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The Modern Family Unit: Toward a More Inclusive Vision of the Family in Immigration Law

Aubry Holland†

INTRODUCTION

Immigration law's shortcomings in setting family policy are often overlooked, as the modern immigration debate is preoccupied with border control and employment opportunities. As a result, immigration law's narrow vision of the family unit often produces contradictory and counterintuitive results. In the recent case *Nguyen v. INS*, for example, the U.S. Supreme Court held that imposing different sets of requirements on unmarried mothers and fathers seeking to confer citizenship benefits on their children does not violate the Equal Protection Clause.¹ In a different context, immigration law also requires an unmarried father, but not an unmarried mother, to prove a bona fide relationship with his child in order to petition for that child's immigrant visa.² Meanwhile, simply based on deference given to the marital unit, a stepfather can petition for a visa on behalf of his wife's illegitimate child without proving any relationship whatsoever.³

The recognition of immigration law's explicit and implicit regulation of the family is imperative, as such recognition will encourage lawmakers to...
better understand and calibrate immigration law's effects on families. 4 Although both immigration and family law evaluate various family criteria for different purposes, immigration law could benefit from family law's vast experience and guidance. 5 Family law primarily consists of individual state policies and statutes that regulate many aspects of family life and tends to be more in touch with modern trends and sensibilities. Meanwhile, immigration law impacts families as a by-product of its related policy goal of family unification. Immigration law's other and more conservative policy considerations, such as national security and administrative ease, might prevent it from embracing the more accommodating nature of family law. Without some adjustments, however, the overall policy goal of family unification will unite only some families, while many contemporary families will be wrongfully kept apart.

This Comment argues that the restrictive immigration policies regulating the entrance of children born out of wedlock, stepchildren, and adopted children are informed by traditional family law's normative legal conceptions of childhood and parenthood. Indeed, immigration policies have failed to modernize and accommodate the growth of non-traditional family structures 6 to the same extent as current family law. Since not all families fall into the traditional American family mold, both specific and general policy changes should be made to promote the goal of a more comprehensive family unification program.

In Part I of this Comment, I show how family law traditionally preserved the marital family paradigm and how it has begun to recognize more non-traditional relationships. In Part II, I introduce family unification as one of the primary goals of immigration law. I then consider immigration law's overt and covert regulation of the family, which presents a traditional understanding of parenthood and familial relationships. Specifically, I use the various policies governing children born out of wedlock, stepchildren, and adopted children to demonstrate how immigration law generally reinforces gendered expectations of parenthood and family law's normative commitments to the traditional marital family. In Part III, I conclude by arguing that immigration law must be recognized in the context of the current immigration debate as a way that the

4. See Kerry Abrams, Immigration Law and the Regulation of Marriage, 91 MINN. L. REV. 1625, 1708 (2007) ("[A]n explicit recognition that immigration legislation functions as family legislation would force a conversation about the implications of particular laws for the family and would prevent immigration law from regulating the family unintentionally."). See generally 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 scope of the word 'family' as used in our immigration policy should be changed to include different culturally relevant models of 'family'").

5. See Abrams, supra note 4. ("Family law offers organizing principles and theoretical models that would help us to understand the effects immigration law has on families.").

6. Throughout this Comment, I use the term "non-traditional" to indicate non-normative families and family structures that stand in contrast, for example, to the traditional nuclear family.
federal government regulates the family. In addition, I offer suggestions for modernizing immigration law with respect to the entry of children. The acknowledgment that immigration law is a form of public family law will help advocates, lawmakers, and the courts create less harmful and biased effects on all families.

I

FAMILY LAW: ADVANCING BEYOND THE MARITAL FAMILY

One of the central bases of traditional family law is parental autonomy.7 The growth of non-traditional relationships that do not comport with the traditional marital unit, however, makes it difficult for the courts to grant parental rights and duties without chipping away at parental autonomy and inquiring into the privacy of family life.8 Such inquiry has enabled family law to begin acknowledging and accommodating non-traditional relationships and the rights of extended families, functional families, same-sex partners, stepparents, second parents, and unmarried fathers.9 While family law has expanded to embrace non-traditional relationships and family structures, the courts' close scrutiny of these relationships and structures demonstrates their continued preference for the traditional marital family.10

A. Traditional and Modern Family Composition

Traditional family law regards marriage as a unifying force that automatically presumes stability and a legal obligation to support the family unit. Thus, parenthood is envisioned as a commitment beyond pure biology.11 Throughout this comment I use "family unit," "unitary family," "marital unity," and "marital family" interchangeably as typifying the nuclear family paradigm—a family usually consisting of married, heterosexual parents and their children. "The family unit accorded traditional respect in our society . . .

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7. The liberty interest of "parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court." Troxel v. Granville, 530 U.S. 57, 65 (2000). The principle of parental autonomy—the authority of parents to rear children as they see fit—limits the state's ability to intervene in the family. See Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).


9. See infra Part I.A.-D.


11. Traditional family law almost unequivocally accepts mothers of any marital status as parents, whereas unmarried fathers must prove they have borne a responsibility for their children. See Kristin Collins, When Father's Rights Are Mother's Duties, 109 YALE L.J. 1669, 1672 (2000); see also infra Part I.C. (Unmarried Fathers).
[is] referred to as the ‘unitary family,’ [and] is typified, of course, by the marital family, but also includes the household of unmarried parents and their children."

Historically, after marriage, a wife’s “legal identity was ‘merged’ with that of her husband under the legal fiction of ‘marital unity.’” The classic expression of the doctrine of “marital unity” is from Blackstone’s Commentaries: “[b]y marriage, the husband and wife are one person in law.” This common law notion of coverture incorporates a married woman’s legal existence into that of her husband. The U.S. Supreme Court continues to recognize the historic “respect [and] sanctity . . . traditionally accorded to relationships that develop within the unitary family.”

Marital family ideals also emphasize gendered roles. Case law reflects, for example, the traditional beliefs in a husband and father’s duty of financial support and a wife and mother’s duty of domestic services. In the past, courts have even acknowledged marriage as “the vehicle through which the apparatus of state can shape the gender order.” Although prior constitutional law has reflected traditional gender roles, in the past few decades the Supreme Court has upheld legislative efforts to combat gender stereotypes. Despite advances in the Court’s jurisprudence, however, some normative commitments to traditional gender roles remain.

Modern family relationships that do not easily fit into the traditional paradigm and marital family ideals include same-sex partnerships, single parent homes, extended families, and stepparent families. States are more willing to disrupt parental autonomy and family privacy when families do not comport with the traditional nuclear model. For example, courts and administrative agencies may examine the “appropriateness” of these relationships and family

13. Collins, supra note 11, at 1682.
15. Id. (noting that a wife’s existence is incorporated into that of the husband “under whose wing, protection, and cover, she performs everything; and . . . [she] is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during the marriage is called her coverture.”).
17. See McGuire v. McGuire, 59 N.W.2d 336, 342 (Neb. 1953); see also Collins, supra note 11, at 1672.
19. See Muller v. Oregon, 208 U.S. 412 (1908) (upholding a limitation on the number of hours women employed in laundries can work as protective legislation for women’s childbearing responsibilities); Bradwell v. Illinois, 83 U.S. 130 (1872) (upholding rules barring women from the practice of law).
21. See infra Part II.B.
structures before parents in non-traditional families are given legal recognition of the rights, benefits, and responsibilities of parenthood.\textsuperscript{23}

As a result of this closer scrutiny, however, family law has adapted to the changing landscape of family structure by beginning to accommodate and recognize certain forms of contemporary family relationships. For example, family policies and case law are slowly recognizing the rights of extended families. In \textit{Moore v. City of East Cleveland}, the Court invalidated a city ordinance that did not permit a grandmother to live with her grandchildren as members of a "single family."\textsuperscript{24} The plurality opinion cited to the tradition of the extended family\textsuperscript{25} and held that the ordinance violated the Due Process Clause.\textsuperscript{26}

Another example demonstrating family law's accommodation of contemporary family arrangements is the courts' acknowledgment of multiple parent families. Despite the traditional refusal to entertain the idea that a child can have more than two legal parents,\textsuperscript{27} family law has gradually begun to legitimate these family arrangements.\textsuperscript{28} Recently, a Pennsylvania Superior Court ruled in \textit{Jacob v. Shultz-Jacob}\textsuperscript{29} that for purposes of child support, "a child can have three legal parents."\textsuperscript{30} The case involved former same-sex partners who were the parents of children conceived with a known sperm donor who had a close relationship with the children.\textsuperscript{31} The decision to recognize the value and support of three parents demonstrates family law's willingness to depart from the traditional nuclear family model. Not only did the \textit{Jacob} court recognize the value of legally recognizing the rights of all three parents, but it also based its decision on the belief that this arrangement provided the best

\begin{itemize}
  \item \textsuperscript{23} \textit{See, e.g.}, \textit{In re Nicholas H.}, 46 P.3d 932, 936-38 (Cal. 2002).
  \item \textsuperscript{24} 431 U.S. 494, 506 (1977).
  \item \textsuperscript{25} \textit{Id.} at 504 ("The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."). For a criticism of Justice Powell's reliance on the so-called historical importance of the extended family, see \textit{HOUSEHOLD AND FAMILY IN PAST TIME} (Peter Laslett ed., 1972).
  \item \textsuperscript{26} \textit{Moore}, 431 U.S. at 504.
  \item \textsuperscript{27} \textit{See} Michael H. v. Gerald D., 491 U.S. 110 (1989). In \textit{Michael H.}, the mother conceived a child with Michael, while married to Gerald. \textit{Id.} at 115. Accordingly, the Court denied the biological father's suit for parental rights and instead recognized Gerald as the child's father. \textit{Id.} The Court's decision disregarded the fact that Michael had developed a parental relationship with the child and focused on the historic respect "traditionally accorded to the relationships that develop within the unitary family." \textit{Id.} at 123.
  \item \textsuperscript{28} \textit{See} K.M. v. E.G., 117 P.3d 673 (Cal. 2005) (holding that same-sex partners are both parents of the child, where one woman gestates the child and the other provides the egg).
  \item \textsuperscript{29} 923 A.2d 473 (Pa. Super. Ct. 2007).
  \item \textsuperscript{30} Elizabeth Marquardt, \textit{When 3 Really is a Crowd}, N.Y. TIMES, July 16, 2007.
  \item \textsuperscript{31} \textit{Jacob}, 923 A.2d at 476. The court recognized the unprecedented nature of its decision, but nevertheless determined that "the courts must construct a fair, workable and responsible basis for the protection of children, aside from whatever rights the adults may have vis-à-vis each other." \textit{Id.} at 482 (quoting \textit{L.S.K. v. H.A.N.}, 813 A.2d 872, 878 (Pa. Super. Ct. 2002)).
\end{itemize}
B. The Functional Family

As seen in the examples regarding extended and multiple parent families, family law has extended the definition of "family" beyond those traditionally regarded as part of the nuclear model. Functional families are those not necessarily connected by legal ties or biology, but that function as family units. For instance, many jurisdictions have begun to recognize a parent-child relationship where an individual does not have a biological relationship with a child, but has acted and functioned as a parent over a period of time. While some courts continue to deny parental rights and family status to non-nuclear families, other courts have begun to recognize functional families in discrete areas of the law.

The watershed case adopting a functional definition of the family was Braschi v. Stahl Associates. The New York Court of Appeals determined that a same-sex couple that lived together as life partners for more than ten years should be regarded as a "family" for purposes of New York's rent control statute. The court refused to allow a strict definition of "family" to defeat the protective purpose of the New York rent control system as a whole. What constitutes a "family," the court concluded, should not be "rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order." The court emphasized the importance of objectively examining the relationship of the parties. The key analysis should be based upon the totality of the relationship, "evidenced by the dedication, caring and self-sacrifice of the parties."

