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UNDOCUMENTED CHILDREN AND FAMILIES IN AMERICA: AN INTERDISCIPLINARY EXPLORATION OF CHALLENGES AND EMERGING OPPORTUNITIES

Diane Geraghty *

The United States has long been mythologized as a safe haven and land of opportunity for immigrants.¹ In truth, however, the nation has a well-documented history of ambivalence toward those who seek a better life in America.² Nowhere is this ambivalence more evident than in the case of children and families who enter the United States without legal immigration status. Traditionally, federal immigration laws have focused on the detection, detention, and deportation of undocumented persons without regard to their age or circumstances.³ As a result, and in stark contrast to other legal proceedings affecting children, the “best interest of the child” standard plays a limited role in federal immigration cases at present.⁴

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¹ Nowhere is this characterization more ardently expressed than in “The New Colossus,” the Emma Lazarus poem inscribed on the Statue of Liberty: “Give me your tired, your poor, Your huddled masses, yearning to breathe free, The wretched refuse of your teeming shore, Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!”

² See generally PETER SCHRAG, NOT FIT FOR OUR SOCIETY: IMMIGRATION AND NATIVISM IN AMERICA (2010) (detailing the complex history of immigration attitudes and policies in the United States over the last three centuries). See also David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 FORDHAM URB. L.J. 393 (2010) (challenging the myths that children receive privileged treatment under U.S. immigration law and that immigrant parents of U.S.-citizen children are afforded easier paths to citizenship).

³ Jacqueline Hagan et al., *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799, 1800 (2010).

⁴ See Bridgette A. Carr, *Incorporating a “Best Interests of the Child” Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 121–24 (2009); Marcia Zug, *Should I Stay or Should I Go: Why Immigrant*

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Increasingly, however, federal and state laws and policies have begun to recognize immigrant children's unique needs and vulnerabilities. The beginnings of these developments can arguably be traced to the U.S. Supreme Court's 1982 decision in *Plyler v. Doe*.⁵ In that case, the Court's majority held that states cannot constitutionally deny undocumented children the right to a public education solely on the basis of their immigration status.⁶ In the words of Justice Brennan, "[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."⁷ Adopting *Plyler*'s narrative of undocumented children as innocent victims, Congress has enacted legislation that makes special provisions for maltreated and trafficked children.⁸ More recently, in June 2012, the Obama administration announced that it would temporarily halt removal proceedings against unauthorized children living in the U.S. who are able to meet certain eligibility requirements.⁹ Some states are also beginning to

Reunification Decisions Should Be Based on the Best Interest of the Child, 2011 BYU L. REV. 1139, 1182 (2011).

⁵ *Plyler v. Doe*, 457 U.S. 202 (1982).

⁶ *Id.* at 202.

⁷ *Id.* at 220.

⁸ See, e.g., Maura M. Ooi, Note, *Unaccompanied Should Not Mean Unprotected: The Inadequacies of Relief for Unaccompanied Immigrant Minors*, 25 GEO. IMMIGR. L.J. 883, 888-92 (2011) (describing existing forms of relief for unaccompanied minors); David B. Thronson, *Thinking Small: The Need for Big Changes in Immigration Law's Treatment of Children*, 14 U.C. DAVIS J. JUV. L. & POL'Y 239, 257-61 (2010) (discussing T and U visa options for children).

⁹ Known as Deferred Action for Childhood Arrivals, or DACA, the policy applies to unauthorized children under the age of sixteen who have lived in the U.S. for at least five years, who are enrolled in school, have a high school/GED degree, or who have been honorably discharged from military service, and who have not engaged in serious criminal behavior. See *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnnextchann>

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adopt policies that ease restrictions on undocumented children and families.¹⁰

The impact of the nation's immigration policies on children and families cannot be underestimated. Today, one quarter of all children in America are members of an immigrant family.¹¹ This group constitutes the fastest growing segment of the U.S. child population.¹² Seventy-five percent of these children are U.S.-born citizens.¹³ Among Latino U.S. citizen children, 40 percent, or 3.3 million children, are living with at least one undocumented parent.¹⁴ These children are more likely to be living in poverty than children whose immigrant parents have legal status.¹⁵ Between 2010 and 2012, over 200,000 undocumented parents of U.S. citizen children

el=f2ef2f19470f7310VgnVCM10000082ca60aRCRD (last updated Jan. 18, 2013).

