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Children, Families, and Immigration Enforcement

Matthew Lister

25.1 Introduction

Although there is now a large and sophisticated literature on ethical or moral matters relating to family immigration (Lister 2007; Lister 2018; Ferracioli 2016; Yong 2016; Song 2019, 132-150; Honohan 2009) and immigration enforcement (Silverman 2014; Mendoza 2017, 195-117; Silva 2015, Hosein 2019, 58-78; Sager 2018; Lister 2020), the intersection of these topics has not been greatly explored. This is unfortunate, as particular and difficult normative issues arise in relation to immigration enforcement when applied to children and to families where some members are unauthorized migrants and others are citizens or authorized migrants ("mixed-status" families). This chapter addresses this deficit, explaining some of these special difficulties and providing suggestions as to how they may be addressed.

For the sake of this chapter, it will be assumed that states should have a significant degree of discretion in setting their own immigration policies. That is to say, I will assume that there is no general or basic right of free movement or a requirement of justice to establish open borders. This discretion is limited by obligations to protect refugees (Lister 2013; Cherem 2016; Owen 2020) and to provide for at least some degree of family migration. Family migration rights rest on the fundamental right to family life, and this right in turn provides strong reason to involuntarily separate families only in limited circumstances. I will also assume that, within limits, states may take steps to make immigration rules effective via enforcement. As will be shown, our topic poses special problems and complications for specific enforcement methods and policies but does not directly challenge the idea that enforcement is possible or acceptable.

Even if we accept the assumptions set out above, there are several special issues and concerns that arise when we look at children and families in relation to immigration enforcement. This chapter looks at these issues and addresses how the above assumptions need to be modified or adjusted in these cases. In doing so, I will look at four typical scenarios that arise repeatedly in many countries and explore the special moral considerations that come up in each of them. Three of these scenarios involve unauthorized migrants as an essential element:

1) Unauthorized and unaccompanied minor child
2) Families of unauthorized migrants including unauthorized children

3) Mixed status families, where these have two main variants:
    a. Citizen child, unauthorized parents
    b. Unauthorized spouse/partner with citizen[1] partner/spouse

A final scenario also involves a non-citizen, but not one who was unauthorized:

4) Non-citizen who has/had legal status is removable for crime/character based grounds, but has immediate relatives who are citizens – a partner/spouse or children.

25.2 Unauthorized Unaccompanied Minors

In this scenario we consider an unauthorized[2] minor who is not accompanied by adult family members. Several issues arise in this situation immediately. Consider first the matter of detention.[3] Most states detain unauthorized migrants when they are encountered, at least for a short time, and we might accept that at least short-term detention to determine status and to facilitate removal for those without a right to remain can be acceptable for adults. The case of minors, however, poses particular problems. On the one hand, it will rarely be reasonable or acceptable to release an unaccompanied minor on his or her own recognizance, as we might with some adults. On the other hand, it will usually be unacceptable to detain unaccompanied minors in the same facilities as adults, especially in cases where these are jail-like.[4] So, what should be done in such situations?

In the short term it will be necessary to provide safe short-term lodging to unaccompanied minors. How, exactly, this can and should be done will depend on the circumstances – whether authorities are dealing with individual cases or a small number of migrants, or a situation of mass flight, for example. Where the minor is first encountered – in a rural area or in a city or in unoccupied territory – may also matter for what sort of provisions can and should be provided, at least in the short term. A second necessary step will be to try to contact family – in the "home" country or the country of migration, both to potentially provide care and lodging, and to help determine the best path forward – that is, whether the child should remain in the country of migration or return home. This will be a necessary goal, if we are to seek the safety and the best interest of the minor, but will often in practice be complicated by the fact that the "in country" relatives may themselves be unauthorized, and so be uneager to interact with immigration officials.

