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# Famigration (Fam Imm): The Next Frontier in Immigration Law

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## *ESSAY*

### FAMIGRATION (FAM-IMM): THE NEXT FRONTIER IN IMMIGRATION LAW

*Kari E. Hong*

FAMIGRATION, or Fam-Imm law, is the field in which family law doctrines, principles, and statutes are employed to critically examine the ways in which immigration law is recognizing families. Two recent articles—*Immigration’s Family Values*<sup>1</sup> and *Removing Citizens: Parenthood, Immigration Courts, and Derivative Citizenship*<sup>2</sup>—explore how immigration law is utilizing a different definition of the parent-child relationship than those found in state family law. The former argues that the divergent definitions arise from conflicting policy and objectives manifest in achieving optimal immigration. (Although the current immigration policies would not be the ones chosen by the authors, the differences are reasonable, or at least understandable, when placed in the larger context of existing immigration objectives.) The latter contends that the differences arise from a much more insidious source: The Department of Homeland Security (“DHS”) is intentionally distorting state family law as a means to expedite the removal of persons (including those who have a legitimate claim to citizenship) it has deemed undesirable. Even if the author is overstating DHS’s motivations, systemic

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<sup>1</sup> Kerry Abrams & R. Kent Piacenti, *Immigration’s Family Values*, 100 Va. L. Rev. 629 (2014).

<sup>2</sup> Kari E. Hong, *Removing Citizens: Parenthood, Immigration Courts, and Derivative Citizenship*, 28 Geo. Immigr. L.J. (forthcoming Nov. 2014).

problems such as overburdened immigration court dockets, political pressures facing immigration judges, the (alleged) immigrant's lack of access to counsel, and the actual limited appellate review of these decisions render the adjudication of these claims troubling at best.

The points of disagreement between these pieces speak volumes for needed immigration reforms. But in conversation, they combine to highlight that DHS's actual policies and practices in recognizing family have been understudied. For over twenty-five years, scholars have observed how family law intersects with immigration law. This Essay asks what can happen if scholars systematize critical family law concepts into the conception and practice of immigration law. Over the past couple of decades, immigrants—and immigrant families—have undergone a fundamental transformation. No longer comprised of parents and children emigrating from their foreign homeland, the ease of international travel has increased the number of citizens who wish to marry or parent someone born abroad. The rise of cross-border relationships prevents immigration law from being the exclusive arm of foreign policy that it was in the twentieth century. Immigration policies can no longer categorically exclude aliens when such exclusion infringes on a citizen's right to marry or parent the alien. Just as Crim-Imm scholarship successfully identified the ways in which the (purported) civil proceedings of immigration law needed the extra constitutional protections found in criminal law, Famigration offers the potential to transform the way in which immigration law operates. Famigration invites the possibility for immigration law to incorporate heightened constitutional protections, a means to resolve conflicts between federal and state law, and universal, transcendental values such as the best interest of the child, when defining and recognizing family.

#### I. DHS'S POLICIES AND GOALS IN DETERMINING PARENTAGE

In their article, *Immigration's Family Values*, Professor Kerry Abrams and R. Kent Piacenti observe that family law and immigration law often deploy different definitions when recognizing a parent-child relationship.<sup>3</sup> This observation is not too surprising. Families have always been complicated, and legal rules about their structure and composition have been constantly evolving as law and public policy attempt to either mirror (or reject) the family realities of the day. The marital pre-

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<sup>3</sup> Abrams & Piacenti, *supra* note 1.

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sumption of parentage, for example, arose from the proverbial mailman casting doubt over who had fathered the only red-headed child in the family.<sup>4</sup> When DNA tests introduced an ability to conclusively identify one man as the father of the child (replacing blood tests that were only able to exclude a particular man from the likelihood of being a child's father), the states did not—and have not—resorted to a singular scientific test to determine fatherhood.

Rather, state family law continues to embrace a variety of factors to determine who is (or who should be defined as being) the natural parent of a child (and who therefore is liable for financial support and receives the rights of custody and control). The most notable example is *Michael H. v. Gerald D.*, in which Carol was married to Gerald when she gave birth to Victoria.<sup>5</sup> The complication arose when their neighbor Michael claimed he had had an affair with Carol and he was in fact Victoria's biological father. Against medical evidence establishing a 98.7% likelihood that Michael was the biological father, the U.S. Supreme Court upheld the constitutionality of California's legitimation statute that "a child born to a married woman living with her husband is presumed to be a child of the marriage."<sup>6</sup>

In immigration law, family definitions have especially dramatic consequences, as much of U.S. immigration law is based on family categories that permit citizens to legalize a relative's status through marriage, birth, and adoption, and, when the relative has criminal convictions, to forgive otherwise deportable conduct.<sup>7</sup> New reproductive technologies

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<sup>4</sup> As a benefit of marriage, the husband of a woman who gives birth is usually granted the legal presumption that he is the natural father of such child, even when there is a conflicting claim by a man who is outside of the marriage.

<sup>5</sup> 491 U.S. 110 (1989).

<sup>6</sup> *Id.* at 113. California's statute at issue was later repealed and replaced by an updated parentage statutory scheme. See Cal. Fam. Code §§ 7600–7730 (West 2014). When interpreting the new parentage statute, the California courts have extended the marital presumption of biological parenthood to both women in a recognized same-sex relationship. See *Elisa B. v. Superior Court of El Dorado Cnty.*, 117 P.3d 660, 666 (Cal. 2005). Other states are following suit and extending the marital presumption of natural parentage to same-sex couples. See David Dodge, *At the Cutting Edge of Gay Family Law*, N.Y. Times Motherlode (June 17, 2014, 10:05 AM), <http://parenting.blogs.nytimes.com/2014/06/17/at-the-cutting-edge-of-gay-family-law/> (when dismissing a second-parent adoption petition filed by the non-gestational mother in a married lesbian couple, a New York judge "ruled that adoption was neither 'necessary nor available' in this case since a 'presumption of parenthood' exists for all married couples").

