FAMILY PLANNING, AMERICAN STYLE

Linda Kelly[*]

Elian and his father are floating together in a little boat, staring up at a dark and starry sky. As the water laps softly up against the sides, Elian takes his father's hand. "Papa, will we see Cuba soon?"

Elian's father laughs softly. "Cuba!" a little girl on the boat screams. "Grandma Troxel, I thought we were going back to Washington after this!"

Now Juan Miguel Gonzalez's laughter is joined by Grandma Troxel. "You see," Juan says, "my son really does love his homeland."

"I don't doubt that he does," says Grandma Troxel, "but if you don't mind me saying so, I think he belongs back down in Miami. His cousin there loves him like his own mother. Losing one mother is enough. There he will be surrounded by family."

"Well it's funny you should say that," Juan replies, no longer laughing. "If you really believe a child should be with her mother, why don't you leave Natalie and her sister alone? Let their mother raise them the way she thinks is best."

"No, no, you misunderstand me. What I mean is that, uh, children need to be surrounded by family in a stable home. Tommie can't raise her daughters alone any more than you can take care of Elian."

"Oh really?" Juan retorts. "Says who? Shouldn't I be able to decide what's best for Elian?"

Just then, the boat hits up against the dock. "Please take your children by the hand," the crew member says efficiently. "Watch your step getting out. We hope you enjoyed your ride here at the Magic Kingdom. And have a nice day."

As the children run ahead, anxious to get to Space Mountain, the music continues to play. "It's a small world after all, it's a small world after all, it's a small world after all, it's a small, small world . . ."

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INTRODUCTION

The chance meeting of the Gonzalezes and the Troxels on the "It's a Small World" boat ride is, of course, a fiction.[1] Yet like the Gonzalez-Troxel encounter, the competition of fiction and reality in the domestic custody and immigration law arenas reveals a common theme. As Juan Gonzalez fought for custody of his son in an international custody dispute of unparalleled intensity,[2] the Troxel grandparents struggled to have a legally recognized right to visit with their grandchildren through domestic custody law.[3] In each setting, how "family" is defined was a critical deciding factor.

Elian and the Troxel children live in a very real world where the "traditional family" of two parents and dependent children is no longer the practiced tradition. However, despite this reality, the nuclear family ideal remains. While changes and debates in custody law are beginning to address the significance of nuclear family bias,[4] little attention has been given to the significance of defining "family" in other areas of the law. How "family" is construed is not only relevant to child custody determinations. In various contexts, legal institutions repeat their willingness to privilege the "traditional" nuclear family at the expense of "alternative" family arrangements. Immigration law is one such area. By dictating what family members may be united and how such relations will be protected, the definition of "family" utilized in immigration law

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1. *Dark Side to Fun Day for Refugee*, N.Y. TIMES, Dec. 13, 1999, at A18. For recognition of the false-reality exemplified by places like the Magic Kingdom, see UMBERTO ECO, TRAVELS IN HYPER-REALITY 39-47 (1986).

2. The federal complaint filed by Elian Gonzalez's great-uncle on behalf of the minor child challenged the Immigration and Naturalization Service's ("INS") denial of an asylum hearing to the child. The Eleventh Circuit found that Elian had the right to file for asylum after surviving a shipwreck in which his mother and 12 other Cubans died in an attempt to reach the United States. However, despite the existence of such a right, the court found the INS' decision to prevent a non-parental relative from filing on behalf of a child absent special circumstances to be reasonable. In so doing, the court recognized the custodial rights of the father, a resident and citizen of Cuba. The Eleventh Circuit's opinion was effectively upheld by the Supreme Court through its refusal to stay the expiration of the Eleventh Circuit's prohibition of Elian's departure from the United States and its denial of petition for certiorari. Elian returned to Cuba (accompanied by his father) shortly after the Supreme Court's decision was rendered. Gonzalez v. Reno, 120 S. Ct. 2737 (2000) (mem.), *cert. and stay denied*; Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000), *aff'g* Gonzalez *ex rel.* Gonzalez v. Reno, 86 F. Supp. 2d 1167, 1187-94 (S.D. Fla. 2000); Gonzalez *ex rel.* Gonzalez v. Reno, 215 F.3d 1243 (11th Cir. 2000) (denying petition for rehearing and petition for rehearing en banc).

For further background on the Elian controversy, see Hiroshi Motomura, *The Year 2020: Looking Back on the Elian Gonzalez Case (A Fantasy)*, 77 No. 25 INTERPRETER RELEASES 853 (June 30, 2000); *Supreme Court Ends Elian's Legal Battle, Boy Returns Home Amid Cheers and Tears*, 77 No. 25 INTERPRETER RELEASES 859 (June 30, 2000); and *Court Rules INS Does Not Have to Consider Elian's Asylum Application*, 77 No. 22 INTERPRETER RELEASES 721 (June 5, 2000).

3. Troxel v. Granville, 530 U.S. 57 (2000) (denying grandparents' visitation request upon finding the statute providing for third-party visitation an unconstitutional infringement upon parents' fundamental right to rear their children). For further discussion of *Troxel*, see *infra* text accompanying notes 128-35.

4. *See infra* Parts II & IV.A (discussing the treatment of "family" in custody law).

is critical to families throughout the world. Through admission and deportation provisions, the legal recognition of family allows U.S. citizens and residents to be united with family members residing in other countries.[5] Alternative forms of relief, such as asylum, may also be predicated upon who is considered family.[6] Yet against the reality of changing family shapes and sizes, immigration law continues to adhere to the nuclear family ideal. As in the child custody context, uncovering the bias leads to questioning its propriety and working to adapt the law to the current state of the family.

From the lessons of custody law, this Article examines the "family" of immigration law. Part I acknowledges the practical and theoretical weaknesses of the nuclear family ideal. Parts II and III reveal that despite such reality, the nuclear family fiction is perpetuated in the law. Attempting to reconcile the law with reality, Part IV explores the difficulties evident in the child custody arena and how such problems are magnified when debating family in the immigration context. Finally, in Part V, the treatment of family in the asylum law is considered as the point to begin redefining the "family" of immigration law.

I. THE FICTION AND REALITY OF FAMILY

In both practice and theory, the "tradition" of the nuclear family ideal of two parents and dependent children living as a unit has broken down.[7] Through rising divorce rates, existing nuclear families are disintegrating; while with the increasing numbers of children born out of wedlock, families are created with the critical traditional nucleus never having been conceived.[8] Similarly, in the surrogacy and adoption set-

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5. *See infra* Parts III.A-C. & IV.B (discussing the treatment of "family" in immigration law).

6. *See infra* Part V (discussing the treatment of "family" in asylum law).

7. Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 880-81 (1984); *see also* Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387, 388.

8. Statistics collected by U.S. Bureau of the Census reported that in 1998, 110.6 million adults (56.0% of the adult population) were married and living with a spouse. In 1998, 19.4 million adults (9.8% of the population) were currently divorced. In reporting on children, the Census Bureau found that 19.8 million children (27.7% of all children) live with only one parent. Of children living in single-parent homes, 84.1% lived with their mothers, and 40.3% of these children lived with mothers who had never been married. Terry A. Lugaila, *Marital Status and Living Arrangements: March 1998 (Update)* (last modified Oct. 29, 1998) <http://www.census.gov/prod/99pubs/p20-514.pdf>. For varying evaluations on current and historical rates of divorce, the effect of the nationwide adoption of no-fault divorce and the impact of divorce on children, see LESLIE J. HARRIS ET AL., FAMILY LAW 359-78 (1996) and see generally MILTON C. REGAN JR., ALONE TOGETHER (1999); MILTON C. REGAN JR., FAMILY LAW AND THE PURSUIT OF INTIMACY (1994). *See also infra* notes 18, 35, 111. On the treatment of "non-traditional" single parent and other family structures, see generally NANCY E. DOWD, IN DEFENSE OF SINGLE PARENT FAMILIES (1997); Nancy E. Dowd, *Rethinking Fatherhood*, 48 FLA. L. REV. 523 (1996); Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375 (1996). On the use

tings, a traditional nuclear family unit cannot neatly be defined as the number of interested individuals who consider themselves "parents" exceeds the two-parent biological maximum contemplated in the nuclear family model.[9]

Examining the nuclear family from a theoretical perspective also reveals the model's flaws. Through the public/private dichotomy, the family has traditionally been viewed as an inviolable entity into which the state does not dare to enter.[10] Yet it is this reverence for family privacy which has hidden the abusive power an individual may have within his family.[11]

The combination of exposing the "violence of privacy"[12] and recognizing the reality of the nuclear family's diminishing existence would suggest that the nuclear family is no longer a model worthy of emulating. Nevertheless, despite the nuclear family's real disappearance and theoretical flaws, the nuclear family remains an ideal, held in high legal and social regard.[13] Attacks against the nuclear family typically do not result in questioning the structure, but in finding that individual families are dysfunctional.[14] The need to uphold the nuclear family ideal also leads to characterizing individuals who live in "alternative" family structures as deviant.[15] In each instance, the determination is made that only certain families, not the nuclear model itself, need to be addressed.[16]

By leaving unchallenged inherent problems with the traditional nuclear family structure, the belief is perpetuated that the traditional model

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of adoption and technological means of child conception, see John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991).

9. *See infra* Part II.B. & text accompanying notes 111-27 (discussing the treatment of "parents" in surrogacy and adoption).

10. Prince v. Massachusetts, 321 U.S. 158, 166 (1944). For further discussion on the notion of family privacy as derived from the constitutional right of privacy, see 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, 730 n.20 (1996).

11. Fineman, *supra* note 7, at 394-96.

12. Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991). For other valuable discussions of how family privacy serves to perpetuate domestic violence, the inequality of women, and the abuse of children, see also Honorable Karen Burnstein, *Naming the Violence: Destroying the Myth*, 58 ALB. L. REV. 961 (1995) (determining that domestic violence must be recognized as a public issue in order to prevent it); Elizabeth Schneider, *Making Reconceptualization of Violence Against Women Real*, 58 ALB. L. REV. 1245 (1995) (arguing for domestic violence to be reconceptualized as a social problem in order to remove it from the private realm); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) (analyzing how domestic violence is perpetuated by modernizing in gender-neutral terms the right of marital privacy).

13. Fineman, *supra* note 7, at 394-96.

14. *Id.* at 388.

15. *Id.* at 392.

16. *Id.* at 394-96.

is the ideal, and all other structures are, at best, poor substitutes.[17] Those who may be unable or unwilling to conform to the purported ideal are socially stigmatized.[18] In the legal setting, this stigma of nonconformity translates into punitive and coercive measures.[19] A review of such denigration of nontraditional families in the custody and immigration context emphasizes the ongoing need to reconsider the definition of family.

