dependency—when in reality children can and do migrate on their own and frequently contribute financially to their parents and other family members.

Legal scholarship has examined the role of family reunification within the immigration system,³² the intersection of family law and immigration law,³³ and the value of prioritizing family reunification.³⁴ Some scholars have advocated for specific changes to immigration law that would further the goal of family reunification

31. Jacqueline Bhabha, *The “Mere Fortuity” of Birth? Are Children Citizens?*, 15 DIFFERENCES 91, 96 (2004).

32. See Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 AM. J. COMP. L. 511 (1995) (exploring the implications of the role of family in immigration law and policy); see also Stephen Legomsky, *Immigration Policy from Scratch: The Universal and the Unique*, 21 WM. & MARY BILL OF RTS J. 339 (2012) (discussing issues that policy makers in all countries must address when considering an immigration policy, including whether family reunification is a goal and, if so, the many questions that arise around which family relationships should qualify); see also Kari E. Hong, *Famigration (Fam Imm): The Next Frontier in Immigration Law* 100 VA. L. REV. ONLINE 63 (2014) (calling for scholars to incorporate family law concepts into immigration law, in the same way that “crimmigration” has identified ways to advocate for greater constitutional protections found in criminal law to immigration proceedings).

33. See Kerry Abrams, *What Makes the Family Special*, 80 U. CHI. L. REV. 7 (2013) (assessing non-rights based reasons a nation like the United States might favor a family-based immigration system); see also David 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) (exploring the role that immigration status plays in family law determinations); David Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 454 (2008) (examining the use of immigration status in child custody determinations); Marcia Zug, *Deporting Grandma: Why Grandparent Deportation May Be the Next Big Immigration Crisis and How to Solve it*, 43 U.C. DAVIS L. REV. 193 (2009) (discussing how children may be separated from undocumented grandparents, who are the primary caregiver, because of deportation and arguing that there should be a hardship exception for grandparents who face deportation under cancellation of removal).

34. See generally John Guendelsberger, *Implementing Family Unification Rights in American Immigration Law: Proposed Amendments*, 25 SAN DIEGO L. REV. 253 (1988).

and be more inclusive of different types of families.³⁵ Other scholars have examined the ways in which immigration enforcement tears families apart, in an apparent disregard for family integrity.³⁶ And some scholars have explored how children lack agency under the law,³⁷ and how women are marginalized within the system.³⁸

This Article expands on that discussion in several respects. First, as a starting point, it closely examines legislative history in order to explore the origins and objectives of the principle of family reunification under immigration law and the historical privileging of certain families and certain members within families. Second, drawing on the work of not only legal scholars but also the research of scholars from other disciplines, it examines the ways in which immigration laws, enforcement, and policy have undermined family integrity for non-privileged families—such as those not modeled after the dominant nuclear family, those from oversubscribed countries, and those who do not fall under the category of highly-skilled workers. Further, within these constructs of privilege, it explores the way in which both women and children are frequently confined to dependent roles. The purpose of examining women's

35. See Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family that Protects Children's Fundamental Human Rights*, 41 COLUM. HUM. RTS. L. REV. 509 (2010) (arguing that immigration law's failure to acknowledge functional family relationships fails to protect the rights of children or honor family unity); see also Linda Kelly, *Family Planning: American Style*, 52 ALA. L. REV. 943 (2001) (arguing for the recognition under immigration law of non-traditional family arrangements); Fernando Colon-Navarro, *Familia E Inmigracion: What Happened to Family Unity?* 19 FLA. J. INT'L L. 491 (2007) (recommending an amendment to section 245 of the INA that would allow immediate relatives who were not inspected and admitted to adjust their status while in the United States).

36. See Lori A. Nessel, *Families at Risk: How Errant Enforcement and Restrictionist Integration Policies Threaten the Immigrant Family in the European Union and the United States*, 36 HOFSTRA L. REV. 1271 (2008) (examining a global movement to restrict family-based immigration and arguing that such restrictions undermine family unity); see also David Thronson, *Creating Crisis: Immigration Raids and Destablizations of Immigrant Families*, 43 MICH. ST. FAC. PUBL'N 391 (2008) (discussing the impact of immigration raids on children and families).

37. David Thronson, *You Can't Get Here from Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL'Y & L. 58 (2006); David Thronson, *Kids Will be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO. ST. L. J. 979 (2002) (examining the way immigration law limits the recognition of children as persons and calls for reforms in immigration law that would enhance child-centered perspectives); David Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 FORDHAM URB. L.J. 393 (2010) (critiquing the treatment of children in immigration law and calling for reform); see Bhabha, *supra* note 31.

38. Joan Fitzpatrick, *The Gender Dimension of U.S. Immigration Policy*, 9 YALE J.L. & FEMINISM 23 (1997) (examining how women's inability to gain lawful admission based on their employability forces them to be dependent on a man for admission or enter unlawfully); Mariela Olivares, *Unreformed: Towards Gender Equality in Immigration Law*, 18 CHAP. L. REV. 419 (2015) (examining the history of discriminatory immigration laws and advocates for comprehensive immigration reform that embodies gender equality).

and children's interests together is not to suggest that their interests are always aligned, but instead to assess their respective dependent roles within the system and how a failure to recognize social agency for either can, in some circumstances, fracture family integrity, particularly when a woman is classified as "unskilled" or a child seeks to head the migration for a family unit. This analysis may provide some insight into the recent increase in migration of women and children.

This Article explores a few fundamental questions:

- Does modern immigration law and enforcement honor family integrity?
- Which families are excluded from the privileges under immigration law?
- How are women and children marginalized under the current system?
- Would recognizing women and children's social agency embrace family integrity more expansively and more equitably?

A Migration Policy Institute report explained that "the central policy challenge for the United States—raised anew by this crisis [surge of unaccompanied minors and families]—is how to provide protection for genuinely vulnerable migrants while restricting the admission of unauthorized immigrants who do not have valid humanitarian claims."³⁹ Congress has attempted to address this policy challenge, particularly since the 1990s by increasing enforcement efforts and creating harsher immigration laws, but also providing some measure of protection to those who are vulnerable. This piece argues that a better focus may be to protect family integrity. This could have a stabilizing effect and reduce the harm that the system imposes through restrictive and harsh immigration measures. Prioritizing family integrity—in all of its complexity—should be the policy aim for the United States.

Part I provides a brief overview of the different types of immigrant visas. Part II examines the ways in which certain families and members within families are privileged under the immigrant and nonimmigrant visa system, first by examining the legislative history

39. MARC. R. ROSENBLUM, TRANSATLANTIC COUNCIL ON MIGRATION, A PROJECT OF THE MIGRATION POLICY INSTITUTE, UNACCOMPANIED CHILD MIGRATION TO THE UNITED STATES: THE TENSION BETWEEN PROTECTION AND PREVENTION 1 (2015), <http://www.migrationpolicy.org/research/unaccompanied-child-migration-united-states-tension-between-protection-and-prevention>.

and then by exploring the current functioning of the system. Part III details the myriad ways immigration enforcement remains the top objective of the immigration system, which effectively tears non-privileged families apart, and harms women and children in specific ways. Part IV explores the value of family integrity and Part V suggests ways to restore it in a manner that is more inclusive.

I. OVERVIEW OF IMMIGRANT VISAS & OTHER FORMS OF RELIEF

The allocation of immigrant visas reflects congressional priorities. The categories for immigrant visas (those which provide lawful permanent residence) are: 1) family-based; 2) employment-based; 3) diversity; and 4) refugees and asylees. The Immigration and Nationality Act allows for a total of 675,000 legal admissions annually under these categories, though this number is generally exceeded.⁴⁰ There is also a per-country ceiling for admissions, which is capped at seven percent of the total family-based and employment-based admissions per year.⁴¹ This section gives a brief description of each of these categories and provides information about some other forms of immigration relief that create a pathway to citizenship.

A. *Family-Based Immigration*

The family-based preference system annually provides 480,000 visas plus unused employment-based visas from the prior year, minus the number of immediate relatives and children who are born to lawful permanent residents while temporarily abroad, admitted the previous year and individuals paroled the previous year.⁴² Immediate relatives—spouses, parents and children (defined as unmarried and under the age of 21)—of U.S. citizens are exempt from this numerical limit.⁴³ There are four preference categories under the family-based system. Generally, the lower the preference category an applicant falls into, the longer they must wait for admission. The first preference is for unmarried sons and daughters of U.S. citizens. The second preference category is divided into two

40. See Immigration and Nationality Act, 8 U.S.C. § 1151 (2012) (allocating 480,000 under the family-based system, 140,000 under the employment-based system, and 55,000 for diversity immigrants).

41. *Id.* at § 1152(a)(2).

42. *Id.* at § 1151(c)(1)(A).

43. *Id.* at § 1151(b)(2).

parts. Spouses and minor children of Lawful Permanent Residents constitute part 2A, and unmarried sons and daughters of Lawful Permanent Residents fall under 2B. The third preference category is reserved for married children of U.S. citizens, while the fourth is for siblings of adult U.S. citizens.⁴⁴ Immediate relatives of U.S. citizens, as well as seventy-five percent of visas allocated under the 2A category, are exempt from the seven percent cap mentioned above.⁴⁵ Spouses and children can accompany or follow to join the principal immigrant under all of the family-based preference categories, but there is no such provision for the immediate relative category described above.⁴⁶

The majority of immigrants are admitted through the family-based system,⁴⁷ which results in significant backlogs, particularly for immigrants from oversubscribed countries such as the Philippines, China, Mexico, and India. For example, as of January 2016, the Visa Bulletin published by the State Department showed that immigrant visas under the first family-based preference category for Mexican applicants were being processed for those with a priority date of 1994, meaning it would take approximately fifteen years for someone from Mexico to receive a visa under that preference category.⁴⁸ For those falling under the 2A category who are from Mexico, the wait time was a little over two years, but for the 2B category it was approximately twenty years.⁴⁹ For the third preference category, the wait-time was approximately twenty-one years and about eighteen years for the fourth preference category.⁵⁰

Though there has been a slight decline over the past decade in admissions under some of the family-based preference categories, there has been an increase in admissions of immediate relatives.⁵¹ Immediate relatives constitute two-thirds of all family-based admissions.⁵² In 2012, for example, immediate relatives, which do not count against the cap, accounted for 478,780 of admissions under the family-based category.⁵³

44. *Id.* at § 1153(a).

45. *Id.* at § 1152(a)(4).

46. *Cf. id.* at § 1153(d).

47. CONGRESSIONAL BUDGET OFFICE, IMMIGRATION POLICY IN THE UNITED STATES: AN UPDATE 6 (2010), https://www.cbo.gov/sites/default/files/111th-congress-2009-2010/reports/12-03-immigration_chartbook.pdf.

48. See BUREAU OF CONSULAR AFFAIRS, *Visa Bulletin for January 2016*, U.S. DEP'T. OF STATE (2016), <https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2016/visa-bulletin-for-january-2016.html> [hereinafter *Visa Bulletin*].

49. *Id.*

50. *Id.*

51. WILLIAM A. KANDEL, U.S. FAMILY-BASED IMMIGRATION POLICY 12 (2016).

52. *Id.* at 5.

53. *Id.* at 27.

B. Employment-Based Preference Categories

For the employment-based preference system, there are 140,000 visas, plus the number of unused family preference visas from the previous year, allotted annually.⁵⁴ The employment-based system, like the family-based system, is divided into preference categories.⁵⁵ The first category is for priority workers (workers with “extraordinary” ability).⁵⁶ The second preference category is reserved for members of professions holding advanced degrees or persons of exceptional ability.⁵⁷ The third preference category includes skilled workers, professionals and “other workers.”⁵⁸ No more than 10,000 visas are available for “other workers.”⁵⁹ The fourth category is reserved for certain “special immigrants” and the fifth employment category is for employment creation. Like the family-based system, spouses and children can accompany or follow to join the principal immigrant under each preference category, meaning that they are automatically admitted as derivatives on the principal applicant’s visa.⁶⁰

The backlogs under the employment-based system are not nearly as high those of the family-based system, though wait times for individuals from oversubscribed countries are still significant. For instance, as of January 2016, persons from China applying for a visa under the second employment preference category must wait about two and a half years; applicants seeking a visa under the third preference category must wait a little over two years.⁶¹ Immigrants from China wanting to come over under the third category for “other workers” must wait approximately ten years.⁶²

C. Diversity

Under the Immigration and Nationality Act of 1990, Congress created immigrant visas for diversity immigrants to admit people

54. Immigration and Nationality Act, 8 U.S.C. § 1151(d) (2012).

55. *Id.* at § 1153(b).

56. *Id.* at § 1153(b)(1).

57. *Id.* at § 1153(b)(2).

58. *See id.* at § 1153(b)(3)(A)(iii) (providing, “other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States”).

59. *See id.* at § 1153(b)(3)(B).

60. *Id.* at § 1153(d).

61. *Visa Bulletin*, *supra* note 48, at 4.

62. *Id.*

from undersubscribed countries.⁶³ Each year up to 55,000 immigrants can be admitted under the diversity program.⁶⁴ A person admitted under this category can bring a spouse and children as accompanying or following to join.⁶⁵ To qualify for a diversity visa, an applicant must have a high school degree and at least two years of work experience.⁶⁶

D. Refugees and Asylees

The 1980 Refugee Act continues to govern overseas refugee admissions, and the admission of those seeking asylum and withholding of removal.⁶⁷ The President is authorized to make an annual determination as to the number of refugees to admit.⁶⁸ There is no upper or lower limit on the number of people admitted. Someone seeking relief under the refugee statute must demonstrate a well-founded fear of persecution, on account of at least one of five grounds specified under the statute: race, religion, nationality, political opinion, or membership in a particular social group, by either the government or a persecutor that the government is unable or unwilling to control.⁶⁹ Those who are granted refugee status abroad or asylum in the United States may bring their spouse and children as accompanying or following to join.⁷⁰ A child who is granted asylum, however, may not bring her parents.⁷¹

Though the asylum statute is neutral with respect to gender and age, women and children face unique hurdles in seeking protection for harms that they may face precisely because of their gender or age—e.g., domestic abuse, female genital mutilation, gang-based violence.⁷² Through litigation and advocacy, there has been greater awareness of the types of persecution that women and children may

63. Immigration and Nationality Act, 8 U.S.C. § 1153(c) (2012).

64. *Id.* at § 1151(e).

65. *Id.* at § 1153(d).

66. *Id.* at § 1153(c)(2).

67. See United States Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

68. See Immigration and Nationality Act, 8 U.S.C. § 1157(a)(2) (2012).

69. *Id.* at § 1101(a)(42).

70. *Id.* at § 1158(b)(3)(A).

71. *Cf. id.*

72. See Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action*, 14 VA. J. SOC. POL'Y & LAW 119 (discussing the fear of floodgates as a reason put forth for opposing protection for gender-based asylum claims); see generally Linda A. Kelly, *The Gangs of Asylum*, 46 GA. L. REV. 639 (2012) (describing the growing difficulty for children fleeing gang-based violence and seeking protection under asylum or withholding of removal in the United States).

face for which asylum protection should be provided.⁷³ Still, particularly for children from Central America fleeing gang-based violence or street children fleeing abuse at the hands of police, there remains resistance to providing protection under asylum law.⁷⁴

E. Special Immigrant Juvenile Status, Trafficking Visas, U Visas and VAWA (protection-based visas)

The visas discussed below offer protection to victims of violence in specified forms and create a pathway to legal permanency. While these protections frequently provide protection to women and children, not all of them allow children to sponsor a parent.

Special Immigrant Juvenile Status (“SIJS”) allows a child who has been found dependent on a juvenile court because of abuse, abandonment, and/or neglect by a parent or guardian to apply for an SIJS visa. A child awarded such a visa is eventually able to apply for lawful permanent residency.⁷⁵

The Trafficking (T) Visa is a form of immigration relief available to victims of trafficking, though only 5,000 visas may be allocated per year.⁷⁶ The beneficiary is also able to eventually apply for permanent residency.⁷⁷

Victims of specified crimes—such as domestic violence—can apply for a U visa,⁷⁸ for which there is a cap of 10,000 per year. Like the above-mentioned visas, the beneficiary can adjust her status after a specified period of time.⁷⁹

As a result of the Violence Against Women Act (VAWA), a battered spouse, parent, or child of a U.S. citizen and a battered

73. See Fatma Marouf, *The Rising Bar for Persecution in Asylum Cases Involving Sexual and Reproductive Harm*, 22 COLUM. J. GENDER & L. 81, 82–83 (2011) (noting that while progress has been made in recognizing gender-based harms for purposes of asylum, there still is not adequate recognition of gender-related and non-traditional forms of persecution).

74. Jacqueline Bhabha and Susan Schmidt, *From Kafka to Wilberforce: Is the U.S. Government's Approach to Child Migrants Improving*, 11 IMMIGRATION BRIEFINGS 1 (2011) (arguing that there continues to be resistance to providing asylum protection to children from Central America fleeing gang-based violence, police violence toward street children, and other forms of abuse).

75. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J) (2012); see also *id.* at § 1153(b)(4) (providing for immigrant visas for “special immigrants”).

76. *Id.* at §§ 1101(a)(15)(T), 1184(o)(2).

77. *Id.* at § 1255(l)(1).

78. *Id.* at § 1101(a)(15)(U); see also *id.* at § 1184(p)(2) (providing an annual cap of 10,000).