<sup>7</sup> See e.g., 8 U.S.C. § 1151(b)(2)(A)(i) (2012) (permitting entry petition and adjustment of status for a citizen's spouse, child, and parent); *id.* § 1401 (citizenship for child born to citi-

and quickly evolving social understandings of family, however, introduce the dilemma as to whether old statutes have the normative and empirical capacity to accurately categorize emerging familial bonds into cognizable categories.<sup>8</sup>

In their important survey of family law and immigration and citizenship law, Abrams and Piacenti have usefully categorized various family formations with such terms as “marital parentage” (conferred through marriage), “functional parentage,” (conferred through an adult’s care), “genetic parentage” (conferred through biological ties), and “intentional parentage” (conferred through contract).<sup>9</sup> Their article deftly explains the origins of these terms and navigates their modern usage.<sup>10</sup> As a whole, Abrams and Piacenti’s compilation of the historical and modern parentage definitions offers helpful framing and critical analysis of how and when immigration and citizenship law determines (and *should* determine) parentage as a precondition for conferring legal status or citizenship.

In comparing the family law definitions of parentage to those found in immigration and citizenship law, Abrams and Piacenti advance the normative position “that recognition of intentional and functional parentage deserves a more prominent place in the nation’s definition of parentage in the immigration and citizenship context.”<sup>11</sup> Abrams and Piacenti posit that the failure of immigration law to mimic its family law counterpoint arises “not because lawmakers have failed to properly incorporate fami-

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zen parent); *id.* § 1433(c) (citizenship for adopted child); see also *Stanovsek v. Holder*, No. 13-3279, 2014 WL 4723268, at \*2 (6th Cir. Sept. 24, 2014) (permitting spouse of citizen to apply for INA § 212(h) waiver to forgive an aggravated felony). The parent-child relationship is also relevant in adjustment (green card) adjudications, asylum cases, and family petitions. See, e.g., 8 U.S.C. § 1153(d) (visa petitions); 8 C.F.R. § 1208.4 (2014) (asylum). “Derivative status recognizes the importance of family integrity within American culture and its particular significance to newcomers to the community.” Carol Sanger, *Immigration Reform and Control of the Undocumented Family*, 2 *Geo. Immigr. L.J.* 295, 317–18 (1987).

<sup>8</sup> N.R. Kleinfeld, *And Baby Makes Four*, *N.Y. Times*, June 19, 2011, at MB1 (“The setup is complicated. Griffin’s mother, Carol Einhorn, a fund-raiser for a nonprofit group, is 48 and single. She conceived through in vitro fertilization with sperm from Mr. Russell, 49, a chiropractor and close friend. Monday, Tuesday, Thursday and Sunday nights, Mr. Russell stays in the spare room of Ms. Einhorn’s apartment. The other three days he lives on President Street with his domestic partner, David Nimmons, 54, an administrator at a nonprofit. Most Sundays, they all have dinner together. ‘It’s not like Heather has two mommies,’ Mr. Russell said. ‘It’s George has two families.’”).

<sup>9</sup> Abrams & Piacenti, *supra* note 1, at 655–707.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 635.

ly law principles, but because lawmakers' interests are not the same in diverse contexts. State family law's primary interests are in privatizing the dependency of children . . . ."<sup>12</sup> By contrast, Abrams and Piacenti argue, immigration and citizenship law is informed by "the federal government's interest in achieving optimal numbers of immigrants and citizens" and "the ferreting out and prevention of fraud."<sup>13</sup> They conclude that "[b]ecause of these differences, variations in institutional actors' attitudes toward various kinds of parentage may be inevitable, or, at the very least, understandable."<sup>14</sup>

## II. THE TROUBLING APPLICATION OF FAMILY LAW IN DERIVATIVE CITIZENSHIP CLAIMS

Abrams and Piacenti are correct in their call for immigration law to recognize functional and intended parentage. In *Removing Citizens: Parenthood, Immigration Courts, and Derivative Citizenship*, this author's own work focused on citizenship law's antiquated reliance on genetic parentage in instances of derivative citizenship, which was one of the subject matters surveyed by Abrams and Piacenti. Derivative citizenship, the legal process whereby birthright citizenship is passed from a citizen parent to a child born outside the United States, is a complicated, technical maze, even in a field of law that has become legendary for its complexity.<sup>15</sup>

*Removing Citizens* examines the troubling way that immigration proceedings adjudicate claims of derivative citizenship.<sup>16</sup> Often, a child

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<sup>12</sup> *Id.* at 634.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See generally 8 U.S.C. § 1401 (2012). The derivative citizen statute is found in §§ 301–309 of the Immigration and Nationality Act ("INA"), codified at 8 U.S.C. §§ 1401–1409. There are at least nine different statutes that may apply to a child, depending on the child's birth date, the parents' citizenship, the parents' marital status, and if divorced, the terms of custody granted to a citizen parent. Derivative citizenship may be conferred at the time of birth, or, if specific conditions are met, retroactively.

<sup>16</sup> "Removal" is the new term for deportation. In 1996, Congress replaced "deportation" (for individuals inside of the country) and "exclusion" (for individuals who legally never entered the country) proceedings with "removal" proceedings. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009–546. This Article will refer to removal proceedings for all immigration proceedings initiated after 1996. Even though removal proceeding is the term for deportation, an alien is charged with either deportable grounds or inadmissibility grounds to ascertain whether the

with one citizen parent grows up in the United States assuming that she is a citizen. If, as an adult, the child is convicted of a crime, she may learn in removal proceedings before an immigration judge that her life-long assumption of U.S. citizenship was incorrect. Although adult children in this position are eligible to have their derivative citizenship status conferred retroactively, government attorneys regularly contest whether the parents who raised them are their “legal” parents under state family law. (In extreme cases, government attorneys have even disclosed the disturbing news that the parents who raised them are not their genetic parents.<sup>17</sup>)

Permitting hearings on whether a parent who raised a child is in fact a “legal parent” is an example of how federal immigration law is improperly diverging from state family law. In state courts, a third party to a family unit—including the government—would not be permitted to collaterally attack a functioning parent-child relationship. In family court proceedings, states have time bars to protect the child and parent, limit the parties who can bring such challenges to the husband or wife (and state government may establish paternity only if child support is needed), and will not let even a bona fide challenge exist when no other per-

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removal can be effected. Compare INA § 237 (deportability grounds), with INA § 212 (inadmissibility grounds).

