U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family that Protects Children's Fundamental Human Rights

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U.S. IMMIGRATION LAW
AND THE TRADITIONAL NUCLEAR CONCEPTION OF FAMILY:
TOWARD A FUNCTIONAL DEFINITION OF FAMILY THAT PROTECTS CHILDREN'S FUNDAMENTAL HUMAN RIGHTS

Shani M. King*

Although the paramount purpose of United States immigration law is not to protect the integrity of family,1 U.S. immigration law does explicitly aim to do so in certain circumstances. The Immigration and Nationality Act (INA) includes family reunification provisions, for example, which allow United States citizens and lawful permanent residents to petition for family members who live in other countries to join them in the United States. Even the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), often described as a draconian

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1. Protecting family integrity is not the paramount purpose of U.S. immigration law. On the contrary, the United States is often criticized for destroying families. See, e.g., Bryan Lonegan, American Diaspora: Deportation of Lawful Residents from the United States and the Destruction of Their Families, 32 N.Y.U. Rev. L. & Soc. Change 55 (2007) (discussing the deportation of lawful permanent residents and the effects these deportations have on families). The scope of this Article does not include situations in which U.S. immigration law does not explicitly provide for the protection of family integrity.
statute,\(^2\) technically allows otherwise removable "aliens"\(^3\) to remain in the United States if removal would result in "exceptional and extremely unusual hardship to the alien's [U.S. citizen or resident] spouse, parent, or child."\(^4\)

But even where the United States aims to further family unity, it fails to do so because U.S. immigration law reflects a legal construction of the "family" concept that is largely premised on biology, is grounded in the traditional conception of a nuclear family, and excludes what this Article calls "functional" families: formations which may not satisfy this narrow conception of family, but satisfy the care-taking needs of children.\(^5\) By excluding functional families,

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3. The word "alien" is placed in quotes because it has objectionable connotations, but it is a term of art in immigration law. See Michele R. Pistone & Philip G. Schrag, The New Asylum Rule: Improved but Still Unfair, 16 Geo. Immigr. L.J. 1, 12 n.64 (2001) (discussing the choice to use the term "alien" in their article and the objectionable connotations of this term); Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. Miami Inter-Am. L. Rev. 263 (1996–97) (arguing that the term reinforces nativist sentiment towards new immigrants).

4. 8 U.S.C § 1229b(b)(1)(D) (2006). Notwithstanding this provision, scholars have noted that the qualifications to this statute are so extreme that it is virtually impossible to use it to prevent deportation on the basis of family unity. See, e.g., Jeffery S. Lubbers, Holes in the Fence: Immigration Reform and Border Security in the United States, 59 Admin. L. Rev. 621, 625 (noting that the IIRIRA "cut to the bone" the possibility of discretionary relief on the basis of family unity by, inter alia, imposing a standard of "exceptional and extremely unusual hardship—a standard that few applicants are able to meet").

5. The concept of "functional family" has been widely discussed in legal scholarship, including a seminal and widely cited note in the Harvard Law Review. Note, Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family, 104 Harv. L. Rev. 1640 (1991) (exploring the functionalist response to the pervasiveness of the traditional nuclear family in U.S. law). See, e.g., J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child 12–15 (2d ed. 1979) (noting that children define family by the caretaking functions adults play in their lives and therefore functional families can take various forms); Monique Lee Hawthorne, Comment, Family Unity in Immigration Law: Broadening the Scope of "Family," 11 Lewis & Clark L. Rev. 809, 811 (2007) (arguing that the United States should follow Canada's lead and adopt broader statutory definitions of family in the immigration context to better effectuate its policy of family reunification); Barbara Bennett Woodhouse, "It All Depends on What You Mean by Home": Toward a Communitarian Theory of the "Nontraditional" Family, 1996 Utah L. Rev. 569, 579–80 (1996) (arguing that the United States should support variations of the traditional family form that "not only correspond[ ] to what most..."
the United States ignores the reality of millions of families who are affected by its immigration laws, separates children from their families, and fails to honor a child's right to family as defined by the United Nations Convention on the Rights of the Child (CRC) and international law as it has developed in Europe and the Americas.\(^6\)

This Article suggests that the United States must move beyond this largely biological narrative of family if it is to protect the internationally recognized human rights of children. What this means in practice is that we must reform U.S. immigration law to reflect a broader conception of family that respects and protects


6. Convention on the Rights of the Child, G.A. Res. 44/25, art. 8, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) [hereinafter CRC] (“States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”) (emphasis added)).
functional families as well as the traditional nuclear family. What this Article suggests is that the notion of parenthood that is reflected in U.S. immigration law should be reconsidered and modified to reflect a definition grounded in relationships and care, or what has been described by Professor Nancy Dowd in a slightly different context as "nurture." This would likely include, for example, "the psychological, physical, intellectual, and spiritual care" of children.

In this Article, the primary focus, therefore, is on what has been described as in loco parentis relationships between children and relatives who are not their biological parents. In other words, relationships in which an adult is operating as a parental figure for a child in a way that results in the child seeing the adult as a parental figure.

This Article proceeds in three parts. Part I defines the concept of "functional" families and contrasts it with the largely biological construction of family grounded in the traditional conception of a nuclear family that is reflected in U.S. immigration law.

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7. There are many different ways to explore the right to family unity. For example, we could discuss the right to family through the lens of parental rights, or through the lens of cultural and racial discrimination. While the right to family unity from these perspectives may be tangentially discussed here, an extensive discussion of family unity from these perspectives is beyond the scope of this Article. Instead, this author has chosen to focus on the rights of the individual child. For a broader discussion of the recognition of family unity in international law from these other perspectives see Sonja Starr & Lea Brilmayer, Family Separation as a Violation of International Law, 21 Berkeley J. Int'l L. 213 (2003). Also, this Article may raise questions that extend well beyond immigration law. Namely, does international law limit the United States' ability to define what it recognizes as a family? And if so, what are those limits? For example, does international law affect what the United States must recognize as a family for inheritance purposes, public benefits, taxation, child custody, divorce, and visitation? These questions are beyond the scope of this Article.


9. Id. at 1312.

10. The term in loco parentis in this Article loosely refers to situations in which a child has a parent-like relationship with an adult who is not his biological parent. It should be noted, however, that in loco parentis can also be a term of art with a meaning that varies from state to state. The use of the term here includes relationships that have been characterized in the United States as equitable adoptions, unformalized step-parent relationships, and other such functional relationships that are protected by international human rights law. What is important is not the form but the substance—the focus is on the functional relationship between an adult and a child, and the term in loco parentis is used in this Article as shorthand to refer to relationships that are the emotional equivalent of what we might think of as a parent-child relationship.
law. This section shows how contemporary family formations in the United States depart from the notion of a traditional nuclear family. In this section, the author discusses family-based immigration, removal and deportation decisions based on family, and the INA's refugee provisions. This section also explores how U.S. immigration law fails to recognize functional families and thereby hurts children who are part of family formations that reflect a more inclusive narrative of family. This is, in part, a notion of family that is based not primarily in biology, but is focused instead on the relational concept of nurture. Part II explores the text and the interpretation of the CRC, with an eye towards the evolution of the definition of family in relevant international instruments. In this section, the author also explores the extension of rights and protections to functional families under international human rights instruments in Europe and the Americas, with special attention on the implementation of the CRC. Part III of this Article examines other contexts in which U.S. courts are willing to expand the definition of "family," explains why U.S. immigration law should include a functional definition of family, and discusses the vital interest of children in secure and stable relationships. Part III also examines the impact U.S. immigration law has on so-called mixed-status families (families whose members have different immigration statuses). This section also discusses some legitimate concerns with a functionalist approach. In the final section, the Article concludes that U.S. immigration law should be reformed to protect functional families, and in particular to include in loco parentis relationships within the definition of "child" and thereby take a step towards respecting the internationally recognized human rights of children. Ultimately, this Article does not argue that Congress is legally bound by international law to change the definition of "child" in immigration law, but instead concludes that compelling children's interests should guide Congress to follow international human rights law in a way that is meaningful to children.

11. See generally Dowd, supra note 8, at 1271 ("[I]t is time to carefully examine and challenge the assumptions of the Court's view of fathers and recast constitutional norms. The constitutional norm of fatherhood should be nurture."
I. FUNCTIONAL FAMILIES AND U.S. IMMIGRATION LAW

A. Defining “Family”

The author's goal in this section is not to provide a comprehensive review of the anthropological, sociological, and psychological literature on the meaning of family in different societies and cultures. Instead, the meaning of “family” to many children around the world is explored and contrasted with the largely biologically-based narrative of family which is grounded in the same traditional conception of a nuclear family that is reflected in U.S. immigration law. The point of this section is to show that U.S. immigration law employs a definition of family which is based on a false construct of human society, cultural constructions, and racial and ethnic prejudices. This definition fails to reflect the cultural diversity and realities of many children because, “[w]estern democracies have conceived of 'family' as a nuclear family, consisting of a mother, father and one or more (biological or adopted) minor children.”

This ideal nuclear family negates other prevalent family configurations which make up functional families, such as single-parent households, grandparent-grandchild households, same-sex couples, polygamous marriages, and extended family configurations “in which . . . relatives and non-relatives, live in the household, either in addition to or instead of the expected nuclear family members.”

For the purposes of this Article, as will be explained below, what is particularly significant is that this narrative of an ideal nuclear family reflected in U.S. immigration law ignores the significance of what this Article refers to as in loco parentis relationships.

1. U.S. Immigration Law’s Definition of Family

The conception of family reflected in U.S. immigration law is a limited vision of family which distorts the narrative of many children's lives. While cross-cultural research indicates that kinship and family organization are present in all human societies, the meaning of these terms has been found to be culturally based.


13. Id. at 290; see also id. at 273–74, 279–82.


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research also shows that the concept of family is not inherently biological, but, rather, is defined in reference to its cultural context.¹⁵

As is reflected in United States immigration law, the predominant view of family equates family with biological connections.¹⁶ Furthermore, the notion of family in the United States reflects three fundamental values of American society: biological connections, individualism, and a person’s ownership over his children.¹⁷ How these core American values influence the conception of family in the United States is briefly explored below.

In the United States hierarchy of family relations, biology is king.¹⁸ Parental rights are first and foremost grounded in their biological connection to their children.¹⁹ Scholars have used the

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¹⁷ Sault, supra note 14, at 398.
¹⁸ The term “American” is used in this Article to refer to the United States of America. It is used because this term is a term of art in the United States and has achieved almost universal acceptance as a reference to the United States of America. The author pauses to acknowledge that its use is inaccurate, because it ignores the fact that there are many other countries in North and South America.
¹⁹ See Anthony Miller, The Case for the Genetic Parent: Stanley, Quillioin, Caban, Lehr, and Michael H. Revisited, 53 Loy. L. Rev. 395, 404–05 (“The court in Pierce stated that ‘[u]nder the doctrine of Meyer v. Nebraska . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.’” (quoting Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925))). See also Appell, supra note 5, at 690 (“The notion of families during the formative periods of the United States Constitution, the Bill of Rights and the Thirteenth and Fourteenth Amendments, contemplated a patriarchal household in which the father presided over and controlled his wife and their children.”).
²⁰ John Hill, What Does It Mean to be a “Parent”?: The Claims of Biology as the Basis for Parental Rights, 66 N.Y.U. L. Rev. 353, 419 (1991) (“[A] fundamentally biological conception of parenthood is ingrained deeply in the ethos of our culture.”); See Appell, supra note 5, at 696 (“The Court’s view of parenthood shows that parenthood is biologically-based . . . ”).
expression "blood is thicker than water" in recognition of the importance American culture places on ties by birth. 21 This cultural value is far from universal, though, as anthropologists have found that in other societies and cultures biology does not occupy the same superior position with respect to other human connections. 22

The second core American value related to the American conception of family is individualism; specifically, the notion that each individual exists as an independent entity. This is a moral, social, and political concept of each individual existing as an autonomous being in society. As one scholar has explained:

In this cultural system, independence is contrasted with dependence, which is interpreted as a sign of weakness or failure. Competition is rewarded and encouraged through contests, prizes, and grade curves. Even within the family, individuals are socialized to compete for material resources as well as attention and affection. Parents vie with each other over the loyalty of their children and argue over custody rights. 23

21. See Franz Neyer & Frieder Lang, Blood is Thicker than Water: Kinship Orientation across Adulthood, 84 J. Personality & Soc. Psychol. 310 (2003) ("Lay psychology knows one such rule that states that blood is thicker than water, implying that kin are generally favored over non-kin.").


