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U.S. IMMIGRATION LAW: CHILDREN AS A UNIFYING MEANS TO IMMIGRATION REFORM

A Thesis

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By

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David was born in Mexico but brought to the United States when he was six months old and lived his entire life here believing he was a United States citizen. His parents were lawful permanent residents since before David was born, but through misinformation had failed to obtain proper papers for their son. Not until David was in his mid-twenties attempting to petition his new wife for residency at the American embassy in Mexico did he discover the truth. Not only was he not a citizen of his home country, he was now permanently banned from returning to the U.S. as a consequence for falsely claiming citizenship. Despite his sincere belief in his legal status in the U.S., David was permanently barred for his parents' error.

Carlos was five years old when he was permanently barred from residency status in the United States. Having overstayed a tourist visa as a toddler, Carlos' lawful permanent resident parents took an emergency visit to Mexico to visit his dying grandmother. Despite having "waited in line" for over 5 years to gain residency through his family reunification petition, Carlos was not only ultimately denied but permanently barred from residency. Carlos would not be eligible for discretionary relief until he completed the first ten years of his bar outside the United States.¹

The above composite cases represent clients that I see on a daily basis through the course of my work as a BIA Accredited Representative with Catholic Charities Chicago. As a non-profit legal practitioner in a leading immigrant community, I encounter a significant volume

¹ The "David Case" and "Carlos Case" presented are composite cases loosely based on real life cases seen in the course of my practice as a Board of Immigration Appeals Accredited Representative at Catholic Charities in Chicago, IL. See pages 33-42 for an in-depth presentation and analysis of the composite cases.

and variety of cases. My specialty is family reunification law,² and as an advocate the cases which cause the most angst frequently involve children. The “David case” and “Carlos case” are examples of such cases and depict proper outcomes under the law as it is written and applied as of March 2011.

U.S. immigration law has become a complex web of social, political, and legal realities which impacts both immigrant families and the nation as a whole. The voices in the polarizing debate today vary greatly. Some bemoan the anti-immigrant attitude calling it “racism” or “classism,” adding that the nation lacks respect for immigrants who “do the jobs Americans aren’t willing to do.”³ Others cry foul when they see “floods of illegal aliens invading our land” that lack respect for the “rule of law” and surreptitiously enter the U.S. by not “waiting in line.”⁴

The Illegal Immigration Reform and Responsibility Act of 1996 (IIRAIRA) was one attempt to limit the “floods” of illegal aliens and tighten restrictions on undocumented immigrants already present in the U.S. In reviewing IIRAIRA and its effects, scholars have largely focused on the changes to the removal system and questions of due process.⁵ Less

² Family reunification is the dominant avenue through which U.S. legal status is authorized, and involves a lawful permanent resident or citizen of the U.S. requesting legal status for a qualifying family member.

³ Daniel Gross, “Dirty Work: What Are the Jobs Americans Won’t Do?” posted January 12, 2007, <http://www.slate.com/id/21574831> (accessed March 12, 2011).

⁴ Pablo Manriquez, “There is No Line for most Unauthorized Immigrants to Legally Come to the U.S., But There Could Be” posted September 14, 2010 http://www.huffingtonpost.com/pablo-manriquez/there-is-no-line-for-most_b_713948.html (accessed March 12, 2011).

⁵ Michelle Magnus, “The Expanding Definition of Aggravated Felonies and the Retroactive Effect of Recent Reforms on Lawful Permanent Residents: An Analysis of the Illegal Immigration Reform and Responsibility Act (IIRAIRA),” *Immigration and Nationality Law Review*, 22 (2001): 717-731.

work has been done to assess the effects of IIRAIRA on administrative applicants for immigration benefits.

The treatment of children as a distinct population under various areas of United States law has been reviewed and debated since the 1890s.⁶ Many legal frameworks for justifying treating children as a distinct population consider minors' lack of agency and therefore lack of culpability in violations of law.⁷ Scholars have long noted the gap between special safeguards which exist for children in family law, labor law, and welfare law; compared to those under immigration law available to immigrant and citizen children.⁸ This is particularly true surrounding the role of the notion of "best interest of the child" both in the writing and implementation of the law.⁹

The immigration debate is largely divisive, even as our national commitment to protecting children is unifying. Perhaps if advocates for reform on either side of the debate began with reform for children, concessions could be made leading to more coherent and comprehensive policies for our nation. Some academics and practitioners have noted the irony of the abundance of state and federal policies which integrate undocumented children into society even as children are legally marginalized by immigration law.¹⁰ The importance of

⁶ Melissa Klapper, *Small Strangers*, (Chicago: Ivan R. Dee, 2007), 145-146.

⁷ David B. Thronson, "Entering the Mainstream: Making Children Matter in Immigration Law," *Fordham Urban Law Journal* 39 (November 2010): 393-413.

⁸ Thronson, "Entering the Mainstream," 393-413.

⁹ Brigitte Carr, "Incorporating a 'Best Interests of the Child' Approach into Immigration Law and Procedure," *Yale Human Rights & Development* 12 (2009): 120-159.

¹⁰ Ragini Shah, "Sharing the American Dream: Towards Formalizing the Status of Long-Term Resident Undocumented Children in the United States," *Columbia Human Rights Law Review* 39 (Summer 2008): 637-679.

family unity in the lives of children has been thoroughly explored¹¹ as well as the very limited recognition of family as “nuclear” unit under family reunification law.¹² As policy memoranda have been published highlighting and defining the various components of IIRAIRA, little has been done to ensure that its impact on children is purposeful and efficacious.

This thesis seeks to evaluate U.S. immigration law and policy in light of their observable impact on children. My purpose is to review and assess the efficacy of current family reunification law specifically as regards minors: its clarity or ambiguity, consistency in application, and its effects on respect for the rule of law and just consequences. Section one addresses normative dimensions of justice including the legal notion that a punishment meted out should be proportionate to the crime of the perpetrator, the idea of consistency as a necessary though insufficient aspect of justice, and the importance of understanding the complexities of the casually used notion of the “rule of law.”¹³ Section two considers the legal and social precedents for special consideration of minors through a historical review comparing the development of immigration law and the concept of “childhood.” Section three details specific failures under immigration law for children with a special focus on IIRAIRA’s additional grounds of inadmissibility. My goal is to expose the consequences such laws have on minors as well as the ways significant inconsistencies undermine the immigrant, adjudicator, and nation’s respect for the law. My analysis will conclude with recommendations for reform in light of the

¹¹ Monique Hawthorne, “Family Unity in Immigration Law: Broadening the Scope of ‘Family,’” *Lewis & Clark Law Review* 11 no. 3, (September 2007): 809-833.

¹² Hawthorne, “Family Unity in Immigration Law,” 809-833.

¹³ The “rule of law” is a phrase frequently used rhetorically by the media and academia alike to suggest that when immigration laws are broken there is a break-down of respect for the law. This paper explores several different approaches to understanding how immigration laws may govern.

plenary power doctrine and the notion that minors without legal status may not expect protection under our laws.

The heart of this paper will be an analysis of the Illegal Immigration Reform and Responsibility Act (IIRAIRA), a draconian law passed in 1996 which continues to have far reaching consequences for children; those both lawfully and unlawfully present.¹⁴ Academics and advocates have written a great deal on the harsh nature of IIRAIRA and its consequences, but the vast majority of scholarly work to date focuses on the treatment of criminal aliens and their family members as a result of changes in the removal system.¹⁵ The impact of changes in administrative adjudications has been largely overlooked. In particular, administrative effects on minor children have been all but ignored. Due consideration for non-criminal aliens under IIRAIRA must recognize the often irreversible consequences for minors with little autonomy and even less responsibility for violations of civil immigration law.

Failing to consider the impact of law and policy on the most innocent and vulnerable populations among us is detrimental to the rule of law and the preservation of an orderly and just society. Children are one of the clearest examples of an innocent and vulnerable population harmed by the lack of coherency and consistency in our immigration laws. The sheer volume of children present in the U.S. directly impacted by our immigration laws supports this premise. According to an August 2010 Pew Hispanic Center study, twenty-four percent of all children under the age of eighteen were immigrants themselves or offspring of

¹⁴ Pub. L. 104-208.

¹⁵ Magnus, "The Expanding Definition of Aggravated Felonies and the Retroactive Effect of Recent Reforms on Lawful Permanent Residents," 717-731.

foreign born parents.¹⁶ Indeed, children who are part of immigrant-led families comprise “the fastest growing segment of the (United States) population.”¹⁷

Considerations for Realizing Justice for Minors under Immigration Law

As Carlos’ and David’s stories evidence, current immigration law is convoluted and inconsistent, leading to significant consequences for minor children and their families. Immigration law is years behind the development of other areas of law impacting children, often justified by the “legality” of the child in question. Particularly in the area of family reunification, immigration laws directly affecting children rarely consider the agency of the child. Ironically, children are held culpable¹⁸ for breaking immigration laws yet are excluded from reaping the benefits many adults may enjoy.¹⁹

Even in affirmative proceedings (those involving the adjudication of benefits as opposed to defense from removal) minors’ interests are silent at best, actively thwarted at worst. No place is this more evident in the Immigration and Nationality Act (INA) than under IIRAIRA. Here, it is instead clear that perceived national security and economic interests (laced with overt and discrete racial discourse) by and large have dictated immigration law in the United States. In amending the law, Congress is heavily influenced by constantly changing policies. A clear understanding of the law as written, its application, and its measurable

¹⁶ Jeffrey Passel, “Unauthorized Immigrants and Their U.S.-Born Children” Pew Hispanic Center posted August 11, 2010 <http://pewhispanic.org/reports/report.php?report10=125> (accessed May 7, 2011).

