

A TALE OF TWO SYSTEMS: ANALYZING THE TREATMENT OF NONCITIZEN FAMILIES IN STATE FAMILY LAW SYSTEMS AND UNDER THE IMMIGRATION LAW SYSTEM

*María Pabón López**

INTRODUCTION

Family unity is a foundation of contemporary United States immigration law and policy.¹ Just a glance at the current yearly admission quotas for immigrants evidences this fact. The visas allotted for family-based immigration number thousands more annually than those for employment-based immigration.² Despite this ostensibly pro-family stance of immigration law, a closer look reveals that for noncitizens,³ family reunification is often ardu-

* Associate Professor of Law, Indiana University School of Law, Indianapolis. J.D. University of Pennsylvania School of Law; B.A., Princeton University. I am grateful to Luis Fuentes-Rohwer and Christiana Ochoa for inviting me to present an earlier draft of this essay at the Indiana University School of Law, Bloomington conference on Latinos and the Law. Earlier versions of this essay were presented at Laterit X in San Juan, Puerto Rico and at the Latino Law Conference held at the Moritz College of Law, Ohio State University. Karen E. Bravo and Kevin R. Johnson provided useful comments to this essay. I appreciate the research assistance of law students Carolina Melean Murillo, Miranda Richard, and Stephanie Sicker. Dragomir Cosanici also provided excellent research support in his position as Head of Reference of the Ruth Lilly Law Library, Indiana University School of Law, Indianapolis. Finally, I am grateful for the research assistance of Donna Johnsen Close and the invaluable support of Miriam Murphy, Associate Law Librarian of the Ruth Lilly Law Library, Indiana University School of Law, Indianapolis. The editorial assistance of Erin Archerd of the Harvard Latino Law Review is also appreciated.

¹ See Victor C. Romero, *Asians, Gay Marriage and Immigration: Family Unification at a Crossroads*, 15 *IND. INT'L. & COMP. L. REV.* 337, 337 n.1 (2005) (highlighting the family based preferences in the Immigration and Nationality Act ("INA") of 1952); see also STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 250 (2005) ("Since [the Immigration Act of 1952 established the first comprehensive set of family-based preferences], one central value that United States immigration laws have long promoted, albeit to varying degrees, is family unity.").

² Under section 201 of the INA, the annual minimum number of family-sponsored immigrants is 226,000. In contrast, the yearly minimum number of employment-based preference immigrants is 140,000. Section 203(c) of the INA provides a maximum of up to 55,000 immigrant visas each fiscal year to permit immigration opportunities for "diversity immigrants," persons from countries other than the principal sources of current immigration to the United States. 8 U.S.C. § 1151(c)-(e) (2000).

³ This essay defines "noncitizen" as a person who is not a citizen of the United States, including those persons who have immigrated to the United States permanently, those who intend to return to their home countries when their visas expire, and those who have illegally entered the United States without inspection. See María Pabón López, *More Than a License to Drive: State Restrictions on the Use of Driver's Licenses by Noncitizens*, 29 *S. ILL. U. L.J.*

ous, if not impossible, to attain. Furthermore, once obtained, family unity is very often difficult to preserve. There are myriad explanations for this lack of noncitizen family unity. Some are rather recent, such as the latest nationwide immigration raids, and some are more longstanding, such as the extremely long waits for visas and the increased risk of deportation following the continued expansion of removal grounds. Finally, the unity of noncitizen families is most powerfully curtailed by the fact that immigration legislation is insulated from most constitutional constraints under the omnipresent plenary power doctrine.⁴

In state family law systems, noncitizens face obstacles such as the denial of the fundamental right to marry—and eventually to create a family—if one of the parties lacks a required Social Security number. Noncitizens also face the problematic effects of an undocumented parent's immigration status or language ability, which may negatively affect a child custody decision. These actions mostly stem from racial, linguistic, or cultural biases prevalent in the system.

This essay compares and contrasts the experiences of noncitizen families in the United States under two systems that affect their lives daily: the immigration law system at the federal level and the state family law court systems. By examining the barriers that noncitizens encounter when attempting to reunite with their families, this essay contends that the United States immigration law system currently fails to put into practice fully its policy of family unity. This essay also examines the experiences of noncitizens in state family law systems, in order to understand the manner in which seemingly neutral decisionmaking regarding their family life often results in immigration-status related outcomes. Furthermore, this examination of noncitizens' family law experiences shows how their cases are mired in cultural and linguistic ignorance, negatively affecting their experiences.

Part II of this essay specifically analyzes the experiences of noncitizens in state family law systems, especially when they try to marry, obtain a divorce, or when they are litigants in child custody cases. Part III analyzes how noncitizens are affected by an immigration law system that keeps families apart during many stages in the immigration process, including both before noncitizens reach the United States and once noncitizens are in the country and a family member is deported.

This essay concludes that while these two legal systems affecting the most intimate of relationships for noncitizen families certainly cannot be changed overnight, every instance of a violation of a fundamental right of a noncitizen family should be cause for concern and a call to action for citizens and noncitizens alike. This is especially critical in a nation that cham-

91, 92 (2004). The term noncitizen is used in this essay instead of the word "alien," which is the term used in the INA, as there are negative connotations to the term "alien." See Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1996).

⁴ See Kevin R. Johnson, *Race, The Immigration Laws and Domestic Race Relations: A "Magic Mirror" Into the Heart of Darkness*, 73 IND. L.J. 1111, 1148 (1998).

pions family values in the way the United States currently does. Furthermore, since the United States is a nation which prides itself in its immigrant history, its commitment to justice, and its adherence to the rule of law and individual rights, it should step back and assess its current laws and policies to avoid repeating mistakes of the not-so-distant past regarding noncitizen or racial minority families.⁵

II. NONCITIZENS IN THE STATE FAMILY LAW SYSTEMS

The initial contact that most persons have with the family law legal system is obtaining a marriage license. Applicants for a marriage license are often apprehensive upon entering into this lifelong commitment. Further along in the life of a family, if a marriage dissolves, much pain and grief ensues for the parties involved. Individuals engaged in family law litigation very often experience it as an extremely stressful time.⁶ Whether for a happy event or a sad one, people come into contact with the family law system during a time of life-changing upheaval. Importantly, for noncitizens, the experience can be even more harrowing because of their status as a noncitizen and its effects on the proceedings.⁷

This Part analyzes the experiences of noncitizens in the family law system in three Sections. The first Section of this Part discusses how noncitizens are barred from marriage, despite its status as a fundamental right. The second Section concerns their experiences with divorce, where noncitizens have been successful, while perhaps wary of resulting restrictions on their access to children or other family members. The third Section concerns the difficulties noncitizens face during child custody disputes because of judges' views towards noncitizens.