<sup>17</sup> See generally *Anderson v. Holder*, No. CV-11-01662-PHX-DGC, 2012 WL 2813868 (D. Ariz. July 10, 2012), *aff'd*, *Anderson v. Holder*, No. 09-70249, 527 Fed. App'x. 602 (9th Cir. Jun. 12, 2013). As recounted in district court Mr. Anderson “first learned about his family secrets and biological origins when the Government disclosed them to [Mr. Anderson] when he was appearing *pro se* in removal proceedings.” Petitioner’s Statement of Facts to Support Motion for Summary Judgment Pursuant to Rule 56, at ¶ 21 (citing to transcribed immigration proceedings in which Mr. Anderson explained to the immigration judge that “[W]hen [I] got these copies of these papers that you guys [the Department of Homeland Security] sent me, or that the prosecution sent me, that’s the first time in my life I’ve ever heard anything like this, in my life. . . . Yes, I mean, this, this, you know, I’m not, like I said trying to pull the wool over anyone’s eyes, or, or, trying to pull some slick move, or any, this is the first time I’ve hearing anything like this. My mother, after finding this out, I confronted my mother about it. And, I, and, I told her, I said, you know what, I, I need the truth here. You know. And, she, she swears up and down that that [the man who raised him] is my father. Unfortunately, he passed away a few years back. . . .”) (citing Immigration Removal Proceedings, held on January 23, 2008, page 9–10) (on file with the Virginia Law Review). As explained in the mother’s deposition, the U.S. citizen father signed a paternity affidavit, gave Mr. Anderson his last name, and placed his name on the birth certificate as being Mr. Anderson’s father. See Deposition of P—A---, February 7, 2012, at 10 (on file with the Virginia Law Review).

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son can step in to serve as the parent that is being challenged. The immigration courts, by contrast, permit the federal government to declare that the citizen parent who raised a child is in fact a legal stranger.

Immigration judges are also ignoring state law definitions of family matters. On the parent-child question, most state legitimation and parentage laws use love, support, and care as proof of parentage. By contrast, immigration courts often will declare that blood alone is the *sine qua non* of parentage.<sup>18</sup> Although this author's article focused on the cases in which parentage was a key element, derivative citizenship claims may depend on the state law definitions of the citizen parents' marital status or the child custody status at relevant times in the child's life. The immigration courts also routinely misapply these state law pro-

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<sup>18</sup> This issue is made complex by Congress's decision, in 1986, to change the derivative citizenship statute to require proof of a blood relationship between an unwed father and a child. See Immigration and Nationality Act Amendments of 1986, Pub. L. 99-653, 100 Stat. 3655. For children born after November 14, 1986, they must follow the requirement of this statute and establish a genetic link to any unwed father. For children born on or before November 14, 1986, a child may "elect the application of the preamendment [8 U.S.C.] § 1409(a), which required only legitimation before age 21." *Miller v. Albright*, 523 U.S. 420, 426 n.3 (1998); *Runnett v. Shultz*, 901 F.2d 782, 783 (9th Cir. 1990) ("The applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth." There are numerous policy arguments to amend the statute and eliminate the dispositive nature of genetics in determining parentage. However, in a pernicious turn of events, immigration courts are interpreting the old law—that does not have a biology requirement—to somehow implicitly incorporate the new statute's blood requirement. See *Martinez-Madera v. Holder*, 559 F.3d 937, 942 (9th Cir. 2009). In *Martinez-Madera*, the petitioner was born in 1953, entitling him to the benefit of the pre-1986 statute. The Board of Immigration Appeals ("BIA") and the Ninth Circuit ruled against the petitioner because he was legitimated by his stepfather, without any blood relations, under California law. Of note, the Ninth Circuit affirmed the biological requirement based on its mistaken reliance on the post-1986 statute. *Id.* at 940 n.1. In oral argument in a different case, Judge Kimberly Wardlaw noted that mistake. Oral Argument at 13:33, *Anderson v. Holder*, 527 F. App'x 602 (9th Cir. 2013) (No. 09-70249), available at [http://www.ca9.uscourts.gov/media/view.php?pk\\_id=0000006940](http://www.ca9.uscourts.gov/media/view.php?pk_id=0000006940). The immigration courts are even requiring mothers to provide such proof, even when § 1409 only applies to unwed fathers and § 1401(e)—the provision applying to mothers—has no such mention at all. See *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1091 (9th Cir. 2005) (holding that by raising the child of her husband's mistress as her own, citizen-mother legitimated the petitioner under California law).



visions. For instance, the Board of Immigration Appeals (“BIA”) has found that a “legal separation” exists only when there is a formal divorce order issue. The relevant state law, however, used a broader definition, explaining that a legal separation exists at the moment the parties ceased living together prior to the formal dissolution of marriage.<sup>19</sup>

Such cases cannot be explained as simply the product of immigration and citizenship law deploying a unique, federal definition of family law. To the contrary, since at least 1949, the BIA has expressly deferred to state family law to determine the preconditions for conferring derivative citizenship.<sup>20</sup> In deferring to state family law, the Ninth Circuit explained that “because there is no federal law of domestic relations, that necessarily means a separation recognized by state law. . . . [O]ur approach accords with the INS’s long standing policy of looking to state law to determine questions of family relations, specifically marriage and custody.”<sup>21</sup>

As this author considered the specific context of derivative citizenship, I reached a different conclusion from *Abrams* and *Piacenti* as to why the immigration law is out of sync with family law. Their conclusions, in brief, were that immigration law’s differences arise from two of the considered policy differences found in immigration law: determining the ideal number of new-immigrants and “ferreting out fraud.”<sup>22</sup> It is striking that the government has not advanced these rationales in practice, and it is here that my conclusions diverge from those of *Abrams* and *Piacenti* in four ways.

