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# Theorizing the Immigrant Child

## THE CASE OF MARRIED MINORS

*Medha D. Makhlouf*<sup>†</sup>

### INTRODUCTION

U.S. immigration law provides special protections, benefits, and forms of relief for children. It also provides certain marriage-based benefits and exclusions. Yet the most common definitions of “child” in the Immigration and Nationality Act make the existence of a married minor child into a legal impossibility. In other words, married minor children are variously treated as either married adults or unmarried children.

In the international humanitarian community, “child marriage” refers to “a legal or customary union” in which “one or both spouses is under the age of [eighteen].”<sup>1</sup> Child marriage is widely considered a human rights violation and a form of gender-based discrimination.<sup>2</sup> It is a problem that

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<sup>1</sup> U.N. POPULATION FUND, MARRYING TOO YOUNG: END CHILD MARRIAGE 11 (2012), <http://www.unfpa.org/sites/default/files/pub-pdf/MarryingTooYoung.pdf> [<https://perma.cc/MQL6-XETL>] [hereinafter UNPF REPORT].

<sup>2</sup> *Id.*; see G.A. Res. 69/156, Child, Early and Forced Marriage, ¶¶ 7, 11 (Jan. 22, 2015) (recognizing child, early, and forced marriage as a harmful practice that violates human rights and that is inherently linked to gender inequalities); Convention on the Elimination of All Forms of Discrimination Against Women art. 16(2), Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] (outlawing child marriage); Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages art. 2, Nov. 7, 1962, 521 U.N.T.S. 231 (requiring states parties to legislate a “minimum age for marriage” and outlawing marriage of individuals under that age “except where a competent authority has granted dispensation as to age, for serious reasons, in the interest of the intending spouses”); G.A. Res. 217 (III) A, art. 16(1), Universal Declaration of Human Rights (Dec. 10, 1948) (recognizing the right of “[m]en and women of full age” to marry); see also Convention on the Rights of the Child art. 24.3, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC] (although not specifically prohibiting child marriage, requiring states parties to “take all effective and appropriate measures with a view to abolish traditional practices prejudicial to the health of the children,” which may be interpreted to include child marriage).

disproportionately impacts girls, both in terms of numbers and health impacts.<sup>3</sup> Worldwide, one in three girls in developing countries is married before she turns eighteen years old, and one in nine is married before she turns fifteen.<sup>4</sup> Based on current trends, the number of girls who are married worldwide is predicted to increase over the next decade and a half.<sup>5</sup>

Child marriage happens for a variety of reasons. International human rights observers and scholars have concluded that the level of socioeconomic development in a country is a determining factor in the age of first marriage for girls and women.<sup>6</sup> In developing countries, “female labor force participation, women’s acquisition of formal education, and urbanization” are all associated with a lower likelihood of early marriage.<sup>7</sup> These factors combat stereotypical gender roles that characterize women as caretakers of the home and children and men as providers for the family. Such stereotypes are one source of the large age disparity between husbands and wives in many societies. Based on these roles, female children may be considered developmentally “ready” for marriage as early as the onset of sexual maturity, while male children are considered to need additional experience and maturity in order to take on the responsibilities of a provider.<sup>8</sup>

When families do not feel that they have realistic alternatives for their daughters—such as during wartime, economic crises, or when a community considers itself under threat—early marriage becomes more commonplace.<sup>9</sup> For example, some parents may choose to arrange early marriages for their daughters in an attempt to protect them because unmarried girls in certain societies face a higher risk of attack by sexual predators.<sup>10</sup> Gender inequality, which is often entrenched in culture and tradition, is the root of the problem of child marriage.<sup>11</sup>

Nevertheless, there are also minors living in almost every country in the world who would describe their decision to marry as a free choice—a decision that is supported by the laws

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<sup>3</sup> UNPF REPORT, *supra* note 1, at 11.

<sup>4</sup> *Id.* at 6 (excluding China from the category of developing countries).

<sup>5</sup> *Id.*

<sup>6</sup> *See id.* at 35.

<sup>7</sup> *See, e.g.,* Susheela Singh & Renee Samara, *Early Marriage Among Women in Developing Countries*, 22 INT’L FAM. PLAN. PERSP. 148 (1996).

<sup>8</sup> Annie Bunting, *Stages of Development: Marriage of Girls and Teens as an International Human Rights Issue*, 14 SOC. & LEGAL STUD. 17, 27 (2005).

<sup>9</sup> *Id.* at 25–26.

<sup>10</sup> Elizabeth Warner, *Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls*, 12 J. GENDER SOC. POLY & L. 233, 242 (2011).

<sup>11</sup> *See* U.N. High Commissioner for Human Rights, *Preventing and Eliminating Child, Early and Forced Marriage*, ¶ 16, U.N. Doc. A/HRC/26/22 (Apr. 2, 2014).

of most nations. Globally, twenty-one countries have a presumptive age of marital consent for girls that is under eighteen years old.<sup>12</sup> Two countries do not have legislation pertaining to a presumptive age of marital consent.<sup>13</sup> In the United States, the presumptive age of marital consent is eighteen<sup>14</sup> in all states except for Nebraska—where it is seventeen—and Mississippi—where it is seventeen for males and fifteen for females.<sup>15</sup> These laws are based on the age at which individuals are presumed to have acquired the decisional capacity required for valid legal consent to marriage.<sup>16</sup> Most countries, including the United States, also have exceptions that permit minors to marry under certain circumstances.<sup>17</sup> The exceptions to the presumptive age of marital consent reflect the viewpoint, based in contract law, that some individuals under the age of eighteen are mature and responsible enough to be married.<sup>18</sup> The exceptions also reflect an understanding that the social conditions that give rise to decisions to marry early can vary tremendously and that these circumstances can influence a married minor's attitude toward and future intentions about a marriage.

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<sup>12</sup> See MEGAN ARTHUR ET AL., WORLD POLICY ANALYSIS CTR., LEGAL PROTECTIONS AGAINST CHILD MARRIAGE AROUND THE WORLD 14 (2013), [http://machequity.com/wp-content/uploads/2015/05/WORLD\\_Policy\\_Brief\\_Legal\\_Protections\\_Against\\_Child\\_Marriage\\_2015.pdf](http://machequity.com/wp-content/uploads/2015/05/WORLD_Policy_Brief_Legal_Protections_Against_Child_Marriage_2015.pdf) [<https://perma.cc/W9FF-LYUW>] (indicating that Lebanon, Iran, Bahrain, Chad, Kuwait, Holy See, and fifteen additional countries have laws permitting the marriage of girls under the age of eighteen).

<sup>13</sup> *Id.* at 5 (Saudi Arabia and Yemen).

<sup>14</sup> Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L. REV. 1817, 1832 (2012).

<sup>15</sup> MISS. CODE ANN. § 93-1-5 (2012); NEB. REV. STAT. § 42-102 (West Supp. 2015); Pamela E. Beatse, Commentary, *Marital Rights for Teens: Judicial Intervention That Properly Balances Privacy and Protection*, 2009 UTAH L. REV. 625, 628 n.18 (2009) (listing state statutes regulating marriage).

<sup>16</sup> Hamilton, *supra* note 14, at 1850–52 (describing the development of marriage law's concept of marital capacity from the law of contract's concept of legal consent); *see also* Roper v. Simmons, 543 U.S. 551, 569 (2005) (recognizing the “comparative immaturity and irresponsibility of juveniles” justifying statutes prohibiting individuals under the age of eighteen from *inter alia* marrying without parental consent in almost every state).

<sup>17</sup> Hamilton, *supra* note 16, at 1821 (depicting countries that have exceptions that lower the legal minimum age to marry to under eighteen; these include parental consent, religious or customary law, court approval, or pregnancy). In 2013, more than 430,000 U.S. residents between the ages of fifteen and nineteen were married, divorced, separated, or widowed. U.S. Census Bureau, *Marital Status of People 15 Years and Over, by Age, Sex, Personal Earnings, Race, and Hispanic Origin tbl.A1* (2013), <https://www.census.gov/data/tables/2013/demo/families/cps-2013.html> [<https://perma.cc/7DDN-F7UW>] (follow hyperlink to “All Races” spreadsheet).

<sup>18</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 12 cmt. a (AM. LAW INST., 1981) (defining capacity as “the legal power which a normal person would have under the same circumstances,” thus contemplating both legal capacity and mental competency).

The married, minor immigrant children who are the subject of this article include non-U.S. citizens between the ages of thirteen and seventeen who have a legally recognized marriage in their country of origin and who are either already physically present inside the United States or who seek to enter.<sup>19</sup> It includes people under the age of eighteen who were married under a wide variety of circumstances, including those whose marriages were arranged, those who chose to marry and were able to consent to marry under the minimum legal age of marriage laws in their country, and those who obtained parental consent to marry under exceptions to marriage laws. It does not include people who were married as minors but who are now adults, children who were forced into marriages, or minors in marriages that would not otherwise be recognized by U.S. Citizenship and Immigration Services (USCIS).<sup>20</sup>

The number of individuals who fall into this category and who become involved in the U.S. immigration system is difficult to estimate. However, records of the Department of Homeland Security's Office of Immigration Statistics (OIS) regarding immigrants admitted to the United States as spouses indicate that the number is not insignificant. Between 1973 and 2014, approximately 20,500 immigrants under the age of eighteen obtained lawful permanent residence (LPR) status based on their relationship with a spouse.<sup>21</sup> This means that USCIS has recognized 500 marriages per year, on average, in which at least one spouse is a minor.<sup>22</sup> Within this group, married minors were most commonly admitted to the United States as the newly arrived spouses of U.S. citizens.<sup>23</sup> This figure does not include the number of applicants for LPR status whose petitions were denied for whatever reason; the number

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<sup>19</sup> The term "immigrant" has a very specific, technical meaning within immigration law. 8 U.S.C. § 1101(a)(15) (2012) (defining the term as "every alien except an alien who is within one of the following classes of nonimmigrant aliens"). It does not include individuals who entered the United States on a temporary visa, among others. *See, e.g., id.* § 1101(a)(15)(B) (describing a nonimmigrant as an alien "who is visiting the United States temporarily for business or temporarily for pleasure"). While most references to immigrants in this article are technically correct, at certain points I use the term loosely to include individuals in the broad category of non-U.S. citizens who aim to become U.S. citizens.

<sup>20</sup> Certain relationships are not recognized as marriages by U.S. Citizenship and Immigration Services, even if they are valid in the place of marriage. *See, e.g., In re H, 9 I. & N. Dec. 640, 642 (BIA 1962)* (refusing to recognize polygamous marriages as a matter of federal public policy).

<sup>21</sup> Office of Immigration Statistics, Dep't of Homeland Sec., Persons Obtaining Lawful Permanent Status by Selected Detailed Class of Admission for Persons Under Age 18: Fiscal Years 1973 to 2014 (July 25, 2016) (on file with author).

<sup>22</sup> *See id.*

<sup>23</sup> *Id.*

of married, minor immigrants who were admitted to other LPR classes of admission; or any information about the number of married minors who applied for nonimmigrant visas (i.e., temporary visas). Therefore, this figure underestimates the true number of married, minor noncitizen children who have sought to enter the United States over the last four decades.

This article analyzes the treatment of married minor children in the immigration system in three contexts: as beneficiaries of spousal petitions; as petitioners for spouses, parents, and siblings; and as beneficiaries of parent-sponsored petitions. It reveals that married minor children are typically treated indistinguishably from married adults and when they are treated as children, it is often to their detriment. Regardless of the precise number of children affected by this discrepancy in immigration law, this article argues that there are compelling reasons for lawmakers to address it. The current, haphazard treatment of married minor children under U.S. immigration law suggests that lawmakers have not seriously considered this group of potential immigrants and reflects the general incoherence of immigration law's treatment of children.

Part I of this article describes social and legal constructions of childhood and marriage, with a focus on the assumptions underlying the treatment of children in immigration law. Part II examines inconsistencies in the treatment of married minor children in common scenarios in the family-based immigration system, which highlight the outdated assumptions about dependency, marriage, and family that underlie the immigration law's constructions of children and women. Finally, Part III proposes incremental reforms to certain family-based immigration laws to address the double disadvantage that married minor children face in the immigration system. These reforms include identifying and amending laws that reflect an outdated understanding of childhood; adopting a critical, child-centered approach to the treatment of married minors; and expanding the rights of children as both petitioners and beneficiaries in immigration law.

## I. SOCIAL AND LEGAL CONSTRUCTIONS OF CHILDHOOD

This part reviews social and legal constructions of childhood from the perspectives of sociology and immigration law, and how the ritual of marriage intersects with or affects these constructions of childhood. A brief summary of the treatment of children under immigration law is followed by an analysis of the assumptions underlying this treatment.

A. *Childhood and Child Marriage from the Perspective of Sociology*

There has never been a uniform conception of childhood. Sociologists and historians of childhood have long recognized that the concept of childhood is defined by social and historical context, and is, therefore, a “social construct.”<sup>24</sup> To say that childhood is socially constructed does not mean that “[c]hildren as younger members of the species” do not exist.<sup>25</sup> Rather, it means that there is nothing “natural” or universal about the characteristics attributed to children in any given culture or time period.<sup>26</sup> This explains the great variation in the ways that age categories have been understood across time and geography.<sup>27</sup> For example, in some societies, adolescence is not recognized as a distinct period in the life cycle.<sup>28</sup> In others, there is more than one age category that is recognized between childhood and adulthood.<sup>29</sup>

The social construction of childhood provides a mechanism, in addition to physiological and developmental facts, to sort between children and nonchildren. The point at which a person is no longer considered a child in any given society is

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<sup>24</sup> Allison James, *From the Child's Point of View: Issues in the Social Construction of Childhood*, in BIOSOCIAL PERSPECTIVES ON CHILDREN 45, 61 (Catherine Panter-Brick ed., 1998) [hereinafter James, *From the Child's Point of View*]; see also Jo Bridgeman & Daniel Monk, *Introduction: Reflections on the Relationship Between Feminism and Child Law*, in FEMINIST PERSPECTIVES ON CHILD LAW 1, 3 (Jo Bridgeman & Daniel Monk eds., 2000) (describing discourses of childhood as culturally specific and socially constructed); ALLISON JAMES, CHRIS JENKS & ALAN PROUT, *THEORIZING CHILDHOOD* 5 (1998) (describing new sociological models of childhood as having an awareness of the social and historical context of childhood); CHRIS JENKS, *CHILDHOOD* 7 (1996) (describing childhood as a social construct that is contingent on time and place).

<sup>25</sup> James, *From the Child's Point of View*, *supra* note 24, at 51–52.

<sup>26</sup> *Id.* at 45–46, 51–52, 55; Annette Ruth Appell, *Accommodating Childhood*, 19 CARDOZO J.L. & GENDER 715, 736–37 (2013) (“[T]he existence of a legal category for children as well as its boundaries and the rights of and duties owed to children are not nature’s law, but ‘political choices’ . . .” (quoting Frances Olsen, *The Myth of State Intervention into the Family*, 18 U. MICH. J.L. REFORM 835, 844 (1985))); Bunting, *supra* note 8, at 21 (“[D]iscourses of childhood are culturally specific, socially constructed, and ‘conflicting or contradictory.’” (quoting Bridgeman & Monk, *supra* note 24, at 3)).

<sup>27</sup> See, e.g., Appell, *supra* note 26, at 736–37 (“[T]he contours and subjects of childhood are contingent and regulatory, changing over time and space in response to different policies, conditions, location, and demographics.”).

<sup>28</sup> Ralph Linton, *Age and Sex Categories*, 7 AM. SOC. REV. 589, 595 (1942).