23. Sault, supra note 14, at 399–400. See also James McHale et al., New Directions in the Study of Family-Level Dynamics During Infancy and Early Childhood, 74 New Directions for Child Development 5, 8 (Winter 1996) (explaining that research on whole-family dynamics indicates that some parents engage in “hostile-competitive coparenting,” which may be exhibited behaviorally, verbally, and even nonverbally).
This concept of individualism is related to the concept of ownership. Historically, women were considered the property of their husbands. Once married, wives had no identity separate and apart from their husbands. Similarly, children were viewed as the property of their parents. Rather than communal responsibility for children in a community or other social group, family in the United States was, and is still, associated with the notion of a person's ownership over his property and the individual accumulation of private property.

In studying the language that people use to describe themselves and their children, Rothman finds that people use the language of ownership and property rights. While it is no longer acceptable to refer to children as property, some individuals in the United States operate as if they have the right to raise their children without interference from others. As one scholar has observed,

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24. Carole Shammas, Re-assessing the Married Women's Property Acts, 6 J. Women's His. 9, 9 (1994) (explaining that under common law, all of a woman's property was under her husband's control when she married and remained under his control for the duration of his life).

25. Jonathan Montgomery, Children as Property?, 51 Mod. L. Rev. 323 (1988) (describing two theories of parents' rights: one in which the parents act as the agents of the child, and one in which the parents have complete dominion over the child and children are subsequently treated as property); Stuart Hart, From Property to Person Status: Historical Perspective on Children's Rights, 46 Am. Psychologist 53 (1991) (explaining that during the 16th, 17th, and 18th centuries, children were regarded as property and valued for the work they contributed to the family). In her article, Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers, Professor Nancy Dowd recognizes this persistent view of children: "We would no longer express as a constitutional value the notion that children are property, or that fathers as patriarchs have ultimate control over their spouses or children. Yet vestiges of that view of children remain. One example is struggles over naming of children, when fathers fight for their children to have their last name as a sign of "ownership" or control. A second example is the common reasoning that, if child support is paid, fathers are "entitled" by that payment to have a voice in the lives of their children or to insist on a certain amount and structure of visitation." Dowd, supra note 8, at 1327 (citations omitted).


27. See Andrew Cherlin & Frank F. Furstenberg Jr., Styles and Strategies of Grandparenting, in Grandparenthood 97, 114–15 (Vern L. Bengtson & Joan F. Robertson eds., 1985) (discussing how the passive grandparent, who is "loath to interfere in the raising of the grandchildren," and "under normal circumstances leaves parenting strictly to the parent," best fits the popular image of American grandparents).
"[e]ach parent wants full custody of the child, or complete ownership and control." For example, in the United States, courts rarely grant visitation with grandparents or stepparents over the parents’ objections. Such requests for visitation are typically considered an invasion of the prerogative of the parents and an infringement of their rights.

The family narrative that encompasses these values of biological connection, individualism and ownership is the traditional nuclear family—a mother and father and one or more (typically) biological children. This is the family narrative that informs immigration law in the United States.

28. Sault, supra note 14, at 401. See also McHale, supra note 23, at 8 (describing how competitive parents may engage in their own parenting belief systems without regard to the other parent’s belief system, thereby establishing another area of marital discord).

29. See, e.g., Troxel v. Granville, 530 U.S. 57, 73 (2000) (concluding that order of grandparent visitation interfered with parent’s fundamental right of childrearing). Even in Troxel, however, the court acknowledged the diversity of family forms in today’s society. For example, Justice O’Connor acknowledged the lack of a typical “American” family in her plurality opinion: “The demographic changes of the past century make it difficult to speak of an Average American family.” Id. at 63. See Dowd, supra note 8, at 1274–75 (“Troxel can be read as a case strongly supporting nurturing parents as well as appreciating the range of families in our society.”). See also Appell, supra note 5, at 685 (noting the value of traditional parental rights doctrine to support nontraditional family forms).
2. A Broader Conception of Family

In contrast to the narrow conception of family reflected in U.S. immigration law, many children throughout the world and in the United States are members of families that make use of shared parenting roles which fall outside of this narrow conception of family. In many cultures, parenting is considered a shared responsibility among a number of people with which a child has a significant relationship, reflecting a much more communal concept of family.\textsuperscript{30}

"Among the Zapotec, sharing children is seen as natural and beneficial for the children, the godparents, and the community as a whole. Parenthood is understood in terms of multiple roles performed by different people according to their personal gifts and abilities. For the Zapotec, having children means sharing children." This understanding—that parenthood does not come in one form—stands in sharp opposition to the exclusive family model used in American law.\textsuperscript{31}

Some cultures are based on kinship. In these societies, the focus is on the collective responsibility to raise children, and there is less focus on becoming independent from one's family, self-reliance, and personal achievement. Instead, the focus is more on obedience, responsibility to family, and collective well-being, typically using the

\textsuperscript{30} See, e.g., Samuel Putnam et al., Child Temperament and Parenting, in Handbook of Parenting Vol. 2: Biology and Ecology of Parenting 267 (Marc Bornstein ed., 2002) (explaining that "[c]ross-cultural approaches to parenting have highlighted the fact that parenting involves . . . a lifetime of relationships," and describing the distinction between social parents and biological parents in Botswana); Barry Wellman & Scot Wortley, Brothers' Keepers: Situating Kinship Relations in Broader Networks of Social Support, 32 Soc. Persp. 273 (1989) (explaining that community family arrangements actively help people deal with stresses and opportunities); Melford E. Spiro, Is the Family Universal? The Israeli Case, in The Nuclear Family in Crisis 81, 82–92 (M. Gordon ed., 1972) (detailing the Israeli \textit{kibbutz} system where children are raised in a communal children's house); Sally Falk Moore, Old Age in a Life-Term Social Arena: Some Chagga of Kilimanjaro in 1974, in Life's Career - Aging: Cultural Variations on Growing Old 23, 24 (Barbara G. Myerhoff & Andrei Simic eds., 1978) (describing how social relations change throughout the course of a person's life in the Chagga culture).

\textsuperscript{31} Matthew M. Kavanagh, Rewriting the Legal Family: Beyond Exclusivity to a Care Based Standard, 16 Yale J. L. & Feminism 83, 92–93 (citing Nicole L. Sault, Many Mothers, Many Fathers: The Meaning of Parenting Around the World, 36 Santa Clara L. Rev. 395, 404 (1996)).
kin group as the important reference point.\textsuperscript{32} As one anthropologist, Dr. Nicole Sault, has found:

In societies that emphasize nurturing, sharing and interdependence, blood ties do not give parents inalienable rights over their children. All kin ties must be validated by nurturing through feeding, bathing, healing, or teaching. People do not have children in the sense of private individual ownership any more than they have land as private property. Children, land and ritual objects all belong to the larger kin group. Children exist as members of the kin group and the community.

This shared responsibility is reflected in the fluidity of household membership, for children often live in more than one household while growing up. In some societies, it is expected that one or more grandchild will go to live with the grandparents and keep them company... People move in with their relatives in response to the varying needs of all the families involved, influenced by factors such as economic needs, political violence, sickness and death, educational opportunities, achieving gender balance, or personal preferences.\textsuperscript{33}

In essence, in societies in which the kin group is the dominant point of reference, “people are encouraged as kin to nurture each other by providing for one another, feeding each other, or protecting members of the group whether they be children or adults. The behavior of mutual support is reinforced by symbolic systems that emphasize the interconnectedness of people.”\textsuperscript{34}

In some cultures, for example, a child’s family may include her godparents, who may have responsibility for guiding her religious education, providing support for her schooling, and play a significant

\textsuperscript{32} Sault, supra note 14, at 402; JoAnn McGregor, \textit{Children and ‘African Values’}: \textit{Zimbabwean Professionals in Britain Reconfiguring Family Life}, 40 \textit{Env’t & Planning} 596, 606–07 (2008) (Zimbabwean parents working in Great Britain rely on an extended family network to look after their children while they are away so that they continue to learn cultural values).

\textsuperscript{33} Sault, supra note 14, at 405; See also McGregor, supra note 32, at 606–07 (discussing the choice of many Zimbabweans to leave their children with relatives while working abroad).

\textsuperscript{34} Sault, supra note 14, at 402; see also Ellen Pader, \textit{Spatiality and Social Change: Domestic Space Use in Mexico and the United States}, 20 Am. Ethnologist 114, 114–137 (1993) (arguing that the spatial configuration of homes can reinforce or change social and cultural norms as is evidenced by research in Mexican and Mexican-American homes).
role in her marriage.\textsuperscript{35} In others, there may be no formal distinction between relatives, but a child's "parents" may be the caregivers who happen to be at home during the hours that the children are at home. During my last trip to Nicaragua with my wife, for example, I learned that a number of my wife's cousins call my mother-in-law "mama" instead of "auntie," because she was their primary caregiver while they were growing up. This family formation, in essence, satisfied the children's caretaking needs and created a functional parent-child relationship between my mother-in-law and her nieces, but like many caretaking relationships, falls outside the traditional nuclear conception of family.

3. The Contemporary "American" Family

Notwithstanding the definition of family reflected in U.S. immigration law, even the contemporary "American" family does not always reflect the traditional nuclear family. It is not defined only by biology or traditional legal structures. As contemporary legal scholars have observed:

Today, far from representing a radical fringe, non-nuclear families have become the norm for a generation. The majority of Americans now live in households that do not mirror the nuclear family model of a wage-earner husband, homemaker wife, and their biological children, all sharing one domicile.\textsuperscript{36}

In other words, the traditional nuclear family is closer to the exception than the rule in the United States.\textsuperscript{37} The majority of Americans live in family formations that do not reflect the traditional two-parent family with biological children,\textsuperscript{38} and as Barbara Woodhouse explains, many of these families are a refuge for those in need.\textsuperscript{39}

The diversity of family forms in today's society has been widely recognized and discussed. For example, in Troxel v. Granville,
a case in which the Supreme Court found that an order of grandparent visitation interfered with a parent's fundamental right of childrearing, Justice O'Connor acknowledged the lack of a typical "American" family in her plurality opinion: "The demographic changes of the past century make it difficult to speak of an average American family.\textsuperscript{40} Thus, scholars have observed that "Troxel can be read as a case strongly supporting nurturing parents as well as appreciating the range of families in our society.\textsuperscript{41}

U.S. Census data also suggest that the traditional nuclear family is rapidly becoming an American anachronism.\textsuperscript{42} According to the U.S. Census Bureau, for example, in 2007, of 78,425,000 "families,\textsuperscript{43} only 26,158,000 were comprised of a married couple with their own children under 18 years old.\textsuperscript{44} The Census Bureau also estimated that in 2003, one-third of all Americans were part of a stepfamily, and in 2004, 1.7 million American families included adopted children.\textsuperscript{45} Also, in 2005, 2.3 million grandparents were responsible for providing for their grandchildren's basic needs.\textsuperscript{46} This data strongly suggest that the traditional nuclear family does not reflect the "families" of many children who live in the United States, and it only tells part of the story because many "American" families fall outside of the Census Bureau's outmoded definition of family.\textsuperscript{47} This is, in part, because many of these families are composed of immigrants.\textsuperscript{48} The family structure of immigrant families often does

\begin{itemize}
\item \textsuperscript{40} Troxel v. Granville, 530 U.S. 57, 63 (2000).
\item \textsuperscript{41} See Dowd, supra note 8 at 1274–75.
\item \textsuperscript{42} For more on the concept of the functional family, see supra note 5.
\item \textsuperscript{43} The U.S. Census Bureau recognizes a family as a married couple either with or without children, unmarried adults with or without children, or a single parent living with or without children. Census Bureau, U.S. Census, Current Population Survey (CPS) - Definitions and Explanations (Nov. 18, 2008), http://www.census.gov/population/www/cps/cpsdef.html.
\item \textsuperscript{44} U.S. Census Bureau, Families and Living Arrangements, http://www.census.gov/compendia/statab/tables/09s0065.xls.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} See Woodhouse, supra note 5, at 570.
\item \textsuperscript{48} Currently, there are approximately 37.9 million immigrants in the United States. Also, the number of births to immigrants has grown from about 230,000 in 1970 to more than 900,000 in 2002. In 2007, there were 10.8 million school-aged children from immigrant families in the United States. Steven A. Camarota, Immigrants in the United States, 2007: A Profile of American Foreign-Born Population (2007), http://www.cis.org/articles/2007/back1007.pdf.
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not reflect the traditional nuclear family, but instead the culture of
the family's native country.49

In his article, *Rewriting the Legal Family: Beyond Exclusivity
to a Care Based Standard*, Matthew M. Kavanagh makes this point:

Twenty-eight million children in the United States grow up
in families in which care is not provided exclusively by two
heterosexual opposite-sex parents. Instead caregivers
increasingly include gay and lesbian families, single parent
or "cohabiting" parent families, families with grandparents
(either as primary caregivers or in addition to primary
caregivers), and various other formations.

