
BOOK REVIEWS

GROWING UP OUTSIDE THE LAW

IMMIGRATION OUTSIDE THE LAW. By Hiroshi Motomura. New York, N.Y.: Oxford University Press. 2014. Pp. 338. \$29.95.

*Reviewed by Stephen Lee**

INTRODUCTION

Immigration law has become unmerciful. Perhaps it has always been this way, but thanks to Professor Hiroshi Motomura,¹ at least we know that it wasn't always *only* this way. Motomura's 2006 book, *Americans in Waiting*,² explored a prior era in which arriving immigrants were welcomed so long as they declared their intention to naturalize and become citizens. Drawing from this lost chapter in American immigration history, Motomura urged us to resuscitate this presumption of belonging. He persuasively argued that immigrants today — many of whom society viewed and continues to view as pariahs — should be treated, not as permanent outsiders, but rather as “Americans in waiting.” Since 2006, *Americans in Waiting* has won several awards³ and permeated the public's consciousness — indeed, a wide range of organizations, from the National Day Laborer Organizing Network⁴ to the

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² HIROSHI MOTOMURA, *AMERICANS IN WAITING* (2006).

³ In 2006, *Americans in Waiting* was awarded the Professional and Scholarly Publishing Award for Excellence (category: Law & Legal Studies) by the Association of American Publishers. See Press Release, Ass'n of Am. Publishers, Inc., Association of American Publishers Announces the Winners of the 2006 PSP Awards for Excellence (Feb. 6, 2007), http://pspcentral.org/rtAwards/attachArchive/winners_2006.doc. It was also placed on the Department of State's suggested reading list for Foreign Service Officers. See U.S. DEP'T OF STATE, *Suggested Reading List*, https://careers.state.gov/uploads/ff/03/ff03e644688fe25f74ff3bo641c59e9d/Updated_FSOT_Reading_List_Aug2013.pdf (last visited Feb. 1, 2015) [<http://perma.cc/3JET-D32P>]. Finally, it has been reviewed in a number of peer-reviewed journals and law reviews including *Perspectives on Politics*, *American Historical Review*, *Immigration Law Today*, *International History Review*, *Journal of American History*, *Law and History Review*, *Law and Politics Book Review*, *LLRX.com*, *Political Science Quarterly*, the *Michigan Law Review Annual Survey of Books Relating to the Law*, and the *Harvard Law Review*.

⁴ See Press Release, Nat'l Day Laborer Org. Network, Day Laborers Respond to Secretary Napolitano's Immigration Speech (Oct. 4, 2011), <http://www.ndlon.org/en/pressroom/press-releases>

New York Times editorial board,⁵ has called this country's twelve million unauthorized immigrants this generation's "Americans in waiting." But *Americans in Waiting* told a story about lawful or authorized immigration, which limited its ability to speak directly to current immigration debates fixated primarily on the fate of unauthorized immigrants. Enter *Immigration Outside the Law*, Motomura's new book that takes on this topic directly. This book explains precisely why many unauthorized immigrants should also be understood as "Americans in waiting" despite their tenuous status under the law.

To make such a bold claim, Motomura turns to the 1982 Supreme Court decision *Plyler v. Doe*,⁶ which invalidated the State of Texas's attempt to exclude unauthorized immigrant schoolchildren from K-12 public schools.⁷ Using parameters set out in *Plyler*, Motomura provides a framework for evaluating a number of divisive issues paralyzing modern immigration debates. This framework points to counterintuitive but principled conclusions. *Immigration Outside the Law* explains why, for example, local attempts to allocate benefits to unauthorized immigrants (such as granting in-state tuition to undocumented college students) may be defensible even where local attempts to enforce immigration laws (such as criminalizing the failure to produce proof of lawful presence) may not be. Motomura is an award-winning teacher,⁸ and this book shows why that is so. Just to take one example, the book's introduction includes a visual representation of the *Plyler* parameters, which neatly illustrate the complex relationship between and among the parameters (p. 14, fig. 1.1). This diagram is labeled as a road map, but I tend to think of it as a diagnostic tool, something akin to an optometrist's phoropter in which the different parameters operate as different analytical lenses. *Immigration Outside the Law* doesn't help you get somewhere else so much as it helps you see things more clearly right where you are. As the lenses are adjusted, changed, and combined, the reader enjoys a crisper and sharper picture of just how much of U.S. social, political, and economic life is affected by and dependent upon unauthorized immigrants. This reality, combined with the basic principles

/item/177-day-laborers-respond-to-secretary-napolitano-s-immigration-speech [http://perma.cc/9X7N-7VCS] (characterizing immigration reform as "legalization for millions of Americans-in-Waiting").

⁵ See Editorial, *Immigrants, Criminalized*, N.Y. TIMES, Nov. 27, 2009, at A38.

⁶ 457 U.S. 202 (1982).

⁷ *Id.* at 230.

⁸ See Press Release, UCLA Sch. of Law, Professor Motomura Selected to Receive UCLA's Distinguished Teaching Award (Mar. 4, 2014), <http://www.law.ucla.edu/news-and-events/in-the-news/2014/03/professor-motomura-selected-to-receive-uclas-distinguished-teaching-award> [http://perma.cc/MQ3C-N24C]; Press Release, UCLA Sch. of Law, Professor Motomura Honored with Chris K. Iijima Teacher and Mentor Award (Jan. 28, 2013), <https://www.law.ucla.edu/news-and-events/in-the-news/2013/01/Professor-Motomura-Honored-with-Chris-K-Iijima-Teacher-and-Mentor-Award> [http://perma.cc/8594-EK6Q].

of fairness, pragmatism, and realism, demand that the law be reformed to reflect the degree to which unauthorized immigrants bear the markers of belonging.

Yet, at the core of *Immigration Outside the Law* resides a critical assumption built into any *Plyler*-centric theory of rights: that what is true and right as to unauthorized schoolchildren is also true and right as to unauthorized immigrants more generally. In deciding to invalidate the State of Texas's attempt to deny unauthorized immigrant children access to public schools, the Court drew a moral distinction between the unauthorized parents who chose to enter the United States "by stealth and in violation of our law" and their unauthorized children who bear a status "over which [they] can have little control."⁹ Excluding unauthorized schoolchildren from school would unfairly "direct[] the onus of a parent's misconduct against his children," the Court reasoned.¹⁰ Thus, *Immigration Outside the Law* amounts to an argument that childhood arrivals do not occupy a special moral ground. Rather, it suggests that a variety of equitable principles justify allocating membership benefits to childhood arrivals and adulthood arrivals alike. Within this formulation, childhood arrivals and adulthood arrivals represent moral equivalents. Because both groups are embedded within U.S. life, neither group enjoys a moral advantage in claiming a membership benefit.

