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Expanding the Framework of Family Issues: Bringing Children’s Rights and Children’s Perspectives into Immigration

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Abstract

Family law, and the systems with which families interact, and child law or children’s rights, are typically viewed as separate legal subjects or categories. This essay challenges that separation and its consequences for family issues, arguing that family law and the systems with which families interact would benefit from a stronger infusion of children’s perspectives, interests and rights. One benefit would be a stronger structural or systemic focus to family law, reflecting the responsibilities of the State for children in the form of positive socio-economic supports for systems of health, education, housing and employment that are critical to children’s development. Through the example of immigrant children and their families, the essay explores the potential structural impact of children’s rights and perspectives in order to illustrate how a child rights perspective would affect the content and implementation of law and policy.

Keywords

children’s rights, family law, immigration

1. Introduction

The separation between a legal focus on family and on children is quite strong.¹ These distinct perspectives can be valuable and justified; but losing sight of each other can also be

1. The separation is exemplified in the identification of family law and child law (or children’s rights) as separate academic areas, and the organisation of statutory frameworks that separate the two. Children’s rights is an unacknowledged, underdeveloped framework in the US. In contrast to the recognition of family law and child law or children’s rights as distinct legal specialties in the Nordic countries, in the US children in general are subsumed under family law. The dominant framework for children conceives of children as subject to and under the control and guidance of their parents or de facto parental caregivers. See *Meyer v Nebraska*, 262 US 390 (1923), *Pierce v Society of Sisters*, 268 US 510 (1925); *Troxel v Granville*, 530 US 57 (2000). Parents have corresponding obligations of care and support. This privatisation of the care and support of children translates into a limited affirmative support for children and families, as exemplified by the high rate of child poverty in the US. National Center for Children in Poverty, ‘Child Poverty’ <www.neep.org/topics/childpoverty.html> accessed 7 January 2020 (noting: ‘About 15 million children in the United States – 21% of all children – live in families with incomes below the federal poverty threshold, a measurement that has been shown to underestimate the needs of families... average, families need an income of about twice that level to cover basic expenses. Using this standard, 43% of children live in low-income families’). Children also have constitutional rights, which may be asserted against the State or in conflict with the wishes of their parents, although their constitutional rights remain ill defined. In general, children are recognised as constitutional subjects with rights, but because of their limited capacity, those rights are not ‘full’ or equal to those of adults. Nevertheless, as children move into adolescence, their constitutional rights are increasingly robust, even as they are given consideration in some circumstances for their developmental context. See *Bellotti v Baird*, 443 US 622 (1979). In addition, it should be noted that it is still debated within the US context whether children have affirmative rights, such as rights to a sufficient standard of living, to quality education, and other socio-economic needs essential to their development. I have argued that one could establish more broadly recognised children’s rights by articulating a stronger, more comprehensive theory of children’s affirmative equality rights as part of a broad theory of children’s constitutional rights. Nancy E Dowd, ‘Children’s Equality Rights’ (2020) *Cardozo Law Review* (forthcoming).

negative. Categorisation and ‘silos’ can discourage collaboration and interconnection, but, more importantly, specialisation and separation may privilege one perspective and render others invisible. Is the focus of ‘family’ on parents and other adults, their perspectives and interests, without significant consideration or inclusion of children’s perspectives, interests or rights? Does the focus on ‘family’ privatise, minimise or render invisible children’s needs, and separate the integral relationship between families and the State? If we were to focus on children within ‘family’, in what aspects are children’s perspectives critical? What consequences would follow? Whether family law is narrowly defined to mean only its traditional scope, or broadly construed to include the systems families rely on, children’s rights and perspectives are essential.

In this essay I refer to ‘family law’ within its traditional boundaries, while arguing that a children’s rights perspective would not only enhance and strengthen this traditional scope but also support framing family law more broadly, inclusive of the systems families rely on and interact with, including social welfare, education, juvenile justice, immigration and human rights. Thus, incorporating children’s rights and perspectives might lead in at least two directions that would enrich family law and better serve children, families and parents. First, within the ‘traditional’ focus of family law, children’s perspectives might enrich and enhance analysis of *relational* rights. Too often, children’s perspectives and interests are subsumed under ‘family’ or ‘parents’ and ‘parental rights.’ In many instances, adding children’s perspectives would not make a difference, as they might be in harmony; in other words, the articulated interests of parents and children would be parallel lines supporting the same goal. Even where children’s perspectives might be different, or in conflict with parents, those differences would enrich our resolution of issues, and are critical to address, rather than assuming parental rights should prevail. In this first category of the consequences of a child-centred perspective we might include such critical family law issues as the doctrines and rules defining ‘family’, family formation, the legal definition of parenthood, care obligations, the rights of parents no longer living together, and the recognition of multiple (more than two) parents. It would also infuse the ubiquitous ‘best interests of the child’ standard with a more strongly child-centred perspective rather than mediating those interests solely through parents or the State.

Second, a focus on children’s perspectives and rights would emphasise the needs of children and positive social obligations to provide for children. This framing expands the scope of family law as traditionally conceived to include all systems that implicate children, and therefore brings a *structural* or systemic focus largely absent in family law. It expands the definition of family law to expressly include and link to the law of systems that families rely on or interact with. This structural focus would reinforce the importance of families, but also the necessity of public support in the form of critical systems to address the needs of children and ensure children’s equality.² Specifically, this would include the interplay between families and systems like healthcare, education, housing, and income support in the context of children’s developmental needs, individual needs, and children’s equality. Children have unique claims to positive rights. A focus on their positive equal developmental rights might also cause us to examine the presence of children’s hierarchies and inequalities, even within the most generous welfare States with the most enduring commitments to equality.³

2. See generally Nancy E Dowd, *Reimagining Equality: A New Deal for Children of Color* (NYU Press 2018); for the example of early childhood interlocking systems see Nancy E Dowd et al, ‘Early Childhood Symposium’ (2019) 71(1) *University of Florida Law Forum* 1.

3. See generally Malcolm Langford et al (eds), *Children’s Rights in Norway: An Implementation Paradox?* (Universitetsforlaget 2019), exploring the paradox that Norway is at the top of children’s rights indicators, yet there is uneven implementation in certain areas.

With respect to both of these contributions of children's rights to family law, what is important is standing from children's perspectives, so as to not limit 'family' issues to adults or solely to the ecology of the family itself.⁴ It is also critical to keep in mind that children's perspectives must be framed from the range of children, by age (from infants to adolescents), and from the diversity of children's identities (including race, ethnicity, religion and gender, alone and in combination).