A. Marriage

In evolving jurisprudence, the Supreme Court has found that while not explicitly stated in the Constitution, the right to marry is a fundamental right. In *Loving v. Virginia*, the Court invalidated a statute prohibiting interracial marriage as violative of the Due Process guarantee of the Fourteenth

⁵ Two examples that come to mind are anti-miscegenation laws and expatriation upon marriage laws. See *infra* note 8 and accompanying text (discussing 1967 Supreme Court case which invalidated such anti-miscegenation laws); *infra* note 84 and accompanying text (discussing 1907 law which expatriated U.S. citizen women upon marriage to citizens of another country).

⁶ Bill Ezzell, Student Article, *Inside the Minds of America's Family Law Courts: The Psychology of Mediation Versus Litigation in Domestic Disputes*, 25 LAW & PSYCHOL. REV. 119, 123-25 (2001).

⁷ There is similarity here with gays and lesbians, who also encounter obstacles to marriage and who may experience adverse effects in family court based on their status as homosexuals. See, e.g., *Downey v. Muffley*, 767 N.E.2d 1014 (Ind. Ct. App. 2002) (resolving a mother's appeal of an order prohibiting her from cohabiting with her same-sex partner).

Amendment.⁸ In *Griswold v. Connecticut*, the Court found marriage to be part of the right to privacy implicit in the Due Process Clause of the Fourteenth Amendment.⁹ In *Zablocki v. Redhail*, faced with significant state-imposed restrictions upon marriage, the Court finally held that marriage is a fundamental right.¹⁰

Despite its importance and solemnity, entering into marriage has few state-imposed requirements. These are usually only proof of age and identity.¹¹ However, for federal law enforcement purposes states must require an applicant's Social Security number.¹² Yet, only noncitizens who are entitled to work lawfully in the United States receive these numbers, and therefore a significant number of noncitizens do not have Social Security numbers.¹³ Thus, the lack of a Social Security number prevents them from marrying in this country.

The enforcement of the federal Social Security number requirement varies greatly by state and even by county.¹⁴ While many state statutes require that applicants provide their Social Security numbers, they are silent about the consequences of their absence.¹⁵ Certain states' statutes allow lawfully present noncitizens lacking a Social Security number to submit other documentation in place of it. For example, they can submit a visa showing their lawful immigration status.¹⁶

Yet, the question remains: are undocumented noncitizens able to marry in such states? Two courts have addressed this query. A federal district court in Pennsylvania found that under the Equal Protection Clause, there

⁸ 388 U.S. 1, 12 (1967).

⁹ 381 U.S. 479, 481-86 (1965).

¹⁰ 434 U.S. 374, 383-86 (1978).

¹¹ See, e.g., New York State Department of Health, Getting Married in New York State, http://www.nyhealth.gov/vital_records/married.htm (last visited Feb. 8, 2008).

¹² 42 U.S.C. § 666(a)(13) (2000). This statute seeks to improve child support efforts and requires that Social Security numbers be presented for, among other documents, a professional license, driver's license, occupational license, recreational license, or marriage license. See Travis Loller, *Some Immigrants Denied Marriage Licenses*, WASH. POST, July 12, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/12/AR2007071201089.html> (Assoc. Press article).

¹³ Social Security Numbers for Noncitizens, SSA Publication Fact Sheet No. 05-10096, December 2005, <http://www.ssa.gov/pubs/10096.html>. Noncitizens without Social Security numbers include tourists, certain students, and undocumented persons, among others.

¹⁴ See Loller, *supra* note 12.

¹⁵ These states include Alabama, Colorado, Hawaii, Nebraska, and New Mexico. See ALA. CODE § 30-3-194 (2007); COLO. REV. STAT. §14-2-105 (2007); HAW. REV. STAT. § 572-6 (2007); NEB. REV. STAT. §43-3340 (2007); N.M. STAT. § 27-1-10 (2007). Moreover, several states' statutes appear to exempt applicants from the Social Security number requirement if they do not have one. These states include Florida, Kansas, and Nevada. See FLA. STAT. § 741.04 (2007); KAN. STAT. ANN. § 74-148 (2006); NEV. REV. STAT. § 122.040 (2007). Further research shows that all but four states—California, Maine, Mississippi, and Washington—require a Social Security number or some other identifier for a marriage license. Memorandum from Donna Close to María Pabón López (Feb. 19, 2008) (on file with the Harvard Latino Law Review).

¹⁶ See IDAHO CODE ANN. § 32-403 (2007) (birth certificate or passport); S.C. CODE ANN. § 20-1-220 (2006) (alien identification number); W. VA. CODE § 48-2-104 (2007) (tourist or visitor visa number).

was ample authority holding that undocumented noncitizens possess the fundamental right to marry.¹⁷ Thus, the court allowed the marriage of an undocumented person to a U.S. citizen. The court used strict scrutiny to invalidate the requirement that noncitizens prove their lawful presence to obtain a marriage license because it interfered with the couple's fundamental right to marry and because the policy prevented undocumented noncitizens from marrying and prevented U.S. citizens from marrying undocumented noncitizens.¹⁸

In a similar case, the Ohio Supreme Court held that its state statute did not require Social Security numbers from those who did not possess them.¹⁹ In doing so, the court rejected the restrictive interpretation of a county which refused to allow undocumented noncitizens to marry. Despite these two court opinions, the use of Social Security numbers varies widely by state, and there are continued reports of clerk's offices in Alabama and Tennessee preventing undocumented persons from marrying.²⁰ Undocumented couples in these states have to "shop around" for counties with more liberal clerks or they will not be able to marry.²¹ Thus, their fundamental right to marry is curtailed.