In this Review, I want to do two things. The first is to bolster Motomura's claim. I want to suggest that Motomura's central claim is defensible — unauthorized immigrants are in fact "Americans in waiting" in many cases — but I want to suggest that a broader set of resources might help defenders of immigrant rights — like Motomura — to mount an even stronger defense. To do this, I borrow insights from the burgeoning social science literature on immigrant brokering. This body of work reveals the active and strategic steps that immigrants take to integrate into their surrounding communities.¹¹ Specifically, this work reveals the extent to which immigrant youth assist their parents across a variety of contexts. Not only do they provide basic translation services, but they also often help their parents "broker" or "mediate" complex interactions such as investigating legal claims, opening bank accounts, securing loans, and facilitating political education and activity. In short, these children help their parents partake in U.S. life. Thus, the Court in *Plyler* may have been right after all about childhood arrivals occupying a special place in American society, but not for the innocence-based reasons it offered. Rather, what sets childhood arrivals apart from their adulthood-arrival counterparts

⁹ *Plyler*, 457 U.S. at 220.

¹⁰ *Id.*

¹¹ See *infra* Part III, pp. 1426–46.

is their ability to advance immigration's well-recognized goal of integration. Childhood arrivals can help forge ties between natives and newcomers, and bridge the gap separating the mainstream and the margins. Immigration laws empower citizens and lawful permanent residents (LPRs) to sponsor their family members, and against this backdrop, childhood arrivals might be understood as a class of quasi-sponsors. They lack the formal ability to confer lawful status to their parents, but they still help ensure that their parents become productive and valuable members of their communities.

A second goal of this Review is to give unauthorized youth their due. Unauthorized youth have been at the forefront of immigration debates in recent years. Indeed, they have impacted public discourse in ways that both challenge and bolster the legitimacy of law. In 2013, for example, nine young men and women intentionally crossed into Mexico and back into the United States through Nogales, Arizona, to protest Obama's deportation policies.¹² Although several were eligible for relief under the Deferred Action for Childhood Arrivals (DACA) program, they imperiled their eligibility by leaving the United States in an act of civil disobedience to protest the Obama administration's deportation-focused immigration enforcement strategy.¹³ And in 2014, the California Supreme Court held that unauthorized immigrants can be licensed to practice law despite their lack of authorization to live or work in the United States.¹⁴ Rather than waiting to be recognized as Americans, in both of these instances, immigrant youth have practically dared the Obama Administration, our courts, and the public to find some reason to deny them their proper place in our national community. These immigrants may have grown up outside of immigration law, but they have laid claim to American legal culture and its commitment to principles of equality and belonging.

Part I of this Review provides a detailed account of Motomura's project. Part II highlights the moral bright line drawn by *Plyler* and explains how Motomura addresses this conceptual hurdle. Part III explores how immigrant youth and immigrant adults have qualitatively different experiences being "illegal," and how attempts to integrate often form a part of a larger, collective enterprise rather than something that happens in isolation. The empirics-based brokering literature

¹² See Julia Preston, *9 in Deportation Protest Are Held in Bid to Re-Enter U.S.*, N.Y. TIMES, July 23, 2013, <http://www.nytimes.com/2013/07/24/us/9-in-deportation-protest-are-held-in-bid-to-re-enter-us.html>.

¹³ See Leti Volpp, *Civility and the Undocumented Alien*, in CIVILITY, LEGALITY, AND JUSTICE IN AMERICA 69, 96–97 (Austin Sarat ed., 2014).

¹⁴ See *In re Garcia*, 315 P.3d 117, 121 (Cal. 2014); see also Jennifer Medina, *Allowed to Join the Bar, but Not to Take a Job*, N.Y. TIMES, Jan. 2, 2014, <http://www.nytimes.com/2014/01/03/us/immigrant-in-us-illegally-may-practice-law-california-court-rules.html>.

suggests that youth play an active part in advancing their parents' interests, thus illustrating the role that unauthorized children play in assisting their parents to integrate. Indeed, as I explain, childhood arrivals function as quasi-sponsors in the migration process. Part IV considers how a brokering vision of membership underlies recent administrative relief programs and how those programs could have gone even further than they did. I then conclude.

I. UNAUTHORIZED AMERICANS IN WAITING

Very early on in *Immigration Outside the Law*, Motomura explains that his book tries to accomplish two goals: one is to provide a framework for understanding why immigration law is marked by “ambivalence and disagreement” and the second is to “evaluate and suggest responses to unauthorized migration” (p. 4). In pursuing these twin goals, Motomura uses themes articulated in *Plyler v. Doe* to organize the chapters of the book. The themes set up a wide-ranging discussion of issues related to immigration and immigrant rights. But if there is a meta theme to *Immigration Outside the Law*, it is integration as a process and as a set of values. Throughout the book, Motomura grapples with how laws facilitate or impede immigrant integration, and the strongest positions he stakes out are on the rights, benefits, and privileges he believes should be allocated to those immigrants who embrace the integration imperative.

The relationship between law and integration is a subject Motomura first took up in his book *Americans in Waiting*. And the themes developed there are put to use in *Immigration Outside the Law*. *Americans in Waiting* addresses a period in American history in which lawful migrants received rights and benefits indistinguishable from those held by and available to citizens, provided they had declared an intention to naturalize. In *Immigration Outside the Law*, Motomura undertakes the more ambitious goal of extending this argument into the context of unauthorized migration. In this Part, I summarize Motomura's core argument in *Immigration Outside the Law*, and in doing so, I begin with a brief summary of *Americans in Waiting*. Discussing these two books together highlights Motomura's primary argument — namely, that many unauthorized immigrants today, like authorized immigrants in the past, are best understood as Americans in waiting.