79. *Id.* at §§ 1255(m), (l).

spouse or child of a lawful permanent resident can file an immigrant visa petition.⁸⁰

The beneficiary of an SIJS visa is not allowed to sponsor family members. Therefore, a child who has obtained an SIJS visa cannot sponsor a parent, even if the finding of abuse, abandonment, or neglect was at the hands of a different parent or guardian.⁸¹ Under the U and T visas, however, family members can accompany or follow to join the principal immigrant, even when the principal immigrant is a child.⁸² A child applying under VAWA may also include a parent in the application.

II. IMMIGRATION LAW PRIVILEGES CERTAIN FAMILIES & FAMILY MEMBERS

The previous section provided an overview of the visa allocation, protection-based relief, and family reunification under immigration law. The current law, on its face, suggests that family reunification is a priority. In practice, many families are left to the hands of immigration enforcement and torn apart. This Part looks to legislative history to better understand the origins of family reunification under immigration law. In doing so, it examines the privileging of the dominant nuclear family, families of highly-skilled workers, and families from undersubscribed countries. Within these constructs of privilege, it examines the ways in which women and children's agency has been overlooked.

A. *Origins of Family Reunification Under Immigration Law*

A focus on family reunification under immigration law did not appear until 1921, but it soon became the fulcrum of subsequent amendments. Before 1921 there had been no numerical restrictions placed on immigration, though individuals were excluded based on specified grounds of exclusion, such as illiteracy and economic and health-related grounds. While the Chinese Exclusion Act of 1882⁸³ excluded the admission of Chinese laborers, Chinese

80. *See id.* at § 1154(a).

81. *Id.* at § 1101(a)(27)(J)(iii)(II) (stating, “no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.”).

82. *See id.* at §§ 1154(a)(1)(A)(iii), (B)(ii).

83. This was not repealed until 1943, but even then, China was only assigned 105 quota slots per year. *See* TOM GJELTEN, *A NATION OF NATIONS: A GREAT AMERICAN IMMIGRATION STORY* 91 (2015).

merchants were still admitted and courts permitted them to bring their wives and children.⁸⁴ With the passage of the Emergency Quota Act of 1921, Congress, for the first time, placed numerical limitations on the number of immigrants who could be admitted.⁸⁵ It also specified family-based preference categories, which included wives, parents, brothers, sisters, and children (under the age of 18) of U.S. citizens, fiancées of citizens, and fiancées of those who applied for citizenship.⁸⁶ Children of citizens were not subject to the quotas.⁸⁷ Under the National Quota Act of 1924, a national origins quota system was put in place which restricted the migration of individuals coming from countries viewed as less desirable while giving preference to individuals from Northern European countries.⁸⁸ The Act also made a few changes to the family preference categories: wives of U.S. citizens were added as non-quota immigrants, as were husbands, parents, and children, under the age of 21, of citizens.⁸⁹

Though President Truman in 1952 urged for the abolishment of the national origins quota system,⁹⁰ Congress remained opposed. Instead, with the McCarran-Walter bill of 1952 Congress sought to

introduc[e] a greater degree of selectivity into the method of allocating the quota numbers on the basis of the need of the

84. *See* *In re Chung Toy Ho*, 42 F. 398, 400 (D. Or. 1890); *see also* Kerry Abrams, *Immigration's Family Values*, 100 VA. L. REV. 629 (2014) (noting that though early immigration laws did not emphasize family-based immigration, the example of Chinese merchants being allowed to bring their wives and children reflected a value placed on family reunification).

85. Emergency Quota Act of 1921, Pub. L. No. 67-5, § 2(d), 42 Stat. 5 (1921); Abrams, *supra* note 33, at 13.

86. Emergency Quota Act of 1921, Pub. L. No. 67-5, § 2(d), 42 Stat. 5 (1921).

87. *Id.* at § 2(a)(8).

88. National Quota Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (1924). The Dillingham Commission report provided statistics, which demonstrated the shift in migration patterns in the late 1800s. From 1820-1910 92.3 percent of immigrants came from Europe. Until approximately 1896 the majority of immigrants came from North and West Europe. In 1896, however, the shift began and forty percent came from North and West Europe and fifty-seven percent came from East and South Europe. By 1910, seventy percent of immigrants were from East and South Europe. *See* FREDERICK C. CROXTON, STATISTICAL REVIEW OF IMMIGRATION TO THE UNITED STATES, 1820-1910 at 11, [http://iiif.lib.harvard.edu/manifests/view/drs:3067941\\$21i](http://iiif.lib.harvard.edu/manifests/view/drs:3067941$21i) (defining North and West Europe as encompassing Belgium, Denmark, France (including Corsica), German Empire, Netherlands, Norway, Sweden, Switzerland, and the United Kingdom (including England, Ireland, Scotland, and Wales); and South and East Europe encompassing Austria-Hungary, Bulgaria, Serbia, Montenegro, Greece, Italy (including Sicily and Sardinia), Poland, Portugal (including Cape Verde and the Azores Islands), Romania, the Russian Empire (including Finland), Spain (including the Canary and Balearic Islands), and Turkey (in Europe and Asia)).

89. *Id.* at § 4; *see also id.* at § 6 (for preference categories).

90. *See* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES RETURNING WITHOUT APPROVAL THE BILL (H.R. 5678) TO REVISE THE LAWS RELATING TO IMMIGRATION AND NATIONALITY, AND FOR OTHER PURPOSES, H.R. DOC. 520 (1952).

services of immigrants in the country and of prospective benefits flowing therefrom.” Its second goal was “adequate provision . . . for the preferential treatment of close relatives of United States citizens and alien residents consistent with the well-established policy of maintaining the family unit whenever possible.”⁹¹

The bill added siblings and adult sons and daughters of U.S. citizens and spouses and children of LPRs to the family-based preference categories.⁹²

That same year, by Executive Order, President Truman established a Commission to evaluate the state of the nation’s immigration law and policy and to make recommendations “for such legislative, administrative, or other action as in its opinion may be desirable in the interest of the economy, security, and responsibilities of this country.”⁹³ The Commission’s report stressed the importance of family unity, noting that “[t]he great American success story records that we are a nation of immigrants, and that a great part of our moral and spiritual fiber grows out of the sacred place of the family in American life” and recommended that one category should be for immigrants whose admission would reunite families.⁹⁴

In the Immigration and Nationality Act of 1965, Congress abolished the national origins quota system and made family unity and skills priorities.⁹⁵ The Act solidified a commitment to family reunification by expanding the family-based system and seeking to remediate the separation of families from Southern and Eastern Europe that occurred under the quota system. Congressional debates emphasized the deleterious effect that the national origins quota system had had on family integrity, specifically for Southern and Eastern European families. As one Congressman explained, “The separation from family is of momentous importance to one’s kinfolk as well as to the individual and must be considered important enough to spell out the law to prevent injustice.”⁹⁶ Sen. Robert Kennedy stated that one of “the primary purposes of civilization—

91. REVISION OF IMMIGRATION AND NATIONALITY LAWS, S. REP. NO. 1137, at 16 (1952).

92. Pub. L. No. 414, 66 Stat. 163 (1952).

93. COMM’N ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME xi (1953).

94. *Id.* at 119.

95. President Lyndon B. Johnson, The President’s Remarks at the Ceremony on Liberty Island, with His Offer of Asylum for Cuban Refugees (Oct. 3, 1965) [hereinafter President’s Remarks].

96. *H.R. Subcomm. Hearings, supra* note 19, at 302 (Testimony of Hon. Roland V. Libonati).

and certainly its primary strength—is the guarantee that family life can flourish in unity, peace, and order. But the current national origins system separates families coldly and arbitrarily. It keeps parents from children and brothers from sisters for years—and even decades.”⁹⁷ Congress overhauled the immigration system to, in theory, abandon outdated assumptions about who should immigrate, recognizing the effect these laws had on family relationships as a result of privileging certain immigrants—Northern and Western Europeans—over others.⁹⁸

One other example from the 1965 testimony is illustrative. That year, in addition to eliminating the quota system, Congress eliminated the epilepsy inadmissibility bar, noting that it placed parents in the terrible position of being unable to bring an epileptic child or other relative with them.⁹⁹ Advocates for the removal of this bar explained that greater medical advancements demonstrated that admitting such immigrants would not render them public charges.¹⁰⁰ In this way, Congress amended a law that had been based on outdated assumptions and had resulted in the unnecessary and harmful separation of families. In acknowledging the need

97. *Id.* at 411 (Testimony of Robert F. Kennedy, Att’y Gen. of the United States).

98. *See id.* at 241 (Testimony of Representative Seymour Halpern) (“It is right for the Nation to be selective in its policy; but such selection must not be based on the faulty and archaic assumption of racial inferiority. The process of determination should be founded upon our own inbred principles of human justice and equality, and must be alined [sic] with the circumstances of changing world realities.”).

99. *Senate Subcomm. Hearings, supra* note 20, at 11 (Statement of Nicholas Katzenbach, Att’y Gen. of the United States) (referring to a family with an epileptic child, he noted, “[a]s a result, she is permanently ineligible for admission and no administrative relief is possible. The family’s choice: On the one hand, give up the promise of opportunity in America, or, on the other hand, come here and leave the little girl behind. This is not a choice any of us would want to make. It is not a choice the United States of America should force any human being to make”); *see also H.R. Subcomm. Hearings, supra* note 19, at 12 (Testimony of Representative Emanuel Celler) (stating in reference to those with a mental disability that “[t]his provision has an unfortunate effect on families seeking admission through one member, often a child, is retarded or feeble-minded. Such families are forced to choose between leaving the child behind, or staying with it; in either case, the child is condemned to facilities for treatment which are often inadequate.”). Robert Kennedy indicated that allowing individuals previously barred because of epilepsy or mental illness would “foster the preservation of the family unit and eliminate much needless suffering.” *Id.* at 416. *Senate Subcomm. Hearings, supra* note 20, at 336 (Statement of Hon. Anthony J. Celebrezze) (“Progress has been along two lines: First, in the medical diagnosis and treatment of epilepsy; and second, in the change in attitudes toward people who suffer from epilepsy. . . . With this medical progress has come better public understanding, less fear, and more interest in dealing with the problems of epilepsy in a rational, constructive way.”).

100. *H.R. Subcomm. Hearings, supra* note 19, at 186 (Testimony of Representative George P. Miller) (“While once [epilepsy] was considered incurable, medical science has reached the point where now it is under control and many people who years ago would not be allowed to drive automobiles or lead normal lives are now leading normal lives.”).

for change, Congress demonstrated how the law could and should evolve based on changing morals and values.¹⁰¹

Though the rhetoric may have suggested otherwise, not everyone viewed these changes as a means to achieve greater equality. Supporters of the quota system understood that the majority of Congress supported its elimination, but agreed to the expansion of the family-based system as a way to maintain the white European face of migration to the United States.¹⁰² More clearly, those who supported the quota system believed that the expansion of the family-based system would simply result in the perpetuation of admitting immigrants from Europe, since, at that time, the majority of immigrants in the United States were European. As the logic went, if they could sponsor more relatives through the family-based system, the same “type” of immigrants would keep coming through chain migration.¹⁰³ Recognizing that the existing quota system was doomed, Congressman Feighan “concluded that the same demographic trend could be maintained by making family unification the paramount goal of U.S. immigration policy.”¹⁰⁴ Though the bill gave top priority to skilled workers with relative reunification as a second priority, Feighan advocated for the reversal in priorities and convinced the American Coalition of Patriotic Societies and the American Legion not to continue to oppose the elimination of the quota system.¹⁰⁵

The unanticipated consequence for Feighan and other supporters of this approach, however, was that Southern and Eastern Europeans stopped migrating in large numbers, and individuals from outside of Europe came in greater numbers through the employment-based system and as refugees.¹⁰⁶ Using the family-based system, these immigrants could then sponsor family members. Thus, since 1965, the diversity of the immigrant population has only grown.

101. *Id.* at 320 (Testimony of Representative James Roosevelt) (“The present Immigration and Nationality Act is based on outmoded, outworn concepts of favored nationalities and races, but the bill now before the subcommittee will, when enacted, represent a significant step in the reaffirmation of the boundless promise of American life.”); *see also id.* at 318 (Testimony of Rep. John Rooney) (“As Americans we take great pride in the depth and importance of our family composition, yet many new Americans are denied the privilege of living and working together in a family circle. The need for such a change in our law is not only of pressing social significant but it is an extremely moral obligation.”).

102. GJELTEN, *supra* note 83, at 125–26.

103. *Id.*

104. *Id.* at 126.

105. *Id.*

106. *Id.* at 128–29.

Another point of contention during the 1965 legislation concerned migration from the Western Hemisphere. To win support of the Republicans, a ceiling on immigration from the Western Hemisphere, which had initially been dropped from the House bill, was restored in the Senate bill.¹⁰⁷ In order to secure the bill's passage, the administration decided not to oppose it.¹⁰⁸ Thus, the 1965 legislation continued the annual cap on visas issued for the Eastern Hemisphere (170,000), imposed the preference system described above, and a 20,000 per country limit each year. For the first time, it placed an annual cap of 120,000 on the Western Hemisphere, but it did not impose the preference system or the per-country yearly limit. Because Senator Philip Hart, who had co-sponsored the bill, did not want an annual cap on the Western Hemisphere, he distanced himself from the legislation.¹⁰⁹

When these changes were eventually imposed on the Western Hemisphere, the ramifications were significant. The cap on migration, as well as other changes, severely limited lawful migration for those closest to the U.S. border, which, in turn, impacted and continues to impact their families.¹¹⁰

This history shows a desire to incorporate family reunification, but the motivations for doing so have varied. The family reunification system privileged certain types of families and privileged certain members within families. The analysis below addresses the privileging of the dominant nuclear family, which was built into the family reunification system, and the privileging of families of highly-skilled workers and families from undersubscribed countries. Women and children are uniquely affected within these constructs of privilege.

107. *Id.*

108. *Id.*

109. *Id.* at 129.

110. In 1976 Congress extended the 20,000 migrant-per-country limit and also subjected the Western Hemisphere to the preference system. In 1978, a worldwide ceiling of 290,000 was enacted and in 1980, Congress reduced that number to 270,000. See Douglass Massey, *To Change the Future of Immigration, Go Back to 1965*, NEW AMERICA WKLY. (Oct. 1, 2015), <https://www.newamerica.org/weekly/94/to-change-the-future-of-immigration-go-back-to-1965/> (“The greatest impact was felt by people seeking to migrate to the U.S. from Mexico. In rough terms, during the late 1950s, annual Mexican migration was running at around 500,000 persons per year, 90 percent on temporary work visas and 10 percent on permanent residence visas (though many with work visas used their Green Cards to circulate freely back and forth). In 1965, Congress abruptly suspended the Bracero program and by the late 1970s, Mexico had access to just 20,000 residence visas, and no work visas, per year.”).

B. Privileging the Heterosexual Nuclear Family

Family reunification gives preference to the dominant heterosexual family model. As Professor Suzanne M. Sinke notes, the 1965 Act prioritized heterosexual family reunification.¹¹¹ Same-sex partners could not derive an immigration benefit based on their family relationship until 2014. And marriage, rather than a mere common-law relationship, remains a requirement.¹¹² In addition to the criteria specified to derive an immigration benefit, the legislative history reveals that the system was built around assumptions about family composition—namely, that the male was the breadwinner and head of household and the wife and children would be dependents on his immigrant visa.

1. Preferred Relationships

First, the family-based system only recognized marriage between a man and a woman for the purpose of conferring an immigrant benefit. In 2013, the Supreme Court in *United States v. Windsor* struck down Section 3 of the Defense of Marriage Act.¹¹³ With that holding, the Attorney General later announced that same-sex couples would be granted the same benefits under immigration law.¹¹⁴ It is worth noting, however, that this change did not arise from congressional action to reform the immigration system to make it more inclusive of all types of families. Instead, the change came about administratively and in response to a Supreme Court decision.

Additionally, until 1990, homosexuality was a bar to admission under immigration law.¹¹⁵ In 1917 Congress passed legislation that excluded individuals based on being “mentally or physically defective” or based on a “constitutional psychopathic inferiority,”¹¹⁶ and in 1952 these exclusions were broadened to include “aliens afflicted with a psychopathic personality, epilepsy, or a mental defect,” with

111. Sinke, *supra* note 14, at 301.

112. *Cf.* Immigration and Nationality Act, 8 U.S.C. §§ 1153(a), 1151(b)(2) (2012). Note also that polygamous relationships are not recognized.

113. 133 S. Ct. 2675 (2013).

114. Memorandum from the Att’y Gen. of the United States to the President of the United States 4–5 (June 20, 2014), <http://www.justice.gov/iso/opa/resources/9722014620103930904785.pdf>.

115. Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978 (1990) (no longer included as a ground of exclusion).

116. H.R. 10384, Pub. L. No. 301, § 3, 39 Stat. 874 (1917).

homosexuals excluded under the psychopathic personality exclusion.¹¹⁷ Around this time, women who regularly crossed the U.S.-Mexican border for work who looked “masculine” would be scrutinized under this ground for being lesbian.¹¹⁸ In 1965, while Congress removed the bar on admission of individuals with epilepsy after recognizing that it unfairly separated family members, it included a bar on the admission of persons considered “sexually deviant”—the official bar used from 1965-1990 to deny admission based on sexual orientation.¹¹⁹

Marriage, however, remains a requirement. This poses problems, particularly for those from Central America where common-law unions are not rare.¹²⁰ If one partner receives an immigrant visa, they cannot sponsor the other partner unless they have a marriage that is recognized as valid under immigration law.