32. Id.
34. See, e.g., In re Nicholas H., 46 P.3d 932, 936-38 (Cal. 2002).
35. See Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991) (denying visitation rights to former same-sex partner because she was neither the child's adoptive nor biological parent).
36. For example, the Wisconsin Supreme Court has established a framework for the recognition of second-parent rights. In re Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995) (holding that visitation of a non-biological parent could be in the best interests of a child, if there is a "parent-like relationship with the child and . . . a significant triggering event [that] justifies state intervention in the child's relationship with a biological or adoptive parent"). See also E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999) (granting visitation rights to same-sex partner who was a de facto parent); T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001) (holding that former same-sex partner could sue for visitation rights by standing in loco parentis).
38. Id. at 214.
39. Id. at 212.
40. Id. at 211.
41. Id. at 213. Some states have even gone as far as recognizing same-sex civil unions and marriages. Currently, Massachusetts and California are the only states that recognizes same sex
recognized unmarried heterosexuals as constituting a family in the housing context.\textsuperscript{42}

In functional families with children, courts have presumed legal parenthood when mothers and fathers raise children despite having no biological connection. In \textit{In re Nicholas H.}, a case decided by the Supreme Court of California, held that a man who receives a child into his home and openly holds the child out as his own, "does not lose his status as a presumed father by admitting he is not the biological father."\textsuperscript{43} The California Court of Appeals in \textit{In re Karen C.} applied the same principles to conclude that a woman who had raised a child from birth, but had no biological connection to the child, was still a presumed mother.\textsuperscript{44} Similarly, in \textit{Elisa B. v. Superior Court}, not only did the Supreme Court of California acknowledge the same-sex parenthood of two women, but it also held that a same-sex partner was responsible for child support after the couple separated.\textsuperscript{45} Despite having no biological ties to the child, the court held that Elisa was a presumed parent because she had "actively consented to, and participated in, the artificial insemination of her partner with the understanding that the resulting child" would be raised by both partners.\textsuperscript{46} The desire to avoid the "harsh result" of leaving a child with only one parent is one reason courts have adopted notions of the functional family and refused to deny parental rights despite lack of biological connections.\textsuperscript{47}

Family law's recent recognition of functional families without ties through blood or marriage demonstrates its willingness to accommodate the growth of modern family relationships.\textsuperscript{48} Although some would argue that
definitions of the functional family still reward only those families analogous to the traditional marital family model,\(^{49}\) family law’s departure from the strict construction of the family demonstrates its accommodation of contemporary family relationships and structures.

**C. Unmarried Fathers**

The United States Supreme Court has only given unmarried fathers constitutional protection when they have accepted the so-called responsibilities of parenthood.\(^ {50}\) Unlike unmarried mothers who are presumed to have responsibility over their children, unmarried fathers often obtain parental rights only when they are able to prove that they have fulfilled traditional expectations of parenthood.\(^ {51}\)

Although family law now recognizes unmarried parental relationships, the requirements imposed on unmarried fathers ensure that modern families continue to conform to normative ideas of family life. For example, in *Quilloin v. Walcott*, the Court upheld a state adoption statute that required only the mother’s consent unless the father legitimated the child by marriage and acknowledgment, or by court order.\(^ {52}\) The Court decided not to recognize the biological father’s rights, as he had made minimal support payments and visited the child only on occasion, but “never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child.”\(^ {53}\) Specifically, the Court found that the new family unit comprised of the child’s mother, stepfather, and half brother was consistent with the child’s best interests.\(^ {54}\) The preference for the stepfather’s relationship over the biological father’s demonstrates the preference for marriage in traditional family law, as marriage implies a commitment of stability and responsibility for the care, maintenance, and support of the family as a whole.

The extent of the constitutional protection an unmarried father obtains varies according to the degree to which he maintains a custodial, personal, or

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\(^{49}\) See generally Mary Ann Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643 (1993) (arguing that the Braschi court determined whether the couple was a committed family by focusing on conservative indicia such as sexual fidelity, sharing a domicile, and commingling finances).

\(^{50}\) Starting with *Stanley v. Illinois*, the Court held that a state law that assumed without a hearing the unfitness of unmarried fathers to care for their children is an unconstitutional denial of equal protection. 405 U.S. 645, 658 (1972). See also *Lehr v. Robertson*, 463 U.S. 248, 262 (1983); *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978).


\(^{52}\) *Quilloin*, 434 U.S. at 256.

\(^{53}\) *Id.* (affirming the stepparent adoption without consent from the natural father).

\(^{54}\) *Id.* at 252. The “legal custody of children is, of course, a central aspect of the marital relationship, and even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage.” *Id.* at 256.
financial relationship with his child.\textsuperscript{55} The biological father in \textit{Caban v. Mohammed} successfully brought an Equal Protection Clause challenge against a New York statute that permitted the adoption of his children with only the mother’s consent.\textsuperscript{56} Since the father saw his children often, contributed to their support, and at one point had custody over them, the Court held that he had a right to disapprove of their adoption.\textsuperscript{57} Cases like \textit{Quilloin} and \textit{Caban} demonstrate that expectations of parenthood still tend to conform to traditional and often gendered caregiving roles. Since unmarried fathers are not seen as being naturally connected to their children, they only receive constitutional protection when they prove their commitment through evidence of a custodial, personal, or financial relationship with their children.\textsuperscript{58} In contrast, unmarried mothers are not required to prove their familial commitment. Rather, the law assumes women will accept a caregiving role for their children due to a perceived automatic and close maternal bond.\textsuperscript{59}

To some extent, the unmarried father cases\textsuperscript{60} also reveal how family law has embraced a more egalitarian view of family responsibilities, as fathers are able to use evidence of custodial and personal relationships instead of proving merely a financial relationship. Although understandings of parenthood have adjusted to some modern developments, public policy often encourages fathers to prove their parental commitment through traditional expectations of parenthood.\textsuperscript{61}

\textit{D. Stepparents and Adoptive Parents}

Family law has also begun to recognize functional families through stepparent and adoptive relationships. Traditionally, an adoption decree terminated “the legal relationship between the adoptee and all biological relatives and replace[d] it with new ties to the adoptive family.”\textsuperscript{62} The adopted child was then treated as a legitimate blood descendant of the adoptive family for legal purposes.\textsuperscript{63}

Stepparent adoptions are currently estimated to encompass half of all adoptions\textsuperscript{64} and demonstrate how family law continues to privilege parents who

\textsuperscript{55} \textit{See Lehr,} 463 U.S. at 262 (noting the unmarried father never contributed to his child’s support and had only visited infrequently). Due process does not require notice of adoption to the natural father if he has not assumed any custodial, personal, or financial responsibility for the child. \textit{Id.} at 262, 267-68.

\textsuperscript{56} \textit{Caban,} 441 U.S. at 394.

\textsuperscript{57} \textit{Id.} at 389.

\textsuperscript{58} \textit{See, e.g., Lehr,} 463 U.S. at 262.


\textsuperscript{60} \textit{See, e.g., Lehr,} 463 U.S. at 262; Quilloin v. Walcott, 434 U.S. 246, 256 (1978).

\textsuperscript{61} \textit{See Lehr,} 463 U.S. at 262 (evaluating how the unmarried father failed to contribute to the child’s support).

\textsuperscript{62} \textit{Weisberg & Appleton, supra} note 14, at 1084.

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} \textit{Id.} at 1087.
closely adhere to the traditional unitary family paradigm. Stepparent rights were traditionally tied to the marriage. If a former stepparent sought custody following the dissolution of the marriage that created the step-relationship, he or she would have to overcome a strong preference for the biological parent. More recently, however, courts have been increasingly willing to consider visitation rights for former stepparents, particularly when the stepparent has established a close and long-term relationship with the child.

Recently, family law has begun to permit second-parent adoptions. In Adoption of Tammy, for example, the Supreme Judicial Court of Massachusetts allowed the same-sex partner of the biological mother to adopt the child without terminating the child's legal relationship with the biological mother. The court reasoned that the second-parent adoption was in the best interest of the child who had been raised by both women, and that the termination provision of the Massachusetts adoption statute should only be applied when a biological parent is not seeking to maintain his or her parental rights after the adoption proceeding. Arguably, the recognition of second-parent adoptions in Massachusetts and other states that have followed suit simply perpetuates the traditional two-parent nuclear model in a non-traditional configuration. However, such recognition still demonstrates family law's egalitarian move beyond traditional conceptions of the family in favor of stable functional families that promote the best interests of the child.

As seen in the cases concerning functional families, unmarried fathers, stepparents, and adoption, courts are increasingly acknowledging the rights and structures of non-traditional families. Such acknowledgment, however, only occurs after subjecting these family arrangements to careful scrutiny, which frequently results in legal recognition and rights being granted only to the parent-child and family relationships that most closely reflect the traditional

65. For instance, the unmarried father cases, such as Lehr v. Robertson, demonstrate family law's disinterest in granting parental rights to uninvolved and unmarried fathers that would otherwise prevent an adoption by a stepparent whose marriage to the mother shows a commitment to the family unit. See Lehr v. Robertson, 463 U.S. 248 (1983).
70. Id.
71. In addition to allowing inheritance rights from both biological and adoptive families, some states permit biological families to reserve contractual rights to continue to visit the child through "open adoptions." See id. One court determined that enforcing a particular visitation agreement with the biological parent was in the best interest of the child. Groves v. Clark, 982 P.2d 446 (Mont. 1999).
marital family unit. 72

II
THE CURRENT STATE OF IMMIGRATION LAW: ADHERING TO THE MARITAL FAMILY

Immigration policy demonstrates a preference for the traditional marital unitary family. Not only does the family unit connote a personal connection and evidence of expected support in the United States, but also a cultural connection to the United States as a whole. Thus, immigration law underscores the importance of the family as a social unit and reflects traditional family law’s normative conceptions of parenthood and childhood.

What is less explicit is how immigration law utilizes and departs from traditional family law principles to determine who should be classified as a “child” of a U.S. citizen or lawful permanent resident (LPR) for immigration benefits. Through this lens, immigration policies governing the entrance of children appear less aimed at the overall goal of family unification and more at judging which households constitute true families and which do not. Indeed, immigration policies governing the entrance of children born out of wedlock, stepchildren, and adopted children reinforce traditional family law’s commitments to the marital family paradigm. This Part explores Congress’s attempts to control the entrance of certain types of families into the United States.

A. The Evolution of Immigration Law’s Marital Family Bias

One of the primary goals of immigration regulations is preserving family unity and promoting family relationships. 73 However, this was not always the case. When immigration law was in its nascent stage there were no explicit policy guidelines for determining who could enter the country, who could remain as permanent residents, and who could naturalize. 74 This changed in the late 1800s and early 1900s with passage of several federal laws that restricted the entry of various non-white populations. 75 The Immigration Act of 1924 was one of the first comprehensive federal immigration schemes. This Act included a national origins quota, which sought to limit immigration so that “immigrants would racially replicate the current U.S. population and thus maintain a

75. See id. at 15-16 (quoting Gordon, Mailman, & Yale-Loehr, Immigration Law and Procedure § 2.02[2]-[3] (2004)).
population that was of primarily northern European descent.\textsuperscript{76} Specifically, the system prohibited any immigration from Asian nations and sharply curtailed immigration from southern and eastern Europe.\textsuperscript{77} Congress eventually abolished this national origin system in favor of the current family-based system due, in part, to the overt racism of the immigration quotas.\textsuperscript{78}

The Immigration Act of 1952 established the first comprehensive guide for family-based preferences.\textsuperscript{79} After the 1964 Civil Rights Act, Congress amended the 1952 Act to eliminate race and national origin discrimination.\textsuperscript{80} By 1965, the national origin quotas were completely abolished and replaced with admission categories that prioritized family ties and employment potential.\textsuperscript{81} As Kerry Abrams explains, family unification became a primary focus because it promotes family stability and integration; it also promotes the interest that U.S. citizens have in forming families.\textsuperscript{82}