A. Americans in Waiting

Americans in Waiting is a book comprised of both descriptive and normative pieces. The descriptive piece sets out a framework for the different types of rights and benefits immigrants are entitled to as immigrants. Motomura suggests that these rights are often organized

around three different principles: (1) immigration as contract; (2) immigration as affiliation; and (3) immigration as transition.¹⁵

According to Motomura, a theory of immigration as contract is loosely based on the “ideas of fairness and justice often associated with contracts.”¹⁶ This model does not suggest that immigration proceeds by “offers” of admission being made by the United States, which are then negotiated and “accepted” by migrants as they enter.¹⁷ Rather, he sketches a picture of immigration in which the decision to come to the United States triggers “a set of expectations and understandings that newcomers have of their new country, and their new country has of newcomers.”¹⁸ In terms of fairness and justice, immigration as contract can lead to harsh outcomes for immigrants. Motomura characterizes the original plenary-power cases issued during the era of Asian exclusion as immigration-as-contract cases.¹⁹ So long as Congress and the President give notice to immigrants that their rights are being curtailed or extinguished, Congress and the President are usually free to act no matter how drastically those rights are curtailed or extinguished.²⁰

A second basis for immigrant rights arises within a model of immigration Motomura calls “immigration as affiliation.” As a theory of rights, Motomura explains that these rights focus on whether “[immigrants] have been here for a long time and have strong family and community ties.”²¹ Immigration as affiliation eases away from the notion that the expectations set at the moment of an immigrant’s initial entry dictate the rights that an immigrant will possess forever thereafter. Rather than viewing rights as frozen in time, affiliation principles recognize that an immigrant’s rights may expand, increase, and evolve over time as circumstances change. Underlying this model is the belief that immigration involves a “gradual decline in a newcomer’s attachment to her former country as part of an incremental process in which her life’s center of gravity shifts to the United States.”²²

A third basis for rights is grounded in a model Motomura calls “immigration as transition.” From 1795 to 1952, lawful immigrants

¹⁵ See MOTOMURA, *supra* note 2, at 9–14.

¹⁶ *Id.* at 10.

¹⁷ See *id.*

¹⁸ *Id.*

¹⁹ See *id.* at 15–31.

²⁰ See *id.* at 29. Because these types of schemes arise from principles of notice and settled expectations, at times, contract principles may protect immigrants against governmental encroachment, see, e.g., *INS v. St. Cyr*, 533 U.S. 289, 314–18 (2001) (holding that a lawful permanent resident who was eligible for discretionary relief at the time of entering a plea deal for a drug conviction continues to remain eligible despite an intervening change in law rendering ineligible those convicted of such crimes), but on the whole, these types of immigration rules favor the state, see MOTOMURA, *supra* note 2, at 54–59.

²¹ MOTOMURA, *supra* note 2, at 11; see also *id.* at 10–11.

²² *Id.* at 89.

could become “intending citizens” provided they filed a “declaration of intent” several years before applying for naturalization.²³ Filing such declarations enabled immigrants to begin enjoying many of the rights and privileges typically reserved for citizens, such as voting, owning property, and holding public office.²⁴ Although much of contemporary immigration law treats “immigrants as outsiders until shown otherwise,” Motomura insists that much can be learned by revisiting a time when immigration laws “treat[ed] lawful immigrants as Americans in waiting, as if they would eventually become citizens of the United States, and thus confer[red] on immigrants a *presumed equality*.”²⁵

Immigration-as-transition principles would do away with the notion that rights are something to be earned over time. Rather, treating immigrants as Americans in waiting would narrow the rights gap separating noncitizens and citizens at the outset. It would create a presumption of belonging rather than merely preserving the possibility that an immigrant might someday belong.²⁶

Ultimately, *Americans in Waiting* asks the state to concede more membership benefits to lawful immigrants than it currently does. This request comprises the book’s normative piece. Goods and opportunities that are typically reserved for citizens, Motomura argues, ought to be allocated to lawful immigrants. Doing so is not only the right thing to do in Motomura’s estimation, but it also serves the state’s goal of integration and incorporation. In other words, giving lawful immigrants a broader set of goods and opportunities will facilitate the transition process. As a policy imperative, a transition model invites reform-minded individuals to revisit issues that have long been resolved against noncitizens. Such new policies may include opening access to federal public assistance programs like Supplemental Security Income or food stamps; allowing noncitizens to cast votes in elections; giving immigrants a chance to serve their communities and country through public-service jobs; and finally, and probably most importantly, slowing the deportation machinery to prevent the mass expulsion of lawful immigrants.²⁷ Treating immigrants as Americans in waiting, Motomura suggests, “giv[es] lawful immigrants the best chance to belong in America, in a broad sense that goes beyond formal citizenship to include integration into American society.”²⁸

²³ See *id.* at 8.

²⁴ See *id.* at 116–17.

²⁵ *Id.* at 9.

²⁶ See *id.* at 152, 155.

²⁷ See *id.* at 190–97.

²⁸ *Id.* at 189.

B. Immigration Outside the Law

With *Immigration Outside the Law*, Motomura steps out of the staid past and into the tempestuous present. Just as he did in *Americans in Waiting*, Motomura once again makes a contribution that speaks in both descriptive and normative tones. Unlike *Americans in Waiting*, in *Immigration Outside the Law*, it is harder to determine when Motomura is explaining how the world is and when he is arguing for how it should be. And perhaps this is how it must be. *Immigration Outside the Law* addresses “illegal” or unauthorized migration, a topic in which “the disagreements run deep, with voices vehement and shrill, fighting over the very words deployed” (p. 4). One side, with its fixation on the rule of law, vilifies “illegals” (p. 4). The other side, with its willingness to privilege equitable considerations, rushes to the defense of “undocumented immigrants” (p. 4). Indeed, Motomura’s decision to coin the phrase “immigration outside the law” represents an attempt to cool the rising temperature of immigration debates. As he explains, the phrase “refers accurately to migrants who are outside the zone of permission in US law, while moving away from politically charged wording” (p. 4). To my original point: marrying descriptive and normative endeavors may be inevitable given how hard it is to say who migrants are without also committing to a position on what they deserve.

For his part, Motomura uses *Immigration Outside the Law* as an opportunity to clarify the terms of debate and engagement. Roughly speaking, this is the descriptive piece of *Immigration Outside the Law*. Motomura observes, “Beyond the broadly shared belief that something must be done, there is little consensus. Serious proposals span a breathtaking range from broad-scale legalization with expanded lawful admissions to zero-tolerance enforcement with criminal prosecution of immigration law violators” (p. 13). To make consensus or something like it a greater possibility, Motomura begins with the landmark Supreme Court decision, *Plyler v. Doe*, from which he extrapolates a number of themes relevant to the decision. These themes, Motomura contends, identify modern flashpoints of disagreement. And Motomura’s explanation for how these disagreements should be resolved provides the normative piece to the book. Building on the framework he established in *Americans in Waiting*, Motomura takes the ambitious step of arguing that many unauthorized immigrants, like lawful immigrants, can and should be thought of as Americans in waiting. In other words, not only should unauthorized immigrants be given a chance to earn a seat at the table, the law should also be construed to give them the best possible chance to do so.