We can clearly disagree about whether these aspects of
family life in the United States are good, bad, or mixed, but
refusing to recognize them legally will not help matters.
Despite the reality that US families take a great many
forms, we continue to base our legal decision-making on a
model that is not a reality for a huge proportion of the
affected population.

Cross-culturally, too, we see that what is held up by some
as "natural" is hardly so. In the United States many urban
African-American families and Native American families
have, throughout American history, made significant use of
shared parenting roles that fall far outside of the exclusive
model.50

Thus, even the contemporary "American" family does not always
reflect the traditional nuclear family that informs U.S. immigration
law. Consequently, to those critics who would say that we should not
define family to conform to cultures other than "our own," this author
responds that defining family to include functional families also
conforms to "American" culture.

49. Nancy Foner, *The Immigrant Family: Cultural Legacies and Cultural
Changes*, 31 Int'l Migration Rev. 961 (1997) (examining the way family patterns
change in the process of immigration); Nazli Kibria, *Family Tightrope: The
Changing Lives of Vietnamese Americans* (1993) (drawing on interviews with
Vietnamese American families to show that the "traditional" family unit rarely
exists).

A. U.S. Immigration Law's Narrow Definition of Family

1. Family-Based Immigration

While the INA has long promoted the notion of family unity in certain circumstances,51 the statutory preference for a conception of family that reflects the traditional nuclear family is clear and unambiguous. In essence, the conception of family unity reflected in the INA is grounded in the concept of an "immediate family," a concept which fails to reflect the familial formations of many children affected by U.S. immigration laws.52

The INA's selection system does not treat all family members alike. As one author has explained:

Recognized relationships closely track westernized notions of family and generally only encompass first-degree relatives; unformalized relationships (de facto or long term cohabitation) are not recognized. Relationships considered contrary to public policy, such as bigamous or close-degree relative marriages, as well as same-sex relationships, will generally not provide the basis for benefits.53

Those relatives eligible to immigrate through a family petition are divided into two main categories. Both categories are made up of


first-degree relatives and would be considered "immediate" family members by those who recognize this concept. The first category includes only "immediate relatives" of U.S. citizens:54 parents, spouses, and unmarried children under the age of twenty-one.55 The second category includes "preference" immigrants:56 unmarried children of United States citizens (who are over twenty-one at the time the petition is filed), spouses and unmarried children under twenty-one of permanent residents, unmarried children over twenty-one of permanent residents, married sons and daughters of U.S. citizens, and brothers and sisters of United States citizens where the petitioner is at least twenty-one years old when the petition is filed.57 While both "immediate" and "preferred" relatives are permitted entry to the United States due to their status as family members, immediate relatives are given priority over "preferred" relatives, who may have to wait months or years before immigrating.58

54. INA § 201(b)(2)(A)(i). The preference system does not grant lawful permanent residents (LPRs) the same rights to family as citizens. Their spouses, minor children, and unmarried adult children are subject to visa quota limits. Married children of LPRs are not considered at all under the preference system; thus, they are excluded entirely from family-based petitions. Spouses, children and unmarried adult children of LPRs are given a second level preference for a visa. LPRs must wait approximately four years and nine months for their spouses and children to receive a visa and join them in the United States. Arshil Kabani, Separation Anxiety: Uniting the Families of Lawful Permanent Residents, 10 Scholar 169, 176–177 (2008).

55. INA § 201(b)(2)(A)(i); Lichter, supra note 52, at 233.

56. INA § 201(b)(2); see also Lichter, supra note 52, at 233.

57. INA § 203(a)(1)–(4). Unlike immediate relatives, so-called "preference" relatives have to wait for an immigrant visa number to become available; it may take years before one becomes available. See Lichter, supra note 52, at 233. One author explains, "[e]ven after prior approval, eligibility for immigration benefits may be lost to subsequent divorce or marriage, or simply due to aging out of a category before a visa becomes available." Id. at 232.

58. INA §201(b)(2); INA § 203. Relatives can immigrate as a "derivative" family member, due to their relationship to the petitioner, but even if this status is available, it is limited to the beneficiary's spouse and any unmarried children under the age of twenty-one. See Lichter, supra note 52, at 236; INA § 204 (a)(1)(D)(i)–(ii). Before 1990, this system resulted in backlogs of family members waiting to enter the United States in order to be reunited with their relatives, and, notwithstanding reforms in 1990, severe backlogs have continued. See Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2006 Statistical Year Book B2 (2006), http://www.usdoj.gov/eoir/statspub/fy06syb.pdf. Although the immigration courts completed more cases than they received in fiscal years 2004 and 2006, the backlogs from previous years still outnumber the surplus completions. Id. The BIA meanwhile has consistently had a backlog despite procedural reforms to improve the system. Id. at S2; See Procedural
Immediate relatives can immigrate as soon as their visa petition is filed and approved by United States Citizenship and Immigration Services.\(^5\)

The total number of family-based visas which can be issued in any one year is 480,000, and these are distributed according to a hierarchical preference system.\(^6\) The following chart summarizes the INA preference system with the yearly quota assigned to each category and approximate backlog waiting time.\(^6\)


59. See INA § 201(b)(2)(A)(i).


Also note that there is a fifth preference for displaced persons fleeing from a Communist country, a Middle Eastern country, and persons uprooted by a national catastrophe. Also, categories of visas based on employment, which were initially part of the preference system, were separated into their own categories in the 1990 reform.
As this chart demonstrates, family-based immigration is largely based on the parent-child relationship. For purposes of the INA, a “child” is only a minor child, which denies the immediacy of a parent-child relationship where the son or daughter is older than twenty-one years of age or married. Moreover, to qualify as a child, an individual must fall into one of the six statutorily defined categories of children, which, while possibly more inclusive than in the past (because, for example, adopted children and children born out of wedlock are included), reflect what one would think of as a child in a nuclear family: (1) children born in wedlock, (2) stepchildren, (3) legitimated children, (4) children born out of

<table>
<thead>
<tr>
<th>Preference to petitioner</th>
<th>Quota</th>
<th>Backlog (approx.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adult unmarried sons and daughters of citizens</td>
<td>23,400 plus any visas that the fourth and last family-sponsored preference aliens do not use.</td>
<td>6 1/2 Years</td>
</tr>
<tr>
<td>Legal permanent residents’ spouse and children as defined by the INA</td>
<td>114,200 visas, plus any visas that the first category does not need, per year.</td>
<td>4 1/2 Years</td>
</tr>
<tr>
<td>Legal permanent residents’ unmarried sons and daughters</td>
<td></td>
<td>8 Years</td>
</tr>
<tr>
<td>Married sons and daughters of citizens</td>
<td>23,400 plus any visas that the first and second preferences do not use per year.</td>
<td>8 1/2 Years</td>
</tr>
<tr>
<td>Brothers and sisters of adult citizens</td>
<td>65,000 visas plus any that the first, second, and third preferences do not use per year.</td>
<td>11 1/2 Years</td>
</tr>
</tbody>
</table>

62. Hawthorne, supra note 5, at 815; See INA § 203(a)(1), 8 U.S.C.A. § 1153(a)(1) (West 1999); see also INA § 101(b)(1), 8 U.S.C.A. § 1101(b) (West 1999) (defining a child to be “an unmarried person under twenty-one years” old).


64. There are various interpretive guides, including the statute itself, that help fill out the definition of stepchild for the purposes of family immigration. Pursuant to the statute, child status is afforded to a stepchild, “whether or not born out of wedlock, provided the child had not reached the age of 18 years at the
time the marriage creating the status of stepchild occurred." 8 U.S.C. § 1101(b)(1)(B) (2000). "A valid marriage is sufficient to create a step relationship recognized for immigration benefits without any parental interest from the stepparent in the stepchild." Sarah B. Ignatius & Elisabeth S. Stickney, Immigration Law and the Family § 6:9 (Thomson West 2008) [hereinafter Immigration Law and the Family] (citing Medina-Morale v. Ashcroft, 371 F.3d 520, 531–532 (9th Cir. 2004) (finding no need to consider the strength of the stepparent-child bond where no evidence that marriage underlying stepparent status was a sham)). One corollary of the inclusion of children born out of wedlock and the decision not to require evidence of parental interest is that children born outside of the marital relationship—as in, for example, a father's child from an adulterous affair—can qualify as stepchildren. Id. (citing cases). Step status may be lost if the marriage underpinning it is terminated, but "[i]f the step relationship continues despite death or divorce, the child remains a stepchild." Immigration Law and the Family, at § 6:12. In other words, while the existence of a genuine relationship or emotional bond between the stepchild and stepparent is not a prerequisite to establishing stepchild status, it may be required to maintain step status in the event that the parent dies or the stepparent's marriage to the parent ends in divorce. By contrast, the step relationship, for the purposes of the INA, terminates regardless of the character of the emotional relationship between the stepparent and the child if the marriage is found to be legally invalid. Matter of Awwal., 16 I. & N. Dec. 617, 621, 1998 WL 235449 (B.I.A. 1998) ("Where there is not and never has been a valid marriage, there cannot be a step relationship under the immigration laws."). If however, a country recognizes a form of marriage such as polygamy that would be invalid in the United States, the children of one spouse in the marriage are considered stepchildren of the other spouses. See Immigration Law and the Family, at § 6:12 (citing Matter of Man, 16 I. & N. Dec. 543, 1978 WL 36451 (B.I.A. 1978)).

65. A child falls into this category if she: (1) is legitimated, (2) the legitimation takes place before the child reaches the age of 18, and (3) the child is in the legal custody of the legitimating parent at the time of the legitimation. 8 U.S.C. § 1101(b)(1)(C) (2000) (The statute defines this category of child in full to be: "[A] child legitimated under the law of the child’s residence or domicile or under the law of the father's residence or domicile, whether in or outside of the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation."). Legitimation generally occurs when the biological parents of a child born out of wedlock subsequently marry. Other forms of legitimation include laws eliminating legal distinctions between legitimate and illegitimate children, judicial decrees legitimating children in the context of paternity proceedings, the written acknowledgement of paternity, and the "open and notorious recognition of paternity." See Immigration Law and the Family, supra note 64, at § 6:17–22. The legal custody requirement is met either if there is a court order awarding custody or there is a "natural right" to custody, which is essentially legal custody that is presumed to exist for biological parents. See id. at § 6:22.
wedlock,\textsuperscript{66} (5) adopted children,\textsuperscript{67} or (6) orphan children from abroad who will be adopted by American parents.\textsuperscript{68}

The consequence of this narrow conception of family is, of course, that if a child living in a non-traditional family formation wants to immigrate—with her family—based on a family petition,

\textsuperscript{66} Under the INA, a child born out of wedlock is entitled to child status if immigration benefits are sought on his behalf “by virtue of the relationship of the child to its natural mother or to its natural father if the father has or had a bona fide parent-child relationship with the person.” 11 U.S.C. § 1101(b)(1)(D)(2000). This provision applies different standards to natural mothers and fathers, requiring only the latter to establish a \textit{bona fide} relationship: “The determination of a \textit{bona fide} parent-child relationship occurs on a case-by-case basis . . . Evidence of a \textit{bona fide} relationship ‘is varied and widespread in nature.’ Numerous types of documents showing concern, financial and emotional support are relevant. Persuasive evidence includes proof that the parties actually lived together at some point, or that the father actually held out the child as his own or provided for some or all of the child’s needs, or that in general his behavior evidenced a genuine concern for the child.” Immigration Law and the Family, supra note 64, at § 6:26. The BIA’s regulatory standard is that a \textit{bona fide} relationship exists “where the father demonstrates or has demonstrated an active concern for the child’s support, instruction and general welfare.” 8 C.F.R. § 204.2(d)(2)(iii) (2009).