<sup>29</sup> There is a growing literature on a more recently identified phase of the life span in advanced capitalist countries, “emerging adulthood,” which includes the period from the late teens through the twenties. See generally Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCH. 469 (2000). Scholars in this field have placed full-fledged adulthood at “27 to 29 years-old.” Appell, *supra* note 26, at 735 n.119 (citing Jeffrey Jensen Arnett, *Emerging Adulthood(s), the Cultural Psychology of a New Life Stage*, in BRIDGING CULTURAL AND DEVELOPMENTAL APPROACHES TO PSYCHOLOGY 255–75 (Lene Arnett Jensen ed., 2011)).

often marked by a transition ritual.<sup>30</sup> In many cultures, the first marriage is the ritual marking the transition from childhood or adolescence into adulthood.<sup>31</sup> But this is not a universal understanding of marriage, particularly in places where arranged early marriages are the norm.<sup>32</sup> For example, marriage does not necessarily indicate that a child is developmentally “ready” for a marital relationship; rather, it signifies a transfer of guardianship from a female child’s parents to her husband’s family.<sup>33</sup> In some places, a female child is not considered an adult until she has given birth to a child.<sup>34</sup>

Laws function as a written expression of the boundaries of childhood. They define both the duties owed to children and the rights recognized as belonging to them.<sup>35</sup> The influence runs in the other direction as well, when laws play an important role in constructing and reinforcing dominant conceptions of childhood in a given society.<sup>36</sup> The vast majority of nations have set a minimum legal age of marriage as a result of a decades-long effort by the international human rights community to end child marriage.<sup>37</sup> In 1965, the United Nations General Assembly adopted a resolution that recommended that all nations set a minimum legal age of marriage to “not [] less than fifteen.”<sup>38</sup> In 1979, that same body adopted the Convention on the Elimination of All Forms of Discrimination Against Women, which required states parties to pass legislation specifying a minimum age of marriage and to create an official marriage registry.<sup>39</sup> It also outlawed the betrothal and marriage of “children,” without defining that term.<sup>40</sup>

In 1989, the United Nations General Assembly adopted the Convention on the Rights of the Child (CRC), which defines “child” as a person under the age of eighteen.<sup>41</sup> The Committee on the Rights of the Child, which is responsible for monitoring the implementation of the Convention, “strongly recommends

<sup>30</sup> Linton, *supra* note 28, at 591.

<sup>31</sup> *Id.* at 597.

<sup>32</sup> *Id.* at 597–98.

<sup>33</sup> *Id.* at 598.

<sup>34</sup> *Id.* at 593.

<sup>35</sup> Appell, *supra* note 26, at 740.

<sup>36</sup> Allison James, et al., *Care and Control in the Construction of Children’s Citizenship*, in CHILDREN AND CITIZENSHIP 85, 88 (Antonella Invernizzi & Jane Williams eds., 2008).

<sup>37</sup> See *supra* note 2 (describing international conventions intended to end child marriage).

<sup>38</sup> G.A. Res. 2018 (XX), Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (Nov. 1, 1965).

<sup>39</sup> CEDAW, *supra* note 2, at Introduction, art. 16(2).

<sup>40</sup> *Id.* (The term “children” is undefined in the CEDAW).

<sup>41</sup> CRC, *supra* note 2, art. 1.



that [s]tates parties” legislate a minimum age of marriage of eighteen, “with and without parental consent.”<sup>42</sup> However, in at least forty countries, customary laws permitting marriage at younger ages or with the consent of a child’s parent can override the laws specifying a minimum age of marriage.<sup>43</sup> In many other countries, inconsistencies and exceptions within the law permit the marriage of individuals under the legal minimum age to continue.<sup>44</sup> These inconsistencies and the continuing prevalence of early marriage around the world suggest that international instruments setting the minimum age of marriage at eighteen function to set a normative, as opposed to a legal, standard in many countries.

### *B. The Treatment of Children Under U.S. Immigration Law*

There is no uniformity or internal logic in the way that U.S. immigration law defines and treats noncitizen children. Scholars have noted that the terms “child,” “minor,” and “juvenile” are scattered throughout the immigration laws, yet no uniform definitions of the terms exist.<sup>45</sup> The definition of “child” in the Immigration and Nationality Act (INA) is complex and differs for purposes of (1) immigration and (2) naturalization and citizenship. For both purposes, however, the definition of “child” is restricted to persons under twenty-one years of age who are unmarried.<sup>46</sup> The reference to marital status in the definition of “child” relates back to the idea that marriage, in many cultures and in some aspects of U.S. domestic relations law, signifies a break with childhood.<sup>47</sup> By contrast, the statutory definition of “unaccompanied alien child” refers to a person under the age of eighteen and does not mention marital status.<sup>48</sup> The term “minor,” when it appears in the statute or other regulations, can mean a person under age twenty-one, eighteen, or fourteen, depending on the context, and does not

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<sup>42</sup> Office of the High Commissioner for Human Rights, CRC/GC/2004/4, ¶ 16, CRC General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child (July 1, 2003).

<sup>43</sup> Warner, *supra* note 10, at 244; *see also* Ruth Gaffney-Rhys, *International Law as an Instrument to Combat Child Marriage*, 15 INT’L J. HUM. RTS. 359, 365 (2011) (describing how the law in many African jurisdictions contravenes the instruments adopted by the African Union that require the minimum age of marriage for men and women to be eighteen years).

<sup>44</sup> *See* Gaffney-Rhys, *supra* note 43, at 363–67.

<sup>45</sup> *See, e.g.*, David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 997–98 (2002).

<sup>46</sup> 8 U.S.C. § 1101(b)–(c) (2012).

<sup>47</sup> *See* Linton, *supra* note 28, at 597.

<sup>48</sup> 6 U.S.C. § 279(g)(2)(B) (2012).

mention marital status.<sup>49</sup> “Juvenile” is used to refer to persons under age eighteen or twenty-one, without reference to marital status.<sup>50</sup> In immigration law, as in the rest of the law, the concept of childhood is a construct that can differ across time and space.

### 1. Children as Members of Nuclear Families

Family-based immigration accounts for the majority of all legal permanent immigration to the United States.<sup>51</sup> For example, in fiscal year 2014, 63.5% of the 1,016,516 foreign nationals admitted to the United States as lawful permanent residents were admitted on the basis of family ties.<sup>52</sup> Of those family-based immigrants, 61,217 were categorized as children of U.S. citizens under the INA.<sup>53</sup> These numbers reflect that the reunification of nuclear families is a major goal of U.S. immigration policy.<sup>54</sup> Accordingly, U.S. immigration laws have

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<sup>49</sup> See 8 U.S.C. § 1101(a)(15)(F)(ii) (2012) (referring to minor children of a student visa holder, which is subject to the definition of child in 8 U.S.C. § 1101(b), which is limited to persons under twenty-one years of age); *id.* § 1182(a)(9)(B)(iii) (describing an exemption applying to minors regarding unlawful presence as “time in which an alien is under 18 years of age”); see also 8 C.F.R. § 103.8(c)(2)(ii) (2016) (describing special service requirements that apply for “a minor under 14 years of age”).

<sup>50</sup> See 22 U.S.C. § 7105(c)(4) (2012) (mandating training for certain agency personnel in identifying “juvenile victims” of trafficking, who are presumably defined in § 7105(b)(1)(C)(ii)(I) as persons “who [have] not attained 18 years of age”); 8 C.F.R. § 236.3(a) (defining a juvenile as “an alien under the age of 18 years” in the context of detention); *id.* § 204.11(c)(1) (describing eligibility for classification as a special immigrant juvenile for aliens “under twenty-one years of age”). The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(6), 122 Stat. 5044, 5079 (codified at 8 U.S.C. § 1232(d)(6) (2012)), clarified that persons twenty-one years of age and older may also be classified as special immigrant juveniles, so long as they were under twenty-one at the time of application. This reinforces that the status is intended for juvenile petitioners, while providing age-out protection.

<sup>51</sup> See WILLIAM A. KANDEL, CONG. RESEARCH SERV., R43145, U.S. FAMILY-BASED IMMIGRATION POLICY 4 (2016).

<sup>52</sup> OFFICE OF IMMIGRATION STATISTICS, DEP’T OF HOMELAND SEC., ANNUAL FLOW REPORT: U.S. LAWFUL PERMANENT RESIDENTS: 2014, at 3 (2016).

<sup>53</sup> *Id.*

<sup>54</sup> Congressional commissions on immigration policy have cited family reunification as one of the primary goals of U.S. immigration policy. U.S. COMM’N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 24 (1997) (stating that “a well-regulated [immigration] system . . . facilitates nuclear family reunification”); *id.* at 67 (“Only if there is a compelling national interest—such as nuclear family reunification or humanitarian admissions—should immigrants be admitted without regard to the economic contributions they can make.”); SELECT COMM’N ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: STAFF REPORT OF THE SELECT COMMISSION ON IMMIGRATION & REFUGEE POLICY, at xix (1981) (“The Select Commission recommends that the reunification of families continue to play a major and important role in U.S. immigration policy.”). The other three major principles of U.S. immigration policy embodied in the Immigration and Nationality Act are “admission of persons with

generally been drafted to promote family reunification, with a preference for members of a petitioner's nuclear family.<sup>55</sup> Family relationships have served as a basis for admitting immigrants since the 1920s.<sup>56</sup> Congress has cited several reasons for prioritizing family reunification in immigration policy including tradition, the policy's humanitarian character, the promotion of public order and wellbeing, and psychological and social benefits to immigrants.<sup>57</sup>

The INA established the structure of the family-based immigration system in 1952.<sup>58</sup> The system was built around a hierarchy of family-based preferences that prioritizes spouses and minor children of U.S. citizens over other relatives.<sup>59</sup> In 1965, the INA was amended and, among other changes, created the classification of "immediate relatives," which included the spouses, unmarried children under age twenty-one, and parents of adult citizens.<sup>60</sup> Immediate relatives are admitted without numerical restriction.<sup>61</sup> By contrast, the number of visas available in any given year for more distant relatives—"family-sponsored immigrants"—is limited.<sup>62</sup> These include the unmarried adult sons and daughters, married sons and daughters, and adult siblings of adult citizens.<sup>63</sup> The lack of numerical restriction on

needed skills[,] . . . refugee protection[,] and . . . country-of-origin diversity." KANDEL, *supra* note 51, at 1.

<sup>55</sup> KANDEL, *supra* note 51, at 1–2 (describing the evolution of U.S. family-based immigration policy from the 1920s through 2016, including the major reformulations of immigration law in 1952 and 1965).

<sup>56</sup> Emergency Quota Law, Pub. L. No. 67-5, § 2(a)(8), 4 Stat. 5, 5 (1921) (exempting minor children of U.S. citizens from the first broad numerically limited immigration restrictions).

<sup>57</sup> See SELECT COMM'N ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: STAFF REPORT OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY 357 (Supp. 1981) ("The reunification of families should remain one of the foremost goals of immigration not only because it is a humane policy, but because bringing families back together contributes to the economic and social welfare of the United States. Society benefits from the reunification of immediate families, especially because family unity promotes the stability, health and productivity of family members.").

<sup>58</sup> Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

<sup>59</sup> *Id.* § 101(a)(27)(A), 66 Stat. at 169 (defining "nonquota immigrant" to include "the child or the spouse of a citizen of the United States"); *id.* § 205(b)(2)–(4), 66 Stat. at 180 (describing allotment of visas to different categories of quota immigrants including parents of U.S. citizens; spouses or children of lawful permanent residents; and brothers, sisters, sons, or daughters of U.S. citizens).

<sup>60</sup> An Act to Amend the Immigration and Nationality Act, § 201(b), Pub. L. No. 89-236, 79 Stat. 911, 911 (1965).

<sup>61</sup> *Id.* § 201(a), 79 Stat. at 911 (codified as amended at 8 U.S.C. § 1151(a)–(b) (2012)).

<sup>62</sup> 8 U.S.C. § 1151(a) (2012).

<sup>63</sup> *Id.* § 1153(a); see also Policy Memorandum from U.S. Citizenship & Immigration Serv., New T Nonimmigrant Derivative Category and T and U Nonimmigrant Adjustment of Status for Applicants from the Commonwealth of the Northern Mariana Islands (Oct. 30, 2014), [https://www.uscis.gov/sites/default/files/USCIS/Outreach/Interim%20Guidance%20for%20Comment/Interim\\_PM-602-0107.pdf](https://www.uscis.gov/sites/default/files/USCIS/Outreach/Interim%20Guidance%20for%20Comment/Interim_PM-602-0107.pdf)

the number of visas available for spouses and minor children reflects the law's intent to keep traditional nuclear families unified. Another indication of this intent is the extension of immigration status to the spouse and children of a family-sponsored immigrant.<sup>64</sup> For example, when a visa becomes available to a family member of a U.S. citizen, the spouse and children of that "principal alien" family member may also immigrate, thus preserving the unity of that nuclear family.<sup>65</sup>

## 2. Designations and Statuses Specifically Intended to Benefit Children

In the family immigration system, children are always defined in relation to a parent.<sup>66</sup> The definition of a "child" in the INA is a person who is under twenty-one years of age, unmarried, and who also fits within one of seven categories of relationships with an adult.<sup>67</sup> Broadly, these relationships include a child born in wedlock, a stepchild, a legitimated child, a child born out of wedlock who has a relationship with his or her biological parent, an adopted child, an orphaned child of an adult with the ability to file an immigration petition for family members, or a child who is the subject of an international adoption.<sup>68</sup> Therefore, in the INA sections relating to family-based immigration, a "child" does not exist without reference to a parent or parent surrogate. Outside of the family immigration context, however, there exist several designations and statuses specifically intended to benefit noncitizen children. This section describes three examples of such classifications to illustrate the ways in which the federal government conceives of immigrant children outside of the nuclear family.

The first example is Special Immigrant Juvenile Status (SIJS), an immigration classification created in 1990 with the intention of protecting unaccompanied immigrant minors present in the United States who were abused, neglected, or

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[<https://perma.cc/9QCW-P9YD>] (explaining that the term "son or daughter" in immigration law "is a term of art meaning a child who is married and/or over the age of 21").

<sup>64</sup> 8 U.S.C. § 1153(d).

<sup>65</sup> *Id.*; *id.* § 1153(a)(4) (describing the preference allocation for brothers and sisters of citizens, whose spouses and children would, under § 1153(d), be entitled to the same status and order of consideration); see 22 C.F.R. 40.1(q) (2012) ("Principal alien means an alien from whom another alien derives a privilege or status under the law or regulations." (emphasis omitted)).

<sup>66</sup> See Thronson, *supra* note 45, at 991.

<sup>67</sup> 8 U.S.C. § 1101(b).

<sup>68</sup> *Id.*

abandoned by a parent.<sup>69</sup> An approved SIJS application allows a person to immediately apply for lawful permanent resident status.<sup>70</sup> SIJS is a unique benefit under immigration law because it requires applicants to obtain a state court order containing specific findings prior to submitting an application for the immigration status.<sup>71</sup> Any state court that is authorized under state law to make judicial determinations about the custody and care of children may issue the order.<sup>72</sup> The court must make three findings: (1) that the applicant is dependent on the court, or is in the custody of a state agency, a private agency, or a private person; (2) that the applicant cannot be reunited with one or both parents due to abuse, abandonment, neglect, or a similar basis under state law; and (3) that it is not in the applicant's best interests to return to his or her home country.<sup>73</sup> In addition to obtaining the "special findings order" from a state court, a successful applicant must be (1) "physically present in the United States"; (2) "under 21 years old at the time of filing"; and (3) "unmarried," both at the time of filing and when USCIS makes a decision on the application.<sup>74</sup>

The second example is the codification of the term "unaccompanied alien child" (UAC), which first appeared in the immigration laws with the passage of the Homeland Security Act of 2002 (HSA).<sup>75</sup> A UAC is defined as a child who

- (A) has no lawful immigration status in the United States;
- (B) has not attained 18 years of age; and
- (C) with respect to whom—
  - (i) there is no parent or legal guardian in the United States; or

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<sup>69</sup> See Immigration and Nationality Act, Pub. L. No. 105-119, § 113, 111 Stat. 2440, 2460 (1997) (codified at 8 U.S.C. § 1101(a)(27)(J)) (requiring findings of abuse, neglect, or abandonment); see also *The 2014 Humanitarian Crisis at Our Border: A Review of the Government's Response to Unaccompanied Minors One Year Later Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (2015) (statement of Joseph E. Langlois, U.S. Citizenship & Immigration Serv.) ("SIJ classification is an immigration protection for foreign-born, non-U.S. citizen or lawful permanent resident children present in the United States who have been abused, neglected, or abandoned by a parent."); 143 CONG. REC. 26,585 (1997).