Immigration Outside the Law opens in Texas during the 1970s as state legislators began contemplating what to do with “the flood of migrants streaming across the Mexican border,” many of whom brought

along “children who, like their parents, were in the country in violation of federal immigration law — and taking up precious seats in public school classrooms” (p. 1). These sentiments eventually led to the passage of Education Code section 21.031, the law at the heart of a litigation challenge that eventually became *Plyler v. Doe* (p. 1). This law prohibited the use of state funding for any child who was not “legally admitted” into the United States (p. 1).²⁹ To enforce this mandate, the law allowed school districts either to deny unauthorized migrant children altogether or to charge them tuition (p. 1). Two suits with two separate sets of lawyers moved through the district courts and the Fifth Circuit in parallel fashion (p. 3). The cases were combined once the Supreme Court granted certiorari (p. 3). And as students of constitutional law well know, the Court invalidated the Texas law on equal protection grounds in a 5–4 decision.³⁰ The Court held that while the law neither targeted a suspect class nor impinged upon a fundamental right, the relative innocence of the schoolchildren plaintiffs combined with the “fundamental role” that education plays in “maintaining the fabric of our society” counseled in favor of invalidating the law.³¹

Many scholars often cite *Plyler* as the high-water mark of noncitizen rights (p. 9).³² But despite the *Plyler* Court’s generous treatment of noncitizens, the unique and ad hoc nature of its reasoning largely limits its holding to the K–12 public educational setting. Motomura concedes *Plyler*’s inelasticity, but explains that his interest goes beyond its narrow doctrinal confines: “The holding in *Plyler v. Doe* was narrow as a matter of constitutional law, and its ethos remains deeply contested. One can reasonably ask if the [U.S.] Supreme Court would reach the same result today. But this uncertainty shows precisely why *Plyler* endures as an essential lens. The gap between arguments and counterarguments on many aspects of unauthorized migration reflects how much each side accepts or rejects the *Plyler* ethos” (p. 17).³³ Thus, Motomura uses *Plyler* to organize many current debates about immigration law and policy. Put differently, Motomura is less interested in what *Plyler* enforces as a matter of law than in what it reflects about the values embedded in the law and in our legal culture.

²⁹ See TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1981), *invalidated by Plyler v. Doe*, 457 U.S. 202 (1982).

³⁰ See *Plyler*, 457 U.S. 202.

³¹ *Id.* at 221; see *id.* at 216–23.

³² See, e.g., Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1120 (1994) (noting that *Plyler* “tends to be viewed as the ultimate aliens’ rights decision”).

³³ Motomura observes that “[h]istorical documents show that Justice Powell cast the pivotal fifth vote for the Court’s opinion only because its reasoning was limited to the education of children and avoided broader pronouncements about constitutional rights” (p. 89).

What exactly does *Plyler* reflect? To begin with, Motomura extrapolates three themes from *Plyler*: (1) the meaning of unlawful presence; (2) the role, if any, of local entities in regulating immigrants; and (3) the terms on which unauthorized migrants should be integrated (p. 14). These three themes, Motomura contends, hold the *Plyler* decision together. The *meaning of unlawful presence* refers to the Court's ambivalence toward the legal status of schoolchildren plaintiffs, which Motomura explains reflects the ambivalence the immigration code exhibits toward unauthorized immigrants generally. "[T]here is no assurance that a child subject to deportation will ever be deported," the Court explained in *Plyler*.³⁴ According to Motomura, this sentiment arises within a reality in which "even when a violation is clear, its consequences are not" (p. 21). It is entirely possible (as modern history has demonstrated³⁵) that someone who lives and works in clear violation of immigration law today may someday qualify for lawful status in the future.

Many communities around the country see this as precisely the problem, which leads to a second theme: the place of *local entities* in regulating immigrants. Recognizing the groundswell of laws targeting immigrants over the last decade, Motomura explains that the law in *Plyler* stands as "an early modern example of indirect state and local immigration enforcement" (p. 70). Because the case was resolved on equal protection grounds, the Court did not address the question of whether federal law preempted the Texas statute, but the modern relevance of this aspect of the case is indisputable: "In 2012, state legislatures considered nearly 1,000 bills, enacted 156 laws, and adopted 111 resolutions on topics relating to immigrants and immigration" (p. 85).

The third theme, the terms on which immigrants are *integrated*, addresses the special place occupied by unauthorized youth within the larger pool of unauthorized immigrants. Motomura focuses on the Court's critical assumption that plaintiffs were "future members of [U.S.] society" (p. 88). The key difference separating childhood arrivals from adulthood arrivals was that the former group had the opportunity to go through the U.S. educational system, and as the Court reminded us, education "is the very foundation of good citizenship,"³⁶ thus reaffirming the important, integrative work that schools perform (p. 88). Denying access to schools would create "the specter of a permanent caste of undocumented resident aliens,"³⁷ which would unset-

³⁴ *Plyler*, 457 U.S. at 226.

³⁵ See *infra* Part IV, pp. 1446–49.

³⁶ See *Plyler*, 457 U.S. at 223 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

³⁷ The author quotes *Plyler*, 457 U.S. at 218–19.

tle “a Nation that prides itself on adherence to principles of equality under law” (p. 88).³⁸

C. Unauthorized Immigrants as Americans in Waiting

The three *Plyler* themes comprise the first three chapters of the book. These chapters perform important prefatory work for the second part of the book in which Motomura explores how these themes are connected and how those connections implicate important legal issues and policy debates. Specifically, the *Plyler* themes speak to the following flashpoints in the current immigration debate: (4) immigration enforcement authority; (5) community building; and (6) mass legalization programs (p. 16).

Motomura observes that modern debates over *immigration enforcement authority* unfold on the terrain of immigration federalism. Over the last several years, a number of states have passed laws enabling local law enforcement officers to help identify and detain potentially removable immigrants (pp. 60, 64). Many of these enforcement schemes enable local law enforcement officials to detain potentially removable immigrants while federal authorities verify the immigration status of those who are detained. Such an allocation of authority, so the logic goes, defers to federal judgment on the matter of immigration status while allowing localities to pursue legitimate criminal law enforcement goals.