\textsuperscript{67} A child is an adopted child for purposes of the INA if the child was (1) adopted while under the age of sixteen years, and (2) is in the legal custody of and has resided with the adopting parent or parents for at least two years. 8 U.S.C. § 1101(b)(1)(E)(i) (2000). An alternative to meeting the second requirement is to show that the child “has been battered or subject to extreme cruelty by the adopting parent or by a family member of the adopting parent residing in the same household.” Id. “Adopted children” status, once granted, extends INA “child” status to natural siblings of the adopted child, provided that siblings are also adopted by the same parents and were adopted while under the age of eighteen. 8 U.S.C. § 1101(b)(1)(E)(ii) (2000).

\textsuperscript{68} A final category of children is orphans from abroad. The requirements that a child must meet to fall into this category are: (1) the child must be either 16 at the time an “immediate relative” petition for permanent legal residency status is filed, (2) the child must be an orphan because either (a) both parents disappeared, abandoned, or deserted the child, or became separated from or lost the child, or (b) the sole surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption, and (3) the child must be adopted either by an unmarried American citizen of at least 25 years of age or by an American citizen and his/her spouse that have \textit{personally seen or observed the child} prior to or during the adoption proceedings (or, alternatively, the child is coming to the United States for adoption). 8 U.S.C. § 1101(b)(1)(F)(i) (2000). In addition, the adoptive parents must meet the pre-adoption requirements, if any, of the proposed residence and furnish proper care. \textit{Id}. Natural siblings under the age of 18 who have been adopted abroad or who are coming to the United States for adoption by the same parents, qualify for child status. 8 U.S.C. § 1101(b)(1)(F)(ii) (2000).
she will not be able to do so. If a child is trying to immigrate with her aunt who was her primary caretaker since birth, she will not be permitted to do so, as the aunt would not fit into either category of relatives recognized on a family petition. Similarly, if a grandmother of a child wanted to enter the United States with her grandchild who calls her "mama," because it was this grandmother who raised her, this relationship would not be one recognized as a family petition. While from the child's perspective, the aunt in the former case, and the grandmother in the latter, might be the most significant relatives in this child's life, in neither case is there an allowance for this reality under U.S. immigration law.

Imagine, for example, a young woman who lives in Nicaragua and is a Nicaraguan citizen. She marries a U.S. citizen and is immediately eligible for a visa to immigrate to the United States. This young woman has cared for her now twelve year-old nephew since his birth. Although the boy's mother cannot care for him, she will not consent to any adoption. She would allow him, however, to move to the United States with his aunt. Unfortunately, if the boy were to arrive with his aunt at the U.S. embassy in Nicaragua, they would be told that because this woman is not legally or biologically the boy's mother, they would not be able to immigrate together on a family petition. This tragic scenario underscores the fact that the INA's conception of family is an unnecessarily narrow conception which may not reflect many of the families of those children who emigrate.

2. Cancellation of Removal Based on Family

The narrow notion of family which is codified in the section of the INA that governs family-based immigration also permeates the law governing the removal of certain nonpermanent residents. This law is part of IRRIRA and allows otherwise removable nonpermanent residents to remain in the United States, if the nonpermanent resident satisfies certain residency and moral character requirements and "establishes that removal would result in

69. Some may ask why we should protect functional families in the immigration context when we do not afford the same protections to functional families in all aspects of domestic law. In response, while the immigration context poses unique challenges, and an extensive discussion of the protection that should be afforded the functional family in the domestic context is beyond the scope of this Article, this author supports the notion that protection should be afforded to functional families in the domestic context.
exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.\textsuperscript{70} The definition of a "child," as held by the Supreme Court in a case involving this statute's precursor, explicitly excludes any individual who does not fit within the INA's statutory definition of "child," even if that individual's "relationship with the deportable alien closely resembles that of a parent and child."\textsuperscript{71}

The case before the Supreme Court involved a woman named Virginia Hector who was a native and citizen of Dominica in the West Indies. Ms. Hector entered the United States in April 1975 as a nonimmigrant visitor, but overstayed her visa and remained in the United States without legal status from April 30, 1975 until 1983, when the United States instituted deportation proceedings against her. Ms. Hector lived with and cared for the youngest of her four children, a ten-year-old boy, and two of her nieces who were United States citizens aged ten and eleven. The nieces' parents lived in Dominica at the time.

The Board of Immigration Appeals (BIA) concluded, as a matter of law, that a niece is not a "child" within the meaning of the deportation statute.\textsuperscript{72} But the Court of Appeals for the Third Circuit granted Ms. Hector's petition for review and remanded the case to the BIA, holding that the BIA erred by not sufficiently considering whether Ms. Hector's relationship with her nieces was the functional equivalent of a parent-child relationship.\textsuperscript{73} The remand order instructed the BIA to ascertain whether Ms. Hector had a "parental-type relationship" with her nieces, and, if so, to determine whether the nieces would experience extreme hardship as a result of Ms. Hector's deportation.

In issuing the remand order, the Third Circuit relied on its own precedent in \textit{Tovar v. I.N.S.}, which held that the BIA should have considered the hardship to a nonpermanent resident's grandchild where the relationship between the two closely resembled that of a parent to a child.\textsuperscript{74} In \textit{Tovar}, the Third Circuit reasoned that Ms. Tovar and her grandson Christian comprised a family and shared the relationship of mother to child:

\begin{itemize}
\item \textsuperscript{70} 8 U.S.C.A. §1229b(b)(1)(D) (West 2008).
\item \textsuperscript{71}  I.N.S. v. Hector, 479 U.S. 85, 87-88 (1986).
\item \textsuperscript{72}  \textit{Id}.
\item \textsuperscript{73}  Hector v. I.N.S., 782 F.2d 1028 (3d Cir. 1985).
\item \textsuperscript{74}  Tovar v. I.N.S., 612 F.2d 794, 798 (3d Cir. 1980).
\end{itemize}
Christian is emotionally attached and financially dependent on Maria Tovar. Testimony at the hearing indicated that he thought of her as his mother, despite his having been informed of the identity of his natural mother. Furthermore, we recognize that grandmother headed households are worthy of fundamental respect. Therefore we believe it proper to extend the same privilege that the suspension provision affords the nuclear family to this grandmother-headed family.  

Unfortunately, the Supreme Court overruled this precedent in *I.N.S. v. Hector*, explicitly holding that the Court is “constrained to hold that Congress, through the plain language of the statute, precluded this functional approach to defining ‘child.’” Although relying on the plain language of the statute, the Court also noted legislative history which “corroborated” the statute’s plain language:

> With respect to suspension of deportation, the Senate rejected a draft of the bill that focused on the hardship to the ‘immediate family.’ See S. 716, 82d Cong., 1st Sess., (1951). In a prepared analysis of S. 716, the INS expressed concern about this undefined term that the INS considered ‘obscure, uncertain, and difficult, if not impossible, to administer’ since the language could ‘conceivably be claimed to include any relative of the alien, by blood or marriage, who might be living with him in his household.’  

> INS, Analysis of S. 716, 82d Cong., 1st Sess., 244–2 and 244–3 (1951) (emphasis in original). Instead, the INS asked Congress to list the ‘particular relatives who are intended to be described.’ *Id.*, at 244–3. The bill that was eventually

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75. *Id.* at 798 (citation omitted).

76. *Hector*, 479 U.S. at 90. For more discussion on the statutes which allowed for the consideration of family hardship in deportation proceedings see Susan L. Kamlet, Comment, *Judicial Review of “Extreme Hardship” in Suspension of Deportation Cases*, 34 Am. U. L. Rev. 175, 175 (1984). See also Mejia-Carillo v. I.N.S., 656 F.2d 520, 522 (9th Cir. 1981) (family separation may constitute extreme hardship); Villena v. I.N.S., 622 F.2d 1352, 1357 (9th Cir. 1980) (separation of close relatives may constitute extreme hardship); Antoine-Dorcelli v. I.N.S., 703 F.2d 19, 21 (1st Cir. 1983) (BIA should give due consideration to family separation in suspension of deportation proceedings in a case where petitioner was not related to the Craig family but had lived with, been treated as, and considered herself a member of that family for over 30 years); Contreras-Buenfil v. I.N.S., 712 F.2d 401, 403–04 (9th Cir. 1983) (holding that the BIA should give due consideration to family separation in suspension of deportation proceedings in a case in which petitioner would be separated from the woman he loved and her children, one of whom was his own); see Kamlet, at 199-200.
passed contained the ‘parent, spouse, or child’ language that is now in effect.\(^7\)

Explicitly deferring to the will of Congress, the Supreme Court, in essence, concluded that it is powerless to extend to functional families the provisions of U.S. immigration law which are meant to protect family integrity and the welfare of children.\(^7\)

More than twenty years after *Hector*, the case continues to bind U.S. courts. In one case, Macario Moreno applied for cancellation of removal on the ground that his removal would cause hardship for his grandchildren who were citizens of the United States. Mr. Moreno had legal custody of his grandchildren and was in the process of adopting them, but the adoption had not been finalized. The children's mother had already been removed to Mexico. While not questioning the parent-child relationship between Mr. Moreno and the children, the Ninth Circuit held that Mr. Moreno's grandchildren did not qualify as 'children' under the INA although Mr. Moreno was *in loco parentis*, because Congress had specifically precluded such a functional approach to defining the term 'child' for cancellation of removal purposes.\(^7\)

At least one circuit, while acknowledging *Hector* as binding precedent, has lamented its holding and explained that “the INA's definition of 'child' may be far out of step with the times, and may have a particularly deleterious effect on aliens whose culture's definition of 'family' is legitimately broader than the traditional definition of those related by blood or adoption.”\(^8\) As this line of cases explains, it would be up to Congress to conform the definition of family to one that reflects the broader, more inclusive conception of family.

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77. *Hector*, 479 U.S. at 90 n.6.

78. As noted above, this Article does not argue that if this case came up today the Court should extend the notion of the constitutional family to functional families. Nor is it arguing that the Court should apply human rights law to overrule congressional intent. The argument is that immigration law should be guided by human rights principles in a way that is meaningful to children.

79. Moreno-Morante v. Gonzales, 490 F.3d 1172, 1178 (9th Cir. 2007); see also Ayala-Hernandez v. Gonzales, 221 Fed.Appx. 570, 571 (9th Cir. 2007) (holding that a granddaughter does not fall under the definition of “child” for the purpose of establishing eligibility for relief).

3. The INA's Refugee Provisions

The definition of family in the context of U.S. immigration law is also relevant when discussing the circumstances under which children can immigrate to, or remain in, the United States with a functional parent who is granted asylum. The Attorney General may grant asylum to a "refugee," which is defined as "a person unable or unwilling to return to the country of that person's nationality or habitual residence because of past persecution or because of a well-founded fear of future persecution on account of his race, religion, nationality, membership in a particular social group, or political


82. Although not directly concerning the protection of functional parental relationships or family unity, the definition of "social group" that has developed through case law betrays how the INA privileges nuclear and immediate families over extended families and may even privilege certain relationships within nuclear families over others. In the leading case of Gebremichael v. I.N.S., for example, the court found that "[t]here can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family. Indeed, quoting the Ninth Circuit, we recently stated that 'a prototypical example of a particular social group' would consist of the immediate members of a certain family, the family being a focus of fundamental affiliational concerns and common interests for most people." 10 F.3d 28, 36 (1st Cir. 1993) (quoting Sanchez-Trujillo v. I.N.S., 801 F.2d 1571, 1576 (9th Cir. 1986)). A Ninth Circuit case, subsequently vacated and remanded without elaboration, further suggests that courts are prone to examine closely the level of extension of the familial ties in assessing whether there is a recognizable social group. Aguirre-Cervantes v. I.N.S., 242 F.3d 1169, 1176 (9th Cir. 2001) (vacated decision) ("The factors which lead us to conclude that the petitioner's family group qualifies as a 'particular social group' are that the petitioner's family members are part of an immediate as opposed to an extended, family unit." (emphasis added)). This trend notwithstanding, there is some case law supporting the notion that extended families may also constitute social groups. One case specifically affords social group status to an extended family. Bamba v. Attorney General, 278 Fed.App'x. 137, 139 (3d Cir. 2008) (affirming, without comment, an administrative judge's finding that the petitioner was entitled to withholding of removal based on his membership in a particular social group, which was his extended family). And in a major case revisiting Acosta at length, the BIA held that the extended family-related concept of a clan can qualify as a social group, concluding that "clan membership is a highly recognizable, immutable characteristic that is acquired at birth and is inextricably linked to family ties." In re H., 21 I. & N. Dec. 337, 342 (B.I.A. 1996). Even the Ninth Circuit has noted that its recognition "that 'a prototypical example' [of a social group] is the nuclear family does not imply that other sets of identified close family relationships might not qualify as a social group." Chen v. Ashcroft, 289 F.3d 1113, 1116 n.1 (9th Cir. 2002) (vacated and remanded to BIA upon briefing by parties). Nevertheless, the rarity of extended family "social group" cases is striking.
opinion."83 While a spouse or child of an alien who is granted asylum may also be granted the status of asylee and thereby immigrate to or remain in the United States for the sake of family unity, only those children meeting the INA's definition of "child" may do so.84 In a recent unpublished case, Tamrat v. Mukasey, in which a native and citizen from Ethiopia, Etsgenet Tamrat, applied for asylum for both herself and the son of her common law husband, for example, the United States Court of Appeals for the Fourth Circuit explained that the son could not be a derivative beneficiary of the applicant as he did not meet the INA's definition of child.85

As the child in Tamrat v. Mukasey was the son of Tamrat's common law husband, it seems possible that Tamrat was a functional parent for this child and that the child considered Tamrat his mother. Tamrat likely had nurtured this child, and may have been the main—or one of the main—providers of the child's "psychological, physical, intellectual, and spiritual care."86 But this was irrelevant in the eyes of the court as Tamrat's common law son did not meet the INA's statutory definition of child.