II. CUSTODY LAW—DEFINING "FAMILY"

From the custody battles of working mothers and unwed fathers, to the disputes which arise in surrogacy and adoption cases, the emphasis upon the nuclear family ideal is clear. Following the traditional constitutional principle which portends that "parental status inures to procreators," biological ties may at first appear to play a critical role.[20] However, in the custody battles of both divorcing and never-wed parents, biological ties can be equally claimed by both sides. Similarly, when surrogacy contracts between gestational mothers and genetic parents are disputed, both parties may have legitimate biological claims.[21] In the adoption setting, the biological argument is generally only being raised by one party.[22] Yet in each instance, when a two-parent nuclear family is

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17. One reaction to the deviant characterization of "alternative" family structures is an attempt to justify such relationships by demonstrating that nontraditional families may provide the same emotional and material support for its family members that is provided by the traditional family. However, successfully "passing" as a traditional family is not a perfect strategy. *Id.* at 393-94. An interesting analogy to the problems raised by trying to "pass" as a traditional family can be made to the historic efforts of blacks to "pass" as white in order to avoid racial discrimination. For a personal discussion of the problems raised by "passing," see Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713-14 (1993).

18. Fineman, *supra* note 7, at 390 (discussing social influences allowing nuclear family to be considered "sacred" and "ideal"); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 235-85 (1985) (discussing historic promotion of the nuclear family).

19. *See, e.g.*, Bartlett, *supra* note 7 (acknowledging need to recognize parent-child relationships which exist outside of the nuclear family); Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 21-24 (1995) (discussing law's reverence for nuclear family as ideal and disparate treatment of single parents); Fineman, *supra* note 7, at 387-88 (acknowledging that law's insistence on the ideal family norm remains, but is showing greater flexibility than societal biases in favor of the traditional family); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 3 (1995) (acknowledging that advances in gay rights have come when homosexuals have successfully "passed" through behavior perceived as heterosexual).

20. Hill, *supra* note 8, at 357. For further discussion of the parents' rights doctrine and the relevance of biological ties, see *infra* notes Part II.A-B.

21. In a surrogacy setting, there may be as many as three biological "parents." A gestational mother may claim the biological connection of having carried the child to term, while the female egg donor and male sperm donor have a genetic biological connection. The "intending" parent(s) who orchestrated the surrogacy contract further increases the number of potential parents as these individuals may not physically be able to participate in the child's biological creation. *See, e.g.*, Hill, *supra* note 8, at 356 (recognizing the number of different reproductive combinations).

22. Yet adoption may involve both biological parents as evidenced by *Lehr v. Roberson*, 463 U.S. 248 (1983) (rejection of biological father's absolute right to notice prior to adoption and termination of mother's parental rights).

found, biology is at best a secondary consideration.[23] Marriage and notions of parental care are the ties which ultimately bind the child to the individuals awarded custody.[24]

A. Divorcing and Never-Wed Parents

Today, the best interests of the child standard prevails in custody disputes between two biological parents whether they are divorcing or were never wed.[25] As is often recognized, while the best interests standard is theoretically gender neutral, its practical application often evidences a predisposition in favor of mothers.[26] However, this discretionary standard also easily allows for the influence of the two-parent, heterosexual family ideal.[27] *Burchard v. Garay*[28] highlights how such a discretionary test may easily adopt a bias against single, working mothers when the two-parent ideal is present.[29]

Awarding the child of a "brief liaison" to the father, the trial court in *Burchard v. Garay* deemed the father's home "a more wholesome environment" because the father's new marriage provided a stepmother who would be able to "provide constant care for the minor child and keep him on a regular schedule without resorting to other caretakers."[30] Remanding the decision, the California Supreme Court recognized that the trial court's reasoning had been influenced by the prejudicial "assumption that the care afforded a child by single, working parents is inferior."[31] Such reasoning not only evidences the threat posed to single parents by the two-parent ideal, but also reflects how the pursuit of this

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23. *See* Hill, *supra* note 8, at 363.

24. Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 24 (1997). *See also infra* notes Part II.A-B.

25. For discussion of the development of the best interests standard and the earlier doctrines favoring paternal custody rights under ownership notions and maternal custody by virtue of the "tender years" principle, see, for example, HARRIS, *supra* note 8, at 518-619.

26. For recognition of this practical result and its implications for men and women, see, for example, Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133 (1992) (discussing the maternal biases in child custody determinations); DOWD, *supra* note 8, at 524 (recognizing the ongoing, albeit waning, favoritism for female custody).

27. Fineman, *supra* note 7, at 388. Professor Fineman is clear to emphasize in her work that existing problems with the two-parent heterosexual model prevent it from being a model worthy of repair or one which other nontraditional family arrangements should attempt to emulate. *Id.* at 393-96.

28. 724 P.2d 486 (Cal. 1986).

29. *Burchard*, 724 P.2d at 492.

30. *Id.* at 488 (quoting trial court decision). The trial court also favored the father because he was financially better off and "better equipped psychologically." On appeal, these rationales were found erroneous, as they ignored that the mother had served as the primary caretaker, and that the quality of this care could not be proven deficient by a showing of the father's finances or a prediction of future model behavior by the father who had not demonstrated better child caretaking ability thus far. *Id.* at 492-93.

31. *Id.* at 493.

ideal may ultimately subvert the best interests standard. In *Burchard*, the child had spent the entirety of his two and one-half year life with his mother, who had never been determined to be an unfit parent.[32] The challenges faced by Alice Hector, a law firm partner who fought for custody of her children upon divorcing, further exemplify the risk posed to the child's best interests standard by the bias against working mothers.[33] While Alice Hector ultimately secured custody, she had to overcome an almost per se assumption that working mothers performed less parenting responsibilities than unemployed fathers.[34] Ironically, it was exactly these biases regarding the limited parenting role of working parents and the significant parenting role of stay-at-home parents that were responsible for women being charged as being the natural caretakers of children when, as a consequence of the industrial revolution, men had economic opportunities outside the home which required women to remain home and care for the children.[35]

Cases like *Burchard* and *Hector* exemplify the contempt levied against single and working mothers. Such challenges faced by women by virtue of the mothering role have been well examined.[36] However, unwed fathers fighting for custody are treated with even greater disdain. Because fathers are traditionally relegated to the role of providing financial support, the combination of an unwed father's marital status and gender ensures that his parenting claim will be quickly dismissed.[37] In-

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32. *Id.* at 488. In arguing for a two-step custody decision-making approach which first defines parents and only then allows a child's best interests to be determined, Naomi Cahn creates a framework which, by clearly bifurcating the determination of parents' interests from child's interests, attempts to prevent either parental or child interests from being ignored. Cahn, *supra* note 24, at 3.

33. Young v. Hector, 740 So. 2d 1153 (Fla. Dist. Ct. App. 1998), *rev'd en banc* (1999).

34. *See generally* Amy D. Ronner, *Women Who Dance on the Professional Track: Custody and the Red Shoes*, 23 HARV. WOMEN'S L.J. 173 (2000) (discussing *Young* and how the biases underlying the best interests and primary caretaker standards significantly impact working women). For further discussions of the biases against working mothers and single parents in custody determinations, see Dowd, *supra* note 19; Susan Beth Jacobs, Note & Comment, *The Hidden Gender Bias Behind "The Best Interest of the Child Standard,"* 13 GA. ST. U. L. REV. 845 (1997); Linda Kelly, *The Fantastic Adventure of Supermom and the Alien: Educating Immigration Policy on the Facts of Life*, 31 CONN. L. REV. 1045, 1049-56 (1999); Sanger, *supra* note 8, at 464-76.

35. On the societal and industrial developments responsible for the development of maternal preference and the "tender-years doctrine," see MARY FRANCES BERRY, THE POLITICS OF PARENTHOOD: CHILD CARE, WOMEN'S RIGHTS AND THE MYTH OF THE GOOD MOTHER 51-54 (1993); GROSSBERG, *supra* note 18, at 248-50; Sanger, *supra* note 8, at 403.

36. *See, e.g.*, BERRY, *supra* note 35; MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995); MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD 73 (Martha Albertson Fineman & Isabel Karpin eds., 1995); Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family and Criminal Law*, 83 CORNELL L. REV. 688 (1998); ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION (10th ed. 1986); Sanger, *supra* note 8; Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991) (explaining how the liberal rhetoric of "choice" mischaracterizes a woman's limited autonomy in "choosing" between work and family).

37. Challenges facing fathers are finally beginning to receive greater attention through such developments as the growing use of joint custody and the growth of the fathers' rights movement.

deed, an Illinois statute presumptively denying an unwed father's right to be defined as a "parent" was only dismissed after an affirmative showing by the father that he could be a "fit father" as a result of a pre-existing long term relationship with his children.[38] Yet even unwed fathers who are able to effectively rebut the presumption against their fitness as parents may not overcome the bias in favor of nuclear families. In *Michael H. v. Gerald D.*,[39] despite an unwed man's ability to scientifically demonstrate a 98.07% probability of being the biological father of the child at issue and that he had an existing relationship with the child, he was denied the opportunity to establish his paternity and right to visitation.[40] Dismissing the biological father's due process and equal protection claims, the U.S. Supreme Court upheld a California statute which presumed that a child born to a married woman was her husband's child and allowed only the wife and husband to challenge such a presumption.[41] So strong is the Court's interest in protecting the fragile bonds of marriage and its belief that a child is best raised within an intact, traditional nuclear family, it resolutely chose to ignore any facts (even those scientifically supported) which could threaten the marriage and reveal a legitimate parental interest outside the marital sphere.[42]

Michael H. is consistent with a history of enforcing the fiction that a child born to a married woman is always her husband's offspring. This ongoing disregard for unwed fathers is a legacy of the historic prohibition on a husband's right to challenge the paternity of a child born to his wife.[43] In both instances, the ideal family is preserved at the cost of due

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For a discussion of the challenges facing fathers and the implication for women, see DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM (1995); Dowd, *supra* note 8; Stephanie B. Goldberg, *In all its Variations, the Fathers' Rights Movement is Saying One Thing . . . Make Room for Daddy*, 83 A.B.A. J. 48 (1997); Linda Kelly, *The Alienation of Fathers*, 6 MICH. J. RACE & L. (forthcoming 2001) [hereinafter Kelly, *Aliendation of Fathers*]; Linda Kelly, *Republican Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 557 (2000) [hereinafter Kelly, *Republican Mothers*]; JAMES LEVINE, WORKING FATHERS: NEW STRATEGIES FOR BALANCING WORK & FAMILIES (1998); Jo-Ellen Paradise, Note, *The Disparity Between Men and Women in Custody Disputes: Is Joint Custody the Answer to Everyone's Problems*, 72 ST. JOHN'S L. REV. 517 (1998). For a historical perspective on the financial role of fathers, see GROSSBERG, *supra* note 18, at 215-18. For a more general comprehensive discussion of how various male gender stereotypes challenge both men and women, see Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037 (1996).