Any evaluation of the potential benefits of these local law enforcement programs (*Plyler*'s second theme), Motomura insists, must also account for the equality costs borne by communities in light of the ambiguities surrounding unlawful status (*Plyler*'s first theme) (pp. 15–16). Allowing local law enforcement agencies to enforce immigration laws increases their discretionary authority. And because discretionary decisions are largely unreviewable, the reality is that local enforcement programs expanding the authority of police will create even more problems of “racial or ethnic discrimination that will escape detection and remedy” (p. 115). By zeroing in on how immigrants help *build communities*, Motomura recognizes how local entities (*Plyler*'s second theme) can, through their expansive regulatory powers, facilitate the integration of unauthorized immigrants (*Plyler*'s third theme) (p. 16). Tuition relief bills (pp. 150–51), bar license rules (pp. 145, 150), labor and employment rights (pp. 156–60), and criminal procedure protections (pp. 161–62) all stand as examples of how a variety of laws place noncitizens and citizens on equal footing even if immigration and citizenship laws insist on their unequal stature. More than anything, Motomura demonstrates through this discussion that law is no mono-

³⁸ The author quotes *Plyler*, 457 U.S. at 19. An internal quotation mark has been omitted.

lith. He shows that localities can creatively piece together a variety of legal protections to allow a sense of community to flourish.

Motomura's discussion of immigration enforcement authority and community building leads him to endorse a particular application of the preemption doctrine. He argues that local laws that extend immigration enforcement authority should be preempted while those that facilitate community building (thereby ignoring an individual's immigration status in most cases) should be left standing. Here, Motomura has some explaining to do. Why should one set of local laws get trounced by preemption doctrine while the other withstands it? The difference, he explains, stems from the kinds of harms each type of law generates. Enforcement laws create opportunities for discretionary decisionmaking, especially at the individual officer level. And because history has shown that these types of decisions have a discriminatory impact and routinely evade meaningful review, Motomura insists on this seemingly asymmetric application because preemption serves a prophylactic function (p. 115). Preemption wrests away altogether immigration enforcement discretion from the many (state officials) and consolidates it in the relatively few (federal officials). Motomura *does not* argue that federal immigration officials never engage in discriminatory enforcement practices. He concedes that they do. In fact, he states that "the unfortunate but unavoidable lesson of history and human nature is that discrimination will occur," and it is for this reason that we must "create structures that anticipate this regrettable fact" (p. 140). For Motomura, a robust application of the preemption doctrine provides just such a structure.

By contrast, the harms associated with benefits programs are much more diffuse, according to Motomura, and qualitatively different from "targeting some persons for selective enforcement because they fit a police officer's image of an illegal alien" (p. 153). The denial of benefits can evince cruelty and state indifference to human suffering, but it does not represent the primary tool through which states and localities subordinate marginalized communities. Motomura reminds us that exclusion on the basis of race or ethnicity in the realm of immigration and citizenship law invites particular solicitude given that national citizenship stands "as an enduring guarantee against not only the battle cry of states' rights, but more fundamentally against racial exclusion" (p. 153).

The final issue Motomura takes up is *mass legalization*. Among immigration reform measures, mass legalization programs invite the strongest disagreement over their wisdom and fairness. In entering this debate, Motomura builds on the observation that localities can foster a sense of community, using a patchwork of laws outside the immigration context to facilitate the integration of unauthorized immigrants despite their status. Rather than frustrating these local attempts to integrate immigrants, Motomura contends that immigration

and citizenship laws should be reformed to promote these attempts. Despite the deeply exclusionary nature of modern immigration laws, many unauthorized immigrants find themselves bound to other citizens and identifying strongly with American values and ideals. Motomura reminds us that “[u]nauthorized migrants who were brought to the United States as children have strong claims to integration that support concrete steps to grant them lawful status” (p. 176).

II. MEMBERSHIP AS INNOCENCE

Motomura organizes his account around *Plyler*, which addressed the membership claims of unauthorized children. Yet *Immigration Outside the Law* speaks in broadly applicable terms that apply to children and adults alike. Therefore, a key question is whether ideas developed as they apply to unauthorized immigrant youth can be stretched to account for unauthorized immigrant adults. In this Part, I explain that Motomura’s decision to build out from *Plyler* amounts to a challenge to an increasingly restrictive vision of membership, what I call “membership as innocence.” Within this vision of membership, children are seen as passive and innocent participants pitted against their parents, who are seen as actively breaking the law through their surreptitious entries or visa overstay.³⁹ Although this innocence narrative can be traced back to *Plyler* itself, Motomura rejects the notion that immigrant youth and childhood arrivals occupy some special moral ground. Rather, he argues that many of the same equitable concerns insulating immigrant youth from immigration law’s harshest consequences also implicate, and therefore ought to protect, unauthorized adults more generally. Thus, Motomura subtly defies the innocent child/culpable adult dichotomy that frames legal issues and policy recommendations, especially concerning mass legalization programs.

A. The Innocent Child/Culpable Adult Dichotomy

A theory of membership as innocence envisions a citizenry (and a pool of LPRs who might someday become citizens) that respects the rule of law. Within this vision of membership, citizens are bound together by a common belief that laws should be followed and obeyed, and this vision demands that anyone who wishes to join this community do likewise.⁴⁰ This theory of membership reserves particular con-

³⁹ See Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform, and Citizenship*, 14 NEV. L.J. 101, 142 (2014) (explaining that mass legalization programs benefiting childhood arrivals compare the “blameless child” and the “‘wrong-doing’ parent”).

⁴⁰ In her seminal work on citizenship and membership, Professor Linda Bosniak helpfully explains that citizenship possesses many dimensions. For my purposes, I build on Bosniak’s notion that citizenship structures identity and fosters a sense of solidarity among citizens. These aspects of citizenship help create “the quality of belonging — the felt aspects of community membership.”

demnation for those immigrants who intentionally break the law for purely self-serving purposes. This sentiment underlies the common rhetorical question: “What part of ‘illegal’ don’t they understand?” Defenders of this position often resist rehabilitative facts such as the depths of an immigrant’s community ties or her complete lack of a criminal record. Rather, this position often fixates on the unauthorized immigrant’s initial surreptitious entry, which casts a sort of “fruit of the poisonous tree” shadow on any good that an immigrant may have accomplished within the United States thereafter.⁴¹ This narrowly conceived vision of membership appears in *Plyler* itself, a decision that proceeded on the assumption that unauthorized children should not be punished for crimes or offenses over which they had no control. In invalidating the State of Texas’s attempt to deny unauthorized children access to public schools, the Court reasoned that such a denial would “direct[] the onus of a parent’s misconduct against his children.”⁴² The Court explained:

[T]hose who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their “parents have the ability to conform their conduct to societal norms,” and presumably the ability to remove themselves from the State’s jurisdiction; but the children who are plaintiffs in these cases “can affect neither their parents’ conduct nor their own status.”⁴³

In other words, on this account, immigrant youth are “innocents” within the larger and sordid enterprise of unauthorized migration to which their parents willingly and intentionally subjected them.