B. Divorce

While divorce does not have the same fundamental right status as marriage, the Supreme Court has invalidated certain divorce restrictions. For example, in *Boddie v. Connecticut*, the Court held that a state could not deny access to a divorce based on a person's inability to pay court fees and costs.²² Because there is no fundamental right to divorce, the standard of review for divorce regulations under the Equal Protection Clause appears to be rational basis.²³ Thus, the federal law which requires a Social Security number on a divorce application²⁴ would likely survive a constitutional challenge as applied to noncitizens since it is likely that this requirement is rationally related to the governmental goal of enhanced enforcement of child support orders.

¹⁷ *Buck v. Stankovic*, 485 F. Supp. 2d 576, 582 (M.D. Pa. 2007).

¹⁸ *Id.* at 583-85. One noteworthy aspect of this opinion is that it relies on *Zablocki*, 434 U.S. 374 (1978), and its fundamental right analysis does not cite or use the reasoning from *Loving v. Virginia*, 388 U.S. 1 (1967). Thus, "neither the symbolism nor the social history of *Loving* has been invoked to dignify the marital and sexual freedom of migrants." Rachel F. Moran, *Loving and the Legacy of Unintended Consequences*, 2007 Wis. L. REV. 239, 280 (2007).

¹⁹ See *Vasquez v. Kutscher*, 767 N.E.2d 267 (Ohio 2002).

²⁰ See Loller, *supra* note 12.

²¹ *Id.*

²² 401 U.S. 371, 382 (1971).

²³ See *Murillo v. Bambrick*, 681 F.2d 898, 905 (3d Cir. 1982); see also *Stottlemeyer v. Stottlemeyer*, 329 A.2d 892, 896 n. 12 (Pa. 1974) (summarizing the rational relationship test for divorce in several states); *Davis v. Davis*, 210 N.W.2d 221, 226 (Minn. 1973); *Villars v. Provo*, 440 N.W.2d 160, 163 (Minn. App. 1989).

²⁴ 42 U.S.C. § 666(a)(13)(B) (2000).

Courts have established that noncitizens have access to U.S. divorce courts if they are domiciled in the state.²⁵ When confronted with the question of whether an undocumented person who had overstayed a non-immigrant²⁶ visa could be domiciled in the United States for purposes of obtaining a divorce,²⁷ a federal court stated that, “[t]o deny an alien access to our divorce courts on the sole ground that he may be in violation of an immigration law would be to deny both due process and the equal protection of the laws.”²⁸ Similarly, a New Jersey court found that an undocumented person who had overstayed a visa could still manifest the requisite intent to be domiciled in the state in order to file for a divorce.²⁹

Thus, noncitizens may find dissolving a marriage easier than entering into marriage under current law. The Social Security number requirements for both, however, are especially burdensome for noncitizens who lack them. While Congress may not have intended these results, the fact that these requirements are maintained in face of these effects shows disregard for noncitizens and their ability to alter their family and intimate relationships.

C. *Child Custody Litigation*

The majority of states use the best interests of the child test when determining the custody of a child.³⁰ The test typically consists of a statutory list of factors, as well as “any other factors the court finds relevant,” a court must analyze to determine the custody of the child.³¹ Although immigration status is not included among these factors, Professor David Thronson has found that courts also take immigration status into account in a decisive way that attaches too much significance to this one factor and often has negative consequences for noncitizens.³²

²⁵ See generally *Williams v. Williams*, 328 F. Supp. 1380 (D.C.V.I. 1971) (holding that an alien of non-immigrant status is not precluded from obtaining domicile in the Virgin Islands sufficient to warrant maintenance of suit for divorce or adoption).

²⁶ Non-immigrants are those who are in the United States lawfully but temporarily, usually with intent to return to their countries of origin. See, e.g., 8 U.S.C. § 1101 (a)(15)(B), (F) (2000).

²⁷ *Williams*, 328 F. Supp. at 1382.

²⁸ *Id.* at 1383.

²⁹ *Das v. Das*, 603 A.2d 139 (N.J. Super. Ct. Ch. Div. 1992).

³⁰ See Susan B. Jacobs, Note, *The Hidden Gender Bias Behind the “Best Interest of the Child” Standard in Child Custody Decisions*, 13 GA. ST. U. L. REV. 845 n.75 (1997); see also *In re Marriage of Ciesluk*, 113 P.3d 135, 140 (Colo. 2005); *Hollon v. Hollon*, 784 So. 2d 943, 947 (Miss. 2001); *Green v. Green*, 863 N.E.2d 473, 477 (Ind. Ct. App. 2007).

³¹ Janet M. Bowermaster, *Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings*, 40 DUQ. L. REV. 265, 269 (2002).

³² See David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL’Y 45, 53, 71-72 (2005); see also Kerry Abrams, *Immigration Status and the Best Interests of the Child Standard*, 14 VA. J. SOC. POL’Y & L. 87, 101 (discussing Professor Thronson’s conclusion that “immigration law and family law are converging in ways that could potentially have dire consequences for children.”).

Thronson has found that the family law courts have four distinct approaches to handling the immigration status of a family court litigant, which Thronson has categorized as discrimination, manipulation, obfuscation, or accommodation.³³ The uses of these vary from unabashed discrimination, where courts base their custody decisions on immigration status,³⁴ to manipulation and obfuscation, where the court's actions are either tailored or more hidden but still take into account immigration status as the underlying basis for the decision.³⁵ Finally, he has found that the most common approach that courts use is to accommodate and respond to the effects of a noncitizen's status and rule accordingly.³⁶

The most telling example to date of the use of a parent's immigration status in a child custody case is *Rico v. Rodriguez*.³⁷ In that case, a lower court had awarded a lawfully admitted permanent resident father custody of two children—who had never lived with him—by considering the undocumented mother's immigration status as a factor.³⁸ The Nevada Supreme Court found that it was not an abuse of discretion to use the mother's immigration status as a factor in the custody determination.³⁹ Thus, undocumented litigants in family law courts now face such adverse precedents in custody determinations.

Additionally, judges' culturally misguided views about the proper way to raise children in the United States can influence a family court proceeding involving a noncitizen parent. News headlines regarding language effects in custody disputes illustrate this point:

“*Judge Tells Moms in Custody Cases to Learn English*”⁴⁰

“*Judge Orders Neb. Father to Not Speak ‘Hispanic’*”⁴¹

These admonishments to noncitizen parents conflict with the freedom from governmental interference and preeminence of the parental prerogatives to

³³ Thronson, *supra* note 32, at 53.