In this essay I focus on the second, structural or systemic impact of children's rights on family law and its potential to support an expanded frame of family law, using as my example issues confronting immigrant children and their families. My scrutiny of the structural impact of children's rights principles in family law is linked to the shortcomings of the broader ecologies that surround families that either fail to support all children, or support children differentially.⁵ What matters most for children is their concrete well-being, which is fundamentally linked to systems with which families interact. The example of immigration⁶ not only exposes what children's perspectives can add to resolving family issues at the border and once families are allowed into the country, but also points to flaws in critical systems that affect all children's socio-economic and developmental rights.

My intention in this essay is to suggest a reframing of the relationship between family law and children's rights. I begin by briefly identifying core concepts of children's rights using American scholarship and constitutional law as well as the UN Convention on the Rights of the Child (CRC).⁷ This essay is not designed as an in-depth consideration of children's rights

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4. For a broad ecological perspective on families, see Barbara Bennett Woodhouse, *The Ecology of Childhood: How Our Changing World Threatens Children's Rights* (NYU Press 2020).
 5. UNICEF, *The CRC at Thirty: For Every Child, Every Right* (UNICEF 2019); UNICEF, *Innocenti Report Card 13, Fairness for Children: A League Table of Inequality for Children in Rich Countries* (UNICEF 2015); UNICEF, *Innocenti Report Card 15, An Unfair Start: Children's Inequality in Education in Rich Countries* (UNICEF 2018).
 6. For data on immigrant children, see several children's rights or well-being indices indicating that immigrant status correlates with lower child well-being along multiple categories; see Ellen Vronnhof, 'The Kids Rights Index 2019' (Kids Rights, 13 May 2019) <www.kidsrightsindex.org/Portals/5/KRI%202019/The%20Kids-Rights%20Index%202019%20Report.pdf?ver=2019-05-09-150422-647> accessed 7 January 2020; Save the Children, 'Changing Lives in Our Lifetime: Global Childhood Report 2019' (Save the Children 2019) <www.save-thechildren.org/content/dam/usa/reports/advocacy/global-childhood-report-2019-pdf.pdf> accessed 7 January 2020. For a localised perspective on interlocking systems and their impact on immigrants and other disfavoured groups of children in the US, see Delores Acevedo-Garcia et al, 'Child Opportunity Index' (Kirwin Institute and diversitydata.org, August 2016) <www.diversitydatakids.org> accessed 7 January 2020. For US data on immigrant children, see Child Trends, 'Immigrant Children' (Child Trends, 28 December 2018) <www.childtrends.org/indicators/immigrant-children> accessed 7 January 2020 (immigrant children are one quarter of the US population, with a higher rate of poverty than native-born children, and the highest rate among first-generation immigrants); Urban Institute, 'Part of Us: A Data-Driven Look at Children of Immigrants' (Urban Institute, 14 March 2019) <urban.org/features/part-us-data-driven-look-children-immigrants> accessed 7 January 2020. On global trends, see UNICEF 'Latest Statistics and graphics on Refugee and Migrant Children' (UNICEF 2019) <www.unicef.org/eca/emergencies/latest-statistics-and-graphics-refugee-and-migrant-children> accessed 7 January 2020; Eurostat, 'Migration Statistics: At Risk for Poverty and Social Exclusion' (data extracted 2019) <<https://ec.europa.eu/eurostat/statistics-explained/index.php/Migrant%20integration%20statistics%20-%20at%20risk%20of%20poverty%20and%20social%20exclusion>> accessed 7 January 2020 (high risk of poverty for both EU nationals and non-EU nationals when they migrate from their home country). On the interaction of immigrant children with systems, see The Future of Children, 'Immigrant Children' (Princeton-Brookings 2011) 21(1) *Future of Children* 1. For a sampling of academic commentary on immigrant children, see Mark Klaassen et al (eds), *Safeguarding the Children's Rights in Immigration Law* (Intersentia 2020); Jason M Pobjoy, *The Child in International Refugee Law* (CUP 2017); Annika Lems et al, 'Children of the Crisis: Ethnographic Perspectives on Unaccompanied Refugee Youth in and En Route to Europe' (2020) 46(2) *Journal of Ethnic and Migration Studies* 315 <<https://doi.org/10.1080/1369183X.2019.1584697>>; Andrew Tae-Hyun Kim, 'Immigrant Passing' (2016) 105(1) *Kentucky Law Journal* 95.
 7. UN Convention on the Rights of the Child, GA Res 44/25, at 2–4 (20 November 1989) [hereinafter UNCRC] <<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>> accessed 7 January 2020.

as developed under the CRC or other sources of children's rights. Rather, these concepts, by no means exhaustive, are presented as a conceptual framework. I use this conceptual framework as a means to illustrate the impact of children's perspectives on family law issues, using the example of immigration.

2. Children's Rights: Concepts

2.1 Introductory comments relating to conceptual framework

Overarching all children's rights is the right to equality, or as UNICEF framed it recently, 'For Every Child, Every Right'.⁸ Critical categories of children's rights include: relational rights, identity rights, developmental rights, socio-economic or positive rights, and protection from State harm or intrusion in a child's family.

These categories are grounded in the evolution of children's rights and underlying principles from multiple sources and contexts. They reflect in particular the CRC.⁹ The CRC stands for the key proposition that children are rights holders, and defines their rights comprehensively, as an interconnected whole.¹⁰ It connects children to systems while recognising the importance of their families as their most intimate and important ecology.¹¹ The CRC expresses core principles of non-discrimination, equality and fairness; use of the best interests of the child as the guiding principle in decisions about children; provision of positive support for children's development, and therefore recognition of their economic, social, and cultural rights; and respect for the primary role of the family.¹² In addition, relevant to the immigration context explored below, under the CRC children have rights to the prevention of separation from their parents, support for family reunification, and refugee rights.¹³

While the conceptualisation of children within family law has assuredly changed over time,¹⁴ the breadth and scope of the CRC solidifies and expands the traditional view of children within family. Most notably it links children to the structures necessary for their

8. UNICEF, 'The CRC at Thirty' (n 5).

9. UNCRC (n 7). There is a considerable range of incorporation of the CRC, whether solely by treaty or also within constitutional and statutory law. The most recent country to fully incorporate or domesticate the CRC within all areas of law is Sweden, commencing in January 2020.