¹⁷ David Thronson, “Kids Will Be Kids?: Reconsidering Conceptions of Children’s Rights Underlying Immigration Law,” *Ohio State Law Journal* 63 no. 979, (2002): 1.

¹⁸ Culpability under the law usually considers the agency of the individual; that is the individual’s responsibility for making moral decisions. This concept enters the legal arena of *mens rea*, meaning “guilty mind” and is outside the scope of this thesis.

¹⁹ Specific examples of administrative immigration benefits are discussed; see page 14.

effectiveness is often lacking. In part this is due to the complexity of economic, social, and political factors directly impacted by immigration law. The discursive nature of immigration further complicates matters as opposing opinions frequently rely more on rhetoric than fact.²⁰

As minors dependent on their parents, guardians, or the state, thousands of children each year face life-altering consequences due to the implementation of immigration law. Regardless of their motivations to immigrate (most often family reunification, physical safety, or a search for viable economic opportunities) the lack of legal options and safeguards for minors under immigration law is startling. It has been remarked that it is tough to reach a consensus on how to treat immigrants who are here lawfully, even more so the treatment of those who are unlawfully present.²¹ I would argue that an inverted notion could be framed around children. Determining how to respond to minors who are here undocumented must be less complex than responding to their parents. The debate regarding immigration law and particularly undocumented migration consists of a cacophony of voices wherein those with differing positions have difficulty listening to one another much less coming to a consensus. As we attempt to inform ourselves of the relevant issues and gain a decent understanding of existing immigration law, perhaps a wise place to begin would be to look at the law as it affects minors.

There is a pervasive assumption that the law is a positivistic body of language, positivistic in that its objectivity is both inherent and obvious in its nature. Facts exist and are

²⁰ Discourse theory is used throughout this paper in the Michael Foucault sense, referring to the power dynamics of language which limit ways of knowing and thinking. Discourse theory as it relates to immigration is discussed beginning on page 15.

²¹ Hiroshi Motomura, "We Asked for Workers, but Families Came: Time, Law and the Family in Immigration and Citizenship," *Virginia Journal of Social Policy & the Law* 15, no. 2 (2008): 103-118.

adjudicated under a predetermined rubric of knowable statutes and regulations. Such simplification of the complex web of governing immigration laws and their often incoherent interaction hides their political nature. The modern day discourse of America as a land governed by the “rule of law” is rendered meaningless if the governing laws are too complex and incoherent for consistent interpretation and application. In other words, if statutes and their implementing regulations are not sufficiently coherent to enable officials to apply them consistently or to allow immigrants to know what is expected of them, perhaps they are less accessible and knowable than common sense would suggest. To be sure, written consistency between laws and their practical application to real life scenarios is not sufficient to realize justice, yet clearly coherency is a necessary component of a just and proper rule of law.

The rule of law is historically tied to protection from violence and defense of civil liberties. In the United States the rule of law applies not just to civilians but rather to government as well. Laws in the U.S. provide a measuring stick to ensure that both the government and its people honor a predetermined set of rules. Anti-discrimination laws, due process,²² and equal protections can be traced to a fundamental understanding of the importance of protecting the rule of law.²³

Particularly in immigration law, the notion of the “rule of law” is often used in a highly rhetorical sense and means, in fact, whatever the speaker intends.²⁴ Law makers, the media,

²² “Due process” as used here refers to a fundamental sense of fairness protected in criminal proceedings including the right to know the charges brought, the right to representation, and the right to a fair trial.

²³ Samuel Donnelly, “Reflecting on the Rule of Law: Its Reciprocal Relation with Rights, Legitimacy, and Other Concepts and Institutions,” *Annals* 603 no. 1, (January 2006): 37-53.

²⁴ Motomura, “The Rule of Law in Immigration Law,” 139.

academics, and the public use the “rule of law” to promote their political agenda. Indeed, the opening remarks to a 1997 report by the Commission on Immigration Reform read as follows:

“We are a nation of immigrants, dedicated to the rule of the law. That is our history – and it is our challenge to ourselves....It is literally a matter of who we are as a nation and who we become as a people. *E Pluribus Unum*. Out of many, one. One people, the American people.”²⁵

There are a variety of ways to conceive of the rule of law and hidden assumptions which may change the meaning of the phrase. According to Motomura in “The Rule of Law in Immigration Law,” there have been three distinct understandings of the concept of the rule of law under immigration law in the U.S. The first is “immigration as contract,” the second “immigration as affiliation,” and the third “immigration as transition.” Of the three perspectives the two that are prevalent in modern mainstream media are the notions of immigration as a simple contract and immigration as affiliation.²⁶

Immigration as a simple contract claims that the execution of the rule of law works as an agreement between two parties; the government and the immigrant. The simple contract view of immigration law reduces immigration law issues to a matter of agreement. Individuals interested in participating are expected to sign on to a set of predetermined expectations as outlined and enforced by the government. The view therefore emphasizes “enforcement only”

²⁵ Barbara Jordan, August 1995. Chair, U.S. Commission on Immigration Reform “Becoming an American: Immigration and Immigrant Policy” December 14, 1993-January 17, 1996.

²⁶ Motomura, “The Rule of Law in Immigration Law,” 142.

methods as viable strategies for protecting the rule of law.²⁷ Immigration law is written by the will of the people via the legislative branch, and immigrants through their presence in our nation have a responsibility to respect the terms of the contract. This model presupposes that there is something distinctly different between the rights of citizens and those of non-citizens. While citizens have the right to liberty, due process, equal treatment, and legal representation; non-citizens may not.²⁸

Immigration as affiliation emphasizes not a contractual agreement between two parties but rather a totality of circumstances including both the government's and immigrants' interests. It suggests there is something inherently important to family ties, good moral character, positive contributions to the land and economy, and a long history of living as a "law abiding" individual. If immigrants set down roots and contribute to the land and its people, immigration as affiliation considers the immigrant's presence justified.²⁹ In the history of immigration law outlined here, examples abound of laws written from either dominant perspective. Examples of laws written from a contractual understanding of immigration law include the Chinese Exclusion Act of 1882 and IIRAIRA of 1996.³⁰ Examples of laws written via an affiliation perspective of immigration law include the Hart-Cellar Act of 1965 and IRCA Amnesty program of 1986.³¹

²⁷ "Enforcement-only policies" focus solely on ensuring society follows the letter of the law often to the exclusion of considering the appropriateness of the law, the factors motivating breaking the law, and/or the law's effectiveness.

²⁸ Motomura, "The Rule of Law in Immigration Law," 139-153.

²⁹ Motomura, "The Rule of Law in Immigration Law," 143.

³⁰ 47th Congress Session I, 1882; Pub.L. 104-208 (1996).

³¹ Pub L. 89-236, 1965; Pub. L. 99-603 (1986). These provisions are discussed in greater depth on pages 23-24.

I would argue that an understanding of the rule of immigration law as a matter of affiliation has two significant deficiencies. First, immigration law as strictly a question of affiliation is illogical in that it assumes presence, ties, roots, and a good record have no beginning. It does not provide a thoughtful response to those who have broken immigration laws and yet have not been here long enough to develop these desirable characteristics. A second deficiency is that it does not adequately address civil immigration law violations, the notion of deterrence, and questions of sovereignty. Violating laws must have consequences if the ruling authority is to be credible.³² Good conduct and meaningful connections to the United States may simply not suffice to justify regularizing the status of significant and repeated immigration law offenders. Other areas of law recognize that legal violations carry consequences. Drivers slow down when they see a police car precisely because they are aware if caught there will be a monetary consequence to speeding. The voting public has determined safety on the roads is important enough to enforce and has therefore given power to authorities to enforce laws with hopes of protecting it.³³ Traffic laws would have no meaning if compliance were optional based on good character, family ties, and humanitarian concerns. Likewise, immigration laws written solely based on affiliation considerations would lack meaning and credibility.

Conversely, an understanding of immigration law as a contract addresses sovereignty concerns as well as consequences for breaking the law. A strictly contractual view, however, is incomplete and likely to lead to draconian laws that do not consider the totality of

³² Donnelly, "Reflecting on the Rule of Law," 37.

³³ Motomura, "The Rule of Law in Immigration Law," 142.

circumstances. I would argue that a complex view of immigration as contract is more appropriate, as it considers the law's subjectivity both as it is written as well as interpreted and applied which demands discretion and due process. A complex view of the rule of law recognizes that a lack of discretion and due process for non-citizens is unjustified not only from a general human rights perspective but also given the plethora of mixed status families present in the U.S.³⁴ It further considers the unspoken policy of acceptance of immigration violations via the lack of sanctions on the business community which capitalizes on the contributions of undocumented immigrants through the supply of cheap labor and access to cheaper goods and services.