U.S. immigration law also does not recognize polygamous marriage for purposes of deriving an immigration benefit,¹²¹ and the practice of polygamy has been a ground of inadmissibility since 1891 when there were concerns about the practice among Chinese immigrants and Mormons.¹²² Additionally, the practice of polygamy can prohibit a finding of “good moral character”—a requirement for many immigration benefits. Such a bar affects families from many nations where polygamy is practiced and has a gendered impact.¹²³ Typically it is the first wife who can qualify for an immigration benefit, disadvantaging the other wives.¹²⁴

117. H.R. 13342, Pub. L. No. 414, § 212(a)(4), 182 Stat. 66 (1952).

118. Sinke, *supra* note 14, at 301.

119. H.R. COMM. ON THE JUDICIARY, 89TH CONG., SUMMARY OF PUBLIC LAW 89-236, AMENDMENTS TO THE IMMIGRATION AND NATIONALITY ACT 4 (1965).

120. Salcido & Menjivar, *supra* note 21, at 351. Common-law marriage is recognized in the jurisdiction where it occurred. See *Marriage and Marital Union for Naturalization*, in U.S. CITIZENSHIP AND IMMIGRATION SERVICES POLICY MANUAL, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartG-Chapter2.html> (last visited Sept. 23, 2016) (“In general, the legal validity of a marriage is determined by the law of the place where the marriage was celebrated (‘place-of-celebration rule’). Under this rule, a marriage is valid for immigration purposes in cases where the marriage is valid under the law of the jurisdiction in which it is performed.”).

121. Matter of Mujahid, 15 I. & N. Dec. 546 (BIA 1976).

122. Claire Smearman, *Second Wives Club*, 27 BERKLEY J. INT’L L. 382, 382–83 (2009); see also Immigration and Nationality Act, 8 U.S.C. § 1182(a)(10)(A) (2012).

123. Smearman, *supra* note 122, at 383–88. The “good moral character” assessment can prohibit a woman in a polygamous relationship from receiving VAWA relief. *Id.* at 400.

124. *Id.* at 407–08.

2. Women's Role Within the Family

a. Historical Background

Though the 1952 Immigration and Nationality Act removed explicit gender inequality under the law, which had precluded women from bringing over non-citizen husbands as immediate relatives, the creation of the family preference system is premised, in subtle ways, on the assumption that women would be dependent on a male relative—namely, their husbands. Professor Kerry Abrams notes that the family categories “began as part and parcel of coverture and now exist in conjunction with new human rights norms of family reunification.”¹²⁵

In the early 1900s, women's rights under the immigration and citizenship law were clearly inferior to the rights of men. Section 3 of the Expatriation Act of 1907 declared that a woman derived her citizenship status by marriage to an American man. Thus, a woman who married a non-U.S. citizen could be divested of her American citizenship.¹²⁶ “By 1907, federal law had reduced the immigrant wife's citizenship to a mere reflection of her spouse's status.”¹²⁷ Further, the Immigration Act of 1917 provided:

[A]ny admissible alien, or any alien heretofore or hereafter legally admitted, or any citizen of the United States, may bring in or send for his father or grandfather over fifty-five years of age, his wife, his mother, his grandmother, or his unmarried or widowed daughter, if otherwise admissible, whether such relative can read or not; and such relative shall be permitted to enter.¹²⁸

Under that law, unmarried women were considered dependent on male relatives. Married men could sponsor their wives, but married women could not petition for their husbands.

125. See generally Abrams, *supra* note 33, at 10. See also Sabrina Balgamwalla, *Bride and Prejudice: How U.S. Immigration Law Discriminates Against Spousal Visa Holders*, 29 Berkeley J. Gender L & Just., 25, 32 (2014) (arguing that dependent visas are a “relic of coverture” and noting, “Although the INA provisions are now gender-neutral on their face, most family-based immigrants are still women. Dependent spouses—a category that includes individuals married to students, employees of transnational companies and international organizations, and diplomats—are also predominately female.”)

126. CANDICE LEWIS BREDBENNER, *A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP* 7 (1998).

127. *Id.* at 42.

128. Immigration Act of 1917, Pub. L. No. 301, § 3, 39 Stat. 874 (1917).

In 1922, Congress removed the provision that a woman would be divested of citizenship for marrying a non-citizen, but a woman who married an alien ineligible to citizenship would still be divested of citizenship.¹²⁹ Those classified as “non-white” continued to be ineligible for citizenship.¹³⁰

In 1921, with the creation of the first family-based preference categories, only children were considered non-quota immigrants, and a woman still could not sponsor her non-citizen husband for an immigration benefit.¹³¹ In 1924, wives were added as non-quota immigrants, but husbands were not. Husbands were, however, added to the list of preference categories, so a woman could sponsor her husband, but he would not be able to come over immediately under the non-quota category.¹³² During and after World War II, the War Brides Acts permitted U.S. servicemen to bring back foreign spouses, thereby “reinforc[ing] one of the central themes of gender in immigration policy, that of married women being classified as dependents, whether they worked for wages or not.”¹³³ By

129. *Hearing Before a Subcomm. of the Comm. on Immigration*, 72nd Cong. (1933); BREDBENNER, *supra* note 126, at 97–98 (“A woman’s ability to pursue naturalization or maintain U.S. citizenship remained contingent on her spouse’s eligibility for naturalization. If he could not be naturalized for any reason, she could not; and if she was a citizen, she was denaturalized for wedding a man ineligible for citizenship and could not seek repatriation until the termination of the marriage.”).

130. BREDBENNER, *supra* note 126, at 98; *see also* Miller v. Albright, 118 S. Ct. 1428, 1451–52 (1998) (“The statutory rule that women relinquished their United States citizenship upon marriage to an alien encountered increasing opposition, fueled in large part by the women’s suffrage movement and the enhanced importance of citizenship to women as they obtained the right to vote. In response, Congress provided a measure of relief. Under the 1922 Cable Act, marriage to an alien no longer stripped a woman of her citizenship automatically. But equal respect for a woman’s nationality remained only partially realized. A woman still lost her United States citizenship if she married an alien ineligible for citizenship; she could not become a citizen by naturalization if her husband did not qualify for citizenship; she was presumed to have renounced her citizenship if she lived abroad in her husband’s country for two years, or if she lived abroad elsewhere for five years. A woman who became a naturalized citizen was unable to transmit her citizenship to her children if her noncitizen husband remained alive and they were not separated. No restrictions of like kind applied to male United States citizens. Instead, Congress treated wives and children of male United States citizens or immigrants benevolently. The 1855 legislation automatically granted citizenship to women who married United States citizens. Under an 1804 statute, if a male alien died after completing the United States residence requirement but before actual naturalization, his widow and children would be ‘considered as citizens.’ That 1804 measure granted no corresponding dispensation to the husband and children of an alien woman.”) (internal citations omitted).

131. *Cf.* Emergency Quota Law of 1921, Pub. L. No. 67-5, § 2(d), 42 Stat. 5 (1921) (providing that “preference shall be given so far as possible to the wives, parents, brothers, sisters, children under eighteen years age, and fiancées”); *see also id.* at § 2(a)(8) (providing that “aliens under the age of eighteen who are children of citizens of the United States” would not be subject to the quotas).

132. Immigration Act of 1924, Pub. L. No. 68-139, § 6, 43 Stat. 153 (1924).

133. Sinke, *supra* note 14, at 300.

1952, the differences in rights of sponsorship between men and women under immigration law had been removed.¹³⁴

The 1965 legislation further opened the door to gender equality and women certainly benefited from the changes to the law. At the same time, however, the law was based on the dominant nuclear family model that presumed a woman's dependence on her husband. For example, in the 1953 Commission report on immigration, the drafters noted that women and children would be dependents on a husband's visa and would not be participants in the labor market.¹³⁵ This information was used to allay fears that increased immigration would result in job loss for American workers. Later, during congressional hearings, Congressman Celler from New York, in support of the legislation, noted labor unions' endorsement of the reforms because "when you bring into the country say, 100 immigrants they are not all workers. But, they are all consumers. Probably half of them may be male, half female. Some of them may be children."¹³⁶ Attorney General Robert Kennedy noted,

Only about one out of three additional immigrants admitted by this bill would enter the labor market. This reflects the fact that these immigrants would include a greater proportion of women and elderly people than the population generally. What it means is that our economy will let in three consumers for every worker that is admitted.¹³⁷

134. H.R. 13342, Pub. L. No. 414, §§ 204, 101(27), 203, 182 Stat. 66 (1952).

135. COMM'N ON IMMIGRATION AND NATURALIZATION, *supra* note 93, at 43. The report also stated, "The Commission was asked to recommend that admissions be permitted on a family basis, to avoid situations where the breadwinners on this side of the ocean are unable to bring their closest relatives to join them, and are separated indefinitely. The heartbreak caused by these separations, and the resulting futility of efforts to restore well-ordered family life, is incalculable." *Id.* at 14.

136. H.R. Subcomm. Hearings, *supra* note 19, at 14.

137. *Id.* at 417 (Statement of Robert F. Kennedy, Att'y Gen. of the United States); *see also id.* at 389 (Testimony of Dean Rusk, Sec'y of State) ("Present-day immigration is very different in volume and makeup from the older migration on which most of our thinking is still based; and its significance for this country is considerably different. Immigration now comes in limited volume and includes a relatively high proportion of older people, females, and persons of high skill and training."); Senate Subcomm. Hearings, *supra* note 20, at 14 (Statement of Nicholas Katzenbach, Att'y Gen. of the United States) ("Of this total, all would be consumers but only about a third would be workers. The rest would be wives, children, and elderly parents. Since the ratio of consumers to workers is somewhat higher than our present ratio, the net effect would be to create rather than absorb jobs.").

This statement was accurate, as data gathered from 1910–2010 reveals that immigrant women were in fact less likely to be in the labor force compared to U.S. born women.¹³⁸

Another justification for increased immigration concerned the need for more marriageable men for American women. According to the Commission's report, prior to the restrictive immigration laws of 1924, there had been more male immigrants than females, but the quota system resulted in the reverse, with wives and relatives filling the small quotas. Thus, according to the report, these laws hindered the ability to "maintain a numerical superiority of men over women in the United States."¹³⁹ The report further noted that as a result of the change in gender migration, the quota system had reduced the number of wage earners for the family, threatened military reserves and reduced marriage possibilities for women.¹⁴⁰ Of these three, "the social and moral effects of reduced marriage possibilities for American women can be of the greatest significance."¹⁴¹ Professor Abrams, in her piece *What Makes the Family Special*, suggested that the family-based system could be used for the purpose of social engineering, and this history seems to support that contention.¹⁴²

While the family reunification system has been adjusted in recent times—namely by recognizing same-sex marriage—it still has not evolved to acknowledge and remedy the subtle ways that women continue to be marginalized under the system.

138. KATHARINE M. DONATO & DONNA GABACCIA, GENDER AND INTERNATIONAL MIGRATION 159 (2015).

139. COMM'N ON IMMIGRATION AND NATURALIZATION, *supra* note 93, at 40.

140. *Id.* at 40–41.

141. *Id.* at 40–41 ("Since 1820, immigration has contributed a very high percentage of men to this country. In the period of free immigration from 1820 to 1921, there were 150 men to 100 women among those admitted to the United States. This same pattern of more men than women prevailed among persons admitted under the displaced persons program, even though there was a conscious and deliberate effort to move families as a whole. Under the Displaced Persons Act, over 119 men were admitted for each 100 women. . . . When the restrictive national origins quota law took effect in 1929, the number of men entering the United States as immigrants dropped very considerably below the number of women. This was due to the fact that small quotas tend to be filled by wives and relatives of earlier immigrants, who have quota preferences, as opposed to new male immigrants who predominate in normal overseas immigration. Whereas previously as much as two-thirds of the immigrants were men, now as much as two-thirds are women.").

142. See Abrams, *supra* note 33, at 23–27.

b. Contemporary Impact

The foundation upon which the immigration system was built continues to impact women's migration, confining them more often than not to positions of dependency or assuming women are in need of protection, rather than recognizing their agency and providing benefits based on this agency. For women classified as unskilled, this directly affects their ability to come to the United States when seeking an immigration benefit independent of a relationship with a male family member. For single mothers, this can be devastating.

First, the majority of female immigrants—roughly seventy percent—gain visas through the family-based immigration system, primarily dependent on a male petitioner.¹⁴³ Additionally, women who come over through the employment-based system overwhelmingly come as dependents on a spouse's employment-based visa.¹⁴⁴ Second, even though a woman may still receive an immigration benefit based on a male petitioner, the subsequent backlogs lead to family separation. Third, these backlogs can place a woman in a position where she is not only dependent on a male spouse for an immigration benefit, but also is dependent on him for income, as employment authorization (a work permit) is needed for those on temporary visas (if the visa permits them to work) and those with pending applications before USCIS.

When Congress passed the Immigration Reform and Control Act in 1986, the majority of eligible recipients under the amnesty provisions were men.¹⁴⁵ Men often had the formal employment records and records of long-term residence to apply for amnesty. Fifty-seven percent of long-time undocumented residents who applied for amnesty were male and eighty-two percent of Special Agricultural Workers who were eligible under IRCA to apply were also male.¹⁴⁶ The latter were not able to include a spouse or child as derivatives, so they had to sponsor them under the family-based system.¹⁴⁷ Women did benefit in 1990 when visas were reserved for relatives of amnesty recipients, but did so as dependents.¹⁴⁸ In this

143. *How Comprehensive Immigration Reform Should Address the Needs of Women and Families: Hearing Before the Comm. on the Judiciary*, 113th Cong. 11 (2013).

144. Salcido & Menjivar, *supra* note 21, at 3.

145. Donato, *supra* note 13, at 82.

146. Fitzpatrick, *supra* note 38, at 27; *see also* Olivares, *supra* note 38, at 427–28 (describing how IRCA benefitted men more than women).

147. *See* Fitzpatrick, *supra* note 38, at 29.

148. *See* DONATO & GABACCIA, *supra* note 138, at 181. It is plausible that Congress had a male paradigm in view when it decided to legalize the status of long-time undocumented residents. Given patterns of serial migration by family members, with male earners frequently

way, IRCA facilitated female dependence on males for an immigration benefit under the family-based system.

Today, there are various ways that partners can be, and are, separated because of the nuances of immigration law, and, in particular, because of backlogs. As one example, a non-citizen woman who marries a lawful permanent resident after he has received his green-card will likely have to wait in her home country until her priority date under the 2A category (spouses of LPRs) becomes current. During a hearing before the Senate Judiciary Committee, it was noted that many of the backlogs under the employment-based system consisted of spouses and children who were separated because the employment-based immigrant received his visa and then married. Current wait times for most countries under this category are about a year and a half, which is not exceptionally long compared to other categories, but still results in separation.¹⁴⁹ Those who are waiting in the United States but have not received a work-permit may find themselves confined to household work and financially dependent on a spouse.¹⁵⁰

One woman from El Salvador explained her frustration with the backlogs. Though she had been able to enter the United States, she had been waiting nine years and still had not received her green card.

They give you one permit to be in all of the United States and to work . . . [and] every year it expires and every year I have to go to immigration to request it again and pay and all. Yes, since I put in my papers, I have only had three permits, before that I had nothing. Three permits is what I have, three years of living with that . . . I spent lots of time not working, only at

taking the lead, it is possible that among migrant families, husbands were more likely to have accrued the necessary years of sustained residence to qualify for legalization. Moreover, even among families where both spouses had accrued the necessary residence, the household economy may have dictated that application for legalization, which required a substantial fee, be restricted to the primary earner. Gendered evaluations of the relative importance of securing legal access to the labor market and lawful residence for the male 'head of household,' as compared to female and minor family members, could thus have contributed to male numerical dominance among amnesty applicants.

149. The LIFE Act of 2000 provided some relief by allowing spouses of lawful permanent residents whose applications had been filed before 2000 and who had been waiting for three years to come to the United States while their visa remained pending. Additionally, it created the K visa, the spouse of a United States citizen can come to the country before the approval of the green card, and because it is an immediate relative petition, there is no preference category wait time. IMMIGRATION AND NATURALIZATION SERVICE, *Fact Sheet, Legal Immigration Family Equity Act*, U.S. DEP'T OF JUSTICE (2000), https://www.uscis.gov/sites/default/files/files/pressrelease/LegalImmigFamEquityAct_122100.pdf.

150. Salcido & Menjivar, *supra* note 21, at 352.

home. I would take care of children, but you know that is nothing.¹⁵¹

A woman who enters unlawfully by evading immigration inspection to reunite with a partner may be subject to bars of inadmissibility, which could require her to wait at least ten years in her country of origin, in addition to the wait-times imposed by the backlogs, before being allowed to enter the United States based on her marriage.¹⁵² Researcher Olivia Salcido and Professor Cecilia Menjivar spoke with a woman named Lucia who entered the United States without inspection in 1985. Her husband had obtained his green card but never submitted the paperwork to petition for her, threatening that if she left him, he would have her deported and their citizen children would stay with him. Eventually, Lucia left her husband, but realized there were no avenues for acquiring status.¹⁵³

[B]ut no, later I found out that because I did not have anything [paperwork] to prove my residence here [in the United States] because I had not worked here and also because I had left him [her husband], those years were lost and I would have to find another way of getting my papers . . . Some people would tell me that I should find myself a boyfriend and get married, but I would say, “Why would I do that now?”¹⁵⁴

Moreover, Lucia did not meet the requirements for VAWA protection.