10. UNCRC (n 7). See the reports of the Committee on the Rights of the Child at the UN Human Rights, Office of the High Commissioner website <<https://www.ohchr.org/en/hrbodies/crc/pages/crcindex.aspx>> accessed 7 January 2020. There is a considerable array of scholarship on the CRC developed over the past thirty years. For a sampling, see *infra* n 16 and 46; see generally Aoife Nolan, *Children's Socio-Economic Rights, Democracy and the Courts* (Bloomsbury 2011); Laura Lundy et al, *The U.N. Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries* (Queen's University Belfast and UNICEF 2012) <www.unicef.org.uk/publications/child-rights-convention-2012-report/>; UNICEF, *Law Reform and the Implementation of the Convention on the Rights of the Child* (UNICEF 2007) <www.unicef-irc.org/publications/pdf/law_reform_crc_imp.pdf>; UNICEF, *Progress for Children: Report Card on Child Protection Number 8* (September 2009) <www.unicef.org/protection/files/Progress_for_Children-No.8_EN_081309%281%29.pdf>; Michael Freeman (ed), *Law and Childhood Studies: Current Legal Issues Volume 14* (OUP 2012); Ursula Kilkelly and Laura Lundy (eds), *Children's Rights* (Routledge 2017); Wouter Vandenhoele et al (eds), *International Handbook of Children's Rights Studies* (Routledge 2015); Ursula Kilkelly, 'The UN convention on the rights of the child: incremental and transformative approaches to legal implementation' (2019) 23(3) *The International Journal of Human Rights* 323; Didier Reynaert et al, 'A Review of Children's Rights Literature Since the Adoption of the United Nations Convention on the Rights of the Child' (2009) 16(4) *Childhood* 518.

11. *Ibid.*

12. UNCRC (n 7) Articles 2, 3, 4, 6, 8.

13. UNCRC (n 7) Article 9 (prevention of separation from parents); Article 10 (support for family reunification); Article 22 (refugees).

14. See generally Steven Mintz, 'Placing Children's Rights in Historical Perspective' (2008) 44(3) *Criminal Law Bulletin* 2.

support, more closely linking areas of law that are highly relevant to children and families but often separated from what is defined as family law, including social welfare, child protection, juvenile justice, and education. All of those systems are linked back to family as children's primary and valued social framework. In this sense the CRC reinforces the traditional primacy of family while claiming as children's right the State's systems of support.

While the CRC is preeminent in the field of children's rights, it is not the exclusive source. The European Convention on Human Rights and its enforcement system is another powerful source of conceptualising and implementing children's rights.¹⁵ It provides a regional system of rights backed by a strong enforcement system, an attribute that the CRC lacks.¹⁶ The implementation of the European Convention in the Member States, also signatories to the CRC, presents multiple perspectives on implementing children's rights.¹⁷

In the US context, similar principles to those embodied in the CRC and the European Convention on Human Rights are inherent in the American constitutional scheme.¹⁸ Although the United States is the only country that has not ratified the CRC, the core principles of the CRC are inherent in American constitutional principles.¹⁹ Barbara Bennett Woodhouse, the leading US children's rights scholar, has articulated the connection this way:

The special nature of childhood, as a time of inherent dependency and also of evolving capacity, gives rise to another way of classifying children's rights – as 'needs-based' and 'capacity-based' rights... [F]ive core principles should inform our thinking about children's rights: Privacy, Agency, Equality, Dignity and Protection.²⁰

The presence of those principles in US law and the explicit and implicit evaluation of the CRC when relevant has meant that a significant number of CRC principles have been expressly recognised in US law.²¹ In addition, the potential for a robust recognition of chil-

15. European Convention on Human Rights, available at <www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 7 January 2020.

16. Although the Convention does not expressly include children's rights, it has been used and interpreted to protect children's rights. See generally Ursula Kilkelly, *The Child and the European Convention on Human Rights* (2nd edn, Routledge 2017); Ursula Kilkelly and Ton Liefaard, *International Human Rights of Children* (Springer 2019). The CRC has no direct enforcement power, in the sense of mandating compliance with the CRC by signatories. However, under Optional Protocol 3 adopted in 2014 there is an international complaints procedure that allows children on their own, or other individuals to file on their behalf, to assert their rights internationally to the Committee on the Rights of the Child: see Optional Protocol to the Convention on the Rights of the Child on a communications procedure, A/RES/66/138 of 19 December 2011, entered into force on 14 April 2014.

17. As Mary Daly suggests, there are three approaches to children's rights in EU welfare States: family focused welfare States, which aim to support the family in order to support children; childhood focused systems, emphasising children's development through measures like early childhood education; and children's rights focused systems which emphasise children's participation in all aspects of their lives and the systems that affect them. Mary Daly, 'Children and Their Rights and Entitlements in EU Welfare States' (2020) 49(2) *Journal of Social Policy* 343 <<https://doi.org/10.1017/S0047279419000370>>.

18. Dowd (n 1).

19. Barbara Bennett Woodhouse, *Hidden in Plain Sight: The Tragedy of Children's Rights from Ben Franklin to Lionel Tate* (Princeton 2008); Dowd (n 1).

20. Woodhouse (n 4) chapter 10.

21. For example, US Supreme Court cases embracing the relevance of development in the juvenile justice system, *Graham v Florida*, 560 US 48 (2010); *Roper v Simmons*, 543 US 551 (2005); *Miller v Alabama*, 132 S Ct 2455 (2012); *JDB v North Carolina*, 564 US 261 (2011); *In re Gault*, 387 US 1 (1967); *Kent v United States*, 383 US 541 (1966); *In re Winship*, 397 US 358 (1970); reproductive rights, *Bellotti v Baird*, 443 US 622 (1979); *Hodgson v Minnesota*, 497 US 417 (1990); *Ayotte v Planned Parenthood of New England*, 546 US 320 (2006).

dren's rights remains even if the US continues to fail to sign on to the CRC.²² The evolution of children's rights under a constitutional framework makes the United States a resource for analysis and implementation of children's rights principles.

Children's rights concepts offer to family law and to systems with which families interact a substantive elaboration based on the categories of relational, identity, developmental, socio-economic and protection rights, all interconnected and comprehensive for every child, and equal for every child. The family is the core of family law; children's rights enhance the valuing of family by providing claims for essential resources for the needs of children.

2.2 The Concepts

Children's relational rights, or rights in relationship, can be defined functionally by understanding the meaning of relationships in their lives and to their development.²³ Those relationships can be measured by the actions of others, the quality of their relationship with children, and particularly their engagement in care, and its importance to the psychological and emotional health of the child. The consistency and commitment of those who engage in relationships with children is vital. We would evaluate those relationships from the perspective of the importance of the relationship to children. This would not, then, depend on formal legal categories or status. Nor would goals like gender equality define who is entitled to the relationship, or be the basis to automatically confer rights, without requiring that the individual demonstrate equality of care and actual relationship.²⁴

Children's right to relationships, and in relationships, would require preservation and support of significant relationships, and therefore might include, based on a functional standard, relationships with grandparents, stepparents, and siblings.²⁵ It might also include a duty of collaboration among the relevant relational adults in the child's life as a requirement of ongoing legal support for the relationship. In those instances where functional realities cannot be measured, such as determining rights at birth, then a relational perspective might rely on the best interdisciplinary evidence of predicting relational success, including the possibility of using intent as a standard, and measured as well by preparation, planning and other relevant factors.²⁶

The relational perspective of children would particularly benefit interpretation of the 'best interests of the child', a pervasive norm for families and children that in practice all too frequently plays out as a contest between parents instead of an outcome informed by

22. For arguments on behalf of children's rights in the US, see generally Woodhouse (n 19); Dowd (n 1); Emily Buss, 'Developmental Jurisprudence' (2016) 88(4) *Temple Law Review* 741; Anne Dailey, 'Children's Constitutional Rights' (2011) 95(6) *Minnesota Law Review* 2099.