Therefore, in context of family based immigration and cancellation of removal, the INA's definition of "child" in its refugee provisions precludes consideration of such functional relationships as persons standing in loco parentis—including a primary caregiver grandmother, or another family member who has served as the de facto parent for a child—thereby narrowing the circumstances under which many families may remain together.

II. HOW U.S. IMMIGRATION LAW CONFLICTS WITH INTERNATIONAL LAW

In this part, the author explores how U.S. immigration law's treatment of functional families conflicts with the internationally recognized human rights of children.87 Although this Article does not

83. Id. (quoting Gao v. Ashcroft, 299 F.3d 266, 272 (3d Cir. 2002)) (emphasis added).
86. Dowd, supra note 8, at 1312.
87. It is recognized that from the perspective of some scholars, this position is largely aspirational, at least in the United States. In The Plenary Power Doctrine, for example, Kif Augustine-Adams argues that the strong statements in favor of family unity in human rights documents are limited in the context of
conclude that international law legally compels Congress to change the definition of the term “child” as it appears in immigration law, it does conclude that children's interests should guide Congress to honor international human rights law in a way that is meaningful to children. This section shows how the INA's definition of "child" does not honor the United Nations Convention on the Rights of the Child (CRC) as it has been interpreted and implemented around the world. First, the text and the interpretation of the CRC are explored with an eye towards the evolution of the definition of family in relevant international instruments. Then the extension of rights and protections to functional families under international human rights instruments in Europe and the Americas is explored, especially with reference to the implementation of the CRC.

A. The CRC and a Child's Right to Live in the Context of Her Family

The General Assembly of the United Nations adopted the CRC in November 1989. With the exception of the United States and Somalia, every United Nations member state has ratified the CRC. Somalia's failure to ratify the CRC can be attributed to the absence of a government stable enough to effect ratification. But the United States' failure to ratify is more complex. The United States objects to ratification on many levels, mostly related to perceived threats to the international covenants and court decisions addressing immigration and citizenship, and that immigration and citizenship are treated as separate from other substantive areas in which international human rights norms traditionally apply. Kif Augustine-Adams, The Plenary Power Doctrine, 38 U.C. Davis L. Rev. 701, 721-35. Augustine-Adams also raises a frequent criticism of international law, even in cases where rights do exist, which is the difficulty in enforcing these rights. Id. Still, even Augustine-Adams is forced to admit that “a very limited right to remain with family members in a country may be emerging under the European Convention on Human Rights.” Id. at 728.


89. The Campaign for U.S. Ratification of the Convention on the Rights of the Child, What is the Status of the CRC?, http://childrightscampaign.org/crcindex.php?sNav=getinformed_snava.php&sDat=status_dat.php (last visited Mar. 8, 2009) (“At present, Somalia is without a functioning central government. However, parties within the government structure have committed to signing and ratifying the CRC once the situation is rectified.”).
prerogatives of either the state (or the states) or a child's parents. Not surprisingly, many of the developed countries which have ratified the CRC have done so with reservations which reflect some of the concerns of the United States.90

Before the CRC's adoption, the protections and rights owed to children under international law were constantly evolving. This evolution began with the Declaration of the Rights of Children adopted by the League of Nations in September 192491 and continued with the Universal Declaration of Human Rights (UDHR) in 1948,92 the Declaration of the Rights of the Child in 1959,93 and the International Covenant on Civil and Political Rights (ICCPR) in 1966.94 Over time, the focus on children shifted from protection to the establishment of rights for children as members of society.95 The CRC, together with its Optional Protocols,96 is the latest codification of this shift in focus.

In addition to the shift in focus from protection to rights, one can see in these instruments an evolution in the definition of family for the purposes of protecting the child. Commencing with the UDHR, the family was defined as the basic unit of society, which must be supported by the family of nations97 and protected from

90. For example, the United Kingdom ratified the Convention with a reservation on Article 22 due to possible intervention in immigration processes. In September 2008, however, the U.K. announced that it was withdrawing its reservation on immigration and nationality matters under Article 22, as well as the one under Article 37(c) relating to confinement conditions for children. Children Rights Alliance England, http://www.crae.org.uk/news-and-events/news/uk-ratify-optional-protocol.html (last visited Jan. 26, 2010).
97. UDHR, supra note 92, art. 16(3).
arbitrary interference. What that family looked like, however, was a function of the society that was creating the relevant legal regime. In the first part of the twentieth century, western countries with nuclear models of family life and a belief that the protection of mother and child was the first priority predominated. By 1989, when the United Nations adopted the CRC, the concept of family had evolved, at least in part, throughout Western countries. Support for the family, and the "family life" to which a child had a right, began to increasingly encompass families that looked quite different from the traditional model, including divorced parents (both of whom could have an important part in a child's life), parents out of wedlock, whether living together or separately, gay and lesbian applicants for adoption and single fathers. In short, the focus on a tight nuclear family consisting of two parents and a child had moved towards an appreciation of the role of the extended or functional family in the raising of a child.

This change reflects in some part the evolution in the western concept of family, but it also arguably reflects the effect of globalization on children's rights. When the Geneva Declaration on Human Rights was adopted in 1924, the family was not referenced at all. Instead, the Declaration was concerned with the protection of the child from specified evils and the promotion of his or her material

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98. Id. art. 12.
102. See, e.g., Nolan and K. v. Russia, App. no. 2512/04 Eur. Ct. H.R. at 80–83 (2009) (holding that a single father had a significant interest in remaining in close physical proximity with his son).
and spiritual development. By 1948, when the Universal Declaration of Human Rights was adopted, the family had been given a central role itself worthy of protection. Article 16(3) provides that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State." In addition, children had been given separate status, albeit in the context of their relationship with their mother.103 Also, fathers became a part of the picture in the provision that gives parents the "prior right" to choose the kind of education to be given their children.104

In 1959, The Declaration of the Rights of the Child introduced the concept of children's rights, the "best interests of the child" standard,105 and an enhanced role for both parents in the development of children—although it retained the special status of the mother.106 In 1966, the International Covenant on Economic, Social and Cultural Rights was adopted and recognized that "[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children."107 This covenant also changed the special status that mothers used to have while the child is "of tender years," as in the 1959 Declaration, to the limited period before and after childbirth108 and introduced the concept of a legal guardian who may take the place of parents in certain cases.109

103. "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection." UDHR, supra note 92, art. 25(2).
104. "Parents have a prior right to choose the kind of education that shall be given to their children." Id. art. 26(3).
105. See Dec. of Rights of Child, supra note 93, princs. 2, 7.
106. "The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother." Id. princ. 6.
108. "Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits." Id. art. 10(2).
109. Article 13(3) provides that: "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those
The ICCPR introduced the concept of the equality of the father and the mother and the right of a child to registration at birth, a name, and a nationality. It is clear then, that by the mid-1970s, the child's place in the international legal regime had changed, the family had been elevated to "the natural and fundamental group unit of society," and parental rights had put the father and mother on more equal footing. The focus remained, however, on married parents and the nuclear family.

Finally, the CRC represents a revolutionary change in the scope of children's rights. Its provisions deal comprehensively with a wide range of issues relating to children and envision a child who will have, in addition to a relationship with one or both of his or her parents, relationships with other relatives and caregivers. For example, Articles 23(2) and (3), concerning children with disabilities, refer to "the parents or others caring for the child." The CRC also envisions a child whose cultural heritage and context is an important referent in supporting him or her. The CRC's preamble, for example, introduces a reference to the "family environment," which includes an "atmosphere of happiness, love and understanding."

More than fifteen years after the United Nations adopted the CRC, the Committee on the Rights of the Child specifically recognized that the word "family" in the preamble to the CRC "refers established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions." Id. art. 13(3).

110. "1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognized. 3. No marriage shall be entered into without the free and full consent of the intending spouses. 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children." ICCPR, supra note 94, art. 23.

111. "1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality." Id. art. 24.

112. CRC, supra note 6, pmbl (recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love, and understanding).
to a variety of arrangements that can provide for young children's care, nurturance and development, including the nuclear family, the extended family, and other traditional and modern community-based arrangements, provided these are consistent with children's rights and best interests." Article 3(2) further expands the list of those who may be in the position of exercising parental responsibilities to parents, legal guardians, or "other individuals" legally responsible for the child, while Article 5 anticipates that parental responsibilities may rest with members of the extended family or the community and refers to local custom as a source of information about the appropriate people to exercise such rights in certain cases.

Other provisions of the CRC also clearly envision a more inclusive definition of "family" than the nuclear family. Article 8(1), for example, provides that attributes of a child's protected identity include not only name and nationality but also "family relations" and Article 20(1) provides special protection and assistance to a child deprived of a "family environment." This right is separate from the rights related to the child's separation from her parents in Article 9. Article 21(a) discusses the determination that an adoption is permissible "in view of the child's status concerning parents, relatives and legal guardians." Article 22(2), dealing with refugee children, directs states "to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family."

The United Nations Committee on the Rights of the Child continues to recognize the expansive definition of family in the CRC, commenting in 2006 that:

[F]amily patterns are variable and changing in many regions, as is the availability of informal networks of support for parents, with an overall trend towards greater diversity in family size, parental roles and arrangements


114. "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention." CRC, supra note 6, art. 5.
for bringing up children. These trends are especially significant for young children, whose physical, personal and psychological development is best provided for within a small number of consistent, caring relationships. Typically, these relationships are with some combination of mother, father, siblings, grandparents and other members of the extended family, along with professional caregivers specialized in childcare and education. The Committee acknowledges that each of these relationships can make a distinctive contribution to the fulfilment of children's rights under the Convention and that a range of family patterns may be consistent with promoting children's well-being.\(^{115}\)

This comment shows how the CRC, in expanding and delineating the rights of the child, takes into account the roles played by the child's culture and extended family. Although numerous provisions of the CRC are specifically attuned to the parent-child relationship, they are no longer exclusive, and even they anticipate that there may be instances in which people other than parents take on the responsibility of parents.

Like the CRC, certain policies set out by the United Nations High Commissioner for Refugees have sought to protect the rights of children by establishing protections for the functional family. In February 1997, UNHCR issued Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum\(^{116}\) acknowledging that:

For cultural, social or other reasons, a child may not have been raised by his/her natural parents. If a child is in a first asylum country with an adult other than the natural parent but who has nevertheless assumed the principal caretaking responsibilities towards the child, then this arrangement should be respected even if it has not been legally formalised.\(^{117}\)

These Guidelines and the CRC reveal that international law now increasingly requires the protection of functional families as essential to children's rights. The United States, unfortunately, has

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consistently failed to respect this principle of international law. The next section explores how regional organizations and other national governments have used international human rights instruments, including the CRC, to extend protections to "functional" families.

A. Implementation of International Children's Rights Instruments

1. Europe

The Council of Europe, which was founded in 1949 to develop common and democratic human rights principles throughout Europe, has extended protections to functional families through several international instruments, including the Convention for the Protection of Human Rights and Fundamental Freedoms (European Human Rights Convention)\(^{118}\) and the Convention on the Exercise of Children's Rights (CECR).\(^{119}\) Applying Article 8 of the European Human Rights Convention, the European Court of Human Rights addressed the rights of a functional or extended family in *Bronda v. Italy*.\(^{120}\) In that case, a child's grandparents, with whom she had formerly lived, had sought her return from a foster home. The court found that the interference with family life prohibited under Article 8(1) of the European Human Rights Convention\(^{121}\) included interference in the relationship between a child and her grandparents. In this case, however, the court held that the determining factor was the best interests of the child, who had settled into her place in the foster family and did not want to leave. In another case,\(^{122}\) the court applied Article 8 to an applicant who sought access to his nephew. Although the case eventually settled, the court had the opportunity to explain that the relationship between an uncle and his nephew could in certain cases fall within


\(^{119}\) Council of Europe, Convention on the Exercise of Children's Rights, Jan. 25, 1996, Europ. T.S. No. 160 [hereinafter CERC]. This convention was specifically designed to address procedural matters arising from the enactment of the CRC.