<sup>70</sup> 8 C.F.R. § 245.1 (2016).

<sup>71</sup> 8 U.S.C. § 1101(a)(27)(J)(ii).

<sup>72</sup> 8 C.F.R. § 204.11(a).

<sup>73</sup> 8 U.S.C. § 1101(a)(27)(J); see 8 C.F.R. § 204.11(c). Regulations implementing amendments to the statutory definition of a Special Immigrant Juvenile in 2008 have been proposed, but not yet adopted. Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54,978 (proposed Sept. 6, 2011) (to be codified at 8 C.F.R. § 204.11).

<sup>74</sup> Special Immigrant Juvenile Petitions, 76 Fed. Reg. at 54,979–80.

<sup>75</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, § 462(g)(2), 116 Stat. 2135, 2205 (codified at 6 U.S.C. § 279(g)(2) (2012)).

(ii) no parent or legal guardian in the United States is available to provide care and physical custody.<sup>76</sup>

Children designated as UACs are not automatically eligible for any immigration status but are eligible for special treatment by the federal agencies responsible for their apprehension, detention, treatment, release, and repatriation.<sup>77</sup> This consists of expanded access to social services and special programs while in immigration custody that are not generally available to adults and accompanied children, including facilitated access to pro bono legal counsel.<sup>78</sup> Being designated a UAC can dramatically improve a person's experience in the U.S. immigration system. Since there is no marital status requirement in the definition of UAC, married minors are eligible for the designation and the special treatment that flows from it.

The third example of an immigration status that is designed to benefit children as individuals—as opposed to children within a family—is the Deferred Action for Childhood Arrivals (DACA) program, a discretionary, temporary protection from deportation for certain people who were brought to the United States as children.<sup>79</sup> DACA does not confer any lawful

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<sup>76</sup> 6 U.S.C. § 279(g)(2). The Secretary of Health and Human Services and the Secretary of Homeland Security have developed procedures to determine the age of aliens in their custody. *See* 8 U.S.C. § 1232(b)(4) (requiring the development of age determination procedures for unaccompanied aliens); OFFICE OF INSPECTOR GEN., U.S. DEPT' OF HOMELAND SEC., AGE DETERMINATION PRACTICES FOR UNACCOMPANIED ALIEN CHILDREN IN ICE CUSTODY (2009), [https://www.oig.dhs.gov/assets/Mgmt/OIG\\_10-12\\_Nov09.pdf](https://www.oig.dhs.gov/assets/Mgmt/OIG_10-12_Nov09.pdf) [<https://perma.cc/46RJ-DMYY>]. *But see id.* at 7 (“We could not identify a single, authoritative definition of what might constitute a holistic approach to age determination. . . . ICE further stated that despite extensive research, it did not find a standard or precise process or technique for conducting holistic age determinations.”).

<sup>77</sup> *See* 6 U.S.C. § 279 (describing the responsibilities of the Director of the Office of Refugee Resettlement (ORR) of the Department of Health and Human Services (HHS) with respect to the care of UACs); 8 U.S.C. § 1232(a)(1) (requiring the Secretary of Homeland Security to work in conjunction with the Secretary of State, the Attorney General, and the Secretary of HHS to develop policies and procedures to ensure that UACs are safely repatriated); Stipulated Settlement Agreement at 3, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997) (setting national standards regarding the detention, release, and treatment of all children in federal immigration custody).

<sup>78</sup> 8 U.S.C. § 1232(c)(5) (requiring HHS to “ensure, to the greatest extent practicable . . . that all [UACs] who are or have been in the custody of the Secretary or the Secretary of Homeland Security . . . have counsel to represent them. . . . To the greatest extent practicable, the Secretary of [HHS] shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge”); *see also* Stipulated Settlement Agreement, *supra* note 77, at 7 (requiring alien minors in federal custody to be treated with “special concern for their particular vulnerability as minors”).

<sup>79</sup> Memorandum from Jeh Charles Johnson, Sec’y of Homeland Sec., to León Rodriguez et al., Dir., U.S. Citizenship & Immigration Serv. (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [<https://perma.cc/4STG-L873>] (expanding certain parameters of DACA); Memorandum from

immigration status on recipients; rather, it represents the Department of Homeland Security's (DHS) decision to refrain from initiating proceedings to deport the recipient for a particular period.<sup>80</sup> DACA recipients receive a renewable, two-year deferral of removal and may apply for employment authorization during that period.<sup>81</sup> In order to be granted DACA, applicants must prove that they: (1) were under the age of thirty-one as of June 15, 2012; (2) came to the United States before they turned sixteen years old; (3) have continuously resided in the United States since June 15, 2007; (4) were physically present in the United States on June 15, 2012;<sup>82</sup> (5) are currently in school, graduated from high school, obtained a general education development certificate, or were honorably discharged from the Coast Guard or Armed Forces; and (6) have not been convicted of certain types of crimes.<sup>83</sup>

The existence of immigration statuses and designations that are specifically intended to benefit children as individuals—such as SIJS, the UAC designation, and DACA—indicate that both Congress and the DHS have put considerable thought into drawing distinctions between children and adults in the immigration context. These distinctions are not uniform and are based on conceptions of childhood and adulthood that were considered appropriate for the particular time and context in which the laws and policies were established. For example, the significance of an applicant's age, marital status, and relationship with his or her parents differs across the three benefits—even though all are designed to benefit noncitizen children outside of the family-based immigration system. These differences reflect the general incoherence of immigration law's treatment of children, which is discussed in detail in Part II.

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Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar et al., Acting Comm'r, U.S. Customs & Border Prot. (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/UY97-KRKW>] [hereinafter Napolitano Deferred Action Memo] (establishing the DACA program by setting forth policy for DHS's exercise of discretion in enforcing immigration laws against young, undocumented immigrants).

<sup>80</sup> See generally *Reno v. Am.-Arab Anti-discrimination Comm.*, 525 U.S. 471, 483–84 (1999) (describing deferred action).

<sup>81</sup> Napolitano Deferred Action Memo, *supra* note 79, at 2; see 8 C.F.R. § 247a.12(c)(14) (2016) (providing that deferred action recipients may apply for work authorization if they can show an “economic necessity for employment”).

<sup>82</sup> This is the date on which the Secretary of Homeland Security established the DACA program in an agency memorandum. Napolitano Deferred Action Memo, *supra* note 79.

<sup>83</sup> *Id.* at 1.

### 3. Recognition of Marriages Involving Minor Children

As the data discussed in the Introduction indicate, USCIS regularly recognizes marriages involving minor children. This section describes the general rules governing immigration agencies' recognition of foreign marriages for immigration purposes and the curious absence of specific guidance on the recognition of foreign marriages involving minor children. The lack of clarity on this issue begs the question: What is the public policy of the United States regarding child marriage?

Congress has given the immigration agencies broad discretion to determine what constitutes a valid, bona fide marriage for immigration purposes. The INA does not define the terms "husband," "wife," or "spouse," nor does it state what constitutes a valid marriage.<sup>84</sup> As a general rule, the DHS considers a marriage valid for immigration purposes if it is recognized as valid in the place of celebration.<sup>85</sup> The place-of-celebration rule originated in English choice-of-law principles from the eighteenth century or earlier.<sup>86</sup> It was adopted in the United States, and governs the recognition of marriages domestically across state lines as well.<sup>87</sup> The Board of Immigration Appeals (BIA)—the highest administrative body for interpreting and applying U.S. immigration law—first applied the place-of-celebration rule in 1952 when it analyzed the legitimacy of a German marriage under German law.<sup>88</sup> In this decision, the BIA linked its adoption of the place-of-celebration rule to the "plain congressional purpose in

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<sup>84</sup> The INA does, however, describe the terms "spouse," "wife," and "husband" in the negative at 8 U.S.C. § 1101(a)(35), describing proxy marriage, which is the only categorically invalid type of marriage for immigration purposes. 8 U.S.C. § 1101(a)(35) (describing a marriage ceremony in which "the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated").

<sup>85</sup> U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATOR'S FIELD MANUAL § 21.3(a)(2)(B) (2015), <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-3481/0-0-0-4484.html#0-0-0-389> [<https://perma.cc/9P2B-SNG5>] [hereinafter USCIS, ADJUDICATOR'S FIELD MANUAL] ("Validity of a Marriage Celebrated in a Foreign Country. One may normally presume the validity of a marriage upon presentation of a marriage certificate, duly certified by the custodian of the official record. As a general rule, the validity of a marriage is judged by the law of the place of celebration.").

<sup>86</sup> Alan Reed, *Essential Validity of Marriage: The Application of Interest Analysis and Depeage to Anglo-American Choice of Law Rules*, 20 N.Y. L. SCH. J. INT'L & COMP. L. 387, 392–93 (2000).

<sup>87</sup> The U.S. Supreme Court's first statement of the place-of-celebration rule to marriage occurred in *Patterson v. Gaines*, a case that centered on the validity of a marriage that, it was claimed, involved bigamy. Bigamy rendered a marriage void under the law of Pennsylvania, where the marriage was celebrated. *Patterson v. Gaines*, 47 U.S. (6 How.) 550, 587 (1848) ("The marriage must be proved, according to what would be proof of it where it took place.").

<sup>88</sup> *In re P*, 4 I. & N. Dec. 610 (B.I.A. 1952).



providing preferential status for entry of immigrants closely related to American citizens,” (i.e., family reunification).<sup>89</sup>

The BIA also adopted one of the common law exceptions to the place-of-celebration rule for marriages that are deemed contrary to the public policy of the United States. It first applied this exception in 1962 in a case involving a polygamous marriage that was valid where it was performed, in Jordan.<sup>90</sup> The BIA found evidence of a strong federal public policy against polygamy dating back to 1891—when polygamists were added to the list of excludable aliens—and therefore concluded that a polygamous marriage could not be recognized as valid for immigration purposes.<sup>91</sup> Incestuous marriages, which are permissible in many U.S. states depending on the degree of blood relationship between the parties, have been deemed contrary to the public policy of the United States in some instances, and recognized as valid for immigration purposes in others.<sup>92</sup> In general, the BIA has applied the public policy exception to incestuous marriages in a limited manner, where there is a possible risk of criminal prosecution in the state of residence.<sup>93</sup> Prior to the landmark U.S. Supreme Court decisions of *Loving v. Virginia* in 1967<sup>94</sup> and *United States v. Windsor* in 2013,<sup>95</sup> interracial and same-sex marriages, respectively, were

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<sup>89</sup> *Id.* at 614.

<sup>90</sup> *In re H*, 9 I. & N. Dec. 640 (B.I.A. 1962); *see also* USCIS, ADJUDICATOR’S FIELD MANUAL, *supra* note 85, § 21.3(a)(2)(B) (“[I]f a marriage is valid in the country where celebrated but considered offensive to public policy of the United States, it will not be recognized as valid for immigration purposes. Plural marriages fall within this category.”).

<sup>91</sup> *In re H*, 9 I. & N. Dec. at 642. The United States has consistently refused to recognize the validity of polygamous marriages for immigration purposes. *See, e.g.*, *People v. Ezeonu*, 588 N.Y.S. 2d 116, 117–18 (N.Y. Sup. Ct. 1992); *In re Darwish*, 14 I. & N. Dec. 307 (B.I.A. 1973); *In re G*, 6 I. & N. Dec. 9 (B.I.A. 1953).

<sup>92</sup> *See, e.g.*, *In re Zappia*, 12 I. & N. Dec. 439 (B.I.A. 1967) (holding that a marriage between first cousins that was validly contracted outside of the parties’ state of domicile may be deemed invalid if it violates a strong public policy of the state of domicile). *In re Balodis*, 17 I. & N. Dec. 428 (B.I.A. 1980) (holding that a marriage between first cousins that was performed in Latvia is valid for immigration purposes, even though the couple resides in Michigan, where such a marriage is void); *But see In re Da Silva*, 15 I. & N. Dec. 778 (B.I.A. 1976) (holding that a marriage between an uncle and his niece that was performed in Georgia is valid for immigration purposes, even though the couple resides in New York, where such a marriage is void).

<sup>93</sup> 12 U.S. CITIZENSHIP & IMMIGRATION SERVS., POLICY MANUAL pt. G, ch. 2(A), n.4 (2016), <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartG-Chapter2.html> [<https://perma.cc/Y2CD-PE2C>].

<sup>94</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that a state law restricting the freedom to marry solely on the basis of race violates both the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment).

<sup>95</sup> 133 S. Ct. 2675 (2013) (rendering unconstitutional previous statutory definitions of “marriage” as the legal union of one man and one woman, and the word “spouse” as a person of the opposite sex who is a husband or a wife).

also found to violate the public policy of the United States in the immigration context.<sup>96</sup>

Marriage validity for immigration purposes has been determined on a case-by-case basis, and the BIA has not considered the issue of whether a marriage that was contracted in a foreign country violates the public policy of the United States because of the young age of one or both parties. It has, however, recognized the validity of marriages involving minors that were performed within the United States.<sup>97</sup> The BIA has even recognized marriages performed in the United States when one of the parties was under the statutory presumptive age of marital consent. For example, in *In re Agoudemos*, the BIA recognized as valid the marriage of a female, fifteen-year-old U.S. citizen and a male, twenty-one-year-old Greek citizen, even though the minimum age of marriage was sixteen—both in the couple's state of domicile and the state in which the marriage was performed.<sup>98</sup> The BIA based its decision on its finding that under the laws of both states, a marriage entered into by a person under the age of consent was voidable and not void.<sup>99</sup> Since neither party had taken any action to void the marriage, it was considered a valid and bona fide marriage for immigration purposes.<sup>100</sup> The small number of BIA decisions on the validity of marriages involving minors, coupled with the available data on the significant number of minor immigrants admitted to the United States as spouses, indicates that child marriage has not been determined to be categorically offensive to the public policy of the United States.

Indeed, there is limited guidance in the USCIS Adjudicator's Field Manual on how the ages of the parties to a spousal petition should influence the analysis of marriage validity. The only reference to age in the manual section on

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<sup>96</sup> See *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982) (creating a judicial bar to the recognition of same-sex marriages for immigration purposes), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *In re D*, 3 I. & N. Dec. 480, 481–83 (B.I.A. 1949) (refusing to recognize a Canadian marriage between a white man and a woman of African descent who were both residents of North Dakota, where such a marriage would be void).

<sup>97</sup> See, e.g., *In re A*, 13 I. & N. Dec. 824 (B.I.A. 1971) (recognizing as valid for immigration purposes the marriage of a fourteen-year-old female Jordanian citizen, performed in Michigan with her parents' consent).

<sup>98</sup> *In re Agoudemos*, 10 I. & N. Dec. 444 (B.I.A. 1964).

<sup>99</sup> *Id.* at 446.

<sup>100</sup> *Id.* at 446–47; see also *In re G*, 9 I. & N. Dec. 89 (B.I.A. 1960) (involving the marriage of a sixteen-year-old female U.S. citizen and a nineteen-year-old male Greek citizen in Illinois, where the minimum age of marriage was twenty-one for males and eighteen for females); USCIS, ADJUDICATOR'S FIELD MANUAL, *supra* note 85, § 21.3(a)(2)(B) ("If the marriage is voidable but no court action to void the marriage has taken place, it will be considered valid for immigration purposes.").

spousal petitions is in the context of determining the bona fides of the marriage (i.e., detecting marital fraud). The manual states that a “large disparity of age” between spouses may indicate that a marriage was contracted solely for immigration benefits, in which case it would not confer benefits under the INA.<sup>101</sup> The nature of this guidance supports the impression that USCIS views the marriage of minors, whether in the United States or abroad, in a value-neutral manner. In other words, USCIS will not normally look beyond the law of the place of celebration when determining the validity of marriages involving minors. Given the significant variation in laws and cultural norms about the minimum age of marriage worldwide, the application of the place-of-celebration rule to marriages involving minors only complicates immigration law’s treatment of children.