23. On the concept of functional parent, see generally Jessica Feinberg, 'Whither Functional Parent?: Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status' (2017) 3(1) *Brooklyn Law Review* 55; Rebecca Aviel, 'A New Formalism for Family Law' (2014) 55(6) *William & Mary Law Review* 2003; Michael Higdon, 'Constitutional Parenthood' (2018) 103(4) *Iowa Law Review* 1483, 1534-38.

24. On social fatherhood and skewed parenthood patterns despite gender equality formal legal norms, see generally Nancy E Dowd, 'Social Fatherhood at Birth' (2005) 14(3) *William and Mary Bill of Rights Journal* 909; Solangel Maldonado, 'Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent' (2005) 153(3) *University of Pennsylvania Law Review* 921; Holning Lau, 'Shaping Expectations about Dads as Caregivers: Toward an Ecological Approach' (2016) 45(1) *Hofstra Law Review* 183; Deborah Dinner, 'The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities' (2016) 102(1) *Virginia Law Review* 79.

25. *Moore v City of East Cleveland*, 431 US 494 (1977); *Troxel v Granville*, 530 US 57 (2000).

26. On intent-based parenthood, see Melanie B Jacobs, 'Parental Parity: Intentional Parenthood's Promise' (2016) 64(3) *Buffalo Law Review* 465; Marjorie Maguire Schultz, 'Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality' (1990) 1990(2) *Wisconsin Law Review* 297.

the perspective of the child.²⁷ For example, where there is disagreement over the structure of custody or parenting time, or particular issues such as the choice of school or health care decisions are presented as an argument between parents, analysis frequently is limited to the competing visions of two parents, but often without the voice or input of the child or children involved.²⁸ The best interests of the child standard, infused with the relational interests of children, would focus on what works best for the child and the child's relationships, not necessarily what is most convenient for the parents.

A second category of children's rights is children's identity rights.²⁹ This means cultural, racial, ethnic and religious identities (and/or their intersections) of children. It also includes children's gender identity, by valuing children's expression of gender and not confining their expression to gender norms or a gender binary. Their identities should be valued but also not confined to any stereotypic norm, recognising the dynamic nature of individual identity as well as the fluid construction of culture, and the importance of a pluralistic multicultural norm. Children's interests here include allowing children to benefit from the diversity of their parents and their communities, and to see their communities valued. Their identity or identities should not be the basis for discrimination, but rather should be celebrated. This might include the requirement that the State address and deal with racism, or anti-immigrant sentiments, as necessary to permit each child to express and identify with their culture. Identity includes not only strong support for self-value, but also valuing the humanity of others, as well as insuring that others value the humanity of each child. Children's identity rights strongly connect to their equality rights.³⁰ Identities should not be the basis for hierarchies among children.³¹

A third category of children's rights is their developmental rights, which are also closely connected to the category of children's socioeconomic rights.³² Children's developmental rights are rights connected to children's developmental arc from birth to adulthood, and to their

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27. UNCRC (n 7) Article 3(1). On critique of the best interests principle, see generally Jana B Singer, 'Bargaining in the Shadow of the Best Interests Standard: The Close Connection Between Process and Substance and Process in Resolving Divorce-Connected Parenting Rights' (2014) 77(1) *Law & Contemporary Problems* 177; Janet L Dolgin, 'Why Has the Best Interest Standard Survived? The Historic and Social Context' (1996) 16(1) *Children's Legal Rights Journal* 2; Lynne Marie Kohm, 'Tracing the Foundations of the Best Interest of the Child Standard in American Jurisprudence' (2008) 10(2) *Journal of Law and Family Studies* 337; Robert H Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39(3) *Law & Contemporary Problems* 226.
28. For example, the Florida statute governing parenting time includes the perspective of the child as 'a' factor among many others: Fla Rev Stat section 61.13. Multiple US Supreme Court cases regarding children are examples of a focus on parents and parental status rather than the perspective of the child. See eg *Michael M v Gerald D* 491 US 110 (1989) (dispute over parental rights between biological father and marital father largely excluding consideration of the child's perspective or arguments); *Elk Grove Independent School District v Newdow*, 542 US 1 (2004) (dispute over whether one parent was accurately representing the views of his child or his own views regarding requiring the child to say the Pledge of Allegiance with the words 'under God' included).
29. UNCRC (n 7) Article 3. On identities and intersectionality, and the importance of seeing identities as in interaction, not in isolation, see Hajer Al-Faham, Angelique M Davis and Rose Ernst, 'Intersectionality: From Theory to Practice' (2019) 15 *Annual Review of Law & Social Science* 247; Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity-Politics, and Violence Against Women of Color' (1991) 43(6) *Stanford Law Review* 1241; Angela P Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42(3) *Stanford Law Review* 581; Aisha N Davis, 'Intersectionality and International Law: Recognizing Complex Identities on the Global Stage' 28(1) *Harvard Human Rights Journal* 205.
30. Identity and equality are deeply connected in existing hierarchies, and thus these two sections of the CRC are particularly important to read together. See UNCRC (n 7) Article 2 (non-discrimination or equality right) and Article 3 (identity).
31. Dowd (n 2).
32. UNCRC (n 7) Article 6 (development rights) and Article 4 (socio-economic rights); on the critical importance of early childhood to development see also Center on the Developing Child at Harvard University <<https://developingchild.harvard.edu/>> accessed 8 January 2020.

developmental equality.³³ Each child should have support to achieve their developmental capacity, which requires that the State remove barriers as well as guarantee equal support. This is the basis for their positive/affirmative socio economic rights, which requires the support of their families as their primary developmental context, but also requires effective systems and policies of support. Equality is essential to robust developmental rights.³⁴ Children are born substantially equal; while there are differences among them, developmental equality is the affirmative right of each child to develop to their maximum capacity.³⁵ To the extent State policies render children unequal, they violate core principles of equality and non-discrimination. Moreover, every child should have the support that they need, which may vary among children even if the State has not put obstacles in their way. The principle of equity is therefore integral to the principle of equality. Equal respect for all children recognises their equal dignity and requires that they be treated with acknowledgment and valuing of their dignity.³⁶

Closely connected to children's developmental rights are their socio-economic rights.³⁷ These are positive rights of support from the State. Children have distinctive rights because of their dependency, value, and need for support. In a welfare State, if there are nevertheless inequalities among children, it should lead to asking the question of how policies and systems ensure that family inequalities are not replicated for particular children.³⁸

Finally, as a coefficient of children's interests, there is not only this positive obligation of support, but also a proscription on the State: it must abstain from interfering with children's rights against harm as well as their right to care and support in situations of known adversity.³⁹ The State should not be the cause of harm,⁴⁰ and there should be an obligation to provide support to deal with trauma and address structural causes of harm.⁴¹

3. Expanding the scope of family issues: children's rights and immigration

3.1 Introduction

Children's developmental, equality, and socio-economic needs lead outward from their families to the systems that families rely on to raise their children. Reciprocally, those systems

33. Dowd (n 2). See generally on developmental equality, Nancy E Dowd, 'Black Boys Matter: Developmental Equality' 45(1) *Hofstra Law Review* 45, 47-48.