This “innocent child/culpable adult” dichotomy continues in modern debates about mass legalization programs. Consider, for example, the Development, Relief, and Education for Alien Minors Act (DREAM Act), which has been introduced by a number of legislators over the years.⁴⁴ Although minor details have varied among the various versions of the bill, they all share a few key characteristics. They all provide (1) some kind of membership benefit to long-term unauthorized residents, (2) who entered the United States during their childhood or adolescence, and (3) who have engaged in “high-

See Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 479 (2000).

⁴¹ See Linda Bosniak, *Amnesty in Immigration: Forgetting, Forgiving, Freedom*, 16 CRITICAL REV. INT’L SOC. & POL. PHIL. 344, 348 (2013) (noting that within debates over amnesty policies, some object to “the element of forgetting” the initial offense).

⁴² *Plyler*, 457 U.S. at 220.

⁴³ *Id.* (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)).

⁴⁴ For a very helpful summary of DREAM Act–related legislative activity, see Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757, 1785–88 (2009).

achieving” activities such as attending college or serving in the military.⁴⁵ While the DREAM Act has yet to pass, a bill targeting childhood arrivals represents the kind of bill most likely to survive the legislative process.⁴⁶ Indeed, should the pursuit of comprehensive immigration reform fall short, the DREAM Act may be what Congress offers up as a consolation prize.⁴⁷

The legislative debates surrounding the various DREAM Act bills invariably reflect a fixation with “innocent” youth. The 2003 version of a DREAM Act bill, for instance, would have granted states the right to determine whether unauthorized immigrants would be entitled to tuition breaks for college and exempted many of them from the bars against equitable relief in removal proceedings.⁴⁸ Senator Orrin Hatch pleaded with his colleagues to support the bill. Childhood arrivals, he explained, “view themselves as Americans, and are loyal to our country. Some may not even realize that they are here in violation of our immigration laws.”⁴⁹ One year later, Senator Richard Durbin offered similar remarks of support: “The DREAM Act is not an amnesty. It is narrowly tailored to assist only a select group of young people who earn legal status. *It is unfair to punish these students for the mistakes of their parents.*”⁵⁰

Debates surrounding subsequent DREAM Act bills often reflected similar sentiments,⁵¹ and probably for good reason. Framing policies

⁴⁵ *Id.*

⁴⁶ See MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: *PLYLER V. DOE* AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN 86 (2012); Jennifer Merolla et al., “Illegal,” “Undocumented,” or “Unauthorized”: *Equivalency Frames, Issue Frames, and Public Opinion on Immigration*, 11 *PERSP. ON POL.* 789, 799–800 (2013).

⁴⁷ The comprehensive immigration bill passed by the Senate in July 2013 includes a generally applicable mass legalization program and a more targeted one for childhood arrivals. Compare S. 744, 113th Cong. § 2101 (2013) (creating a “registered provisional immigrant status” that does not draw age-based distinctions), with *id.* § 2103 (creating a “DREAM Act” benefiting childhood arrivals).

⁴⁸ S. 1545, 108th Cong. (2003) (as reported by the S. Comm. on the Judiciary, Nov. 25, 2003). Under current federal law, states may allow undocumented students to benefit from in-state tuition relief but only if they also allow out-of-state citizens to reap the same benefit, which effectively deters any state from providing such a benefit to undocumented students. See 8 U.S.C. § 1623(a) (2012). States may avoid this prohibition and provide in-state tuition relief only to undocumented students (as opposed to undocumented students and out-of-state citizens) if the state has enacted a law affirmatively granting that benefit. See *id.* § 1621(d). Currently, twenty states have passed legislation or taken some other affirmative legal action providing in-state tuition to undocumented students. See *Tuition Benefits for Immigrants*, NAT’L CONF. ST. LEGISLATURES (July 15, 2014), http://www.ncsl.org/documents/statefed/in_state_tuition_07152014.pdf [<http://perma.cc/48WP-8VST>].

⁴⁹ 149 CONG. REC. 20,608 (2003).

⁵⁰ 150 CONG. REC. 17,059 (2004) (emphasis added).

⁵¹ See, e.g., 158 CONG. REC. E1048 (June 15, 2012) (statement of Rep. Laura Richardson (“The DREAM Act recognizes that there are a limited number of young people who, through no fault of their own, have been living in the United States illegally since childhood.”)).

in terms of their impact on unauthorized youth tends to soften the public's restrictionist tendencies. As one study found, while choosing among the terms "illegal," "undocumented," and "unauthorized" had no appreciable impact on voters' opinions about policies, highlighting the impact on unauthorized youth did.⁵² The study suggests that "including language that immigrants came over as young children led to less restrictive preferences, and even tilted support slightly in favor of the policy. [This] positive effect held for all registered voters, and had even stronger effects among Republicans."⁵³

Although Congress has yet to pass any version of the DREAM Act, President Obama has created a regulatory substitute that follows the same basic contours of the bill. The DACA program provides administrative relief in the form of deferred action to childhood arrivals.⁵⁴ While deferred action status does not provide a full array of membership benefits, it greatly minimizes the likelihood of removal. Moreover, it authorizes childhood arrivals to work and expands their opportunities for traveling abroad.⁵⁵ Here, again, the program was clearly designed to benefit innocent youth. In announcing the terms and vision of DACA, President Obama explained: "[I]t makes no sense to expel talented young people . . . who want to staff our labs or start new businesses or defend our country *simply because of the actions of their parents . . .*"⁵⁶ As he later continued, "[W]e are a better nation than one that expels innocent young kids."⁵⁷

In sum, a number of membership benefits are available to childhood arrivals (most notably in the form of precedent and administrative relief programs), and these benefits invariably have been justified on moral innocence grounds. Therefore, the laws protecting childhood arrivals rest on assumptions that prevent adulthood arrivals from obtaining similar benefits.