³⁴ *Id.* at 54.

³⁵ *Id.* at 64.

³⁶ *Id.* at 68.

³⁷ 120 P.3d 812 (Nev. 2005).

³⁸ *Id.* at 815.

³⁹ *Id.* at 819. In response to this case, Professor Kerry Abrams has proposed “a rebuttable presumption against the use of immigration status in child custody determinations that will allow courts to exercise self-restraint while still making the consideration of immigration status available in exceptional circumstances.” Abrams, *supra* note 32, at 102. For further discussion of this case, and of two Texas cases in which the mother's immigration status was at issue, see Nicole Lawrence Ezer, *The Intersection of Immigration Law and Family Law*, 40 FAM. L.Q. 339, 363-65 (2006).

⁴⁰ CTR. FOR FAM. POL'Y & PRAC., POLICY BRIEFING 4 (2005), http://www.cffpp.org/briefings/pdfs/brief_0502.pdf (discussing Judge Barry Tatum of Wilson County, Tennessee, who ordered an eighteen-year-old Mexican mother in a child protection case to learn English and consider using birth control).

⁴¹ Darryl Fears, *Judge Orders Neb. Father to Not Speak “Hispanic,”* WASH. POST, Oct. 17, 2003, at A03 (describing a district court judge's statement during a hearing in a custody dispute). The custody dispute was between a Mexican-American father and Polish-American mother. *Id.* The judge warned the father that his visitation rights would be “severely limited if he insisted on speaking ‘the Hispanic language’ to his 5-year-old daughter.” *Id.*

raise children recognized by the Supreme Court in cases such as *Meyer v. Nebraska*⁴² and *Pierce v. Society of Sisters*.⁴³ In *Meyer*, a Nebraska law banned the teaching of foreign languages to students who had not passed the eighth grade.⁴⁴ The Court held that by limiting what topics the child could be taught, the law infringed on a parent's Fourteenth Amendment liberty to raise and nurture his or her child.⁴⁵ *Pierce* involved an Oregon compulsory school attendance law requiring children to attend public schools. The case was brought by private schools that would be forced out of business because of the law.⁴⁶ Here, the Court, finding that the state law interfered with a Fourteenth Amendment liberty interest, recognized the right of parents to direct the upbringing of their children.⁴⁷

Thus, when the judges described in the above news headlines considered the use of a foreign language as contrary to the child's best interest, they overlooked and violated an established right of the parent. This is just another example of the adverse experiences of noncitizens in state family law systems. A host of negative consequences appear to stem solely from their immigration status and language ability. As seen above, these consequences range from a complete bar to the right to marry, to the infringement of the right to raise their children, to outright language discrimination.

These experiences in family law matters are not only discriminatory and detrimental to noncitizens, they further reaffirm noncitizens' status as outsiders in the United States. Finally, given the fact that most foreign born are ethnic and racial minorities,⁴⁸ the documented effect of racial biases in the courtroom and the judicial system⁴⁹ cannot be discounted. These circumstances add yet another layer of unfairness and exclusion for noncitizens in the family law court system.

⁴² 262 U.S. 390 (1923).

⁴³ 268 U.S. 510 (1925).

⁴⁴ *Meyer*, 262 U.S. at 397.

⁴⁵ *See id.* at 400 (the right of the teacher "to teach and the right of parents to engage him so to instruct their children [in the learning of other languages], we think, are within the liberty of the [Fourteenth] Amendment").

⁴⁶ *Pierce*, 268 U.S. at 530-33.

⁴⁷ *See id.* at 535.

⁴⁸ *See* U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2003, at 1 (2004), <http://www.census.gov/prod/2004pubs/p20-551.pdf> (finding that among the foreign born population in the United States, nearly four-fifths were born in Latin America and Asia, indicating that the majority of the foreign born in the United States are racial minorities).

⁴⁹ *See e.g.*, William E. Martin & Peter N. Thompson, *Judicial Toleration of Racial Bias in the Minnesota Justice System*, 25 *HAMLIN L. REV.* 235, 253 (2002) (describing instances of racial stereotyping in the courtroom). Further, during this author's time representing indigent Latina noncitizens in state family law court, this author commonly observed instances of Latinas being treated differently than wealthier, Anglo litigants in similar cases. This author observed judges who were intolerant of the use of languages other than English in the courtroom, family law system employees who used harmful stereotypes, and outright judicial disrespect for a Latina attorney on more than one occasion.

III. NONCITIZENS IN THE IMMIGRATION LAW SYSTEM

A noncitizen initially encounters the U.S. immigration system when applying for admission to enter the country. Difficulties abound for noncitizen families navigating this system. The long delays in obtaining a visa often cause applicants to wait for extended periods of time, often years, to be reunited with close family members.⁵⁰ The law limits to a statutorily identified list the ability of a current resident to bring noncitizen family members to the United States. Adult unmarried and noncitizen children of U.S. citizens are also among those who encounter limitations under the immigration system.

A. *Entering the United States*

1. *The Immediate Family*

Family-based immigrant visas are currently divided into four preference categories. From highest to lowest they are: (1) for unmarried sons and daughters of United States citizens; (2) for spouses and unmarried sons and daughters of lawful permanent residents (LPRs);⁵¹ (3) for married sons and daughters of U.S. citizens; and (4) for brothers and sisters of U.S. citizens.⁵²

As noted above, there are significant delays for these families. For example, the spouses and children of LPRs who are now eligible for visas filed their applications in July 2002.⁵³ If the children are over twenty-one years of age and remain unmarried, the wait is longer, as the applications that are now current were filed in April of 1998.⁵⁴ Spouses, parents, and children of U.S. citizens under twenty-one years of age do not have to wait as long because they are admitted as immediate relatives and are not subject to visa delays, only to administrative delays.⁵⁵

⁵⁰ See U.S. Dep't of State, Visa Bulletin, No. 109, Vol. VIII (A)(1), http://travel.state.gov/visa/frvi/bulletin/bulletin_3269.html (indicating that some qualified families who filed their visa applications before November 1996 to July 2002 are only now receiving their visas). The waiting time also depends on the country of origin, since China, India, Mexico, and the Philippines have separate "chargeability" and entrants from those four countries often have different priority dates.