Women are also precluded from sponsoring other family members when they do not have the economic resources to do so.¹⁵⁵ Under Section 212(a)(4), those who are “likely at any time to become a public charge” are inadmissible. A person who cannot show that they have funds sufficient to support themselves needs an affidavit of support from either a U.S. citizen or LPR and, since 1996,

151. *Id.* at 354.

152. *See* Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(6), 1182(a)(9), 1255(a) (2012) (adjustment of status in the United States requiring having previously been inspected and admitted or paroled into the United States). As a result of the provisional unlawful presence waivers, individuals eligible for an immigrant visa can now apply for an unlawful presence waiver without first having to depart the United States to do so. *See Professional Unlawful Presence Waivers*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <https://www.uscis.gov/family/family-us-citizens/provisional-waiver/provisional-unlawful-presence-waivers> (last visited Sept. 23, 2016).

153. Salcido & Menjivar, *supra* note 21, at 348–50.

154. *Id.* at 349.

155. Secretary of Labor Willard Wietz testified in 1964 that unskilled laborers without family support would not be admitted under the proposed 1965 laws because of the public charge provisions. *H.R. Subcomm. Hearings, supra* note 19, at 454.

the affidavits of support are binding. Affidavits of support are required for all immediate relative and family-based immigrant petitions, and the sponsor's income must be 125 percent above the poverty level.¹⁵⁶ Those not able to demonstrate sufficient funds (and women, on average, earn less than men), are inadmissible.¹⁵⁷ Thus, a low-wage female worker may be unable to petition on behalf of a relative because of the affidavit of support requirements.¹⁵⁸

3. Children as Dependents

Unlike women, under the law, children are recognized as dependent on a parent and, generally, cannot confer an immigration benefit to a parent or other relative.¹⁵⁹ A child, under the age of twenty-one and unmarried, cannot sponsor a relative, including a parent, for an immigration benefit.¹⁶⁰ This conflicts, however, with the agency children exhibit in the migration process. As Professors Donato and Sisk observe, "child migrants are incorporated into the migration process via their ties to families,"¹⁶¹ though they may be heading migration for their families.

In the majority of these situations, parents provide the anchor to which children are attached. But in a growing number of cases, it is children who provide or have the potential to provide the migration stability—children who would, but for the asymmetry just mentioned, have the right to establish family unity around them.¹⁶²

A child may head the migration for the family unit, but the law, with a couple of exceptions discussed *infra*, does not allow the child to facilitate lawful family reunification.

156. See Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(4), 1183A (2012). With some exceptions, all immediate relatives of U.S. citizens and relatives qualifying under the family-based system are required to submit an affidavit of support.

157. *Id.*

158. See Salcido & Menjivar, *supra* note 21, at 352.

159. See Thronson, *supra* note 37, at 69–70.

160. See *H.R. Subcomm. Hearings*, *supra* note 19, at 197 (Testimony of Charles B. Keely, Dep't of Sociology, Fordham Univ.) ("The withdrawal of a benefit to Western Hemisphere aliens from a minor U.S. citizen child raises the problem of an ambiguous attitude toward citizenship. Should birth confer citizenship? If so, should we de facto require a minor citizen to depart and lose benefits and protections by barring his parents? This raises a question of children's rights, if we choose to continue to confer full citizenship rights by birth."); see also *Senate Subcomm. Hearings*, *supra* note 20, at 109 (Testimony of Mr. Mailman, President of the Ass'n of Immigration and Nationality Lawyers) ("It is anomalous that parents can petition for children, but children cannot petition for parents.").

161. Donato & Sisk, *supra* note 14, at 73.

162. Bhabha, *supra* note 31, at 96.

C. Immigration Law Privileges Families of Skilled Workers

As with the family-based immigration system, spouses and children can accompany or follow the principal immigrant under the employment-based categories.¹⁶³ Spouses and children can also accompany or join a temporary worker.¹⁶⁴ As this section will describe, employment-based and temporary work visas for those classified as “skilled” workers are more readily available compared with those for unskilled workers. Economic migrants with little education seeking opportunities in the United States face tremendous obstacles. For women classified under the unskilled category who do not have male relatives to sponsor them under the family-based system, the opportunity to come to the United States is almost non-existent. Visas allocated for unskilled workers give less preference to traditionally female-dominated jobs, like domestic and care-based work.

In addition to prioritizing family reunification, the 1965 Act preferenced skilled labor, which remains a priority under immigration law today.¹⁶⁵ President Johnson announced, “This bill says simply that from this day forth those wishing to immigrate to America shall be admitted on the basis of their skills and their close relationship to those already here.”¹⁶⁶ The 1965 Act reserved the third and sixth preference categories (the family and employment categories were combined) for admitting employment-based immigrants. Members of the professions,¹⁶⁷ along with scientists and artists, could be admitted under the third category, with an annual

163. Immigration and Nationality Act, 8 U.S.C. § 1153(d) (2012).

164. This does not apply to Cultural Exchange Visitors and Q1 visa applicants. See *Temporary Worker Visas*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/visas/en/employment/temporary.html> (last visited Sept. 23, 2016).

165. See *H. R. Subcomm. Hearings*, *supra* note 19, at 430 (Testimony of Robert F. Kennedy, Att’y Gen. of the United States) (providing that the administration’s proposal would focus on two categories: highly skilled workers and reuniting families. With regard to the first, he noted, “They will be skilled people who will contribute to the economy of the United States, scientists, engineers, people with special skills which will be particularly valuable, which will help the economy of this country, which will give more jobs in this county because they have these skills.”); *Senate Subcomm. Hearings*, *supra* note 20, at 20 (Statement of Nicholas Katzenbach, Att’y Gen. of the United States) (asking one senator, “[d]o you think, Senator, that a maid from Ireland really will contribute more to the United States than a trained doctor from an Asian country?”); see also *id.* at 28–29 (questioning Attorney General Katzenbach’s argument that the country needed to focus on admitting highly skilled immigrants, Senator Ervin stated, “[b]ut if we had always said we would have only highly skilled people in the United States, no one could come here, because none could qualify.” The Attorney General responded, “There was a different economy than there is today.” Later, Senator Ervin stated, “Instead of taking those we talk about when we get oratorical, the tired and the poor and the despised, we take the brilliant.”).

166. The President’s Remarks, *supra* note 95, at 365.

167. See Immigration and Nationality Act, 8 U.S.C. § 1101(a)(32) (2012) (“The term ‘profession’ shall include but not be limited to architects, engineers, lawyers, physicians,

cap of 17,000. The same cap number applied to the sixth category, which Congress reserved for skilled and unskilled persons able to fill labor shortages.¹⁶⁸

During debates, some legislators expressed a desire to provide for the admission of more “new seed” immigrants—essentially unskilled laborers, despite the bill’s focus on skilled workers.¹⁶⁹ Ultimately, the Act did include a “left over” provision for “new seed” immigrants by providing that additional visas could be reserved for this group when the annual cap on total migration was not met.¹⁷⁰

A year earlier, Congress ended the Bracero program, a temporary work program for Mexican agricultural workers.¹⁷¹ Liberals advocated for its demise, believing it to be exploitative, though it had been the main avenue for unskilled workers from Mexico to come to the United States.¹⁷² Even though there had not been a cap on migration from the Western Hemisphere before 1965, most Mexicans did not qualify to come under the permanent system because they had to first show that they would be employable and would not become a public charge.¹⁷³ As explained by Douglass Massey and Magaly Sanchez in *Brokered Boundaries: Creating Immigrant Identity in Anti-Immigrant Times*, “the low numbers coming from Latin America were due . . . to the absence of an established migratory infrastructure and the relatively low education levels of the population.”¹⁷⁴ The end of the Bracero program, combined

surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.”).

168. Immigration and Nationality Act of 1965, H.R. 2580, Pub. L. No. 89-236, § 203(a)(6), 79 Stat. 911, (1965).

169. *H.R. Subcomm. Hearings, supra* note 19, at 15 (Testimony of Rep. Emanuel Celler) (“We are not getting into this country what we call enough new seed immigration . . . we haven’t got the rough laborers anymore. The Italians, and Germans, and Portuguese, and the Czechoslovakians, and the Yugoslavs, and the Poles. They don’t work at those rough chores anymore, so we are compelled, for example to use Puerto Rican labor. Now soon that Puerto Rican labor will be exhausted.”).

170. *Id.* at 588 (Testimony of Frank E.G. Weil, Am. Veterans Comm. Representative) (“The Bracero legislation recently ended. Some people may ask, Why do not all the Mexicans come in on straight immigration visas since there is no quota on Mexicans? But the kind of Mexican who is willing to be a bracero is at an economic level where he could not meet the public charge provision of the general immigration laws. This is why we have not been flooded by ex-Braceros as immigrants.”).

171. Doris Meissner, *U.S. Temporary Programs: Lessons Learned*, Migration Policy Institute, (March 1, 2004).

172. GJELTEN, *supra* note 83, at 141; MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 148 (2004).

173. GJELTEN, *supra* note 83, at 141.

174. *Id.*

with changes in the law curtailing lawful migration from the Western Hemisphere, led to an increase in unlawful migration from Mexico.¹⁷⁵

The 1990 Immigration Act reinforced the priority for skilled labor under U.S. immigration policy. President Bush declared the legislation to be “blending of our tradition of family reunification with increased immigration of skilled individuals to meet our economic needs.”¹⁷⁶ Congress allocated a total of 140,000 visas for the employment-based category, and 131,000 visas for the H category—a temporary work visa that includes professionals and low-skilled workers. Additionally, Congress created four new temporary employment categories for highly-skilled workers: O, P, Q, and R.¹⁷⁷

In 1997, the Jordan Commission, a commission formed to evaluate the immigration system, expressed preference for admitting highly-skilled workers and eliminating categories for unskilled workers. It “continue[d] to recommend that immigrants be chosen on the basis of the skills they contribute to the U.S. economy. Only if there is a compelling national interest—such as nuclear family reunification or humanitarian admissions—should immigrants be admitted without regard to the economic contributions they can make.”¹⁷⁸ The report further explained that unskilled workers negatively affect unskilled U.S. workers and cost U.S. taxpayers money.¹⁷⁹

Under the current system, the majority of employment-based and temporary work visas go to highly-skilled workers. A total of 140,000 visas are allocated each year for all five employment-based categories. Category three, the only one that includes visas for unskilled workers, has 40,000 allocated each year, *but no more than 10,000 visas can go to workers classified as unskilled*.¹⁸⁰ Additionally, half of all NACARA (Nicaraguan Adjustment and Central American Relief Act) grants for Guatemalan and Salvadoran beneficiaries are subtracted,

175. DOUGLAS S. MASSEY & MAGALY SANCHEZ R., BROKERED BOUNDARIES: CREATING IMMIGRANT IDENTITY IN ANTI-IMMIGRANT TIMES 73 (2010).

176. President George H.W. Bush, Statement on Signing the Immigration Act of 1990 (Nov. 29, 1990), <http://www.presidency.ucsb.edu/ws/?pid=19117> (last visited Sept. 23, 2016).

177. S. 358, Pub. L. No. 101-649, §§ 207–08, 104 Stat. 4978 (1990). O visas are for individuals with extraordinary ability or achievement. P visas are for internationally recognized athletes and members of internationally recognized entertainment groups. The Q visa is a cultural exchange visa and the R visa is reserved for temporary religious workers.

178. BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY, U.S. COMM. ON IMMIGRATION REFORM 67, <http://www.utexas.edu/lbj/uscir/becoming/full-report.pdf> (last visited Sept. 23, 2016).

179. *Id.*

180. Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(B) (2012).

in part, from the already limited “other worker” or unskilled worker category (i.e., the category is capped at 10,000).¹⁸¹

The only temporary visa available to unskilled workers is the H visa, though even within that category more visas go to skilled workers than to unskilled workers. In 2014, 89,274 visas were given to those falling under the H2A category (temporary visas for agricultural workers).¹⁸² That same year, 68,102 visas were given to those falling under the H2B category—non-agricultural, temporary work visas for which unskilled laborers may qualify.¹⁸³ Contrast that with the H-1B category—temporary professionals—which is a temporary visa intended for skilled labor. In 2014, 161,369 visas were awarded.¹⁸⁴ Unlike other H visas, H-1B visa holders eventually can transition from a temporary work visa to a permanent one if their employer sponsors them.¹⁸⁵

The privileging of skilled workers affects both men and women who fall under the unskilled worker category, especially if they have no family relationship to qualify them for a family-based immigrant visa. Women, however, are uniquely affected. First, in comparison to men, women are frequently denied educational opportunities in their country of origin, making it more difficult for them to qualify for an employment-based immigrant visa (most of which require an advanced degree).¹⁸⁶ This contributes to the significant underrepresentation of women among employment-based visa holders, as may employer hiring practices that favor men in the process.¹⁸⁷ Second, while few visas are available for unskilled workers, those that are available are more likely to be in male-dominated industries. For instance, there is one category under the temporary work visas for agricultural workers, but no similar visa for domestic work.¹⁸⁸

To the first point, women constitute only one-third of principal employment-based visa holders. Though women constitute fifty-one percent of immigrants in the United States, employment-based visas

181. Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, § 203(d), 111 Stat. 2160 (1997).

182. *Nonimmigrant Visas Issued by Classification*, DEP'T OF STATE (2014), <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2014AnnualReport/FY14AnnualReport-TableXVIB.pdf> (last visited Sept. 23, 2016).

183. *Id.*

184. *Id.*

185. STEPHEN LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 373 (6th ed., 2015).

186. *How Comprehensive Immigration Reform Should Address the Needs of Women and Families*, *supra* note 143, at 11.

187. *See* Salcido & Menjivar, *supra* note 21, at 356; *How Comprehensive Immigration Reform Should Address the Needs of Women and Families*, *supra* note 143, at 20.

188. *See* Salcido & Menjivar, *supra* note 21, at 356.

go to men over women by a ratio of 3:1.¹⁸⁹ The same disparities are also seen in the temporary work visa system. In 2011, more than seventy percent of H-1B visas were awarded to men.¹⁹⁰ Individuals frequently come to the United States on a nonimmigrant (temporary) H-1B visa, which in time can create a pathway to receiving an employment-based visa.¹⁹¹ This makes obtaining an H-1B visa advantageous because it may lead to permanent residency and eventually citizenship. But this is a benefit that mostly men are receiving. Spouses of H-1B visa holders, mostly female, may be equally qualified and employable, but because of their dependent visa status, they are prevented under the law from working, making them financially dependent on a spouse.¹⁹²

Within the limited number of visas reserved for unskilled labor, little to no priority is given to domestic labor, typically performed by women.¹⁹³ Prioritizing skilled labor arguably meets economic needs, but the demand for care workers is expected to increase by forty-eight percent over the decade; the American population able to fill such jobs, on the other hand, is predicted to grow by only one percent.¹⁹⁴ While reforms were made to allocate visas to nurses, as

189. *How Comprehensive Immigration Reform Should Address the Needs of Women and Families*, *supra* note 143, at 2. In 2014 73,619 women came in under the employment-based system compared with 120,589 who came under the family-based system. That same year, 77,966 men came in under one of the employment-based categories versus 108,365 who came under the family-based system. Importantly, these numbers do not provide data on how many of those women who came under the employment-based category came as the spouse (i.e., dependent) of an employment-based visa holder. See Dep't of Homeland Sec., *2014 Yearbook of Immigration Statistics*, Office of Immigration Statistics (Aug. 2016).

190. *More Men than Women Get Visas for Highly Skilled Immigrants*, THE SEATTLE TIMES, March 18, 2013, <http://www.seattletimes.com/nation-world/more-men-than-women-get-visas-for-highly-skilled-immigrants/>.

191. See Immigration and Nationality Act, 8 U.S.C. § 1184(h) (2012).

192. LEGOMSKY & RODRÍGUEZ, *supra* note 185, at 373. Additionally, the more common pathway to obtain an employment-based visa is to first come to the United States on an H-1B visa. Spouses of H-1B visa holders are generally prohibited from working. Recent changes implemented by President Obama under his Executive Authority will now allow spouses on H-4 visas to work if their spouse has applied for a green card or has requested an extension before the expiration of the six year H-1B visa term. This means that there still remains a significant period of time in which H-4 visa holders are unable to work. 8 C.F.R. § 215 (2015), https://www.federalregister.gov/articles/2015/02/25/2015-04042/employment-authorization-for-certain-h-4-dependent-spouses?utm_campaign=pi+subscription+mailing+list&utm_medium=email&utm_source=federalregister.gov.

193. See generally William J. Banks, *The Domestic Worker Debauch: The Need for Domestic Worker Visas in the United States*, 88 FLA. BAR J. 28 (2006), <https://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/E2CAF8B89110686C8525713B0055B1A3>.