38. Stanley v. Illinois, 405 U.S. 645, 657-58 (1972).

39. 491 U.S. 110 (1989).

40. *Michael H.*, 491 U.S. at 114.

41. *Id.* at 130.

42. *Id.* at 123 (finding the respect for parental rights rests upon "the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family").

43. *See, e.g.*, Egbert v. Greenwalt, 6 N.W. 654 (1880), *overruled by* Serafin v. Serafin, 258 N.W.2d 461 (1977) (preventing a husband from proving his wife's child belonged to another through the doctrine barring spousal testimony). *See also* GROSSBERG, *supra* note 18, at 220. For the Supreme Court's recognition of this history in favor of recognizing children as legitimate, see *Michael H.*, 491 U.S. at 124-26.

process.[44]

B. Surrogate and Adoptive Parents

In surrogacy and adoption disputes the marital bias influence is also strong. However, rather than relying solely upon the best interests standard, another legal device is employed. By controlling initial determinations of who are defined as the "parents" in surrogacy and adoption litigation, courts may also perpetuate the bias in favor of married litigants.[45]

Faced in *Johnson v. Calvert*[46] with a custody battle between a gestational mother and a husband and wife, who were the genetic donors, the court awarded custody to the couple.[47] Determining the law would allow only "one natural mother," the married Mrs. Calvert, who donated the egg, was awarded the status.[48] In order to break the biological tie created by Mrs. Calvert's genetic claim and Mrs. Johnson's gestational one, the court looked to the intent to parent and found for Mrs. Calvert because she had initiated the child's conception and had the intent to parent.[49]

The determinative power of marriage and intending parenthood is perhaps more dramatically emphasized by the Supreme Court's treatment of adoption. Deciding *Quilloin v. Walcott*[50] in 1978, the Supreme Court upheld a Georgia statutory scheme which gave only the unwed mother an unconditional right to object to the adoption of a child born out of wedlock.[51] By contrast, the biological father's objection power would only arise if he had legitimized the child—if he had affirmatively proven his role as a parent. Without such a showing by the father, the Court determined that the biological father's equal protection claim was outweighed by the state's interest in protecting the "family unit already in existence," namely, that consisting of the biological mother, her hus-

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44. *See, e.g.*, GROSSBERG, *supra* note 18, at 218-28 (describing central tenets of bastardy laws to be an interest in providing the child with a intact family, giving women parental rights for illegitimate child, and ensuring the child was financially supported); Hill, *supra* note 8, at 380, 387 (recognizing *Michael H.* decision to signify that integrity of family unit is of greater interest than biological father's rights).

45. Cahn, *supra* note 24, at 17-35. *See also* Hill, *supra* note 8 (advocating the resolution of custody disputes upon determinations of who are defined as "parents").

46. 851 P.2d 776 (Cal. 1993).

47. *Johnson*, 851 P.2d at 778.

48. *Id.* at 781.

49. *Id.* at 782 (determining the mother as "she who intended to bring about the birth of a child that she intended to raise as her own"). For discussion of the "intentional parent" dimension of *Johnson*, see Cahn, *supra* note 24, at 28-30; Hill, *supra* note 8, at 370-72, 382 (contrasting traditional presumption of motherhood based on gestation with award of custody to genetic donor as intentional mother in earlier decision of *Johnson v. Calvert*, No. X 633190 (Cal. App. Dep't Super. Ct. 1990)).

50. 434 U.S. 246 (1978).

51. *Quilloin*, 434 U.S. at 256. For further discussion, see Hill, *supra* note 8, at 377-78.

band (the non-biological father) and the child.[52] One year later, in *Caban v. Mohammed*,[53] an unwed father's constitutional attack on a similar New York statute providing unwed mothers, but not fathers, the right to object to adoptions was found unconstitutional.[54] However, rather than awarding biological fathers an unconditional objection power on par with that awarded biological mothers, the Court reached its decision that the statute was unconstitutional only after the father demonstrated a "substantial" relationship with his child.[55] *Caban* raised the potential for putting the nuclear family ideal in jeopardy when there is a proven intending parent outside the proposed nuclear family of child—one biological parent and the new spouse. However, in response to such a threat, the Court quickly returned to rejecting the claims of an unwed father who challenged the adoption of his biological child by the biological mother's husband. Deciding *Lehr v. Robertson*[56] four years after *Caban*, the Court upheld a state statute denying an unwed father's absolute right to notice and hearing opportunity prior to the adoption of his child by the biological mother's spouse.[57] Rejecting the father's equal protection and due process claims, the Court found that the father's limited post-birth relationship with his two-year-old child was insufficient to entitle his involvement in determining the child's best interests.[58]

While such cases are consistent with a bias against fathers, the decision in other custody disputes evidences that it is the bias in favor of nuclear families, not the bias of maternal preference, that is paramount. Relying on a determination of who psychologically served as the parents, custody has still been awarded to the potential adoptive parents rather than a biological mother who revoked her consent to the relinquishment of custody.[59] While such revocation terminated the adoption process, the otherwise "natural" tie between the biological mother and the child had not endured given the mother's failure to assume post-birth responsibility for the child.[60] In contrast, the non-biological, once-recognized adoptive couple's establishment of a loving relationship with the child entitled them to custody as "above all," the child identified them as his parents.[61] Such a decision again evidences the secondary

52. *Quilloin*, 434 U.S. at 255. For such an interpretation of *Quilloin*, see Hill, *supra* note 8, at 377-78.

53. 441 U.S. 380 (1979). For further discussion of *Caban*, see Hill, *supra* note 8, at 378-79.

54. *Caban*, 441 U.S. at 394.

55. *Id.*

56. 463 U.S. 248 (1983). For further dissussion of *Lehr*, see Hill, *supra* note 8, at 378-80.

57. *Lehr*, 463 U.S. at 267-68.

58. *Id.*

59. *See In re* C.C.R.S., 892 P.2d 246, 253 (Colo. 1995) (en banc), *cert. denied*, 516 U.S. 837 (1995) (using the theory of "psychological parents"). For a discussion of *C.C.R.S.*, see Cahn, *supra* note 24, at 19-22.

60. *See In re C.C.R.S.*, 892 P.2d at 257-58.

61. *See id.* at 258.

consideration of biological ties.[62]

Given this strong framework of biases in custody law, the pattern which emerges in immigration law is almost predictable. Overlapping the gender biases is a structure which remains "inherently biased toward the married and intending parents."[63]

III. IMMIGRATION LAW—WHOSE FAMILY?

A. The Legislative Scheme

Any review of the number of immigrants entering the United States and the means by which they secure residency will reveal a common conclusion: U.S. immigration is oriented toward family.[64] The numbers allotted to the three most direct means of acquiring residency—family-sponsored, employment-based, and diversity—immediately reveal that family unity is the unchallenged priority.[65] "Immediate relatives," defined as spouses,[66] unmarried children under twenty-one,[67] and parents of United States citizens,[68] are completely exempt from any quantitative

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62. For further discussion of the importance of biological ties, see *supra* Part II.

63. Cahn, *supra* note 24, at 24. For a discussion of the gender biases in immigration law, see Joan Fitzpatrick, *The Gender Dimension of U.S. Immigration Policy*, 9 YALE J.L. & FEMINISM 23 (1997); Kelly, *Republican Mothers*, *supra* note 37.

64. Family unification has historically been a priority in U.S. immigration policy. For a historical account of the emphasis upon family and the influence of race, gender, and social status issues on U.S. immigration, see John Guendelsberger, *The Right to Family Unification in French and United States Immigration Law*, 21 CORNELL INT'L L.J. 1, 7-25 (1988) [hereinafter Guendelsberger, *Family Unification*]; John Guendelsberger, *Implementing Family Unification Rights in American Immigration Law: Proposed Amendments*, 25 SAN DIEGO L. REV. 253, 255-58 (1988) [hereinafter Guendelsberger, *Proposed Amendments*].

65. Immigration and Nationality Act § 201, 8 U.S.C. § 1151(a)(1)-(3) (1994). For further discussion of the family, employment, and diversity basis for immigration, see STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 131-210 (2d ed. 1997).

In examining the family emphasis, it should be acknowledged that this Article presupposes family unity as a valid priority. Consequently, this examination does not evaluate arguments for retooling immigration policy in order to prioritize economic interests over humanitarian ones. For further discussion of economic concerns, see Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 AM. J. COMP. L. 511, 539-41 (1995) (recognizing that drafting an ideal immigration policy may require balancing economic interests and family values). However, for the argument that the psychological benefits enjoyed by an immigrant worker who is allowed to unify with his family advance both humanitarian and economic national interests, see Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147, 1172 (1997). *See also* Motomura, *supra*, at 540.

66. 8 U.S.C. § 1151(b)(2)(A)(i) (1994 & Supp. V 1999). For a discussion of the qualitative restrictions on residency for the spouses of United States citizens, see 8 U.S.C. §§ 1154, 1186(a). *See also* Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 669-73 (1998); Note, *The Constitutionality of the INS Sham Marriage Investigation Policy*, 99 HARV. L. REV. 1238 (1986) [hereinafter, Note, *Sham Marriage Investigation*].

67. 8 U.S.C. § 1151(b)(2)(A)(i) (1994 & Supp. V 1999). For the definition of "child" as unmarried and under 21, see 8 U.S.C. § 1101(b).

68. However, in qualifying as a "parent" of a U.S. citizen, the petitioning citizen/child must be twenty-one or over. 8 U.S.C. § 1151(b)(2)(A)(i) (1994 & Supp. V 1999). This age requirement

limits.[69] For the family of U.S. residents and certain other family members of U.S. citizens, an annual minimum of 226,000 visas is guaranteed.[70] This sum of "immediate relatives" of U.S. citizens and the 226,000 family-sponsored allotment clearly exceeds both the 140,000 visas annually available to employment-based immigrants[71] and the 55,000 visas provided to the diversity classification.[72] However, other provisions also indirectly allow for family-sponsored immigration, thus further emphasizing the law's family unity priority. The notion of "accompanying or following to join" allows an immigrant who secures a visa through family, employment, or diversity the ability to bring his spouse and minor unmarried children.[73] Likewise, an individual who is granted refugee or asylum status can have his spouse and unmarried children accompany him through a derivative status.[74] The impact of the combination of these provisions protecting the family is clear. In 1998, family-sponsored immigration accounted for 72% of all immigration.[75]

Yet notwithstanding the priority of family unification over other immigration goals, do existing immigration provisions effectively allow "families" to be united?[76] In order to answer that question, the definitions of "family" utilized in immigration law must be compared with our

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limits the potential of the doctrine of *jus soli*. Acknowledged by the Fourteenth Amendment, *jus soli* confers citizenship upon the child of alien parents who is born on U.S. soil. Requiring the citizen child to be 21 or over before petitioning for his parents prevents an individual from becoming a citizen by virtue of *jus soli* and thereby being able to immediately provide a right of residency to his parents. For arguments that the Fourteenth Amendment guarantee of citizenship does not extend to the children of undocumented aliens and temporary visitors and workers, see PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985).