⁵¹ An immigrant accorded the privilege of residing permanently in the United States is one who is "lawfully admitted for permanent residence." 8 U.S.C. § 1101(a)(20) (2006). These are the so-called "green card" holders, permanent residents, or "LPRs." These noncitizens have adjusted status under 8 U.S.C. § 1255 (2006) such that they have the right to remain in the United States permanently. The most common way to become an LPR is by family-based or employment-based immigration. See 8 U.S.C. § 1153(a), (b) (2006) (detailing the statutory preferences for visa allocation based on these characteristics). An LPR can then become a citizen in three or five years, depending on whether the LPR status was obtained through family or employment. *Id.*

⁵² The four preferences are found at § 1153(a).

⁵³ U.S. Dep't of State, *supra* note 50.

⁵⁴ See *id.* (indicating that these groups must have filed their applications prior to April 1998 to be eligible now.).

⁵⁵ 8 U.S.C. 1151(b)(2)(A)(i) (2006).

The lengthy separations endured by noncitizens and their families appear to disregard the Supreme Court's pronouncement in *Moore v. City of East Cleveland* that family unity is a constitutionally protected right under the Fourteenth Amendment.⁵⁶ However, Professor Hiroshi Motomura has argued when viewing family reunification as a matter of immigration as affiliation, an unqualified right to family unity is limited only to citizens, so that "[f]amily-based admission categories evidently may discriminate against noncitizens by drawing lines that would unconstitutionally intrude on family unity outside of immigration law."⁵⁷ Professor Motomura came to this conclusion by examining the case of *Fiallo v. Bell*, in which unwed fathers and their out of wedlock children argued to the Supreme Court that they were immediate relatives under the Immigration and Nationality Act.⁵⁸ At that time, the law permitted illegitimate children to receive immediate relative status only through their natural mothers.⁵⁹ The Court held that Congress' plenary power over immigration law allowed such classifications and upheld the statute.⁶⁰

Therefore, under current law, the Constitution allows the government to keep noncitizen families apart under the plenary power doctrine, yet social science research shows that such long periods of separation have harmful effects on the family.⁶¹ For example, when separated from their parents for extended periods, children have difficulties forming secure attachment bonds and may experience problems with other family relationships and suffer from depression.⁶²

To avoid these extended delays in family reunification, Professor Motomura proposes considering LPRs under his "immigration as transition" approach.⁶³ This approach "treats lawful immigrants as Americans in waiting, as if they would eventually become citizens of the United States, and thus confers on immigrants a presumed equality."⁶⁴ Under such presumed equality, LPRs would have the same rights to sponsor their family members as U.S. citizens until the time that they can naturalize.⁶⁵ Another view is that

⁵⁶ 431 U.S. 494, 505-06 (1977).

⁵⁷ HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 159 (2006).

⁵⁸ 430 U.S. 787, 789-791 (1977).

⁵⁹ *Id.* at 797.

⁶⁰ *Id.* at 798-800.

⁶¹ See Victoria B. Mitrani, Daniel A. Santisteban & Joan A. Muir, *Addressing Immigration-Related Separations in Hispanic Families with a Behavior-Problem Adolescent*, 74 AM. J. ORTHOPSYCHIATRY 219, 220 (2004) (discussing family therapy intervention strategies for behavior-problem adolescent Latinos who have experienced an immigration-related separation from their families).

⁶² *Id.*

⁶³ MOTOMURA, *supra* note 57, at 159-60.

⁶⁴ *Id.* at 9 (emphasis omitted).

⁶⁵ *Id.* at 160. Professor Motomura has further analyzed how "the family adds the dimension of time to analysis of immigration and citizenship" and how this "time dimension poses choices concerning the role of law in the integration of immigrants." Hiroshi Motomura, *We Asked for Workers, But Families Came: Time, Law and the Family in Immigration and Citizenship*, 14 VA. J. SOC. POL'Y & L. 103, 118 (2006).

of Professor Linda Kelly, who argues that under a constitutionally humane approach, once noncitizens are subjected to U.S. laws, they are entitled to constitutional rights.⁶⁶ Thus, Professor Kelly would restore the rights enumerated in *Moore*, which have “quietly joined the ranks of constitutional rights disregarded in U.S. immigration law.”⁶⁷

In addition to the lengthy waiting periods to reunite their families, in many cases the family relationships of noncitizens are subjected to in-depth, intimate examination. For example, noncitizen marriages entered into less than two years from the time in which the noncitizen beneficiary applies for lawful permanent resident status receive this level of scrutiny.⁶⁸ For the noncitizen spouse to obtain permanent residency when the marriage is less than two years old at the time of the application,⁶⁹ the couple has to prove that their marriage is bona fide.⁷⁰ To meet this requirement, couples usually use evidence of cohabitation, commingling of finances, and the birth of children—personal matters which are generally kept confined to the intimacy of a couple’s relationship.⁷¹ This is in contrast to U.S. citizen couples, who may marry for any reason and choose never to cohabit, share finances, or have children, yet are exempt from such scrutiny.⁷²

Once the couple proves a bona fide marriage, the noncitizen spouse still has limited immigration status. In this situation, the law only grants noncitizen spouses a two-year conditional permanent residency, and at any time during those two years the government may revoke the noncitizen spouse’s residency if it determines that the marriage was entered into solely for immigration purposes.⁷³ On the other hand, if all goes well, a noncitizen couple must jointly petition to have the conditions on the noncitizen’s conditional residency removed at the end of the waiting period, so that he or she may become a lawful permanent resident.⁷⁴

The policy reason for such intense examination of these marriages is to prevent marriage fraud,⁷⁵ but the legislation that mandates such scrutiny was

⁶⁶ Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens’ Rights*, 41 VILL. L. REV. 725, 772 (1996).

⁶⁷ *Id.* at 776.

⁶⁸ Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1683 (2007).

⁶⁹ *Id.* at 1683-84.

⁷⁰ 8 C.F.R. § 204.2 (2007).

⁷¹ Abrams, *supra* note 68, at 1685-86.

⁷² *Id.* at 1682-83.

⁷³ 8 U.S.C. § 1186a(b)(A)(1) (2000) (the noncitizen spouse becomes removable upon revocation of residency).