A clear example of this is found in the 1986 IRCA legalization. The provision was passed in part due to the stipulations included to prevent the recruiting and hiring of undocumented workers.³⁵ Yet little meaningful implementation and even less enforcement occurred. More recently the half-hearted implementation of E-verify comes to mind.³⁶ While intended to electronically spot the use of improperly registered social security numbers, its optional participation and faulty design truncates its effectiveness.

The realities of a lack of discretion and very limited due process as well as a lack of sanctions on employers contravene the notion of immigration as contract.³⁷ Equality in the law is not the basis of justice under the contract view, rather it is protecting the expectations of

³⁴ A mixed status family is comprised of some family members with lawful immigration status and others without status. According to Jeffrey Passel at the Pew Hispanic Center, 79% of children born to unauthorized immigrants are part of mixed status families. Jeffrey S. Passel and Paul Taylor, Pew Hispanic Center, August 11, 2010.

³⁵ Pub. L. 99-603 (1986).

³⁶ E-verify, www.dhs.gov-E-verify last updated April 6, 2011 (accessed May 7, 2011).

³⁷ Motomura, "The Rule of Law in Immigration Law," 139-153.

those writing and enforcing the law. There are two main parties involved in the “contract” of immigration law: the government and immigrants. To the extent that immigrants fail to abide by the agreement set forth by governing bodies, the contract has been broken and consequences follow. The difficulty in viewing immigration law as contract is that it assumes the law is knowable. Governing bodies break their commitment to the contract when the law is not knowable. If immigrants are expected to comply with the terms of the agreement, the terms must be accessible. The cases of Carlos and David evidence the law’s inaccessibility. Despite sincere attempts to comply with the government’s expectations, their parents fail to do so as a result of the law’s ambiguity, constantly changing laws, and uneven application. Additionally, as minors, Carlos and David are held indefinitely responsible for decisions they did not make.

One key component to enhancing respect for the rule of law is “treating like cases alike.”³⁸ If the law is simplified to a functioning contract which dictates relatively straightforward expectations, then it follows that mechanisms to ensure uniform applicability and properly executed determinations will be less necessary.³⁹ A lack of meaningful federal immigration law has encouraged some states to take matters into their own hands. An example of an overly simplistic strictly contractual understanding of immigration law can be

³⁸ Motomura, “The Rule of Law in Immigration Law,” 139-153.

³⁹ Motomura, “The Rule of Law in Immigration Law,” 142.

found most recently in the controversial Arizona state legislation known as SB 1070 passed summer of 2010.⁴⁰

One portion of the legislation authorized public officials such as police officers to check immigration status during any encounter with a civilian. The law requires that immigrants must carry identification verifying their lawful status, suggesting that one particular document exists which carries self-evident status verification. If an immigrant fails to carry this “status document” he or she is subject to detention and possible removal through ICE involvement. The “contract” between government and immigrant is that government officials will stop and detain immigrants if they do not produce their “status document.”

This application of law is overly simplistic and fails to consider factors which make abiding by the contract virtually impossible for immigrants through possibly no fault of their own. In reality, a person may be here lawfully without any documents to prove it (for example Cubans, deferred action grantees, etc.) or conversely may be here unlawfully with legally issued documents which suggest otherwise (such as an Employment Authorization Document holder whose underlying adjustment of status was denied). For example, status documents often have expiration dates imprinted that no longer correspond to the facts of the case. This includes work authorization cards whose underlying basis has been terminated thus rendering apparently current documents null and void. This demonstrates the nuanced layers which render a simple violation of the contract of SB 1070 implausible. Laws formed from simple contractual understandings, like SB 1070, may be nearly impossible for immigrants to obey or

⁴⁰ Arizona State Legislature, “SB 1070 Technical Correction; Unlawful Aliens; Transporting,” http://www.azleg.gov/DocumentsForBill.asp?Bill_Number=Sb1070&session_Id=102&image.x=8&image.y=10 (accessed February 24, 2011).

the government to meaningfully enforce. Furthermore, properly written and applied federal laws would preclude state governments from establishing laws concerning a clearly federal matter.

Additionally, one must consider the sheer volume of differing documents which may be used to verify lawful status:⁴¹ “green cards” (of which three different styles are still valid and in circulation), I-797 Welcome Notices for lawful permanent residents, work authorization cards, refugee/asylee/Cuban I-94s, non-immigrant visas, non-immigrant I-94s and approval notices, deferred action grants, withholding of removal grants, I-797 letters of extension for conditional residents, and many more. To suggest that non-immigration government officials should be able to identify valid status documents under current immigration policy is ludicrous. Indeed, many experienced immigration practitioners and officers of immigration themselves are unable to do so without significant research. None-the-less immigration as a simple contract claims that immigrants are responsible to protect the expectations of those writing and enforcing the law, however impossible such expectations may be in actuality. This impedes not only the right of the individual immigrant to know and understand what is expected of him, it threatens the credibility and effectiveness of laws written. Finally, it seems to invite arbitrary application of the “rules,” limiting the possibility of effective accountability of authorities.

A less simplistic view of justice in immigration law recognizes that the law is ambiguous and must be applied to a nearly infinite combination of life circumstances and human decisions. As a result of the vast variability of cases, informed discretion is necessary. Such discretion

⁴¹ Lawful status is defined in 6CFR 37.3.

must in turn be held accountable by due process. Without such provisions the integrity of the “rule of law” is virtually nonexistent.⁴²

Discourse theory provides a useful tool when considering language and power in immigration law, shedding light on the dynamics of the use of the phrase “rule of law.” Assessed through the lens of discourse theory, immigration-as-simple contract fails immigrants and citizens alike. According to Foucault, discourses operate by conditioning the possible, giving legitimacy to the speakers (those with power) and creating future discourse. The immigration policy of the United States has been heavily influenced by discursive power dynamics since the nation’s inception. From the sanctioned historical use of the term “alien” to describe non-citizens in the governing statutory body of law to the assumption of opposition between national security and immigration reform in modern day rhetoric, the topic of immigration to the U.S. provides an easy arena for analysis of discursive power.

The dichotomy of restrictive versus open immigration and enforcement versus legalization reform continues to be prevalent today in the discourse on American immigration. As with any oppositional framework, such discourse limits the possibility of conceptualizing policy alternatives.⁴³ It places the options in a binary relationship where only two possibilities are conceivable: either pro-immigration or anti-immigration, pro-restriction and the “rule of the law” as discussed above, or pro-immigrant and “welcoming the stranger.” The binary nature of open versus closed door policies and protection of civil rights versus insistence on the importance of national security frames the complex issues in such a way that limit the

⁴² Motomura, “The Rule of Law in Immigration Law,” 139-153.

⁴³ Edward Said, *Orientalism* (New York: Random House Inc, October 1979), 46.

possibilities of understanding. Such discursive limitations inhibit policy makers' ability to not only understand the topic but to creatively formulate comprehensive policies. Edward Said's book *Orientalism* makes a powerful case for the impact discursive reality has on material reality, and American immigration policy is no different.⁴⁴

The discourse of immigration in the United States is hidden even as it is obvious.⁴⁵ The latent nature of hegemonic discourse enables that which is dominant to retain its power. It is only by bringing to light the impact of such common sense assumptions taken for granted by all (legislative bodies, implementing bodies, the voting public, and immigrants themselves) that the power of the dominant discourse may be acknowledged and alternatives may be envisioned.⁴⁶

According to Edward Said in *Orientalism*, dominant hegemonic discourse is dangerous not because it is limited in its abilities to describe, understand, and know, but rather because *it pretends not to be*.⁴⁷ The modern discourse of "following the rule of the law" assumes a positivism that the law 1) is consistent with Congressional intent 2) is knowable and understandable 3) is possible to consistently be extrapolated to real-life scenarios (for both adjudication officers and immigrants) 4) is internally consistent such that obeying the terms of one section will not violate the terms of another.

⁴⁴ Said, *Orientalism*, 58.

⁴⁵ Examples touched on here include Edward Said's notion of "other-izing" found in the terms "alien" and "illegals," the oppositional framework of immigration reform versus immigration enforcement, and a presumption of positivism in the law (that the law is objective by nature).

⁴⁶ Said, *Orientalism*, 116.

⁴⁷ Said, *Orientalism*, 116.

In the Carlos case, the end result of a permanently barred 5 year old whose family resides legally in the United States is clearly inconsistent with Congressional intent in writing IIRAIRA. The convoluted terms of the law have limited its accessibility and encouraged inconsistent application. Finally, the logical inconsistency is evident of exempting children from accruing unlawful presence for the 10 year bar and not for the permanent bar.

Legal and Social Precedents for Special Consideration of Minors

The concept of “child” and “childhood” is a modern development, heavily influenced by western thought and practice. Philippe Aries is credited with the first historical study of the notion of childhood in his work *Centuries of Childhood* published in 1960.⁴⁸ Despite just fifty years of analysis, conclusions regarding the nature of childhood and appropriate treatment of children have varied significantly since that time.

The foundation for a philosophy of the child is often credited to John Locke (1632-1704) who argued that children are not fully rational and are therefore in need of an education to learn to reason. A being that lacks full ability to reason lacks the ability to choose freely and as a result is dependent on others for moral and rational decisions. Locke believed knowledge was learned through experience, and viewed children as “imperfect, incomplete versions of their adult selves.”⁴⁹ Locke’s perspective of the child sees children as dependent beings not fully formed, and not only vulnerable toward those who would harm but actually incapable of self-direction, as not just people lacking a voice but as incapable of having a voice.