\(^{121}\) "Everyone has the right to respect for his private and family life, his home and his correspondence." European Human Rights Convention, *supra* note 118, art. 8(1).

the concept of "family life" for purposes of Article 8 of the European Human Rights Convention and therefore be entitled to protection from interference.

Like the European Human Rights Convention, the CECR extends protections to functional families. Instead of referring exclusively to "parents," the CECR refers to "holders of parental responsibilities," which are defined as "parents and other persons or bodies entitled to exercise some or all parental responsibilities." The Council of Europe also extended protections to functional families in 2003 when it promulgated the Convention on Contact Concerning Children. The Preamble states that one of its goals is "to establish co-operation between central authorities and other bodies in order to promote and improve contact between children and their parents, and other persons having family ties with children." "Family ties" are defined in Article 2(d) as "a close relationship such as between a child and his or her grandparents or siblings, based on law or on a de facto family relationship." This definition of "family ties" extends family and children's rights to protect functional families and shows that European international organizations are moving towards the CRC's definition of family.

2. The Americas

In the Americas, the rights of the child derive primarily from the American Convention on Human Rights (American Convention) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador). The Inter-American

123. CERC, supra note 119, art. 2(b).
125. Id. pmbl.
126. Id. art. 2(d) (emphasis added).
128. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 16, opened for signature Nov. 17, 1988, O.A.S.T.S. No. 69 (entered into force November 16, 1999), available at http://www.oas.org/juridico/english/treaties/a-52.html ("Every child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the State.").
Commission on Human Rights and the Inter-American Court on Human Rights have also used the CRC as a reference in defining the protection granted by the American Convention to children. In the "Street Children Case," for example, the Inter-American Court on Human Rights construed Article 19 of the American Convention by reference to Articles 2, 3, 6, 20, 27, and 37 of the CRC stating that:

Both the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international corpus juris for the protection of the child that should help this Court establish the content and scope of the general provision established in Article 19 of the American Convention.129

In 2001, at the request of the American Commission on Human Rights, the Inter-American Court of Human Rights issued an Advisory Opinion on the Juridical Status and Rights of the Human Child.130 The goal of the request was to establish "limits to the good judgment and discretion of the States" with respect to children and also to establish "general and valid criteria on this matter in conformance to the framework of the American Convention."131

In issuing its advisory opinion, the court determined that it could use the CRC in the interpretation of the American Convention and other international treaties.132 The court also adopted a number of the provisions of the CRC, including the "best interests of the child" standard,133 the centrality of the family (including the European Court's decisions concerning "de facto 'family' ties where the parties are living together outside of marriage"),134 the prohibition of official interference with the right to family life,135 the principle that a child and his or her family cannot be separated

130. IACtHR Advisory Opinion 17, supra note 95.
131. Id. at 1.
132. Id. at 51.
133. Id. at 78.
134. Id. at 60–61 (emphasis added).
135. Id. at 61 ("Every person's right to receive protection against arbitrary or illegal interference with his or her family is implicitly a part of the right to protection of the family and the child . . . .").
except where it is in the best interests of the child, the right of due process in judicial and administrative matters where decisions are made on the rights of children, and the right of due process where a child is accused of a crime.

Further focus on the rights of the child and the variety of family structures came at the Nineteenth Pan American Child Congress held in Mexico City in 2004, which was convened on the anniversary of the adoption of the CRC. This congress was convened by the Inter-American Children's Institute—a specialized organization of the Organization of American States (OAS)—and involved participants from national governments, non-governmental organizations, and academia. The main theme of the congress in 2004 was, “The Family: Basis for the Integral Development of Children and Adolescents,” and the third sub-theme was, “Children's Rights and their Relation to the Different Types of Families.” The goal of the congress was to provide a clearinghouse for the exchange of information, experience and expertise, and to address and analyze policies with the ultimate goal of contributing to the progress of child policies in the Americas. The Declaration of the Nineteenth Pan American Child Congress suggests conducting technical studies on the rights of children and their families and refers to “the heterogeneity and cultural diversity that characterizes the countries in the region [which] bring about a variety of family structures and organizations . . . .” This declaration emphasizes that every child has a right to a stable familial institution, that states have an obligation to support and strengthen the family unit, and that states must “protect the integrity of the family in order to enable it to perform its social role of protection and respect for children's rights.”

136. Id. at 62 (“Any decision pertaining to the separation of the child from his or her family must be justified by the best interests of the child.”).
137. Id. at 70–71 (“Protection measures adopted by administrative authorities must be strictly in accordance with the law and must seek continuation of the child’s ties with his or her family group, if this is possible and reasonable . . . . All this enables adequate development of due process . . . .”).
138. Id. at 73. (“As regards the subject matter we are now addressing, the rules of due process . . . safeguard the rights of children subject to various actions by the State, society, or the family.”).
140. Id. at 3.
141. Id. at 1.
3. The United States

Unlike regional international courts and courts in other countries, courts in the United States have not embraced the CRC. The Fifth Circuit has explicitly refused to apply the CRC to U.S. immigration law and has also refused to apply "customary international law" such as the UDHR where a "controlling legislative act" occupies the field.142 Similarly, the Second Circuit rejected the argument that the CRC is binding as "customary international law" where Congress had already "enacted legislation defining the circumstances under which hardship to a child may appropriately be considered as a ground for granting relief from removal to a nonpermanent resident alien."143 The Eighth Circuit also refused to consider the CRC where "Congress has clearly expressed in the INA its intent to remove certain aliens, as in this instance, without a separate consideration of the impact of that removal upon the alien's children . . . "144

Despite the widespread rejection of the CRC in the United States, at least one circuit has acknowledged its relevance to U.S. immigration law. In Cabrera-Alvarez v. Gonzales, the Ninth Circuit noted that the CRC is not the law of the land because the United States has not ratified it, but "assume[d], without deciding that the [CRC] ha[d] attained the status of 'customary international law.'"145 The court went on to consider whether the Department of Justice's interpretation of the hardship standard in IRRIRA contravenes the

144. Arellano-Garcia v. Gonzales, 429 F.3d 1183, 1188 (8th Cir. 2005).

Professors Jacqueline BhaBha and Wendy Young explain the implications of the CRC obtaining the status of customary international law: "Any framework for the adjudication of children's asylum claims must consider the provisions of international human rights instruments. These instruments have become increasingly important in interpreting the obligations of states towards their citizens and, by extension, the obligations of host states toward individuals seeking asylum. The INS recognizes that such instruments are relevant to the evaluation of asylum claims, and that even if the United States has not ratified a particular treaty, it may still be bound if the provisions have acquired the status of customary international law." Jacqueline BhaBha & Wendy Young, Not Adults in Miniature: Unaccompanied Child Seekers and the New U.S. Guidelines, 11 Int'l J. Refugee L. 84, 93 (1999) (emphasis added). See also I.N.S., The Basic Law Manual: U.S. Law and INS Refugee/Asylum Adjudications 12 (1994) (stating that "treaties to which the United States is not a party, while not legally binding, can be evidence of customary international law").
The court held that the interpretation did not violate the CRC, so the discussion of the CRC is dictum; however, the fact that the Ninth Circuit entertained the CRC as customary international law for purposes of argument suggests that the CRC may be emerging as a force in U.S. immigration law.

Despite the Ninth Circuit's analysis, however, the reality is that several federal circuits have refused to grant the CRC the status of customary international law. As we saw in Section I, the courts have simply deferred to Congress to define "family" for the purpose of immigration law:

Though this result—separating five U.S. citizen children from their grandfather, who appears to be their only loving and stable source of care and support—may seem unduly harsh and perhaps illogical, it is the result dictated by law. Congress is of course free to correct any inequities resulting from our application of its plain statutory language, as it has done in the past.

Unfortunately, for matters relating to immigration, Congress has consistently relied on a definition of family which conflicts with international law and is unduly harsh, illogical, and contrary to the best interests of children.

146. Cabrera-Alvarez, 423 F.3d at 1010–13. The issue before the court was the interpretation and application of the "best interests" standard in Article 3 of the convention; this case did not explicitly involve a child's right to be raised in the context of her family.

147. An example of the emergence of the CRC in U.S. law generally is the landmark juvenile death penalty case Roper v. Simmons, 543 U.S. 551 (2005). In Roper, the 2005 decision that struck down the death penalty for juveniles, Justice Anthony Kennedy explained that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." Id. at 578. In assessing the opinion of the world community, the Court noted that the CRC "contains an express prohibition on capital punishment for crimes committed by juveniles under 18." Id. at 576.

148. Moreno-Morante v. Gonzales, 490 F.3d 1172, 1178 (9th Cir. 2007). For more discussion of the effect of U.S. immigration law's definition of family on mixed-status families, see infra Part III.B.
III. WHY U.S. IMMIGRATION LAW SHOULD CONFORM TO INTERNATIONAL LAW AND INCLUDE A FUNCTIONAL DEFINITION OF FAMILY

Certainly, international law contemplates a state's right to define family for itself:

The Committee notes that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition. However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23.149

In the United States, we do recognize that extended families are entitled to constitutional rights. In Moore v. City of East Cleveland,150 for example, a plurality of the Supreme Court found that a zoning ordinance limiting the definition of “family members” to nuclear families infringed upon the Due Process Clause of the Fourteenth Amendment. The Court explained that the “sanctity of the family” must be respected based on the “teachings of history [and] the solid recognition of the basic values that underlie our society.”151 Writing the plurality opinion, Justice Powell reasoned:

Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it.152

In a concurring opinion, Justices Brennan and Marshall observed that “[t]he Constitution cannot be interpreted . . . to tolerate the

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151. Id. at 495.
152. Id. at 504–05 (citation omitted).
imposition by government upon the rest of us of white suburbia's preference in patterns of family living."

Scholars have acknowledged that U.S. constitutional law protects the unity of "extended family" by protecting family ties between "persons bound together by marriage and kinship ties," as well as de facto parent-child relationships that may exist, for

153.  
Id. at 506–08. The Supreme Court has long accorded constitutional protection to family relationships, not only safeguarding existing relationships from intrusion—e.g., Griswold v. Connecticut, 381 U.S. 479, 494–95 (1968) (noting that the Court has acknowledged the "private realm of family life which the state cannot enter")—but also preventing the erection of barriers to their formation—e.g., Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (finding that the right to marry is a "central part of the liberty protected by the Due Process Clause"). Similarly, the Court has recognized that in our history and traditions, there is a "private realm of family life which the state cannot enter," Prince v. Massachusetts, 321 U.S. 158, 166 (1944), and that "the child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). "[IIn the culture and traditions of the Nation," the Court has found, it is families that assume a primary role in "cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State." Roberts v. U.S. Jaycees, 468 U.S. 609, 618–19. See also Meyer v. Nebraska, 262 U.S. 390, 401–02 (1923) (state-imposed collective rearing of children would do violence to the letter and spirit of Constitution). In short, in the United States it is clear that family relationships are seen as critical to the independent formation of one's core beliefs and ideals, and receive constitutional protection in order to safeguard the freedom of self-definition that is "central to any concept of liberty." Roberts, 468 U.S. at 619. See also Stanley v. Illinois, 405 U.S. 645, 651–52 (1972) (describing the importance of family and family bonds); Santosky v. Kramer, 455 U.S. 745, 758–59 (1982) (describing parent-child relationship as "far more precious than any property right"). The Court has supported so-called non-traditional family forms. See, e.g., Moore, 431 U.S. 504-05 (finding constitutional protection for extended families); Smith v. Org. of Foster Families for Equality and Reform, 431 U.S. 816, 844 (1977) (noting that "[n]o one would seriously dispute that a deeply loving and independent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship"). But many courts have found no constitutional rights are implicated when a citizen's noncitizen family members are excluded from the United States or not allowed to remain. See, e.g., Perdido v. I.N.S., 420 F.2d 1179, 1181 (5th Cir. 1969) (finding no deprivation of a citizen child's constitutional right where the noncitizen parents were ordered deported); Gonzales-Cuevas v. I.N.S., 515 F.2d 1222, 1224 (5th Cir. 1975) (holding that deportation orders to noncitizen parents do not violate any constitutional right of citizen children). For a response to those who argue that the Constitution should apply in the context of immigration see Augustine-Adams, supra note 87, at 712 (noting the difficulty in grounding constitutional protections for noncitizens in the U.S. Constitution because it says little, if anything, about noncitizens).
example, between a child and a grandmother.\textsuperscript{154} The Court has established that such family ties are protected against state intervention by the highest levels of scrutiny derived from due process considerations.\textsuperscript{155} However, in the context of immigration law, the Court has applied the most minimal levels of scrutiny to state activity.\textsuperscript{156}