### C. *The Dependency Construct of Childhood*

Underlying the varied definitions of “child” within U.S. immigration law is a shared assumption that children are dependent on adults. This dependency construct casts children as dependent on others for basic needs, as well as for the fundamental aspects of personhood, such as having opinions, interests, values, and culture.<sup>102</sup> Children’s views are only expressed through their parents or caregivers. The concept is closely related to the notion of “children as property.”<sup>103</sup>

Historically, children in Europe and North America were considered to be the property of their parents—specifically, their fathers.<sup>104</sup> As such, they were not recognized as having rights independent of their fathers.<sup>105</sup> However, a shift occurred during

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<sup>101</sup> USCIS, ADJUDICATOR’S FIELD MANUAL, *supra* note 85, § 21.3(a)(2)(H).

<sup>102</sup> M. Aryah Somers et al., *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL’Y 311, 326–27 (2010) (“This construction tends to romanticize the child as embodying a state of purity, a *tabula rasa*. . . . Through their dependency, children can gain community, love and affection, belonging, language, culture, moral authority, racial identity, class, and values. This needs-based view also means that children have limited agency and depend upon adults to determine their objectives, make decisions for them, and represent their interests.” (footnotes omitted)).

<sup>103</sup> See Thronson, *supra* note 45, at 982 (“Notions of parental property rights in children, though discredited, have persistent influence.”); Barbara Bennett Woodhouse, “*Who Owns the Child?*”: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1042 (1992) (“A property model asserts not that children are property but that our culture makes assumptions about children deeply analogous to those it adopts in thinking about property.”).

<sup>104</sup> See, e.g., Jonathan Todres, *Independent Children and the Legal Construction of Childhood*, 23 S. CAL. INTERDISC. L.J. 261, 266–67 (2014).

<sup>105</sup> Thronson, *supra* note 45, at 982.

the nineteenth century, when children came to be viewed as inherently vulnerable and in need of protection.<sup>106</sup> Still, children under the age of majority were considered to be “subsumed within the family and largely out of the public sphere of society,” and therefore not a discrete category of people about whom to legislate.<sup>107</sup> Children’s rights were designed to promote their freedom as adults, not as children.<sup>108</sup> These assumptions have influenced and, to a certain degree, continue to influence, how the law conceives of children.

U.S. immigration law is structured around the assumption that the child’s natural place is within the family and that children are, in a sense, appendages of their parents. This assumption is reflected in the unlimited number of immigrant visas available for individuals recognized as children under the family-based immigration laws.<sup>109</sup> There is no independent sense of these children as people in their own right; they are merely subparts of a family unit.<sup>110</sup> The family-based immigration system does not recognize children unless they are bound to a parent.<sup>111</sup> Children’s perspectives have been invisible in the framing of most U.S. immigration policy—an echo of the invisibility of children’s interests that permeates the dependency construct.<sup>112</sup> In this

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<sup>106</sup> See *id.* at 984 (“In a sense, parents were not viewed as property owners, but as fiduciaries. For the benefit of the community as a whole, children were seen as persons in need of protection and guidance as they moved toward adulthood. . . . During this time, the ‘best interests of the child’ standard emerged as the prevailing legal principle in determining the fate of children.”).

<sup>107</sup> Todres, *supra* note 104, at 272.

<sup>108</sup> Annette Ruth Appell, *The Pre-political Child of Child-Centered Jurisprudence*, 46 HOUS. L. REV. 703, 729 (2009).

<sup>109</sup> See discussion *supra* Section I.B.1.

<sup>110</sup> See Jacqueline Bhabha, *The “Mere Fortuity of Birth”? Children, Mothers, Borders, and the Meaning of Citizenship*, in MIGRATIONS AND MOBILITIES: CITIZENSHIP, BORDERS, AND GENDER 187, 193 (Seyla Benhabib & Judith Resnik eds., 2009) (“[C]hildren, particularly young children, are often considered parcels that are easily moveable across borders with their parents and without particular cost to the children.”).

<sup>111</sup> Thronson, *supra* note 45, at 992; see 8 U.S.C. § 1101(b)(1)(A)–(F) (2012) (describing the six categories of relationships with parents included in the INA definition of “child”).

<sup>112</sup> However, undocumented youth played an important role in campaigning for the DREAM Act, or the Development, Relief and Education for Alien Minors Act, introduced in 2009, which ultimately became the DACA program. See generally WALTER J. NICHOLLS, *THE DREAMERS: HOW THE UNDOCUMENTED YOUTH MOVEMENT TRANSFORMED THE IMMIGRANT RIGHTS DEBATE* (2013). Since then, immigration debates have included children’s voices more often and in more prominent venues, such as eleven-year-old Karla Ortiz’s speech at the 2016 Democratic National Convention. See Janell Ross, *How Karla Ortiz, 11-Year-Old Daughter of Undocumented Immigrants, Made a Powerful Political Case*, WASH. POST (July 26, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/07/26/how-karla-ortiz-11-year-old-daughter-of-undocumented-immigrants-made-a-powerful-political-case/> [https://perma.cc/4N4H-C39V].

construct, children's rights, such as they are, derive from their needs for protection and socialization.<sup>113</sup>

The primary reason why legislators have supported laws prioritizing parent-child reunification is the assumption that parents owe a "legal and fiduciary responsibility" to their children.<sup>114</sup> The findings of the bipartisan U.S. Commission on Immigration Reform, which issued a 1997 report on the legislative and political history of the family-based immigration system that is still widely considered relevant,<sup>115</sup> echo this rationale: "[T]he national interest in the entry of nuclear family members outweighs that of more extended family members. . . . Whatever the cultural and economic values attached to each family relationship . . . *the far stronger responsibilities to one's spouse and minor children are well established in the U.S.*"<sup>116</sup>

Despite the emphasis on parent-child reunification in immigration legal and political history, children under the age of twenty-one have never been permitted to file immigrant visa petitions for their parents in the U.S. family-based immigration

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<sup>113</sup> Appell, *supra* note 108, at 729.

<sup>114</sup> *How Comprehensive Immigration Reform Should Address the Needs of Women and Families: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 12–14 (2013) [hereinafter *Hearings on Comprehensive Immigration Reform*] (statement of Susan F. Martin, Donald G. Herzberg Professor of International Migration, Georgetown University, Washington, DC) (stating that the "legal and fiduciary responsibility for spouses and minor children" justifies the priority given to these categories of relatives). Dr. Martin is the former executive director of the Jordan Commission, and her statement reviewed the Commission's recommendations regarding priorities for immigrant admissions, including its recommendation to eliminate the admission categories for more distant relatives, such as adult children and siblings. *Id.* at 12–13.

<sup>115</sup> *See, e.g., Hearings on Comprehensive Immigration Reform, supra* note 114, at 13 (statement of Professor Susan F. Martin) (discussing relevant findings and recommendations of the Commission on Immigration Reform). The Commission's recommendations are decidedly on the conservative end of the immigration policy spectrum, and conservative advocates for immigration reform often cite them. *See, e.g.,* Nayla Rush, *Recalling "The Americanization Ideal": The Legacy of Barbara Jordan*, FED'N FOR AM. IMMIGRATION REFORM (Feb. 2014), <http://www.fairus.org/issue/recalling-the-americanization-ideal-the-legacy-of-barbara-jordan> [<https://perma.cc/5Y34-XMYE>]; DAVID NORTH, CTR. FOR IMMIGRATION STUDIES, *BACKGROUND: A BLUEPRINT FOR IMMIGRATION REFORM: REVISITING THE JORDAN COMMISSION REPORT (2013)*, <http://cis.org/sites/cis.org/files/north-jordan-commission.pdf> [<https://perma.cc/JY4S-XY4U>].

<sup>116</sup> U.S. COMM. ON IMMIGRATION REFORM, *BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 65* (1997) (emphasis added). The report recognized the importance of close bonds with, and the practical assistance of, extended family members, but relied on tradition and the responsibility of the petitioner to provide for his family as justification for the prioritization of spouses and minor children. *Id.*; *see also* Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 737 (1988) (describing children as "a form of social investment in which custody produced concomitant social duties on the part of each parent, the performance of which the state could supervise").

system.<sup>117</sup> A parent has the right to create immigration status for a child, but the right does not flow in the other direction.<sup>118</sup> This asymmetry in the rights between parents and children is not uncommon in U.S. immigration law.<sup>119</sup> An earlier federal commission on immigration policy recommended against creating an immigration status for the parents of U.S. citizen children based on its view that “petitioning for relatives is a decision to be reserved for adults.”<sup>120</sup> It is difficult to speculate about the commission’s rationale, but it likely had concerns about children’s capacity to make immigration decisions and their inability to financially support their family members in the United States.

The dependency construct of childhood in the family-based immigration system recalls an earlier set of assumptions that once applied to women. Under the doctrine of coverture, which originated in domestic relations law, “the husband and wife are one person in law” and the “legal existence of the woman is suspended during the marriage.”<sup>121</sup> This principle was incorporated into federal citizenship law in the following way: Foreign women who married U.S. citizen men automatically became U.S. citizens, while U.S. citizen women who married foreign men were stripped of their citizenship.<sup>122</sup> The underlying assumption was that only a husband, as head of the family, could determine the political and cultural character of that family. This former gender asymmetry in citizenship laws is similar to a current asymmetry in family reunification rights between parents and children: Children derive immigration status from their parents but not vice versa.<sup>123</sup>

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<sup>117</sup> 8 U.S.C. § 1151(b)(2)(A)(i) (2012).

<sup>118</sup> David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 FORDHAM URB. L.J. 393, 403–04 (2010).

<sup>119</sup> *Id.* at 404 (“Child asylees and refugees may not extend derivative status to their parents, yet adult asylees and refugees may generate derivative status for their spouses and children. Similarly, a child granted protection from removal pursuant to the Convention Against Torture may not extend eligibility to a parent. A child who obtains legal immigration status through a family petition from one parent or a stepparent may not include the other parent as a derivative.” (footnotes omitted)).

<sup>120</sup> STAFF REPORT OF THE SELECT COMMISSION, *supra* note 54, at 114. The report also noted that some Commissioners “believe that this limitation [on children petitioning for parents] discriminates against and causes extreme hardship for some minor U.S. citizens who must choose between living with their parents outside the United States or growing up without their parents in the United States.” *Id.* at 115.

<sup>121</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*442.

<sup>122</sup> See Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604 (conferring U.S. citizenship on a foreign woman upon marriage to a citizen); Act of Mar. 2, 1907, ch. 2534, § 3, 34 Stat. 1228, 1228–29 (stripping U.S. citizen women of their citizenship upon marriage to a foreigner).

<sup>123</sup> See discussion *infra* Section II.A.

The invisibility of the woman's perspective, like children's perspectives in the family-based immigration system today, was "justified by assumptions about her dependence—social, political, economic, and personal—on male relatives, typically her father first and her husband second."<sup>124</sup> Her right to immigrate and obtain citizenship depended entirely on her male relative's right to do so. The justification for the asymmetrical rights in this case, and in the case of children vis-à-vis their parents, is that a categorically dependent person travels with or follows the person who supports her, but not the reverse.<sup>125</sup> The long-standing assumptions about women and the nature of family life that informed gender asymmetries in the immigration and nationality laws of an earlier era are now understood as discriminatory and socially constructed.<sup>126</sup> Children's legal coverture and underlying assumptions about the "natural" dependency of children, however, persist.

In the family immigration system, there is an assumption that the marriage of a child affects her dependence on her parents, regardless of the actual nature of that relationship post-marriage.<sup>127</sup> A child, once married, is no longer recognized as a "child" of her parents for immigration purposes.<sup>128</sup> There is no transition period between childhood and adulthood when the transition is marked by marriage. The change is abrupt, as in other legal contexts.<sup>129</sup> Part II contains a detailed discussion of how the logic of the family-based immigration system's dependency construct breaks down when applied to married minor children.

## II. PROBLEMS WITH IMMIGRATION LAW'S TREATMENT OF MARRIED MINOR CHILDREN

Several scholars have described the need for a coherent framework for thinking about children's rights in immigration law.<sup>130</sup> This part examines inconsistencies in the treatment of

<sup>124</sup> Bhabha, *supra* note 110, at 199.

<sup>125</sup> *See id.* at 194.

<sup>126</sup> *Id.*; Appell, *supra* note 108, at 715 ("Feminist jurisprudence . . . has delegitimized the legal incompetence and dependency of the female subject.")

<sup>127</sup> *See* Thronson, *supra* note 45, at 991–92.

<sup>128</sup> 8 U.S.C. § 1101(b), (c) (2012).

<sup>129</sup> Appell, *supra* note 108, at 753 ("Once children become adults, they are the liberal citizen: autonomous, independent, unattached, and self-sufficient. They are no longer entitled to care and support, but are responsible for their own lot, their own achievements, and their own resources. This is true even though children experience their dependency in widely disparate conditions.")

<sup>130</sup> *See, e.g.*, Bhabha, *supra* note 110, at 218–19; Laila L. Hlass, *States and Status: A Study of Geographical Disparities for Immigrant Youth*, 46 COLUM. HUM.

married minor children in common scenarios in the family-based immigration system. It highlights the outdated assumptions about dependency, marriage, and family that underlie immigration law's constructions of children and women. The inadequacy of these assumptions is amplified when they are applied to situations involving married minor children.

#### A. *Inconsistent and Unfair Treatment of Married Minor Children*

The structure of the family-based immigration system permits U.S. citizens and permanent residents to petition for immigrant visas for relatives who fall within certain discrete and narrowly defined categories.<sup>131</sup> In this system, the spouses, children, and parents of citizens receive priority.<sup>132</sup> Since the definition of “child” in the INA is restricted to those who are unmarried, a married person under the age of twenty-one is no longer considered a child for most purposes in the family-based immigration system.<sup>133</sup> When children under the age of twenty-one are married, it can affect their ability to reunite with certain relatives—sometimes for better, but often for worse.<sup>134</sup> The current, seemingly haphazard treatment of married minors under U.S. immigration law is a signal that outdated assumptions about dependency, marriage, and the family continue to influence the law's constructions of children.<sup>135</sup> It also indicates that lawmakers have not seriously considered the situation of married minor children, a potentially vulnerable population within the family-based immigration system.

This section describes two common scenarios in the family-based immigration system that demonstrate how

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RTS. L. REV. 266 (2014); Elizabeth Keyes, *Evolving Contours of Immigration Federalism: The Case of Migrant Children*, 19 HARV. LATINO L. REV. 33 (2016) (describing how the complexity of the law governing Special Immigrant Juvenile Status frustrates its purpose of protecting vulnerable children); Somers et al., *supra* note 102, at 322–25; Thronson, *supra* note 118, at 395 (“[T]he examination of the treatment of children in immigration law serves not only as a critique of current law, but also as a template for simple, yet fundamental reforms that would bring U.S. immigration law closer to mainstream values and approaches regarding children.”); Todres, *supra* note 104, at 264 (“[D]eveloping a more comprehensive construct of childhood is a critical first step toward producing law and policy that is more responsive to the range of realities facing all children, including independent children.”).

<sup>131</sup> See *supra* Section I.B.

<sup>132</sup> 8 U.S.C. § 1151(b)(2)(A)(i) (2012).

<sup>133</sup> *Id.* § 1101(b)(1). The term “unmarried” means “an individual who at such time is not married, whether or not previously married.” *Id.* § 1101(a)(39).