⁴⁸ David Archard, *Children: Rights and Childhood* (London & New York: Routledge, 1993), 15.

⁴⁹ Archard, *Children: Rights and Childhood*, 2.

Much law and policy regarding minors concurs with John Locke's view. A clear legal example of this is found in the definition and application of statutory rape. The notion of statutory rape views minors as incapable of consenting to sexual intercourse with adults.⁵⁰ State laws seek to protect minors from abusive sexual relationships which often involve a severe difference of power, yet in so doing take a minor's agency away by their seemingly arbitrary application. For example, a seventeen year old minor dating a forty year old male may be considered a victim of statutory rape as might a seventeen year old minor in a relationship with a twenty-one year old.⁵¹

The notion of "childhood" as a distinct time frame in a person's life is a relatively recent phenomenon. Modern childhood very much involves a separation from the adult world: children are responsible for playing, socializing, and learning, work is largely left to adults. They are distinguished from adults from a number of different viewpoints. Children are considered unable to be held responsible for many choices due to their moral immaturity, are considered incapable of mature reasoning abilities, and are dependent upon adults for meeting their basic needs. They are further sexually distinct from adults in their immaturity and physical inability to procreate as well as their social aptitude restricting their participation in community leadership.⁵²

Yet between the late 1960s to early 1970s theories of childhood developed which sought to liberate children from the oppressions of the adult world. With the growth of the language of "rights" came an emphasis on the need to protect children's basic rights for safety,

⁵⁰ Archard, *Children: Rights and Childhood*, 2.

⁵¹ 730 ILCS 5/12-12.

⁵² Archard, *Children: Rights and Childhood*, 25.

shelter, and sustenance but also to recognize the autonomy and self-determination of children in their choices regarding schooling, travel, dress, and guardianship. Additionally, modern socialization theory emphasizes the importance of children being socialized with other children (assuming children cannot learn proper socialization from adults). Children spend their time in daycare or school with peers, at church children are placed in the nursery or taken to “children’s church,” etc. The life of a child in modern western society is very distinct from the adult world.⁵³

This was not always the case, however. It was not until the economic development of the west in the late 1700s to early 1800s that children were able to quit working alongside adults and focus on school instead.⁵⁴ As social roles changed so did children’s dress and demeanor. Prior to the industrial revolution children were depicted in paintings as mini adults. Boys looked like miniature versions of men, girls like mini-women. Common children’s dress was simply a smaller version of adult clothing, and children played games (such as gambling) which are today considered appropriate only for adults.⁵⁵ In the mid-late 1800s children became dependent creatures, fathers worked industrial jobs away from the home and mother’s had fewer children and therefore more closely sheltered their children at home. Additionally, the gap between genders grew, evidenced in increasingly genderized children’s clothing and toys.

⁵³ Hugh Cunningham, *Children & Childhood in Western Society Since 1500* (London: Longman, 1995), 44.

⁵⁴ Cunningham, *Children & Childhood*, 45.

⁵⁵ Cunningham, *Children & Childhood*, 45.

Initially, protecting and segregating children was encouraged by the philanthropic realm.⁵⁶ The state was hesitant to intervene as child rearing was a sacred right to be implemented by the family. Philanthropists promoted a proper childhood as a romantic worry-free time of life devoted to learning, development, and play in the protection of the home nurtured by mom and financed by dad.

The rhetoric of the separation of state and family decisions for children began to change when a new emphasis was placed on the political agenda's need to form a competitive state. Protection of the child shifted from philanthropy to governmental entities in the late 1890s in the U.S. With the state involvement childhood became increasingly distinct from adulthood through compulsory education, the establishment of the juvenile justice system, and the development of child-labor laws.⁵⁷ The establishment of juvenile courts occurred first in Illinois in 1899; and was based predominantly on a model which emphasized reform rather than retribution. The courts were given preventative powers and sentences were indeterminate in that they were adjusted based on a child's behavior in response to punishment. Finally, the juvenile courts implemented a probationary system designed to capitalize on adult mentoring and rewards for good behavior.⁵⁸

Scholars today point to the modern irony in the study and analysis of childhood and protection of children's rights. On the one hand children have been increasingly categorized as a select group in need of special protections and legal exceptions due to their dependent nature and inability to reason fully as adults can. This logic suggests that as children are limited

⁵⁶ Cunningham, *Children & Childhood*, 136.

⁵⁷ Klapper, *Small Strangers*, 145-146.

⁵⁸ Klapper, *Small Strangers*, 145.

in their ability to reason they should be afforded special leniency and protections from themselves and others. On the other hand the discourse of rights and the best interest of the child promote treating children as independent self-sufficient beings (adults) with agency, autonomy, and power. Scholars have pointed out the inconsistencies between the two perspectives of the child and the need for consensus amongst advocates both in dialogue and implementation.⁵⁹

The desire to pit the two perspectives against one another is natural yet unnecessary. To the contrary, the best interests of a child are compatible with the notion of a need for special protections and provisions. The best interests of an autonomous adult are frequently illusive, how much more clouded those of a child who is limited in language, functionality, and reasoning ability. In nearly every arena of law in the United States the best interest of the child is a standard which carries significant weight in decision making. This is true in welfare law, custody and guardianship proceedings, and child abuse and neglect to name a few. Labor laws protect children's interests by preventing exploitation, and compulsory education laws provide all children with the right to a basic education.⁶⁰ It is my assertion that a failure to protect the best interests of children in immigration law is not only inconsistent with legal precedents and our declared national values; it is often lastingly harmful to both foreign national and citizen children as well as universal respect for the law.

My assertion is not that the best interest of the child is the only important consideration in immigration law adjudication. Clearly this would be an over simplification. It is not that the

⁵⁹ Archard, *Children: Rights and Childhood*, 186.

⁶⁰ *Plyler v. Doe*, 457 U.S. 202 (1982).

U.S. government ought to routinely ignore national security or economic considerations. Rather, the best interest of the child should provide a starting point both for writing and implementing effectual immigration laws. Children hold two significant claims to their interests being taken seriously: first, they are uniformly innocent of decisions to break laws, and second, they are and always have been the foundation of society. Throughout history societies that invest in children's protection and education, and by extension the family as their nucleus of support and formation, are healthy, productive, and successful. Indeed considering the true "best interests of the child" refers to both policies that are child-centered allowing the voice of a child to be heard, as well as a substantive legal standard that considers the "safety, permanency, and well-being of the child" in immigration proceedings.⁶¹

When considering the flaws in immigration law as regards protecting children's best interests it is important to understand the history of immigration law in the U.S. One of the oldest aspects of immigration law involves the word "alien." The term alien is a legal term for all foreign national non-citizens and is still commonly used today, over two hundred years later. It has been in use in U.S. immigration policy since prior to 1798 when President John Adams signed the Naturalization Act (also known as the Alien Act). The Alien Act clarified the number of years a free white person must reside in America for the purposes of citizenship.⁶²

The Chinese Exclusion Act went into effect as early as 1882 prohibiting Chinese from immigrating to the United States and deeming the over one hundred thousand Chinese already present ineligible for citizenship. In 1917 the Immigration Act commonly known as the

⁶¹ Carr, "Incorporating a 'Best Interest of the Child' Approach into Immigration Law and Procedure," 124.

⁶² James Ciment, ed. *Encyclopedia of American Immigration* (Armonk, New York: M.E. Sharpe, 2001), 1278.

“Literacy Act” or the “Asian Barred Zone Act” not only restricted all immigrants based on literacy levels, it was also responsible for deeming non-Japanese or Philippine Asians as ineligible to become citizens based solely on ethnic origin.⁶³ In 1921 Congress passed the first quota act limiting annual immigration from any given country to three percent of the population already living in the United States as of the 1910 census. The quota act was amended several times but was the main governing body of law until 1952 and essentially served white Europeans to protect them as the majority race of America.⁶⁴

While the Chinese Exclusion Act was repealed in 1943, the Asian Barred Zone Act was not officially changed until 1952.⁶⁵ The current federalized body of immigration law was unified in 1952 and is still known today as the Immigration and Nationality Act (INA). In it, all blanket exclusions based solely on race were abolished although significant preference was still granted to white Europeans.⁶⁶ The INA dramatically altered the face of immigration policy as it codified U.S. immigration law into one centralized governing body of law. While it continued much of the previously existing quota system, the INA placed new importance on the question of national security. In light of the Cold War and the fear of communism, such a development is perhaps not surprising.

By 1965 the Civil Rights movement was well underway. There was a newfound emphasis on tolerance and humanitarianism as a reaction to the fear driven policies of the Cold War. Under the Lyndon Johnson administration, changes in immigration law reflected the

⁶³ Ciment, *Encyclopedia of American Immigration*, 1290.

⁶⁴ Ciment, *Encyclopedia of American Immigration*, 1293.

⁶⁵ U.S. Immigration & Nationality Act (McCarren-Walter Act 1952).