34. *Ibid.*

35. Dowd (n 2).

36. Nancy E Dowd, 'Equality, Equity, and Dignity' (2019) 37(1) *Law and Inequality* 1.

37. Aoife Nolan makes a sophisticated, nuanced evaluation and argument for the judicial role in effectuating children's socio-economic rights. See Nolan (n 10).

38. Useful in this area is comparative policy, see UNICEF, *Innocenti Report Card 13* (n 5); UNICEF, *Innocenti Report Card 15* (n 5).

39. While the State is not understood to have affirmative obligations, it may nevertheless assert rights of intervention in the family, or impose duties upon parents, under the doctrine of *parens patriae*. *Parens patriae* literally means the parent of the nation. It refers to the role of the government as the protector of children, and is expressed in laws that are aimed to ensure child well-being and development.

40. So, for example, the State should not adopt immigration policy that harms children. See Freedom of Movement Research Collective, 'Stop Killing Us Slowly: A Research Report on the Motivation Enhancement Measures and Criminalization of Rejected Asylum Seekers in Denmark' (Freedom of Movement Research Collective 2018) <http://refugees.dk/media/1757/stop-killing-us_uk.pdf> accessed 7 January 2020.

41. One example might be to ensure that sources of trauma, such as those identified by the Adverse Childhood Experiences (ACEs) framework, are dealt with both individually and structurally. See generally Centers for Disease Control and Prevention, *Adverse Childhood Experiences (ACEs)* <www.cdc.gov/violenceprevention/acestudy/index.html> accessed 7 January 2020; Nancy E Dowd, 'Radical Aces' (2019) 71(1) *Florida Law Review Forum* 1.

place families at the centre of supporting children. The example of immigration issues regarding children and families illustrates this relationship. Casting immigration issues as ‘family’ issues without incorporating children’s rights may leave critical issues unaddressed. A children’s rights perspective at the border and once in the country does not allow the State to render children invisible by directing policies at adults and ignoring the impact of those policies on children. The importance of family to children also does not permit a focus on children’s rights to justify negative treatment of their parents or families, with children inevitably harmed as well. The example of immigration also directs us back to the implications of children’s rights to systems that affect families generally. The systems must be responsive to the particular needs of immigrant children just as they should be responsive to the distinctive needs of every child to ensure equity and equality among children.

Immigration tableaux of a human rights crisis of massive proportions continues to challenge multiple countries.⁴² The forces of war, internal chaos and violence, economic displacement, and patterns of gendered, racial and ethnic violence are some of many forces that drive migration. Receiving countries have shifted from supportive asylum policies to a wave of nationalistic resistance to open borders. Borders are contested and defended, triggering a range of problems for immigrants: making the process of border crossing and legal migration more difficult, complex, and time consuming; requiring lengthy, complex and difficult legal procedures; facing conditions of detention that are purposefully uncomfortable and inadequately provide even basic needs.

In the ongoing controversy regarding the southern border of the United States, specific cases have come to the fore, including the death of children in custody and the miscarriage of a pregnant woman in custody, as well as persistent concerns about basic medical care; reports of sexual abuse in the detention of children; and the separation of children from their parents.⁴³ In addition, unaccompanied minors are held in sprawling camps until they can be released or deported.⁴⁴ Similar concerns are present in the border facilities, detention practices and immigration processes in Europe.⁴⁵ The issues faced by families are not only

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42. See Dara Lind, ‘The Trump Administration’s Separation of Families at the Border, Explained’ *Vox* (15 June 2018), <www.vox.com/2018/6/11/17443198/children-immigrant-families-separated-parents> accessed 7 January 2020; see also Ellen Barry and Martin Selsoe Sorensen, ‘In Denmark, Harsh New Laws for Immigrant “Ghettos”’ *New York Times* (New York, 1 July 2018), <www.nytimes.com/2018/07/01/world/europe/denmark-immigrant-ghettos.html> accessed 7 January 2020; BBC News, ‘Migrant Crisis: Illegal Entries to EU at Lowest Levels in Five Years’ *BBC News* (London, 4 January 2019) <<https://www.bbc.com/news/world-europe-46764500>> accessed 7 January 2020.
43. National Public Radio, ‘Whistleblowers Warn of Harmful Conditions for Children in Migrant Detention Centers’ *National Public Radio* (8 December 2018) <www.npr.org/2018/12/08/674327419/whistleblowers-warn-of-harmful-conditions-for-children-in-migrant-detention-cent> accessed 7 January 2020; Sheri Fink and Caitlin Dickerson, ‘Border Patrol Facilities Put Detainees with Medical Conditions at Risk’ *New York Times* (New York, 5 March 2019) <www.nytimes.com/2019/03/05/us/border-patrol-deaths-migrant-children.html> accessed 7 January 2020.
44. Richard Luscombe, ‘Inside America’s Biggest Facility for Migrant Teens’ *The Guardian* (London, 7 March 2019) <www.theguardian.com/us-news/2019/mar/06/immigration-migrant-children-homestead-florida> accessed 7 January 2020.
45. Freedom of Movement Research Collective (n 40); Betsy Cooper, ‘Norway: Migrant Quality, Not Quantity’ (Migration Policy Institute, 1 May 2005) <www.migrationpolicy.org/article/norway-migrant-quality-not-quantity> accessed 7 January 2020; Steven Erlanger, ‘Attack Reignites Immigration Debate in Divided Oslo’ *New York Times* (New York, 25 July 2011) <www.nytimes.com/2011/07/26/world/europe/26norway.html> accessed 7 January 2020; Peter Goodman, ‘The Nordic Model May Be the Best Cushion for Capitalism but Can It Survive Immigration’ *New York Times* (New York, 11 July 2019) <www.nytimes.com/2019/07/11/business/sweden-economy-immigration.html> accessed 7 January 2020.

family law issues, but also civil rights/human rights issues and children's issues, and should be evaluated, discussed, and articulated in all of those ways.⁴⁶

If immigrants are accepted into the country, there are also longer-term issues regarding their inclusion as members of the society.⁴⁷ Social inclusion ideally includes not only the acquisition of basic skills (eg language) and establishment of a home, work, and education for children, but also a mutual interchange of cultures, rather than forced assimilation, discrimination, or subordination to the lowest rung in the social hierarchy. Thus, a critical additional issue is equality. Immigrant children, because of their experiences and their shift to a new culture and a new set of systems, require that their developmental interests be taken into account within their context and needs. Their developmental equality requires being responsive to their unique needs, including providing resilience support and ensuring that every child achieves their maximum capacity.