69. 8 U.S.C. § 1151(b) (1994 & Supp. V 1999).

70. While the total number of U.S. citizens' "immediate relatives" offsets the worldwide quota of visas which are available to the family members of U.S. citizens and lawful permanent members subjected to numeric restriction, the maximum number of quota visas annually available for family-sponsored immigrants is 480,000, plus any unused employment-based visas from the previous fiscal year. 8 U.S.C. § 1151(c) (1994 & Supp. V 1999).

71. The employment-based guarantee of 140,000 may be increased through the distribution of any family-sponsored visas from the previous fiscal year that were unused. 8 U.S.C. § 1151(d) (1994).

72. *Id.* § 1151(e).

73. *Id.* § 1153(d). The "accompanying or following to join" provision is not available to the spouses and unmarried minor children of aliens who receive status as the immediate relatives of U.S. citizens. For more on the notion of "accompanying or following to join," see LEGOMSKY, *supra* note 65, at 127.

74. 8 U.S.C. § 1157(c)(2); 8 U.S.C. § 1158(b)(3) (Supp. V 1994).

75. In real numbers 1998 saw family-sponsored immigration of 475,750 (191,480 family-sponsored preference immigrants and 284,270 as immediate relatives of citizens). The employment-based percentage of 11.7 brought in 77,517 immigrants, while 6.9% or 45,499 immigrants entered the U.S. by virtue of the diversity classification. "Other categories" of 61,690 immigrants comprised the remaining 9.3% of immigration in 1998. INS, Office of Policy and Planning, *Annual Report: Legal Immigration, Fiscal Year 1998* (last modified Feb. 2, 2001) <http://www.ins.gov/graphics/aboutins/statistics/index.htm>.

76. For discussion of other immigration goals, including U.S. economic and humanitarian interests, see sources cited *supra* note 65 (scholarly discussion) and *infra* note 85 and accompanying text (Immigration Commission discussion).

developing understanding of "family."

B. The "Family" of Immigrants

As suggested in reviewing the family immigration statistics, both the direct and indirect measures used to unite families place an almost exclusive emphasis on uniting the nuclear family of spouses and dependent children. For citizens—spouses, children, and parents (of adult citizens)—are exempt from quotas.[77] While spouses and unmarried children under twenty-one of residents are subject to annual quotas, the nuclear family members of a resident are given the highest visa allotment within the preference system.[78] The remaining categories, allowing for the adult sons and daughters of citizens and residents and siblings of citizens, receive a distinctly smaller percentage of the annual allotment.[79] Consequently, an overall comparison of the treatment of the immediate family of citizens and residents vis-a-vis the treatment of other relatives clearly demonstrates that the nuclear family is being prioritized.[80]

Apart from the numeric allocation, which relations are included within the "immediate relative" and "preference categories" also reveals an understanding of family strongly anchored in the traditional nuclear family ideal. None of the categories extend to family members beyond

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77. *See supra* notes 66-69 and accompanying text. For a discussion of efforts to eliminate the "parents of adult children" provision given the interest in emphasizing the nuclear family of spouses and dependent children, see *infra* text accompanying notes 85-88 (discussing Immigration Commission proposals).

78. Of the 226,000 minimum annual family allotment, spouses and children of residents receive a maximum of 114,200 plus. 8 U.S.C. § 1153(a)(2). Unused first preference visas are also allotted to this category. Of the 114,200 plus number of visas allotted to spouses and children, spouses and unmarried children under 21 are given 77%. *Id.* For the argument that equal protection concerns and the fundamental right of family unity should entitle the spouses and unmarried children of citizens and residents to be uniformly prioritized, see Guendelsberger, *Proposed Amendments*, *supra* note 64.

79. The provisions for adult children allow for the married and unmarried adult children of citizens, but only for the unmarried adult children of residents. 8 U.S.C. § 1153(a)(1) (providing for adult, unmarried sons and daughters of citizens); *Id.* § 1153(a)(2)(B) (providing for adult, unmarried sons and daughters of residents); *Id.* § 1153(a)(3) (providing for the married sons and daughters of citizens); *Id.* § 1153(a)(4) (providing for the siblings of citizens).

80. The mathematical distribution of the family visas subject to numeric limitation can be charted as follows:

Preference Definition # of Visas annually allotted:
1st Preference: Unmarried sons and daughters, over 21 23,400 plus unused 4th Pref of citizens
2nd Preference:
2A Spouses and unmarried, under 21 children 77% [114,2000 + (worldwide of residents level exceeding 226,000) + unused 1st Pref.]
2B Unmarried sons and daughters, over 21 23%[114,2000 + (worldwide of residents level exceeding 226,000) + unused 1st Pref.]
3rd Preference: Married sons and daughters of citizens 23,400 + unused 1st Pref + (age not relevant) unused 2nd Pref.
4th Preference: Brothers and sisters of citizens over 21 65,000 + unused 1st Pref + (marital status not relevant) + unused 2nd Pref + unused 3rd Pref

Id. § 1153(a). *See also* LEGOMSKY, *supra* note 65.

the most traditional parent, child, spouse and sibling relations.[81] Certainly, provisions allowing the parents and siblings of adult children who are citizens and the adult children of both citizens and residents to immigrate reflect a willingness to recognize the legitimacy of family unity beyond the most traditional nuclear family members of parents and dependent children.[82] However, efforts to eliminate such categories through recent immigration reform measures reaffirm that the strongest commitment in immigration policy is to the nuclear family.[83] In 1997, finding that the backlogs created by the quota system forced spouses and children of lawful permanent residents to wait at least four years before receiving an immigration visa, the Commission on Immigration Reform recommended that the "extended family" categories of adult children and siblings be eliminated so that these visa allotments could be provided to the spouses and children of residents.[84]

The Commission's recommendation was based upon its finding a "national interest" which favored the unity of nuclear families over extended families.[85] Coming to this determination, the Commission did not dispute that ties with adult children and siblings could be as strong as the bonds with spouses and children.[86] Yet the Commission ultimately concluded: "Whatever the cultural and economic values attached to each family relationship, however, the far stronger responsibilities to one's spouse and minor children are well established in the U.S."[87]

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81. 8 U.S.C. § 1153(a). For a constitutional analysis of the definition of family in the immigration process, see Kelly, *supra* note 10.

82. Note also that citizens are also given the additional ability to petition for married children, while residents may only petition for unmarried children. *See* 8 U.S.C. § 1153(a)(1)-(3).

83. For example, in 1995, House Bill 2202 included amongst its immigration overhaul provisions measures to restrict the ability of parents to qualify as immediate relatives and to completely eliminate the categories allowing citizens and residents to petition for their adult children and allowing citizens to petition for their siblings. H.R. 2202, 104th Cong. (1995). For further discussion of H.R. 2202, see Kelly, *supra* note 10, at 725-26.

84. The Commission's proposal would also have retained parents of citizens in their exempt priority position. Similarly, the Commission on Immigration Reform's recommendations also included a clear interest in prioritizing the unity of citizens' as well as residents' nuclear families. In order to achieve this goal, the Commission proposed to eventually eliminate the preference categories for adult children of citizens and residents and for the siblings of citizens. The Commission was a bipartisan effort charged by the Immigration Act of 1990. U.S. COMMISSION ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 59-67 (1997).

Recognizing the family interest, as well as the skilled labor and humanitarian interests of U.S. immigration policy, the Commission found that current policy, particularly because of long delays in family unification, was not achieving its intended purpose. *Id.* at 62-67. Accordingly, in addition to the Commission's recommendations for severely limiting the preference categories to nuclear families of citizens and resident aliens, it also recommended eliminating the category of unskilled workers to improve immigration opportunities for skilled workers. *Id.* at 59-75.

85. *Id.* at 65.

86. "We recognize that others disagree; they argue that the bonds to adult children and adult siblings can be as strong as the bond between spouses and with minor children. They also point to the valuable assistance provided by many extended families in setting up and running businesses and providing child care and other supportive services." *Id.* at 65.

87. COMMISSION ON IMMIGRATION REFORM, *supra* note 84, at 65.

In so easily dismissing the importance of extended families, the Commission's work endorses an ongoing adherence to a "culture-bound approach" consistent with the emphasis on nuclear family in custody law.[88] As in custody law, the bias in favor of the nuclear family also has ramifications for unwed parents. Again, fathers are particularly hard hit.

C. The Bias Against Unwed Families

Today, a child born abroad and out of wedlock to a citizen father and alien mother will only be recognized as a citizen if the father's paternity is legally acknowledged and the father assumes financial responsibility for the child prior to the child's eighteenth birthday.[89] A further gender disparity in conferring citizenship upon the child requires the father/citizen in an unwed, mixed nationality couple to demonstrate five years of U.S. residence prior to the child's birth.[90] By contrast, a mother/citizen in an unwed, mixed nationality couple only needs to establish one year of residence in the United States.[91] Announcing *Miller v. Albright*[92] in 1998, the Supreme Court, in a plurality opinion, found no equal protection violation in a challenge to this gender disparity which determined the statutory privilege of citizenship by virtue of *jus sanguinis*, or "right of blood," which provides the basis for citizenship by virtue of being the descendants of citizens.[93] This principle has only been recognized in the United States through statute. By contrast, *jus soli*, "right of land," is the alternative means of acquiring citizenship at birth by virtue of being born within a nation's territory.[94] It is widely

88. *See* Motomura, *supra* note 65, at 528 (recognizing that the definition of family utilized in U.S. immigration law is consistent with the ideal of western industrialized countries).

89. *See* 8 U.S.C. § 1409(a) (1994). In addition to the requirement of financial support, the need to be legally recognized as the father was altered. Prior to the child's eighteenth birthday, the relationship must now be established through a paternity adjudication, legitimization under the law of the father's domicile, or acknowledgment of paternity in writing under oath. *Id.* § 1409(a)(4). By contrast, the child of an unwed citizen mother and alien father is not subject to these additional requirements and is simply "held to have acquired at birth the nationality status of his mother." *Id.* § 1409(c).