⁶⁶ While racial restrictions were officially terminated in 1952, not until 1965 did the end of the quota system realize significant change.

rising value of equality and the basic human rights of all, regardless of ethnicity. Congress passed a significant overhaul of the 1952 version of the INA abolishing the quota system and instead establishing a system focused on family reunification. The dramatic change in the structure of immigration to the U.S. brought about by the 1965 amendment known as the Hart-Celler Act conceived of a system not based on race or national security but rather on the importance of family and value for relationship.⁶⁷ The effect of the overhaul of immigration law through the Act was to bring the best and the brightest by recruiting those with skills and resources, as well as those least educated and with fewest skills through the new emphasis on family reunification. Today one-third of all U.S. Noble Prize winners are immigrants. Immigrants are over represented among people with doctorates in the U.S. as well as those who have not graduated high school.⁶⁸

Immigration policy in the U.S. is often formed as a reaction to the current political nature of our country's relationship to immigrants. The dichotomy of restrictive immigration/open immigration and enforcement/legalization reform continues to be prevalent today in the discourse of American immigration. As with any oppositional framework, such discourse limits the possibilities of conceptualizing policy alternatives. It places the options in a binary relationship where only two possibilities are conceivable: either pro immigration or anti-immigration, pro-restriction and the "rule of the law" as denoted in popular modern day rhetoric, or pro-immigrant and welcoming the new comer.

⁶⁷ Pub.L. 89-236, October 3, 1965.

⁶⁸ Margie Shields & Behrman, "Children of Immigrant Families: Analysis and Recommendations" *The Future of Children* 14, no. 2 (Summer 2005): 4-15.

Since the early 1600s immigration has been closely tied to race and equality discourse, both in inclusive and exclusive terms. The Fourteenth Amendment to the U.S. Constitution from 1865 points to this fact:

“Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, *or of nationality*, and the protection of the laws is a pledge of the protection of equal laws (emphasis added).”

It is difficult if not impossible for those with strong opinions on immigration law in this country (which in 2011 includes nearly the entire adult population) to separate racial concerns from the debate. Indeed, whether from white guilt or ignorance, overt racism, or minority anger, the immigration debate is laced with racial discourse much the same way yeast infects dough.⁶⁹

Similarly, immigration law in the United States has been historically tied to our economic policies. When the economy is flourishing and demand for menial labor is high, immigration tends to skyrocket and politicians begin discussing guest worker programs and legalization. The popularly known *bracero* program serves as a key example. Instituted in 1942 by executive order in response to the labor vacuum caused by World War II, the *bracero* program (formally known as the “Labor Importation Program”) allotted entry and work permits for much needed foreign agricultural workers. The program did not end when the war

⁶⁹ Ruben Rumbaut and Portes. *Ethnicities: Children of Immigrants in America*. Los Angeles, CA: Regents of the University of California, 2001.

finished, however, but continued until it was terminated in 1964 by the U.S. Labor Department officer in charge named Lee Williams, who dubbed it “legalized slavery.”⁷⁰ In sharp contrast to the booming economy of the *bracero* period, when the U.S. economy is weak (such as the recent economic downturn in 2008 with the stock and housing crisis) immigrants tend to be scape-goated as an economic burden to be eliminated.

According to Zolberg in *A Nation by Design*, there is a widely held assumption that a laissez-faire attitude toward immigration has dominated immigration policy and as such that immigration policy has historically been lax and welcoming. Zolberg challenges this notion pointing to the history of immigration law in the United States as support for his view that Americans cling tightly to their right to decide who may be allowed in and who must be kept out. Whether based on ethnic or language differences, religious roots, or educational/socio-economic differences, America has intentionally and systematically shaped its populace.⁷¹

America was designed initially through state-led immigration laws as there was no unifying federal body. Its main focus was on questions of slavery and how citizens were to be defined. Prior to 1870 only “free white people” residing in the United States were considered to be eligible for citizenship.⁷² Lack of federal laws governing immigration does not necessarily point to a liberal stance on immigration, however. Rather it speaks to the climate of concern over states’ rights at the time.⁷³

⁷⁰ Thomas M. Leonard, ed., *Encyclopedia of the Developing World* (New York: Routledge, Taylor & Francis Group, 2006), 194.

⁷¹ Aristide Zolberg, *A Nation by Design*. London, England: Harvard University Press, 2006.

⁷² Elliot Barkan, *And Still They Come*. Wheeling, IL: Harlan Davidson, Inc., 1996, 16.

⁷³ Zolberg, *A Nation by Design*, 3.

The United States is popularly known as a land of immigrants, and in many respects this continues to be true. Approximately 12% of today's U.S. population consists of people born outside of the U.S. The U.S. receives the highest actual number of immigrants annually in the world.⁷⁴ Comparing the annual percentage of population in the U.S. to other high immigrant receiving states, however, other states far outstrip the U.S. in acceptance rates of immigrants. Australia's foreign born population is steady at 22.2% since 1995, Switzerland registers 22.89%, and 19.8% of those residing in Canada are foreign born.⁷⁵

The relatively small percentage of immigrants the U.S. receives is emblematic of the country's design. Much as an architect begins a building project with specific plans in mind, the historical population of America since the arrival of the British has been predetermined. From the arrival of European immigrants in the 1700s, the slaughter and relegation of the Native American population, and the beginnings of official immigration law in the late 1800s which severely restricted Asian immigration, the leaders of the land today known as the United States have jealously guarded their right to draw clear cut citizenship distinctions between "us" and "them."⁷⁶

America has been a self-constituted nation since the arrival of the British and their widespread killing of natives and subjugation of black slaves. The standard has been historically evident: healthy able-bodied whites are normative even as people of color are different and less favored. From modern white American fears that immigrants (today brown Spanish-

⁷⁴ U.S. Bureau of the Census. "The Foreign-Born Population in the United States: 2003" www.census.gov/prod/2004pubs/p20-ssl.pdf (accessed May 7, 2011).

⁷⁵ United Nations World Population Report as summarized by Canadian Census Bureau at www.statcan.gc.ca.

⁷⁶ Zolberg, *A Nation by Design*, 3.

speaking immigrants) may be unable to assimilate based on cultural and language differences, to pre-Civil Rights era jargon fearing differences brought by the waves of Irish and Asian immigrants, America has a historical narrative of immigration as one which is intrinsically tied to difference in race.⁷⁷

While some contend that the U.S. is extremely lax in its immigration policies (pointing to the high levels of undocumented immigration and the popular perception that the U.S. is a land of immigrants), the important debate is not so much whether the U.S. takes an active role in guiding and controlling immigration, but rather who it controls and how.⁷⁸ Should Congress have total authority over immigration laws? Given the prevailing plenary power doctrine as the basis of governance of immigration law, to what extent should other branches of the government or other institutions provide checks and balances? Whose interests should be served in U.S. immigration policies? What priority if any should be given to the interests of immigrants?

IIRAIRA: Specific Failures in Immigration Law for Minors

Congress determined to act decisively through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), a stiff statutory provision which was passed in September of 1996.⁷⁹ IIRAIRA touches on a variety of subjects within immigration law related to criminal and noncriminal aliens, the definition of due process, and the terminology and practice in the removal process. More specifically as regards criminal aliens, IIRAIRA expands

⁷⁷ Zolberg, *A Nation by Design*, 2.

⁷⁸ This is evident in the views of two prominent groups advocating immigration restriction and regulation: Federation for American Immigration Reform www.fairus.org/site/PageServer and Center for Immigration Studies www.cis.org/About (accessed March 13, 2011).

⁷⁹ Pub. L. 104-208 (1996).

the definition of both “felony” and “conviction” under immigration law and removes the Attorney General’s power to exercise discretion in waivers for many offenses. Through the law removal proceedings replaced previous authority governing deportation and exclusion proceedings. Additionally, expectations of due process were changed significantly through the establishment of expedited removals (INA 235 and INA 238). Such removals allow administrative officers at points of entry and elsewhere the authority to remove individuals without the need for judicial review.

The inception of reinstatement of removal originates in IIRAIRA. Reinstatement amends 245(a)(5) under IIRAIRA 305(a), making a person removable who re-enters the U.S. prior to complying with the terms of his/her deportation or removal (an exception applies to those who first obtain consent to do so from the Attorney General). For example, a person who is removed from the United States at the government’s expense is given a bar from re-entry (prior to IIRAIRA inadmissibility bars were 1 year and deportation bars were 5 years, post IIRAIRA most are 10 years). If an individual who was deported or removed re-enters undocumented without first remaining outside the country according to the requisite bar, the original removal order may be subsequently reinstated. Reinstatement precludes the possibility of discretionary relief under the statute. While reinstatement issues can be cured if the individual is eligible for consular processing (obtaining a lawful immigrant visa at an embassy abroad), many applicants for immigrant visas abroad while not subject to reinstatement are precluded from gaining residency due to the permanent bar.