⁵² See Merolla et al., *supra* note 46, at 797, 799.

⁵³ *Id.* at 800.

⁵⁴ *Deferred Action for Childhood Arrivals*, DEP'T HOMELAND SEC., <http://www.dhs.gov/deferred-action-childhood-arrivals> (last updated July 2, 2013) [<http://perma.cc/N7EB-QEUM>]. The DACA program was announced on June 15, 2012. It was initially limited to those who entered the United States before June 15, 2007 under the age of sixteen and who were not over the age of thirty-one on the date of the program's announcement (that is, June 15, 2012). The program has since been expanded in two significant ways: (1) it moves up the entry date from June 15, 2007, to January 1, 2010; and (2) it removes the age cap. See Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., et al. 3 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [<http://perma.cc/4AQD-CEML>].

⁵⁵ Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to Stevan E. Bunnell, Gen. Counsel, Office of the Gen. Counsel 3 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_arrabally.pdf [<http://perma.cc/RZ4W-KQVB>].

⁵⁶ Remarks on Immigration Reform and an Exchange with Reporters, 2012 DAILY COMP. PRES. DOC. 201200483 (June 15, 2012) (emphasis added).

⁵⁷ *Id.*

B. *A Spectrum of Moral Culpability*

In response to the sharp moral dichotomy at the heart of *Plyler*, the DREAM Act bills, and DACA, scholars and activists have attempted to reframe the dichotomy as a spectrum of moral culpability. At various levels, these interventions all reflect a frustration with the narrowness of the criteria membership-as-innocence considers.

Professor Elizabeth Keyes suggests that the fixation on “worthiness,” blame, and unauthorized parents’ unlawful behavior draws attention away from the benevolent and altruistic impulses motivating that behavior, namely the desire to do what is in “the best interests of their children by coming to a country where they could provide for and support their children.”⁵⁸ Unauthorized immigrant parents may have committed a marginally bad act, so this argument goes, but they did so for understandable and laudable reasons. Professor Michael Olivas makes a similar point in even stronger terms:

This “dirty hands” or “outlaw” version of immigration law is a powerful, indeed, all-encompassing trope. In its purest form, this view is the basis for all restrictionist and nativist worldviews, undergirding objections to the lawlessness and undeserving nature of seeking refuge in a community in which one has not met the test of admission or, once admitted, forfeits membership.⁵⁹

At heart, both of these critiques suggest that immigration’s legal categories do not match up to the underlying moral evaluations embedded within those categories. Keyes and Olivas are kindred spirits with criminal law scholars who argue that misdemeanor and petty crime prosecution has watered down the meaning of fault and moral culpability in convictions.⁶⁰ Indeed, the misdemeanor docket has created a large subclass of criminal defendants who are “normatively innocent” — those defendants whose “conduct is undeserving of communal condemnation, even if it is contrary to law.”⁶¹

Professor Rose Cuison Villazor likens DREAMer activity to gays coming out of the closet. Rather than “living hidden lives in plain sight,” undocumented students are coming out, she observes.⁶² In the process, the act of coming out forces the public to reckon with an uncomfortable reality: that the very same noncitizens who bear the markers of belonging “lack the documents to prove that they do, in

⁵⁸ See Keyes, *supra* note 39, at 143.

⁵⁹ OLIVAS, *supra* note 46, at 25.

⁶⁰ See Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 *FORDHAM URB. L.J.* 1043, 1082 (2013).

⁶¹ Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 *COLUM. L. REV.* 1655, 1678 (2010).

⁶² Rose Cuison Villazor, *The Undocumented Closet*, 92 *N.C. L. REV.* 1, 52 (2013).

fact, belong in the United States.”⁶³ By comparing the experience of undocumented students to the experience of gays and lesbians, Villazor also sets out to show the limitations of binary identities.⁶⁴ Binaries in the immigration context tend to stick, and those attempting to blur the line separating one side from the other often must do so at the cost of themselves becoming ostracized.⁶⁵ For undocumented students, then, their “coming out moment” forces others to confront the blurriness of the lines separating acceptable from unacceptable immigrants.⁶⁶

For his part, Motomura attacks the prevalent moral dichotomy by suggesting that immigrant youth do not occupy a special moral ground. He notes:

It is also important to think about the role of children in immigration law and policy, and in turn about parents and children together in families. Shifting away from a stark choice between focusing on children and focusing on adults, and instead viewing immigration as a matter of families moving to the United States, the choice between the innocent child and the guilty parent seems artificial and misleading. Workers accept an invitation to work in the United States under trying and precarious conditions not only for themselves, but also for the future of their children. (pp. 183–84)

In this passage, Motomura highlights the practical difficulties of disaggregating the interests of children from those of their parents, and in the process, reaches the conclusion that what is true for children is also true for their parents. In other words, Motomura argues that many of the same fairness concerns associated with removing unauthorized youth also apply to removing unauthorized adults (pp. 89, 183).⁶⁷

In the strictest sense, adult immigrants who cross the border surreptitiously or who overstay the terms of their visas violate immigration law and therefore earn the admonishment of the law. Yet “[a] na-

⁶³ *Id.* at 53.

⁶⁴ Of course, the comparison of undocumented students, on the one hand, and gays and lesbians, on the other, itself represents a binary. Villazor readily acknowledges that these identities can and do intersect as evidenced by her decision to open the article with a discussion of Jose Antonio Vargas, the Pulitzer Prize-winning journalist who is both undocumented and gay. *See id.* at 3. Or, as expressed satirically by Stephen Colbert, Vargas is a “border gay.” *Id.* (internal quotation mark omitted).

⁶⁵ In the case of Salvadoran and Guatemalan arrivals during the 1980s, as citizens began interceding on behalf of migrants and providing them with “sanctuaries,” law enforcement officials began investigating them as smugglers (of illegal aliens) despite activist proclamations that they were doing the work of Samaritans (on behalf of refugees). *See* Susan Bibler Coutin, *Smugglers or Samaritans in Tucson, Arizona: Producing and Contesting Legal Truth*, 22 AM. ETHNOLOGIST 549, 553–55 (1995).

⁶⁶ *See* Nicholas De Genova, *The Legal Production of Mexican/Migrant “Illegality,”* 2 LATINO STUD. 160, 161 (2004) (describing the contested and legally constructed nature of “illegal” migrant identity).