Even if we assume that it is often acceptable to return many unauthorized migrants to their home country (perhaps especially if they have been in the country of migration for a short time), difficulties and complications arise in the case of unaccompanied minors. For example, if family members in the home country cannot be contacted, it may be unsafe to return the minor to the home country, even if it would be acceptable to return an adult. This might be so if the country does not have a well-functioning child welfare system, for example, meaning that return would likely mean living alone or on the streets. When this is the case, or when it would otherwise be unsafe to return an unaccompanied minor to her or his home country, a form of protection should be granted. While this need not necessarily be full permanent residence immediately, access to full residence will soon become the most acceptable result, given that the child in question will soon have spent a significant percentage or his or her formative years in the country of migration, and there is good reason to think that when this is the case, access to permanent residence is the best solution. (Lister 2010; Ferracioli 2022, 28-46) It is also important to note that some unaccompanied minors will be convention refugees,

meaning that they should be granted refugee protection, but will usually have an even more difficult time than an adult showing this. Special care should be given to unaccompanied minors to ensure that rights owed to them under international and domestic law dealing with refugees is met. (UNHCR 1992, 50-51).

What sorts of concrete steps should be taken to comply with the conditions above? First, special advocates should be provided to unaccompanied minors, to help them find family members in either the country of migration or the home country, and to access what would be the safest and best course for the child. Sometimes this will involve removing the child and returning her or him to family members or government officials in the home country, but often it will involve a grant of legal status which will have to also allow for basic needs to be met – by the government of the country of migration or by extended family members – including education, nutrition, and so on. This protection need not necessarily be permanent. If, say, a close family member is found in the home country and return would be safe after a few months or even one or two years, return may be the best course. But, if the child spends significant "formative" years in the country of migration, then arguments like those that support giving permanent resident status to so-called "Dreamers"[5] in the US will apply. (Note that one difference between "Dreamers" and unaccompanied minors that we might have first thought to be morally relevant – that "Dreamers" were typically brought to the US by their parents, and not of their own mature volition – is not actually relevant here, given that the people at question in this section would typically be too young to be held accountable for any moral fault in their entering without authorization, assuming we would find fault for that in an adult. We return briefly to this question below.)

Here we must address for the first time a worry that will come up for each of our scenarios, the question of moral hazard. That is, would taking this approach encourage more of the action that it seeks to remedy? If a state puts these plans in place, would it encourage more unaccompanied minors to cross state borders? While it is hard to be certain, I do not think this can be ruled out. Taking the path suggested above would make sending a child on his or her own, or sending for such a child, a better option than if the proposal was not in place, and we should always assume that migrants, like most people, are rational. However, even if this is so to a degree, this ought not cause us to reject the proposed path. First, if there is no presumptive default of permanent residence for unaccompanied minors, and no assumption of being able to sponsor family members for a visa, the increase in flows may not increase by too great of a level. Secondly, and more importantly, if an action is required by considerations of justice and accepted legal obligations, as will be the case in many instances of unaccompanied minors, then there can be an obligation to take the action, even if it imposes a cost on the one taking it.

25.3Unauthorized family with minor child

Our second major scenario involves an unauthorized family (or parent) with a minor child. Here we do not face the special issues that come up with an unaccompanied minor, since the child in question is "accompanied", but we still face important considerations that do not arise in the case of adults on their own, including the need to keep families together. To start with, if, as already argued, it will not normally be acceptable to keep minors in detention facilities where we might think it is acceptable to keep adults, then we will either have to provide special facilities for families, provide for their (perhaps monitored) released, or separate the family members.

The policy of separating families needs special consideration given that it was the recent policy of the Trump administration in the US. It is now beyond doubt that this was done with the specific intent of it being a deterrent to migrants crossing the southern border of the US (Dickerson 2022). We must here ask why, if it sometimes acceptable to separate parents from children (a point I will return to) it would be unacceptable to do this to deter unauthorized border crossings. There are several reasons. A first and important reason is that, in some cases, one or all of the family members in question will meet the requirements to be refugees under the Refugee Convention (and so under the domestic law of most signatory states.) When this is so, they have, under the Refugee Convention, a right to enter and apply for asylum without being subject to maltreatment (UNHCR 1992, 69; Goodwin-Gill 1996, 152-153). Only rarely, if ever, could family separation be justified in such cases, and then only for very short-term safety reasons, at most. This is especially the case given the generally recognized right to family unification for refugees (Beaton 2023; UNHCR 1992, 43-44). Here, though, the goal of deterrence is applied before an application for asylum can be made, let alone evaluated, indicating a naked attempt to avoid treaty and other legal obligations.