90. *Id.* § 1401(g) (requiring a citizen parent in a mixed nationality couple to, prior to the child's birth, have been "physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years" with exceptions for overseas U.S. military and international organization service).

91. 8 U.S.C. § 1409 (requiring a citizen mother in an unwed couple to, prior to the child's birth, have "been physically present in the United States or one of its outlying possessions for a continuous period of one year").

92. 523 U.S. 420 (1998) (upholding 8 U.S.C. § 1409(a)(4)).

93. *See Miller*, 523 U.S. at 420. For further discussions of *Miller* and its gender implications, see Cornelia T. L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 SUP. CT. REV. 1 (1998); Kelly, *Republican Mothers*, *supra* note 37, at 565-72.

94. *Miller*, 523 U.S. at 423-24.

considered constitutionally protected by the Fourteenth Amendment.[95]

As this Article goes to press, a Supreme Court decision is being awaited in *Nguyen v. INS*.[96] *Nguyen* effectively rechallenges the immigration provision at issue in *Miller*, raising similar arguments against it. However, regardless of the outcome in *Nguyen*, immigration law may maintain a disparate treatment of fathers and mothers. The reduction of a father's parenting role to a financial obligation as represented by *Miller* affirms the marginalization of unwed fathers endorsed by the Court in the immigration context several years earlier. In *Fiallo v. Bell*,[97] the Court upheld sections of the Immigration and Nationality Act which prohibited both citizen and resident fathers from petitioning for the residency of their out-of-wedlock, foreign-born children.[98] While claiming no judicial responsibility as a result of the deference given to the political branches in immigration matters, the Court acknowledged that the statute's bias against unwed fathers was motivated, at least in part, by "a perceived absence in most cases of close family ties" between the unwed father and his child.[99] While the statute challenged in *Fiallo* was eventually amended by Congress to provide petitioning rights for unwed fathers, the revised statute continues to harbor a skeptical attitude toward an unwed father's parenting ability.[100] An unwed father petitioning for the residency of his foreign child born out of wedlock must now show that he "has or had a bona fide parent-child relationship."[101] As in the citizenship context, an unwed mother petitioning for her child's residency merely has to establish her "natural" connection.[102]

As *Miller* and *Fiallo* demonstrate, the limited expectation of unwed fathers remains as prevalent in the immigration context as it is in the domestic custody setting.[103] The disparate treatment of unwed fathers is a logical byproduct of the preference for marriage. By placing no similar evidentiary demands on wed fathers, the statute encourages the unity of

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95. *See* LEGOMSKY, *supra* note 65, at 1030-39. For a controversial argument that *jus soli* is not an unconditional constitutional right, see SCHUCK & SMITH, *supra* note 68.

96. Nguyen v. INS, 121 S. Ct. 29 (2000) (cert. granted). Oral arguments were heard on January 9, 2001. For more on *Nguyen*, see *Supreme Court Hears Arguments in Transmittal of Citizenship Case*, 78 INTERPRETER RELEASES 229 (Jan. 15, 2001).

97. 430 U.S. 787 (1977).

98. *See Fiallo*, 430 U.S. at 792.

99. *Id.* at 799. Reservations concerning the scientific accuracy of paternity testing at that time were also recognized as an influential factor. *Id.* For further discussion of the deference given to the political branches in immigration matters, see *infra* text accompanying notes 148-50 (discussing the plenary power doctrine).

100. 8 U.S.C. § 1101(b)(1)(D) (Supp. V 1999).

101. *Id.* The amended portion was part of the Immigration Reform and Control Act of 1986. S. 1200, 99th Cong. § 315(a) (1986).

102. 8 U.S.C. § 1101(b)(1)(D) (Supp. V 1999). For further discussion of the female gender bias in immigration law, see Fitzpatrick, *supra* note 63, at 27-43; Kelly, *Republican Mothers*, *supra* note 37 (discussing biases in petitioning process and in asylum's "good victim").

103. For the disparate treatment of unwed fathers in custody decisions, see *supra* text accompanying notes 37-44.

a married man, wife, and child while creating obstacles for the unification of an unwed man and his child.[104]

D. Expanding the "Family"

Despite the legal persistence of the nuclear family ideal in both custody and immigration law, the Supreme Court recognized the legitimacy and existence of nontraditional families over twenty years ago.[105] Striking down a municipal ordinance which led to criminal charges being filed against a grandmother for living with her grandson in *Moore v. City of East Cleveland*, the Supreme Court found that the sanctity of family contemplated by the Constitution was not limited to a narrow conception of family.[106] Indeed, in rejecting the notion that the "family" entitled to protection was limited only to a couple and their dependent children, the Court acknowledged that our history showed a long tradition of extended family members living with and caring for one another.[107] Drawn together "[o]ut of choice, necessity or a sense of family responsibility," such families were "equally venerable and equally deserving of constitutional recognition."[108] Moreover, as cautioned by the concurrence, to ignore alternative family arrangements risked promoting a "cultural myopia" in favor of the nuclear family bias of "white suburbia."[109]

Choice, necessity, and a sense of family responsibility remain the explanation for the growing number of unique family configurations in our society today. As the rejection of the municipal housing ordinance limiting the definition of family in *Moore* evidences, legal and scholarly efforts to bring the law in line with reality exist.[110] Given the centrality

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104. This implication is consistent with the tradition that children born out of wedlock should be with their mothers. For further discussion of the stereotypical treatment of mothers and fathers in immigration law, see Kelly, *Republican Mothers*, *supra* note 37, at 561-74. For a historical analysis of the treatment of unwed parents, see GROSSBERG, *supra* note 18, at 207-15.

105. Moore v. City of East Cleveland, 431 U.S. 494, 504-06 (1977) (plurality opinion).

106. *Moore*, 431 U.S. at 504-06. The fundamental right to family unity declared in *Moore* was seen as a natural corollary to the rights of family protected through as a matter of due process by the Fourteenth Amendment. *Id.* at 500-06. For earlier cases protecting various family rights see, for example, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Roe v. Wade, 410 U.S. 113 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Wisconsin v. Yoder, 406 U.S. 205 (1972); Ginsberg v. New York, 390 U.S. 629 (1968); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Poe v. Ullman, 367 U.S. 497 (1961); May v. Anderson, 345 U.S. 528 (1953); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

107. *Moore*, 431 U.S. at 504-05.

108. *Id.* at 504.

109. *Id.* at 507-08 (Brennan, J., concurring).

110. Martha Fineman finds that the law is more flexible than other normative institutions in its recognition of nontraditional families and points to the decriminalization of sodomy and the growing acceptance of domestic partnership ordinances as examples of the law's development. Fineman, *supra* note 7, at 389.

of defining family to custody law, it is not surprising that the debates have been the loudest in this area. Such debates provide a strong foundation upon which to reconsider the definition of family in immigration law.

IV. REDEFINING FAMILY

A. The Custody Dispute

On the scholarly front of custody law, the redefinition of family is subject to healthy debate.[111] Legal scholarship acknowledges the intention and act of parenting theories being utilized by the courts as legitimate considerations.[112] Support for the "intending parent theory" is evident in the critiques of the reasoning employed in the much publicized *Baby M.* decision.[113] While the New Jersey Supreme Court awarded custody to the biological/sperm donor father, Mr. Stern, in the custody claim against the surrogate mother, Mary Beth Whitehead, it did so only after first invalidating the surrogacy contract.[114] Only then, after reducing the case to a traditional two biological parent custody dispute, would the court award the child to Mr. Stern.[115] Further ramifications of this reasoning required the court to void the adoption of the child by Mrs. Stern and acknowledge Mary Beth Whitehead as a parent entitled to

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111. *See, e.g.*, Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988) (emphasizing importance of considering parenthood in terms of parental responsibility, not parental rights); Bartlett, *supra* note 7 (arguing that the demise of the nuclear family requires recognition of custody determinations beyond traditional parent-child arrangements); Cahn, *supra* note 24 (setting the definition of "parents" as the first step in a two-step analysis in custody disputes); Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 CONN. L. REV. 1315 (1994) (arguing for grandparent visitation only in instances when grandparents have lived with the grandchildren or shown similar level of involvement); Martha Albertson Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955 (1991) (asserting that protection of privacy fails to protect single and poor mothers who are not recognized within the concept of "natural" families); Ruth Halperin-Kaddari, *Redefining Parenthood*, 29 CAL. W. INT'L L.J. 313 (1999) (discussing treatment of reproductive technologies in Israel); Hill, *supra* note 8 (arguing for determinative power of defining "parent" through intending parent theory in custody disputes); Martha Minow, *Redefining Families: Who's In and Who's Out*, 62 U. COLO. L. REV. 269 (1991) (evaluating the determination of family based upon test of functioning as a family); Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209 (1995) (examining the genetic tie argument in custody disputes and the role of race and gender); Carolyn Wilkes Kaas, *Breaking Up a Family or Putting It Back Together Again: Refining the Preference in Favor of the Parent in Third Party Custody Cases*, 37 WM & MARY L. REV. 1045 (1996) (emphasizing presumption in favor of parental custody in third-party custody cases).

112. *See, e.g.*, Cahn, *supra* note 24; HILL, *supra* note 8; Wilkes Kaas, *supra* note 111 (considering only the functional roles when nuclear family breaks down). *See also* FINEMAN, *supra* note 36, at 233-36 (arguing for recognizing the mother/child dependency relationship rather than the sexual family in determining the basis for legal subsidies and protections). For a discussion of judicial use of the intending parenting theory, see *supra* Part II.

113. *In re* Baby M., 537 A.2d 1227 (N.J. 1988).

114. *In re Baby M.*, 537 A.2d at 1234.

115. *Id.* at 1256.

visitation rights.[116]

As Professor Hill persuasively argues, if the intent-to-parent theory, rather than biology, had been openly acknowledged, the parenting role of Mrs. Stern could have been legitimized while Mary Beth Whitehead could have been denied any parental recognition.[117] Such reasoning would have been a significant advancement of the intending parenting theory.