Immigration law is structured in part around the policy goal of family reunification. Indeed, the Immigration and Nationality Act (INA) outlines a four-tiered, family-sponsored preference system designed to privilege certain familial relationships above others in the granting of immigrant visas.\textsuperscript{83} "Immediate relatives" of United States citizens, for example, are entirely exempt from immigration quotas.\textsuperscript{84} Other familial ties receiving priority include unmarried sons and daughters of citizens; these immigrants, however, are counted against the quotas.\textsuperscript{85} In addition, spouses, children,\textsuperscript{86} and the unmarried sons and daughters of an LPR are given second preference in the

\begin{thebibliography}{1}
\bibitem{76} Abrams, supra note 4, at 1637 (citing MAE NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 21-25 (2004)). The quota formula was based on the number of persons of each national origin currently within the United States. LEGOMSKY, supra note 73, at 16. Certain groups were excluded from counting against the quota, including alien wives and children of U.S. citizens, and returning lawful residents. \textit{Id.}
\bibitem{77} \textit{Id.}
\bibitem{78} Abrams, supra note 4, at 1637 (citing ALEINIKOFF, MARTIN, & MOTOMURA, IMMIGRATION AND CITIZENSHIP 146, 162 (5th ed. 2005)).
\bibitem{79} LEGOMSKY, supra note 73, at 250.
\bibitem{80} \textit{Id.} at 19.
\bibitem{81} Abrams, supra note 4, at 1637; \textit{see also} LEGOMSKY, supra note 73, at 20.
\bibitem{82} Abrams, supra note 4, at 1637 (citing Nora V. Demleitner, How Much Do Western Democracies Value Family and Marriage?: Immigration Law's Conflicted Answers, 32 HOFSTRA L. REV. 273 (2003)).
\bibitem{83} The four categories counted against the immigration quotas are: (1) unmarried sons and daughters of U.S. citizens; (2) (a) spouses, children, and (b) unmarried sons and daughters of LPRs; (3) married sons and daughters of U.S. citizens; and (4) brothers and sisters of U.S. citizens. Immigration and Nationality Act § 203(a), 8 U.S.C. § 1153 (2000).
\bibitem{84} Immediate relatives include spouses, parents of a U.S. citizen who are 21 or older, and unmarried children under 21 of a U.S. citizen. Immigration and Nationality Act § 201(b)(2)(A)(i), 8 U.S.C. § 1151.
\bibitem{85} \textit{See} § 203(a)(1).
\bibitem{86} A child is "an unmarried person under twenty-one years of age" who is born in wedlock, a stepchild, a legitimated child, a child born out of wedlock, an adopted child, or an orphaned child. Immigration and Nationality Act § 101(b)(1), 8 U.S.C. § 1101.
\end{thebibliography}
family-sponsored visa quota system. The U.S. Department of Homeland Security, the agency charged with implementing the visa quota system, requires a more specific showing of family ties to unite families whose relationships are further removed from the marital household paradigm of the unitary family. As the Board of Immigration Appeals (BIA) explained in examining an unmarried father-child relationship, "In keeping with the immigration laws' historical and ongoing concern with true family reunification, the key is the existence of a parent-child relationship in fact, not merely a tie by blood." However, as I will show in the remainder of this Comment through the examples of immigrant children born out of wedlock, stepchildren, and adopted children, many immigration policies and statutes do not require evidence of a bona fide relationship when an immigrant child is part of a recognized family unit. Indeed, the restrictive immigration policies governing the entrance of less conventional families tend to reinforce traditional family law's adherence to the unitary family paradigm.

B. Immigration Law's Gender Bias: Children Born Out of Wedlock

One parent-child relationship that has received much attention from the courts has been that of immigrant children and their unmarried parents. Immigration law mandates different requirements for unmarried fathers and mothers who attempt to attain citizenship benefits for their children born out of wedlock. Unmarried mothers must meet only limited statutory requirements; in contrast, unmarried fathers must overcome significant evidentiary hurdles to establish paternity and confer citizenship benefits on their children. Although a similar unequal statutory scheme exists for parents petitioning for immigrant visas for out-of-wedlock children, more flexibility is engrafted into the immigrant visa section of the INA that allows courts to make individual factual inquiries. In some cases, children born out of wedlock are able to seek immigration benefits through their unmarried fathers if the laws of either one of their domiciles have legitimated them.

87. See § 203(a)(2). A lawful permanent resident (LPR) is a noncitizen who has the "status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws." Immigration and Nationality Act § 101(a)(20), 8 U.S.C. § 1101.

88. For a discussion of immigration requirements and policy implications for children born out of wedlock, stepchildren, and adopted children, see infra Part II.B.-D.

89. After a decision is made by an immigration judge, either the government or the noncitizen may appeal the decision to the BIA for appellate consideration. LEGOMSKY, supra note 73, at 641-42. The BIA sits in Virginia and its members are appointed by the Attorney General. Id.


92. See id.

93. See id.

94. See infra Part II.B.2.

95. See infra Part II.B.3.
1. Citizenship by Descent

Immigration law has stringent statutory provisions informed by gendered expectations of family roles that restrict the conferral of citizenship by descent on out-of-wedlock children. The INA codifies and strengthens the traditional family law conception of the unmarried mother as the child's natural caregiver in contrast to the unmarried father who lacks a similar presumed natural connection to the child.\(^{96}\) Indeed, the statutory provision that confers citizenship status on out-of-wedlock children requires additional proof of parenthood from unmarried fathers,\(^{97}\) but not unmarried mothers.\(^{98}\)

According to section 1409(c) of the U.S. Code, a child born out of wedlock to a U.S. citizen mother and non-citizen father can receive citizenship as long as the mother is a citizen at the time of the child's birth and has lived in the United States for at least one year.\(^{99}\) However, if the child born out of wedlock has a citizen father and non-citizen mother, the child can only receive citizenship if the citizen father meets additional stringent requirements.\(^{100}\) Specifically, section 1409(a) requires proof of a blood relationship, that the father was a citizen at the time of the child's birth, and that the father (unless deceased) "has agreed in writing to provide financial support for the person until the person reaches the age of 18 years."\(^{101}\) In addition, while the child is under eighteen years of age, the father must legitimize the child, acknowledge paternity in writing under oath, or the child must obtain a court order of paternity.\(^{102}\) The requirement that the father prove paternity before the child turns eighteen could simply be an administrative marker of adult status; however, it could also indicate that parenthood must be established while a child is still legally dependent and the father maintains parental control over him or her.

Either way, the statutory requirements of section 1409 reinforce the stereotypical assumption that fathers are not as naturally connected to their children as mothers. Instead, unmarried fathers must actively demonstrate the recognition of their children. Without the benefits of the marital presumption, even evidence of caregiving and a bona fide relationship is not enough to prove the indicia of parenthood for an unmarried father.\(^{103}\) Instead, an unmarried father must officially declare his paternity and support in front of a neutral decision maker.\(^{104}\)

The different statutory requirements imposed on married and unmarried

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96. See Weisberg & Appleton, supra note 14; Collins, supra note 11 at 1672.
98. Id. § 1409(c).
99. Id.
100. See id. § 1409(a).
101. Id. § 1409(a)(3).
102. Id. § 1409(a)(4).
fathers illustrate the statute's underlying belief in marriage as a unifying force. A married father can confer citizenship benefits on his children much more readily than an unmarried father can, even if his wife is not a citizen and the child was not born in the United States. Both married mothers and fathers are subject to the same requirement that, prior to the birth of their child, they were "physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years." In contrast, without a marriage that implies a family is inherently unified, immigration courts use statutory markers of a parent-child relationship to determine whether an unmarried father can confer citizenship benefits on his child. The law does not allow courts to make individual inquiries into relationships between parents and illegitimate children; instead, it requires strict adherence to a statutory scheme that promotes gendered notions of parenthood and family life.

Miller v. Albright provides a prime example of immigration law's adherence to gendered notions of the family. In Miller, the immigrant child was born out of wedlock in the Philippines in 1970 to an unmarried couple, a non-citizen mother and a U.S. citizen father. There was no evidence that the father was present for the child's birth or that he ever returned to the Philippines to visit the child. The child grew up in the Philippines and never resided in the United States. In 1992, the child's application for U.S. citizenship through her father was denied because her court order of paternity did not meet the formal proof requirements of section 1409(a)(4). The Court upheld the statute against an Equal Protection Clause challenge alleging that the statute classified parents based on gender without justification.

The Miller Court concluded that the government's interests gave the gender classification ample justification. These interests included: ensuring that a child born out of wedlock truly shares a blood relationship with a U.S. citizen, encouraging the development of a bona fide parental relationship while the child is a minor, and encouraging ties between the child and the United States. The Court reasoned that a blood relationship to a mother is more

106. Id.
107. See id.
108. See id.
109. 523 U.S. 420 (1998). Miller was decided three terms before Nguyen v. INS, but a majority of the Court could not agree on the equal protection question, thus requiring the decision in Nguyen.
110. Id. at 424-25.
111. Id. at 425.
112. Id.
113. Id.
114. Id. at 445.
116. Id. at 436, 438.
readily apparent and often documented in hospital records and on birth certificates. In contrast, the unmarried father is often undisclosed, unrecorded, and potentially unknown.

Justice Stevens cited *Lehr v. Robertson* to support the conclusion that Congress can constitutionally require affirmative action by unmarried fathers, but not mothers. A plurality of the Court pointed to the real biological differences between men and women to argue that gender-based classifications related to childbirth are not suspect. Justice Stevens endorsed family law's treatment of unmarried fathers in the immigration context.

Justice Breyer, who dissented in *Miller*, was skeptical of the Court's rationalization of the statute based on the "close connection of mother to child, in contrast to the distant or fleeting father-child link." As Justice Breyer reasoned, rather than relying on gender stereotypes, Congress could inquire into the actual parent-child relationship, and instead base different statutory requirements on caretaker and non-caretaker parents or have a knowledge-of-birth requirement. According to Justice Breyer, the Court's affirmation of the statute instead encourages and reinforces gendered expectations of caretaking in the family.

The U.S. Supreme Court again addressed the conferral of citizenship by descent to a child born out of wedlock to a citizen father and non-citizen mother in *Nguyen v. INS*. In this case, the child was born in Vietnam, immigrated to the United States as a six-year-old, and was then raised by his father. The child later became a lawful permanent resident, but at the age of twenty-two, after committing crimes of moral turpitude the government initiated deportation proceedings against him. In an effort to prevent the deportation, the father obtained a court order of parentage and attempted to argue that his son had citizenship by descent. The BIA and the Fifth Circuit rejected the child's citizenship claim because the father did not obtain the court order of parentage until after his son had reached eighteen, and therefore, the order failed to comply with section 1409(a). Both the child and the father

117. *Id.* at 436.
118. *Id.*
119. *Id.* at 441 (citing *Lehr v. Robertson*, 463 U.S. 248, 267-68 (1983) (holding that due process does not require notice of adoption to the biological father if he has not assumed any custodial, personal, or financial responsibility for the child)).
121. *Id.* at 441.
122. *Id.* at 468 (Breyer, J., dissenting).
123. *See id.*
124. *Id.* (Breyer, J., dissenting).
126. *Id.* at 57.
127. *Id.*
128. *Id.*
129. *Id.* at 58.
appealed to the Supreme Court arguing that the statute violated the Equal Protection Clause by establishing sex-based distinctions for the conferral of citizenship on out-of-wedlock children.\(^{130}\)

Similar to Miller, the Nguyen Court held that section 1409 was consistent with the Equal Protection Clause because the gender-based classification served two important governmental interests.\(^{131}\) The statute assured "that a biological parent-child relationship exists"\(^{132}\) and "that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States."\(^{133}\) To ensure that immigrant children do not use citizen fathers instrumentally to gain immigration benefits, section 1409 contains strict standards for out-of-wedlock children.\(^{134}\)

Justice Kennedy explained in the majority opinion that "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood. The imposition of a different set of rules for making that legal determination with respect to fathers and mothers is neither surprising nor troublesome from a constitutional perspective."\(^{135}\) The Court rationalized the gender-based difference on the ground that only the mother’s biological tie is verifiable from birth.\(^{136}\) In addition, the mother has an automatic opportunity for a relationship with the child at birth, whereas the father might not even know the child exists.\(^{137}\) The statute ensures an opportunity for a real connection between the child and father and thus a connection between the child and the United States, before citizenship is conferred.\(^{138}\) Justice Kennedy concluded that the statute did not embody a gender-based stereotype, but merely accommodated the real gender differences present at the moment of birth.\(^{139}\)

Immigration law partly relies on actual biological differences between men and women in order to administer a statutory scheme with administrative ease. Due to the seriousness of conferring citizenship benefits, this is the least forgiving area of immigration law for children. Citizenship is "a most precious right,"\(^{140}\) requiring a careful administrative scheme that considers "two of the

130. *Id.* at 57-58.
132. *Id.* at 62.
133. *Id.* at 64-65.
134. *Id.* at 65.
135. *Id.* at 63.
136. *Id.* at 60.
137. Nguyen v. INS, 533 U.S. 53, 60 (2001). In particular, the Court was concerned about men in the Armed Forces unintentionally fathering children while on duty in foreign countries. *Id.* at 65.
138. *Id.* at 60.
139. *Id.*
most serious of human relationships, that of parent to child and that of individual to the State."\textsuperscript{141} However, merely accepting these justifications ignores the remaining stereotypes engrafted into the statute.