Even if the people in question are not convention refugees, they will often need and deserve humanitarian protection of some sort. States have different (usually insufficient) systems of complementary protection to respond to such situations, but these are again cases where deterrence of any sort is illegitimate, given that it is trying to prevent people for exercising rights or taking necessary steps for their own preservation where no risk of similar harm is imposed on others, and where there is no clear violation of a moral or legal obligation. (I return to this last point below.) We must here also note that the form of deterrence used here involves an infringement (at least) of important rights – the rights to family life and family unity – and an obligation to protect the best interests of children (MacLeod, 2018; Ferguson, 2018). Doing something we may not legitimately do in an especially bad way is, obviously enough, not acceptable.

A more interesting case involves unauthorized families who do not have good claims to asylum or other humanitarian protection. Could family separation as a deterrent be justified in these cases? One major issue is that it will normally be very difficult, if not impossible, to screen this group out from the one above before any harm is done. This should, perhaps, be sufficient to rule out deterrence through separation, but for now assume that we could make this distinction. Would it then be acceptable to use family separation as a deterrent for unauthorized migrants? No, for a few reasons.

The first reason is that such a policy would impose disproportionate harm onto minors, who cannot be seen as morally blameworthy in any case. Most plausible accounts of deterrence require it to be restricted by a proportionality principle, and if the harm is inflicted on someone who is morally blameless, the proportionality principle will easily be violated (Bentham 1948, [1789] 178-88; Hart 1968, 24-5). Secondly, the deterrence is also unacceptable when directed towards parents. As will be discussed further below, separation of family members is sometimes widely accepted, such as when a parent has committed a significant crime and is therefore imprisoned, or when it is necessary to achieve an important and acceptable goal, such as in the case of a draft for the purpose of self-defence. But, there are two important differences between these cases and the use of family separation for deterrence of unauthorized migration.

First, in both cases just mentioned, the separation of families is an incidental, if necessary, side-effect of an otherwise legitimate goal, with it at least being very difficult to see how the goals – legitimate punishment and incapacitation of the dangerous and national self-defence – could be achieved otherwise. Now, even in these cases we have reason to limit the separation as much as is reasonably possible. We see this with policies in some states of delaying imprisonment of parents of young children, or in providing them with different penalties, and in the common policy of giving lower draft priority to parents when possible. The Trump policy, however, specifically used family separation as a deterrent, imposing the separation to achieve its goal of reducing migration, and not as an unintentional side-effect to be minimized as far as possible. This makes it significantly harder to justify, even if it does deter people from behaviour that they have no right to do.

Here we may note another significant difference from the case of family separation that results from punishment for a serious crime. Even if we accept that states have a right to control migration, and even if we accept that they may take steps to control it via enforcement, it is not at all clear that unauthorized border crossing is itself a case of serious wrongdoing. This is especially so if we consider cases of unauthorized border crossing one-by-one, which seems to be required if we are to make a comparison with justified punishment for criminal wrongdoing. This is even more the case if we consider that it is not obvious, at least in the world we live in now, that non-citizens have an obligation to obey the immigration laws of other countries. This is to say, in our current world the right to enforce migration laws by states may not imply an obligation by all non-members to respect these laws. While there are plausible arguments to be made that in a much more fully just world there could be such an obligation,[6] the necessary conditions for such an obligation do not generally obtain in our world, at least for many unauthorized migrants. So, if an unauthorized migrant both does not commit a serious wrong in violating an immigration law, and does not have a moral obligation to follow or respect the law, then using measures that involve significant infringements of rights and the imposition of significant harms to deter the behaviour will be unacceptable. Family separation policies fit this description, and so will almost always be unacceptable when used as a deterrent.[7]

25.4 Mixed Status Families

The next scenario to consider involved mixed-status families. Here we may distinguish two main cases, first, one where there is one or more citizen-child with unauthorized parents, and second, one where a citizen has an unauthorized spouse or partner. (Other, more complex cases, some involving the mixture of the two above, are possible, but I will here focus on these two scenarios because, first, both involve relationships [minor child–parent and spouse – spouse] universally recognized to be especially important and which ground immigration rights in nearly all countries, as opposed to relationships such as those with adult siblings, grandparents, and other more distant relationships. Secondly, in many of the more complex cases, what we have can be seen as an iteration of the more basic cases, such as when an unauthorized person has both a citizen child and a citizen spouse.)