194. *How Comprehensive Immigration Reform Should Address the Needs of Women and Families*, *supra* note 143, at 7; see also Olivares, *supra* note 38, at 435–38 (discussing gender inequality under the proposed immigration reforms contained in the 2013 Border Security Bill). The bill proposed “blue card status” for agricultural workers—the majority of whom are men,

well as other reforms to provide doctors for underserved communities, there remain shortages in other areas, which are being filled by immigrants and undocumented persons. While their labor fills a need, it is not valued under the current employment-based system.

The type of low-wage work immigrant women perform in the United States also tends to pay less. One woman noted:

I would say that things always go better for the men because you know that there are a lot of jobs that only men can do, and those jobs almost always pay better than the jobs for women. For example, my co-worker's husband worked in construction, and he used to make good money in that. I know a lot of men who can make like \$8, \$10 per hour, and that's really good. And my partner now, he works as a gardener, and he makes like \$325 per week! When do you think I'll be able to make even \$300 a week?! So yeah, they have it much better.¹⁹⁵

Moreover, it is common for immigrant men, compared to immigrant women, to work in industries that allow for upward mobility, which ultimately leads to greater pay.¹⁹⁶

Thus, for women who lack a male partner and who fall under the unskilled worker category, the pathways to migrate lawfully become almost non-existent, both because of U.S. immigration laws and because of cultural expectations of women in their countries of origin and in the United States. Men are typically assumed to be the breadwinners and heads of households, leaving many women from Central America, and Mexico in particular, to rely on a male relative to petition for them. Deborah Boehm in *Intimate Migrations* notes that, among Mexicans, female migrations are “rarely ‘autonomous’ in the ways that men’s are: women migrate to reunite with male partners or because they have been abandoned by their spouses and must go to provide for their children. In nearly every

which would have created a pathway to citizenship, yet the bill also proposed a W nonimmigrant visa, which would have provided visas in areas of labor shortages in occupations where women comprise larger numbers. Yet this visa, unlike the one for agricultural workers, would have provided no pathway to citizenship. Jeanna Smialek, *Boomers Face Caregiver Shortage as U.S. Offers New Rules: Jobs*, BLOOMBERG BUSINESS (Sept. 25, 2013), <http://www.bloomberg.com/news/articles/2013-09-26/boomers-face-caregiver-shortage-as-u-s-offers-new-rules-jobs>; Judith Graham, *A Shortage of Caregivers*, NEW YORK TIMES (Feb. 26, 2014), http://newoldage.blogs.nytimes.com/2014/02/26/a-shortage-of-caregivers/?_r=0.

195. ABREGO, *supra* note 17, at 102.

196. *Id.* at 107.

case, regardless of the motivations, women's migration is tightly controlled by male family members."¹⁹⁷

This is not to say that men from oversubscribed countries who fall under the unskilled worker category have an easy time migrating lawfully to the United States. It is to say that women face restrictions both in the migration process and under immigration law that relate to their dependent role.

D. Immigration Law Privileges Families from Undersubscribed Countries

In 1965, legislative testimony emphasized the discriminatory impact of a system that favored immigrants from Northern Europe, in spite of the high demand for visas from Southern and Eastern Europeans.¹⁹⁸ For example, under the quota system, three countries—in Northern and Western Europe—supplied seventy percent of all immigrants to the United States.¹⁹⁹

While the 1965 law presumably opened the doors to a more equitable reallocation of immigrant visas, “lawmakers predicted that the main beneficiaries of the new law would be immigrants from Italy, Greece, and Poland . . . concerns about an increase in immigration from Asian, Latin American, and African countries persisted, revealing continued anxiety about large increases in the admission of immigrants of color.”²⁰⁰ During congressional hearings in 1965, Attorney General Katzenbach testified that 150,000 people migrated from the Western Hemisphere the previous year and noted that

197. DEBORAH A. BOEHM, *INTIMATE MIGRATIONS: GENDER, FAMILY, AND ILLEGALITY AMONG TRANSNATIONAL MEXICANS* 96 (2012).

198. *H.R. Subcomm. Hearings, supra* note 19, at 292 (Testimony of Robert Giaimo) (“Almost 400,000 Italians and Greeks are on the list of the oversubscribed. Our quotas allow only 5,975 from these two countries to enter each year. These statistics indicate too great a discrepancy between our quotas and the demand.”); *see also Senate Subcomm. Hearings, supra* note 20, at 454 (Testimony of ACLU attorney) (noting that the majority of immigrants come from European countries, not the Western Hemisphere. When asked whether he believed placing a ten percent cap would discriminate against those with a larger population, he responded, “the provisions of the statute, the proposed bill, should be examined scrupulously in order to make sure that they do not, in effect, continue a discrimination.”).

199. The President’s Remarks, *supra* note 95, at 365; *see also* DILLINGHAM, *H.R. REP. NO. 756*, at 8 (1911).

200. Erika Lee, *A Nation of Immigrants and a Gatekeeping Nation: American Immigration Law and Policy*, in *A COMPANION TO AMERICAN IMMIGRATION* 1, 19–20 (2006); *see also* GJELTEN, *supra* note 83, at 124 (Immigration from northern and western Europe had already declined dramatically, because people in those countries no longer saw compelling reasons to move. Administration officials also anticipated that the urge to migrate would soon be declining in Italy and other southern European countries. They did not, however, foresee how many people in Asia, Africa, Latin American, and the Middle East would be increasingly likely to leave home and look for a better life elsewhere.).

overpopulation that existed in parts of Europe did not exist in the Western Hemisphere, reassuring members of Congress that there was less pressure on those from the Western Hemisphere to migrate.²⁰¹ Nonetheless, the 1965 law placed an annual cap of 120,000 on migration from the Western Hemisphere and 170,000 from the Eastern Hemisphere, and established a commission to examine migration from the Western Hemisphere.²⁰² In 1976, Congress imposed a 20,000 migrant per country limit to the Western Hemisphere, as well as the family-based preference system, and capped migration to a total of 290,000 for both hemispheres.²⁰³ With the imposition of the family-based preference system, minor citizen children from the Western Hemisphere could no longer sponsor their parents, which they had previously been able to do.²⁰⁴ While Congress sought to equalize the system by ending discrimination toward specific European nations, it capped migration for its nearest neighbors, who had been accustomed to fewer restrictions on migration.²⁰⁵

In 1978, the Select Commission on Immigration and Refugee Policy recommended reducing immigration in order to curb the flow of undocumented migration.²⁰⁶

Legislation in 1990 raised the total migrant limit to 675,000, but since that time the numbers have not been raised or allocated in a manner that would address the significant backlogs.²⁰⁷

201. *Senate Subcomm. Hearings, supra* note 20, at 19.

202. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. § 1151 (2006)) (amending the Immigration and Nationality Act); *see also* IMMIGRATION AND NATIONALITY ACT AMENDMENTS OF 1976, H.R. REP. NO. 94-1553, at 3 (1976) (noting that the 120,000 ceiling did not go into effect until July 1, 1968).

203. Pub. L. No. 94-571, 90 Stat. 2703 (1976); *see also Hearings before the Subcomm. on Immigration, Citizenship and International Law of the Comm. on the Judiciary*, 94th Cong. 46 (1975) [hereinafter *Immigration Hearings*] (“It has often been suggested that by curtailing the opportunity of Western Hemisphere natives to immigrate lawfully, we have seriously aggravated the illegal alien problem.”).

204. *Immigration Hearings, supra* note 203, at 58 (Testimony of Cornelius D. Scully, Chief Regulations and Legislation Division) (stating, “under the Eastern Hemisphere system, there is no benefit for the parent of a minor U.S. citizen as there is now under the Western Hemisphere system.”); *see also* Pub. L. No. 94-571, 90 Stat. 2703 (1976) (applying the Eastern Hemisphere preference system to the Western Hemisphere).

205. The Department of State testified that the preference system and other limitations placed on Western Hemisphere migration, which it supported, would not relieve the demand for immigration from the Western Hemisphere and backlogs would continue. *See Hearings on S. 3074 Before the Subcomm. on Immigration and Naturalization of the Comm. on the Judiciary*, 94th Cong. 6 (1976).

206. *Excerpts from Final Report of Commission on Immigration and Refugee*, N.Y. TIMES (Feb. 27, 1981), <http://www.nytimes.com/1981/02/27/us/excerpts-from-final-report-of-commission-on-immigration-and-refugee.html?pagewanted=all>.

207. Immigration and Nationality Act of 1990, Pub. L. No. 101-649, § 101, 104 Stat. 4978 (1990).

The heartache resulting from these backlogs is perhaps most pronounced when it involves children who age out. As explained in Part I, a child is no longer considered a child under immigration law once she is married and/or reaches 21 years of age. The child of a lawful permanent resident who ages out would move from family-based preference category 2A to 2B. The wait times for the 2B category are generally much longer than those under the 2A category.²⁰⁸ Senator Franken described a scenario that exemplifies this situation.

In the first hearing we held this year on the subject of immigration reform, I highlighted the case of a Minnesota green card holder, a legal immigrant who filed to be reunited with his wife and four children in November 2010 and only got his application processed in February of this year. During that wait, his eldest son turned 21. That kicked [his son] into a separate visa category with a 19-year backlog.²⁰⁹

If an individual is in the United States and cannot maintain some sort of other immigration status through a non-immigrant visa, for example, she would have to return to her country of origin and be separated from her family for years. Those with pending LPR petitions who are abroad are frequently denied visitors visas to the United States because they are presumed to intend to immigrate to the U.S. permanently, which is prohibited under Section 214(b) of the Immigration and Nationality Act.²¹⁰ Individuals seeking to reunify with their family are therefore often unable to visit their family in the U.S. until they complete the lengthy LPR process.²¹¹

In 1965, Congress recognized the unmet demand for visas for immigrants from Southern and Eastern Europe and the strain placed on their family relationships. Today, however, Congress has failed to remedy the hardship imposed by the backlogs on immigrants who are from oversubscribed countries. There are approximately 1.3 million people waiting in Mexico for a visa, and 1.8 million people waiting in various Asian countries. Families from these regions face long separations as a result.²¹²

208. The comprehensive immigration reform bill in 2013 proposed the inclusion of spouses and minor children of LPRs as immediate relatives. S. 744, Border Security, Economic Opportunity, and Immigration Modernization Act, 113th Cong. § 2305 (2013).

209. *How Comprehensive Immigration Reform Should Address the Needs of Women and Families*, *supra* note 143, at 23.

210. Immigration and Nationality Act, 8 U.S.C. § 1184(b); KANDEL, *supra* note 51, at 17.

211. KANDEL, *supra* note 51, at 17.

212. *How Comprehensive Immigration Reform Should Address the Needs of Women and Families*, *supra* note 143, at 10.

III. IMMIGRATION LAW AND POLICY & FAMILY SEPARATION FOR NON-PRIVILEGED FAMILIES

In the past, Congress appeared to recognize that its restrictive immigration laws should be balanced with discretionary relief. For instance, in 1952, President Truman vetoed the immigration bill and noted the severity of deportation and the inability of “citizen and alien residents to save family members from deportation.”²¹³ He stated, “Seldom has a bill exhibited the distrust evidenced here for citizens and aliens alike—at a time when we need unity at home and the confidence of our friends abroad.”²¹⁴ In 1957, Congress passed a provision allowing for discretionary relief from deportation for the spouses, parents, and children of citizens or LPRs who misrepresented a document on entry.²¹⁵

The intent of the Act is plainly to grant exceptions to the rigorous provisions of the 1952 Act for the purpose of keeping family units together. Congress felt that, in many circumstances, it was more important to unite families and preserve family ties than it was to enforce strictly the quota limitations or even the many restrictive sections that are designed to keep undesirable or harmful aliens out of the country.²¹⁶

Yet recently, although family unity’s importance is noted in passing, enforcement and removal have taken precedence.²¹⁷

Since 1996, Congress has continued to pass legislation expanding deportation grounds, while making discretionary relief from deportation nearly impossible and criminalizing migration.²¹⁸

213. Harry S. Truman, Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality (June 25, 1952), <http://www.presidency.ucsb.edu/ws/?pid=14175>.

214. *Id.*

215. Pub. L. No. 85-316, § 7, 71 Stat. 639 (1957); *see also* Immigration and Naturalization Serv. v. Errico, 385 U.S. 214, 219–20 (1966).

216. Errico, 385 U.S. at 220.

217. *See* Sook Young Hong v. Napolitano, 772 F. Supp. 2d 1270, 1279 (D. Haw. 2011) (noting “[d]espite paying lip service to the multiple goals of family unity, the liberal treatment of children, and fraud, *Cariaga* evidences the BIA’s concern exclusively with the issue of fraud. By the time it decided *Drigo*, six years later, the BIA did not even mention family unity or the liberal treatment of children.”).

218. Referring to deportation orders that had been instituted for individuals who had been in the United States for years and who had family here, Mr. Feighan in 1964 testified that there should be discretionary relief available because deportation would be “a pretty cruel act and an unreasonable act.” *H.R. Subcomm. Hearings, supra* note 19, at 490; *see, e.g.*, Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009) (describing the increased use of the criminal justice system to handle migration control); Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the*

Congress has also increased funding for immigration enforcement, along the U.S.-Mexico border, making it highly militarized.²¹⁹

The rhetoric surrounding the need for increased enforcement and harsh immigration laws focuses on removing “criminal aliens” from the country, yet this non-nuanced message creates a pervasive image that criminalizes immigrants and overshadows the human reality—that these laws tear families apart. The current immigration priorities dilute the principle of family reunification and render it meaningless for many immigrants. Thus, while family reunification has been claimed as the cornerstone of our immigration system, the overarching functioning of the system, including visa backlogs, increased enforcement, and harsh immigration penalties, seems to confine this principle to select families and select family members.

This Part examines how removals, bars on reentry, and enforcement all contribute to the devaluation of family integrity.

A. Removals

Removals represent the clearest example of families being torn apart by immigration enforcement. These removals do not just affect those who are undocumented—they also affect U.S. citizens. For example, between July 2010 and September 2012, DHS removed 204,810 parents of U.S. citizen children.²²⁰ In 2013, 72,410 removed persons reported that they had one or more U.S.-born children.²²¹ In 2014, Andres Jimenez (age ten at the time) made a plea to President Obama requesting the reunification of families like his, who had been torn apart because of deportation.²²² Three years before, his father had been deported to Guatemala following

Incorporation of Immigration Law into the Criminal Justice System, 54 HOWARD L.J. 3 (2011) (exploring how the criminalization of immigration has had a profound impact on the Latino community in that it has served to “stigmatize, punish and remove Latinos”).

219. Massey & Riosmena, *supra* note 23, at 295 (stating that “during the 1990s legal entry from Latin America grew considerably more difficult, and the Mexico-U.S. border became the most militarized frontier between two peaceful nations anywhere in the world. Indeed, the Border Patrol grew into the largest arms-bearing branch of the federal government except for the military itself. From 1986 to 2004, its budget increased tenfold, the number of officers tripled, the number of hours they spent patrolling the border grew eight times, and internal deportations expanded by a factor of ten.”) (internal citations omitted).

220. Seth Freed Wessler, *Nearly 205K Deportations of Parents of U.S. Citizens in Just Over Two Years*, COLORLINES (Dec. 17, 2012), <http://www.colorlines.com/articles/nearly-205k-deportations-parents-us-citizens-just-over-two-years>.

221. Deportations Separated Thousands of U.S.-Born Children From Parents in 2013. Wessler, *supra* note 220.

222. Lauren Gambino, *Orphaned by Deportation: The Crisis of American Children Left Behind*, GUARDIAN (Oct. 15, 2015), <http://www.theguardian.com/us-news/2014/oct/15/immigration-boy-reform-obama-deportations-families-separated>.

a stop by police for having an expired license plate. He said, on national television, “President Obama, I want to have a family like yours” and broke down in tears when talking about his father’s deportation.²²³

The Obama Administration has recognized the hardship of restrictive immigration laws, and has allowed for limited relief. Through executive actions, President Obama implemented Deferred Action for Childhood Arrivals and 2014 Deferred Action for Parents of U.S. citizens and Lawful Permanent Residents.²²⁴ The administration also expanded the unlawful presence provisional to all relatives eligible for an immigrant visa.²²⁵ At the same time, the administration has focused heavily on enforcement. In January 2016, for instance, ICE continued raids to apprehend new arrivals—many of whom were mothers with children—who had crossed the border unlawfully.²²⁶

Increased enforcement is meant to send a message that the immigration laws should not be broken, but it is a message that is irrelevant to individuals seeking family reunification. Twenty-one percent of deportees in the United States had reentered previously, while more than a third of deportees who are parents of U.S. citizen children had previously entered the United States.²²⁷ “The fact that a greater percentage of deportee parents are repeat violators suggests that parents of dependent children in the United States may be especially motivated to remigrate, presumably to rejoin their families.”²²⁸

223. *Id.*

224. See *Consideration of Deferred Action for Childhood Arrivals*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last visited Sept. 23, 2016) (describing DACA); see also *Executive Actions on Immigration*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <https://www.uscis.gov/immigrationaction#1> (last visited Sept. 23, 2016) (describing Deferred Action for Parents of U.S. Citizens and LPRs).

225. *Provisional Unlawful Presence Waivers*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <https://www.uscis.gov/family/family-us-citizens/provisional-waiver/provisional-unlawful-presence-waivers> (last visited Sept. 23, 2016).