<sup>134</sup> See *Fiallo v. Bell*, 430 U.S. 787, 797–98 (1977) (recognizing that the INA's definition of a child may hinder the reunification of families in the United States but concluding that this is a policy judgment entrusted to Congress).

<sup>135</sup> See *supra* Section I.C.



married minor children are not treated as either full children or full adults and are, therefore, disadvantaged relative to both groups. In the first example, married minor children can petition for their spouses of any age but they cannot petition for their parents and siblings until they are age twenty-one.<sup>136</sup> In the second, married minor children receive a lower priority as beneficiaries of parent-sponsored visa petitions than both unmarried minor children and unmarried adult sons and daughters. Minority trumps marital status when nonage prevents a married minor from reunifying with her parents and siblings by bringing them to the United States, while marital status trumps minority when marriage prevents a minor from reuniting with her parents by joining them in the United States. The result is that the law disadvantages the married minor children of U.S. citizens and permanent residents in relation to unmarried minor children by excluding them from eligibility for a benefit that they could have otherwise received by virtue of their age; and in relation to adult children—whether married or unmarried—by excluding them from eligibility for a benefit that other individuals receive by virtue of their presumed independence.

### 1. Inability to Petition for Parents or Siblings

The INA simultaneously treats married minor citizen children as adults in relation to their spouses, but as children in relation to their status as petitioners for their parents and siblings.<sup>137</sup> This suggests that Congress has either failed to seriously consider how marital status should affect a married minor's right to petition for close relatives, or that it has relied on stereotypes of dependent children and women, or both.

U.S. citizens and lawful permanent residents may file petitions for immigrant visas for their spouses.<sup>138</sup> A noncitizen spouse of a U.S. citizen is categorized as an immediate relative of the citizen,<sup>139</sup> and a noncitizen spouse of a lawful permanent resident is categorized as a Second Preference immigrant.<sup>140</sup>

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<sup>136</sup> 8 U.S.C. § 1151(b)(2)(A)(i) (defining "immediate relatives" of U.S. citizens to include parents but only when a citizen is at least twenty-one years of age).

<sup>137</sup> This section does not discuss family visa petitions for the children of U.S. citizens and lawful permanent residents because neither marital status nor age affect the petitioner's right to file such petitions.

<sup>138</sup> 8 U.S.C. § 1154(a)(1)(A)(i), (a)(1)(B)(i)(I).

<sup>139</sup> *Id.* § 1151(b)(2)(A)(i).

<sup>140</sup> *Id.* § 1151(c) (calculation of worldwide level of family-sponsored immigrants); *id.* § 1153(a)(2)(A); see KANDEL, *supra* note 51, at 4 (noting that in the calculation of the number of family preference immigrants, "[u]nused visas in each category roll down to the next preference category"); *id.* at 4 tbl.1 (indicating the order

Congress has consistently given the immigration agencies broad discretion to draw the boundaries of what should be considered a valid marriage for immigration purposes without setting any age limits on who might be considered a “husband,” “wife,” or “spouse.”<sup>141</sup> Legally, there is nothing preventing a married minor from successfully petitioning for his or her spouse. Indeed, marriages involving one or more minor spouses are regularly recognized as valid.<sup>142</sup> Married minor children can immigrate to the United States in the status of “spouse,” as well as file petitions for their noncitizen spouses.<sup>143</sup> In this context, immigration law affords married minor children the same benefits as married adults.

Separate from the issue of who may enter into a valid marriage for immigration purposes, Congress decided that U.S. citizens who are under the age of twenty-one cannot file immigrant visa petitions for their parents and siblings.<sup>144</sup> Therefore, married minor citizen children must wait until they are twenty-one years old to petition for their parents and siblings, just as unmarried minor children must do.<sup>145</sup> In this context, they are not treated as full adults.<sup>146</sup> Their marital

of preference for family preference immigrants, which parallels the preference allocations listed in § 1153(a).

<sup>141</sup> 8 U.S.C. § 1151(b)(2)(A)(i) (defining “immediate relatives” to include the spouse of a U.S. citizen and not including a minimum age requirement for the petitioner); *id.* § 1153(a)(2)(A) (including the spouse of an alien lawfully admitted for permanent residence in the Second Preference category and not including a minimum age requirement for the petitioner). See *supra* Section I.B.3 for a discussion of the rules governing marriage validity for immigration purposes.

<sup>142</sup> If there is a large difference in age between the spouses, however, the marriage may be subject to increased scrutiny. See USCIS, ADJUDICATOR’S FIELD MANUAL, *supra* note 85, § 21.2(b)(1)(B) (“A large difference in age between the petitioner and beneficiary on a spouse petition is often the first indication you will have that the marriage may have been contracted solely for the purpose of gaining an immigration benefit (with or without the knowledge and complicity of the petitioner).”).

<sup>143</sup> This is a common situation. For example, 15,971 minors (under the age of eighteen) became lawful permanent residents based on visa petitions filed by their U.S. citizen spouses since 1973. Office of Immigration Statistics, *supra* note 21. See discussion *supra* Part I.B.3 citing BIA cases in which married minor U.S. citizens successfully filed visa petitions for their spouses. See *In re Agouedemos*, 10 I. & N. Dec. 444 (B.I.A. 1964); *In re G*, 9 I. & N. Dec. 89 (B.I.A. 1960).

<sup>144</sup> 8 U.S.C. § 1151(b)(2)(A)(i) (including parents of U.S. citizens in the category of immediate relatives, “except that, in the case of parents, such citizens shall be at least 21 years of age”); *id.* § 1153(a)(4) (“Qualified immigrants who are the brothers or sisters of citizens of the United States, if such citizens are at least 21 years of age, shall be allocated visas . . .”).

<sup>145</sup> Eligibility to petition for these relatives is strictly monitored. See, e.g., USCIS, ADJUDICATOR’S FIELD MANUAL, *supra* note 85, § 21.2(b)(1)(B) (“[A] petition filed to accord immediate relative classification to a parent or fourth preference classification to a brother or sister requires a review of the petitioner’s date of birth because the petitioner must be at least 21 years of age at the time of filing.”).

<sup>146</sup> “Adult” is not defined in the family-based immigration system. 8 U.S.C. § 1101 (listing definitions used in Chapter 12, “Immigration and Nationality,” of Title

status—which enabled them to file or benefit from a spousal petition, just as an adult could—does not enable them to file petitions for their parents or siblings, as an adult could. They are treated indistinguishably from unmarried minors. In other words, minority trumps marital status when non-age prevents a married minor from petitioning for her premarital, nondescendant kin.

## 2. Obstacles to Benefitting from Parent-Sponsored Petitions

Married minor children of U.S. citizens face obstacles to benefitting from parent-sponsored petitions that do not affect unmarried children of the same age. An unmarried child of a naturalized U.S. citizen who is under twenty-one years of age is able to immigrate to the United States immediately after his or her visa petition is approved, while the married minor child of a U.S. citizen can wait decades for the same benefit.<sup>147</sup> This is because individuals who fit the former description are considered “immediate relatives” of the citizen,<sup>148</sup> a category for which there is an unlimited number of visas allocated in any fiscal year.<sup>149</sup> Married sons and daughters of U.S. citizens, on the other hand, are not considered immediate relatives of the citizen; they are “family preference immigrants,” subject to an annual numerical limitation<sup>150</sup> and further subcategorized into four preference types based on the immigration status of the petitioner, their relationship to the petitioner, and their marital status.<sup>151</sup> Married sons and daughters—regardless of age—of U.S. citizens fall within the Third Preference classification,<sup>152</sup> while

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8, “Aliens and Nationality,” of the U.S. Code). However, the Department of Homeland Security does refer to U.S. citizens who are at least twenty-one years old as “adult U.S. citizens” in official reports. See, e.g., OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., 2014 YEARBOOK OF IMMIGRATION STATISTICS 21 tbl.7 (2016) (describing the IR5 immigrant class of admission as “[p]arents of adult U.S. citizens, new arrivals”). Under 8 U.S.C. § 1151(b)(2)(A)(i), U.S. citizen petitioners in this category “shall be at least 21 years of age.”

<sup>147</sup> See, e.g., *Immigrant Numbers for September 2016*, VISA BULL., Aug. 8, 2016, at 2, [https://travel.state.gov/content/dam/visas/Bulletins/visabulletin\\_September2016.pdf](https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_September2016.pdf) [<https://perma.cc/M6KS-FED7>] (indicating that individuals from the Philippines and Mexico seeking F3 visas have been waiting for twenty-two years for their visas).

<sup>148</sup> 8 U.S.C. § 1151(b)(2)(A)(i) (defining “immediate relatives”).

<sup>149</sup> *Id.* § 1151(b).

<sup>150</sup> *Id.* § 1151(a)(1) (describing the annual limit on the number of family-sponsored immigrants); *id.* § 1151(c) (describing the process for calculating the annual level of family-sponsored immigrants). In fiscal year 2016, the number of visas available to family preference immigrants was 226,000. *Immigrant Numbers for September 2016*, *supra* note 147, at 1.

<sup>151</sup> 8 U.S.C. § 1153(a).

<sup>152</sup> *Id.* § 1153(a)(3).

unmarried adult sons and daughters have a higher priority classification of First Preference.<sup>153</sup>

Every year there are many more qualified family preference immigrant applicants than there are available visas. This has caused an enormous backlog of approved family preference immigrant visa petitions.<sup>154</sup> There are also per-country caps for family preference immigrants, which means that natives of countries with the largest numbers of emigrants to the United States since the current immigrant selection system went into effect on October 1, 1991,<sup>155</sup> can wait decades before they are permitted to immigrate.<sup>156</sup> If the minor, unmarried child of a U.S. citizen gets married after a petition has been approved but before he or she is granted LPR status, the approval of the petition is automatically revoked, the immediate relative petition is converted to a Third Preference petition, and the child will then be subject to a decades-long wait.<sup>157</sup> Between 1973 and 2014, at least 126 married minor noncitizens obtained LPR status based on their relationship with their U.S. citizen parents.<sup>158</sup> If they had not been married, they could have immigrated as immediate relatives.

The married minor children of permanent residents are even worse off than the married minor children of U.S. citizens, as they do not fall into any category of relatives who their parents may sponsor. Their marital status effectively bars them from immigrating through a parent-sponsored petition, unless and until their parent becomes a U.S. citizen. Compared to U.S. citizens, permanent residents have limited rights to file visa petitions for relatives. Permanent residents may petition for only two categories of relatives: (1) their spouses and

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<sup>153</sup> *Id.* § 1153(a)(1).

<sup>154</sup> *See, e.g., Visa Bulletin: Immigrant Numbers for September 2016, supra* note 147, at 1–2 (indicating that every family preference category is currently oversubscribed, i.e., there are many more approved petitions compared to available visas).

<sup>155</sup> Immigration Act of 1990, Pub. L. No. 101-649, § 161, 104 Stat. 4978, 5008 (codified at 8 U.S.C. § 1101 notes) (stating that amendments take effect on October 1, 1991, unless otherwise noted).

<sup>156</sup> For example, in September 2016, the married Mexican sons or daughters of U.S. citizens whose approved petitions were filed before November 15, 1994, were finally permitted to apply for lawful permanent residence (LPR) status. Every person in that category who applied for a visa on or after November 15, 1994, is still waiting to immigrate. *Immigrant Numbers for September 2016, supra* note 147, at 2.

<sup>157</sup> 8 C.F.R. § 205.1(a)(3)(i)(G) (2010) (describing automatic revocation of approved petition); U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, at 9 FAM 502.2-3(D)(a) (2015) (describing automatic conversion of immediate relative petition to a Third Preference petition if a child marries). Similarly, when adult sons and daughters of U.S. citizens (First Preference) marry before they are granted LPR status, their petitions are reclassified as Third Preference. *Id.* at 9 FAM 502.2-3(D)(b); 8 C.F.R. § 205.1(a)(3)(i)(H).

<sup>158</sup> Office of Immigration Statistics, *supra* note 21.

children and (2) their unmarried sons and daughters who are at least twenty-one years old.<sup>159</sup> Both categories are considered family preference immigrants who fall within the Second Preference classification, but are typically referred to as 2(A) and 2(B) respectively.<sup>160</sup> The wait for a visa is much longer for 2(B) beneficiaries than for 2(A) beneficiaries.<sup>161</sup> The married minor children of permanent residents do not fit within either category. The 2(A) category includes a permanent resident's "children," which is a term that is defined in the INA to mean unmarried persons under twenty-one years of age.<sup>162</sup> The 2(B) category is, likewise, restricted to unmarried sons and daughters, but those who are twenty-one years of age or older. Therefore, the law permits permanent residents to reunite with their *unmarried* sons and daughters of any age, but precludes them from reuniting with their *married* sons and daughters of any age. In this situation, as in other areas of immigration law, a child's marital status trumps minority to his or her detriment.

The logic, assumptions, and statutory language of the family-based immigration system also apply to other types of immigration benefits. One example of this is the family relative petition process for recipients of asylum and for refugees. Asylum is an immigration benefit available to noncitizens who are already in the United States and who meet the definition of a refugee.<sup>163</sup> A refugee is a person who has fled his or her country of nationality because of persecution or a well-founded fear of persecution on account of "race, religion, nationality, membership in a particular social group, or political opinion."<sup>164</sup> A grant of asylum or refugee status permits an individual to stay in the United States indefinitely, apply for LPR status, and, eventually, become a U.S. citizen.<sup>165</sup> The spouses and children of asylum recipients and refugees are entitled to immigrate to the United States in the same status as their family member, even if they would not independently qualify for asylum or

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<sup>159</sup> See 8 U.S.C. § 1153(a)(2) (2012).

<sup>160</sup> See, e.g., KANDEL, *supra* note 51, at 3.

<sup>161</sup> *Id.* at 18; see *Immigrant Numbers for September 2016*, *supra* note 147, at 2 (indicating, for example, that visas are available for Mexican spouses and children of permanent residents whose petitions were filed before September 1, 2014; and for unmarried Mexican adult sons and daughters of permanent residents whose petitions were filed before September 15, 1995).

<sup>162</sup> 8 U.S.C. § 1101(b).

<sup>163</sup> *Id.* § 1158(a)(1), (b)(1)(B)(i).

<sup>164</sup> *Id.*; see *id.* § 1101(a)(42)(A).

<sup>165</sup> *Id.* § 1157 (describing the admission of refugees as immigrants); *id.* § 1158(c)(1) (stating that the attorney general shall not remove an alien granted asylum from the United States); *id.* § 1159 (describing adjustment of status procedure for refugees and aliens granted asylum); *id.* § 1427 (describing requirements of naturalization).

refugee status.<sup>166</sup> “Child” is defined with reference to the same INA provision that is used in the context of family-based immigration, which means it is restricted to individuals who are under the age of twenty-one and unmarried.<sup>167</sup> Therefore, the married minor child of an asylum recipient or refugee would not qualify for any immigration benefit through her parent for a minimum of five years, when the parent would be eligible to become a U.S. citizen.

The impact that these differences in classification can have for married minors is best illustrated through a pair of examples involving a hypothetical family. In 1994, a Filipina mother becomes a U.S. citizen. She has three children living in the Philippines: an unmarried twenty-five-year-old son; a married sixteen-year-old daughter; and an unmarried fifteen-year-old daughter. She files visa petitions for all three children on June 15, 1994. The fifteen-year-old daughter is considered a child under the immigration law, and is therefore eligible to immigrate immediately after her visa petition is approved, within months. The sixteen-year-old daughter is classified as a Third Preference family immigrant. The twenty-five-year-old son is classified as a First Preference family immigrant. In May 2010, after a sixteen-year wait, a visa becomes available for the now forty-one-year-old son.<sup>168</sup> In October 2016, after a twenty-two-year wait, a visa becomes available for the now thirty-seven-year-old daughter.<sup>169</sup> Overall, the married minor daughter waited twenty-two years longer than her unmarried sister and six years longer than her unmarried brother to reunite with their mother. If the mother in this hypothetical was a permanent

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<sup>166</sup> *Id.* § 1157(c)(2) (refugees); *id.* § 1158(b)(3)(1) (asylum recipients).