Importantly, at this point we are only considering cases where the unauthorized person has violated immigration laws (and perhaps laws on working without authorization or other essentially regulatory laws) but has not violated any criminal law[8] or otherwise shown themselves to be a danger to the community. In these cases we have, on the one side, a violation of immigration laws, and possibly other regulatory laws, and on the other a very important right

– the right to live with one's immediate family members – spouses and minor children. That there is an obligation to allow at least close family migration is accepted by most people working on migration, and reflected in the practice of most states. But, many states do not extend this right to all of the cases we are considering under this heading. In the US, for example, this right is in practice not available to most people who entered without inspection, and not available to unauthorized parents of minor children.[9]

Are the limits placed on mixed-status families acceptable? That is, is it reasonable to allow the removal of unauthorized aliens who have citizen spouses or minor children? There are two main arguments for allowing such removals. The first is that not doing so will "reward lawbreaking". This claim is not completely empty. In many normal cases like the ones we are considering, if the person had not violated the relevant immigration law, he or she would likely not have had the relationship in question, and so would not have this claim for changing status. Second, we should ask if making exceptions to normal immigration enforcement in these cases is likely to significantly increase unauthorized migration overall, and in particular if allowing these exceptions will increase the number of mixed-status families. Even if the answer to this question is yes, that may not settle the issue, but it will raise concerns about moral hazard[10] - a situation where attempting to address a problem gives rise to more of the same situation that needed to be addressed - that must be addressed.

Let's start with the first concern, that of "rewarding lawbreaking". We can accept that the violation of an immigration rule will often be a "but for" cause of the relationship here without this implying that granting a right to stay in the country of migration and gaining legal status is "rewarding" the "lawbreaking" in question. To see this, consider how in some other cases where violation of an immigration rule is a "but for" cause of some benefit, it is generally accepted that the benefit must still be provided. To use a clear case, violating migration regulations and rules on employment by people without authorization is a "but for" cause of engaging in employment by unauthorized aliens, but it seems clear morally, and is generally accepted legally, that if an unauthorized alien performs work, he or she must still be paid for the work they do.[11] This comparison suggests that not every benefit that depends, in some way, on having violated a rule can properly be seen as a "reward for" violating the rule. If this is right, then this objection loses much of its force. (See also here (Motomura 2012)).

While our first concern seemed to apply both in the case of citizen children and citizen partners, our second concern may give different answers in these two cases. It does not seem especially likely that allowing spouses of citizens to avoid normal immigration enforcement will increase unauthorized migration. This is because it would be highly presumptuous to expect to be able to move to a country and find a citizen spouse. And, even if we (more plausibly) worried that allowing these benefits would increase the temptation to engage in marriage fraud so as to be able to remain in the country, the proper way to deal with this issue would be to impose increased evidentiary standards for marriages when one partner was unauthorized, and to have in place penalties for citizens who engage in marriage fraud.[12]

What seems more plausible, however, is that if having a child in the state of migration is enough to prevent unauthorized parents from being removed, this will encourage unauthorized migration by pregnant women and couples who might have children. This inference does not depend on the idea that unauthorized migrants would treat having children merely instrumentally, but only that the availability of relief from enforcement would influence these

decisions. Given the already widespread practice of birth tourism to countries like the US with strong jus soli rules[13] it is not implausible to imagine that such rule changes would influence the behaviour of unauthorized migrants.