¹⁰ Illinois, for example, recently adopted a law authorizing undocumented residents to obtain driver's licenses. See Greg Botelho, *New Illinois Law Allows Undocumented Immigrants to Get Driver's Licenses*, CNN (Jan. 29, 2013), <http://www.cnn.com/2013/01/28/us/illinois-immigrant-licenses/>. Illinois has also enacted a safe harbor law that protects children engaged in the commercial sex trade, including undocumented children, from criminal prosecution. H.B. 6462, 96th Gen. Assemb. (Ill. 2010) (enacted as Public Act 096-1464); 325 ILL. COMP. STAT. ANN. 5/3 (West 2013); 325 ILL. COMP. STAT. ANN. 5/5 (West 2013).

¹¹ WENDY CERVANTES & KEVIN LINDSEY, *FIRST FOCUS, PRINCIPLES FOR CHILDREN IN IMMIGRATION REFORM* (2013), <http://www.firstfocus.net/sites/default/files/Principles%20for%20Children%20in%20Immigration%20Reform%20with%20Organizations.pdf>.

¹² *Id.*

¹³ See *Children and Family Policy*, MIGRATION POL'Y INST., NAT'L CENTER ON IMMIGRANT INTEGRATION POL'Y, <http://www.migrationinformation.org/integration/children.cfm> (last visited May 28, 2013).

¹⁴ RICHARD FRY & JEFFREY S. PASSEL, PEW HISPANIC CTR., *LATINO CHILDREN: A MAJORITY ARE U.S.-BORN OFFSPRING OF IMMIGRANTS*, at ii (2009), <http://www.pewhispanic.org/files/reports/110.pdf>.

¹⁵ *Id.* at 7.

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were deported.¹⁶ These children face stark options—remain in the U.S. without their parent or move to a country that is foreign to them. At least 5,000 of these children are living in foster care, with no one to care for them after their undocumented parent's detention or deportation.¹⁷ Over 1.5 million undocumented children currently reside in the U.S., either having been brought to this country by a parent or having traveled alone to reach American shores.¹⁸ In 2012, 14,000 undocumented children were placed in the custody of the Office of Refugee Resettlement (ORR) after their legal status was discovered by federal, state, or local law enforcement authorities.¹⁹

This symposium issue of the *Children's Legal Rights Journal* offers an interdisciplinary exploration of current issues affecting child immigrants, especially undocumented children and their families. As many of the articles in this volume suggest, undocumented children and parents face a range of challenges. These include a constant fear of deportation, family separation, and futures limited by immigration laws, policies, and practices.

Several articles in this symposium issue address the nexus between immigration and child protection. The first is based on a keynote address given by Howard Davidson, Executive Director of the ABA Center on Children and the Law. In his speech, entitled *Improving*

¹⁶ Roque Planas, *Deportation: More than 200,000 Parents Removed Who Say They Have a U.S. Citizen Child Since 2010*, HUFFINGTON POST: LATINO POL. (Dec. 17, 2012), http://www.huffingtonpost.com/2012/12/17/deportation-more-than-200000-parents-removed-citizen-child_n_2316692.html.

¹⁷ Seth Freed Wessler, *Thousands of Kids Lost From Parents in U.S. Deportation System*, COLORLINES (Nov. 2, 2011), http://colorlines.com/archives/2011/11/thousands_of_kids_lost_in_foster_homes_after_parents_deportation.html.

¹⁸ JEFFREY S. PASSEL ET AL., URBAN INST., UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES (2004), http://www.urban.org/UploadedPDF/1000587_undoc_immigrants_facts.pdf.

¹⁹ *Unaccompanied Alien Children (UAC)*, REFUGEE COUNCIL USA, <http://www.rcusa.org/index.php?page=uac> (last visited May 28, 2013).

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How Our Child Welfare System Addresses Children, Youth and Families Affected by the U.S. Immigration Process, Davidson sets forth a number of recommendations for state and county child welfare agencies to consider when responding to the needs of immigrant children. He argues that these agencies have an obligation to serve both abused and neglected child immigrants, as well as their undocumented family members. These services should be culturally and linguistically appropriate. Davidson also urges child-serving agencies to develop written protocols for working with immigrant families and to provide specialized training to line staff and supervisors. Lastly, he suggests that a parent or legal guardian's immigration status should never be the sole basis for termination of parental rights and that those parents who are subject to termination proceedings should have full participation rights in such cases.

In their article, *Child Maltreatment and Immigration Enforcement: Considerations for Child Welfare and Legal Systems Working with Immigrant Families*, academic social workers Alan J. Dettlaff and Megan Finno-Velasquez explore the link between immigration status and a child's risk for abuse or neglect. Despite a longstanding assumption that the children of immigrant families are more likely to experience maltreatment, a major empirical study finds the opposite to be true—that children of immigrants are underrepresented in the child welfare population—although the authors acknowledge that further study is required to better understand the reasons for this finding. They also note that some children enter the foster care system not because they are abused, but because increased immigration enforcement efforts mean that some children are left without family members to care for them. The authors end their article with recommendations for child welfare practice and with a proposed agenda for researchers and policy makers going forward.