First, there is no policy interest in limiting the parent-child definition out of any concern that a broad definition would let in too many new citizens or legal immigrants. For both citizenship and immigration benefits,

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<sup>19</sup> See *Minasyan v. Gonzales*, 401 F.3d 1069, 1078–79 (9th Cir. 2005) (“Central to our determination is the fact that in California a separation by virtue of law entails important legal consequences under state law. . . . Critically, these consequences flow from the date of the separation, not from the date of a court order.”).

<sup>20</sup> See, e.g., *Wedderburn v. INS*, 215 F.3d 795 (7th Cir. 2000). When adjudicating a derivative citizenship claim, Judge Easterbrook observed that “federal law may point to state (or foreign) law as a rule of decision, and this is how the INS has consistently understood these terms.” *Id.* at 799 (citing *Matter of H—*, 3 I. & N. Dec. 742 (BIA 1949)).

<sup>21</sup> *Minasyan*, 401 F.3d at 1076–77; see also *id.* (“As the Supreme Court recently emphasized, ‘[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.’” (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004)) (internal quotation marks omitted)).

<sup>22</sup> *Abrams & Piacenti*, supra note **Error! Bookmark not defined.**, at 634.

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there *are* no numerical limits on how many children will be citizens by birth nor how many children may receive lawful status as dependents.<sup>23</sup> To the contrary, the immediate relatives of a citizen—defined as a spouse, parent, and child—are exempted from the annual numerical limits imposed on family immigration.<sup>24</sup>

Second, the federal government never has suggested that fraud was an issue in its litigation of derivative citizenship claims. Unlike marriage where two people could (and in fact do) pretend to be in a legitimate relationship to receive benefits, it is hard to imagine how an adult could pretend to love, support, and raise a child for years as part of a long-term immigration scheme to confer benefits to any child.<sup>25</sup> To the extent that the 1986 law was driven by fears that foreign-born individuals would falsely claim to be children of U.S. servicemen who were stationed abroad, it is the *state* law's legitimation process—one in which the father must affirmatively claim the child as his own—and not a blood test that in fact protects a citizen from the burdens of unintended parenthood.<sup>26</sup>

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<sup>23</sup> 8 U.S.C. § 1151(a), (b) (providing that “immediate relatives,” defined as “children, spouses, and parents of a citizen of the United States,” “are not subject to the worldwide levels or numerical limitations” set forth in the INA).

<sup>24</sup> *Id.* § 1153(d).

<sup>25</sup> There is a legitimate question as to whether marriage fraud is a widespread problem. The Immigration Fraud Marriage Act of 1986 was passed to curtail what was perceived as widespread immigration fraud. See Immigration Fraud Marriage Amendment of 1986, Pub. L. No. 99-639, 100 Stat. 3537.

Immigration Service proffered to the Congress statistics from a 1983-1984 study that purported to show that fully 30 percent of marriage-based visa petitions were fraudulent. Much later, in connection with discovery in a civil suit, it was discovered that top INS officials knew the study was statistically flawed and the results unreliable at the time the study's findings were presented to Congress. Congress was never given the true figures on the incidence of marriage fraud, nor was it apprised of how often the penalties for marriage fraud had been successfully invoked under the old law.

Mary L. Sfasciotti & Luanne Bethke Redmond, *Marriage, Divorce, and the Immigration Laws*, 81 Ill. B.J. 644, 645 (1993). As for 2009, the number of marriage petitions “denied for fraud is tiny: 506 of the 241,154 filed by citizens in the last fiscal year, or two-tenths of 1 percent (an additional 7 percent were denied on other grounds, like failing to show up for an interview).” Nina Bernstein, *Do You Take This Immigrant?*, N.Y. Times, June 13, 2010, at MB1.

<sup>26</sup> See generally *Miller v. Albright*, 523 U.S. 420, 425 n.2, 426 n.3, 435 (1998). The Court rejected an equal protection claim brought by a citizen-father Mr. Miller on behalf of his foreign-born daughter. The daughter, born in the Philippines, did not have contact with Mr. Miller for many years. On his own, he filed a paternity action in the state of Texas to declare himself the biological father. Unfortunately, the daughter was 22 years old at that time, one

Third, in federal court litigation, the federal government has never articulated a sound policy reason for using the immigration law definitions of family instead of the more nimble and robust definitions found in the states. Instead, the government seems to intentionally distort family law in order to expedite the removal of individuals who have criminal convictions. In 2012, the Ninth Circuit strongly criticized the government for its differing—and often conflicting—interpretations of state parentage statutes, pointing out that “the government’s position is that the word ‘legitimation’ should be read broadly when a broad reading results in the denial of citizenship, and narrowly when a narrow reading results in the denial of citizenship.”<sup>27</sup> Referring to the government’s litigation position as “unfair as well as erroneous,” the court captured the regular abuses that occur in immigration proceedings.<sup>28</sup>

Fourth, the deployment of state family law is not limited to the derivative citizenship context. In defining who is a child for purposes of receiving numerous immigration benefits, Congress has directed immigration officials to use the law of “the child’s residence or domicile or under the law of the father’s residence or domicile, whether in the United States or elsewhere,” to determine parentage.<sup>29</sup> Just like determining which criminal convictions have consequences under immigration law, Congress has determined that the family laws of each of the fifty states is a means to decide which individuals are defined as the family members of citizens and accordingly receive immigration and citizenship benefits.