\textit{Miller} and \textit{Nguyen} typify immigration law's reliance on gender stereotypes in conferring citizenship benefits on out-of-wedlock children. As Justice Breyer outlines in his \textit{Miller} dissent, assuming a mother's involvement and a father's disconnection with the family continues to perpetuate gender stereotypes.\textsuperscript{142} Such overbroad sex-based generalizations reinforce "an inequitable allocation of parental responsibility,"\textsuperscript{143} and perpetuate historical patterns of discrimination.\textsuperscript{144} This gender-based statutory scheme is misleading as it "fails to account for the numerous gender-inflected factors—other than 'real' biological difference—that underlie the allocation of parental rights, such as marital status and sex-based distribution of parental responsibility; it is misleading because it obfuscates the principal harms caused by the sex-based allocation of parental rights."\textsuperscript{145}

The harms resulting from a sex-based allocation of parental rights, however, must be balanced with the important government interests at stake.\textsuperscript{146} A blood relationship and the eighteen year time limit to establish paternity are intended to deter fraudulent claims of paternity and provide the evidentiary equivalent of the "blood relationship between the mother and the child" resulting from the fact of birth.\textsuperscript{147} In addition, proof of an opportunity for a relationship and national ties "require . . . a relatively easy, formal step by either the citizen father or his child."\textsuperscript{148} Although the government interests are important, the current administrative scheme unnecessarily promotes gender stereotypes "when more accurate and impartial functional lines can be drawn."\textsuperscript{149}

The current scheme not only fails to protect against the potential fraud that could be committed by unmarried mothers via their simplified statutory

\textsuperscript{141} \textit{Id.} at 478.
\textsuperscript{142} \textit{See id.}
\textsuperscript{143} \textit{Collins, supra} note 11, at 1674.
\textsuperscript{144} \textit{See Nguyen v. INS, 533 U.S. 53, 74 (2001) (O'Connor, J., dissenting) (quoting J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 136 (1994) ("Sex-based statutes, even when accurately reflecting the way most men or women behave, deny individuals opportunity. Such generalizations must be viewed not in isolation, but in context of our Nation's 'long and unfortunate history of sex discrimination.'").}
\textsuperscript{145} \textit{Collins, supra} note 11, at 1672. This requirement dates back to common law notions of coverture, where family obligations were based on gender stereotypes. \textit{See Weisberg \\& Appleton, supra} note 14; \textit{Collins, supra} note 11, at 1672.
\textsuperscript{146} \textit{See Miller v. Albright, 523 U.S. 420, 425 (1998).}
\textsuperscript{147} \textit{Id.} at 436.
\textsuperscript{148} \textit{Id.} at 438.
\textsuperscript{149} \textit{Id.} at 460 (Ginsburg, J., dissenting). "[N]eutral categories would serve the legislature's" purpose and are available in the place of gender-based distinctions. \textit{Id.} at 478 (Breyer, J., dissenting).
requirements, but also does not accomplish well the important government interest of ensuring paternity. The requirement of evidence of paternity before the age of eighteen does not necessarily protect against potential fraud nor does it guarantee any form of a relationship and national ties. As the Miller Court acknowledges, "[A] child could obtain an adjudication of paternity absent any affirmative act by the father, and perhaps even over his express objection." In its place, the statute could utilize "inexpensive DNA testing that will prove paternity with certainty" at any time. For instance, a relationship could be well-established during a child's formative years, while the evidence could be gathered after the age of eighteen. The relationship between the important government interests and the statutory requirements for unmarried fathers are not "substantially related," but instead perpetuate gender-based assumptions such as the belief that mothers are the primary caretakers of children born out of wedlock.

Although a mother's blood relation is verifiable from the event of birth, "the [Nguyen] majority has not shown that a mother's birth relation is uniquely verifiable by the INS, much less that any greater verifiability warrants a sex-based, rather than sex-neutral, statute." If immigration fraud is a primary government concern, more evidence of parenthood should be required of unmarried mothers in addition to fathers. "Congress could have required both mothers and fathers to prove parenthood within 30 days, or for that matter, 18 years, of the child's birth." A gender-neutral requirement would better serve the purpose of ensuring that parenthood is not being used instrumentally by immigrant children.

Similarly, a gender-neutral statute could more accurately serve the government interests in an opportunity for the immigrant child to have a relationship with his or her citizen parent and ties to the United States. If Congress utilized a gender-neutral requirement that the citizen parent be present at birth or have knowledge of the birth, then both unmarried mothers and fathers would be similarly situated. In contrast, "the idea that a mother's

150. Id. at 434. The only requirement that requires an affirmative act of a father who is alive is an agreement "in writing to provide financial support for the person until the person reaches the age of 18 years." See 8 U.S.C. § 1409(a)(3). Thus, if the child has a deceased father, the child could potentially meet all the statutory requirements by obtaining a court order of paternity. See 8 U.S.C. § 1409(a)(4)(C).
151. Miller, 523 U.S. at 484 (Breyer, J., dissenting).
154. Nguyen, 533 U.S. at 82.
155. Id. at 64.
156. See id.
157. See id. at 86 (O'Connor, J., dissenting).
presence at birth supplies adequate assurance of an opportunity to develop a relationship while a father's presence at birth does not would appear to rest only on an overbroad sex-based generalization.\textsuperscript{158} The statute discriminates between similarly situated unmarried mothers and fathers, as it requires even those fathers who are present at birth to establish additional proof of parenthood.\textsuperscript{159}

If Congress also intends to ensure that the parent and child established an actual relationship through this requirement, the statute could "require some degree of regular contact between the child and the citizen parent over a period of time."\textsuperscript{160} Alternatively, the statute could allow for a fact-based inquiry and "excuse compliance with the formal requirements when an actual father-child relationship is proved."\textsuperscript{161} The current statutory scheme imposes significantly more burdens on unmarried citizen fathers to prove paternity, which perpetuates the "'generalization that mothers are significantly more likely than fathers . . . to develop caring relationships with their children.'"\textsuperscript{162} Even if empirical evidence supports this notion, overbroad sex-based generalizations are impermissible and unconstitutional.\textsuperscript{163}

In addition, administrative convenience is not an important enough governmental interest to withstand the intermediate scrutiny that accompanies gender-based classifications.\textsuperscript{164} The Supreme Court has "repeatedly rejected efforts to justify sex-based classifications on the ground of administrative convenience."\textsuperscript{165} Although administrative convenience should not pass muster, immigration law could maintain an administratively convenient scheme in a more gender-neutral manner.\textsuperscript{166} As Justice O'Connor explains, "[t]here is no reason to think that [Nguyen] is a case where administrative convenience concerns are so powerful that they would justify the sex-based discrimination."\textsuperscript{167} Indeed, little administrative inconvenience would appear to accompany a gender-neutral scheme requiring either "presence at birth, knowledge of birth, or contact between the parent and child prior to a certain age."\textsuperscript{168}

To the extent that changing the statutory scheme exacts costs on the

\begin{footnotesize}
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\item \textsuperscript{158} Nguyen v. INS, 533 U.S. 53, 86 (2001) (O'Connor, J., dissenting).
\item \textsuperscript{159} See id. at 87.
\item \textsuperscript{160} Id. at 88.
\item \textsuperscript{161} Id.
\item \textsuperscript{162} Id. at 89 (quoting Miller v. Albright, 523 U.S. 420, 482-83 (Breyer, J., dissenting)).
\item \textsuperscript{163} See id. at 76 (O'Connor, J., dissenting).
\item \textsuperscript{164} See Miller v. Albright, 523 U.S. 420, 460 (Ginsburg, J., dissenting) (quoting O'Connor, J., concurring) ("[D]istinctions based on gender trigger heightened scrutiny and '[i]t is unlikely . . . that any gender classifications based on stereotypes can survive heightened scrutiny.'").
\item \textsuperscript{165} Nguyen v. INS, 533 U.S. 53, 88 (2001) (O'Connor, J., dissenting).
\item \textsuperscript{166} See, e.g., Miller, 523 U.S. at 468 (Breyer, J., dissenting).
\item \textsuperscript{167} Nguyen, 533 U.S. at 88 (O'Connor, J., dissenting).
\item \textsuperscript{168} Id.
\end{enumerate}
\end{footnotesize}
system or the administrative back-log, they would be offset by the saved costs of a more efficient system that protects against immigration fraud committed by both unmarried mothers and fathers, as well as a system that fosters closer familial ties to the United States and decreases burdens on other public resources. By declining to strike down the statute as unconstitutional for failing to include a flexible approach to proving paternity, the *Nguyen* Court indicated that it did not matter if the father has been the child’s sole custodian and caregiver since the age of six. For an unmarried father to attain citizenship benefits for his children, what matters is whether he is willing to declare his paternity and provide financial support in line with his “role” as a “father.”

Family law and other areas of immigration law, including unmarried fathers petitioning for visas for their children, take a slightly more functional approach in establishing parent-child relationships. Although gendered expectations of family life still form the basis for most inquiries, other immigration benefits are conferred on many non-traditional family members after a factual inquiry into the parent-child relationship. While the seriousness of citizenship status requires a formal scheme, Congress should reformulate the current statutory scheme regarding citizenship by descent in a gender-neutral manner in order to accommodate non-traditional family relationships.

2. **Immigrant Visas**

The requirements imposed on parents seeking to sponsor their out-of-wedlock child for an immigrant visa also reinforce gendered expectations of family responsibilities. The evidence unmarried fathers must use to prove the indicia of parenthood for securing an immigrant visa for their children suggests a particular vision of fatherhood that encompasses both traditional family law ideals as well as modern egalitarian standards. When a child born out of wedlock fails to meet the statutory requirements for citizenship, the child might nonetheless meet the requirements to obtain an immigrant visa through his or her citizen or LPR parent.

As in the citizenship statute, unmarried citizen mothers need not prove anything to attain immigration benefits for their children. However, unmarried citizen fathers must prove the existence of an actual parent-child relationship. In 1986, Congress amended the INA to allow a visa petition

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169. See infra Part II.B.2. Additionally, although family law imposes sex-based requirements on unmarried parents, it at least provides flexibility in allowing unmarried fathers to establish their family commitments through a factual inquiry into the parent-child relationship. See supra Part I.C.

170. Immigrant visas permit noncitizens to enter the country as an alien lawfully admitted for permanent residence. See LEGOMSKY, supra note 73, at 9. As an LPR, a noncitizen may eventually apply for citizenship after meeting three to five years worth of statutory requirements. *Id.* at 8.


172. See *id.*
through an unmarried father, as long as "the father has or had a bona fide parent-child relationship with the person." 173 Unlike the strict citizenship by descent statute discussed in the previous section, the amended visa statute adheres more closely to modern family law principles by simply requiring unmarried fathers to prove an actual custodial, personal, or financial relationship with their child.

The BIA has articulated certain factors that prove a bona-fide parent-child relationship for immigrant visa purposes. In *In re Vizcaino,* a thirty-three-year-old citizen of the Dominican Republic sought an immigrant visa through his unmarried U.S. citizen father. 174 Outlining specific criteria to be analyzed on a case-by-case basis, the BIA emphasized that when "assessing a relationship, some evidence of emotional and/or financial ties should be shown." 175 In order to make this determination, the fact finders should look for proof that the parent and child actually lived together at some point, "that the father held the child out as his own," that the father "provided for some or all of the child's needs," or that the father's behavior generally demonstrated a genuine concern for the child. 176 The baseline finding includes "evidence of some attempt to help support the child and/or some showing of communication with or about the child, which evinces a genuine interest in the child." 177

While these requirements are more in line with modern family law, they still promote a particular vision of fatherhood. On one hand, immigration law in the visa context allows citizen fathers to use evidence of emotional ties, caregiving, or custody. However, the fact that evidence of financial support alone could potentially be sufficient to prove a bona fide relationship indicates that fathers are still expected to fulfill traditional financial support roles within the family. In addition, the requirement that only a father prove he has held the child out as his own, reinforces the belief that the father-child relationship is a less natural bond compared to the mother-child relationship.