While acknowledging such arguments and recognizing that "something more" than biology should be considered in defining parents, other scholars express a clear reluctance to simply dismiss biological ties.[118] However, despite the continued recognition of biological ties, such regard does not discount the significance of the intending parent theory.[119] Sensitivity to the legitimacy of each position prevents following a doctrine which risks forcing custody disputes to fit the traditional "nuclear family in dispute" model of two warring parents.[120] Scholars in such a position may acknowledge that the number of potential parents may exceed two.[121] Commentators advocating the possibility of multiple parents would have, in the *Baby M.* case for example, recognized the intentional parenting claims of both Mr. and Mrs. Stern while also acknowledging that intent may change. As a result, Mary Beth Whitehead's biological connection and her post-conception intent to parent may have still provided a legitimate parenting claim (entitling her to visitation or other rights).[122] In ultimately deciding custody, an approach which takes both biology and intent into account would also prevent such unduly "harsh" decisions such as that reached in *Michael H.*[123] However, it must be emphasized that such an approach does not require that in the case of multiple potential parents, biology, per se, should be a sufficient basis to confer custodial or visitation rights.[124] Rather, the multiple parent line of reasoning, at minimum should allow, for example, the biological father in *Michael H.*, the legal opportunity to argue that the child's best inter-

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116. *Id.* at 1234. On remand, Mary Beth Whitehead was awarded "unsupervised, uninterrupted, liberal visitation." *In re* Baby M., 542 A.2d 52, 52 (N.J. Super. Ct. Ch. Div., 1988).

117. For arguments in favor of a completely ignoring biology when "intending parents" have been determined, see Hill, *supra* note 8, at 386 (arguing that Mr. Stern's custody award should have been based on initiating the procreative relationship, thereby also allowing Mrs. Stern's parental rights to be recognized and disallowing any parental privileges for Mary Beth Whitehead).

118. *See supra* text accompanying notes 20-22 (discussing the role of biological ties in custody).

119. *See supra* text accompanying notes 20-22.

120. Cahn, *supra* note 24, at 43-59. For more on the *Baby M.* "two-parent" reasoning, see *supra* text accompanying note 118.

121. Cahn, *supra* note 24, at 43-59.

122. *Id.* at 42-43.

123. *Id.* at 43; Michael H. v. Gerald D., 491 U.S. 110, 114 (1989). *See also supra* text accompanying notes 39-42 (discussing *Michael H.*).

124. Cahn, *supra* note 24, at 43-51.

ests would be served by allowing his participation in the child's life.[125]

Other concerns also suggest the need to recognize multiple parents. As a practical matter, in the surrogacy and adoption settings, as well as in the case of divorcing, never-wed parents, and still-wed parents, children may have legitimate parent-child relationships with a variety of individuals.[126] To truly evaluate a child's best interests, all these relationships need to be acknowledged and evaluated.[127] By respecting all potential parent-child connections, a multiple parent approach recognizes both the existing reality and the ongoing necessity of today's varying family structures.

Troxel v. Granville[128] well-illustrates the legal struggle surrounding efforts to recognize the reality of today's families.[129] Through legislation allowing any individual to petition for visitation of a child, the state demonstrated a desire to acknowledge the valuable role of nontraditional family members.[130] As a result of such legislation, grandparents, uncles, aunts, and individuals unrelated by blood or marriage came forward to claim visitation rights with children they considered family.[131] Yet in striking down the statute, the Supreme Court found the nonparental visitation provisions to be an unconstitutional violation of parental rights.[132] Read as a response to the reality of today's varying family structures and the changing interests of children, such a holding could simply be perceived as a reaffirmation of the parental rights doctrine and refusal to move beyond the tradition of presuming the protection of parental rights is always in the child's best interests.[133] However, a bolder reading of

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125. *Id.* at 51.

126. *Id.*

127. *Id.* at 51-52. Cahn is careful to explain that her two-step approach of defining all potential parents and then determining the child's best interests does not follow the traditional approach of allowing the parental rights doctrine to trump a child's best interests. Neither does it allow the best interests standard to outweigh parental rights. Rather than advocating either side of the parent vs. child dichotomy, Cahn recognizes that the interests overlap and wants both to be acknowledged. *Id.* at 49. For further discussion of the traditional deference to parental rights, see Hill, *supra* note 8, at 364.

128. 530 U.S. 57 (2000).

129. *Troxel*, 530 U.S. at 63.

130. *Id.* at 69.

131. *Troxel* was a consolidation of three cases. The plaintiffs in *Troxel* were the grandparents of the children's father who had committed suicide suing the children's mother. In the consolidated case of *Smith v. Stillwell-Smith*, plaintiffs were the parents and siblings of the children's father (who had been killed by the mother's mother). Troxel v. Granville, 969 P.2d 21 (Wash. 1998). In the consolidated case of *Clay v. Wolcott*, 933 P.2d 1066 (Wash. Ct. App. 1997), the plaintiff seeking visitation was unrelated either legally or biologically to the child at issue. *Clay*, 933 P.2d at 1067. However, the plaintiff had lived with the mother and the child until he and the relationship between he and the child's mother deteriorated. *Id.*

132. *Troxel*, 530 U.S. at 72.

133. *Id.* (relying upon *Parham v. J.R.*, 442 U.S. 584 (1979)). For a discussion of the primact of the parental rights doctrine over the best interest standard, see Cahn, *Reframing Child Custody Decisionmaking*, *supra* note 24, at 363-66. For historical accounts of the role of parents see BERRY, *supra* note 35, GROSSBERG, *supra* note 18, and LINDA K. KERBER, WOMEN OF THE REBUPLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA (1980).

the decision can also be had. In its decision, the Court acknowledged the standing of third parties and suggested the possible judicial acceptance of third party visitation rights in certain instances.[134] Moreover, by refusing to hold that all nonparental visitation statutes must include a showing of detriment to the child as a condition precedent to granting visitation, the Court acknowledged the tension that can arise between serving a child's best interest and protecting parental rights.[135] Grappling with the current reality of family life, the Court may have demonstrated some readiness to move forward, albeit not as quickly as the rejected legislation would have permitted.

As the dynamic history of child custody suggests, the debate over such matters as the relevance of the nuclear family ideal, the impact of biological ties, and the value of the parents' rights doctrine will not be resolved quickly. What is significant, however, is that in the child custody arena the debate over how to define family has begun. Because immigration law affects foreign individuals and U.S. citizens and lawful permanent residents at the most intimate level, redefining the "family" of immigration law must also begin. As in the custody debates, the exploration of "family" in immigration must question whether the nuclear family bias and its various manifestations throughout the law *can* or *should* be dislodged.

B. The Inalienable Family of Immigration

While nuclear family is indisputably the most important familial focus for many individuals, it does not define the critical core for all individuals. The need to define family beyond a nuclear definition is critical in immigration law as the law directly impacts individuals from other cultures where the nuclear family may be of little importance. Moreover, even assuming, momentarily, the need to assimilate new immigrants, requiring assimilation to the position of increasingly fewer Americans is unsettling.[136] Consequently, to impose a "cultural[ly]

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134. *Id.*

135. Troxel v. Granville, 530 U.S. 57 (2000). Similarly, the Washington Supreme Court suggested a permissible statute would allow for third party visitation when the child would suffer "severe psychological harm" without such visitiation and when a "substantial relationship" with the third party was demonstrated. *In re* Custody of Smith, 969 P.2d 21, 25-27, 30-31 (Wash. 1998).

136. There is a wealth of valuable literature questioning assimilation and its function in immigration policy. *See, e.g.*, Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259 (1997), 10 LA RAZA L.J. 173 (1998); KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989); Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303 (1986); George A. Martinez, *Latinos, Assimilation and the Law: A Philosophical Perspective*, 20 CHICANO L. REV. 1 (1999); Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965 (1995); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992);

myopi[c]" definition of family upon immigrants from other countries flaunts both the reality which exists in the United States and throughout the world.[137] By promoting the ideal of "white suburbia," immigration law risks engaging in a form of racial coercion which *Moore* and critics of the nuclear family ideal have sought to prevent in domestic family matters.[138]

Wary of the nuclear family model, the reform suggestions being proposed by immigration scholars match those proposed by their child custody counterparts. Scholars encourage utilizing a "functionality" test which recognizes relationships of dependency in the family-petitioning context rather than relying simply upon biological ties.[139] In so doing, immigration policies of other countries which respect relationships beyond immediate family and evaluate such non-biological ties are promoted.[140] However, because "functionality" testing in immigration is strikingly similar to the "intending parent" concept developing in the child custody arena, the approaches also share certain difficulties.[141] Dismissing a biological parent who cannot demonstrate an existing parenting function might be more harsh in the immigration context than it has proven to be in the child custody context, as immigration law itself may place the physical barriers of land and water between a parent and child.[142] Adhering to such an approach in the immigration petitioning context would also threaten the unification of family members, such as siblings, whose relationship is perceived simply as ones of association, not of the dependence that resembles the relationship between parents and child.[143]

Other costs are also associated with an approach that relies upon ties less tangible than biology. By defining "family" more broadly, the effect would be to increase overall immigration, while decreasing waits in cer-

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Dorothy Roberts, *Who May Give Birth to Citizens: Reproduction, Eugenics and Immigration*, *in* IMMIGRANTS OUT! 205 (Juan F. Perea ed., 1997).

137. Moore v. City of East Cleveland, 431 U.S. 494, 507 (1977) (Brennan, J., concurring).

138. *Id.* at 508 (Brennan, J., concurring). For a discussion of the racial implications of the nuclear family model in domestic law, see *supra* notes 110-12 and accompanying text (discussing observations of Fineman and others).

139. For a discussion of the "functionality" approach, see Guendelsberger, *Family Unification*, *supra* note 64. *But see* Note, *Looking for a Family Resemblance, The Limits of the Functionality Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640 (1991).

140. Guendelsberger, *Family Unification*, *supra* note 65, at 41 (discussing the French immigration law's provisions for extended family ties); Motomura, *supra* note 66, at 518 (discussing the German approach to respecting extended family ties).

141. See *supra* Part II (discussing the intending parent approach of custody law and scholarship and its inherent difficulties).

142. Guendelsberger, *Family Unification*, *supra* note 64, at 54.

143. *Id.* This concern would parallel an observation in the domestic context that non-dependent family relations are provided minimal recognition. *Id.* at 52 (discussing Bell v. City of Milwaukee, 746 F.2d 1205, 1245 (7th Cir. 1984) (denying a section 1983 claim by a sister as was not a de facto parent-child relationship and so failed to show a constitutional dimension requiring protection)).

tain family-petitioning categories maintained under a quota and increasing waits in other categories.[144] Moreover, problems of testing the purported family tie would certainly raise questions regarding abuse of discretion by bureaucrats and invasion of familial privacy.[145] As seen in the child custody context, determining who is "parenting" can be a discriminatory analysis.[146] Immigration law has already demonstrated a similar willingness to follow stereotypes. The statutes unsuccessfully challenged in *Nguyen*, *Miller*, and *Fiallo* clearly emphasize the discrimination dangers posed by allowing functionality testing of parenthood.[147] Finally, the plenary power awarded to the political branches over immigration would further complicate matters.[148] Government assertions of the plenary power it wields over immigration would prevent judicial review of family relation tests conducted by immigration officials operating in their discretionary capacity.[149] More fundamentally, the plenary power doctrine would prevent any judicial constitutional analysis of the nuclear family ideals and gender biases underlying immigration law.[150]

Against these unique challenges, the ability to redefine "family" in the immigration context is more daunting a task than advocates in the

144. Motomura, *supra* note 65, at 528.

145. *Id.* at 528-30. Such evidentiary concerns already exist as a result of the statutory need to demonstrate a "bona-fide" marriage prior to being accorded an immigrant visa based upon the marital relation. *See* Note, *Sham Marriage Investigation*, *supra* note 66. For an understanding of the various changes made in the 1990s to the ability to immigrate based upon marriage, see 8 U.S.C. § 1186(a) (1999). *See also* Janet Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593 (1991); Kelly, *supra* note 66.