If we think that this is a significant concern, it might be addressed in a few ways. The most drastic, from the perspective of states that have strong *jus soli*[14] citizenship laws, would be to modify these laws to somewhat more closely resemble the law in Australia, which has only a weak *jus soli* rule. Without a strong *jus soli* rule, the problem of mixed status families with citizen children and unauthorized parents will rarely arise, in that way "solving" the problem. While many countries have *jus soli* rules that are much weaker than that found in the US and many other countries in the Americas, these rules create their own problems insofar as they can create a class of children raised in a country who are de facto but not de jure members. (Lister 2010; Ferracioli 2022, 9-27; Cohen and Ghosh 2019, 99-120). If we wish to avoid these problems, while still reducing incentives to create more of the mixed-status families we hope to avoid, we should look to less drastic steps than changing citizenship law. For example, a restrictive rule might only refrain from normal immigration enforcement either when the child has lived in the country of birth for some significant amount of time, or where it could be shown that it would be unsafe and unreasonable to expect the citizen child to accompany his or her parents to their country of citizenship. (This is, of course, presupposing that the child would have easy access to the citizenship of his or her parents. This will usually be so, but not always, and the legal issue may be complicated in various ways. For the sake of this chapter we must abstract from some of these complications, but people seeking to implement policy would obviously need to think them through carefully.) In the case that it would be unsafe or implausible for the child to move with her or his parents, a status less than full permanent resident status might be granted to the parents for some time. This status would not allow for the sponsorship of other relatives or access to citizenship until the time that the citizen child would be able to sponsor the parent under normal sponsorship rules, but would still maintain the ability of families to promote integration into the society of immigration.[15] Taking these steps would not fully eliminate the moral hazard in this case, but would reduce it and balance it against the hardship faced by mixed-status families and the best interests of the children. (One these hardships, see Zayas 2015.)

25.5 Mixed-Status Families and Criminal/Character Removal

Our final category involves non-citizens who are (or were[16]) lawful residents, but who face removal on criminal or character grounds, (where the later need not require a criminal conviction) and who also have close citizen family members, focusing here again on minor children and spouses or partners. Unlike our prior scenarios, this case involves someone who has violated a criminal law or otherwise shown themselves to be "of bad character".[17] Removal is a collateral consequence of the criminal violation. (On "collateral consequences", see Hoskins (2019).) This is important in that removal is not, officially, itself part of the punishment for violating the underlying law. If it were, there would be grave worries about inequitable treatment – about non-citizens being subject to significantly harsher penalties than citizens. But if this outcome is not supposed to be punishment, what is it? What (supposedly) justifies it? The best answer has two parts. First, we might think that the non-citizen has violated a (perhaps implied) promise to be of good character in exchange for the privilege of being allowed to migrate. Second, we may think that removal in this case is done to promote

the safety and well-being of the community – a dangerous element is removed, making the community over-all better off.

Several problems arise almost immediately from this account. One is that the crimes that are used to justify removal are extremely diverse, and may not provide any significant indication of on-going dangerousness. (That citizens who are punished for these crimes are typically not detained based on on-going dangerousness after they have served their sentences is indicative but not dispositive, given that there may be other good reasons to not allow post-enforcement confinement for dangerousness.) This worry is furthered by the fact that these laws typically operate in a strict-liability way – if the standard is met, the person is removable. There does not need to be any post-punishment showing of dangerousness before removal. Additionally, even if we could find that admission to a state involved an implied promise to be of good character (or if states modified their immigration policies to make such a promise explicit) it is unclear that such a promise could function to justify current policies in many states. Note that risk from removal for bad character or criminal grounds typically stops when an immigrant becomes a citizen. But, if having good character was a condition of migration, why would this be so? Why would the "promise" not still operate? On the other hand, we might reasonably doubt that a person could legitimately promise to comply with an arbitrarily long list of requirements in perpetuity, as is required by current policy. It seems implausible that we can promise to not do an indefinitely large list of things for an indefinitely long period of time. For these reasons the "promise" account seems less than compelling.

The above worries about removal on criminal or character grounds are general, applying to anyone who faces removal on such grounds. But there are also specific reasons why we might question the appropriateness of removal when the person removed is part of a mixed-status family. The first reason is like those considered above, and to questions of family migration in general. That is, the situation involves not only a non-citizen, but a citizen as well, and an infringement of his or her rights to family life. Given that these are important rights, they should be infringed only for very weighty reasons. Even if we give credit to the arguments made for removing non-citizens of "bad character" above, these would need to be balanced against the rights of citizens to live with their family members. We might also come at this question from a slightly different direction. In Australia, for example, immigration officials who are considering whether a non-citizen who is purportedly of bad character should be removed are charged with considering the "good of the community".[18] The normal way to do this is to look at the broader "community". This is not wrong insofar as it goes, but we should also consider that families are themselves part of the "community", and often the part with the most at stake. We might see this as especially important for children, given the obligation of states to take the best interest of children into account (Ferguson 2018). Sometimes this might tell in favour of removing the non-citizen, but in many cases where the non-citizen has one or more citizen child, the "community interests" may tell in favour of allowing the non-citizen to remain, especially when there is no strong inference of on-going dangerousness.