The expectations of fatherhood are further delineated in *In re Pineda,* where an unmarried LPR father petitioned for an immigrant visa for his eighteen-year-old daughter, a citizen of El Salvador. 178 The evidence of a father-daughter relationship consisted of tax returns listing the child as his dependent, the child's report card signed by the father, the child's immunization record, and the child's affidavit stating that she resided with her

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174. *In re Vizcaino,* 19 I. & N. Dec. at 645. (explaining that in order to seek immigration benefits as a son or daughter of a U.S. citizen under section 203 of the Immigration and Nationality Act one must have at some point qualified as a child within the meaning of section 101(b)(1)).
175. *Id.* at 648.
176. *Id.*
177. *Id.* at 648-49.
father and that he was always responsible for her financial support and personal welfare.\textsuperscript{179} The BIA concluded the evidence was too scarce and of limited evidentiary value.\textsuperscript{180} In particular, the father signed the report card and immunization record \textit{after} the visa petition was filed; they were thus not considered evidence of a relationship \textit{before} the immigration benefit was sought.\textsuperscript{181} Further, he did not submit any direct evidence concerning the child's residence with him.\textsuperscript{182} The BIA explained that the evidence was "insufficient to establish the active parental concern for the child's support and general welfare that [it] believe[d] must be present in any bona fide parent-child relationship."\textsuperscript{183} At a minimum "some showing of emotional and/or financial ties [needed to] be made."\textsuperscript{184} Indeed, the BIA indicated that it might have credited the father-child relationship for immigrant visa purposes if the petitioners had provided more substantial evidence.\textsuperscript{185}

\textit{In re Pineda} and \textit{In re Vizciano} demonstrate how certain areas of immigration law are progressing towards a more egalitarian view of family relationships in recognizing fathers who engage in responsibilities traditionally expected of mothers. However, these cases also reveal immigration law's lingering bias toward traditional family structures and gender roles.\textsuperscript{186} A family's attempt to establish fatherhood through less traditional roles may result in a higher evidentiary hurdle. As a result, it is potentially easier for an unmarried father to perform his gendered responsibilities. A citizen father's evidentiary burden in order to confer immigrant visa benefits thus evinces both family law's traditional understanding of fatherhood as well as evolving modern understandings.

3. Legitimation

Another avenue through which a child born out of wedlock can obtain immigration benefits is by becoming legitimated.\textsuperscript{187} As established in the previous sections, a child born out of wedlock can seek benefits through her biological mother regardless of legitimacy. To obtain immigration benefits through her father, however, a child is considered legitimated if he or she is "legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile," before the child reaches eighteen

\begin{itemize}
\item \textsuperscript{179} Id. at 72.
\item \textsuperscript{180} Id. at 73.
\item \textsuperscript{181} Id.
\item \textsuperscript{182} Id. at 74.
\item \textsuperscript{183} Id. at 73.
\item \textsuperscript{184} \textit{In re Pineda}, 20 I. & N. Dec. 70, 73 (B.I.A. 1989).
\item \textsuperscript{185} Id. at 73.
\item \textsuperscript{186} See id.
\item \textsuperscript{187} Legitimation is the granting of full legal status to an out-of-wedlock child based, for example, on the subsequent marriage of an out-of-wedlock child's biological parents. \textsc{Gordon, Mailman, & Yale-Loehr,} \textsc{3 Immigration Law and Procedure} § 36.04[4][b] (2006).
\end{itemize}
years of age and while "in the legal custody of the legitimating parent or parents at the time of such legitimation."\textsuperscript{188}

Legitimation places a child born out of wedlock "in all respects upon the same footing as if begotten and born in wedlock."\textsuperscript{189} The BIA explains that "[w]hile it is true that the mother of an illegitimate child is presumed to have custody of that child, the same is not true where the child has been legitimated."\textsuperscript{190} This presumption implies that both the father and mother have an equally "natural right" to the custody of the child only after a father has legitimated his child, for example, by marrying the mother.\textsuperscript{191} This policy reflects dated notions of coverture where the father chose whether to recognize his illegitimate children, but otherwise did not have any legal obligations toward them.\textsuperscript{192}

Immigration law's requirement that an unmarried father prove legitimation or a bona fide relationship with the illegitimate child,\textsuperscript{193} while an unmarried mother need not prove anything, again reinforces a normative commitment to gender roles and the marital family. One of the most common methods of legitimation is through the subsequent marriage of the biological parents.\textsuperscript{194} As in traditional family law, marriage serves as a unifying force in the immigration context. The marital unit signals stability as well as an affirmative responsibility to care for the family. As a result, marital families are given preferential treatment for administrative ease.

The unmarried father's position in the family only becomes clearly defined when the illegitimate child has been legitimated per the laws of either the father's or the child's domiciles. Many countries and states will only consider a child to be legitimated through the marriage of his or her biological parents.\textsuperscript{195} In \textit{In re Mourillon}, the visa beneficiary attempted to prove his legitimation through his sibling.\textsuperscript{196} The petitioner grew up with his father in Curacao, Netherlands Antilles, where the legitimation of a child could only occur through the subsequent marriage of the biological parents and their acknowledgment of the child.\textsuperscript{197} Since the child was acknowledged, but his biological parents never married, the BIA determined that he was not legitimated according to the laws of his domicile as required by section...

\textsuperscript{189} Pfeifer v. Wright, 41 F.2d 464, 466 (10th Cir. 1930); see also \textit{In re Rivers}, 17 I. & N. Dec. 419, 420 (B.I.A. 1980).
\textsuperscript{190} \textit{In re Rivers}, 17 I. & N. Dec. at 420.
\textsuperscript{191} \textit{Id.} at 421.
\textsuperscript{192} \textit{See Collins, supra} note 11, at 1682.
\textsuperscript{193} \textit{See infra} Part II.B.2.
\textsuperscript{194} \textit{See GORDON, MAILMAN, \& YALE-LOEHR, supra} note 187, at § 36.04[5].
\textsuperscript{195} \textit{See id.}
\textsuperscript{196} 18 I. & N. Dec. 122, 281 (B.I.A. 1981) (noting that "in order to establish the existence of a sibling relationship the petitioner must show that he and the beneficiary are, or once were, "children" of a common "parent" within the meaning of section 101(b)(1) and (2)").
\textsuperscript{197} \textit{Id.}
Similarly, in *In re Reyes*, the beneficiary was born out of wedlock in the Dominican Republic and was subsequently acknowledged by his citizen father in New York. However, the BIA held that according to the laws of the Dominican Republic and New York, acknowledgment of paternity without the marriage of the biological parents does not fully legitimate a child because it does not make the child legally equivalent to a child legitimated by marriage. Since the beneficiary was not a legitimated child under the laws of his own domicile or his father’s domicile, the BIA held that the petitioner did not qualify as his father’s “child” for immigration purposes.

The immigration policy in the legitimation context establishes marriage as the ultimate indication that a father has taken on the responsibilities of caring for his family and has thus accepted the legal responsibilities of parenthood. The marital unit in this context evinces stability and indicates that parents have borne an affirmative responsibility for their children. While this requirement provides an administratively convenient method of presuming marriage as a unifying force, it simultaneously compels families to fit into a requisite mold. This perpetuates the traditional marital structure for both families already living in, and attempting to immigrate to, the United States.

Once marriage and acknowledgment has occurred, in many countries it does not matter if a parent-child relationship exists in fact. Even if a parent-child relationship fails to exist, the BIA presumes a relationship within the marital unit and does not make a factual inquiry. As demonstrated by *In re Reyes* and *In re Mourillon*, marriage is often the single factor that determines whether or not a child has been legitimated. Therefore, an uninvolved father who simply marries the biological mother can often bring his legitimated child into the country.

On occasion, the BIA allows a legitimated child to receive immigration benefits without evidence of a marriage. Certain countries have laws that legitimize children without requiring a marriage between the biological parents. In *In re Goorahoo*, for example, an unmarried LPR father who was a citizen of

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198. *Id.* The petitioner did not qualify as his father’s “child” and was additionally not considered a sibling to the beneficiary through their father. The petitioner and beneficiary were determined to be siblings through their common parental relationship to the stepmother. *Id.* This case came about before the 1986 law that allowed out-of-wedlock children to gain immigration benefits through their father. Thus, if this case was brought after 1986, the petitioner presumably would have been able to establish a father-child relationship through the out-of-wedlock provision. See Legomsky, *supra* note 73, at 283.


200. *Id.* at 515.

201. *Id.*


203. The policy considerations of administrative convenience will be considered in-depth in Part III of this Comment.

204. See Gordon, Mailman, & Yale-Loehr, *supra* note 187, at § 36.04[5].
Guyana filed an immigrant visa for the benefit of his six-year-old son, also a citizen of Guyana.\textsuperscript{205} The visa petition contained the beneficiary’s birth certificate with his father’s name and an affidavit from the mother stating that the father acknowledged paternity of the child and that he regularly contributed toward the child’s maintenance.\textsuperscript{206} Since the laws of Guyana had eliminated all legal distinctions between legitimate and illegitimate children\textsuperscript{207} and regarded the child as the legitimate son of the father, the BIA recognized the child as legitimated for immigration purposes.\textsuperscript{208} This recognition demonstrates immigration law’s ability, even if somewhat indirect, to acknowledge the rights of members of families outside the marital family paradigm as well as cultural variations of the family structure. Congress should consider accommodating more non-traditional family relationships by legislating beyond the marital family unit in order to reflect the diversity and reality of parent-child relationships.

\textit{C. Immigration Law’s Marital Bias: Stepchildren}

Marriage functions to benefit stepchildren in the same way it functions to benefit children born out of wedlock: it unites the family for immigration purposes. Much like the citizenship by descent statute, courts strictly apply immigration law’s stepchildren statute to ensure the preservation of the marital family unit. This strict application, however, arguably produces counterintuitive results that favor only those families that best fit into the traditional paradigm.

A stepchild may receive immigration benefits as a “child” of a U.S. citizen or an LPR. According to section 101(b)(1)(B) of the INA, the stepchild must have been under the age of eighteen at the time of the marriage that created the stepparent-child relationship.\textsuperscript{209} Case law also requires that the stepparent status exist at the time the immigration benefit is sought or that an actual relationship continued to exist after the termination of the marriage.\textsuperscript{210}

A marriage that produces a step-relationship creates the legal fiction of an existing unified family. The step-relationship can be established even if the child was originally born out of wedlock and regardless of whether an actual personal relationship exits during the marriage.\textsuperscript{211} Similar to traditional family

\begin{itemize}
\item \textsuperscript{205} 20 I. & N. Dec. 782 (B.I.A. 1994).
\item \textsuperscript{206} \textit{Id.} at 783.
\item \textsuperscript{207} \textit{Id.} at 785.
\item \textsuperscript{208} \textit{Id.}
\item \textsuperscript{209} Immigration and Nationality Act § 101(b)(1)(B), 8 U.S.C. §1101 (2000). In contrast, the adoption statute imposes an age requirement of sixteen because an adopted family must first establish familial and cultural ties to the child over a period of two years. See § 101(b)(1)(E); see also infra Part II.D.
\item \textsuperscript{210} \textit{See, e.g., In re Mower,} 17 I. & N. Dec. 613, 615 (B.I.A. 1981).
\item \textsuperscript{211} \textit{See, e.g.,} Medina-Morales v. Ashcroft, 371 F.3d 520, 531 (9th Cir. 2004); Palmer v. Reddy, 622 F.2d 463, 464 (9th Cir. 1980).
\end{itemize}
law's treatment of step-relationships, marriage in the immigration law context presumes a sense of responsibility, stability, and commitment to the family unit. The formalistic statute arguably does not support true family unity, but provides for administrative convenience for an overburdened agency. The stepparent might not care about the stepchild's welfare or exercise parental control, but can still bring the child into the country.\textsuperscript{212} Analogous to the unmarried father cases in family law that often prefer step-relationships over biological ties,\textsuperscript{213} immigration law's treatment of stepparents presumes a marital unit signifies stability.

The stepparent-child relationship is one of the few modern relationships that immigration law accepts without imposing additional statutory hurdles. By recognizing the stepparent-child relationship, immigration law permits the bifurcation of parental responsibilities.\textsuperscript{214} The statute does not require that the biological parent abandon the child, nor does it require the stepparent take an active role in the child's life.\textsuperscript{215} The stepparent-child relationship is arguably viewed as more socially acceptable than the unmarried father's relationship because it is simply a reconfiguration of the marital family unit. As the stepparent-child relationship resembles the traditional family paradigm, the statute preserves the respect "traditionally accorded to the relationships that develop within the unitary family."\textsuperscript{216} The effect of this immigration policy preference is to reinforce conformity to the marital family unit.

In \textit{Palmer v. Reddy}, the Ninth Circuit was the first to articulate immigration law's endorsement of the marital family unit within the stepchild statute.\textsuperscript{217} The \textit{Palmer} court held that as long as a stepparent-child relationship meets the statutory requirements and the marriage is still legally in existence, no stepparent-child relationship must exist in fact.\textsuperscript{218} The court held that the granting of immigration benefits "is available to stepchildren as a class without further qualification."\textsuperscript{219} The BIA has since adopted the holding in \textit{Palmer} and similarly no longer requires proof of a step-relationship in fact.\textsuperscript{220}

\textsuperscript{212} See, e.g., \textit{Palmer}, 622 F.2d 463.


\textsuperscript{215} See \textit{Palmer}, 622 F.2d 463.