The real controversy surrounding reinstatement, however, is the change in the terms of the deportation or removal requiring the individual to remain outside the country for a specified time. Prior to IIRAIRA, many who were deported or excluded were given a one year bar from re-entry. Since IIRAIRA, however, the bar for re-entry in most cases is ten years. Because reinstatement is applied retroactively, a person who was deported in 1996 and re-entered unlawfully in 1997 believing he/she complied with the one year bar may now be reinstated for violating the terms of deportation/removal! Effectively, the government converts the terms of the original removal to a ten year bar and holds the individual accountable for having violated the changed terms of deportation. While clearly the unlawful entry is problematic in and of itself, to change a punishment and its consequences for violation without informing the violator is fundamentally unjust under other U.S. laws.⁸⁰

For many immigrants otherwise eligible to regularize their status in the family reunification context, Congressional intent under IIRAIRA took a severe stance against undocumented immigration. True to its title, the provision largely sought to annihilate illegal entries to the U.S. as well as make life untenable for those already present unlawfully. Historically there were thirty-one specific grounds of exclusion barring applicants for immigrant visas from realizing permanent residency. These grounds for exclusion were summarized into nine categories of inadmissibility as a result of the Immigration Amendments Act of 1990, and additional penalties for unlawful presence or prior removals followed by travel for foreign nationals were established through IIRAIRA in response to the World Trade Center bombing of

⁸⁰ Constitution of the United States, Sixth Amendment. *Re Oliver*, 333 U.S. 257, 273-74 (1948), <http://www.lectlaw.com/def/d080.htm> (accessed March 13, 2011).

1993.⁸¹ Working hand in hand with IIRAIRA, Congress passed the Enhanced Border Security and Visa Entry Reform Act in 2002. This act was designed to improve Department of State (DOS) and Department of Homeland Security's ability (DHS) to track foreign national travel in and out of the U.S. and thus practically enforce IIRAIRA's crack down on immigration violators.⁸²

Ironically, rather than reducing clandestine immigration, the real impact of IIRAIRA was to reduce cyclical migration (entering for a few months to work during harvest season and save money to return home) via increased border security, removals, and the formation of stiff consequences for accumulating "unlawful presence" and subsequently leaving the U.S. Many in the family reunification context who were awaiting a priority date to immigrate permanently anecdotally report they would enter occasionally to visit family members and save money for migration once their visa was available. With the passage of IIRAIRA and the increasingly difficult journey to enter the U.S. unlawfully, many immigrants ceased travel. Family reunification and comparative economic opportunities being what they were, immigrants have come and stayed rather than not coming at all. This is evidenced by annual statistical reports published by DHS estimating the numbers of foreign nationals present unlawfully. As of January 2009, DHS estimates a population of 10.8 million here unlawfully. From 2000-2008 the unlawfully present population grew by twenty-seven percent.⁸³ Significantly, this growth has occurred post the passage and implementation of IIRAIRA.

⁸¹ Ruth Wasem, "Immigration Visa Issuance and Grounds for Exclusion: Policy and Trends" (Washington, D.C.: Congressional Research Service Report for Congress, March 10, 2010): 9.

⁸² Wasem, "Immigration Visa Issuance and Grounds for Exclusion," 9.

⁸³ Michael Hoeffler, Ritina, and Baker, "Estimates of the Unauthorized Population Residing in the U.S." Department of Homeland Security <http://www.dhs.gov/xlibrary/assets/statistics/publications> (accessed May 13, 2011).

While academics and practitioners alike have reviewed the harsh nature of IIRAIRA and its consequences since its inception thirteen years ago, most critics have focused on the provision's impact on criminal aliens and their family members along with changes in the removal system. The focus on criminal aliens and removal proceedings is in part due to the unprecedented lack of due process in these areas as well as a fundamental assumption in U.S. criminal law that the consequence of a violation should be proportionate to the offense. Much analysis of the removal process and rights of criminal aliens has been conducted in light of IIRAIRA's impact even as the creation of unlawful presence and false claims bars have widely been ignored. While due process for criminal aliens is certainly an important issue of justice, it is crucial that we not ignore the significant consequences for non criminal aliens under IIRAIRA. In advocates' fervor to expound on the disproportionately harsh nature of IIRAIRA for relatively minor offences; we unintentionally ignore IIRAIRA's life-altering consequences for non-criminal aliens, particularly innocent minors lacking the independence and agency to break civil law.

Administrative processes under the INA are those processes handled outside of immigration court proceedings. Citizenship and Immigration Services (under the auspices of the Department of Homeland Security) and the Department of State (responsible for running the American embassies abroad) represent the federal agencies carrying out Congressional mandates as regards administrative immigration processes (all applications for immigration benefits applied for affirmatively, i.e., outside of the defense context). Regulations, memoranda, and cables are all written by these branches to clarify the practical application of Congressional intent as put forth in the statute.

For non-criminal aliens outside of removal proceedings, IIRAIRA dramatically changes the consequences of illegal presence in the U.S. by establishing unlawful presence bars as a ground for inadmissibility (detailed in INA Sec. 212(a)). Despite the widespread impact of unlawful presence bars on the possibility of legally immigrating, as of February 2011 no regulations have been written. Instead, a fifty-two page agency memo brings definition to unlawful presence.⁸⁴ IIRAIRA changes the definition and severity of making a false claim to citizenship by making a person who falsely declares U.S. citizenship to any governmental authority permanently ineligible for residency. No pardon is available for such an offense for an intending immigrant.⁸⁵

There are several additional unintended consequences resulting from the now nearly fifteen years of implementation of IIRAIRA. Many directly affect children, both U.S. children and undocumented children alike. The provision in IIRAIRA which carries the most significant consequences for non-criminal aliens seeking family reunification relates to the creation of unlawful presence and the punishments which ensue. In a study conducted through the Congressional Research Service, statistical analysis revealed that from FY1996-FY2000 the leading reason for permanent residency denial by Department of State (DOS) was a finding of inadmissibility due to being likely public charges. By FY2004 the rejection numbers based on public charge inadmissibility had dropped significantly, and by FY2008, unlawful presence and prior removal orders outstripped public charge as the leading ground.⁸⁶ There could be several explanations for this change including additional concrete policy guidance regarding affidavit of

⁸⁴ Department of Homeland Security, Field Memorandum, May 6, 2009.

⁸⁵ There are very limited exceptions to this rule for applicants for permanent residency status. Though rules governing nonimmigrant visas allow for a waiver it is very difficult to obtain. See INA Sec. 212(d)(3).

⁸⁶ Wasem, "Immigration Visa Issuance and Grounds for Exclusion," 18.

support requirements to establish an applicant is not likely to be a public charge as well as a streamlining of the procedural implementation of the new rules. What the research does reveal, however, is the significant impact IIRAIRA has on non-criminal aliens otherwise eligible for residency. Further research is needed as regards the rate of denials for minor applicants based on these grounds. The following “Carlos case” is a composite from my experience representing immigrants in administrative proceedings and elucidates the impact of these changes for some minors.

Carlos was born in Mexico to Mexican national parents with lawful permanent residency in the United States. His parents were temporarily living in Mexico while they finished their higher education, and just before Carlos’ second birthday they completed their schooling and moved to the U.S. having obtained a nonimmigrant tourist visa for Carlos. (Though Carlos’ immigrant relative petition had been pending for a year, he still had seven years to wait to obtain his residency via his green card holding father). Carlos was issued a permit based on his tourist visa to enter the United States with his parents, valid for just six months.

Once in Chicago, his parents took advantage of their education and obtained good paying jobs, put down roots in a local church community, and had two more children (born in Chicago and therefore citizens at birth). When Carlos was 5 his maternal grandmother suddenly became ill and died. The entire family left within twenty-four hours to support extended family in Mexico and prepare for the funeral arrangements. Driving home to Texas after the funeral, the parents presented their green cards at the border unconscious of the fact that their five year old son’s permit had expired long before they had left the U.S. potentially

making it difficult to obtain another for reentry. Luckily, the border patrol officer failed to ask for the children's documents at the point of entry. The family returned to their home in Texas in time for Carlos to start kindergarten.

Two years later Carlos' petition was finally ready to be processed for residency, and he and his father went to the American embassy in Ciudad Juarez, Mexico for his adjudication interview. At the interview, the facts of seven year old Carlos' case were innocently disclosed in full. Rather than issuing the long awaited green card, however, the adjudication officer denied Carlos' residency and instead gave him a permanent bar from being able to fix his papers. How could such a seemingly innocent scenario lead a seven year old to permanent ineligibility for legal reunification with his family in the United States? Was the immigration officer right under governing immigration laws to not only deny Carlos' residency but permanently bar him for the future?

The statutes leading to Carlos' bar to residency are found in INA Sec. 212(a)(9)(B)⁸⁷ and (C).⁸⁸ Sec. 212(a)(9)(B) bars anyone who accumulates over six months or one year of unlawful presence and subsequently exits the U.S. with a three and ten year bar to obtaining legal status; respectively. A fifty-two page memorandum published by the United States Citizenship and Immigration Services (USCIS) lays forth a very complex definition of unlawful presence; most people unlawfully present are such as a result of having either entered the country illegally or

⁸⁷ Unlawful presence bars commonly known as the "three and ten year bars" found in 8 U.S.C. S 1182(a)(9)(B) prescribe inadmissibility for those unlawfully present in the U.S. for more than 180 or 365 days, respectively, who subsequently exit the U.S resulting in a bar from admission for three or ten years.

⁸⁸ Unlawful presence bar commonly known as the "permanent bar" found in 8 U.S.C. S 1182(a)(9)(C) prescribes inadmissibility for two different groups: those who attempt to enter or enter unlawfully subsequent to having been removed, and those who attempt to enter or enter unlawfully subsequent to having accumulated 366 days of unlawful presence in the aggregate.

having over-stayed their non-immigrant permission to be here. Sec. 212(a)(9)(C) is an even stiffer provision which applies a permanent bar to legal status to anyone who either accumulates more than one year of unlawful presence, exits, and then re-enters or attempts to re-enter without inspection, or who enters without inspection or attempts to after having been removed.