At this point a proponent of removing non-citizens who have committed crimes might note that, with "domestic" criminals, we also regularly separate them from their families for significant periods time, when they are in jail. This is true, but it is not obvious that it supports the removal of non-citizens in mixed-status families. Some of this issue has been discussed already above. Most relevantly here, we must note that, in the large majority of cases, the non-citizen who has been convicted of a crime has already been separated from his or her family to

the same degree as would be a citizen. The question is whether this deprivation should be extended indefinitely. We must here remember that, in most cases, the non-citizen will have already served whatever penalty is generally thought appropriate for the crimes he or she has committed. Because of this, we should normally hold that whatever harm is "deserved" by the non-citizen has already been given to them. Keeping this in mind, and keeping in mind the rights of children and spouses/partners, what should we do in these cases?

One approach would be hold that, if a non-citizen who is removable for criminal grounds has citizen immediate family members, the non-citizen may be removed only if it can be shown that there is a compelling need to do this that is significant enough to balance the harm that will come to family members if the non-citizen is removed. This approach would, to start, reverse the burden of proof required in many current legal systems, where the non-citizen must show that his or her removal would bring about bad results.[19] Under the proposal here, the state would be obliged to show that not removing the non-citizen would be likely to bring about specific harms. This might be done by showing that the non-citizen has continuing ties to organized crime, for example. But, the showing would need to be more specific and more significant than the normal risk of re-offending that exists for any particular person if the important rights of family members are to be appropriately respected.

25.6Conclusion and thoughts on future directions

In this chapter I have tried to show that special and difficult issues arise for immigration enforcement when we consider the case of children and families, especially mixed-status families. If my arguments are correct, states wishing to have just immigration policies will need to make several changes to current practice. But several important questions remain open for further study. For example, we may ask how far the arguments I have made in relation to citizens can and should be applied to permanent residents, and if they should be applied to all permanent residents, or only long-term ones or ones who have difficulty naturalizing for some reason. We might also investigate whether the type of arguments I have made in relation to immediate relatives can or should be extended in some ways – perhaps to a lesser degree – to other family members and perhaps to other relationships. (On this idea see Ferracioli 2016). These and other questions remain to be solved, but I hope that the importance of the issues discussed above is clear.[20]

Notes

[1] In many of the scenarios I will consider we might get similar conclusion with a permanent resident immediate family member rather than a citizen family member. This seems more likely to me to be the case for spouses/partners than for children, but space considerations prevent me from exploring that issue in detail. Similarly, for space considerations, and to isolate a clear case at first, I will mostly focus on scenarios where at least one family member is a citizen. I will very briefly address how and why we might extend this analysis to permanent resident family members at the end of the chapter.

[2] Note that it is not always completely straight-forward to determine unauthorized status even for adults, and that difficulty will likely be even higher for children, adding additional complexity to the scenario, but we will leave this issue aside here.

[3] For a more detailed discussion of normative issues relating to immigration detention, see the chapter by Felix Bender and Stephanie Silverman in this volume, and (Silverman 2014).

[4] Immigration detention facilities are sometimes literally situated in jails, though typically (but not always) in distinct wings. In other cases, the facilities are not located in a jail, but are physically very similar to jails.

Some detention facilities are much less jail-like, though few would find them desirable places to spend significant time.

[5] "Dreamers" are unauthorized residents in the US who were brought to the US by their parents when they were young and who have since grown up or otherwise spent significant time in the US.