\textsuperscript{216} \textit{Michael H.}, 491 U.S. at 123.

\textsuperscript{217} \textit{Palmer v. Reddy}, 622 F.2d 463, 464 (9th Cir. 1980). \textit{See also} \textit{Medina-Morales v. Ashcroft}, 371 F.3d 520, 531 (9th Cir. 2004) (upholding \textit{Palmer} and its progeny by reversing a BIA decision to review the strength of the noncitizen's relationship to his stepfather).

\textsuperscript{218} \textit{Palmer}, 622 F.2d. at 464. In \textit{Palmer}, the U.S. citizen stepmother married a man with an illegitimate daughter, and the stepmother petitioned for an immigrant visa for the daughter. \textit{Id.} Prior to the statutory change in 1986, allowing unmarried fathers to petition for their children, the statute produced peculiar results where stepmothers could petition for illegitimate children but the biological fathers of those children could not. \textit{See} \textit{Legomsky}, supra note 73, at 283.

\textsuperscript{219} \textit{Palmer}, 622 F.2d. at 464.

\textsuperscript{220} \textit{See In re McMillan}, 17 I. & N. Dec. 605, 606 (B.I.A. 1981) (abandoning its previous requirement of establishing a relationship in fact and explicitly adopting the rule in \textit{Palmer}).
As long as a marriage remains legally valid, an active stepparent-child relationship does not need to exist. However, if the marriage is terminated by a legal separation or due to the death of one spouse, the courts must determine whether a relationship continues to exist in the absence of the unifying force of marriage. In *In re Mowrer*, the BIA held that the viability of an existing marriage, even when the spouses were separated, is irrelevant for the purposes of establishing a stepparent-child relationship.221 Hence the petitioner could still confer benefits upon his stepchildren since the separation was not formalized.222 Only where the marriage has been legally and formally terminated is it necessary to examine "whether a family relationship has continued to exist as a matter of fact between the stepparent and stepchild."223 This policy exhibits immigration law's firm reliance on marriage as a unifying force even in situations where a stepparent might have no intention to care for the child after immigration. Similar to family law's preference for marital relationships, this policy amounts to a blanket distribution of benefits for the sake of administrative convenience.

The BIA further explained the reasoning behind the requirement of a legally valid marriage in *In re Simicevic*.224 In this case, the BIA held that the immigration policy of family unification does not apply to former step-relationships because there is no family unit to reunite.225 As opposed to consanguinity or blood relationships, which are incapable of dissolution, the step-relationship is merely one of "affinity."226 Furthermore, the BIA explained that subsequent marriages after a divorce create new step-relationships and new family units.227 Immigration and social policy are not served by allowing a former stepparent to petition for a former stepchild in situations where the only connection between them was the dissolved marriage because "[c]learly, it cannot be held that a family unit is being reunited in [that] case."228

Immigration law concerning the admission of stepchildren demonstrates adherence to a preference for marriage and the traditional marital family. After

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221. 17 I. & N. Dec. 613, 615 (B.I.A. 1981). In *In re Mowrer*, the U.S. citizen petitioner sought immigrant visas based on immediate relative status for his two stepchildren from the Philippines. The beneficiaries met the requirements of the statute because the petitioner married the beneficiaries' mother prior to the children becoming eighteen years of age. However, the petitioner and the mother had since been separated with no plans for reconciliation. The marriage had not been terminated by law, but was merely nonviable. *Id.* at 614-15.

222. See *id.*

223. *Id.* at 615.


225. *Id.* In *In re Simicevic*, the petitioner was a lawful permanent resident who married the father of the beneficiary. The father and stepmother never had any children and were eventually formally divorced, at which time the custody of the beneficiary was given to the father. Since the petition for the child was filed after the divorce, the beneficiary was no longer considered a stepchild of the petitioner for immigration purposes. *Id.*

226. *Id.* at 365.

227. *Id.*

228. *Id.*
the dissolution of a marriage, traditional family law assumes that no custody should be granted to stepparents.\textsuperscript{229} Likewise, immigration law does not confer an affirmative responsibility of care on former stepparents.\textsuperscript{230} As a result, the law functions as a tool that encourages citizenship-seeking families who might otherwise legally separate to remain in the family unit. Indeed, the presumption of an actual relationship between stepparents and stepchildren rewards families who best conform to the traditional family model.

Immigration law has only recently begun to follow family law’s movement beyond traditional assumptions of step-relationships\textsuperscript{231} by occasionally conferring immigration benefits on former step-relationships. Some courts will inquire into the facts of a relationship to determine whether to confer immigration benefits upon a child of a former stepfamily member. In In re Mourillon, for example, the BIA allowed the petitioner to seek an immigrant visa for his stepsister based on their actual continued relationship as stepsiblings.\textsuperscript{232} The BIA held that in order to confer immigration benefits to a stepsibling, “either (1) the marriage which created the step-relationships must continue to exist, or (2) where the parties to that marriage have legally separated or the marriage has been terminated by death or divorce, a family relationship must continue to exist as a \textit{matter of fact} between the ‘stepsiblings.”\textsuperscript{233} The BIA determined that regardless of whether the parents were still alive and married, the record reflected that the petitioner and beneficiary continued to maintain a family relationship.\textsuperscript{234} Therefore, they were “children” of a common “parent,” and the petitioner could seek an immigrant visa for the beneficiary as his “sister.”\textsuperscript{235}

\textsuperscript{229} See Olvera v. Superior Court, 815 P.2d 925 (Ariz. Ct. App. 1991) (denying custody to stepparent); \textsc{Weisberg} & \textsc{Appleton}, \textit{supra} note 14, at 799.


\textsuperscript{231} See Robinson v. Ford-Robinson, 208 S.W.3d 140 (Ark. 2005); see also \textsc{Weisberg} & \textsc{Appleton}, \textit{supra} note 14, at 799.

\textsuperscript{232} 18 I. & N. Dec. 122, 123 (B.I.A. 1981). In order to prove the existence of a sibling relationship “the petitioner must show that he and beneficiary are, or once were, ‘children’ of a common ‘parent’ within the meaning of section 101(b)(1) and (2) of the Act.” \textit{Id.} In \textit{In re Mourillon}, the petitioner was the half-sibling of the beneficiary, thus requiring proof that they were both at some point “children” of the same “parent.” The only avenue through which the siblings could successfully pursue an immigrant visa was through their relationship to the petitioner’s stepmother (the beneficiary’s biological mother). \textit{Id.} at 125. As discussed in Part II.B.3. of this Comment, the siblings in this case were not both considered to be the children of the biological father because the petitioner was not properly legitimized by the father. In addition, the statute prohibiting unmarried fathers from petitioning for their out-of-wedlock children was still in effect, preventing the petitioner from being considered the “child” of his father.

\textsuperscript{233} \textit{Id.} at 126 (emphasis added).

\textsuperscript{234} \textit{Id.} Starting at the age of thirteen, the petitioner lived with his father and stepmother “as a family unit until the petitioner came to the United States” after the age of twenty-one. \textit{Id.} at 122. Meanwhile, the petitioner’s father and stepmother had a child, the beneficiary. At some point the beneficiary came to the United States on a nonimmigrant student visa and lived with the petitioner. \textit{Id.}

\textsuperscript{235} \textit{Id.}
Immigration law's recognition of former step-relationships is catching up to evolving family law principles. Indeed, the policy expands the definition of parent to include those individuals with actual personal relationships that do not necessarily fall within the traditional marital unit. To an extent, immigration law still prefers the traditional family paradigm in this context because it requires former stepparents overcome higher statutory hurdles in order to attain immigration benefits for their former stepchildren.

Although step-relationships are not traditional in their allocation of parental responsibilities, they are nonetheless rewarded in the immigration policy framework because they preserve important aspects of marital unity.\textsuperscript{236} The immigration statutes attempt to assure that children are not immigrating into the country without a support network. Therefore, even families who have divorced or faced illegitimacy are "cured" when they conform to the marital paradigm through step-relationships.\textsuperscript{237} As a result, marriage continues to serve as a unifying and transformative tool of social policy that presumes the existence of parental involvement and responsibilities even if they fail to actually exist.

\textbf{D. Immigration Law's Unitary Family Bias: Adopted Children}

Congress's treatment of children adopted overseas reveals its policy interest in family unification. When the relationship between an adopted child and his or her adoptive parents resembles the relationship between a parent and child in a traditional family unit, immigration law becomes more accommodating.\textsuperscript{238} In contrast, when the relationship between an adopted child and his or her parents strays from normative conceptions of the family unit, the law requires petitioners to provide additional evidence of true parenthood.\textsuperscript{239}

In 1957, Congress changed immigration law to bestow benefits upon adopted children.\textsuperscript{240} Due to the increased interest of U.S. citizens in adopting children overseas, lawmakers expanded the definition of "child" to include an adopted child.\textsuperscript{241} The prior denial of immigration benefits to adopted children was based on a policy concern that sham adoptions could be used to circumvent the quota laws.\textsuperscript{242} The current definition of adopted children is strictly applied to address this policy concern.\textsuperscript{243} In addition, the biological parents of a child

\begin{itemize}
\item \textsuperscript{236} See Robinson v. Ford-Robinson, 208 S.W.3d 140 (Ark. 2005).
\item \textsuperscript{237} See, e.g., Lehr v. Robertson, 463 U.S. 248 (1983).
\item \textsuperscript{238} See, e.g., Yin v. Esperdy, 187 F. Supp. 51 (S.D.N.Y. 1960).
\item \textsuperscript{239} See, e.g., In re Cuello, 20 I. & N. Dec. 94, 97 (B.I.A. 1989) (inquiring "into the nature of the relationship between the adopted child and adoptive parents" in order to determine whether the residency requirement had been satisfied); In re Repuyan, 19 I. & N. Dec. 119, 120 (Bd. of Immigration Appeals 1984) (discussing residency requirement).
\item \textsuperscript{240} GORDON, MAILMAN, & YALE-LOEHR, supra note 187, at § 36.04[6][a].
\item \textsuperscript{241} Id.
\item \textsuperscript{242} Id.
\item \textsuperscript{243} Id.; see also In re Marquez, 20 I. & N. Dec. 160 (B.I.A. 1990).
\end{itemize}
adopted overseas cannot later claim immigration benefits through their former relationship to the child. This adheres to the traditional family law policy of completely terminating the adopted child’s ties to the biological parents in favor of the adoptive parents.

According to section 101(b)(1)(E) of the INA, an adopted child may receive immigration benefits if he or she was adopted while under the age of sixteen years and “has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years.” This ensures that the child remains a minor and dependent upon his or her adoptive parents for at least two years, thus requiring immigration to the United States. Unlike step-relationships where the statutes assume that the stepchild is connected to the family by virtue of the marriage, adopted children must demonstrate an actual connection to their adoptive family and hence the culture of the United States.

Immigration policy delineates parenthood as requiring support, care, custody, and control over a child. Adoptive parents must show proof of actually establishing a residence for their family unit to provide evidence of traditional parental support and assumption of parental control. A parent-child relationship is not strictly about a bond, but is also a form of dependency. If an adopted child receives support and shelter from someone other than the adoptive parent or parents, courts will view the adoptive relationship with suspicion. Immigration law thus adheres to traditional family law in preventing the bifurcation of parental rights and responsibilities between the biological and adoptive parents.

The requirement of parental control over an adopted child preserves both the traditional family law concept of parental autonomy as well as the traditional family unit paradigm. Much like the traditional family law principles outlined in Michael H. v. Gerald D., the BIA generally recognizes only one set of parents. Contrary to the recognition of second-parent adoptions in domestic family law, immigration law imposes a burden on adoptive parents

246. In addition, the adoption must conform to the formal adoption laws of the residence or domicile of the child and proof of legal custody must take the form of an official document by a court or government entity. See GORDON, MAILMAN, & YALE-LOEHR, supra note 187, at § 36.04[6][a]-[b].
250. See id.
251. See id. at 94.
252. See Adoption of Tammy, 619 N.E.2d 315, 321 (Mass. 1993) (second-mother adoption of the child by the biological mother’s same-sex partner), Groves v. Clark, 982 P.2d 446 (Mont. 1999) (open adoption); WEISBERG & APPLETON, supra note 14, at 1095-96.
to prove that the adoption is not fraudulent. For example, this is particularly the case when both the adoptive and biological mothers are involved in the child's life. This additional requirement pressures adoptive families to keep the biological parents at a distance and discourages non-traditional and non-marital relationships. Indeed, the policy preserves the respect "traditionally accorded to the relationships that develop within the unitary family." Since the bifurcation of parental responsibilities does not resemble the traditional marital unit, immigration law requires families in non-traditional arrangements to overcome additional evidentiary hurdles before awarding them immigration benefits. The strict statutory requirements and the additional need to prove parental control demonstrate immigration law's desire to prevent fraudulent use of family relationships to gain immigration benefits.