<sup>167</sup> *Id.* §§ 1157(c)(2), 1158(b)(3)(1) (referring to *id.* § 1101(b)(1)(A)–(E)).

<sup>168</sup> The wait times in the hypothetical are the actual—not estimated—amount of time that a person in each situation would have waited for a visa. See *Immigrant Numbers for May 2010*, VISA BULL., Apr. 9, 2010, at 2, <https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2010/visa-bulletin-for-may-2010.html> [<https://perma.cc/BMM3-NMW3>] (indicating that visas became available for unmarried Filipino sons and daughters of U.S. citizens whose petitions were filed before November 1, 1994). The previous month, visas were available only for individuals in the same category whose petitions were filed before March 1, 1994. See *Immigrant Numbers for April 2010*, VISA BULL., Mar. 9, 2010, at 2, <https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2010/visa-bulletin-for-april-2010.html> [<https://perma.cc/G2LL-4LHE>]. This hypothetical assumes that the son remained unmarried all those years.

<sup>169</sup> See *Immigrant Numbers for October 2016*, VISA BULL., Sept. 8, 2016, at 2, [https://travel.state.gov/content/dam/visas/Bulletins/visabulletin\\_October2016.pdf](https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_October2016.pdf) [<https://perma.cc/K4XH-4UQC>] (indicating that visas became available for married Filipino sons and daughters of U.S. citizens whose petitions were filed before July 8, 1994). The previous month, visas were available only for individuals in the same category whose petitions were filed before June 15, 1994. See *Immigrant Numbers for September 2016*, *supra* note 147, at 2.

resident who never naturalized,<sup>170</sup> the married sixteen-year-old would not be eligible to immigrate at all; and the unmarried daughter and son would have been eligible to immigrate in January 1999 and March 2003, respectively.<sup>171</sup>

This hypothetical illustrates several problems with the family-based immigration system including the extremely long wait times for visas to become available in general; the disincentives to marry that U.S. immigration law creates for the adult children of U.S. citizens and permanent residents; and the fact that the unmarried adult sons and daughters of permanent residents can be eligible to immigrate sooner than the unmarried adult sons and daughters of U.S. citizens. However, its main purpose here is to illustrate the relative disadvantage of a married minor child of a U.S. citizen compared with unmarried minor and adult children.

### B. *Interpreting the Treatment of Married Minor Children in the Family-Based Immigration System*

The inability of U.S. citizen children to generate immigration status for their parents has been criticized as a form of age discrimination.<sup>172</sup> This limitation aligns with the dependency construct of childhood, conceiving of children as “passive objects” in contrast with their parents as “active rights holders.”<sup>173</sup> Age is used as a proxy for dependency, and it is assumed that children derive their immigration status from their parents.<sup>174</sup>

<sup>170</sup> There are many reasons why a permanent resident who is eligible to naturalize might not do so. For example, a 2012 survey by the Pew Hispanic Center found that personal barriers—such as limited English proficiency, difficulty of the citizenship test, and cost of the naturalization application—were the main reasons why nearly half of Latino permanent residents had not yet naturalized. PEW HISPANIC CTR., AN AWAKENED GIANT: THE HISPANIC ELECTORATE IS LIKELY TO DOUBLE BY 2030, at 21 & fig.13 (2012), [http://www.pewhispanic.org/files/2012/11/hispanic\\_vote\\_likely\\_to\\_double\\_by\\_2030\\_11-14-12.pdf](http://www.pewhispanic.org/files/2012/11/hispanic_vote_likely_to_double_by_2030_11-14-12.pdf) [https://perma.cc/33XM-8EK2].

<sup>171</sup> U.S. DEP'T OF STATE, PHILIPPINES FAMILY PREFERENCE FINAL ACTION DATES FROM FY1992–2015, [https://travel.state.gov/content/dam/visas/family-preference-cut-off-dates/Cut-off\\_Dates\\_Philippines\\_online.pdf](https://travel.state.gov/content/dam/visas/family-preference-cut-off-dates/Cut-off_Dates_Philippines_online.pdf) [https://perma.cc/FD85-V6GG] (indicating a cut-off date of June 15, 1994, for F2A visa petitions for Filipino citizens, announced in the January 1999 *Visa Bulletin*); *Immigrant Numbers for March 2003*, VISA BULL., Feb. 10, 2003, at 2, <https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2003/visa-bulletin-for-march-2003.html> [https://perma.cc/M8BY-FXUD] (indicating a cut-off date of July 1, 1994, for F2B visa petitions for Filipino citizens).

<sup>172</sup> See, e.g., Bhabha, *supra* note 110, at 190 (“No other group of citizens in the developed world today has such legally sanctioned partial access to the benefits of membership. In other societies, and during other historical periods . . . the same has been true of women. . . . Age-based discrimination, by contrast, is universal and unquestioned.”).

<sup>173</sup> Thronson, *supra* note 45, at 994.

<sup>174</sup> Bhabha, *supra* note 110, at 194.

As applied to married minor children, however, the limitation on petitioning for parents and siblings seems particularly unfair. Minor children can both petition for and benefit from spousal visa petitions.<sup>175</sup> As a result of the marriage, they are no longer considered “children” who are eligible to benefit from parent-sponsored petitions. Marriage is considered a proxy for adulthood in the family-based immigration system; having recognized a minor as sufficiently mature to enter into marriage, it is unfair to treat her as a child for the purpose of exercising a right to reunite with close family members.

The broad, age-based exclusion from the right to petition for close family members is inconsistent with the immigration system’s approach of treating marriage as a proxy for adulthood. It is likely that Congress did not realize or give serious consideration to how these laws would apply to married minor children. Immigrants who fall into this category are virtually invisible in immigration statistics because they would be included in categories traditionally dominated by adults, such as “spouse.”<sup>176</sup> However, given the centrality of marital relationships in the family-based immigration system, it is important for the law to have a coherent approach to distinguishing between children and adults and the rights that come with membership in each of those categories.

Immigration laws that delay or prevent reunification between U.S. citizen or permanent resident parents and their married minor children living abroad are based on the assumption that marriage alters the dependency relationship between parents and children, regardless of the actual nature of that relationship.<sup>177</sup> Marriage signifies a break with dependency on one’s parents, and therefore, with childhood. The transition from childhood to adulthood is non-existent. A child, once married, is no longer recognized as a “child” who is eligible to immigrate with or follow a parent.<sup>178</sup> In the family-based immigration system, a married minor child moves from a dependent childhood to a form of adulthood that lacks some of its key attributes—including the right to file immigrant visa petitions for parents and siblings.

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<sup>175</sup> Note that Congress could have included a minimum age requirement for petitioners or beneficiaries of spousal visa petitions, but did not.

<sup>176</sup> See, e.g., Office of Immigration Statistics, *supra* note 21 (indicating that approximately 20,000 immigrants under the age of eighteen obtained LPR status based on their relationship with a spouse).

<sup>177</sup> See Thronson, *supra* note 45, at 991.

<sup>178</sup> 8 U.S.C. § 1101(b), (c) (2012).



The treatment of married minor children, the vast majority of whom are girls, recalls both the concept of “children as property” and the treatment of women in an earlier era.<sup>179</sup> Married minor children are passed from the possession and control of their parents, to the possession and control of their spouses. Take the example, common in many cultures, in which parents arrange an early marriage of their daughter. The dependency construct assumes that parents have the liberty to make marriage decisions for their children, even if such decisions restrict their children’s opportunities to immigrate to the United States. Decisions relating to marriage are relegated to the private family and, therefore, release the state from any obligation to consult with the married minor child about her desire to enter and remain in the marriage.<sup>180</sup>

The criteria defining the preference categories for family-based immigrants reinforce the significance of marital status, as opposed to age, as a proxy for adulthood and independence. For example, married minor children are actually in a lower preference classification than the unmarried adult sons and daughters of U.S. citizens.<sup>181</sup> The reports of Congressional commissions on immigration policy provide a window into the minds of legislators who have the ability to change which family members are prioritized for family reunification, even if their recommendations are not followed.<sup>182</sup> For example, in 1981, the Select Commission on Immigration and Refugee Policy recommended that Congress move the unmarried adult sons and daughters of U.S. citizens from the First Preference classification to the immediate relative category, based on its position that there should be no age-based distinctions among children to the right to quickly and easily reunite with their parents and that this change would not significantly increase the number of immediate relative immigrants.<sup>183</sup> Distinctions based on marital status, on the other hand, have not been similarly criticized as “artificial.”

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<sup>179</sup> See discussion *supra* Section I.C.

<sup>180</sup> See Appell, *supra* note 26, at 729; Bhabha, *supra* note 110, at 200 (“The parallels [between gender and] age discrimination are dramatic. Because the child is absent from the political and legislative process, his or her interests are unvoiced.”).

<sup>181</sup> 8 U.S.C. § 1153(a)(1), (a)(3).

<sup>182</sup> See, e.g., STAFF REPORT OF THE SELECT COMMISSION, *supra* note 54, at 115 (recommending that Congress add grandparents of adult U.S. citizens to the immediate relative category because “[g]randparents in many cultures are among the closest relatives who, as a result of family movements, may be left alone in their homelands during their later years”).

<sup>183</sup> *Id.* at 114 (“[B]ecause [the Commission] believes that there should not be an artificial distinction based on the age of unmarried sons and daughters of U.S. citizens, it recommends moving the current first preference—the adult unmarried sons

There are several additional features of the family-based immigration system that support the observation that being characterized as a child has more to do with one's perceived dependency status than one's level of development. First, the requisite "unmarried" status of childhood does not mean "never married." As defined by statute, "unmarried" means "an individual who at such time [that a petition is filed] is not married, whether or not previously married."<sup>184</sup> A previously married person who has been divorced or widowed and is under the age of twenty-one is still considered a child in the family-based immigration system.<sup>185</sup> Just as the minor children and adult sons and daughters of U.S. citizens can be reclassified to a less-favorable family preference classification if they marry, they may also move in the other direction—to more favorable classifications—if they obtain a divorce.<sup>186</sup> The same is true for the minor children and adult sons and daughters of lawful permanent residents, who, but for their marital status, would be eligible to immigrate in the Second Preference classification. However, as with marriages, divorces must be in good faith and not obtained solely to qualify for immigration benefits.<sup>187</sup>

It is only in this context that the USCIS Adjudicator's Field Manual urges officers to closely examine the claimed marital status of a child beneficiary. The manual instructs officers to carefully scrutinize a beneficiary who is "abnormally old to be an unmarried person in a particular country."<sup>188</sup> By

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and daughters of U.S. citizens—to the numerically unlimited family reunification subcategory. The expansion of this numerically exempt subcategory to include all unmarried sons and daughters of U.S. citizens will not result in significant increases in immigration.”).

<sup>184</sup> 8 U.S.C. § 1101(a)(39).

<sup>185</sup> USCIS, ADJUDICATOR'S FIELD MANUAL, *supra* note 85, § 21.2(b)(1)(B) (“A son or daughter who is unmarried and under age 21 is a child. Unmarried does not mean ‘never married’ and a previously married son or daughter under age 21 is a ‘child.’”).

<sup>186</sup> See 8 U.S.C. § 1151(f)(3) (stating that the age of an alien on the date of termination of a marriage shall be used to determine if a petition originally filed for a married son or daughter of a U.S. citizen should be converted to an immediate relative petition or a First Preference classification—i.e., for an unmarried adult son or daughter).

<sup>187</sup> See, e.g., *Bazzi v. Holder*, 746 F.3d 640, 646 (6th Cir. 2013) (describing “sham divorce” as a potential basis upon which to deny immigration benefits); *In re Aldecoaotolora*, 18 I. & N. Dec. 430 (B.I.A. 1983) (denying a visa where the beneficiary admitted that she divorced solely to obtain immigration benefits as the unmarried daughter of lawful permanent residents); see also USCIS, ADJUDICATOR'S FIELD MANUAL, *supra* note 85, § 21.2(b)(1)(B) (The ability of a previously married son or daughter under age twenty-one to be characterized as a child “raises the distinct possibility that someone might engage in divorce fraud in order to qualify for an immigration benefit. As we do not recognize a marriage which is contracted solely to circumvent immigration law, we also do not recognize a divorce which is obtained solely to circumvent immigration law.”).

<sup>188</sup> USCIS, ADJUDICATOR'S FIELD MANUAL, *supra* note 85, § 21.2(b)(1)(B).

doing so, USCIS explicitly recognizes that in many cultures, marriages routinely occur at ages that would be considered “fairly young” in the United States.<sup>189</sup> It uses this knowledge to screen for fraud among beneficiaries who are claimed as children of U.S. citizens or permanent residents, or unmarried adult sons and daughters of U.S. citizens, but who actually have undeclared marriages.<sup>190</sup> The nature of this guidance further supports the impression, discussed above, that in the family-based immigration system, USCIS is only concerned with the marital status of minors for the purpose of fraud detection.<sup>191</sup>

The ability to revert to the status of “child” after being divorced or widowed makes it clear that the law’s conception of childhood has nothing to do with physical, emotional, or cognitive development. Rather, in the family-based immigration system, perceived dependency status delineates childhood from adulthood. Moreover, the ability of adult sons and daughters of U.S. citizens to obtain more favorable immigration benefits after being divorced or widowed signifies the centrality of dependency relationships to the definition of the family unit. Indeed, the Board of Immigration Appeals has recognized that Congress’s intent in creating the First Preference classification was “based upon the belief that such unmarried children, although not minors, still belonged to the family unit.”<sup>192</sup>

Second, the family-based immigration system protects the children of U.S. citizens from “aging out” of eligibility for a visa but does not protect them from “marrying out.” The Child Status Protection Act (CSPA) adjusted the calculation of a child beneficiary’s age in order to partially correct for the effects of administrative inefficiency in processing visa applications.<sup>193</sup> For example, when a U.S. citizen files an immediate relative petition for his or her unmarried child before the child’s twenty-first birthday, that child will continue to be considered a “child” regardless of when the visa petition is actually processed.<sup>194</sup> The child’s age for purposes of the visa petition freezes as of the date it was filed; therefore, the petition will not be converted to

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<sup>189</sup> *Id.*

<sup>190</sup> It is apparently not unusual for petitioners with LPR status to fail to disclose the marriages of their children. *Id.* § 21.2(b)(9)(B) (“One of the most frequent problems in this area concerns petitioners who gained entry into the United States as children or unmarried sons or daughters, and whose pending petitions establish that they were actually married before entering the United States.”).

<sup>191</sup> See *supra* Section I.B.3.

<sup>192</sup> *In re Coletti*, 11 I. & N. Dec. 551, 553–54 (B.I.A. 1965); see *In re Aldecoaotolora*, 18 I. & N. Dec. at 431.

<sup>193</sup> Child Status Protection Act, Pub. L. No. 107-208, § 3, 116 Stat. 927, 928 (2002) (codified as amended at 8 U.S.C. § 1153(h) (2012)).

<sup>194</sup> *Id.* §§ 2, 3 (codified as amended at 8 U.S.C. §§ 1151(f)(1), 1153(h)).

a First Preference classification. The CSPA did not address the issue of “aging out” for the children of permanent residents. Therefore, many children who are under twenty-one years old at the time a petition is filed age out of the 2(A) category for spouses and children of permanent residents and “must be sponsored for admission under the 2(B) category” for unmarried adult sons and daughters, resulting in “a substantially longer wait time to obtain LPR status.”<sup>195</sup> The CSPA does, however, protect the beneficiaries of family petitions filed by refugees and asylum recipients from aging out of eligibility.<sup>196</sup> For example, if a principal applicant applies for asylum or refugee status before his or her child turns twenty-one, that child will continue to be classified as a child for all eligibility determinations related to the asylum or refugee application.