As a result of IIRAIRA, therefore, any person unlawfully present for more than 365 days who subsequently leaves the United States and re-enters without inspection receives a permanent bar to admission to the United States. No exception for minor children. The statute is found in INA Sec. 212(a)(9)(C) and is worded as follows:

“In general any alien who has been unlawfully present in the United States for an aggregate period of more than 1 year, or has been ordered removed under section...or under any provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.”

Ironically, INA Sec. 212(a)(9)(B) which addresses the definition of unlawful presence statutorily exempts children. “No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States....”

Up until 2007, the American embassy in Ciudad Juarez, Mexico was among several embassies which upheld the interpretation that if a person was exempted from accruing unlawful presence for purposes of INA Sec. 212(a)(9)(B) (commonly known as the ten-year bar) then he or she was likewise exempted from INA Sec. 212(a)(9)(C) (known as the permanent bar) for having entered without inspection subsequent to accrual of unlawful presence.

Unfortunately for Carlos and many other children like him, shifts in implementation of the law led the consulate to change their interpretation just prior to his interview.

The inconsistency for minors between the impacts of the two statutes is startling. INA Sec. 212(a)(9)(B), the less draconian of the two sections, allows for an exception for minors making any time accrued under age eighteen not count toward unlawful presence tallies for purposes of the three and ten year bars. Minors are therefore not held responsible for being present in the United States unlawfully until they turn eighteen years old, at which point they are expected to exit the U.S. to avoid INA Sec. 212(a)(9)(B) consequences. Ironically, there is no such stated exception in INA Sec. 212(a)(9)(C). Minors can therefore accrue unlawful presence for the purpose of the permanent bar but not for the lesser offenses of three and ten year bars!

Though it seems highly improbable that Congress intended to punish the unlawful presence of some children but not of others, because the law does not explicitly contain the same exception, Department of State is free to make a determination on implementation of the two statutes. In 1997 policy guidance issued by the former Immigration and Nationality Service (INS) concluded that the unlawful presence exceptions to inadmissibility under 212(a)(9)(B) do not apply to permanent bar inadmissibility under 212(a)(9)(C) and therefore children may be issued the permanent bar. Traditionally embassies abroad applied the exception to both statutes thereby not ascribing permanent bars to minors. However, within the past five years the American embassy in Ciudad Juarez, Mexico began applying the same standard as the local CIS offices. The practical impact for children leads to the possibility of being permanently

barred from family reunification in the U.S. with no opportunity for discretionary relief until having substantially complied with the first ten years of the bar.⁸⁹

The best interest of the child is sorely missing in immigration law determinations. Special Immigrant Juvenile Status and U visas provide two shaky exceptions to this rule, as the provisions provide for children's interests in part. The U visa, most significantly, opens an avenue for children to include derivative parents and siblings on their applications (INA 101(a)(15)(U)).⁹⁰ Unfortunately for these children, the underlying U visa eligibility is dependent upon having undergone substantial suffering as the result of being the victim of a violent crime.

Evidence of the sore lack of consideration for children under the INA includes the child's inability to serve as the source of family reunification (INA Sec. 201(b)(2)(A)(i), 203(a)).⁹¹ As previously noted children may not be considered the requisite family member for a relative's waiver application; the INA provides for discretion by the Attorney General where there is extreme hardship to the spouse or parent of a U.S. citizen or lawful permanent resident. Hardship to a citizen or resident child is ignored when considering discretionary relief (212(a)(9)(B)(v)). U.S. citizen adults petitioning their parents to come to the United States frequently must choose which parent to bring despite their classification as immediate relatives with immediate access to permanent residency status. Minor children (siblings of the U.S. citizen) are not immediate relatives and therefore must wait in significant backlogs for

⁸⁹ There is one exception within the body of the section which applies to VAWA self-petitioners (qualifying victims of domestic violence). There are additional limited exceptions found in statutes governing provisions such as HARRIFA, NACARA, SIJ, and Registry applicants.

⁹⁰ U status is found in the Immigration and Nationality Act Section 101(a)(15) and provides lawful U status to select victims of violent crimes who are helpful to authorities in the investigation or prosecution of the offense.

⁹¹ The Immigration and Nationality Act Sections 201(b) and 203(a) detail requisite family relationships necessary for legal family reunification. Minor children are noticeably absent as a source of legalization for family members.

residency.⁹² Finally, as detailed above, there are numerous draconian provisions in IIRAIRA which hold a child directly (and in some cases permanently) responsible for decisions adults have made. It is important to note that these examples come from civil administrative contexts – laws governing criminal aliens are more draconian still.⁹³

There are other significant unintended consequences for minors, both aliens and citizens alike. The first is IIRAIRA's effect on the ability of twenty-one and over U.S. citizen sons and daughters (whether through birth or naturalization) to petition their parents who entered the U.S. illegally (even many who entered over twenty years prior). Parents of a United States citizen are considered immediate relatives for family reunification. That is, they are not subject to annual quotas and residency visa numbers are immediately available to them. In order to be eligible to process their legal residency applications in the U.S. via adjustment of status, immediate relatives are required to prove their last entry to the United States was lawful (INA Sec. 245(a)).⁹⁴

With the exception of those immediate relatives who qualify under 245i (via having had an approvable family petition filed on or before April 30, 2001) those who cannot prove their last entry was lawful must leave the States to process their residency application packets at an embassy abroad. As previously discussed, however, 212(a)(9)(B) statutorily fixes individuals who have accrued more than six months or one year of unlawful presence with a three-year or ten-year bar, respectively, thereby preventing barred individuals from legal residency until they

⁹² Visa Bulletin for December 2010 www.travel.state.gov/visa/bulletin/5197.html, 9 no. 27, Washington D.C. (accessed December 2010).

⁹³ Gerald Neuman, "Admissions and Denials: a Dialogic Introduction to the Immigration Law Symposium," *Connecticut Law Review* 29 no. 4, (Summer 1997): 1407.

⁹⁴ 8 U.S.C. S 1255(a).

have complied with the bar or been awarded a waiver. The caveat in applying for the waiver, however, is the requirement of a qualifying citizen or resident family member to evidence suffering extreme hardship. The terms of the waiver state the qualifying family member must be a “parent or spouse” and do not include U.S. citizen sons and daughters. This leaves parents of U.S. citizen adults without a legal remedy, despite the fact that they may have illegally entered the U.S. only once in their lives. Because it is commonly known amongst the immigrant community that twenty-one year old U.S. citizen children may petition their parents, many parents of United States citizens (USCs) apply despite their statutory ineligibility issues.

The creation of “false claims” to citizenship via IIRAIRA carries perhaps the most draconian consequences for minors: permanent ineligibility for any immigration benefit under the Act, in many cases even if the claim was made as a minor. This provision makes it virtually impossible to legally immigrate to the United States or regularize status, having made a false claim to citizenship subsequent to the implementation of IIRAIRA. The following composite case of “David” sheds light on the life-altering consequences of making a false claim to citizenship, in some cases even as a minor, under IIRAIRA. Similar to the above “Carlos case” illustrating some minor’s experience with the permanent bar, the following composite “David case” depicts the irrational observable outcome of the law and the importance of accountability in adjudicators’ use of discretionary powers.

In 1963 David was the son of U.S. lawful permanent resident parents (LPRs) who had been visiting their family in Mexico when David was born. Six months later they returned to the United States, and at the border showed their LPR cards (popularly known as green cards). The

border patrol officer advised them to complete their son's paperwork as soon as they arrived home to California. Arriving to California, the couple did as instructed – they went to a notary public (in their country on par with an attorney) and completed the process of obtaining their son's papers. They were advised to register David's birth in California because he was so young by completing some paperwork, and in exchange for the fee for service were given a copy of their son's birth registry from California. With the birth certificate the parents ignorantly applied for and were issued David's social security card.

David grew up in California, went to school, all the while living and working and traveling as the United States citizen he believed himself to be. In his twenties he moved to Mexico for a time with his extended family and met and married his wife and had two children. By 2003 the family decided it was time to move back to California where most of David's U.S. born siblings and their families lived. In the process of applying for his wife's legal residency before coming over, the embassy in Ciudad Juarez discovered his birth was not actually registered in California and the certificate was false. Under IIRAIRA, David was found guilty of making a false claim to United States citizenship, after September 30, 1996, to an immigration officer for the purpose of obtaining an immigration benefit. He was therefore determined to be permanently inadmissible to the United States – his home country. The only statutory exception to exempt David from the consequences of a false claim to citizenship requires the immigrant to be not only physically residing in the United States before the age of 16, but also the child of two U.S. citizen parents. While David had lived in the United States his entire life, his parents were legal residents, not citizens.

Under INA 212(a)(6)(C)(ii) as amended by Section 344(a) of IIRAIRA,⁹⁵ a false claim to citizenship “for any purpose or benefit under the Act or any Federal or State law” renders the maker of the false claim permanently inadmissible to the United States for lawful permanent residency (a necessary first step before eligibility for citizenship). Prior to the passage of IIRAIRA, 212(a)(6)(C)(i) was the governing authority on false claims to citizenship.⁹⁶ A false claim to citizenship had to meet the requirements of a willful misrepresentation of a material fact in that it is made 1) to a government official 2) for the purpose of obtaining an immigration benefit. Similar to fraud and willful misrepresentations of material facts, false claims to citizenship historically allowed for discretionary waivers.