In this respect, Abrams and Piacenti’s contention that the federal government has a legitimate disagreement with state law definitions of family glosses over salient, institutional problems that citizens and their families encounter: Rather than rendering a decision over a legal issue within their expertise, immigration judges have to grapple with the complexities of family law while facing political and workload pressures that favor removal for reasons quite other than the application of family law.<sup>30</sup> Detained individuals, many without counsel, face immigration

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year past the date by which a child must be legitimated by a citizen father to receive derivative citizenship.

<sup>27</sup> *Anderson v. Holder*, 673 F.3d 1089, 1100 (9th Cir. 2012).

<sup>28</sup> *Id.*

<sup>29</sup> 8 U.S.C. § 1101(b)(1)(C).

<sup>30</sup> Robert Katzmann, Judge, U.S. Court of Appeals for the Second Circuit, Immigration and the Courts, Roundtable Discussion at the Brookings Institution 49 (Feb. 20, 2009) [hereinafter Brookings Institution Panel], available at <http://www.brookings.edu/~media/events/>

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judges who are overworked, understaffed, and have no training in the family laws of the fifty states.<sup>31</sup> Unique to other administrative judges, immigration judges lack independence from the prosecutor arguing a case before them.<sup>32</sup> “Immigration judges cannot hold federal prosecutors from the Department of Homeland Security in contempt of court because the judges are considered to be lawyers working for the Justice Department . . . .”<sup>33</sup> The job security of immigration judges has been conditioned on whether they are ordering enough people removed from the country.<sup>34</sup> Under Attorney General John Ashcroft, BIA judges were

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2009/2/20%20immigration/20080220\_immigration.pdf (“[W]hile recognizing the real problems in the system, we shouldn’t forget those immigration judges who are doing outstanding jobs, and, unfortunately, they get tarnished when there are these instances of those immigration judges who are not performing . . . .”).

<sup>31</sup> It is estimated that, in 2013, 40% of individuals in immigration court did not have counsel. See Erin Kelley, Immigration Judges Call for Reform, USA Today (Aug. 27, 2014, 5:58 PM), <http://www.usatoday.com/story/news/politics/2014/08/27/immigration-judges-reform/14704039/>. The immigration judges have a larger caseload with less help than their federal court counterparts. As of 2009, each immigration judge heard approximately 1200 cases each year, which requires the judge to hear and decide, on average, one hundred cases each month at a rate of five cases each day of the week. Such a degree of efficiency is unusual for courts. A federal district judge, by contrast, considers and decides 480 cases each year, at a rate of forty cases each month and just over one case per day. In addition to the fewer number of cases, federal district courts have the benefit of at least two law clerks that assist each judge. In the immigration court system, four immigration judges share one law clerk. See Dana Leigh Marks, An Urgent Priority: Why Congress Should Establish an Article I Immigration Court, 13 *Bender’s Immigr. Bull.* 3, 14 (Jan. 1, 2008); Stephen H. Legomsky, Restructuring Immigration Adjudication, 59 *Duke L.J.* 1635, 1652 (2010); Brookings Institution Panel, *supra* note 30, at 7–8 (statement of Russell Wheeler, Visiting Fellow, Brookings Institution).

<sup>32</sup> Dana Leigh Marks, An Independent Immigration Court Is Needed, N.Y. Times Room for Debate (July 12, 2011), <http://www.nytimes.com/roomfordebate/2011/07/12/how-can-the-asylum-system-be-fixed/an-independent-immigration-court-is-needed> (“The National Association of Immigration Judges believes that establishment of an independent agency or Article I court (like the tax or bankruptcy courts) rather than the current placement of the courts within the Department of Justice, is an essential reform.”).

<sup>33</sup> See Kelley, *supra* note 31.

<sup>34</sup> See Marks, *supra* note 31, at 3–4 (“At present, the Attorney General, our nation’s chief prosecutor in terrorism cases, acts as the boss of the judges who decide whether an accused non-citizen should be removed from the United States. At the same time, despite the creation of the DHS and the placement of trial-level immigration prosecutors there, the Attorney General continues to supervise a critical element of the prosecution process, the Office of Immigration Litigation (OIL), which defends immigration cases on behalf of the government in the circuit courts of appeals. This conflict of interest between the judicial and prosecutorial functions creates a significant (and perhaps even fatal) flaw to the immigration court structure, one that is obvious to the public and undermines confidence in the impartiality of the courts.”).

fired based on their approval rates.<sup>35</sup> (Not surprisingly, since 2002, the denial rate of the BIA rose from 59% to 93%.<sup>36</sup>) For the few cases that reach the federal courts (fewer than 10% of immigration decisions are appealed),<sup>37</sup> government attorneys will often argue that the meaning of the relevant state statute is whatever favors the removal of the claimed citizen.<sup>38</sup>

In *Removing Citizens*, this author argued—perhaps somewhat polemically—that the government’s distortion of family law in immigration proceedings seems intentional and that, given the systemic problems in the adjudication process, the applicants (and when available, their counsel) face an unfair uphill battle in navigating the complexities of family law to prove parentage (and thus citizenship). Given that *citizens* are sometimes wrongly removed from this country, these practices are in urgent need of reform.<sup>39</sup>

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<sup>35</sup> The Attorney General fired the BIA judges who had decided in favor of non-citizens at higher rates than the Board’s average. See Brookings Institution Panel, *supra* note 30, at 22 (statement of Professor Andrew I. Schoenholtz, Georgetown University Law Center); see also Marks, *supra* note 31, at 14 (criticizing an internal DOJ investigation into immigration judges decisions because, “with the clear memory of the not-too-distant personnel purge at the BIA,” the investigation had a “decidedly chilling effect on Immigration Judges”).