226. See generally Cindy Carcamo, *After Recent ICE Raids, Sanctuary Movement Grows for Immigrants Here Illegally*, L.A. TIMES (Feb. 8, 2016), <http://www.latimes.com/local/california/la-me-immigration-sanctuary-revival-20160208-story.html>; Pamela Constable, *Deportation Raids Continue, Despite Outcry*, WASHINGTON POST (Jan. 8, 2016), https://www.washingtonpost.com/local/social-issues/pre-dawn-raids-leave-us-immigrant-communities-paralyzed-with-fear/2016/01/08/5bdf664c-b412-11e5-a76a-0b5145e8679a_story.html.

227. Jodi Berger Cardoso, Erin Randle Hamilton, Nestor Rodriguez, Karl Eschbach & Jacqueline Hagan, *Deporting Fathers: Involuntary Transnational Families and Intent to Remigrate among Salvadoran Deportees*, 50 INT’L MIGRATION REV. 3 (2014).

228. *Id.* In 2013 USCIS announced a proposed rule to allow unlawful entrants who are immediate relatives of U.S. citizens and who are applying for an immigrant visa, to adjust their status in the United States rather than having to leave the U.S. and then be subject to

Not only do the removals separate family members, but they have financial and gender-specific impacts within families. Though the undocumented population is split equally by gender, the majority of deportees—nine out of ten—are men.²²⁹ As a result, women find themselves becoming, effectively, single mothers and the only providers for their children in the United States.²³⁰ For men, the stigma of deportation to their country of origin, particularly in Mexico, can make it difficult to find a job, which, in turn, makes it more difficult for fathers to provide financially for their family members who remain in the United States.²³¹

Additionally, as discussed in *The Immigrant “Other”: Racialized Identity and the Termination of Undocumented Parents’ Parental Rights*, because of immigration enforcement, undocumented parents risk the termination of their parental rights.²³² Appellate decisions and academic studies reveal that these cases are not rare.²³³ As one judge in Southwest Florida commented:

Our child protection system has had very little, almost non-existent success at reunifying children, whether born in the USA or in a foreign country, with parents who come to the USA (1) undocumented, (2) poor, (3) uneducated/illiterate, (4) unable to communicate in English, (5) culturally segregated If children of these parents come into care, they are virtually doomed by these five factors and the probability of permanent loss of these children is overwhelmingly high.²³⁴

There are 5.5 million children in the United States with at least one undocumented parent.²³⁵ Three quarters of those children are

the inadmissibility bars, precluding their reentry for a period of time. While helpful, this only applies to a small subset of the population. 78 Fed. Reg. 536 (Jan. 3, 2013).

229. *ICE Deportations: Gender, Age and Country of Citizenship*, TRAC IMMIGRATION, <http://trac.syr.edu/immigration/reports/350/> (last visited Sept. 23, 2016).

230. JOANNA DREBY, *EVERYDAY ILLEGAL: WHEN POLICIES UNDERMINE IMMIGRANT FAMILIES* 34–37 (2015).

231. *Id.* at 37.

232. Anita Ortiz Maddali, *The Immigrant “Other”: Racialized Identity and the Devaluation of Immigrant Family Relations*, 89 IND. L.J. 2 (2014).

233. See, e.g., *In re M.M.*, 587 S.E.2d 825 (Ga. App. 2003); *In re E.N.C., et al.*, 384 S.W.3d 796 (Tex. 2012); *In re Mainor T. and Estela T.*, 674 N.W. 2d 442 (Neb. 2004); *In re Doe*, 281 P.3d 95 (Idaho 2012); *In re B and J.*, 756 N.W. 234 (Mich. Ct. App. 2008); *In re Angelica L.*, 767 N.W. 74 (Neb. 2009); *In re C.M.B.R.*, 332 S.W. 3d 793 (Mo. 2011); SETH FREED WESSLER, *SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM* 22–24 (2011).

234. WESSLER, *supra* note 233, at 18.

235. JEFFREY S. PASSEL & D’VERA COHN, *A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES* 7 (2009), pewhispanic.org/files/reports/107.pdf.

U.S. citizens.²³⁶ With increased immigration enforcement, parents and children living in mixed-status households face a very real threat of separation: from 2000-2009, the government deported over 100,000 parents who had U.S. citizen children.²³⁷ In 2011, the Applied Research Center conservatively estimated that 5,100 children in foster care had either a parent detained by ICE or a parent that has been deported, representing 1.25 percent of the total foster care population, a number it expected to increase.²³⁸

Children of undocumented parents come into contact with the child welfare system in various ways. When ICE arrests an undocumented parent—for instance, during a workplace raid—and detains him, it can cause family separation, which may then result in state intervention.²³⁹ In other instances, family services may investigate an undocumented parent for abuse or neglect.²⁴⁰ ICE may be notified in these circumstances, resulting in the parent's apprehension and subsequent removal from the United States.²⁴¹ Even

236. *Id.*

237. Ajay Chaudry, Randy Capps, Juan Manuel Pedroza, Rose Maria Castaneda, Robert Santos & Molly M. Scott, *Facing Our Future: Children in the Aftermath of Immigration Enforcement*, THE URBAN INSTITUTE 1 (2009), http://www.urban.org/UploadedPDF/412020_FacingOurFuture_final.pdf.

238. WESSLER, *supra* note 233, at 6.

239. *See* Chaudry, et al., *supra* note 237, at 13–26 (describing family separations as a result of immigration enforcement); *see also In re* Adoption of C.M.B.R., 332 S.W.3d 793 (Mo. 2011) (undocumented mother arrested during a workplace raid).

240. *See In re* B and J, 756 N.W.2d 234 (Mich. Ct. App. 2008) (reversing termination involving undocumented parents whose rights had been terminated by the family court following their deportation); *In re* Interest of Angelica L., 767 N.W.2d 74 (Neb. 2009) (reversing termination of mother's rights. Following allegations of abuse, a social worker and police officer went to the mother's house to follow-up. Mom identified herself as the babysitter because she was afraid that she would lose her children and be deported. She was arrested for obstructing a government operation, her children were taken into protective custody, and she was later taken into custody by ICE, deported, and her parental rights terminated); *In re* Interest of Mainor T. and Estela T., 674 N.W.2d 442 (Neb. 2004) (vacated judgment terminating mother's parental rights and remanded for further proceedings. Mother's rights were terminated after she was arrested for striking her child. She was subsequently incarcerated for child abuse and the former INS placed an immigration hold on her, which led to her deportation); *State v. Lopez-Navor*, 951 A.2d 508 (R.I. 2008) (upholding termination of mother's rights. Mother's rights were terminated because she did not report her husband's abuse of her children to the police. She was charged with criminal neglect. She argued that her status as an undocumented immigrant made her afraid to report her husband to the police, which the Rhode Island Supreme Court said was not a defense); *In re* S.H.A., 728 S.W.2d 73 (Tex. App. 1987) (upholding termination of parental rights of undocumented parents accused of neglecting their sixteen-month-old son); *Anita C. v. Superior Court*, 2009 WL 2859068, No. B213283 (Cal. App. 2 Dist. Sept. 8, 2009) (finding that the facts regarding the mother, who plead guilty to child cruelty for leaving children alone while she worked, and who lived in unhygienic living conditions, supported termination of her parental rights).

241. *See, e.g., In re* B., 756 N.W.2d at 237; *In re* Interest of Angelica L., 767 N.W.2d at 82; *In re* Interest of Mainor T., 674 N.W.2d at 449.

unsubstantiated reports may, at a later date, become the justification for termination of parental rights.²⁴² Other cases involve an undocumented parent who is incarcerated because of a criminal conviction, resulting in separation from his or her child.²⁴³ After completion of the criminal sentence, the parent is deported.²⁴⁴

B. Penalties for Violations of Immigration Laws

In 1996, Congress not only increased the grounds for removal, but also created penalties for immigration violations that have consequences beyond removal and make reunification even more difficult. Under Section 212(a)(9)(B), a person who has been unlawfully present in the United States for more than a year is barred from reentry for ten years. Additionally, there are time bars for those who have a previous order of removal, and criminal penalties for those who reenter without permission after having been previously removed.²⁴⁵ In practice, these penalties mean that an

242. During investigation by child welfare workers, one mom was arrested and placed in removal proceedings. As a result of her deportation, a petition for termination of her parental rights was filed because of her failure to comply with the case plan and because her children had spent more than 15 months of the most recent 22 months in foster care. *See* Angelica L., 767 N.W.2d at 84. In another case, child welfare authorities reported the parents to ICE and then used their deportation to construct a claim of abandonment. *See In re B and J*, 756 N.W. 2d at 237; *see also* WESSLER, *supra* note 233, at 32 (describing a case in Texas, in which a mom with six U.S. citizen children was charged with neglectful supervision and child endangerment after someone reported seeing the mother's 3 year-old playing near a highway. Border Patrol checked her criminal record, and she was charged with illegal reentry because she had been deported previously. Because she faced a minimum of two years of incarceration and then deportation, her parental rights were terminated. According to her attorney, "[i]f she were a citizen, she would have been bonded out in 24 hours. She would not have lost her kids.").

243. *See, e.g., In re* Interest of C.T., 544 S.E.2d 203 (Ga. App. 2001) (upholding termination of father's parental rights, which had been terminated while he was incarcerated because of a felony conviction); *Fairfax Cty. Dep't of Family Servs. v. Ibrahim*, 2000 WL 1847638, No. 0821-00-4 (VA App. Dec. 19, 2000) (Ghanaian father had been arrested, incarcerated for importing drugs, and deported. Department of Family Services petitioned to terminate his parental rights, which was denied by the trial court and the appellate court affirmed the denial. It is unclear whether the father had been undocumented at the time of his arrest); *In re* Matter of B.A. and R.A., 705 N.W.2d 507 (Iowa App. 2005) (reversing the termination of mother's parental rights. Father pled guilty to conspiracy to distribute methamphetamine and mother pled guilty to misprision of felony); *Dep't of Children's Servs. v. Ahmad*, 2005 WL 975339, No. M2004-02604-COA-R3-PT (Tenn. Ct. App. Apr. 26, 2005) (upholding termination of a mother's rights after she had been arrested on felony theft charges, served her criminal sentence, was transferred to ICE custody, and then deported); *In re* RH, 524 S.E.2d 257 (Ga. App. 1999) (upholding termination of an undocumented father's parental rights who was incarcerated for cocaine distribution).

244. *See, e.g., Fairfax Cty. Dep't of Family Servs., supra*; *State Dep't of Children's Servs. v. Ahmad*, 2005 WL 975339.

245. Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9) (2012).

undocumented person who marries a United States citizen faces difficulties in attempting to obtain lawful immigration status. To do so, she would have to return to her country of origin, which would result in her being subject to the time bar. She could apply for a waiver of inadmissibility, but would need to demonstrate that refusal of admission would cause extreme hardship to her U.S. citizen spouse or parent.²⁴⁶ As one U.S. citizen, whose husband is living outside of the United States because of the time bar, stated, “When they give out these bars, they’re not just giving them to one person. They’re giving them to a family.”²⁴⁷

Take the case of T.J. Barbour, a software engineer and American citizen, who married Maythe, a citizen of Mexico. After Maythe was stopped by a police officer for driving too slow, ICE agents were contacted and Maythe was removed in 2011. Because of a previous order of removal, she was barred from returning to the U.S. for twenty years. Their son lives with T.J. in the U.S., separated from his mother. According to Maythe, “His life is there [in the United States], everything he knows. I still feel he loves me. He makes an effort to come, and he says he misses me. But I am not a part of his total life now.”²⁴⁸

Chris Xitco, a U.S. citizen and Army veteran, has three children with Delia, a Mexican citizen. Chris and Delia married in 2002. Chris filed an immediate relative petition for Delia based on their married status. They went to Mexico in 2007 for their visa interview and at that time learned that Delia was barred for ten years because of a previous removal. They tried to apply for a waiver of inadmissibility, but her husband’s emotional distress from the separation did not constitute “extreme hardship.” Chris drives to Mexico every weekend to visit his wife and children, who remain with Delia, but worries about the effect of the separation on his relationship with his children.²⁴⁹

Families, like the ones described above, want to be together but are separated because of harsh and unforgiving immigration laws.

246. As of 2013, there is a provisional unlawful presence waiver that allows immediate relatives of U.S. citizens, who only need an unlawful presence waiver, to apply for the waiver of inadmissibility before leaving the U.S. to appear for their visa interview abroad. They still need to make a showing that refusal of admission would cause extreme hardship to a U.S. citizen spouse or parent. *Provisional Unlawful Presence Waivers*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <https://www.uscis.gov/family/family-us-citizens/provisional-waiver/provisional-unlawful-presence-waivers> (last visited Sept. 23, 2016).

247. Susan Ferriss, *Separated by Law: Families Torn Apart by 1996 Immigration Measure*, CTR. FOR PUB. INTEGRITY (Oct. 19, 2012), <http://www.publicintegrity.org/2012/10/19/11563/separated-law-families-torn-apart-1996-immigration-measure>.

248. *Id.*

249. *Id.*

The focus on enforcement of immigration laws at all costs takes a toll on human relationships. This, too, has a societal impact.²⁵⁰

C. Increased Security at Border

Over the past ten years, security at the border has increased significantly, making unlawful crossings more difficult and more dangerous. *The Economist* noted, “Border patrol agents no longer just patrol the border; they scour the country for illegals to eject. The deportation machine costs more than all other areas of federal criminal law enforcement combined.”²⁵¹

Increased enforcement has reduced the number of people crossing unlawfully, but it has also perpetuated separation for families whose only way to reunite is by doing so unlawfully. Undocumented individuals in the United States who would like to reunite with family members in their country of origin fear doing so because they realize that returning to the U.S. will be much more difficult. For those who must cross multiple borders, like Salvadorans, it has made “circular migration almost impossible”—leaving parents and children separated for years.

Any separation of children from their parents is painful, but it becomes worse when children see no possibility of reunification. Children who can count on the possibility of reunification fare better than those who cannot. Sociologist Leisy Abrego noted in *Sacrificing Families*,

The family separation was easier to accept because Doris [a girl in El Salvador] had spent a month with her mother the previous year and was awaiting an immigrant visa in the foreseeable future. Not pained by the consequences of illegality, even economic hardships and a transgression of gender ideologies seemed manageable when she could count on a family reunification.²⁵²

250. Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime and Sovereign Power*, 56 AM. L. REV. 378 (2006) (arguing that “[e]xcluding and alienating a population with strong ties to family, communities, and business interests in the United States fractures our society in ways that extend well beyond the immediate deportation or state-imposed criminal penalty”).

251. *Barack Obama, Deportee-in-Chief*, *ECONOMIST* (Feb. 8, 2014), <http://www.economist.com/news/leaders/21595902-expelling-record-numbers-immigrants-costly-way-make-america-less-dynamic-barack-obama>.

252. ABREGO, *supra* note 17, at 156.

D. Dangers at the Mexican – U.S. Border

Increased enforcement means that today's border is extremely difficult to cross. "The need to cross more remote and hostile terrain . . . increased the risks of injury and death, thereby raising psychic costs of undocumented migration."²⁵³

Women and children face additional risks that make their crossing particularly expensive and dangerous. For example, in 2013, unauthorized travel from El Salvador to the United States, which involves the hiring of a smuggler (or coyote) to help a migrant cross the border, cost approximately \$8,000–10,000 per traveler.²⁵⁴ According to Leisy Abrego's research, Salvadoran men generally feel comfortable crossing the first two borders on their own, which can save them approximately \$4,000.²⁵⁵ Women and young girls, who are more vulnerable to rape and other gender-based violence while crossing the border, more often pay the entire fee in order to receive assistance throughout the entire journey.²⁵⁶

The risks are very real, and women often take the risks for the sake of their children. One woman recounted an attempted rape perpetuated against her while crossing the border. When asked how she could face that hardship, she responded, "I just thought about my children. I would say to myself, I came this far to get food for them. I am going to get there. I know I am going to get there."²⁵⁷

Marta, a fourteen-year-old from El Salvador and mother of a young baby, left in 1991 with Antonio, a coyote who promised to get her across the U.S. border.²⁵⁸ While on the journey, Antonio told Marta that she would have to sleep with him and when she refused, "Antonio leaned closer and said if she didn't comply, he would make sure that all the other men he knew could have their way with her. She knew she was powerless."

The entire trip was a terror. Though Marta was small, less than a hundred pounds, and Antonio was tall and strong, she resisted his advances as best she could, but he beat her when he didn't get what he wanted. And then there was the railroad. Antonio directed the group to hitch rides on freights heading northward, and that put them on *el tren de la muerte*, the train

253. Massey, *supra* note 110, at 297.

254. ABREGO, *supra* note 17, at 50.

255. *Id.* at 50–51.

256. *Id.*

257. *Id.* at 53.

258. GJELTEN, *supra* note 83, at 156–57.

of death, named for all the migrants who were killed under its wheels. Guards kept the migrants from approaching the train when it was stopped, so they had to wait until it was moving and then jump aboard. Many lost their grip and fell. Marta saw torn and bloody bodies almost every day, but the more upset she became, the more likely Antonio was to hit her. Fearing being left alone, she nevertheless stayed with him all the way to the U.S. border at Reynosa, and swam with him across the Rio Grande to the U.S. side, where they were immediately caught. Marta pleaded for refuge, telling U.S. Border Patrol officers that Antonio had abused her throughout the journey and that her life would be in danger if she were deported. It was no use. She was sent back to El Salvador. So was Antonio, who showed up at her home a short time later to inform her father that he and Marta were now a couple, that she was his woman. Modesto [Marta's father] threw him out of the house, but it was too late. Marta was once again pregnant.²⁵⁹

It seems to be a contradiction that immigration policy offers the possibility of safety and refuge in the United States for those who are escaping persecution, yet it also contributes to the violence experienced by migrants due to the militarization of the border and denies safety to many vulnerable migrants, especially women and children, who are fleeing unprecedented levels of violence in Central America.