The fact that there is no such durable status protection for beneficiaries whose marriages disqualify them from eligibility for an immigration benefit signifies, once again, Congress’s belief that unmarried adult children remain dependent members of their parents’ family units, while married children—regardless of their age—do not.<sup>197</sup> This is a narrow definition of the family unit that does not account for the diversity of marriage practices and family structures around the world. It fails to account for married minor children who remain dependent on their parents. Underlying the law’s message that marital status trumps minority when it comes to defining membership in a family are old-fashioned, property-based notions of children and women, discussed above.<sup>198</sup>

Third, although marriage disqualifies minors from benefitting from parent-sponsored immigration petitions, there is nothing preventing minors who are parents themselves from being classified as children. However, the petitioning grandparent’s status determines whether or not the grandchild would be able to immigrate with his or her parent. There is no direct relative petition category for grandchildren of U.S. citizens and permanent residents, but the grandchildren of

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<sup>195</sup> KANDEL, *supra* note 51, at 18.

<sup>196</sup> 8 U.S.C. § 1157(c)(2)(B) (2012) (codifying the CSPA as applied to refugees); *id.* § 1158(b)(3)(B) (codifying the CSPA as applied to asylees).

<sup>197</sup> See *Akhtar v. Gonzales*, 406 F.3d 399, 408 (6th Cir. 2005) (“Congress very well could have determined that older children and married children are, in general, sufficiently independent such that they do not merit preferential treatment based on the asylum status of their parents.”).

<sup>198</sup> See *supra* Section I.C. The lack of durable status protection for marriages affects adults who wish to marry as well. In the most extreme scenario, the unmarried son or daughter of a permanent resident who never naturalizes must postpone marriage for decades otherwise his or her visa petition will be automatically revoked. 8 C.F.R. § 205.1(a)(3)(i)(I) (2012).

certain U.S. citizens and permanent residents can potentially derive immigration benefits from their parents.<sup>199</sup> For example, a permanent resident filing a visa petition for his child in the 2(A) category can also include his grandchild as a derivative beneficiary. In a striking example of the poor logic within the family-based immigration system, however, U.S. citizens filing visa petitions for their children as immediate relatives cannot include their grandchildren as derivative beneficiaries.<sup>200</sup> This is because there is no statutory language providing for the derivative beneficiaries of immediate relatives. This effectively separates the minor parent from her child, breaking up a family unit despite Congress's intentions in creating the family preference categories.<sup>201</sup> The children of refugees find themselves in a similar predicament, choosing between immigrating immediately and enduring a separation from their children or waiting to immigrate in order to remain with their children.<sup>202</sup>

The preceding paragraph illustrates how in the family-based immigration system, it is possible for an unmarried person who has dependent children of her own to be characterized as a child for immigration purposes (i.e., dependent on her parents). At the same time, a childless married minor is not considered a child for the purpose of benefitting from a parent-sponsored petition because she is assumed to be dependent on her spouse. If maturity or development—rather than dependency—informed the INA's construction of childhood, it is possible that these children would be categorized differently. Embedded within these provisions, however, is Congress's assumptions about dependency, namely that a minor child who is raising a child of her own is not independent of her parents, but a married minor child is. The examples also

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<sup>199</sup> 8 U.S.C. § 1153(d) (indicating that the child of a family preference immigrant shall be entitled to the same status as his or her parent “if accompanying or following to join”).

<sup>200</sup> Thronson, *supra* note 118, at 404.

<sup>201</sup> In this situation, families typically choose between two options, neither of which is as good as the process available to permanent resident grandparents. The first option is for the child to petition for her own child after she obtains LPR status as an immediate relative, a process which would likely involve a years-long separation. 8 U.S.C. § 1153(a)(2)(A); *Immigrant Numbers for September 2016*, *supra* note 147, at 2 (indicating that visas are available for the children of permanent residents whose petitions were filed before November 15, 2014). The second option would be for the U.S. citizen grandparent to wait until his or her child turns twenty-one before filing a petition for the child in the First Preference category. 8 U.S.C. § 1153(a)(1). The child would have to wait longer for a visa, but she would be able to include her own child as a derivative beneficiary. See *supra* Section I.B.1 for a description of limitations on different categories of family-sponsored immigrants.

<sup>202</sup> 8 U.S.C. § 1157(c)(2) (describing entitlement to admission of the spouse or child of a refugee, employing the definition of child in 8 U.S.C. § 1101(b)(1)).

illustrate how well-established principles within immigration law—here, the superior rights of U.S. citizens compared to permanent residents to sponsor family members to immigrate—can become inverted when the law does not conceive of family structures that are outside of the norm contemplated by Congress. They also show how the law’s failure to explicitly address the situation of married minor children can create inconsistencies in the way that children of the same age are treated.

C. *Comparing the Treatment of Married Minor Children in Other Immigration Contexts*

The degree to which other immigration designations and statuses for children are based on the dependency construct varies. Special Immigrant Juvenile Status is one such immigration benefit that strongly aligns with the family-based immigration system’s conception of the child. Here, the child is defined in relation to an absent or otherwise unfit parent on whom the child should have been able to depend.<sup>203</sup> Since that parent is unavailable, another individual or entity must step into the role of responsible parent. A married child who is under age twenty-one is not eligible for SIJS because it is presumed that she is no longer dependent on her parent.<sup>204</sup> She is unequivocally excluded from eligibility for SIJS, even if she presented an otherwise identical history of parental abuse, abandonment, or neglect as an unmarried child. On the other hand, if her marriage ends in annulment, divorce, or death, and she still meets the other eligibility criteria, she will qualify for SIJS.<sup>205</sup> This interpretation is consistent with the INA’s definition of “child” in the family-based immigration context: A person under the age of twenty-one who is unmarried, even if previously married, is presumed to be dependent on her parents once again. Another common feature is that Congress provided “age-out protection” for SIJS petitioners, similar to the durable age protection provided to the children of U.S.

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<sup>203</sup> *Id.* § 1101(a)(27)(J)(i) (describing a special immigrant juvenile as an immigrant “whose reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law”).

<sup>204</sup> Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54,978, 54,980 (Sept. 6, 2011) (to be codified at 8 C.F.R. § 204.11) (“Marriage alters the dependent relationship . . . and emancipates the child.”).

<sup>205</sup> 8 U.S.C. § 1101(a)(39) (defining “unmarried” to mean “an individual who at such time is not married, whether or not previously married”); Telephone Interview with Aryah Somers Landsberger, Dir. of Programs, Grantmakers Concerned with Immigrants & Refugees (July 22, 2016) (recounting a case in which she engaged a family lawyer in Guatemala to obtain a divorce for a sixteen-year-old client, who later qualified for SIJS) (on file with author).

citizens under the Child Status Protection Act.<sup>206</sup> So long as SIJS petitioners file their applications before they turn twenty-one, they remain eligible for SIJS even if the petition is adjudicated after their twenty-first birthday.<sup>207</sup> Congress had an opportunity to create similar protection for SIJS petitioners who marry, but did not, relying on its assumption that unmarried children and young adults are dependent, while married children—regardless of their age—are not.<sup>208</sup>

The Deferred Action for Childhood Arrivals (DACA) program and the Unaccompanied Alien Child (UAC) designation do not include eligibility criteria related to marital status. Indeed, there is no suggestion that dependency or the performance of activities or rituals that typically signify adulthood—such as marriage, employment, or financial independence—would affect an individual's eligibility for the special treatment afforded by either program. This represents an inconsistency in the way that immigration law regards the significance of a minor child's marital status among various definitions applying to children. Marriage does not prevent an individual from being characterized as a child under the UAC definition or the DACA program, but it does prevent her from being characterized as a child in the family-based immigration system and for SIJS.<sup>209</sup> One possible explanation for this inconsistency is that those who drafted the DACA policy and UAC statutes did not specifically consider the situation of married children. Another possibility is that they did consider the possibility and intended to treat married children the same as unmarried children. The inconsistency could also be the result of compromise in the legislative process.<sup>210</sup>

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<sup>206</sup> 8 U.S.C. § 1232(d)(6).

<sup>207</sup> Congress addressed this issue in part because there was ambiguity regarding the age-related eligibility criterion. *See id.* In some jurisdictions, when petitioners turned twenty-one years old, their pending SIJS petitions were automatically denied; in others, they remained eligible. Hlass, *supra* note 130, at 323–24. Ambiguity remains, however, with respect to the eligibility of individuals who are unable to obtain a dependency order because they are between the ages of eighteen and twenty-one. *See id.* State laws regarding the jurisdiction of juvenile courts vary. *See id.*

<sup>208</sup> *See* Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54,978 at 54,980 (describing USCIS's decision to maintain the "unmarried" eligibility criterion as based on Congress' failure to extend durable marital status protection to SIJS petitioners).

<sup>209</sup> *See supra* Section I.B.1 (discussing children in the family-based immigration system), I.B.2 (discussing children for purposes of the UAC designation, the DACA program, and SIJS).

<sup>210</sup> Although the DACA Program is immigration policy, not legislation, it was inspired by the DREAM Act, federal legislation that would have benefited the same population as DACA. *See* Barack Obama, President of the U.S., Remarks by the President on Immigration (June 15, 2012), <https://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration> [<https://perma.cc/A68L-3BQA>] ("Precisely because this is temporary, Congress needs to act. There is still time for Congress to pass the DREAM Act this year, because these kids deserve to plan their lives in more than two-

Whatever the reason, this difference in the treatment of married minor children signals that the conceptions of childhood embraced in the DACA and UAC contexts differ slightly from the dependency construct that underlies the family-based immigration system and SIJS. Conceptions of childhood that include married minor children emphasize children's developmental distinctiveness over their dependency. From the developmental perspective, children are essentially incomplete, fragile, and vulnerable, and therefore deserve special treatment and protection.<sup>211</sup> This construct is well accepted in the juvenile justice context, especially since the U.S. Supreme Court recognized that children and the decisions they make deserve special consideration: "Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly during the formative years of childhood and adolescence, minors often lack the experience, perspective and judgment expected of adults."<sup>212</sup> The developmental construct also dominates the conception of childhood under international legal standards, which consider all persons under the age of eighteen to be children, regardless of whether they inhabit adult-like bodies and roles.<sup>213</sup> A married minor child, therefore, is still considered a child who can seek protection under international legal standards.

The developmental construct of childhood is closely linked with the dependency construct in that it presumes that children do not have "the capacity and experience to exercise

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year increments."). The legislation was ultimately defeated in Congress, but, like DACA, did not include an eligibility criterion related to marital status. See DREAM Act of 2010, S. 3992, 111th Cong. (2010).

<sup>211</sup> Appell, *supra* note 108, at 708 ("[C]hildhood is the developmental process of becoming an adult."); Thronson, *supra* note 45, at 985; Somers et al., *supra* note 102, at 325 ("The developmental construction presents childhood as a progression of cognitive and psychosocial development towards adulthood.").

<sup>212</sup> Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982).

<sup>213</sup> See CRC, *supra* note 2, art. 1; U.N. High Comm'r for Refugees, *Refugee Children: Guidelines on Protection and Care*, 27 (1994), <http://www.refworld.org/docid/3ae6b3470.html> [<https://perma.cc/A5L8-9ZRB>] ("[G]enerally speaking they have not fully developed the emotional maturity and judgment, nor achieved the social status, of adults that come with life experience. . . . Their physical maturity but lack of full adult capabilities and status also make them possible targets of exploitation. . . ."). The definition of "child" in Article 1 of the CRC contains an exception for national laws under which individuals may attain majority earlier than the age of eighteen. CRC, *supra* note 2, art. 1. However, the UN interprets the CRC protections as applying to everyone under the age of eighteen and seeks to empower those who have attained majority earlier by permitting them to "claim the benefits of adulthood." U.N. High Comm'r for Refugees, *Action for the Rights of Children: Critical Issues Abuse and Exploitation*, 4 (2001), <http://www.unhcr.org/protection/children/3bb81aea4/action-rights-children-arc-critical-issues-abuse-exploitation.html> [<https://perma.cc/JCH2-TVQ7>].



control over themselves or others,” and are therefore dependent on adults for those purposes.<sup>214</sup> Children are considered “both different from adults and less than adults . . . not yet full persons.”<sup>215</sup> This is the justification for giving children special treatment and protection, but not necessarily rights. Part III of this article argues that these developmental facts should inform, but need not dictate, how childhood is understood in immigration law, particularly because of the diversity of cultures, environments, and socioeconomic backgrounds it encounters.

### III. MOVING TOWARD A MORE THOUGHTFUL UNDERSTANDING OF CHILDHOOD

#### A. *Why Reform Is Necessary*

This article began with an explanation of the social constructionist approach to understanding childhood. This approach posits that the prevailing conception of childhood in a given society at a given time will influence that society’s determination of the rights that should be accorded to children.<sup>216</sup> When the prevailing conception of childhood changes, the understanding of children’s rights should also change. One function of U.S. immigration law is to reflect society’s expectations of the behavior of newcomers.<sup>217</sup> However, the law is based on outdated conceptions of children as dependent, vulnerable, and unwise and no longer “synchronize[s] with broadly held views of [children in] law and society.”<sup>218</sup> Immigration law also holds a narrow conception of family based on the nuclear family, an idea that has been recognized as theoretically flawed and practically defunct in other legal settings.<sup>219</sup> Although the law is “framed as neutral and objective,” it actually privileges and normalizes a particular conception of women—and, I argue, of children as well—while

<sup>214</sup> Appell, *supra* note 26, at 717; *see also* Appell, *supra* note 108, at 715 (“Until [children] can govern themselves, they are dependent.”).

<sup>215</sup> Appell, *supra* note 108, at 714–15.

<sup>216</sup> PHILIP E. VEERMAN, *THE RIGHTS OF THE CHILD AND THE CHANGING IMAGE OF CHILDHOOD* 10 (1992).

<sup>217</sup> Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 AM. J. COMP. L. 511, 530 (1995).

<sup>218</sup> Thronson, *supra* note 118, at 395.

<sup>219</sup> *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 504 (1977) (describing nontraditional families as “equally venerable and equally deserving of constitutional recognition”); Linda Kelly, *Family Planning, American Style*, 52 ALA. L. REV. 943, 945–47 (2001); Bhabha, *supra* note 110, at 194 (“The assumption of a unitary family, all of whose members share the same nationality, live in the same country, travel together or follow the (male) bread winner, have the same short- or long-term interests, and have easy access to each other, is outmoded.”).

punishing or marginalizing those who defy the existing definitions.<sup>220</sup> Feminist and other critical theorists have described how scientific ideas and legal constructions are based on the perspective of a “white, male, heterosexual adult,” and therefore marginalize the perspectives of those who fall outside of the “norm.”<sup>221</sup> These biases have been criticized as “cultural[ly] myopi[c]” and “engaging in a form of racial coercion” that has fallen from favor in the domestic family law context.<sup>222</sup>

These outdated assumptions underlying conceptions of children and the family in immigration law are largely unacknowledged and unexamined by those who would have the power to change them; and yet, they continue to influence how children are treated in the immigration system.<sup>223</sup> As a result, immigration law marginalizes and unfairly punishes children for the actions and inaction of their parents, such as choosing to enter the country without valid entry documents.<sup>224</sup> It judges the appropriateness of deportation primarily based on its impact on adult, not child, deportees.<sup>225</sup> These shortcomings in the law are exaggerated as applied to married minor children. In light of contemporary sociological and developmental understandings of childhood that have filtered into domestic law and society,<sup>226</sup> relying on the dependency construct of childhood in immigration law is no longer justified.

In the family-based immigration system, marital status plays a critical role in determining who is considered a child versus who is an adult. However, as the preceding part has shown, the lines that immigration law has drawn reflect an incoherent understanding of childhood, particularly as the law applies to children who do not fit the mold created for them by the dependency construct.<sup>227</sup> In fact, the law functions to

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<sup>220</sup> Appell, *supra* note 26, at 738–39.