In addressing potential fraudulent use of the adopted child provision, the BIA has followed the U.S. Supreme Court's lead in Nguyen by strictly applying the statute. The BIA has even exceeded the basic statutory requirements to ensure the authenticity of the adoptive parent-child relationship. In particular, the BIA looks for indicia of parental control and responsibility, through evidence such as report cards, not only to verify true parenthood, but also to ensure that a citizen assumed to be culturally connected to the United States raises the adopted child. In this way, immigration law prioritizes family unification for those it believes are actually invested in the United States.

The BIA has determined that when an inter-country adoption takes place and the child continues to live with the biological parent during the period the adoptive parent claims he or she resided with the adopted child, "the petitioner has the burden of establishing that the adoptive parent exercised parental control during that period of residence." For example, in In re Cuello, a U.S. citizen adoptive father was the adopted beneficiaries' biological uncle and resided with them and their biological mother in the Philippines. The BIA explained that adoptive parents who live with the biological parents must provide the indicia of parental control which includes, but is not limited to, "competent objective evidence that the adoptive parent owns or maintains the property where the child resides, provides financial support and day-to-day

254. See id.
260. Id. (emphasis added).
care, and assumes responsibility for important decisions in the child’s life.\textsuperscript{262} The BIA reasoned that the continuing presence of the biological mother in the adopted children’s lives required a deeper inquiry into the nature of their residence and relationships.\textsuperscript{263} Only with proof of parental control would the adoptive relationship be presumed bona fide for immigration purposes.

Parental control was further defined in \textit{In re Repuyan}, where the BIA held that an adopted child must actually reside in the adoptive parent’s principal dwelling for the two-year statutory period.\textsuperscript{264} In denying an immigrant visa, the BIA explained, “Congress intended that the two-year residence requirement vis-à-vis an adopted child connote a familial relationship not inherent in a mere visit.”\textsuperscript{265} Residence means a person’s principal and actual dwelling place.\textsuperscript{266} The BIA noted that “[w]hile it is true that there is an underlying principle of family unification in the immigration laws, there is at the same time specific direction as to what relationships are to be recognized for immigration benefits.”\textsuperscript{267}

The residency requirement articulated in \textit{In re Cuello} and \textit{In re Repuyan} is one way immigration law ensures the existence of an actual parent-child relationship. The adoptive parent’s ability to provide a stable residence is the ultimate indicia of support and daily care of the child. This requirement compels immigration officers to ask whether a parent is willing and able to care for the child once he or she immigrates to the United States. In addition, it decreases the probability that the child will become a burden on public resources or is using a sham adoption to gain citizenship. Providing a residence implies that the parent exerts control over the rearing of the child and will hence foster a cultural connection to the country.

The requirement of primary parental control reflects the family law belief in parental autonomy. True parents exercise their fundamental liberty interest in “the care, custody, and control of their children.”\textsuperscript{268} Immigration law uses this concept to test the actual nature of the relationships in the adopted child’s life. If the biological parent is still involved in the child’s life, the adoptive relationship is automatically suspect and additional evidence is required to

\textsuperscript{262} \textit{Id.} at 98. Although the petitioner submitted evidence of birth records reflecting the addition of his name and that he supported the children, the record also reflected that he did not claim them as his dependents on his tax returns or navy benefits, and that he had not signed their report cards. \textit{Id.} at 96.

\textsuperscript{263} \textit{Id.}

\textsuperscript{264} 19 I. & N. Dec. 119, 120 (B.I.A. 1984). In \textit{In re Repuyan}, the petitioner adopted her niece and nephew in the Philippines and sought to bring them to the United States on an immigrant visa. The adoption decrees indicated that the petitioner visited the children for various lengths of time for a total period exceeding two years over a period of sixteen years. \textit{Id.}

\textsuperscript{265} \textit{Id.} at 119.

\textsuperscript{266} \textit{Id.} Although the BIA does not require the two-year residence to be continuous, the child must actually reside with the parent rather than merely maintaining a succession of visits.

\textsuperscript{267} \textit{Id.} at 121.

\textsuperscript{268} \textit{Troxel v. Granville,} 530 U.S. 57, 60 (2000).
If the biological parent actually maintains his or her fundamental liberty interest of parental autonomy, then the adoptive parent is not considered a true parent for immigration purposes. Immigration law generally follows traditional family law's requirement of terminating all biological ties when an adoption occurs. However, allowing continued residence with the biological parents so long as the adoptive parents maintain control, demonstrates immigration law's slow progression beyond the heteronormative unitary family and toward the recognition of alternative family configurations, such as open adoptions or extended families. Requiring evidence of parenthood preserves the sanctity of the traditional family and ensures that parenthood is not used instrumentally.

In the case of a traditional marital family unit, courts may impose less stringent requirements on adoptive parents who are seeking benefits for their child. In *Yin v. Esperdy*, the petitioner resided with his wife and adopted son for a period of eight or nine months in China. Upon his departure to the United States, his wife and child continued to reside together in China. The court held that residency with the non-citizen adoptive parent will satisfy the residency requirement for immigration purposes. The adopted child section of the INA "was intended to avoid the harsh results of breaking up bona fide family units." In particular, "the two year residence requirement was intended by Congress as an assurance that the family unit would be bona fide." The court in *Yin* reasoned that the only way to further this purpose would be to grant the adopted son an immigrant visa. The sole avenue in which the bona fide family relationship of husband and wife as well as mother and child can be maintained "is to allow all three of the individuals involved to maintain a single residence." Otherwise the bond between mother and child or between wife and husband would be broken. "A true family relationship can exist only if the family is a unit . . . . To maintain that unity all of the individuals must reside together."

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270. See *id.* at 97 ("[A] 'true parental relationship' had not been created." (quoting *In re Yuen* 14 I. & N. Dec. 71 (B.I.A. 1972))).
272. *id.* at 52.
273. *Id.* at 52. The Attorney General granted the wife's immigrant visa, but denied the adopted child's visa because the father and child did not reside together for a period of two years according to the statutory requirements. The reviewing court reversed and granted the child a visa.
274. *Id.* at 52.
275. *Id.* at 53.
276. *Id.*
277. *Id.* at 54.
278. *Id.* at 54.
Through the residency requirement, immigration law evaluates parental control, guidance, care, and responsibility over adopted children seeking to immigrate into the country. To foster the goal of family unification, flexibility may be engrafted onto the statute when a marital unitary family is involved.\textsuperscript{279} For instance, the court’s concern that the Yin family could not cohabitate if the son was denied a visa demonstrates how immigration law links the traditional marital unit with parenthood.\textsuperscript{280} The traditional marital paradigm envisions a family in a single residence fostering a sense of stability and responsibility. Thus, not only is cohabitation used as evidence of parenthood, but courts also use the possible obstruction of cohabitation as a reason to grant immigration benefits.\textsuperscript{281}

The strict statutory and judicial requirements imposed on adopted children in these cases serve immigration law policy goals of accommodating family unification and preventing immigration fraud. Adopted children who more successfully demonstrate a bona fide parent-child relationship with their adoptive parent or parents are rewarded with immigration benefits. However, when an adoptive child maintains relationships that stray from the traditional family unit paradigm, immigration law requires the adoptive parent or parents to prove indicia of genuine parenthood as evinced through “the care, custody, and control of their children.”\textsuperscript{282} Congress’s concern for family unity results in a particular vision of parenthood that causes immigration laws to reflect a bias in favor of the traditional unitary family.

III
THE FUTURE OF IMMIGRATION LAW: SUGGESTIONS FOR A MORE INCLUSIVE VISION OF THE FAMILY

Although the immigration debate often focuses its solutions on national security, legalization, and employment opportunities, the debate would be benefited by also considering immigration law in light of current family law principles. Taking into account alternative ways of thinking would more carefully balance the effects of immigration policy on families and would allow Congress to consider specific changes that would better recognize and benefit the reality of family relationships. Indeed, re-casting certain areas of immigration law as forms of family law would allow the possibility of more family unification to come to fruition.

\textit{A. Ensuring Family Unification Remains a Priority of Immigration Policy}

Currently, the immigration debate is preoccupied with border control and

\begin{itemize}
  \item \textsuperscript{279} See id.
  \item \textsuperscript{280} See id.
  \item \textsuperscript{281} See id.
  \item \textsuperscript{282} Troxel v. Granville, 530 U.S. 57, 60 (2000).
\end{itemize}
employment concerns. The bipartisan Comprehensive Immigration Reform Act of 2006,283 for example, proposed major changes to immigration law such as a legalization program, guest worker program, improved border security, and increased use of a "merit-based system" for immigration.284 The shift to a primarily employment-focused visa program raised concerns that families would face even more problems of separation.285 Although the bill ultimately failed in the Senate, some of its less contentious pieces have resurfaced as Congress attempts to deal with concerns of illegal immigration and national security.286

In its new proposals, Congress should consider making changes to the present family-based system.287 Moving beyond traditional family law and gendered expectations of family life, as discussed in Part II, might even help curb illegal immigration. The existing immigration laws and their enforcement tend to preserve traditional family law values that do not reflect modern innovations in the field. Accounting for non-traditional family structures could help decrease illegal immigration by providing for more individualized inquiry into the authenticity of family relationships. Since immigrants have an incentive to migrate to where they already have a social network of friends and family,288 in theory, illegal immigration increases as genuine families are not able to unify through legal means. Therefore, if openness to accommodating non-traditional family relationships is prioritized over a rigid adherence to traditional family structures, and if the principle of family unification remains important in future legislation, more families would likely be lawfully unified through immigration law.

B. Taking Into Consideration Developments in Family Law

It is important to look at immigration law through the lens of family law instead of accepting current policy rationales blindly. The BIA explained that "[w]hile it is true that there is an underlying principle of family unification in the immigration laws, there is at the same time specific direction as to what

285. See id.
286. See Julia Preston, In Increments, Senate Revisits Immigration Bill, N.Y. TIMES, Aug. 3, 2007, at A1. Support has reemerged for bills granting citizenship to illegal immigrant students who complete some college or military service, implementing an agricultural guest worker program, and legalizing certain illegal immigrant farm workers. See id.
287. See Hawthorne, supra note 4, at 826 (arguing that the United States should aim to broaden its statutory definition of "family" to emulate Canada's system which includes same-sex partners as members of the family).
relationships are to be recognized for immigration benefits." As immigration law sets up a model for family behavior, it affects how families present themselves to get across the border. Kerry Abrams argues that immigration law's characterization of "normal" family behavior shapes the cultural ideals of families for both those who are immigrating and those who are already U.S. citizens. It reflects a commitment to perpetuating normative constructions of the family and parenthood, as immigrants and their relatives will become the next generation of Americans. Immigration law serves an expressive function that subtly signals to U.S. citizens, who might be uninvolved in the immigration process, what type of family structure the country prefers. Immigration law presents the kind of family life Americans are expected to be living and maintaining: the life of the marital family unit.

Unlike the advancements made in family law, immigration policies have failed to adequately modernize and accommodate the growth of non-traditional family structures. While a few immigration policies have embraced a more egalitarian view of family responsibilities, the overwhelming majority of immigration law reinforces traditional family law principles. Because immigration law has made only slight progress in recognizing non-traditional families and relationships, many bona fide families continue to face arbitrary, gendered, or unnecessary evidentiary hurdles in immigration proceedings. Immigration law thus remains outdated and focused on the marital family unit. As a normative matter, this harms families in the United States attempting to unify through the immigration process. By failing to consider modern variations of the traditional paradigm, the current laws often frustrate the goal of family unification.

In order to unite more non-traditional families, immigration law should be informed by developments in domestic family law. This in turn could increase the efficiency of the immigration system as a whole. Like family law, immigration law should consider engrafting more flexibility into its statutory requirements. To the extent that immigration law's concerns regarding fraud, national security, and administrative feasibility prevent such flexibility, Congress should, at minimum, consider their proposals with family unification and modern family law in mind. The continued recognition of immigration law's regulation of the family will at least encourage lawmakers to better understand and temper immigration law's effects on families.