The drastic difference in the standard for 212(a)(6)(C)(i) and 212(a)(6)(C)(ii) is apparent. Pre IIRAIRA a false claim to citizenship had to be made to a government official for the purpose of obtaining a specific immigration benefit. It essentially focused on admission questions at ports of entry or when applying for an immigration benefit in the U.S. or abroad. If a person lied in that context, she was found inadmissible (ineligible) to receive the immigration benefit sought. In cases where the person had a qualifying relationship to a United States citizen or resident and could demonstrate extreme hardship to that person due to the denial, a waiver could be sought and the intending immigrant could be pardoned, thus providing for family reunification. Post IIRAIRA false claims to citizenship are in a category of their own: any claim made in any context for “any purpose or benefit” under the act or any state or federal benefit are now included in what renders one inadmissible. False claims at points of entry and while

⁹⁵ 8 U.S.C. S 1182.

⁹⁶ 8 U.S.C. S 1182.

applying for an immigration benefit now render one permanently inadmissible without hope of relief, but so do false claims made on employer I-9 forms, when registering to vote, or when applying for public benefits or financial aid for higher education. (Oddly enough, the Department of Motor Vehicles in most states routinely completes a voter's registration card for applicants for license renewal. Applicants are simultaneously advised to sign at the "X" on the application for the driver's license as well as the voter registration with little or no explanation. Many non-citizens ineligible to vote are therefore unintentionally encouraged to make a false claim to citizenship by a government official!)

My concern is not that rules and regulations exist or that they are enforced. Nations must have the authority to create and implement laws. Sovereign states must have some system for organizing their constituents, for determining as a body what behavior is permissible and what is not. Limits and consequences for standards chosen by the polity must exist, held in tension with human rights to self determination. My concern is with convoluted standards that fail to consider undue consequences for minors.⁹⁷

Modern day immigration discourse viewed through the binary lenses of following the law versus breaking the law or enforcing the law versus ignoring the law leaves little room for alternative interpretations. The consequences of such discourse for some immigrants can be devastating. The reality for the "subaltern" (defined by Gayatri Spivak under "Can the Subaltern Speak?" as "the one who cannot be heard") is that she is essentialized and her

⁹⁷ Yasemin Soysal, *Limits of Citizenship: Migrants and Post-national Membership in Europe*. Chicago: University of Chicago Press, 1994.

experience flattened.⁹⁸ She is essentialized in the label of “law breaker” or worse “illegal” or “criminal” and her public identity is constituted by her offense. (Ironically, even the law itself does not consider her a criminal as immigration violations are most often civil not criminal offenses!) Her experience is flattened as it is assumed she is a competent adult intentionally choosing to flagrantly skirt the law of another nation in order to steal something that is not rightfully hers. In the immigration context, draconian laws are justified to the extent that they demand “following the law” often with little understanding of the ways in which such laws are implemented in real-life cases.

Since 1889, the plenary power doctrine has informed the notion of Congressional autonomy in writing and implementing immigration policy. The plenary power was predominantly established through a series of three Supreme Court cases, *Chae Chan Ping*, *Nishimura Ekiu*, and *Fong Yue Ting*.⁹⁹ Though the cases are credited with having given Congress sole authority over immigration law in the U.S., critics of both the intent in those decisions and their appropriate applicability abound. Those supporting the plenary power doctrine point to past holdings and the legal notion of *stare decisis* which establish the legal practice of respecting prior precedent as foundational to present decisions and practice.¹⁰⁰ Proponents of the plenary power are concerned with keeping the governing power of immigration laws within the hands of elected bodies and thus accountable to the voting public.

⁹⁸ Gayatri Spivack, *In Marxism and the Interpretation of Culture* (Chicago: University of Illinois Press, 1988), 275.

⁹⁹ *Chae Chan Ping v. United States* 130 U.S. 581 Concepts: Treaties/Congressional Powers/Immigration (1889). *Plyler v. Doe*, 457 U.S. 202 (1989).

¹⁰⁰ Jon Freere, “Plenary Power: Should Judges Control U.S. Immigration Policy?,” 1.

Contrastingly, opponents of the plenary power argue that the lack of checks and balances upon the public, due process concerns, and other constitutional protections put immigration law at the whim of Congress leading to a web of laws which are difficult to interpret consistently and even harder to apply.¹⁰¹ Some commentators on the plenary power doctrine hold an extreme position either supporting complete Congressional autonomy over immigration law and zero constitutional accountability, or a court dominated immigration system where the judiciary reviews every matter and all administrative decisions (like expedited removal) are discontinued.

Yet neither extreme seems prudent. There is certainly a measure of well established *stare decisis* which supports the governance of immigration law by Congress and the executive branches. Other scholars have detailed this history exhaustively.¹⁰² Immigration law in the United States is inherently political in its national security and economic concerns and as such it is largely appropriate to allow the political branches to write crucial policy.

But as with any governmental entity, appropriate checks must be in place to ensure that justice is done. The “Carlos case” and “David case” provide clear examples for the application of the law without the exercise of proper discretionary powers. The Constitution clearly protects all people physically present in the United States; indeed it is foundational to our notions of justice and equality. Particularly regarding due process and equal protection, the Constitution seeks to provide a standard of human rights for our country.

¹⁰¹ 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” *Villanova Law Review* 41 (1996): 744.

¹⁰² Freere, “Plenary Power: Should Judges Control U.S. Immigration Policy?,” 8.

Conclusion: Policy Proposals

Between judicial control of immigration law and absolute plenary power lies a vast realm which respects Congressional authority as well as Constitutional constraints. To that end this paper proposes four recommendations for beginning the process of reform. In the midst of the controversy of how best to tackle comprehensive immigration reform, it is difficult to not be for simple, pragmatic changes designed to rectify existing inconsistencies. Particularly as regards family reunification law, the best interest of the child should be respected as a significant factor amongst economic and national security interests. Legal precedent for protecting the best interest of the child has been set in family, welfare, and child labor law. Critics will argue that immigration law is distinct due to the authority of the plenary power and a lack of constitutional protections afforded to those without status. Yet studies reveal children with diverse legal status (citizens, residents, nonimmigrant visa holders, and undocumented) are significantly affected by immigration law. Mixed status families provide a beginning for justifying consideration for the best interest of the child.

A thorough Congressional review of family reunification law (as well as a regulatory review by USCIS) checking for coherency and consistency is a necessary step to ensuring justice for minors. Specifically, children must not be held responsible for false claims to citizenship and unlawful presence violations. As nearly two-thirds of U.S. immigration comes through the avenue of family reunification, such a review would be time well spent to ensure the

implication of family reunification laws is internally coherent and consistent with political intent.¹⁰³

A mechanism must be established to guarantee basic inalienable rights to those present on U.S. soil including principally the right to due process and equal protection. Congress (and USCIS as the body largely responsible for implementing Congressional will in immigration) must be held accountable when writing and implementing our immigration laws to protect a system of checks and balances as fundamental to our way of governance and a complex appreciation for the rule of law.¹⁰⁴

Finally, further study regarding the notion of the “rule of law” under immigration law is necessary to distinguish between fact and rhetorical power. Special attention must be given to studying primary motivations for undocumented migration and what if any role children play. Particular focus should be aimed at studying the factors associated with the fear of “rewarding law breakers.” Evidence for the need for such studies can most recently be seen in the Senate’s failure in 2011 to move forward on the DREAM Act, a provision which would allow undocumented children schooled in the U.S. a chance to earn legal residency through good moral character and college attendance or military service. One of the key reasons it was not passed is the common perspective that for the law to be respected an “enforcement-only” stance is required. Senator Jeff Sessions from Alabama summed up this understanding in his comments to news reporters “If we pass this vote, we signal to the world we are not serious

¹⁰³ Randall Monger, “U.S. Legal Permanent Residents: 2009” DHS Annual Flow Report (Washington D.C., Department of Homeland Security, April 2010): 1.

¹⁰⁴ Donnelly, “Reflecting on the Rule of Law,” 42-43.

about the enforcement of our laws or our borders.”¹⁰⁵ Yet a comprehensive understanding of the contractual nature of the rule of law recognizes the various forces at work motivating the violation of immigration laws as well as our government’s own contribution in undermining respect for the law. If indeed the violation of immigration law can be viewed as breaking a contract, the government must recognize its responsibility as a party to the contract taking actions to make the law coherent, consistent, and accessible to citizens and immigrants alike.

Through deepening the consistency of our laws, protecting the interests of children, and providing for appropriate checks in the governance of immigration, the United States can make great strides in improving respect for the rule of law as it metes out justice. Reform which respects a complex understanding of the rule of law will protect not only our nation’s economic and national security interests, but also the best interests of our children. As we further inform ourselves of the complex socio-economic factors and gain a deeper understanding of existing immigration law, perhaps a wise place to look for common ground would be to consider the law as it affects minors.

¹⁰⁵ Scott Wong, “Jeff Sessions: Dream Act Needs Vetting” posted December 2, 2010 <http://www.politico.com/news/stories/1210/45878.html>. *Politico* (accessed May 7, 2011).

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