Although courts in the United States recognize that the constitutional right to family extends to functional families, these same courts explicitly deny these rights to extended families subject to immigration law. As Professor Trucios-Haynes concludes, the concept of the "immediate family" in immigration law is a narrow definition of family "at odds with the constitutional protection for extended families under the Due Process Clause of the Fourteenth Amendment." She explains, however, that courts have upheld the narrow definition of family under the plenary power of Congress to legislate on immigration matters.\textsuperscript{157}

\begin{itemize}
\item 155. \textit{Id.} at 264–66.
\item 156. \textit{Id.} at 266–68.
\item 157. Enid Trucios-Haynes, "Family Values" 1990's Style: U.S. Immigration Reform Proposals and the Abandonment of the Family, 36 Brandeis J. Fam. L. 241, 243–246 (Spring 1997–1998) (examining how restrictive immigration reform proposals affecting family unity are at odds with the constitutional values, economic interests, and the emerging transnational identity of the United States). Congress exercised its plenary power over immigration in the nineteenth century through the Chinese Exclusion Acts. The Exclusion Acts and cases upholding them gave birth to the plenary power doctrine. Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) (holding that the power "to exclude or to expel aliens" is "vested in the political departments of the government"); Chae Chan Ping v. United States, 149 U.S. 698, 713 (1893) (holding that the power "to exclude aliens from U.S. territory for any sufficient reason"); see also Matthews v. Diaz, 426 U.S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."). There are a number of scholars who have criticized the plenary power doctrine. \textit{See, e.g.}, Gerald L. Neuman, \textit{Strangers to the Constitution} (1996) (asserting that the government should not be free to deport aliens on constitutionally suspect grounds); Linda S. Bosniak, \textit{Membership, Equality, and the Difference that Alienage Makes}, 69 N.Y.U. L. Rev. 1047, 1091–92 (1994) ("Whatever rationales support it, the plenary power doctrine has often had distressing real-life consequences . . . for years, scholars have characterized the plenary power doctrine as a national embarrassment and have called for its abandonment by the courts."); Gabriel J. Chin, \textit{Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of}
So, if Congress has plenary power to narrowly define family for the purpose of regulating immigration, and the CRC is not binding on U.S. courts, of what moment is it that U.S. immigration laws conflict with the well-established right to family, including the functional family, as set out in the CRC?

As is emphasized throughout this Article, we should care that our immigration law conflicts with the well-established right to family because we are falling behind the human rights standards set by the rest of the world. But there are additional compelling reasons

why we should care that U.S. immigration law conflicts with the well-established right to family: (1) doing so interferes with the vital interest of children to be raised in a secure and stable family relationship, and (2) these laws have a devastating impact on mixed-status families. After discussing these reasons, this Article explores some concerns raised by adopting a functional approach to defining family.

A. The Vital Interest of Children in a Secure and Stable Family Relationship

It is well-established that to develop into autonomous, socially competent, responsible, and well-adjusted adults, children require a secure and stable family relationship. Child-development research shows that children form strong bonds of attachment to their parents early in life, which strengthen and develop as children grow older. These attachment relationships do not depend on biological connection, but form with adults who "on a continuing, day-to-day basis, through interaction, companionship, interplay and mutuality, [fulfill] the child's psychological needs, as well as the child's physical needs." It is through such relationships—which require a "reciprocal, enduring, emotional, and physical affiliation between a child and caregiver [that children] form their concepts of self, others and the world."

Thus, a child should not be separated from a parental figure just because that person is not their biological parent—doing so can have extremely detrimental effects on a child. Scientific research supports this conclusion. For example, in its report, From Neurons to Neighborhoods: The Science of Early Childhood Development, the National Research Council and Institute of Medicine found that attachment relationships "shape the development of self-awareness, social competence, conscience, emotional growth and emotional regulation, learning and cognitive growth." This report also found

158. See, e.g., 1 John Bowlby, Attachment and Loss: Attachment 198–209 (1st ed. 1969) (examining the nature of a child's attachment to his or her mother).
159. Joseph Goldstein, et al., Beyond the Best Interests of the Child 98 (2d ed. 1979) [hereinafter Beyond the Best Interests]
that these relationships "buffer young children against the development of serious behavior problems, in part by strengthening the human connections and providing the structure and monitoring that curb violent or aggressive tendencies." Similarly, the American Academy of Pediatrics has found that "[a]ttachment to a primary caregiver is essential to the development of emotional security and social conscience." And, David M. Brodzinsky, a highly regarded researcher, educator, author, and expert in the area of child development and psychology has found that attachment relationships form "the cornerstone for healthy psychological adjustment."

It is the separation from a parental figure that can cause a child profound emotional and psychological harm. And, it is well known that disruption in primary attachment relationships causes children separation anxiety as well as more difficulty in forming

162. Id.
163. American Academy of Pediatrics: Committee on Early Childhood, Adoption, and Dependent Care, Development Issues for Young Children in Foster Care, 106 Pediatrics 1145, 1146 (2000).
Interference with children's attachment relationships can lead to aggression, problems in school, and "elevated psychopathology." In short, the scientific evidence is clear, compelling, and undisputed. Because primary attachment relationships are so critical to a child's cognitive, emotional, social, and psychological development, and because disruption of those attachment relationships impairs the child's ability to form future attachments, it follows that children need security and stability in their family relationships and should not be separated from adults who act as their parents, whether or not those parental figures are biologically or legally related to the child.

B. Impact on Mixed-Status Families

While there is no principled reason to distinguish American-citizen children from non-American citizen children when it comes to protecting their human rights, the reality of the political debate in the United States is that the fate of American-citizen children is considered more compelling. This reality is reflected in a recent *New York Times* story on mixed-status families, that is, families in which at least one family member has legal status in the United States and at least one family member does not. This section briefly discusses the impact of U.S. immigration law on these families.

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165. Beyond the Best Interests, supra note 159, at 33. ("When infants and young children find themselves abandoned by the parent, they not only suffer separation distress and anxiety but also setbacks in the quality of their next attachments, which will be less trustful . . . They tend to grow up as persons who lack warmth in their contact with fellow beings.").


It has been widely recognized that the line between “American families” and “immigrant families” is blurred. Three types of families can be identified on the basis of immigration status: families with legal immigration status, families with undocumented or unauthorized status, and families whose status is mixed.

In the first case, as noted above, legal immigration status has typically been obtained through family petition provisions. “As of 2004, 75 percent of the workload for United States Citizenship and Immigration Services (USCIS) officials was family-based,” and in 2006, 66 percent of legal immigration to the United States was attributable to family related visas.

In the second case, undocumented families have been described as those “composed entirely of persons [living in the United States] without authorized immigration status,” and have been estimated at four to five million. As a consequence, based on

in the United States; while many of these children live with their undocumented parents, there are at least 400,000 adults also living in these households. See Pew Report 2009, supra note 167, at 8 (discussing “mixed-status” families). David B. Thronson, You Can’t Get Here From Here: Toward A More Child-Centered Immigration Law, 14 Va. J. Soc’ly & L. 58, 64 (2006) (finding that mixed-status families are “remarkably widespread,” and “the permutations of immigration status in mixed families are myriad”) [hereinafter Thronson, You Can’t Get Here From Here].


While not explicitly defined in the Pew Center Report, the term “family” as used here appears to reflect a traditional western definition of family. The Pew report defines “Unauthorized-Immigrant Households,” as households in which “either the householder, spouse or partner (if any) or both are unauthorized immigrants,” and estimates that there are 4.7 million of these households. See Pew Report 2009, supra note 167, at vii, 35.
current estimates, undocumented children represent 13 percent of the undocumented population in the United States.\footnote{172}

In the third case, families have been defined as "mixed-status" families, or as "families in which all family members do not share the same immigration status or citizenship."\footnote{173} It has been estimated that 73 percent of the children in families headed by a noncitizen are U.S. citizens by birth.\footnote{174} More to the point, "of the entire population of the United States, one of every ten children now lives in a mixed-status family."\footnote{175} A 2009 report released by the Pew Hispanic Center shows that four million children with U.S. citizenship are the children of undocumented parents.\footnote{176}

Under current immigration laws, one reason that American citizens may care about the fate of immigrant families is that there are many American citizens who are in mixed-status families. In other words, under current immigration policy, American citizen children are vulnerable to separation from their noncitizen family members.\footnote{177}
The most common understanding of mixed-status families, of course, is an undocumented biological parent who gives birth to a child in the United States, thereby creating a mixed-status family. But given that families may immigrate together and given that a primary caretaker for the child of an immigrant family may not always be the biological parent, immigration laws that do not recognize in loco parentis relationships may make American citizen children in these families vulnerable to separation from their primary caretaker who (in addition to their biological parent) does not have legal status.

Unfortunately for the children in some mixed-status families, U.S. immigration law focuses on regulating and channeling the individual immigrant, without consideration for the welfare of the child or the integrity of the family unit. As discussed above, the problem, in essence, lies in how immigration law defines the unit of family. Again, "[w]estern democracies have conceived of 'family' as a nuclear family, consisting of mother, father and one or more (biological or adopted) minor children." This ideal nuclear family excludes other prevalent family configurations, such as in loco parentis relationships, single-parent households, grandparent-grandchild households, same-sex couples, polygamous marriages,

178. Under the Fourteenth Amendment to the United States Constitution all children born in the United States are granted citizenship. The Fourteenth Amendment provides, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1. The Constitution's granting of so-called "birthright citizenship" applies without regard to the legal status of the children's parents—so, for example, children born to parents who are living in the United States but are undocumented are United States citizens. For a discussion of this rule and challenges to it see Christopher L. Eisgruber, Birthright Citizenship and the Constitution, 72 N.Y.U. L. Rev. 54 (1997) (discussing challenges to birthright citizenship and defending the constitutional principle).

179. Of course, if a child's primary caretaker were her biological parent, this connection would also be placed in jeopardy by virtue of a family's mixed-status. The main point in this section is that there are American citizen children who may be affected by immigration laws that reflect a western notion of family, due, in part, to the law's failure to recognize in loco parentis relationships. It is also true, of course, that even if in loco parentis relationships were recognized, the person would still have to be eligible to stay in the United States on some specific ground. While it is the view of the author that these grounds should be expanded, that argument is beyond the scope of this Article and is not addressed here.

180. Demleitner, supra note 12, at 276.

181. Id. at 290.
and extended family configurations "in which . . . relatives and non-relatives, live in the household, either in addition to or instead of the expected nuclear family members."\(^{182}\) Most fundamentally, this "ideal" family unit reflected in the INA negates the validity of *in loco parentis* relationships, without regard for the welfare of children.