<sup>36</sup> Prior to Attorney General Ashcroft’s reforms, the BIA denied alien claims at a rate of 59%. One year after Attorney General Ashcroft’s reforms were introduced, the denial rate climbed to 86%. By 2005, the denial rate rose to 94%. As of 2010, the denial rate is 93%. See Anna O. Law, *The Immigration Battle in American Courts* 151 (2010); Solomon Moore & Ann M. Simmons, *Immigrant Pleas Crushing Federal Appellate Courts*, L.A. Times (May 2, 2005), <http://articles.latimes.com/2005/may/02/local/me-backlog2>.

<sup>37</sup> In 2012, 187,270 immigration court decisions were issued and aliens filed 15,841 appeals, which is 8% of the cases. See U.S. Department of Justice, Executive Office for Immigration Review FY 2012 Statistical Year Book (March 2013) at X1. In 2008, the rate of appeal of 9% and in 2009 through 2012, the rate was 8%. *Id.* “Studies show immigrants with legal representation are three to four times more likely to win their case, yet nationwide, only about 35 percent have any kind of lawyer.” Nina Bernstein, *Many Immigrants Fighting Deportation Go It Alone*, N.Y. Times Mar. 12, 2009 at A21.

<sup>38</sup> See *Anderson v. Holder*, 673 F.3d 1089, 1100 (9th Cir. 2012).

<sup>39</sup> A reasonable estimate from the few studies on whether Immigration and Customs Enforcement (“ICE”) is wrongfully detaining citizens places the number of individuals who are asserting derivative citizenship claims in removal proceedings between 50 and 500 people each year. See generally Jacqueline Stevens, *U.S. Citizens Detained and Deported: 2010 Fact Sheet, States Without Nations* (July 15, 2010, 4:11 PM), <http://stateswithoutnations.blogspot.com/2010/07/us-citizens-detained-and-deported-2010.html> (reporting that between 2006 and 2008, 82 out of 8027 (or approximately 1%) of ICE detainees who were detained in Arizona were found to be a U.S. citizen by an immigration court). In 2011, the Warren Institute issued findings of its independent investigation that reported 3600—or 1.6%—of those detained in the Secure Communities program from 2008 to 2011 were citizens. See Aarti Kohli et al., *Warren Institute, Secure Communities by the*

### III. THE CALL FOR A FORMAL FAMILY IMMIGRATION LAW FIELD

For over twenty-five years, legal scholars have engaged in important conversations over how family law and immigration law intersect and inform one another.<sup>40</sup> It is time to think hard about how we might systematize critical family law concepts into the conception and practice of immigration law, perhaps in ways that are analogous to what has been achieved in the realms of criminal and immigration law, now known as “Crim-Imm” or “Crimmigration”.<sup>41</sup> Crim-Imm scholars advanced (and continue to advance) notable ideas: on the doctrinal level, the immigration system is in need of reform, and on the empirical level, rules of criminal procedure may correct some deficiencies arising in the functioning of immigration courts.<sup>42</sup> The scholarship has included conversations that imagine heightened constitutional protections,<sup>43</sup> critique immi-

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Numbers: An Analysis of Demographics and Due Process 4 (2011), available at [https://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf).

<sup>40</sup> Although this list does not at all intend to be exclusive, notable contributions have been many: See e.g., David B. Thronson, *You Can't Get Here from Here: Toward a More Child-Centered Immigration Law*, 14 Va. J. Soc. Pol'y & L. 58, 58–60 (2006); Sanger, *supra* note 7, at 317–18; Jennifer M. Chacon, *Loving Across Borders: Immigration Law and the Limits of Loving*, 2007 Wis. L. Rev. 345, 358 (2007); Stephen H. Legomsky, *Rationing Family Values in Europe and America: An Immigration Tug of War Between States and Their Supra-National Associations*, 25 Geo. Immigr. L.J. 807, 808–09 (2011); María Pablón López, *A Tale of Two Systems: Analyzing the Treatment of Noncitizen Families in State Family Law Systems and Under the Immigration Law System*, 11 Harv. Latino L. Rev. 229, 230 (2008); Bridgette A. Carr, *Incorporating a “Best Interests of the Child” Approach into Immigration Law and Procedure*, 12 Yale Hum. Rts. & Dev. L.J. 120, 123–24 (2009); Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family that Protects Children's Fundamental Human Rights*, 41 Colum. Hum. Rts. L. Rev. 509, 510–13 (2010); 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, 1273–74 (2008); Over the past decade, Professor Abrams has made numerous and notable contributions to this field. See, e.g., Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 Colum. L. Rev. 641 (2005); Kerry Abrams, *Immigration Status and the Best Interests of the Child Standard*, 14 Va. J. Soc. Pol'y & L. 87 (2006); Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 Minn. L. Rev. 1625, 1634 (2007); Kerry Abrams, *Marriage Fraud*, 100 Cal. L. Rev. 1 (2012).

<sup>41</sup> Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. Rev. 1705, 1726–30 & n.96 (2011) (discussing some forms and functions of crimmigration law).

<sup>42</sup> Conversation with Daniel Kanstroom (Sept. 26, 2014).

<sup>43</sup> See, e.g., Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. Rev. 1461, 1464–66 (2011); Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 Duke L.J. 1563, 1570 (2010); Nan-

gration proceedings and enforcement practices,<sup>44</sup> and caution (warnings usually arising from criminal law practitioners) that the criminal procedure protections often sought might not in fact be the panacea that they purport to be.<sup>45</sup> *Padilla v. Kentucky* embodies an important accumulation of some of these ideas, in which the Supreme Court endorsed (and cited) scholarship advancing heightened constitutional protections to non-citizens in what had previously been deemed civil proceedings.<sup>46</sup>

The area of family immigration law, or likewise “Fam-Imm” or “Famigration,” deserves similar recognition. Immigration law’s determinations of family are in equal need of examination, scrutiny, and reform. Simply put, the complexities involved in defining families can no longer be confined to family law scholars.