⁷⁴ Abrams, *supra* note 68, at 1684. One exception to the requirement that spouses jointly petition for the removal of the condition to the noncitizen spouse’s permanent residency is found in the Violence Against Women Act (“VAWA”). VAWA allows noncitizen spouses who have been battered or subjected to extreme cruelty to self-petition to remove the condition. This prevents battered noncitizen spouses from relying on their abusive spouses who are often unwilling to petition or may manipulate the noncitizen by use of the joint petition requirement. *Id.* at 1695-97.

⁷⁵ LEGOMSKY, *supra* note 1, at 270 (discussing the Immigration Marriage Fraud Amendments of 1986 (IMFA)).

enacted in 1986 at the behest of the Immigration and Naturalization Service (“INS”) based on faulty INS survey research. In fact, the INS later conceded the statistical invalidity of the survey results.⁷⁶

Notwithstanding the inaccuracies in the data that led to its passage, this presumption of fraud remains the basis of the present law, despite no indication of any reduction in the incidence of marriage fraud.⁷⁷ Thus, as at least one commentator has observed, immigration law acts as family law when regulating the marriages of U.S. citizens to noncitizens.⁷⁸

2. *Noncitizen Spouses of U.S. Citizens Married Abroad*

While noncitizen families are certainly the most affected by the current immigration system, mixed status families experience hardships as well. For example, the marriage of a U.S. citizen to a noncitizen spouse abroad does not guarantee the U.S. citizen the right to reside in the United States with the noncitizen spouse. In *Hermina Sague v. United States*,⁷⁹ a U.S. citizen married a citizen of France while abroad.⁸⁰ Although by virtue of the marriage, the French spouse was an immediate relative of a U.S. citizen, his visa application was denied.⁸¹ When the U.S. citizen sued, the court held that since immigration decisionmaking is within the plenary power of the United States, the court did not have jurisdiction over the decisions of consular officers to deny the visa.⁸²

While the plenary power doctrine currently makes this separation of noncitizens permissible under U.S. law, such protracted or enduring separations rarely occur when all family members are U.S. citizens unless wrongdoing is involved—such as when a family member is incarcerated or when the state removes a child from the parents because of abuse or neglect.⁸³

⁷⁶ *Id.* at 271. The preliminary survey indicated that as many as 30% of the marriages were fraudulent. It has since been revealed that the 30% figure was not taken from the overall group of spousal visa petitions, but from selected petitions thought to be at high risk for fraud. *Id.* Additionally, the investigators in the petition cases were asked whether they suspected fraud, not whether fraud had actually occurred. *Id.*

⁷⁷ *Id.*

⁷⁸ Abrams, *supra* note 68, at 1708-09.

⁷⁹ 416 F. Supp. 217 (D.P.R. 1976).

⁸⁰ *Id.* at 218.

⁸¹ *Id.*

⁸² *Id.* at 220. In the words of the court:

[T]here is no constitutional right of a citizen spouse, who voluntarily chooses to marry an alien outside the jurisdiction of the United States, to have her alien spouse enter the United States. No citizen can, by the individual action of contracting matrimony in a foreign jurisdiction with an alien, deprive the United States of as fundamental an act of sovereignty as is the determination of what aliens may enter its territory.

Id. (citation omitted).

⁸³ More recently, these separations take place when a U.S. service member is called to active duty in the Middle East. Long family separations curtail the empathy in the children left behind. This phenomenon has been noted for children of incarcerated parents. See Jack B. Weinstein, *Adjudicative Justice in a Diverse Mass Society*, 8 J.L. & POL'Y 385, 410 (2000)

Nevertheless, while under the law it is acceptable to deny the noncitizen spouse entry into the United States, it is inescapable that such a decision takes away the U.S. citizen's right to a life in her country with her spouse. This results in a devaluation of a U.S. citizen's fundamental marriage rights when married to a noncitizen abroad. Such a result harkens back to early twentieth century legislation that expatriated a U.S. citizen when she married a noncitizen, since a woman's citizenship was coupled to that of her spouse.⁸⁴

3. *Other Family and Close Relationships*

For many cultures, family ties transcend spousal and parent-child relationships. Extended family is very important to some ethnic groups and can have an emotional status similar to the nuclear family. In the Latino tradition, for example, cooperation, collectiveness, and strong inter-generational family ties are highly valued.⁸⁵ Family networks can include primary kin, extended kin, and close friends and neighbors to whom members turn for financial and emotional support.⁸⁶ Or in some cases, persons have no blood relatives, but have longtime friends in their countries of origin who they consider to be their family.⁸⁷ These are people immigrants would like to have them join in the United States and be part of their family. Yet such relationships are not recognized under the existing immigration law.⁸⁸ The nuclear family is the only family unit allowed in immigration law, to the exclusion of other familial relations such as longtime same sex couples.⁸⁹

Further, certain lawfully admitted noncitizens cannot petition for family members to join them in the United States. This is the case for immigrants who come to the United States to escape torture. The regulation implement-

("[B]reaking up families by sending fathers and mothers to prison for unnecessarily long terms sows the seeds of problems for the next generation.").

⁸⁴ See Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 U.C.L.A. L. REV. 405, 425 (2005) (discussing 1907 Expatriation Act); see also KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 125 (2004).

⁸⁵ See Shirley L. Patterson & Flavio Francisco Marsiglia, "*Mi Casa Es Su Casa*": *Beginning Exploration of Mexican Americans' Natural Helping*, 81 FAMILIES IN SOCIETY 22, 24 (2000).

⁸⁶ *Id.*

⁸⁷ The term "hermano de crianza" comes to mind. It means "brother who was raised in the same household" and refers to a person with whom there are no blood ties but with whom there has been a close, familial bond during childhood.

⁸⁸ See, e.g., Linda Kelly, *Family Planning, American Style*, 52 ALA. L. REV. 943, 963-66 (2001) (discussing the benefits and disadvantages of utilizing a "functionality" test, which "recognized relationships of dependency in the family-petitioning context" rather than blood relationships).