C. Suggestions for Modernizing Immigration Law

Evaluating immigration law through the lens of family law will allow

290. Abrams, supra note 4, at 1708-09.
291. Id. at 1709.
292. See supra Part I.
Congress to consider the often harsh effects of adhering to the traditional unitary family paradigm. Congress should implement specific changes to family unification priorities and take steps to address immigration law’s gender bias, marital bias, and unitary family bias. Bona fide family relationships should be prioritized over superficial adherence to normative ideals and family structures. Such reprioritization would not only acknowledge the reality of contemporary families, but also address concerns about immigration fraud, national security, and administrative feasibility.

1. Addressing Immigration Law’s Gender Bias: Children Born Out of Wedlock

   a. Citizenship by Descent

   The statutory requirements to confer citizenship by descent on immigrant children born out of wedlock reinforce traditional gendered notions of family roles. Unlike other immigration statutes, this scheme is strictly construed and leaves no room for judicial consideration of a bona fide parent-child relationship. The unduly rigid statutory scheme ensures immigration law’s commitment to normative conceptions of the family by perpetuating the stereotypes that mothers, but not fathers, are natural caregivers and that fathers have a choice of whether to take an active role in a child’s life. The statute requires the unmarried father to provide evidence of financial support and a declaration of his paternity for his immigrant child to gain citizenship by descent, while an unmarried mother need not provide such evidence.

   Both unmarried mothers and fathers should be required to prove their parenthood through either a formal or functional statutory scheme. Indeed, immigration law’s reliance on traditional normative conceptions of family life is fundamentally flawed. The statute governing citizenship by descent effectively punishes those families that are truly cohesive but do not fit into the rigid statutory scheme. The result is reinforcement of gender stereotypes that leave no room for flexibility or individualized determination of whether a bona fide family relationship exists.

   Immigration law should not rely on traditional understandings of family structure. However, so long as it does rely on such stereotypes, there must be room for factual inquiry. A more flexible policy would help prevent inconsistent outcomes, such as the result in *Nguyen*, and would benefit petitioners who truly have familial ties in the United States. Although the existing statutory scheme promotes administrative convenience, other areas of immigration law dealing with children allow for factual inquiry, implying that further inquiry in citizenship cases would not unduly burden the system.

294. For a more detailed analysis of suggested changes to the statutory scheme, see supra Part II.B.1.
295. See supra Part II.B.2.
In addition, administrative convenience is never a legitimate government interest against the intermediate scrutiny that accompanies gender-based classifications. Congress could also utilize the administratively convenient scheme suggested by Justice Breyer in his Miller dissent. Rather than relying on gender stereotypes, Congress could require different levels of proof from caretaker and non-caretaker parents or have a knowledge-of-birth requirement to prove the father’s involvement. Whatever solution is ultimately adopted, the continued affirmation of the present statutory scheme by Congress and the Court should be addressed, as it encourages families to conform to gendered expectations of the traditional marital family.

b. Immigrant Visas

Immigration law in the immigrant visa context similarly propagates stereotypes of motherhood, as unmarried mothers are not required to prove a bona fide parent-child relationship to confer benefits on their children. In contrast, the requirement that a father must prove a parent-child relationship for an out-of-wedlock child simultaneously reinforces traditional family law principles. The factors used to establish fatherhood for purposes of obtaining an immigrant visa for a child indicate a limited move toward recognition of modern variations on parental responsibilities. An unmarried father, for example, need not necessarily prove that he has taken financial responsibility for his child, but rather is able to utilize evidence of a custodial, personal, or emotional relationship. Although the immigrant visa section of the INA is more flexible than the citizenship by descent scheme, modification is needed.

It is administratively convenient for the laws to presume unmarried mothers possess a natural and automatic relationship with and responsibility toward their children, while unmarried fathers must prove an actual relationship and demonstrate the desire to take active responsibility toward their children. Administrative convenience, however, should not pass muster under the intermediate scrutiny standard applied to gender-based classifications. The current policies, while administratively easy, discount important changes in the make-up of modern configurations of the family, such as functional families. Moreover, immigration law’s current gendered expectations are illogical in the face of contemporary family relationships and create a burdensome statutory hurdle for caring and involved fathers who nonetheless fail to fulfill traditional roles.

Unmarried fathers and mothers equally situated should bear equal and un-

298. See In re Vizcaino, 19 I. & N. Dec. 644, 648 (B.I.A. 1988) ("[S]ome evidence of emotional and/or financial ties should be shown.").
299. See Nguyen, 533 U.S. at 88 (O’Connor, J., dissenting).
300. See supra Part I.B.
gendered requirements to establish their parental status. In addition, immigration law should utilize additional criteria borrowed from family law that acknowledge contemporary family structures and relationships to prove parenthood.\textsuperscript{301} To the extent that this policy change imposes additional costs to the system, such costs would be offset by the saved costs of a more protective system that impedes immigration fraud committed by unmarried parents of both sexes, and fosters closer cultural connections to the United States. This change would also decrease burdens on public resources from immigrants fraudulently entering the country or entering without the support of close family ties.

c. Legitimation

The requirement that an unmarried father prove legitimation or a bona fide parent-child relationship, while an unmarried mother faces no burden of proof to convey benefits to her children, reinforces a commitment to gender roles and the marital family unit. Although immigration policy determines legitimation through the laws of the child and father's domiciles, many countries and most states will only legitimate a child through the subsequent marriage of the biological parents.\textsuperscript{302} Once marriage and acknowledgment has occurred, it does not matter if a parent-child relationship existed in fact.\textsuperscript{303}

To some extent, the immigration policy regarding legitimated children is the most lenient for non-traditional family structures. If a country has a more modern approach to legitimating children, such as the laws of Guyana in \textit{In re Goorahoo}, the BIA is forced to recognize a legitimated child based on a relationship in fact. However, it seems anomalous that U.S. immigration policy gives credence to the laws of other countries. In almost all other situations, U.S. immigration policy strictly adheres to its own ideas of what family structures should look like. Perhaps because most jurisdictions and countries require marriage to legitimate a child, immigration policy is not concerned with the few jurisdictions that allow legitimation to occur without marriage. Immigration law, however, should address this inconsistency and establish its own standards for determining parenthood and alternative forms of legitimation beyond marriage that recognize the reality of families falling outside of the traditional marital unit paradigm. Although immigration law should reflect the cultural sensitivity implied in the legitimated children policies that credit the laws of other countries, such a blanket policy is impractical and could impose

\textsuperscript{301} For instance, even in situations where the father has not legitimately claimed paternity, evidence of caregiving and emotional support should suffice to establish fatherhood. In practice, however, the BIA enforces a higher burden of proof for fathers seeking to establish parenthood through evidence of caregiving. \textit{See, e.g.}, \textit{In re Pineda}, 20 I. & N. Dec. 70 (B.I.A. 1989).

\textsuperscript{302} \textit{See} \textsl{GORDON, MAILMAN, \\& YALE-LOEHR}, supra note 187, at § 36.04[5].

\textsuperscript{303} \textit{See id.}
excessive administrative burdens on the system.

Although administrative convenience is always an underlying governmental consideration, Congress should consider the advantages of a more individualized and gender-neutral policy. Immigration law could even establish its own standard of legitimation independent of marriage and individual state and country laws. Both unmarried mothers and fathers could be required to prove either a bona fide relationship or that they legitimated their children and intend to care for them in the future. This initial increase in scrutiny would save costs and resources in the long run as the policy deters fraud, fosters closer ties to the United States, and decreases burdens on public resources. Indeed, Congress should attempt to accommodate more non-traditional relationships by moving beyond the traditional marital unit paradigm and rewarding the reality of contemporary parent-child relationships.

2. Addressing Immigration Law's Marital Bias: Stepchildren

Marriage unifies and transforms immigration processes through the stepparent-child relationship. By allowing citizen stepparents to seek immigration benefits for their immigrant stepchildren, the stepparent statute attempts to preserve the marital family unit, while producing counterintuitive results that favor those families who best fit into the traditional paradigm. Marriage assumes an affirmative responsibility for children and reinforces traditional gender roles within the family. Hence, the stepparent need not prove an actual relationship unless the marriage that created the stepparent relationship has since been terminated.

Stepfathers and stepmothers have equal rights to petition for their stepchildren. However the statute produces absurd results despite supposedly having family reunification as a goal. For example, if a child is born out of wedlock and has never been legitimated, his unmarried father must prove his relationship to his child to confer immigration benefits. However, if the unmarried father marries another woman with a child, he can seek immigration benefits for his stepchild based on the legal validity of the marriage alone. Marriage is used as an administratively convenient presumption of care and responsibility for a child. If Congress were truly concerned with family unification the statute would instead provide for more individualized inquiry, which would reward more actual family relationships.

As already discussed, the unmarried father requirements should be altered to better reflect non-traditional family arrangements. Stepparents should also be required to prove the existence of a bona fide relationship. If an unmarried father, who has a biological link to his child, must prove his relationship, so should stepparents who might have no intention to care for their stepchild whatsoever. As in case of legitimation, an increase in the scrutiny of

304. See supra Part II.B.2.
stepparents would ultimately save costs to the system by deterring fraud, fostering closer ties to the United States, and decreasing burdens on other public resources. The stepparent-child relationship is one of the few modern family configurations that immigration law accepts through statutory requirements. However, until the statute is amended to better reward bona fide stepparent-child relationships, its policy will continue to produce counterintuitive results that reinforce the traditional marital unit.

3. Addressing Immigration Law's Unitary Family Bias: Adopted Children

Congress' policy goals of encouraging family unification and preventing immigration fraud are evinced in the requirements imposed on adopted children seeking immigration benefits. In the past, INS applied requirements more leniently to those who conformed to the traditional family unit. However, when an adopted child maintains a relationship with his or her biological parents, immigration law requires additional evidence of true parenthood. An adoptive parent must establish a residence for the family unit and exercise their liberty interest in "the care, custody, and control of their children." Immigration law's attempt to encourage family unification results in a particular vision of adoptive parenthood that preserves the traditional marital family.

Although family law does not evaluate the legitimacy of an adoptive relationship, immigration law requires that adoptive parents exercise sole control over the child. In addition to preventing immigration fraud, this policy is likely aimed at preserving traditional understandings of family life. Congress should amend this section of the statute to better account for non-traditional family relationships. Ideally, the statute should expressly authorize second-parent adoptions and allow for situations where biological parents retain some connection to the child. Immigration fraud could be prevented as long as there is sufficient evidence that the adoptive parents exercise some degree of control over the child and a genuine relationship exists. As in the cases of legitimation and stepparents, the benefits of such a scheme would later save costs to the system.

Immigration law's continued adherence to family law's marital unit paradigm is culturally insensitive and does not account for non-traditional family arrangements. Under the present system, the superficial dedication to traditional family structures is valued more than true family reunification. At minimum, some amendments to immigration policy should be adopted in order to prevent absurd results. For instance, since stepparents have the right to bring a stepchild into the country without any evidence of a relationship or parental control, adoptive parents should be afforded similar flexibility. Adoption typically requires a formal assumption of responsibility for a child, whereas step-parenthood merely connotes a marriage into the biological family.

Marriage alone should not override such important considerations as an individualized inquiry into whether a bona fide relationship exists.

CONCLUSION

As evinced by the restrictive statutes affecting children, the formal and functional application of U.S. immigration policies preserves the traditional family unit paradigm. In *Nguyen v. INS*, the Court strictly applied the statute to ensure that unmarried fathers met additional evidentiary requirements before attaining immigration benefits for their children. However, courts seem to apply a less stringent interpretation of the laws when the case involves a family that closely resembles the traditional family unit. In *Yin v. Esperdy*, for instance, the normally rigid adoption residency requirement was softened, and immigration law was bent to allow the family unit to migrate together.

The regulation of the family through restrictive immigration policies affecting children born out of wedlock, stepchildren, and adopted children reinforces traditional family law's commitment to the family unit. The regulation of children born out of wedlock and stepchildren preserves the traditional marital unitary family while reinforcing gendered notions of parenthood. International adoption laws reflect the traditional expectation of parental autonomy, support, and control over their children in the marital unitary family. Immigration law's various requirements to prove the indicia of parenthood generally preserve traditional family law principles while ensuring that parenthood is not used instrumentally. Such requirements, however, often function to keep apart many families with actual relationships.

Immigration law ultimately functions as a form of public family law as it is used as a tool of social policy on both sides of the border. While contemporary family structures have evolved, immigration law has failed to modernize its policies to the same extent as family law. Immigration policies instead reinforce the institution of the marital unitary family by constructing a restrictive vision of the family. Because many contemporary families do not fit into this traditional model, the overall policy goal of family unification is frustrated. Immigration law should inform its policies with developments in family law so that members of non-traditional families are not wrongfully kept apart.