First, questions of family formation—who is the child, spouse, or parent of a citizen—determine which person may enter or remain in the United States. Viewed only as an immigration question, *Fiallo v. Bell* explained that “over no conceivable subject is the legislative power of

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cy Morawetz, Determining the Retroactive Effect of Laws Altering the Consequences of Criminal Convictions, 30 Fordham Urb. L.J. 1743, 1745 (2003) (correctly predicting the holding in *Cardenas-Delgado v. Holder*, 720 F.3d 1111 (9th Cir. 2013), that § 212 relief is not limited to plea agreements).

<sup>44</sup> See, e.g., Juliet P. Stumpf, States of Confusion: The Rise of State and Local Power over Immigration, 86 N.C. L. Rev. 1557, 1558 (2008) (critiquing the trend of states using criminal law to control immigration); Stephen H. Legomsky, The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms, 64 Wash. & Lee L. Rev. 469, 471–72 (2007) (observing that the “theories, methods, perceptions, and priorities” of criminal law enforcement have been incorporated into immigration proceedings, while the procedural protections of criminal adjudication have been explicitly rejected); Teresa A. Miller, Blurring the Boundaries Between Immigration and Crime Control after September 11th, 25 B.C. Third World L.J. 81, 83–86 (2005) (discussing how the post-9/11 War on Terror blurred criminal enforcement and immigration regulation); Margaret H. Taylor, Dangerous by Decree: Detention Without Bond in Immigration Proceedings, 50 Loy. L. Rev. 149, 149–50 (2004); Peter L. Markowitz, Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings, 43 Harv. C.R.-C.L. L. Rev. 289, 289 (2008) (“[F]or noncitizens who have been the subject of both removal and traditional criminal proceedings, the two can be indistinguishable but for the relative lack of procedural protections and the often graver liberty interest at stake in the former.”).

<sup>45</sup> See, e.g., Ingrid V. Eagly, *Gideon’s Migration*, 122 Yale L.J. 2282, 2282 (2013) (discussing “lessons learned from the criminal system’s implementation of *Gideon*” when considering “the appropriate scope and design for an immigration defender system”).

<sup>46</sup> See, e.g., *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010) (citing Gabriel J. Chin & Richard W. Holmes, Jr., Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 713–18 (2002)).

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Congress more complete than it is over the admission of aliens.”<sup>47</sup> Under the plenary power doctrine, “the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”<sup>48</sup> But today’s immigrant family is different from its twentieth-century counterpart. Today’s immigrants are not simply those who (like my own grandparents and great-grandparents) were existing families of foreign nationals, emigrating together with their worldly belongings packed in one trunk and dreams of a better life propelling them to either Ellis or Angel Islands. Modern travel—and the Internet—has introduced a way in which love can transform a quick intended vacation into a serendipitous encounter in which a U.S. citizen will now seek to marry or parent a person who was born abroad.

On October 2, 2014, the Supreme Court granted certiorari in *Kerry v. Din*, which involves the visa denial to an Afghan national.<sup>49</sup> The Kabul consulate informed the Afghan national that he was inadmissible due to “terrorist activities” and then invoked provisions permitting it to neither disclose nor have reviewed its determination. The Afghan’s wife, however, was a U.S. citizen and argued that her constitutional rights were violated if the consulate’s actions are unreviewable. Famigration offers a means to recognize that immigration policy is no longer the exclusive arm of foreign policy that it once was. When formerly unreviewable policies and practices implicate a citizen’s fundamental right to choose his or her spouse, in this important respect, the immigrant is no longer a stranger to this land. The mapping of citizens’ constitutional rights into areas previously conscribed as foreign would permit opportunities for oversight. With the introduction of citizen family interests, the plenary power doctrine and other non-reviewability doctrines may in fact yield to the reality that the bars at issue unfairly impede upon a citizen’s interests.

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<sup>47</sup> 430 U.S. 787, 792 (1977) (citing *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)) (internal quotation marks omitted).

<sup>48</sup> *Id.* (citing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)) (citations and internal quotation marks omitted).

<sup>49</sup> *Din v. Kerry*, 718 F.3d 856, 860 (9th Cir. 2013) (“When the denial of a visa implicates the constitutional rights of an American citizen, we exercise a highly constrained review solely to determine whether the consular official acted on the basis of a facially legitimate and bona fide reason.” (citations and internal quotation marks omitted)), cert. granted, 82 U.S.L.W. 3712 (U.S. Oct. 2, 2014) (No. 13-1402).



Second, Famigation invites new scrutiny into how functional conflicts between federal and state law are best resolved. Emerging issues in family law are often entangled with immigration and citizenship issues. In 2012, the U.S. State Department denied a citizen mother's application to confer citizenship to her newly born twins.<sup>50</sup> The citizen mother was a single mother who had become pregnant using an anonymous donor. The embassy stated that it had to have proof of the sperm donor's nationality before granting citizenship to the children.<sup>51</sup> The authority for such action was the State Department's own regulations governing how the matter should be resolved. This outcome is contrary to most state law determinations of parentage when children are conceived with the use of sperm banks.<sup>52</sup> Indeed, in October 2014, the USCIS collaborated with the Department of State to reverse its prior position and redefine "mother" and "parent" to include "mothers using assisted reproductive technology regardless of whether they are the genetic mothers."<sup>53</sup> This policy change occurred quietly, with unknown reasons and champions. In another example, in September 2014, Brazil permitted a child to have three parents—his two lesbian mothers and their friend who served as a sperm donor and asked to be the child's father.<sup>54</sup> Although that case did

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<sup>50</sup> See Michelle Chabin, *In Vitro Babies Denied U.S. Citizenship*, USA Today (Mar. 19, 2012), <http://usatoday30.usatoday.com/news/world/story/2012-03-19/in-vitro-citizenship/53656616/1>.