What if immigrant children/migrant children were the focus under a family law framework infused with children's rights? How might we approach this differently from an integrated approach instead of a separated approach – in other words, not just from a family/parent perspective, but also from the child's perspective? This would mean approaching the issues from a children's rights perspective/child law perspective, not only to prevent or minimise harm after being taken into custody, but to prevent significant detention, ensure social and economic support, and provide support to avoid the long-term effects of trauma, both from circumstances leading to migration as well as the trauma of the journey and the events at the border.

For children, implicated are relational rights, developmental rights, identity rights, equality rights, and protection from harm as well as attention to trauma already suffered and potentially exacerbated by border policies or supports once in the country (or the lack of policies). Our focus on parents/families means that children are the innocent bystanders who are sacrificed. Instead, children's perspectives would reinforce family/parental perspectives by requiring assessment and support for children no matter what the border crossing determination is; requiring social and economic rights be recognised and supported at crossing, as well as considered for special needs if permanent settlement is permitted. The harsh camps, detention, and lack of services characteristic of current border policies would not be permissible when viewed from the perspective of children.

Consistent with the principle of developmental equality, the State should not only provide developmental support, it also should neither cause nor ignore harms or toxic factors in the lives of children. The Adverse Childhood Experiences (ACEs) framework suggests that childhood adverse experiences, particularly when they are multiple, can reach toxic levels that can have long-term developmental consequences if unaddressed.⁴⁸ In order to explore that possibility the core question asked of a child (or even an adult) is not 'why are you like this?' or 'why are you behaving this way?' but rather, 'what happened to you?'.⁴⁹ In the context of migration, leaving one's home country is a traumatic event by itself; the factors that triggered migration may be even more traumatic. Because of that context, border crossings are inherently challenging and anxiety-provoking events. Border policies can add to

46. For a sampling of academic commentary on immigrant children see Mark Klaassen et al (eds), *Safeguarding the Children's Rights in Immigration Law* (Intersentia 2020); Jason M Pobjoy, *The Child in International Refugee Law* (Cambridge University Press 2017); Andrew Tae-Hyun Kim, 'Immigrant Passing' (2016) 105 *Kentucky Law Journal* 95.

47. See n 6.

48. Centers for Disease Control and Prevention, 'Adverse Childhood Experiences' <www.cdc.gov/violenceprevention/childabuseandneglect/acestudy/index.html>.

49. Ibid.

the consequences, revictimising a child or adding new trauma, or they can be geared to be responsive, to the context and potential consequences. Children's rights would demand a responsiveness to children's unique needs as well as a consideration of how the process of determining their fate at the border should be handled in a way that does not bring a new series of adverse effects upon their development.

In order to better explain and illustrate this perspective, two real stories, one from the American context, and one from the Danish context, illustrate the absence of a children's rights perspective, and should cause us to question how a children's rights perspective would change the outcome. They might also cause us to ask what other connected systems reflect the absence of a children's rights perspective. I suggest that in these two situations a children's rights perspective might include attentiveness to process in order to give children a real voice in proceedings, as well as considering their specific needs. Furthermore, there is a need for a thorough developmentally informed set of policies to ensure that any children in the State's care are not isolated or unsupported, but rather are developmentally assured of support.

3.2 Examples: Stories from the United States and Denmark

The first story is a report of a case brought before an immigration judge in New York City, far from where it began in Texas.⁵⁰ Fernanda Jacqueline Davila, from Tegucigalpa, Honduras, appeared in a New York City US federal immigration court in the autumn of 2018. She was two years old. Imagine walking a two-year-old into a courtroom designed for adults, typically designed to impress, even intimidate, adults. Just before she entered the courtroom, she had a few minutes with a lawyer, who was trying to 'prepare' her for the hearing. To his questions, she gave no responses. Fernanda was led into the courtroom by a child welfare caseworker, then lifted into the chair provided for those making appearances; a chair sized for adults, so her feet stuck out from the chair. As described by a reporter who was present, after being placed in the chair, the caseworker walked away, consistent with courtroom protocol. Fernanda began to cry. The judge permitted the caseworker to return and remain, and then the proceeding continued.

In this proceeding the judge asked questions of Fernanda, including how old she was, whether she spoke Spanish; explained the proceedings; and made decisions about the case, which she then asked Fernanda if she understood, and requested that the lawyer explain to her client. Fernanda was one of thirty children whose cases were heard that day, ranging in age from two through 17. Fernanda had come to the border with her maternal grandmother in July 2018. She was the child of teenage parents, and her father had died before she was born; she was being raised by her paternal grandparents. Her maternal grandmother travelled with her to the border to, in her words, 'give her a better life', but without the knowledge or permission of her mother or the paternal grandparents. Three days after Fernanda and her grandmother arrived at the border, they were separated. For three months, Fernanda was on her own, transferred to New York, where she was placed in the care of Cayuga Centers and/or foster families. Despite the fact that her paternal grandparents wanted her to return to Honduras, the process for completing her return was complicated, and had been made intentionally more complex and difficult due to Trump administration policies.

50. The facts of Fernanda's case were reported in a series of news articles. The initial and most comprehensive part of her story, from which the following paragraphs are derived, can be found in Vivian Yee and Miriam Jordan, 'A 2-Year-Old's Day in Immigration Court' *New York Times* (New York, 8 October 2019) <www.nytimes.com/2018/10/08/us/migrant-children-family-separation-court.html> accessed 7 January 2020.

The judge in Fernanda's case, in a subsequent hearing to the initial hearing described above, granted her return to her paternal grandparents. She returned to Honduras three months after her maternal grandmother had taken her to the United States.⁵¹ Describing the day of her homecoming, reporters who followed up on her story described a scene of extended bureaucracy before Fernanda, along with other children who had been held in the United States after illegal border crossings by adults. The description of the homecoming scene captures the confusion and difficult emotions of this child. Fernanda did not immediately recognise her family or understand what was going on. Initially she hardly spoke to any of her family, including her mother and grandparents, and seemed lost and withdrawn.