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Meghan Johnson and Yasmin Yavar's article, *Uneven Access to Special Immigration Juvenile Status: How the Nebraska Supreme Court Became an Immigration Gatekeeper*, addresses the challenges children face in using SIJS, or Special Immigration Juvenile Status, as a pathway to lawful immigration and permanent resident status. In their article, Johnson and Yavar, both attorneys, describe how in 1990, Congress adopted SIJS as a method for undocumented children who were victimized by parental abuse, neglect, or abandonment to achieve legal status. They go on to outline the complicated and lengthy process involved in securing this form of relief for a child client. They also illustrate through case law and examples, the challenges of involving states in the implementation of federal immigration policies. One memorable example is that, even though children are technically eligible to seek SIJS up until the age of twenty-one, juvenile courts in some states lose jurisdiction over maltreated children at the age of eighteen. In Johnson and Yavar's judgment, this patchwork of state juvenile court laws leads to disparities in the treatment of youth who are eligible for the type of relief envisioned by Congress when it adopted the SIJS legislation.

In her contribution to the symposium issue, *A Path to Citizenship Through Higher Education for Undocumented Students in the United States: Examining the Implications of Martinez v. Regents of the University of California*, attorney Diana Moreno advocates for increased access to higher education for undocumented students, not just as a gateway of opportunity for immigrant youth, but also for the benefit of a society increasingly in need of a college-educated workforce. As she notes, however, differing interpretations of federal law by state courts has meant that some students in one state are eligible for educational benefits, while similar students in other states are denied these same benefits. Moreno uses a recent California Supreme Court case, *Martinez v. Regents of the University of*

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California, to illustrate her point. At issue in that case was whether federal immigration law preempts a California law that allows undocumented students to pay in-state tuition for higher education.²⁰ Although Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 bars students from receiving a postsecondary benefit on the basis of residency, the Act does not define “benefit” or “residency,” thereby leaving it to individual states to determine whether the provisions of their in-state tuition policies comport with federal law. Reversing a lower court opinion, the California Supreme Court in *Martinez* held that the requirement under state law, that a student must have attended a California high school for at least three years to qualify for in-state tuition, is not a residency requirement and does not, therefore, conflict with federal immigration law. Although Moreno agrees with the holding in *Martinez*, her broader point is that federal immigration reform is the ultimate assurance that all youth, without regard to their status, have a meaningful opportunity to receive a college education. In particular, she suggests that passage of the proposed Development, Relief, and Education of Alien Minors Act (“Dream Act”) is the key to equal access to higher education for all students. Her article ends with a discussion of possible changes to the current language of the bill that would, in her view, make ultimate passage of the Dream Act more likely.

²⁰ The federal provision at issue in *Martinez* is Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). That provision contains the following language: “[N]otwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit . . . without regard to whether the citizen or national is such a resident.” Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009; 8 U.S.C.A. § 1623 (West 2012).

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Finally, anthropologist Lauren Heidbrink, in her article, *Criminal Alien or Humanitarian Refugee?: The Social Agency of Migrant Youth*, explores the legal system's ambivalent treatment of unaccompanied minors—children who are in the United States without a parent or legal guardian and who lack lawful immigration status. Does the law treat these children as vulnerable victims in need of special protections, or are they instead considered criminal wrongdoers, subject to the same penalties as their adult counterparts? Heidbrink's article catalogues recent changes in federal policy that suggest a more "humanitarian" approach to unaccompanied children than existed in the past. While noting that children can now seek potential relief under special visas and asylum procedures, she also recognizes that these options are "difficult to obtain and easy to lose." Heidbrink concludes her article with the observation that undocumented children themselves may hold the key to breaking through the stereotypes of "criminal alien" or "powerless victim." She hails the growing willingness of young people to refuse to accept immigration policies based on labeling and to advocate for their own rights. She analogizes the growing DREAMers movement to the gay rights movement, in which visible activism by those most directly impacted by traditional norms became the catalyst for social change.

As the articles in this volume suggest, although comprehensive immigration reform is once again on the nation's agenda, at present it is unclear what shape it will take or the degree to which it will address issues affecting children and youth. It is our hope that the articles in this symposium issue, and the reactions and commentary they generate, will help inform the debate in a way that serves the needs of children, families and, ultimately, the nation.