[6] Colin Grey (2015) has provided the most sustained discussion of when and how an immigration regime could have authority over would-be migrants. However, for this authority to be established, the states in question would have to implement many significant changes from their current immigration policy and practice of international relations. Given this, on Grey's account, nearly all, perhaps all, states currently lack at least full authority to enforce their immigration law on non-citizens. David Miller (2021) has developed an account of authority in immigration law resting on the idea of a natural duty of justice. Such an account has plausibility, but will, in our current world, be greatly restricted by the stringent requirements of a duty of natural justice to apply. In my own work (Lister 2020) I have tried to show what can be done in this area if we do not assume that migrants have a general obligation to comply with the immigration laws of other states.

[7] For additional helpful discussion of closely related matters, see (Motomura 2012).

[8] Of course states may categorize immigration violations as "criminal" if they wish. The US does this for entry without inspection and for re-entry without permission after removal (see 8 USC § 1325 and § 1326 respectively.) However, these are, at worse, *malum prohibitum* offenses, with more in common with civil regulatory offenses than with core criminal laws.

[9] While some unauthorized immigrants can "adjust status" if they marry a US citizen, this option is in practice largely foreclosed for people who entered without inspection, as they are required to leave the US before applying for adjustment of status, but then are barred from returning to the US for up to 10 years. See INA § 212(a)(9)(B)(ii). For a child to be able to sponsor his or her parent for immigration benefits, the child must be 21 years of age or older, excluding the scenario considered here. See INA § 201(b)(2)(A)(i). Somewhat similar laws apply in Australia.

[10] For a helpful brief introduction to the idea of moral hazard, see (Heath 2010, pp. 117-33.)

[11] For discussion, see US Department of Labor Fact Sheet #48, available at https://www.dol.gov/agencies/whd/fact-sheets/48-hoffman-plastics. Similar rules apply in Australia.

[12] The US already has higher evidentiary standards for people applying for adjustment of status on the basis of marriage when one party is in removal proceedings. See INA § 245(e)(3). As noted above, this typically could not apply to people who entered without inspection. The proposal here might simply consist in applying this standard to people who entered without inspection as well. Penalties for marriage fraud exist in several countries. See 8 USC § 1325(c) (establishing penalties of up to five years in prison and a fine of up to $250,000) and Migration Act of 1958 s 240 (establishing a penalty of up to 10 years in prison) for Australia, for representative examples.

[13] For one example, see, Department of Justice, "Chinese National Pleads Guilty to Running Birth Tourism Scheme", https://www.justice.gov/usao-cdca/pr/chinese-national-pleads-guilty-running-birth-tourism-scheme-helped-aliens-give-birth-us. For a wide-ranging discussion of some of the issues here, see Reed-Sandoval (2020).

[14] "*Jus soli*" citizenship rules base citizenship on the location of birth. The strongest versions – such as that found in the US and many other countries in the Americas – grants citizenship upon birth in a territory without any other requirements. Weaker versions – more common in Europe and Australia – impose requirements other than mere birth in a territory before granting citizenship. In Australia, for example, a child born in Australia gains citizenship at birth only if at least one parent is a citizen or a permanent resident. See Australian Citizen Ship Act (2007) s 12(1)(a).

[15] On this last point, see (Motomura 2006).

[16] In Australia, for example, someone who "fails the character test" becomes an "unlawful non-citizen" as a matter of law. While this may be challenged, as a legal matter the person automatically loses legal permanent resident status once he or she violates the character test. See Migration Act of 1958 s 501. In other states loss of permanent resident status only comes after a ruling on removability. Because of this, in this scenario we have to consider both people who are, and ones who were, but no longer are, lawful permanent residents.

[17] In Australia, a person may be found to be "of bad character" without a criminal conviction if certain other factors are present. This is troubling on its own, but as most cancellations of visas are due to criminal convictions, and the other grounds usually involve criminal activity, even if not convictions, we will here focus on cases where there has been a conviction. See Migration Act of 1958 s 501(6).

[18] Immigration Direction 41.

[19] In Australia, see Immigration Direction 17, 2.17(c). In the US, see INA § 240A(b)(1)(D).

[20] A version of this chapter was presented at the Julius Stone Institute at the University of Sydney Law School. My thanks to the audience there, and especially to Kevin Walton, Luara Ferracioli, Sam Sphall, and Wojciech Sadurski for their comments, and to Caleb Yong for helpful conversation.

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