146. *See supra* Part II.

147. For discussion of *Miller* and *Fiallo* and the upholding of statutes which demand unwed fathers, not unwed mothers, to demonstrate a parent-child relationship in order to secure citizenship and residency rights for children, see *supra* Part III.C.

148. The political branches' absolute control over immigration is seen as a natural component of the federal government's sovereign power to possess full control over U.S. territory and foreign affairs. For some of the fundamental cases recognizing plenary power, see *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (finding absolute congressional control over the expulsion and exclusion of aliens); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (upholding immigration law excluding aliens on the basis of race by deferring to congressional power); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (upholding the exclusion of an alien without the right of judicial review); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (holding that an alien's due process rights are dependent upon congressional will). For a sampling of the vast scholarship analyzing and criticizing the breadth of the plenary power doctrine, see Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of the Plenary Congressional Power*, 1984 SUP. CT. REV. 255; and Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

149. For a discussion of the broad use of discretion in immigration law, see Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 731-51 (1997).

150. *See supra* Part III.C.

custody reform debate now face. The degree of difficulty, however, does not mitigate the need to recognize alternative family arrangements in immigration law. The immigration procedures of other countries demonstrate that relationships beyond immediate family can be recognized in order to respect the immigrant's understanding of who constitutes his family.[151] The "family" debates surrounding U.S. child custody law further underscore the importance of the need to re-evaluate the definition of family in U.S. immigration law.

V. LEARNING FROM ASYLUM

Asylum may seem an unusual place to begin an examination of "family" in immigration law. Consistent with the United Nations standard, in order to establish an asylum claim, an individual must show past persecution or a well-founded fear of future persecution on account of one of five factors: race, religion, nationality, membership in a particular social group, or political opinion.[152] This statutory definition clearly does not articulate any considerations regarding family.[153] However, family is indeed relevant to asylum adjudications. It is precisely this unobtrusive importance of family which makes analyzing the treatment of family in asylum law critical. The lack of statutory definition prevents being limited to narrow, essentially unreviewable congressional definitions of who is family.[154] Yet, more importantly, revealing asylum

151. For discussion of the expanded treatment of family in the immigration policies of such countries as Germany and France, see sources cited *supra* notes 64-66.

152. 8 U.S.C. § 1158(b)(1) (1994 & Supp. V 1999). A request for asylum is evaluated upon the refugee standard which is applied to persons seeking safety that are outside the United States. In order to qualify as a refugee, an individual must show that he is one who suffers from "persecution or [who has] a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A) (1994 & Supp. V 1999). The terms "asylee" and "refugee" are often used interchangeably. However, an asylee achieves such status after making an application once inside the United States, while a refugee applies for protection abroad (generally at a U.S. embassy).

The U.S. refugee standard is based upon the United Nations 1951 Convention Relating to the Status of Refugees ("Refugee Convention") and the 1967 Protocol Relating to the Status of Refugees ("Protocol"). In 1968, the United States acceded to the U.N. Protocol and, in so doing, indirectly acceded to the Refugee Convention. Since then, the Refugee Convention and its definition of a "refugee" have been codified by the U.S. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. §§ 1101-1125 and 22 U.S.C. § 2601 (1980)).

For further discussions of the development of refugee law, see generally OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (1992) [hereinafter UN HANDBOOK]. *See also* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES (3d ed. 1999); GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW (2d ed. 1996); Legomsky, *supra* note 148, at 748-952; David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247 (1990); Peter Margulies, *Democratic Transitions and the Future of Asylum Law*, U. COLO. L. REV. 3 (2000); Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733 (1998).

153. 8 U.S.C. § 1158(b)(1) (1994 & Supp. V 1999).

154. For discussion of the plenary power wielded by the political branches over immigration,

law's underlying assumptions regarding family underscores the pervasive influence that attitudes toward family can have. So strong is this influence in asylum law that an asylum claimant raising the relevance of family is challenged in satisfying three distinct aspects of their claims: 1) proving his claim falls within one of the protected categories; 2) demonstrating the nexus between the protected category and the persecution suffered; and 3) establishing credibility.

A. Family as a Protected Category

Through both the political opinion and social group categories, family relations are the most relevant to an asylum claim.[155] However, a review of the treatment of family when such claims are lodged confirms that the traditional limited understanding of family prejudices asylum seekers. The restricted definition of family in the social group context well illustrates this challenge.[156]

Because the social group identification has traditionally been made upon a showing of a "shared immutable characteristic," a family may be recognized as a social group by virtue of its kinship ties.[157] Indeed, through the dicta of *Sanchez-Trujillo v. INS*,[158] "family" has been suggested to be the "prototypical example" of a social group.[159] This recognition results from understanding that the family unit is "a focus of fundamental affiliation concerns and common interests for most people."[160] However, despite this clear understanding of the intangible ties which bind "a family" together, courts adjudicating requests for asylum have resisted recognizing a family unit beyond the immediate family.[161]

Recent decisions in the Ninth Circuit evidence both the potential and challenge of defining the social group category of family beyond the nuclear definition. In an early consideration of family as a social group, the Ninth Circuit decision in *Hernandez-Ortiz v. INS*[162] found that violence visited upon the "close" family members of a brother, sister-in-

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see *supra* text accompanying notes 148-50.

155. For a discussion of the relevance of family to the "political opinion" category, see ANKER, *supra* note 152, at 333-43, and on family as a social group, see *id.* at 386-88.

156. For a discussion of the use of family to demonstrate imputed political opinion, see *supra* text accompanying note 152 (discussing Ramirez Rivas v. INS, 899 F.2d 864 (9th Cir. 1990)).

157. *See* Matter of Acosta, 19 I & N Dec. 211, 233-34 (B.I.A. 1985), *modified on other grounds*, Matter of Mogharrabi, 19 I & N. Dec. 439 (B.I.A. 1987). For a discussion of how the social group standard set by *Acosta* may have been curtailed, at least for women claiming asylum based upon gender violence, see Kelly, *Republican Mothers*, *supra* note 37, at 593-96.

158. 801 F.2d 1571 (9th Cir. 1986).

159. *Sanchez-Trujillo*, 801 F.2d at 1576.

160. *Id.*

161. *See, e.g.*, *id.* (suggesting only the immediate members of a family would constitute a social group).

162. 777 F.2d 509 (9th Cir. 1985).

law, and grandparents was indeed significant.[163] While this decision served only to grant a motion to reopen, it clearly suggested the significance of family when the merits of an asylum claim would ultimately be considered.[164] However, several years later, the Ninth Circuit, in *Estrada-Posadas v. INS*,[165] upheld a denial of asylum to a Guatemalan applicant who based her fear of persecution upon a cousin's kidnapping, an uncle's murder, and other family members' forced abandonment of their lands.[166] In so doing, the court simply stated that there was no family recognized by the social group factor.[167] Finding that the concept of persecution of a social group did not extend to the persecution of family, the court stated, "If Congress had intended to grant refugee status on account of 'family membership,' it would have said so."[168]

While a contradiction could be seen between the *Estrada-Posadas* assertion that social group did not extend to family and the earlier acknowledgment of family as a viable social group, the response of the Ninth Circuit revealed another interpretation of its case law.[169] Reversing a Board of Immigration Appeals ("BIA") denial of asylum, the Ninth Circuit found in *Alarcon-Mancilla v. INS*[170] that "acts of violence against petitioner's immediate family members are relevant to determining whether petitioner's fear was well-founded."[171] This statement, however, would not provide a basis for revisiting *Estrada-Posadas*. According to *Alarcon-Mancilla*, the definition of family contemplated by the social group category was limited to the "immediate" family.[172] In making this determination, the Ninth Circuit cited to its earlier case law in which the argument of family as a social group supported an asylum request.[173] Decisions in other circuits are consistent with such a limited nuclear definition of family.[174]

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163. *Hernandez-Ortiz*, 777 F.2d at 519.

164. The standard of granting a motion to reopen was a determination as to whether a prima facie case of asylum based on new material evidence was presented. The effect of granting the motion to reopen would also allow the request for withholding of deportation to be reviewed. *Id.* at 513 (discussion standard for motion to reopen). *See also* 8 U.S.C. § 1158(a)(2)(B); 8 U.S.C. § 1229a(c)(6)(C)(ii) (1999).

165. 924 F.2d 916 (9th Cir. 1991).

166. *Estrada*-Posadas, 924 F.2d at 919.

167. *Id.*

168. *Id.*

169. Noting the contradiction, see *Gebremichael v. INS*, 10 F.3d 28, 36 n.21 (1st Cir. 1993) (finding after *Estrada-Posadas* decision that Ninth Circuit's case law on family as social group was "not entirely clear").

170. No. 97-70619, 1998 U.S. App. LEXIS 10758 (9th Cir. Apr. 16, 1998).

171. *Alarcon-Mancilla*, 1998 U.S. App. LEXIS, at *7-*8.

172. *Id.*

173. "[W]e implicitly affirmed the conclusion that one's immediate family constitutes a social group in *Aruta v. INS*, 80 F.3d 1389 (9th Cir. 1996)." *Id.* at *8. *See also id.* at *7-*8 (relying upon Rodriguez v. INS, 841 F.2d 865, 871 (9th Cir. 1988) (holding acts of violence against petitioner's immediate family members relevant to determining whether petitioner's fear was well-founded)).

174. The review of other circuits on the issue of family as a social group is relatively sparse in comparison to the Ninth Circuit's review. However, in both cases relying upon the family as a

While the nuclear definition of family prevalent in asylum law clearly prevents the potential of the social group category, the current standard's underlying western bias also limits an asylum seeker's ability to satisfy other critical considerations. The narrow definition of family challenges the ability to demonstrate the critical "on account of" nexus between persecution and the protected ground and presents credibility issues.