⁸⁹ See *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982) (denying same sex partner the ability to immigrate because the term "spouse" under the INA is limited exclusively to those of the opposite sex, and under the rational basis test, such a statutory construction is constitutional). Other countries do permit such immigration. See Desiree Alonso, Note, *Immigration Sponsorship Rights for Gay and Lesbian Couples: Defining Partnerships*, 8 CARDOZO WOMEN'S L.J. 207, 220 (2002). In particular, the United Kingdom grants immigration benefits to unmarried couples, including homosexual couples, who can prove the existence of a bona fide relationship. *Id.* at 221. Australia, Canada, and Finland also allow homosexuals' noncitizen partners to immigrate if they are in a bona fide relationship. *Id.* at 220-24.

ing Article 3 of the United Nations Convention against Torture explicitly acknowledges that it does not allow for family reunification.⁹⁰ Thus, it forces persons who request protection under the Convention to make the hard choice between their own safety and reuniting with their family.⁹¹ While the Convention does not require family reunification, such absence contravenes United States immigration policy favoring family unity, as well as the basic international human right to family unity.⁹²

B. *Remaining in the United States*

Once in the country, noncitizens must not commit acts that would render them removable.⁹³ Thus, noncitizens who enter the United States in a sense have entered into contract to remain in the country subject to certain conditions imposed by the Immigration and Nationality Act (INA).⁹⁴ If the noncitizen violates one of the conditions of their entry, he or she has breached the contract and becomes removable.⁹⁵ Once charged with being removable, a noncitizen may defend against the action by requesting cancellation of removal.⁹⁶ However, the noncitizen must establish that he or she meets the requirements to be eligible for cancellation⁹⁷ and receive favorable discretion of an immigration judge.⁹⁸ The requirements are very often difficult to meet and, as a result, the noncitizen is removed from the United States. Thus, the family of the noncitizen loses its member. So in essence, the third party beneficiaries to the contract are not able to reap the benefits of that contract when their noncitizen relative is removed from the United States.

Until a noncitizen is naturalized, he or she will be removable—even if lawfully admitted—if he or she violates the INA.⁹⁹ While removal from the

⁹⁰ Lori A. Nessel, *Forced to Choose: Torture, Family Reunification, and United States Immigration Policy*, 78 TEMP. L. REV. 897, 899 (2005) (discussing 8 C.F.R. § 208.16(e) (2007)).

⁹¹ *Id.*

⁹² *Id.* at 900. This right is recognized in the Universal Declaration of Human Rights, the 1969 American Convention on Human Rights, the International Convention on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. *Id.* at 906-07; see also Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st Plen. Mtg., P. 16(3), U.N. Doc A/810 (Dec. 12, 1948) (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”).

⁹³ See generally 8 U.S.C. § 1227 (2006) (stating several ways in which a noncitizen can become removable, including involvement in criminal activity or activity that is a threat to national security).

⁹⁴ See LEGOMSKY, *supra* note 1, at 500.

⁹⁵ *Id.*

⁹⁶ 8 U.S.C. § 1229b (2006).

⁹⁷ These requirements include that the citizen be continuously physically present in the United States for at least ten years, have good moral character, have no convictions for certain criminal offenses, and that the noncitizen’s removal would result in exceptional and extremely unusual hardship to their United States citizen or LPR spouse, parent, or child. *Id.*

⁹⁸ See *id.* § 1229b(a).

⁹⁹ See 8 U.S.C. § 1227 (2006). Having lawful permanent resident status does not protect a person from removal. However, there are fewer barriers for a lawful permanent resident to

United States is not considered punishment under current U.S. law,¹⁰⁰ it has harmful consequences on the noncitizen and the noncitizen's family. Immigration judges decide most removal cases without regard to the noncitizen's family circumstances.¹⁰¹ Thus, the family members are frequently confronted with the alternative of departing the United States with the noncitizen relative or remaining behind on their own.¹⁰²

While spouses are able to make the agonizing choice between their partner and their life in the United States, young children are, in effect, not presented with that choice, since they must go along out of necessity or be left behind with extended family or friends in the United States, if there are any. Some of the children involved may be U.S. citizens by birth,¹⁰³ if they were born in the United States. As citizens, they have the right to live in this country; yet as children, they need to be cared for by their parent. This dilemma has come to the forefront in the latest nationwide immigration raids, which have a documented deleterious effect on children when their parents are taken away from the home in predawn raids.¹⁰⁴

In such situations, courts have dismissed cases filed on behalf of U.S. citizen children, based on the fact that the removal of the undocumented parent is not a form of constructive removal of the child.¹⁰⁵ Because the removal does not interfere with the child's ability to exercise his or her right to be with the parent, albeit abroad, courts have countenanced this rule.¹⁰⁶ Yet the citizen child's need for his or her parent's care coupled with the parent's removal means that the child will likely leave the country with the removed parent.¹⁰⁷

Professor Jacqueline Bhabha has argued that a child's citizenship is less valuable than an adult's because citizen children are frequently constructively removed with their noncitizen parent, whereas an adult citizen of the

cancellation of removal than are present for undocumented noncitizens and nonimmigrants. See § 1229b.

¹⁰⁰ See *Mahler v Eby*, 264 U.S. 32, 39 (1924); see also *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

¹⁰¹ See Gregory R. Hawran, Note, *Taking Fairness and Retroactivity from Immigration Law: Casenote on Fernandez Vargas v. Gonzalez*, 38 U. MIAMI INTER-AM L. REV. 431 (2007) (discussing a recent retroactivity case that may have devastating effects on families of noncitizens).

¹⁰² Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law's Conflicted Answers*, 32 HOFSTRA L. REV. 273, 300 (2003).

¹⁰³ 8 U.S.C. § 1401 (2000); see also U.S. CONST. amend. XIV, § 1.

¹⁰⁴ See generally RANDOLPH CAPPS ET AL., URBAN INST., *PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN* (2007), <http://www.urban.org/url.cfm?ID=411566> (discussing the impact of worksite enforcement operations on children with undocumented parents).

¹⁰⁵ See *Gonzalez Vallejo v. Gonzalez*, 187 F. App'x 787 (9th Cir. 2006); *Coleman v. United States*, 454 F. Supp. 2d 757 (N.D. Ill. 2006). For further discussion of these two cases, see Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of Loving*, 2007 WIS. L. REV. 345 (2007).

¹⁰⁶ *Coleman*, 454 F. Supp. 2d at 767-68.