E. Limited Relief from Removal

Once an individual is placed in removal proceedings, the possibility of discretionary relief is largely unavailable. In 1940 Congress allowed what was called Suspension of Deportation for individuals who could prove five years of residence in the United States, good moral character, and that the deportation would cause *economic* hardship to a U.S. citizen or LPR spouse, parent or child.²⁶⁰ Just a few years later, that benefit was extended to those who could show seven years residence, absent any kind of hardship to a relative.²⁶¹ Congress pushed back and made the criteria more stringent in 1952, requiring a showing of exceptional and extremely unusual

259. *Id.*

260. William C.B. Underwood, *Unreviewable Discretionary Justice: The New Extreme Hardship in Cancellation of Deportation Cases*, 72 *IND. L.J.* 3, 889 (1997); see Alien Registration Act of 1940, Pub. L. No. 76-670, § 20, 54 Stat. 670, 672 (1940).

261. See Act of July 1, 1948, Pub. L. No. 863, 62 Stat. 1206 (1948).

hardship, good moral character and a period of seven years of continuous residence.²⁶² The hardship could be suffered by the individual or to his or her U.S. citizen or LPR spouse, parent, or child. In 1962, in recognition of the high standard of “exceptional and extremely unusual hardship,” Congress amended the law once again so that those found deportable under grounds considered less serious only had to prove extreme hardship rather than the exceptional and extremely unusual hardship imposed by the 1952 law.²⁶³ The exceptional and extremely unusual hardship standard, however, remained a requirement for those in deportation proceedings for more serious reasons—such as deportation based on a crime involving moral turpitude, a controlled substance offense, or an aggravated felony. In 1994, Congress lowered the standards for certain victims, spouses, and children who had been subjected to “extreme cruelty” by a U.S. citizen or LPR spouse or parent, by requiring only three years of continuous physical presence and a more lenient showing of hardship.²⁶⁴ Moreover, the hardship could be to the individual, her child, or parent.

In 1996, Congress took a significant step backward: it replaced Suspension of Deportation with a form of relief called Cancellation of Removal.²⁶⁵ Cancellation of Removal distinguishes between lawful permanent residents and all other “aliens.” For lawful permanent residents to qualify for relief, they must have: 1) LPR status for not less than five years; 2) resided in the U.S. in any status for not less than seven years; and 3) not been convicted of an aggravated felony (an ever growing list of crimes).²⁶⁶ For non-LPRs, the requirement is now seven continuous years of residence, rather than ten. “Good moral character” is still a requirement, and criminal bars may now preclude someone from receiving this relief. Importantly, the “extreme hardship” standard was changed to “exceptional and unusual hardship” to the applicant’s U.S. citizen or LPR spouse, parent, or child; hardship to the individual is no longer relevant.²⁶⁷ The requirements for cancellation of removal for victims of abuse mentioned above remained the same. Under the new cancellation law, still in effect, only 4,000 grants may be

262. Act of June 27, 1952, Pub. L. No. 82-414, § 244(a), 66 Stat. 163, 214 (1952).

263. Act of Oct. 24, 1962, Pub. L. No. 87-885, § 4, 76 Stat. 1247 (1962).

264. Immigration and Nationality Act, 8 U.S.C. § 1254(a)(3) (2012), amended by IIRIRA, Pub. L. No 104-208, § 304(a)(3), 110 Stat. 3009 (1996).

265. See *In re Andazola-Rivas*, 23 I. & N. Dec. 319, 333 (2002) (Osuna, dissenting) (citing H.R. Rep. No. 104-828 (1996) (noting that Congress’ intent was to narrow the class of individuals who could qualify)).

266. Immigration and Nationality Act, 8 U.S.C. 1229a(a)–(b) (2012).

267. *Id.*

given per year, which has resulted in a backlog of approvals.²⁶⁸ Thus, a remedy meant to provide individual relief by preventing family separation makes the criteria so stringent and the yearly cap so low that few can actually benefit.

The Nicaraguan Adjustment and Central American Relief Act (NACARA) is also a form of relief from removal, which allows for permanent residency for certain nationals of Guatemala, El Salvador, the former USSR and its successor republics, and most European nations.²⁶⁹ These individuals are allowed to apply for cancellation of removal under the less stringent Suspension of Deportation criteria.²⁷⁰ A person granted NACARA relief can also bring his or her spouse and children.²⁷¹ Importantly, while there is no limit on the number of NACARA grants allowed per year, those awarded to Guatemalan and Salvadoran beneficiaries are deducted from other categories. Half of the Guatemalan and half of the Salvadoran grants are subtracted from the annual ceilings for diversity immigrants and the other half are subtracted from the third, already limited, employment-based “other workers” category.²⁷²

IV. THE VALUE OF FAMILY REUNIFICATION & FAMILY INTEGRITY

As noted, the principle of family reunification has been an underpinning of our immigration laws since the 1920s, but the system has always privileged some families over others. Moreover, the current system of preferences, strong enforcement, and ever-harsher penalties for violations does little to honor this principle.

Though the abolition of the national origins quota system opened the door for greater migration from other parts of the world and facilitated family reunification for Southern and Eastern European families, today many families—especially families of color—face long and permanent separations. The Secretary of the Department of Health, Education, and Welfare noted in 1965, “[t]here could be no more visible demonstration of our commitment to the ideals of individual worth, or of our recognition of the

268. *Id.* at § 1229a(e) (2012).

269. *See* Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160 (1997). Part of NACARA also involved amnesty for certain nationals of Nicaragua and Cuba.

270. *Id.* at § 203(a)–(b).

271. *Id.*

272. *See id.* at § 203(d). The reductions to each of these categories cannot be greater than 5,000 per year.

importance of the human values of the family, than a just and equitable immigration policy.”²⁷³ The current system is neither just nor equitable. Perhaps such a system is only possible in theory, but with so many families facing separation, reforms are needed to once again recognize the value of family.

The system could certainly do more than it has done to value family integrity. In particular, adjusting the law to respond to migration trends could further reunification for many more families. This Part assesses how recognizing the social agency of women and children within the system could facilitate reunification, particularly when family unit migration is headed by a woman or a child.

A. *The Value of Prioritizing Family Integrity*

As discussed throughout this Article, modern immigration laws fracture families through harsh and unforgiving immigration laws. Since the mid-1990s, harsh legislation has led to prolonged and sometimes permanent separation of families with little to non-existent avenues for relief. While the quota system of 1924 restricted entry for those immigrants whom Congress deemed undesirable, the same tactic has been used in the past two decades—not through a national origins quota system, but through punitive and unforgiving laws, privileging of certain families, and pursuing an outdated conception of family.

Yet is there value in prioritizing family relationships under immigration law? Do those immigrating under the family-based system add value to the United States?²⁷⁴ Professor Stephen Legomsky suggests that in formulating an immigration policy for a nation, policymakers must articulate their reasons for a family reunification program. According to Legomsky, such questions include: “Is family reunification mainly a humanitarian project, to avoid the

273. *H.R. Subcomm. Hearings, supra* note 19, at 334 (Statement of Hon. Anthony J. Celebrezze).

274. See Kit Johnson, *Theories of Immigration Law*, 46 ARIZ. ST. L.J. 1245–46 (2015) (suggesting that family-based migration fits within all four theories of immigration law. Under the individual rights theory, families have a right to live with one another. Under the domestic interest theory, family-based immigrants provide economic value to the country in the form of “low-skilled market labor, nonmarket labor, and gray market labor.” From the national values theory, the United States values immigrants who can quickly assimilate; having family present helps speed the process of integration. And from the global welfare theory perspective, if one immigrates and leaves behind family members, those family members in the country of origin will potentially lose a financial resource, which could weaken the family left behind).

hardship of separation? Is it a human rights concept, meant to satisfy international legal obligations? Is it a way to foster the integration of immigrants? Is it a practical alternative to illegal immigration?²⁷⁵

In her piece, *What Makes the Family Special*, Professor Kerry Abrams explored the benefits that the family-based system provides to the nation.²⁷⁶ She examines this question not from a rights-based perspective, but rather from the perspective of potential benefits the nation may derive from it. In doing so, she proposes three possible rationales for privileging the family-based system: integration, labor, and social engineering.²⁷⁷

According to Abrams, under a theory of integration, the nation benefits because faster integration is likely to occur when an immigrant has an American spouse or family because these family members can speed up the immigrant's process of integration into society.²⁷⁸ Additionally, even without a citizen family member, immigrants who have their family members with them are more likely to integrate and this in turn provides greater emotional and economic investment in the country.²⁷⁹

Abrams also posits that the family-based system may promote three types of labor: market labor, nonmarket labor, and "gray" market labor.²⁸⁰ In the market labor context, the family-based system may screen for labor migration and offer greater flexibility because low-skilled workers may be more open to new areas of employment when labor shortages arise, compared with highly-skilled workers who are often tied to their specific occupation.²⁸¹ Because of the affidavit of support requirements, the family-based system provides a mechanism for screening family members who are brought here. For example, a potential sponsor, because of her own liability, will choose the more responsible family member to sponsor.²⁸² Second, immigrants coming through the family-based system are more likely to engage in unpaid, nonmarket labor in the home that supports participants in market labor.²⁸³ And, finally, gray market labor—unregulated work typically performed in the

275. Legomsky, *supra* note 32, at 348.

276. Abrams, *supra* note 33.

277. *Id.* at 9.

278. *Id.* at 16.

279. *Id.* at 16–17.

280. *Id.* at 19.

281. *Id.*

282. *Id.* at 20–21.

283. *Id.* at 21–22.

home for a wage—is more likely to be performed by female immigrants who come through the family-based system, and the nation may benefit by privileging this migration.²⁸⁴

A criticism of the family-based system is that it does not necessarily bring individuals with needed skills to the United States, so it does not add value.²⁸⁵ The employment-based system was created to attract those with desirable skills to come to the United States and to meet certain labor needs.²⁸⁶ Yet, the employment-based system does not fill all labor needs. Indeed, immigrants under the family-based system are better suited to invest in human capital.²⁸⁷ Harriet Duleep, a Research Professor of Public Policy, notes that though family-based immigrants' earnings are initially low, they invest in schooling and training so that they have high earnings growth. In this way they “meet labor market needs in an ongoing flexible fashion that contributes to a vibrant economy, which has been characteristic of the U.S.”²⁸⁸

The final argument that Abrams proposes as a potential benefit of the family-based system is that it allows Congress to engage in social engineering, in a manner in which it is prohibited from doing so domestically.²⁸⁹ Congress, through immigration, can privilege certain types of families to come over, promote certain types of family structures, and regulate the demographics of the country.²⁹⁰ As this Article has suggested, Congress has engaged in social engineering through the immigration system to privilege certain families and members within families. While this may be viewed as a benefit to the nation, it can also create instability for families who are not privileged under the system, which can then engender instability within society. Historically, through social engineering, those outside the dominant group—certain racial and ethnic groups, women, and sexual minorities—have been denied privileges under immigration law.

284. *See id.* at 23.

285. Harriet Duleep, *Hearing before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int'l Law, Comm. on the Judiciary*, 110th Cong. 1 (2007) [hereinafter *Duleep Testimony*], at 2 (Testimony of Harriet Duleep) (noting that employment-based immigrants “have specific skills that are immediately valued in the U.S. labor market”).

286. A lawsuit was recently filed against Disney, in which former employees of Disney allege that they were replaced by employees whom Disney hired under the H-1B program. Sara Ashley O'Brien, *Disney Sued for Replacing American Workers with Foreigners*, CNN (Jan. 26, 2016), <http://money.cnn.com/2016/01/25/technology/disney-h1b-workers/>. As mentioned earlier, the H-1B program is a common way for a foreign worker to enter, and after a certain period of time, can apply for an employment-based immigrant visa.

287. *Duleep Testimony*, *supra* note 285, at 14 (Testimony of Harriet Duleep).

288. *Id.* at 13.

289. Abrams, *supra* note 33, at 23–24.

290. *Id.*

Preserving family integrity—throughout immigration law—benefits immigrants and the nation. Professor Stephen Lee notes, “Allowing families to remain together throughout the migration process reflects a belief that the family has a stabilizing effect.”²⁹¹ For mixed-status families—families where members have different immigration statuses—allowing members to stay together provides stability because it means that they can build a life in the United States without living in constant fear of separation.²⁹² Tom Gjelten, while interviewing immigrant families in Fairfax, VA for his book *A Nation of Nations*, offers this assessment of acculturation and a “good immigration experience from a bad one.” “When parents and children are separated and only reunited later, problems ensue. When families go through a migration together and maintain bonds of support, the adaptation to the new life is much smoother.”²⁹³ Family integrity creates a stable environment in which immigrants have a greater opportunity to thrive, rather than falter, in the U.S.; this benefits the nation.²⁹⁴

What about the value of family integrity for those families or members within families who have not come over through the family-based system but who are here unlawfully? It could be argued that a family should reside wherever they all have lawful status and the U.S. should not facilitate or encourage family integrity for those who do not come lawfully. On its face, that is a persuasive argument. Yet it glosses over the complexities and nuances of migration. As is quite common, some members within a family have lawful immigration status while others do not. How can families remain together when a child, for instance, has the legal right to remain in the United States, but a parent does not and faces removal? The child cannot sponsor the parent. Where do these families belong?

291. Stephen Lee, *Growing Up Outside the Law*, 128 HARV. L. REV. 1405 (2015).

292. H.R. Subcomm. Hearings, *supra* note 19, at 248 (Testimony of Rep. Ogden Reid) (“I think it is extremely important not only in terms of reuniting families and for family reasons, but also I think if someone coming to this country has members of his or her family here this automatically means to some extent that they will have a better base, they will have people who will help them, and it seems to me that is a valid criterion and it would give some guarantee that those coming will be well take care of and will have a place here in this country.”).

293. GJELTEN, *supra* note 83, at 300.

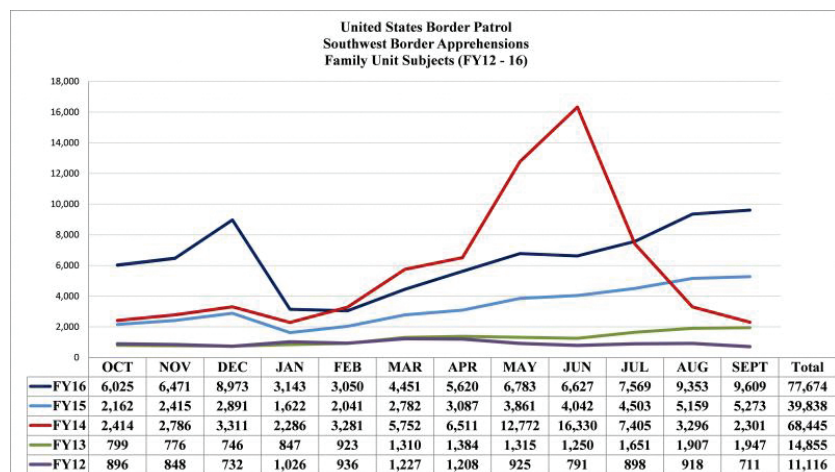
294. Suketu Mehta, *The ‘Tiger Mom’ Superiority Complex*, TIME at 6 (Feb. 3, 2014), <http://content.time.com/time/magazine/article/0,9171,2163555-1,00.html> (“When my family immigrated in 1977, we didn’t do well because of delayed gratification or cultural superiority or a chip on our shoulder. We did well because my uncle in Detroit, an engineer, brought us over on the family-reunification bill, not in shackles or in steerage. When my father started his diamond business on 47th Street in Manhattan, there was a network of Indian diamond merchants who could show him the ropes. My sons, in turn, will benefit from my connections.”).

Should the United States be responsive to families who are not privileged under the system and, therefore, have no avenues for lawful migration?

B. Migration Trends & Family Reunification Outside the Law

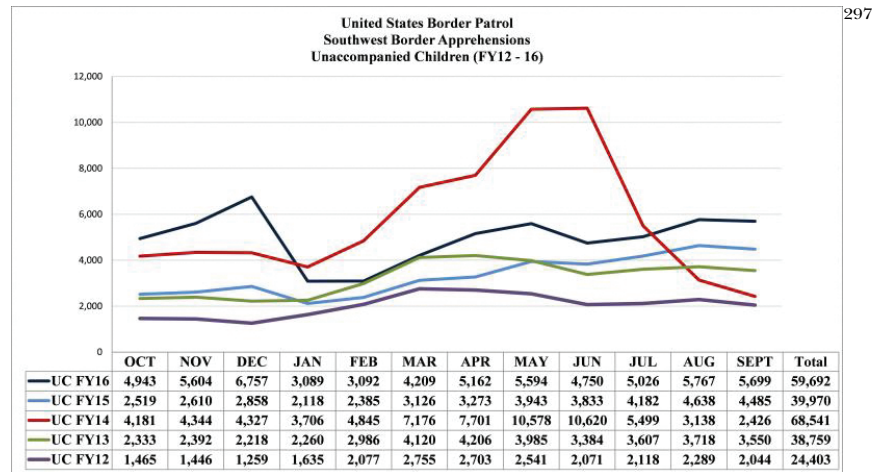
The pattern of unlawful border crossings to facilitate family reunification demonstrates the need for reform. One of the failures of the 1965 reforms was that it looked at historical trends rather than anticipating future trends and the push and pull factors that would drive migration from other parts of the world.²⁹⁵ The current system has largely ignored current trends, except for the purpose of increasing enforcement. Considering migration trends could create a system that would be responsive and flexible enough to meet demands. This would be a more humane way of responding to unlawful migration.