As noted in the initial and follow-up story about Fernanda, she was not the only child under six who appeared on the immigration docket; children this young are now regularly on the docket; and she was not the only child who was eventually allowed to return to her family, often after months of separation. The fact of separation, under the traumatic context of a custodial setting, and the time frame of separation within the developmental framework of a two-year-old, all combine to create a developmental crisis for this child.⁵² Some 350 children separated from their families as a result of the controversial separation policy of the summer of 2018 have still not been reunited with their families.⁵³ Despite a court ordered deadline of late July, reunification had still not occurred for many children by the autumn of 2018.⁵⁴ In addition, policies of separation of families have not entirely ended; these continue under a policy that separates children from the adults they are with if the children are deemed 'at risk' based on vague and unstated child welfare concerns, a reinvention of the zero-tolerance policy.⁵⁵

Even when families are kept together, the conditions under which they are in custody are harsh and uncomfortable: the detention centres are called 'freezers' because they are kept so cold and families are only provided meagre blankets.⁵⁶ Most recently, a surge in migrant families exceeded the capacity even of these harsh centres, and families were temporarily held in El Paso in an encampment under a bridge.⁵⁷ The conditions for families, even if held

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51. Jeff Ernst and Miriam Jordan, 'Immigration Court Goes Home to Honduras. "Mi Amor" Her Mother Cries' *New York Times* (San Pedro Sula, 25 October 2018) <www.nytimes.com/2018/10/25/us/migrant-honduras-family-separation.html> accessed 7 January 2020. Other families continue to try to reunite with their children. See Phil McCausland and Mariana Atencio, 'Deported parents demand the return of their children in U.S. custody' *NBC News* (Mexicali, 2 March 2019) <www.nbcnews.com/us-news/deported-parents-demand-return-their-children-u-s-custody-n978571> accessed 7 January 2020.
 52. Center on the Developing Child at Harvard, 'Statement of the Center Director Jack P. Shonkoff M.D. on Separation of Families' (Center on the Developing Child, 20 June 2018) <<https://developingchild.harvard.edu/about/press/shonkoff-statement-separating-families/>> accessed 8 January 2020.
 53. Hannah Wiley, 'Hundreds of Migrant Kids have Not Been Reunited with Their Families. What's Taking so Long?' *Texas Tribune* (4 October 2018) <www.texastribune.org/2018/10/04/zero-tolerance-policy-reunite-separated-immigrant-families/> accessed 7 January 2020.
 54. Ibid. More recent data indicates that as of October 2019, 120 children remained separated from their parents, and the average length of detention was five months. American Civil Liberties Union, 'Family Separation by the Numbers' *ACLU.org* (15 October 2019) <www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/family-separation> accessed 7 January 2020. At the same time, significant numbers of separated families remain in the US immigration system. Julia Jacobs, 'US Says it Could Take Up to Two Years to Identify thousands of separated Immigrant Families' *New York Times* (New York, 6 April 2019) <<https://www.nytimes.com/2019/04/06/us/family-separation-trump-administration.html>> accessed 7 January 2020.
 55. Ginger Thompson, 'Families Are Still Being Separated at the Border, Months After Zero Tolerance Was Reversed' *Pro Publica* <www.propublica.org/article/border-patrol-families-still-being-separated-at-border-after-zero-tolerance-immigration-policy-reversed> accessed 7 January 2020.
 56. National Public Radio (n 43).
 57. Miriam Jordan and Simon Romero, 'Spring Brings Surge of Migrants, Stretching Border Facilities Beyond Capacity' *New York Times* (30 March 2019) <www.nytimes.com/2019/03/30/us/border-migrants-el-paso-bridge-spring-surge.html> accessed 7 January 2020.

together in the United States, are clearly inhumane and damaging to the well-being particularly of children, although also traumatic for adults.

What if those conditions were permanent? That is the reality of my second story, a Danish story at a much later stage of the immigration process from an initial border crossing.⁵⁸ My concerns about American immigration policy led to many conversations about the parallels in other countries, and the push not only to prevent immigrants from coming into the country, but also to expel them if they did not fit the paradigm of a person that would be welcomed as a resident and perhaps one day, as a citizen. In Denmark there is a holding facility that houses families who are in limbo: for these families, it had been determined that they would not be allowed to live in Denmark, but they cannot or will not leave.⁵⁹ In an apparent effort to deter immigrants from thinking that eventually they would be accepted into the country if they could not be deported, there is an official policy to detain these migrants under conditions designed to be undesirable.

Two deportation centres, Sjaelsmark and Kaershovedgard, are part of ‘motivation enhancement’ measures of the Danish Aliens Act for non-deportable rejected asylum seekers. A coalition of human rights organisations and activists, the Freedom of Movement Research Collective, explored the policies and operation of these centres in a chilling report, *Stop Killing Us Slowly*.⁶⁰ The core goal of the policy is to induce ‘voluntary’ self-deportation by locating the centres in remote areas, providing bare minimum housing and living standards. The Sjaelsmark facility, in Horshom municipality, northeast of Roskilde, includes 70 children, 21 of whom were born in Denmark. The families are housed in a special part of the centre, which is a military barracks, surrounded by fences and with electronic gates. A part of the report compares the goals of the centres to prisons, and it notes that prisons are geared towards enabling prisoners to re-enter society, while the centres are geared to getting those in custody to leave Denmark. As the report notes, ‘We know from earlier reports that “most children are psychologically damaged after a few years in the Danish asylum system.”’⁶¹ Many children have spent more than four years of their lives in the centre, spending their childhood in a ‘State of exception.’⁶² The report continues:

[A]side from sharing the anxiety and uncertainty of their parents, children are also deeply affected by the social isolation, stigmatization, and lack of freedom in the centre, where the everyday is also marked by forced deportations, and by the destructive or desperate outbursts of other fellow residents ... long-term residence in Sjaelsmark will have a lasting, traumatizing effect on children ... Children are, in other words, bereft of a sound and healthy future.⁶³

This human tragedy seems surprising in Denmark, a country known for its strong social welfare system and robust family support.⁶⁴ Denmark, however, does not act in isolation, but in the context of EU policies and of regional variations that impact border pressures.

58. Freedom of Movements Research Collective (n 40). On Denmark and the CRC, see Per Schultz Jorgensen et al, ‘The Children’s Rights Convention in Denmark: A Status Report on Implementation’ (2011) 22(5) *Early Education and Development* 839 <<https://doi.org/10.1080/10409289.2011.597026>>.

59. *Ibid.*

60. See Freedom of Movement Research Collective (n 40). The facts in text that follow are all drawn from this report.

61. *Ibid* at 34.

62. *Ibid.*

63. *Ibid.*

64. UNICEF, *Innocenti Report Card 13* (n 5) 14 (in this report on 41 EU and OECD countries on income, education, health, life satisfaction, comparing children at the bottom with children at the midpoint on these factors, based on these measures, Denmark had the lowest rate of inequality overall).