B. The Nexus of Family and Persecution

"Persecution" includes acts of physical and psychological violence taken directly against an asylum applicant as well as more subtle forms of discrimination and deprivation.[175] However, in order for such acts to be relevant to an asylum analysis, they must be properly linked to race, religion, nationality, social group, or political opinion.[176] Contrary to the United Nations High Commissioner for Refugees' more results-oriented approach, which focuses on the effect of the actions upon the applicant, current understanding of U.S. case law suggests the "on account of" requirement still demands a showing of the persecutor's specific motivation to punish because of one of the five listed grounds.[177] Given this standard, problems in evaluating the nexus between persecution and the protected category of social group depends upon appreciating family from the applicant's and his culture's perspective. Unfortunately, this is not the perspective generally taken.

Failing to see the connection between the actions taken by the state against an asylum applicant and the social group of family in *Gebremichael v. INS*,[178] the BIA denied a request for asylum.[179] Although

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social group and the utilization of family to assert an imputed political opinion claim, the definition of family remains consistent. While the persecution of more distant family members may be noted, successful claims and recognition of family as a social group consistently show the common existence of a close family tie. *See, e.g.*, Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985); Draganova v. INS, 82 F.3d 716 (7th Cir. 1996) (finding applicant eligible for asylum based upon grandfather's death, brother's severe beatings and father's arrest, exile and possible death); *Gebremichael*, 10 F.3d at 36 (stating that "[t]here can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family"); Hamzehi v. INS, 64 F.3d 1240 (8th Cir. 1995) (denying imputed political opinion asylum claim based upon the political ideology of an applicant's brother and sister-in-law); Ratnam v. INS, 892 F. Supp. 619 (D.N.J. 1995) (finding husband's political opinion may be imputed to wife). *See also* ANKER, *supra* note 152, at 333 (cautioning that family ties alone are not enough—one must also show other factors indicating that the applicant is being "singled out," that the family has a "notorious" public reputation, or that other family members have already been targeted, "especially where these family members are closely related to the applicant").

175. For an excellent discussion of persecution through physical and emotional harm as well as the treatment of illegal departures, economic sanctions, and other actions, see ANKER, *supra* note 152, at 209-52.

176. *See generally* Matter of Acosta, 19 I & N Dec. 211, 233 (B.I.A. 1985), *modified on other grounds*, Matter of Mogharrabi, 19 I & N Dec. 439 (B.I.A. 1987).

177. ANKER, *supra* note 152, at 268-90.

178. 10 F.3d 28, 32-33 (1st Cir. 1993).

"reprehensible" torture and detention had been endured, punishment was not based on any of the recognized reasons.[180] Rather, the BIA determined the actions were merely a means of compelling the applicant to reveal the whereabouts of his brother, who was the Ethiopian government's real target of persecution on account of his political views.[181] Remanding the BIA's decision, the First Circuit properly recharacterized the treatment of the asylum applicant as not simply a state investigative tool but as a "terrorization" of the applicant for no other reason than because of his relationship to his brother.[182] Employing the "time-honored theory of *cherchez la famille* ('look for the family')," the First Circuit concluded "no reasonable fact-finder" would determine that the applicant was not persecuted on account of his family.[183] Indeed, as another court has noted, the targeting of an individual's family in certain cultures is seen as a more effective means of persecution than punishing an individual directly.[184] However, as evidenced by the BIA's initial decision in *Gebremichael*, courts do not easily and readily make the reasonable connection between the harm suffered and the social group category of family. As a result, the rigid western definition of family, insensitive both to the applicant and his culture, prevents the law from providing refuge to eligible individuals. Such ignorance can also go to the most fundamental aspect of an asylum claim—establishing credibility.

C. The Credibility of Family

In 1980 Tsion Kahssai, an Ethiopian Jew, fled Ethiopia at the age of nine.[185] Several years earlier, her father was arrested, tortured, and killed by the communist-led Ethiopian government because of suspicion that he was an Eritrean rebel.[186] The subsequent arrest and disappearance of Kahssai's mother and killing of her brother were also believed to be in retaliation for the father's suspected activity.[187] Following the loss of both parents, Kahssai and her remaining two brothers were taken to live with their uncle, the husband of their mother's sister.[188] Reaching the

179. *Gebremichael*, 10 F.3d at 32-33.
180. *Id.*
181. *Id.* (quoting *In re* Gebremichael, No. A26876916, slip op. at 3 (B.I.A. Mar. 25, 1992)).
182. *Id.* at 36-37.
183. *Id.* at 36.
184. Aruta v. INS, 80 F.3d 1389, 1398-1400 (9th Cir. 1996) (Hug, C.J., dissenting) (relying on testimony of expert witness who testified that in the Philippines the New People's Army will "target a family member of an official for retribution if the official has committed an extraordinary crime against the people").
185. Kahssai v. INS, 16 F.3d 323, 324 (9th Cir. 1994).
186. *Kahssai*, 16 F.3d at 324.
187. *Id.*
188. *Id.*

United States several years later, Kahassai requested asylum.[189] Questioning Kahssai's credibility, the immigration judge denied her request.[190]

Credibility is a critical threshold issue in every asylum claim. Absent alternative corroborating evidence, an asylum applicant's testimony must evidence a high degree of detail.[191] However, rather than making a credibility determination based upon legitimate concerns, the immigration judge found it "unbelievable" that members of Kahssai's father's family would be persecuted while her uncle would not be.[192] The immigration judge's decision clearly revealed that the judge's understanding of family structure—not the applicant's nor her country's attitude toward family—was the standard upon which credibility was being measured.[193] As Judge Reinhardt's concurrence in the Ninth Circuit's opinion highlighted, credibility determinations should not turn on U.S. perceptions of family but those of the asylum applicant and her country.[194] Finding the applicant credible, Judge Reinhardt relied upon Ethiopia's and the applicant's perspectives on family.[195] As Judge Reinhardt remarked, "The [Immigration Judge] fails to consider that where we see one family, the Ethiopian government sees two families: one headed by Kahssai's father, who was the object of persecution, and one headed by her uncle, who was not considered to be an enemy of the state."[196] Citing to the applicant's testimony, Judge Reinhardt's reliance upon the petitioner's understanding of family was also evident. "[I]n Ethiopia . . . if one family member is in trouble . . . the rest of the family is in trouble."[197]

D. Moving Toward a More Thoughtful "Family"

Fortunately, improving the understanding of family in asylum law is a less difficult undertaking than addressing the limited application of

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189. *Id.*

190. *Id.* at 325-28 (Reinhardt, J., concurring) (reviewing immigration judge's negative credibility determination).

191. Uncorroborated asylum testimony must be "believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear." Matter of Mogharrabi, 19 I. & N. Dec. 439, 445 (B.I.A. 1987). For further discussions of credibility determination in asylum law, see ANKER, *supra* note 152; Peter Margulies, *Democratic Transitions and the Future of Asylum Law*, 71 U. COLO. L. REV. 3, 12-17 (2000). For a critical evaluation of the challenges raised in demonstrating credibility through the increasing demand for external evidence in asylum law, see *id.* at 12-17.

192. *Kahssai*, 16 F.3d at 327-28 (Reinhardt, J., concurring).

193. *See id.* (Reinhardt, J., concurring).

194. *See id.* (Reinhardt, J., concurring).

195. *Id.* (Reinhardt, J., concurring).

196. *Id.* at 327-28 (Reinhardt, J., concurring).

197. *Kahssai*, 16 F.3d at 328 (Reinhardt, J., concurring) (quoting applicant's testimony).

family in other admission and exclusion contexts.[198] Because asylum is a discretionary form of relief which is not limited by a statutory definition of family, no congressional permission is needed to alter the current understanding of family.[199] Certainly, decisions made by the courts and administrative agencies discussed thus far give reason to suggest discretion is not always positively exercised.[200] However, efforts to more carefully evaluate the relevance of family associations have been made. Encouraging the adoption of such an approach in asylum determinations may be a first step toward promoting a fuller acceptance of family throughout immigration law.

Deciding *Ramirez Rivas v. INS*,[201] the Ninth Circuit relied heavily upon a young woman's relationship with a variety of family members to find that a sufficient basis for granting asylum had been established.[202] While the applicant considered herself politically neutral, the court found the pro-guerrilla political opinions held by a number of the applicant's cousins, uncles, and siblings had been imputed to her.[203] The Salvadoran government was recognized to have persecuted other neutral relations of the applicant, including her father.[204] However, more important to the court were the instances of persecution against more extended family members.[205] The disappearance of an uncle, questioning of an aunt, extrajudicial killing of a cousin, torture of a half-brother, and the dismemberment of a family friend because of their own political opinions and their association with the family's "notorious" anti-government members were critical considerations.[206] Because "family connections are often used as a proxy for individualized investigation of subversive activity," the applicant's ongoing interaction with various family members living and imprisoned throughout the region of El Salvador inhabited by her family was significant.[207] The applicant was "not just any family member of a guerilla or oppositionist."[208] Looking closely at the reality of the applicant's family, the court understood the applicant's legitimate fear.

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198. For a discussion of the difficulties in expanding the definition of family in other areas of immigration law, see *supra* Part IV.B.

199. The discretionary nature of asylum is in contrast to the mandatory form of relief available through "withholding of removal," which also is provided due to past or future persecution on account of the five statutorily protected grounds. *Compare* 8 U.S.C. § 1158(b)(1) (1994 & Supp. V 1999) *with* 8 U.S.C. § 1231(b)(3) (1994 & Supp. V 1999).

200. For a discussion of the discretionary power underlying asylum, see Kanstroom, *supra* note 149, at 731-51.

201. 899 F.2d 864 (9th Cir. 1990).

202. *Ramirez Rivas*, 899 F.2d at 867-73.

203. *Id.* at 866-70.

204. *Id.* at 868.

205. *See id.* at 868-70.

206. *Id.*

207. *Ramirez Rivas*, 899 F.2d at 871.

208. *Id.* at 870.

CONCLUSION

As Deborah Anker acknowledges, *Ramirez* may be "one of the most thoughtful and extensive discussions" of family in asylum law.[209] As we are beginning to see in the child custody context, more thoughtful treatment of the family needs to be taken throughout immigration law. "Family" is not stagnant in the United States or the rest of the world. Increasing globalization and the movement of people prevents enforcing borders which have never been more than social constructions. The definition of "family" is one such border. Allowing the legal "family" to grow with societal realities in asylum law is a step toward breaking such a border.

As custody law evidences, the complexity of family prevents concluding there is any simple redefinition. However, the pervasive influence of "family" in immigration law, as in custody law, demands examination. By revealing that biases and attitudes surrounding family are not isolated to one area of law, we begin to appreciate that attitudes toward family have an effect in many ways not readily evident. Taking on such discoveries is the next step.

209. ANKER, *supra* note 152, at 333.