Scholars have recognized the vulnerability of mixed-status families to separation, due to legislative and policy shifts between "extremes of openness to newcomers and nativist exclusion."\(^{183}\) Shifts in recent years have favored a policy of "attrition," whereby immigrants give up and deport themselves when confronted with heavy-handed methods of immigration enforcement.\(^{184}\) This policy shift has translated into dramatic large-scale immigration raids in homes and workplaces with the supposed purpose of picking up immigrants with outstanding criminal records or deportation orders.\(^{185}\) The raids have led to the removal of large numbers of undocumented immigrants, whether or not they have outstanding arrests or deportation orders, but have also met the underlying goal of instilling panic, trauma, and crisis in families and children suddenly faced with the removal of a parent.\(^{186}\) Advocates of "attrition" should know, however, that a "case study found that sixty-

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182. Id.; see also 273–74, 279–82.
184. "The basic idea of attrition advocates is that "[b]y deterring the settlement of new illegals, by increasing deportations to the extent possible, and, most importantly, by increasing the number of illegals already here who give up and deport themselves . . . [t]he result would be a shrinking of the illegal population to a manageable nuisance.' The predicted 'self-deportations' are to come as 'an increase in conventional enforcement—arrests, prosecutions, deportations, asset seizures, etc.—with expanded use of verification of legal status at a variety of important points . . . make it as difficult and unpleasant as possible to live here illegally.' Advocates of attrition note that under this approach it is 'true that random raids at workplaces and elsewhere will always be needed as an enforcement tool (like speed traps or random tax audits, in other contexts), because every illegal alien must understand that he may be detained at any time.'" Id. at 402–03 (quoting Mark Krikorian, *Downsizing Illegal Immigration: A Strategy of Attrition Through Enforcement*, CIS Backgrounder (Ctr. for Immigration Studies, Wash., D.C.), May 2005, at 2, available at http://www.cis.org/articles/2005/back605.pdf).
185. Id. at 398–99.
186. Id. at 400–05.
six percent of children with a parent arrested in a workplace raid were U.S. citizens.\footnote{187}

In addition, the Antiterrorism and Effective Death Penalty Act (AEDPA) causes family disintegration by establishing that detainees must be sent to jails, processing centers, temporary tent cities, or detention centers.\footnote{188} Those sent to detention centers remain there, from a few months to several years, without counsel, in places far removed from their family's residence, until their deportation process is complete.\footnote{189} Once removed, deportees may face additional punitive conditions and assimilation challenges, not to mention family separation. It appears that deportation is being used as a second-tier punitive system by Congress for immigrants; removal is a severe punishment that neither corresponds to the act, nor justifies the destruction of the family unity.\footnote{190} Thus, in a fundamental way, immigration law fails to acknowledge that immigrants are more fluidly assimilated into society if they can migrate with their families. These laws also separate children from their family members and disregard the rights of children in mixed-status families.

This section has explored why we should care about the well-established right of a child to live with her family. Now that this question has been addressed, perhaps the question should be framed this way: why shouldn't U.S. immigration law define family in a way that includes functional families and thereby furthers the best interests of children? Where the intent of U.S. immigration law is to protect family unity for the sake of children's best interests, why does it make sense to place artificial limitations on what constitutes a family? These questions are addressed below by exploring some likely counterarguments.

C. Overcoming the Problems of a Functional Approach

Including a functional definition of "parent" and "child" in immigration law will bring certain difficulties. Some criticism will focus on the fact that a functional definition will increase immigration. Although any related increase in the number of

\footnotesize{\begin{tabular}{ll}
187. & \textit{Id.} at 405. \\
189. & Lonegan, \textit{American Diaspora}, supra note 1, at 66–70. \\
190. & \textit{Id.} at 70–73. \\
\end{tabular}}
immigrants who enter or remain in the United States is likely to be relatively small, this Article takes as a given that more individuals will be eligible to immigrate to the United States under a functional approach. The Article does not discuss the benefits or criticisms of more open immigration policies generally, but notes that substantial scholarship exists on this issue.\textsuperscript{191} What is important to emphasize here is that honoring the rights of children is worth whatever tradeoff critics say will come from an increase in the number of individuals who can immigrate legally to the United States.

Other concerns will arise relating to what Professor Martha Minow refers to as the messiness of functional definitions, namely: less predictability, intrusive judicial examination, and inevitably inconsistent outcomes.\textsuperscript{192} Professor Minow asks: if we use a

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\item \textsuperscript{192} Professor Minow articulates two additional problems with using a functional approach to define family. The first, which she discusses only briefly, has to do with what she describes as the "suspicious pedigree" of functional approaches. More specifically, there is literature that finds a connection between analysis of "family functions and social thought," or as Minow describes, the kinds of "intellectual work that also brought us Social Darwinism, eugenics, and programs of governmental intrusion into and control over the lives of immigrants, racial minorities and poor people." Another concern Professor Minow raises with using a functional approach in this area is the government assigning family-like status to "punish people or deny them benefits for which they would otherwise be eligible." Thus, Professor Minow sees an important distinction between family form chosen by participants and one used by the government to achieve its own ends. Minow provides a number of examples of this last concern, one of which was when the Department of Housing and Urban Development adopted a regulation that allowed the eviction of any family member suspected of engaging in certain
\end{itemize}
functional approach to define family, might we then only be able to predict that the results will be unpredictable, or might our predictions be only as good as our understanding of a particular judge's conception of family? And, in response to the suggestion that more specific rules that reflect functional family relationships should be proposed, not only might these rules create their own kind of unpredictability, as Minow suggests, but these rules will also necessarily exclude some \textit{in loco parentis} relationships in which an adult is acting as a parent to a child. In the context of immigration policy, however, some unpredictability is preferable to the alternative, which is automatically prohibiting functional families from immigrating to the United States as a family unit. And in other contexts, as Professor Barbara Woodhouse explains, concerns regarding indeterminacy can be overcome since courts are particularly equipped to interpret ambiguous terms. Fortunately, the U.S. immigration system is also equipped to make such determinations. In fact, immigration officers and administrative judges are tasked with making fact-specific determinations every day. In the same way that the government determines whether a person's removal would cause "extreme hardship" to a United States citizen, it could determine whether a child's aunt or grandfather "functions" as a parent.

The functionalist approach may also be less troublesome for parent-child relationships than for adult-adult relationships because there is more likely to be a consensus over criteria adults must meet to be considered parental figures than consensus over the criminal activity. This concern is less pressing in the immigration context because U.S. immigration laws do not contain provisions that punish individuals based on their family affiliations. Minow, supra note 5, at 278–83.

193. Minow, supra note 5, at 276.
194. Id.
195. Woodhouse, supra note 5, at 576–80. Professor Woodhouse also acknowledges that the efficiency, predictability, and certainty that comes with bright line rules are legitimate goals, but that they should operate alongside equitable mechanisms that operate post-hoc to mitigate damage done by bright line rules.
196. For Barbara Woodhouse's parallel argument in the context of judicial decision-making see id. at 576–81.
197. See, e.g., Note, Limits of the Functional Approach, supra note 5, at 1654–56 (recognizing that there is little consensus over what characteristics are essential to adult consensual relationships; using as examples sexual intercourse which may not be common, especially among older couples, and joint bank accounts, which may or may not be considered evidence of a serious consensual adult relationship).
essential characteristics of adult consensual relationships.\textsuperscript{198} Even opponents of functional approaches tend to agree on these criteria.\textsuperscript{199}

Another problem related to the unpredictability and manipulability that Professor Minow identifies is that using a functional approach, rather than a formal, legal definition, will make the system vulnerable to abuse.\textsuperscript{200} In other words, the concern is that such an approach will lead to "sham" family formations that are structured only to take advantage of immigration benefits. The suspicion of "sham" family formations may also lead to invasions of privacy by authorities who are trying to determine if these are bona fide family formations. The response here is again to consider the alternative in the immigration context—functional families who wish to immigrate together or remain together in the United States may have to undergo scrutiny, but the alternative would be not to have

\textsuperscript{198} Id. at 1656. While courts acknowledge that the perceived needs of children may vary from culture to culture, they find that there is a "minimum threshold of care a parent must provide any child" that includes "a place to live, clothing, an education, attention and medical care." Matter of the Appeal in Cochise County, 133 Ariz. 157, 160, 650 P.2d 459, 462 (1982). Similar factors are listed in at least one state statute which provides for a functional determination of parenthood. See Or. Rev. Stat. § 109.119(10) (1990). To qualify as parents under this statute, functional parents must have provided the child with "food, clothing, shelter and incidental necessaries [including] necessary care, education and discipline." Id. On the other hand, consensus may be difficult to reach over questions such as: Are joint bank accounts indicative of a bona fide adult-adult relationship? Is a sexual relationship necessary for a bona fide relationship?

\textsuperscript{199} Eliza Patten, The Subordination of Subsidized Guardianship in Child Welfare Proceedings, 29 N.Y.U. Rev. L. & Soc. Change 237, 242 (2004) ("An acknowledgment that multiple bonds are characteristic of most children's emotional and social networks and are, in fact, beneficial, has replaced the monotropic view."); Ayelet Blecher-Prigat, Rethinking Visitation: From a Parental to a Relational Right, 16 Duke J. Gender L. & Pol'y 1, 16 (2009) ("The current consensus on children's relational interests is that children can form multiple relationships, which are essential for their social developmental needs."); Kathryn Kendell, The Custody Challenge: Debunking Myths About Lesbian and Gay Parents and Their Children, 20 Fam. Advoc. 21, 26 (1997) ("Every credible research study demonstrates that sexual orientation is irrelevant to parental ability and that children who have a close relationship with a lesbian or gay parent will not suffer adversely."); Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 Geo. L.J. 459, 464 (1990) (arguing that the legal definition of parenthood should be expanded "to include anyone who maintains a functional parental relationship with a child when a legally recognized parent created that relationship with the intent that the relationship be parental in nature").

\textsuperscript{200} Minow, supra note 5, at 277.
the option altogether. If the United States adopts a functional
definition of "child" for the purposes of immigration, families will
have the choice (although an admittedly difficult one), to forego
government scrutiny and not make an application to immigrate
together. In other words, defining "child" to include functional
families opens up opportunities for families who may be willing to
undergo government scrutiny, but does not force this scrutiny on any
families who choose to opt out.

Because this Article advocates an approach that is focused on
children, some of the traditional concerns regarding functional family
definitions are less worrisome. A child-centered approach means
more predictability and less manipulation than an approach that
includes adult-adult relationships.201 A focus on the interests of
children makes the problems and risks inherent in a functional
approach worth accepting. As Professor Minow suggests in
ultimately supporting a functional approach that is grounded in the
interests of the child, children's interests "above all, are what must
take center stage. Neither the government's interests, nor the
interest of adults, justifies regulating otherwise private and intimate
concerns. The needs of vulnerable and developing children supply
that justification."202 While "to talk of children's interests hardly
simplifies matters,"203 the problems inherent in a functional approach
to defining family are worth confronting to advance the interests of
children.

IV. CONCLUSION

The UNHCR's Guidelines on Refugee children emphasize the
importance of family unity to the child's mental health.204 A child's
physical safety is also compromised by family separation.205 This is
why "[p]reservation of family unity and preventing the separation of

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201. See, e.g., Note, Limits of the Functional Approach, supra note 5, at
1654–55 (explaining the problems of using a functional approach to define adult-
adult relationships).
202. Minow, supra note 5, at 284.
203. Id.
204. U.N. High Comm'r for Refugees, Refugee Children: Guidelines
Refugee Children Guidelines].
205. Eliahu Frank Abram, The Child's Right to Family Unity in
children from their parents or guardians is a peremptory mandate in refugee assistance.”

There should be no confusion that the starting point in any conversation regarding children's human rights should be the best interests of children. We must begin to treat human rights, and specifically children's human rights, in the same way we treat the obligation of countries to protect the rights of their own citizens. The United States must meet its moral imperative and modify its immigration law in a way that recognizes the inalienable dignity of children. Individual, cultural, and social interests underlie the importance of a child's right to be raised by her family. These interests are particularly strong when a child is at risk of being separated from her parental figure. We accept this idea implicitly when we are shocked by news reports of children who are in this country without family to care for them. Unfortunately, this shock fades, and these cases are often thought of as “exceptional cases” or otherwise acceptable consequences of a necessary and inevitable immigration policy.

As discussed throughout this Article, U.S. immigration law should be guided by human rights principles. The argument here is not that Congress is compelled by international law, at least as is interpreted by the U.S. Supreme Court, to do this, nor that the Supreme Court should invalidate Congress' choices about defining family as violative of the U.S. Constitution. The contention is that there is a human rights aspect to the interests of children that should outweigh the practical concerns discussed in this Article. In short, the suggestion is that Congress should follow human rights law in defining family in a way that is meaningful to children.

Like the Supreme Court, lower U.S. federal courts have imported international law principles and international norms into their opinions, despite their apparent refusal to grant the CRC the status of customary international law. Isn't it time for us to follow

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206. Id. See also UNHCR Refugee Children Guidelines, supra note 204, at 43, 93, 124.

207. BhaBha and Young explain, "In any given case about children seeking asylum, the principle will be one among several primary considerations of concern to governments." BhaBha & Young, supra note 145, at 97. "Others may include maintaining effective immigration control, preventing abuse of asylum procedures, deterring smuggling networks, restricting the scope of the refugee definition." Id.

208. See, e.g., Alvarez-Machain v. United States, 331 F.3d 604 (9th Cir. 2003) (holding that Alvarez-Machain stated an actionable claim to recover
the lead of these brave judges and join the rest of the world in an effort to protect the rights of children?