¹⁰⁷ Jacqueline Bhabha, *The 'Mere Fortuity' of Birth? Are Children Citizens?*, 15 DIFFERENCES 91, 99-100 (2004).

same noncitizen parent cannot be removed.¹⁰⁸ Also, while minor U.S. citizens cannot petition for their immediate relative parents to join them in the United States until they reach majority—twenty-one years of age for immigration purposes—adult U.S. citizens can do so.¹⁰⁹

In some circumstances, immigration judges will grant cancellation of removal to a removable noncitizen based on the hardship caused to immediate citizen or lawful permanent resident family members, yet the level of hardship required is “exceptional and extremely unusual.”¹¹⁰ This threshold may be met when the children’s lives would be endangered in the parent’s home country.¹¹¹ Lack of language ability¹¹² or the poor education and scant opportunities¹¹³ available for the children in the country of origin have not been enough to justify a parent’s cancellation of removal.

It is noteworthy that this treatment of children is outside of the prevailing international norm. In Canada, the rights and interests of children are central humanitarian and compassionate values in Canadian society and are considered in prosecuted deportation decisions.¹¹⁴ The European Court of Human Rights and domestic courts in Europe have terminated the deportation of noncitizens if their life and family is centered in the country of immigration.¹¹⁵ In reviewing such cases, the European Court of Human Rights examines the balance between the right of the noncitizen to family life and the state’s interest.¹¹⁶

Despite the United States having a venerable immigration policy of family unity, noncitizen families are often separated for lengthy periods of time to disastrous effects on the family. The façade of family reunification needs to become a reality, so that the United States falls into line with its international standing and obligations. Thus, as analyzed by Professor Kerry Abrams, there is a need in the U.S. immigration policymaking arena to have “a conversation about the implications of particular laws for the family,”

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* See 8 U.S.C. § 1151(b)(2)(A)(i) (2000) (children, spouses, and parents of a citizen) and 8 U.S.C. § 1153(a)(4) (2000) (brothers and sisters of citizens).

¹¹⁰ 8 U.S.C. § 1229b(b)(1)(D) (2000).

¹¹¹ Demleitner, *supra* note 102, at 298.

¹¹² *In re Andazola-Rivas*, 23 I. & N. Dec. 319 (2002). The Board of Immigration Appeals denied cancellation of removal to single mother of two U.S. citizen children with no family to help her in Mexico and whose children spoke only academic Spanish, and would be placed in lower grades in Mexico. While the children, according to mother, would be uprooted and suffer daunting hardship, the BIA found no extreme and unusual hardship.

¹¹³ *In re Monreal-Aquinaga*, 23 I. & N. Dec. 56, 57, 64 (2001).

¹¹⁴ *Baker v. Canada*, [1999] 2 S.C.R. 817 (Can.). More recently, Canadian courts have departed from this analysis. See *Kim v. Canada*, [2007] F.C. 1088, para. 22 (Can.) (finding that while the best interests of child were not determinative, officer erred in not considering the impact that removal, as well as language and communication barriers, would have on the child’s “immediate and long-term educational development”).

¹¹⁵ Demleitner, *supra* note 102, at 302-03. For instance, in the case of *Berrehab v. the Netherlands*, the court held that the expulsion from the Netherlands of a Moroccan father of a Dutch citizen child violated the father’s right to respect for family life because it deprived him of regular contact with his child; see also Bhabha, *supra* note 107, at 99, 101-02.

¹¹⁶ Demleitner, *supra* note 102, at 304-05.

which “would prevent immigration law from regulating the family unintentionally.”¹¹⁷

CONCLUSION

As this country is a land of opportunity that receives the huddled masses, noncitizens come to the United States in pursuit of better opportunities for themselves and their families. However, they very often encounter obstacles during their quest that hinder their ability to be together as a family. This occurs in spite of both a state family law system and an immigration law system that claim to place a premium on family reunification. These obstacles can be as small as a misinterpreted and misused law that requires Social Security numbers when applying for a marriage license, or as large and difficult to remedy as the system of distribution for family-based visas or the racial or cultural bias of judges. Whatever the barrier, families must usually deal with the effects for many years. The end result may even be the eventual destruction of the family due to time apart and stress on relationships. These families often contain U.S. citizen children, part of our future adult citizenry. This is a fact we cannot forget.

Given this reality, U.S. policymakers should step back and question whether family unity really is a priority and how to address the difficulties and hardships that noncitizens and their families will face when they choose to make America their home. Unfortunately, there are signs that our legislators have not engaged in such an inquiry and, in fact, will continue to curtail family-based immigration.

This dismal legislative failure to engage in a reassessment of family unity for noncitizens in the United States is evidenced by the latest effort at comprehensive immigration reform, which would have abolished most of the family-based preferences and substituted a point system to admit immigrants to the United States.¹¹⁸ Among the criteria to obtain points to immigrate to the United States would have been knowledge of the English language and educational achievement. Had such reform passed, there would have been undoubtedly racial and ethnic changes in the migrant stream to the United States, as such a major restructuring of the family-based preferences has been analyzed as disproportionately affecting Asians and Latinos.¹¹⁹

The U.S. immigration law and family law systems, while operating in different legal spheres, send the same message to the noncitizen, one of ob-

¹¹⁷ Abrams, *supra* note 68, at 1708.

¹¹⁸ See Secure Borders, Economic Opportunity and Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007).

¹¹⁹ See *Role of Family-Based Immigration in the U.S. Immigration System: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Bill Ong Hing, Professor of Law and Asian American Studies, University of California, Davis), available at <http://judiciary.house.gov/media/pdfs/Hing070508.pdf>.

stacles and difficulties to overcome in the United States based on the mere fortuity of where he or she was born. This ambivalence about families in the immigration law system and noncitizens in the family law systems is inconsistent with our nation's best interest in promoting the well-being of all its citizens and residents, whether or not they are born of undocumented parents and whether or not they are married to noncitizens. Furthermore, this ambivalence is short-sighted and fails to recognize the invaluable contributions of the noncitizen population to the long term stability of the United States and the fact that many of the families that are being broken are comprised of U.S. citizen children. These mixed status families, comprised of noncitizens and U.S. citizens, are the places where immigration law and family law must confront the realities of the twenty-first century regarding the noncitizens in our midst.