In recent years, there has been an increase in the number of children and mothers with children traveling on their own to the United States. The charts below illustrate that increase, but also demonstrate a much greater increase in family unit apprehensions (apprehensions by law enforcement of a child with a family member).²⁹⁶



295. GJELTEN, *supra* note 83, at 124.

296. *United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016> (last visited Sept. 23, 2016).



Many women—single, divorced, or widowed—are migrating on their own or with their children to provide for their families financially.²⁹⁸ Though few studies examine the gender composition of migrants, one conducted in 1999 revealed that of the female migrants who reported being unmarried, sixty percent had at least one child and forty percent of these women had children under the age of five.²⁹⁹

Female migration carries with it added burdens. As ethnographic research illustrates, and common sense dictates, the decision for a single mother to migrate is difficult and the result of limited options in her country of origin. Leisy Abrego, in her book *Sacrificing Families*, interviewed men and women from El Salvador and asked about their reasons for leaving their families to migrate.³⁰⁰ She noted that men described political reasons for migrating—such as fleeing the civil war—whereas women articulated the need to economically provide for their children.³⁰¹ Most women explained that they could not provide for their children’s basic needs unless they migrated.

For these mothers [poor and working-class], most of whom had already been working outside the home, migration was the last option they wanted. It pushed them further from the

297. *Id.*

298. ABREGO, *supra* note 17, at 33 (noting that the women who left during the civil war in El Salvador were single mothers and heads of households).

299. Martha Luz Rojas Wiesner & Hugo Angeles Cruz, *Gendered Migrations in the Americas: Mexico as Country of Origin, Destination and Transit*, in *NEW PERSPECTIVES ON GENDER AND MIGRATION, LIVELIHOOD, RIGHTS AND ENTITLEMENTS* 225 (Nicola Piper ed., 2008).

300. ABREGO, *supra* note 17, at 25–46.

301. ABREGO, *supra* note 17, at 34.

already unattainable traditional gender ideologies, so they had to negotiate their definition of motherhood to include international migration and risks that endangered their lives as part of their responsibility to provide for their children.³⁰²

Women are migrating because they have no other way to provide for their families. For these women, who cannot be sponsored by a male relative, there are no avenues for entering the United States lawfully, even though they will be filling labor needs while here.

Abrego further states:

Even when not in direct physical danger during the civil war, with the economy in shambles, single mothers like Gloria, who had no one else to rely on for financial assistance, looked to migration. In those moments of desperation, some women began to negotiate and redraw the contours of motherhood to include international migration as an acceptable path to provide for their families' pressing needs.³⁰³

Single mothers redefine motherhood by migrating—and sometimes leaving their children behind—to provide for their family. This can defy cultural expectations in their home country and also in the United States. Deborah Boehm in *Intimate Migrations* describes the gendered character of migrations in Mexico.³⁰⁴ Migration is typically a right of passage for teenage males, but a female's migration is viewed with dishonor.³⁰⁵ She explains that a woman's migration is often driven by the need to join her male partner in the United States, or arises from necessity as the sole provider following a divorce, abuse, or a male partner who already migrated but repartnered in the United States.³⁰⁶ When women migrate unlawfully, once in the United States, they are not only criticized for violating immigration laws, but their fitness as parents may be questioned.³⁰⁷

In addition to female-led migration, there are constant negotiations within families about whether to migrate and who should migrate, and the realization that providing for children means that the family may not, and often cannot, migrate together as a unit.

302. *Id.* at 39.

303. *Id.* at 33.

304. BOEHM, *supra* note 197, at 91–108.

305. *Id.* at 96.

306. *Id.*

307. See, e.g., S.M. v. E.M.B.R. (*In re* Adoption of C.M.B.R.), 332 S.W.3d 793 (Mo. 2011). See also *The Immigrant "Other"* *supra* n. 231.

Within this framework, parents must decide with whom children should reside when children are left behind and whether, at some point, to seek reunification in the United States.³⁰⁸

The New Yorker described the migration story of Guatemalan parents who came to the United States first and later sent for their children.³⁰⁹ The husband migrated first, his wife followed, and their kids stayed in Guatemala with relatives. The couple planned to return to Guatemala with enough money to build a family home.

In the mid-nineties, Alfredo had been working as a security guard at Exclusivas, an upscale supermarket in Guatemala City that sold name-brand U.S. goods, when he met and courted Melida, a round-faced cashier of eighteen. Jennifer was born in 1996, and Robinson followed, in 1998. Both Alfredo and Melida dreamed of heading north, to seek out decent-paying work that would fund their children's education. The prospect of leaving the kids behind was anguishing, but they'd be well cared for until Alfredo and Melida returned with a nest egg, a few years later. In 2000, the couple agreed that Alfredo would embark first on the journey to Trenton, where he had a relative who could find him a job. Melida was pregnant with Brayan; she'd wait to give birth before joining Alfredo, the next year. "That's what we decided," Alfredo told me, "with all the pain in our hearts."³¹⁰

Because of increased violence in Guatemala, the couple later decided to send for their children, hiring a coyote to facilitate their crossing. Though the children eventually arrived, the family continued to face extortion from the smugglers.³¹¹

308. "Migrations can be traced within family and kin relations. When parents 'place' young people in diverse locales, they are acting for their families and fulfilling their responsibilities as parents and caregivers. [T]ransnational Mexicans have indicated that a primary motivation for migrating is their children. Although migrants have slightly different perspectives on this theme—nearly everyone describes the need to financially support family, some hope for a different life for their children than they have in Mexico, while others identify educational opportunities in the United States—the words 'for my children' have become a kind of trope linking migration to the next generation. As one mother described, 'There are advantages for me, but above all, I migrate for my children . . . I have to think about them, so that they can have a better life.' Even as the actions of young people are directed by adult actors, children and youth are at the center of migration processes." BOEHM, *supra* note 197, at 118.

309. See generally Sarah Stillman, *Where are the Children?: For Extortionists, Undocumented Migrants Have Become Big Business*, *THE NEW YORKER*, Apr. 27, 2015.

310. *Id.*

311. *Id.*

For many families, migration is a necessity, whether they are escaping violence, poverty, or, likely, a combination of factors. The limited opportunities to do so lawfully under U.S. immigration law leaves many families in a position to find safety and security, outside of lawful migration, for their family. The roles that family members play in the migration process do not necessarily fit the traditional dominant nuclear family model. Single mothers migrate. Children are part of the decision to migrate and may even head the migration for the family. Other non-parent relatives may be the primary caregivers for children. Yet immigration law largely functions to provide immigration benefits to those who fit the dominant nuclear family model. In this way, it cannot facilitate family integrity when it has a narrow view of family.

V. POSSIBLE CHANGES TO A CREATE SYSTEM THAT HONORS FAMILY INTEGRITY

A. Recognizing the Social Agency of Women and Children

One means of emphasizing family integrity is not simply by expanding the family-based system, but recognizing the agency of women and children and providing privileges under immigration law for them. Why does this matter? Because a system that does not value integral members of a family—women and children—is not a system that values family integrity.

First, the current employment-based system undervalues the type of work performed by unskilled female workers and is therefore more advantageous to men. During one congressional hearing, Senator Jeff Sessions asked Ms. Moua, President and Executive Director of the Asian American Justice Center and former Minnesota State Senator, whether the system should choose to admit a valedictorian of his high school class with two years of college who knew English or someone of the same age who dropped out of high school, has limited skills and has a brother in the United States.³¹² Ms. Moua responded,

Senator, I think that under your scenario people can conclude about which one would be in the best interest of the United States. I think the more realistic scenario is that in the second

312. *How Comprehensive Immigration Reform Should Address the Needs of Women and Families*, *supra* note 143, at 28.

situation that individual would be female, would not have been permitted to get an education. And if we were to create a system where there was some kind of preference given to, say, education or some other kind of metrics, I think that it would truly disadvantage specifically women and their opportunity to come into this country.³¹³

Essentially, the system as it stands puts women, particularly those classified as “unskilled,” at a disadvantage. Far fewer women gain visas through the employment-based system.³¹⁴ The system should not only increase visas for unskilled workers, as discussed below, but among unskilled workers it should prioritize work typically performed by women. Canada, for instance, has a caregiver program, which allows those (mostly women) who work as caregivers for two years to apply for permanent residency.³¹⁵ One category of caregivers is for childcare providers and the other is for those caring for the elderly or people with medical conditions. There is an annual cap on the number of applicants who will be granted permanent residence, but that cap does not include spouses or children, who are also entitled to residency based on the principal applicant’s grant.³¹⁶

The subordinate position of women makes them vulnerable to other types of harm. For instance, immigrant women are not only paid less than men, but also face greater threats of sexual exploitation in the workplace. But, women generally do not complain, viewing these abuses as necessary sacrifices in order to support their children.³¹⁷ Describing immigrant women who are underpaid and abused in the workplace, Dr. Panetta, an Engineering Professor at Tufts University, testified,

When it comes to women, this problem is even more further exacerbated because women most likely will have—I have here—a lot of my students have children, and they are afraid that they are going to be thrown out of the country and even

313. *Id.* at 28–29.

314. *See id.* at 29.

315. *Major Reforms to Caregiver Program Announced by Canadian Government*, CIC NEWS (Nov. 5, 2014), <http://www.cicnews.com/2014/11/major-reforms-caregiver-program-announced-canadian-government-114044.html> (last visited Sept. 23, 2016).

316. *Id.*

317. ABREGO, *supra* note 17, at 114.

though their children are U.S. citizens. They have no opportunity to be treated with the full rights as their children should be and as their children's neighbors and their parents are.³¹⁸

Children's agency is also not recognized under the system. As discussed in Part II, children from the Western Hemisphere could sponsor their parents for an immigrant visa until 1976. Now, a child (defined under immigration law as under 21 and unmarried) cannot sponsor a parent. The justification is that a parent should not use a child to gain an immigration benefit. However, this justification ignores the complexities of migration and the fact that a child may head migration for a family unit or is an active participant in the family's collective decision to migrate.³¹⁹ Professor David Thronson notes that rather than serving as an effective deterrent, such efforts result in "devaluing children and creating barriers to families regularizing their immigration status as demonstrated in the challenging conditions and insecurities under which mixed-status families live."³²⁰

Additionally, under many of the protection-based categories which create a pathway for a child to obtain citizenship, a child is not able to bring over his or her parents under the accompanying or following to join provisions. More specifically, a child who is granted asylum cannot bring over a parent or siblings, while an adult granted asylum can bring over her spouse and children.³²¹ If a child is granted special immigrant juvenile status based on abuse perpetrated by one parent, the child still cannot have her non-abusive parent accompany or follow to join her in the United States.³²² Children are provided some protection through asylum and Special Immigrant Juvenile Status (SIJ), but are denied the benefit of reunification. Unlike SIJ and asylum, a child who has been granted a U or T visa (victims of specified crimes or of trafficking), however, would be able to bring a parent as a result of such a grant. It is unclear why there is a difference in family reunification provisions for these various forms of relief.

Thus, immigration reforms should recognize the agency of both women and children. At the very least, immigration reforms could allow children under the age of 21 to petition for parents when they receive a grant of asylum. Professor Stephen Lee has proposed

318. *How Comprehensive Immigration Reform Should Address the Needs of Women and Families*, *supra* note 143, at 23.

319. Thronson, *supra* note 37, at 84–86.

320. *Id.* at 84.

321. *Cf.* Immigration and Nationality Act, 8 U.S.C. §§ 1157(c)(2), 1158(b)(2) (2012).

322. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J)(iii)(II) (2012).

that a future DREAM Act bill should allow children to not only adjust their status, but should also permit them to sponsor their parents.³²³ For women, opening up the employment-based system to include “unskilled” visas for work typically performed by women would allow women to come to the United States independently and then petition for family members on their own. Additionally, assessing the gender parity under the employment-based system for both skilled and unskilled workers is another starting place to provide more opportunities for women to migrate independently.

B. Relaxing Harsh Immigration-Related Inadmissibility Grounds

With congressional reforms in 1996, the time bars imposed for immigration-related violations have resulted in lengthy separations among family members with little to no flexibility. As mentioned above, there are lengthy time bars for persons who have been unlawfully present for over 180 days, as well as for those who have been previously deported. It is unclear whether such bars have a deterrent effect. While the unlawful presence provisional waivers are helpful, they only apply to immediate relatives and do not apply to people who applied before 2013. Families remain separated for a very long time, and the options for discretionary waivers are limited and hard to obtain. These bars have provided little flexibility to honor family integrity in the face of separation.

C. Providing Greater Opportunities for Discretionary Relief

As noted earlier, Congress has provided certain forms of discretionary relief for those facing removal, in an effort to ease unnecessary harshness and recognize the hardship of family separation. In fact, under the Suspension of Deportation criteria, hardship as a result of family separation was a consideration. “The most important single [hardship] factor may be the separation of the alien from family living in the United States.”³²⁴ Over the years, however, the criteria have become increasingly stringent.

Cancellation of removal is an important form of relief from removal, but the hardship requirement—“exceptional and extremely unusual” hardship—is one that very few people can meet. “[T]he

³²³ Lee, *supra* note 291, at 1445.

³²⁴ Salcido-Salcido v. I.N.S., 138 F.3d 1292 (9th Cir. 1998) (citing *Contreas-Buenfil v. I.N.S.*, 712 F.2d 401, 403 (9th Cir. 1983)).

hardship to an alien's relatives, if the alien is obliged to leave the United States, must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country."³²⁵ Cancellation of removal under section 240A(b) of the Act is limited to "truly exceptional" situations. When the original suspension of deportation provision was enacted in 1940, "serious economic detriment" could suffice.³²⁶ Under suspension of deportation, the burden was extreme hardship, which was later replaced with the current standard. Cancellation of removal now requires ten, rather than seven, years of physical presence, and harm to the individual seeking cancellation is irrelevant. Thus, very few people can meet the standard. Family separation, in and of itself, should qualify as a hardship, as should "serious economic detriment." Additionally, the length of time to meet the physical presence standard should be lowered.

D. Allocating Greater Share of Visas for Oversubscribed Areas to Reduce Visa Backlogs

The 1965 legislation attempted to create a system that was just and equitable—allocating the same number of visas for each part of the world. This directly benefited Southern and Eastern Europeans because they needed their visa allocation increased to bring over relatives. Although the system presumably became more equitable, it specifically benefitted Southern and Eastern Europeans. With the limits placed on migration from the Western Hemisphere, as well as visa backlogs for Asian and Latin American countries, there is now greater demand for visas from those regions. Responding to this demand could help to better regulate the system. As Professor Susan Martin said in her testimony before Congress, "[c]eilings have generally been assigned in an arbitrary manner, often as a result of political compromise rather than empirical evidence as to the likely demand for visas' different categories."³²⁷

325. *In re* Francisco Javier Monreal-Aguinaga, 23 I. & N. Dec. 56, 62 (BIA 2001).

326. *Matter of* O.J.O., 21 I. & N. Dec. 381, 398 (BIA 1996).

327. *How Comprehensive Immigration Reform Should Address the Needs of Women and Families*, *supra* note 143, at 13; *see also* *Immigration Hearings*, *supra* note 203, at 34 (Testimony of Professor Bill Ong Hing) ("Easing the worldwide backlogs by providing favored treatment for Mexican immigrants is also worthy of consideration. Expanded legal access for Mexican immigrants has a great capacity to reduce unauthorized flows to the United States by addressing the greatest source of migration demand. Expanding the number of legal immigrant visas to Mexicans or taking Mexican migration out of the worldwide quota would increase the number of available worldwide visas to other countries, thereby reducing backlogs per se.").

CONCLUSION

The family reunification system under immigration law is based on assumptions about family composition and privileges certain families, and certain members within families, over others. Women and children, who are vital members within a family, can be confined to positions of dependency, even though migration trends demonstrate their social agency. Harsh and restrictive immigration laws have separated families for lengthy periods of time, sometimes even permanently. Consideration of future comprehensive immigration reform should examine the assumptions embedded into our immigration laws, which hinder, rather than promote, family integrity. Future immigration reform should assess migration trends. Some areas for possible reform include expanding opportunities under immigration law for unskilled workers, and, in particular, providing visas for labor typically performed by women; allowing children, or at least children granted asylum, to petition for family members; meeting visa demands for areas of the world that are oversubscribed, and within the family-based system where backlogs result in long separations for parents and their children (e.g., preference category 2); and recognizing how time bars and limited discretionary relief have made removal especially severe and have torn families apart. These suggestions are in no way comprehensive, but seek to address some areas where family integrity is weakened as a result of laws, policies, and the changing dynamic of migration.