<sup>51</sup> *Id.*

<sup>52</sup> See Cal. Fam. Code § 7613(b) (West 2014) ("The donor of semen provided to a licensed physician and surgeon or to a licensed sperm bank for use in assisted reproduction of a woman other than the donor's spouse is treated in law as if he were not the natural parent of a child thereby conceived, unless otherwise agreed to in a writing signed by the donor and the woman prior to the conception of the child."). But see *Jason P. v. Danielle S.*, 171 Cal. Rptr. 3d 789, 790–91 (Cal. Ct. App. 2014) (not permitting statute to bar parentage determination to known sperm donor who acted as a father to a child once born).

<sup>53</sup> See USCIS Expands The Definition of "Mother" and "Parent" To Include Gestational Mothers Using Assisted Reproductive Technology, (Oct 28, 2014) <http://www.uscis.gov/news/uscis-expands-definition-mother-and-parent-include-gestational-mothers-using-assisted-reproductive-technology-art>

<sup>54</sup> See *Brazilian Baby Registered with Three Parents*, BBC News (Sept. 13, 2014), <http://www.bbc.com/news/world-latin-america-29195890> ("For the first time in Brazil, a judge in southern Rio Grande do Sul state has permitted a baby to be registered with two mothers and a father. . . . [All three parties requested that their names appear on the birth certificate.] The women married two months ago and the father was a male friend. . . . Judge Cunha said that all three parents had been involved during the pregnancy in the preparations for the arrival of the child. 'Being a father and a mother is above all about taking care and fulfilling tasks. I feel sure that for this child the possibility of happiness will be very great,'

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not involve a parent who was a citizen, similar situations are arising (including those involving a citizen father and non-citizen surrogate), which are being newly litigated in immigration proceedings.<sup>55</sup> As discussed in Part II, the immigration scheme already incorporates and defers to existing state (and foreign) family law when defining the terms “child,” “parent,” and “spouse.” These emerging issues demand oversight as to whether immigration officials are faithfully applying existing family law when appropriate or applying uniform federal definitions as required by law, policy, and common sense.

Third, analogous to how Crim-Imm introduced heightened constitutional protections into a civil proceeding, it seems like Fam-Imm scholarship might be able to import more universal, idealized concepts into the application of the otherwise technocratic, regulatory scheme of the Immigration and Nationality Act. Family law is able to adapt and respond to emerging families in part because of the accepted norm that the best interest of the child prevails. Marriage law is likewise evolving. A generation ago, federal courts gave unquestioned deference to a state’s exercise of its police power to exclude certain people from marriage. By contrast, the state’s role in contemporary marriage is to reward those who choose to marry. In a fundamental shift, federal courts now scrutinize whether a state may withhold the tangible benefits of marriage when such deprivation infringes on a family’s dignity and an individual’s means of self-definition.<sup>56</sup> The practice of family law thus blankets emerging families with protections arising from doctrines aspiring to view children and parents as having more than legal rights but also transcendent rights in the receipt of love, dignity, and care.

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the judge said. The baby’s birth certificate bears the name of two mothers, a father and six grandparents.”).

<sup>55</sup> Conversation with Sharon Dulberg, practicing immigration attorney in San Francisco, California (June 20, 2014).

<sup>56</sup> Compare *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971) (denying suit to permit same-sex couple to marry because “in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex”), with *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2013) (“Marriage also bestows enormous private and social advantages to those who choose to marry.”), and *United States v. Windsor*, 133 S. Ct. 2675 (2013) (“[A] far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages, [which] reflects both the community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.”)

What if various forms of defenses to removal started with the premise that the federal government may not separate citizen children from their parents?<sup>57</sup> What if petitions by citizens to marry were presumed valid and parentage questions directed to be resolved in favor of the alien/alleged citizen? The summer's surge of unaccompanied minors arriving in the United States highlighted how immigration law has been undertaking steps to protect minors in immigration proceedings. Despite its shortcomings, the Trafficking Victims Protection Reauthorization Act ("TVPRA") recognizes that unaccompanied minors present "specialized needs" that require offering heightened substantive and procedural protections than those offered to adults.<sup>58</sup> What if the specialized needs of minors extended into specialized protections that citizens have when determining their own family composition? What if immigration law favored unity over enforcement? Although numerous objections to these policy changes exist, what would happen if Famigration scholarship helped reshaped assumptions behind existing policies and redefined the measure of success?

There is no doubt that family formation as defined under the laws of the United States and abroad will continue to advance in unimaginable ways and combinations. Family law is unique in that its discretionary standards are designed to be responsive to emerging families not yet imagined when statutes were written. Given that Congress has directed immigration officials to defer to family law in ascertaining the meaning of family, and given that immigration families often include citizens, it is time to hold the federal government accountable to the faithful and fair application of these standards. The academy has an ability to recon-

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<sup>57</sup> Anita Ortiz Maddali, *The Immigrant "Other": Racialized Identity and the Devaluation of Immigrant Family Relations*, 89 *Ind. L.J.* 643, 679 (2014) ("An undocumented parent's interest in raising her child is no less fundamental than a citizen parent's interest."). Although he has not formulated an express theory in any written opinions, Judge Harry Pregerson has often queried why the interests of citizen children do not have more consideration in the adjudication of immigration laws that determine whether parents have the right to remain in the United States. See Oral Argument at 17:58, 21:24, *Alejo-Ceja v. Holder*, 356 F. App'x 50 (9th Cir. 2009) (Nos. 05-76475, 06-71150, 06-72543), available at [http://www.ca9.uscourts.gov/media/view.php?pk\\_id=0000000300](http://www.ca9.uscourts.gov/media/view.php?pk_id=0000000300) (after discussing the rights of citizen children in their parents' case, the panel requested the government to consider mediation to resolve the case when issues of fairness are present).

<sup>58</sup> 8 U.S.C. § 1232(d)(8). Although many criticize its application, § 1232 attempts to place minor children in housing or foster care rather than detention, secure the services of pro bono counsel, appoint child advocates to detention centers, and provide training for those adjudicating the asylum claims.

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sider doctrinal and empirical norms. It is thus time to commence scholarly conversations on how transcendent family law principles may recognize the families that citizens and their immigrant relatives have engendered.