4. Immigration from the perspective of children and children's rights

Building from the issues raised by these two incidents, how should the treatment of children at the border be reoriented from a children's rights perspective? We have largely regarded the issue of the treatment of children and families at the border as solely a 'family' matter, a case of intrusion into the family especially due to the policies of family separation, a singular harm that intrudes on the privatised family. A children's rights frame exposes a more complex picture of harm and unfulfilled needs, similarities and differences in the impact of family separation on parents and children, in addition to developmental harm and denial of social and economic needs. The viewpoint of children's rights extends the frame of family law into other public sectors.

The relational, identity, developmental, and equality concepts of children's rights suggest at least the following:

First, the model for children at the border, and until their immigration status is resolved, should be to provide supportive care, including health, education, and trauma services, until the process is complete.⁶⁵ This is based on our duty as one human to another, with special regard for the impact on children and their much shorter time frames within which these challenging events occur. Interdisciplinary expertise should be applied to frame evidence-based policies that should replicate the highest standard of care consistent with the best supports we have for children.

Second, interviewing children is not the same as interviewing adults.⁶⁶ At a minimum it is age dependent, but also situational and individual, in terms of their capacity and desire to communicate or understand the situation they might be confronted with at the border, or in detention. Developmental touchstones should be the basis of such interviews, along with use of a framework like ACEs⁶⁷ to ensure sensitivity to trauma along the path of migration. Another useful perspective would be to ensure that children are oriented to the system that they find themselves in, and that they understand the process. For a child as young as Fernanda, the idea that she can speak for herself, understand for herself, and make decisions for herself is ridiculous. It defies every developmental insight as well as basic common sense. Practices to maximise a young child's voice should be followed, coupled with a respect for their developmental stage and the careful need for someone to speak on their behalf.⁶⁸

Third, separation of a child from her parent(s) or caretaker by its terms would be forbidden as a violation of the child's right not to be harmed by the State.⁶⁹ The State as *parens patriae* instead has the duty and affirmative responsibility to support the child in the situation of a border crossing to minimise the impact of necessary procedures and max-

65. Center on the Developing Child at Harvard, 'In Brief, The Science of Resilience' <<https://developingchild.harvard.edu/resources/inbrief-the-science-of-resilience/>> accessed 7 January 2020.

66. Amit Jain and Joanne Lee, 'Interviewing Refugee Children: Theory, Policy, and Practice with Traumatized Asylum Seekers' (2018) 29(2) *Yale Journal of Law and Feminism* 42.

67. See supra note 41 and accompanying text.

68. On child participation, see UNCRC (n 7) General Comment 12 (2009) The Right of the Child to Be Heard; UNICEF, *Every Child's Right to Be Heard: A Resource Guide on the UN Committee on the Rights of the Child General Comment 12* (UNICEF 2011); Monica Ruiz-Casares et al, 'Children's Rights to Participation and Protection in International Development and Humanitarian Interventions: Nurturing a Dialogue' (2017) 21(1) *The International Journal of Human Rights* 1 <<https://doi.org/10.1080/13642987.2016.1262520>>.

69. Harvard Center on the Developing Child (n 54); see also Denise-Marie Ordway, 'Family Separation: How Does It Affect Children?' *Journalist's Resource* (27 June 2018) <<https://journalistsresource.org/studies/society/public-health/family-separation-child-health-research/>> accessed 7 January 2020; Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* (Civitas Books 2009) 6-8.

imise situational and long-term developmental support in order to ensure the stress of the border crossing is met with support, resilience, and prevention of long-term developmental harm.⁷⁰

Fourth, detention should be presumptively inappropriate unless strong mitigating circumstances require detention. When children and their families are held, such detention should be minimised. The focus for children should be to provide the essential ecology, including any special needs related to the characteristics of the child or in relation to experiences in the course of migration. The aim should be inclusion rather than separation or ‘othering’. The long-term detention of children such as the isolated camps in Denmark cannot be justified under any circumstances.⁷¹

Finally, at least two other areas are suggested by the necessary reform of border crossing for children. First, the long-term inclusion of immigrant children in the country should be reimagined from this perspective. Their presence should be considered not as a challenge, but as a benefit, particularly with respect to the expansion of language and culture for all. It is critical to reject the notion of assimilation to some unitary norm, and instead welcome the expansion of the norm by the infusion of new perspectives and cultures.⁷²

Second, evaluation of the position of children within immigration, and specifically current practices of detention, should lead us to ‘ask the other question’.⁷³ That is, we should ask: What other systems function in this way? What other systems function without listening to children? In what other systems do we successfully and fully support children? In what other systems do we continue to harm children within structures created by the State that neither help children nor help society?⁷⁴ In what other systems do we fail to recognise family as children see family, and continue to ignore the integrity of children’s family ties?

5. Conclusion

Because children are under our care, we subject them to our vision or support their diversity. Children’s interests also have implications for the systems intended to support them, and the power of the State to intervene and cause them harm. The benefit of consciously, meaningfully and frequently not separating family law from children’s law or rights, but considering them together, is integral to achieving the most beneficial legal regime to support children and families. Children’s rights not only expands the subjects; it also expands the perspective on the role of the collective society to the child, delivered through the State. This structural, systemic focus beyond the privatised family is essential to the well-being of children and their equality. The greatest benefit might be better support and equal support of families, and real equality for children.

70. On resilience strategies, see *supra* n 65.

71. The example of internment camps in the US during WWII point to both immediate and long-term effects. See generally Donna Nagata et al, ‘The Japanese American Wartime Incarceration: Examining the Scope of Racial Trauma’ (2019) 74(1) *American Psychologist* 36; Donna Nagata, ‘The Japanese American Internment: Exploring the Transgenerational Impact of Traumatic Stress’ (1990) 3(1) *Journal of Traumatic Stress* 47.

72. To the contrary, see the example of the actions of Danish authorities in Copenhagen in immigrant sectors, forcing families to comply with particular policies. See Barry and Sorensen (n 42).

73. The strategy of asking the other question is attributed to Mari Matsuda: see Mari Matsuda: ‘Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition’ (1991) 43(6) *Stanford Law Review* 1183, 1189.

74. For example, the child welfare system in the US and elsewhere; on the negative and racialised impact of the US system, see generally Roberts (n 69); Martin Guggenheim, *What’s Wrong With Children’s Rights* (Harvard 2005).

This essay is an expanded version of my plenary talk delivered at the University of Oslo conference 'Human Rights and International Private Law in the Family Law Area', November 7, 2018. I am grateful to the organisers of the conference for the invitation to participate while serving at Aalborg University as a Distinguished Guest Professor in the autumn of 2018. Dr. Tone Linn Wærstad has been particularly supportive of my participation in this special issue. In that presentation I offered examples from adoption, family integrity, social and economic policies; here I focus exclusively on the example of immigration.