<sup>221</sup> *Id.*

<sup>222</sup> Kelly, *supra* note 219, at 963–64 (alterations in original) (quoting Moore, 431 U.S. at 507 (Brennan, J., concurring)).

<sup>223</sup> Thronson, *supra* note 45, at 980.

<sup>224</sup> *Id.*

<sup>225</sup> Bhabha, *supra* note 110, at 192.

<sup>226</sup> Thronson, *supra* note 118, at 407–08 (“In sharp contrast to the rigidity of immigration law, mainstream approaches to families and children largely leave families to make their own critical decisions about who is considered family. . . . Immigration law’s exclusive use of a narrow construct of family effectively ‘negates other prevalent family configurations which make up functional families, such as single-parent households, grandparent-grandchild households, same-sex couples, polygamous marriages, and extended family configurations.’” (footnote omitted) (quoting Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family That Protects Children’s Fundamental Human Rights*, 41 COLUM. HUM. RTS. L. REV. 509, 515 (2010))).

<sup>227</sup> See *supra* Part II.

disadvantage married minor children vis-à-vis unmarried minor children and married adult children. Minors whose marriages are recognized by USCIS are not considered adults for the purpose of petitioning for their parents and spouses, and are not considered children for the purpose of benefitting from a parent-sponsored petition. They are limited by immigration law's constructions of childhood, in the former case, and family, in the latter case.

Although there is a need for reform in the way that immigration law understands childhood as a whole, focusing on reforming the family-based immigration laws as applied to married minor children is a good first step for two reasons: First, because the current laws' failure to acknowledge the existence of married minor children makes a potentially vulnerable population invisible; and second, because the injustice of the laws as applied is particularly stark.

### *B. A Critical, Child-Centered Approach*

U.S. immigration law does not and cannot account for all of the differences in geography, socioeconomic status, and culture that influence constructions of childhood and family around the world. Each country's approach to the treatment of children in its immigration laws is informed by its own domestic laws, policy agendas, and respect for international human rights norms.<sup>228</sup> For example, the question of whether citizen children should have the right to create immigration status for their parents requires balancing the child's interest in family reunification with the state's interest in controlling the number of immigrants it admits and the bases for their admission.<sup>229</sup> The challenge for U.S. immigration law is to address its incoherent treatment of children without throwing out its core principles and assumptions.<sup>230</sup> It can do this by moving toward an understanding of childhood and family that is informed by child-centered approaches and critical theory. This section describes how a critical, child-centered approach can empower children, recognizing their independence and autonomy, while still acknowledging their need for care and protection.

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<sup>228</sup> Bhabha, *supra* note 110, at 201–02.

<sup>229</sup> *Id.*

<sup>230</sup> The core principles of U.S. immigration law and policy are currently contested, but have historically included “(1) family reunification; (2) admission of persons with needed skills; (3) refugee protection; and (4) country-of-origin diversity.” KANDEL, *supra* note 51, at 1. A core assumption of U.S. immigration law and policy as they relate to children is that children are dependent on their parents for protection, socialization, and meeting their basic needs. *See supra* Section I.C.

The principle at the heart of a child-centered approach is that children have participation rights that are similar to those of adults, but they also may claim special assistance to effectuate those rights because of their age.<sup>231</sup> This approach takes into account the impact of culture and environment on a child's individual development.<sup>232</sup> It permits children to exercise a flexible range of rights consistent with their individual levels of cognitive development, maturity, independence, and comfort. Importantly, it requires that children have a say in decisions that affect their lives.<sup>233</sup>

The United Nations Convention on the Rights of the Child (CRC) is a well-known representation of the child-centered approach. It replaced prior attempts to conceptualize the needs and rights of children around the world that were based on a dependency construct of childhood.<sup>234</sup> Since U.S. immigration agencies already consult international human rights norms in certain immigration law contexts, the CRC might be considered a potential source of guidance on the treatment of children.<sup>235</sup> However, scholars have criticized the CRC and child-centered jurisprudence for failing to challenge the essence of the dependency construct.<sup>236</sup> Although children are considered people first—just like adults—their ability to exercise the rights of personhood is ultimately limited by their incomplete development.<sup>237</sup> The CRC embraces the legal categorization and subordination of the child by defining the child as a “human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”<sup>238</sup> Its description of childhood as a time of education, play, and limited responsibility indicates its agreement with the developmental construct of childhood.<sup>239</sup> The CRC does not address children's

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<sup>231</sup> See, e.g., Appell, *supra* note 26, at 719.

<sup>232</sup> Somers et al., *supra* note 102, at 326.

<sup>233</sup> CRC, *supra* note 2, art. 12(1) (assuring “the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child”).

<sup>234</sup> See, e.g., Appell, *supra* note 26, at 733 (noting the CRC's significance for “recognizing children not as property but as human beings who should have identities, procedural rights, and moral rights” (footnotes omitted)); Jonathan Todres, *A Child Rights-Based Approach to Reconstruction in Haiti*, 6 INTERCULTURAL HUM. RTS. L. REV. 43, 68–70 (2011) (describing the CRC's role in advancing children's rights after the 2010 earthquake in Haiti).

<sup>235</sup> See, e.g., Thronson, *supra* note 45, at 988.

<sup>236</sup> Appell, *supra* note 26, at 717.

<sup>237</sup> Ann Quennerstedt, *Children, but Not Really Humans? Critical Reflections on the Hampering Effect of the “3p's”*, 18 INT'L J. CHILD. RTS. 619, 631–32 (2010) (criticizing the CRC's failure to contemplate political rights for children).

<sup>238</sup> CRC, *supra* note 2, art. 1; see *id.* art. 5 (describing children as having “evolving capacities”).

<sup>239</sup> *Id.* art. 31 (“State parties recognize the right of the child to rest and leisure, to engage in play and recreational activities . . .”).

relationships outside of their relationships with parents, the state, and schools.<sup>240</sup> Finally, the CRC does not address the issue of how to conceive of married minor children. Although international efforts to regulate child marriage began decades ago, scholars have criticized the discourse as dominated by western assumptions about children as dependent, weak, vulnerable, and powerless.<sup>241</sup> By adopting a “universalist psychological model of the child,” these efforts, like U.S. immigration law, disempower and fail to accommodate children from societies that do not share the western model of childhood.<sup>242</sup>

Any reform of the family-based immigration system that aims to adopt a critical, child-centered approach for the treatment of married minor children must consider the cultural constructions of childhood in its analysis. It must recognize that social constructions of childhood rooted in political and legal systems created the idea of children as inherently vulnerable, and not the other way around.<sup>243</sup> It must accommodate the complexity of global perspectives on childhood while still recognizing the negative impact that early marriage has on girls’ lives.<sup>244</sup> It must take into account the socioeconomic conditions in which girls marry and the role that their families play post-marriage in the process of determining their rights. It must move away from the old approach of vilifying cultural practices and instead draw attention to the actions of developed nations that contribute to the systemic causes of early marriage. And it must ensure that children have more than just a “voice” in decisions concerning their lives. A critical child-centered approach will follow the lead of feminist jurisprudence and ask: What purpose does the designation of childhood serve? Who benefits from the construction of childhood and who suffers? How can the law function to correct for outdated and irrelevant assumptions about children?

At a minimum, a critical child-centered approach ensures that children are the authors of “what they want as

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<sup>240</sup> Appell, *supra* note 108, at 724 (describing how law school textbooks on children and the law do not typically cover or inquire about other types of relationships that children may have).

<sup>241</sup> Bunting, *supra* note 8, at 32 (describing global regulation of the issue of child marriage as being “grounded in a colonial project”).

<sup>242</sup> Appell, *supra* note 26, at 729–33 & n.96 (quoting ALLISON JAMES, CHRIS JENKS & ALAN PROUT, *supra* note 24, at 141); James, *From the Child’s Point of View*, *supra* note 24, at 45, 52. *But see* Warner, *supra* note 10, at 247–48 (criticizing international convention addressing child marriage for being overly deferential to local cultural and religious practices and for failing to recognize the “special vulnerabilities of children” with respect to free consent to marriage).

<sup>243</sup> Appell, *supra* note 26, at 718.

<sup>244</sup> Bunting, *supra* note 8, at 31.

children.”<sup>245</sup> Immigration policy has been dominated by concerns about how family separation impacts adults, without consideration of the child’s perspective at all.<sup>246</sup> When children’s views are taken into account in child-centered approaches, it is done in the context of determining “the best interests of the child.”<sup>247</sup> Ultimately, however, it is an adult’s opinion of what is in a child’s best interest that matters.<sup>248</sup> The critical child-centered approach regards children as “independent and reliable informants” about their lives and accords primacy—not mere consideration—to their views on the extent to which they wish to exercise their rights as people and the support they need in order to do so effectively.<sup>249</sup> It treats children with dignity, takes their opinions seriously, and enables them to exercise their rights as people to the fullest extent.

### C. *First Steps Toward Improving the Treatment of Married Minor Children*

This section proposes two steps toward correcting the incoherent understanding of childhood in U.S. immigration law. If realized, these changes could serve as a model for making incremental improvements in the treatment of children throughout the immigration system, regardless of the number of immigrant petitions they would affect directly. Together, these improvements would chip away at the dependency construct that underlies the inequities facing immigrant children. Practically, they address the double disadvantage that married minors face relative to unmarried minor children and married adult children. There is no basis for concern that these reforms to treat married minor children in a more thoughtful way would promote or encourage the practice of child marriage. Parents who marry off their daughters at a

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<sup>245</sup> Appell, *supra* note 108, at 756; James, *From the Child’s Point of View*, *supra* note 24, at 52–53 (“[T]he study of childhood need no longer simply be the adult study of children’s socialisation or child development. . . . To understand ‘childhood’ . . . we should ask children themselves.”).

<sup>246</sup> See Bhabha, *supra* note 110, at 200–01 (“It is a strange paradox of modern public policy that children are considered to have a fundamental right to family life and yet no legally enforceable right, unlike their adult counterparts, to initiate family reunion or resist family separation where a family is divided by national borders.” (footnotes omitted)).

<sup>247</sup> CRC, *supra* note 2, art. 3(1) (assuring that “the best interests of the child will be a primary consideration” in all actions concerning children).

<sup>248</sup> Thronson, *supra* note 45, at 989.

<sup>249</sup> James, *From the Child’s Point of View*, *supra* note 24, at 53; Bhabha, *supra* note 110, at 206 (describing “an approach that explores the substantive meaning of a right from the perspective of the affected applicant, in this case a baby, rather than from the standpoint of a generic adult claimant”).

young age and the spouses who marry them are neither rewarded nor punished for those actions. Rather, the major effect of the reforms is to make married minor children visible in a legal regime that treats them like people, not property, nor wards, nor lost causes.

### 1. Permit Married Minor Children to Petition for Their Parents and Siblings

The INA should be amended to permit married minor U.S. citizen children to petition for their parents and siblings. Under the INA, only U.S. citizens who are age twenty-one and over may successfully file immigrant visa petitions for their parents and siblings.<sup>250</sup> Married minor children are treated no differently than unmarried minor children in this context. This result does not make sense, even using the logic of the dependency construct. If USCIS has recognized a marriage that alters a minor's dependency relationship with her parents, such that she is no longer dependent on them for care, she is effectively an adult for all other purposes in the family-based immigration system. When USCIS recognizes the marriage of a minor, it enables the married minor child to reunite with her spouse in the role of either petitioner or beneficiary. The law recognizes that the minor child has created a new family relationship, and it should therefore also recognize her legally enforceable right to protect family unity.<sup>251</sup> There is no logical or practical reason to deny that right to a minor who is treated like an adult for all other purposes. Outside of the family-based immigration context, children are permitted to present independent claims for immigration status and, therefore, exercise some autonomy over immigration decisions.<sup>252</sup> It would not be a radical departure to permit married minor children, who are otherwise treated as adults, to petition for their parents and siblings.

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<sup>250</sup> See *supra* Section II.A.1.

<sup>251</sup> See generally Office of Immigration Statistics, *supra* note 21 (providing evidence of USCIS approval of spousal immigrant visas for persons under the age of eighteen).

<sup>252</sup> Thronson, *supra* note 45, at 995 & n.103 (providing as an example the fact that children may independently apply for asylum when they fear persecution in their native countries).

## 2. Parent-Sponsored Visa Petitions: Analyze the Dependency Relationship Between Parents and Married Minor Children

When parents file visa petitions for their married minor children, USCIS should analyze the dependency relationship between the petitioner and beneficiary before determining the preference classification of the beneficiary. Married minor children who are wholly or partially dependent on their U.S. citizen parents should be classified as immediate relatives, and their spouses should receive provisional visas to immigrate to the United States. Similarly, married minor children who are dependent on their permanent resident parents should be considered Second Preference (2A) immigrants and their spouses granted provisional visas within that classification. In determining whether or not a minor child is dependent on her parents, USCIS should take a totality-of-the-circumstances approach and consider all evidence submitted by the petitioner and beneficiary regarding the relationship between the two. This would include all evidence of financial, legal, social, and emotional ties between the petitioner and beneficiary.

This proposal challenges the dependency construct of childhood by treating a married minor child as both a child of her parents and a married spouse. It requires USCIS to investigate the actual nature of the financial and emotional relationship between parents and children—an activity similar to determining whether a marriage is bona fide, which USCIS already does.<sup>253</sup> Like the existing process, USCIS officers in this case would approve a petition so long as they determined that the parent-child relationship was valid and that the dependent relationship was not being claimed solely for immigration purposes. USCIS may develop a nonexclusive list of indications that a dependent relationship may have been claimed solely for immigration benefits—for example, if the beneficiary has an independent source of substantial income or controls valuable assets. In line with the critical child-centered approach, the beneficiary child's perspective is just as important as the petitioner parent's perspective in the adjudication of the petition. The married minor child's ability to move to a higher preference classification can be considered an accommodation on account of her youth.<sup>254</sup>

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<sup>253</sup> U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 85, § 21.3(a)(2)(H) (describing interview process for determining whether a marriage is bona fide).

<sup>254</sup> See Appell, *supra* note 26, at 754 (describing an “accommodationist approach” to children's rights that both enhances children's liberty and accounts for their vulnerability).



This approach directly acknowledges the diversity of marital practices around the world. Certainly, the immigration system cannot function by adopting a completely subjective, culture-dependent interpretation of marriage; but it also need not unquestioningly apply its own stereotypes and biases about child marriage to assess the motivations of foreigners.<sup>255</sup> By focusing on the actual dependency relationship between petitioner parents and married minor children as the source of immigration rights, the proposal does not stray too far from the dependency construct at the heart of the family-based immigration system. Finally, this approach permits the U.S. government to credibly condemn the deleterious consequences of child marriage—which it already does, led by the Department of State and the United States Agency for International Development—while still being sensitive to different understandings of the terms “child” and “marriage” in different cultures.

## CONCLUSION

Long-standing assumptions about dependency, marriage, and the family underlie the construction of childhood in U.S. immigration law. These assumptions recall an earlier set of assumptions that once applied to women and that are now understood as discriminatory and socially constructed. This article presents arguments for reforming U.S. immigration law as applied to children and focuses on the treatment of married minor children in the family-based immigration system. This subgroup of immigrant children is treated inconsistently as either married adults or unmarried children; such inconsistent treatment doubles the disadvantages they face relative to both groups. Reforming the law’s treatment of married minor children in the family-based immigration system is a first step toward incorporating a critical child-centered perspective into the immigration law. In an era of unprecedented child immigration to the United States and predicted increases in the number of child marriages globally, immigration law should reflect a contemporary understanding of childhood.

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<sup>255</sup> See Bhabha, *supra* note 110, at 197–98 (describing the British Government’s moderation of the application of the “primary purpose rule,” which restricted the entry of young South Asian men based on an assumption that the primary purpose of an arranged marriage to a British-born woman was the husband’s immigration into Britain).