⁶⁷ For example, Motomura insists that the “fundamental reasons and justifications for integrating unauthorized migrants are not limited to children” (p. 89) and argues that the innocent child/guilty parent dichotomy “seems artificial and misleading” (p. 183).

tional policy of acquiescence means that unauthorized migrants come to the United States as a part of a tacit arrangement that is mutually beneficial” (p. 107). Borrowing from his earlier work on “immigration as affiliation” principles, Motomura argues that “the law should acknowledge unauthorized migrants’ ties and contributions to their communities in various forms that include work, tax payments, and civic participation” (p. 110). This pragmatic approach recognizes that individuals often migrate as families, and builds on existing immigration rules organized around a principle of derivative membership — for example, acceptance of one individual means acceptance of all those individuals within the core family unit.⁶⁸ Therefore, so long as one person within a family has a viable claim to membership, the rest should as well by extension. According to Motomura, this larger background of enforcement realities “amounts to an invitation extended by the combination of willing employers, limited enforcement, and legal mechanisms that allow unauthorized migrants to stay as a matter of government discretion” (p. 107).

Rather than framing the moral consequences of unauthorized migration in binary terms of guilt and innocence, Motomura implicitly suggests that those consequences exist along a spectrum. To illustrate this point, Motomura employs the analogy of a merchant who routinely accepts late payments as a way of expanding his customer base, but then, in the wake of a contract dispute, tries to insist that a customer’s late payment violated the contract’s terms (pp. 109–10). In other words, a fair moral accounting of an immigrant’s decision to enter or overstay should consider the realities of immigration enforcement and the societal and economic benefits that unauthorized immigration generates, as well as the individual violations of formal law. Thus, unauthorized adults may not be able to claim clean hands in the same way that unauthorized youth can, but neither can the various governmental and private actors who know about, acquiesce to, and benefit from the presence of unauthorized migrants: “Unauthorized migrants have come within a scheme of tolerance that enriches the United States and supports their claims to be treated as Americans in waiting” (p. 107).

In many ways, Motomura’s rejection of the innocent child/guilty adult binary is reminiscent of an earlier era of disobedience. During the 1980s, hundreds of thousands of Salvadorans and Guatemalans entered the United States, inviting a fierce public debate over whether these newcomers were “illegal aliens,” lacking any claims to relief, or whether they were “refugees,” displaced by political instability caused, in part, by U.S. support for efforts to suppress the nascent communist

⁶⁸ See 8 U.S.C. § 1101(a)(15)(T)(ii) (2012); *id.* § 1101(a)(15)(U)(ii).

insurgency.⁶⁹ In the modern context, Professors George Lakoff and Sam Ferguson have argued that many unauthorized migrants might be understood as “economic refugee[s]” — those fleeing their country on account of economic insecurity.⁷⁰ That is, when you consider the vast array of governmental and private actors that have facilitated and tolerated the presence of unauthorized immigrants, it is hard not to conclude that everyone shares some of the blame. The result, of course, is that the blame dissipates in the face of the crush of pragmatic benefits that come from legal reforms like mass legalization.

Mass legalization programs touch upon the most sensitive political nerve within modern debates over unauthorized immigration. Professor Linda Bosniak observes that “the center of gravity in the immigration amnesty debate lies at the intersection” between those who fixate on the moral consequences of amnesty programs and those who champion the pragmatic benefits of opening up pathways to regularizing status.⁷¹ The “forgive-and-forget” version of amnesty foregrounds moral questions while the “administrative-reset” position sidelines them. And for many, the inability to “forgive” the moral culpability of unauthorized immigrants prevents them from even beginning to recognize the pragmatic benefits of opening up pathways to lawful status because to open up such pathways would be to allow an entire class of noncitizens to avoid being held accountable for their offenses.⁷² Of course, the point that Motomura and others make is that accountability requires a comprehensive analysis of the full moral costs tied up in a system of unauthorized immigration that benefits individuals beyond unauthorized immigrant parents and children.

The moral dichotomy surrounding immigrant youth has attracted not only scholarly attention. It has also invited the ire of undocumented youth activists. Consider, for example, the actions taken by the “Dream 9.” The Dream 9 are the nine young men and women who attempted to cross into the United States without authorization at the southern U.S. border on July 22, 2013. In contrast to the hundreds of crossings that take place daily from Mexico to the United States under cover of dark at isolated and dangerous locations in the desert, these nine approached the United States at the Nogales, Arizona, port of entry in broad daylight, practically announcing their arrival to the border guards.⁷³ Moreover, unlike the majority of unauthorized migrants

⁶⁹ See Coutin, *supra* note 65, at 553–55.

⁷⁰ George Lakoff & Sam Ferguson, Rockridge Inst., *The Framing of Immigration* 4 (2006) (unpublished manuscript) <http://academic.evergreen.edu/curricular/ppandp/PDFs/Lakoff%20Framing%20of%20Immigration.doc.pdf> [<http://perma.cc/8UPZ-RUC2>].

⁷¹ Bosniak, *supra* note 41, at 351.

⁷² See *id.* at 348.

⁷³ See Preston, *supra* note 12.

who help fill low-skilled and high-peril jobs, these transgressors have degrees from American universities, giving them access to different, higher-paying, and safer labor markets, a point some of them punctuated by wearing caps and gowns as travel clothes.⁷⁴ Their break in continuous presence within the United States rendered them ineligible for programs like DACA and the DREAM Act, forcing immigration officials to weigh the membership options for the not-so-innocent youth.

And this was probably the point. By crossing and recrossing the border as an act of civil disobedience, the Dream 9 have invited prosecution that will almost certainly lead to their removal. But they have also illuminated the tension within an immigration enforcement policy that would save them from removal while demanding their parents' deportation.⁷⁵ This streak of disobedience highlights a subtle but unmistakable sentiment within the broader DREAMer movement: that some childhood arrivals would rather reject than embrace the privileges that come with their DREAMer status if the cost of those privileges includes vilifying their parents and family members.⁷⁶ As an assertion of political identity, this renouncement resembles the rejection by Asian Pacific Americans (APAs) of the "model minority" identity, which has a disciplining effect on "deviant" racial groups by reductively highlighting APA success within contested institutions such as higher education.⁷⁷ Both the DREAMer and model-minority narratives obscure the plight of those who do not fit within the parameters of the myth.⁷⁸ This type of criticism has particular salience for the 1.3 million unauthorized APAs in the United States,⁷⁹ many of whom struggle

⁷⁴ See Cindy Carcamo, *'Dream 9' Released from Immigration Detention*, L.A. TIMES, Aug. 7, 2013, <http://articles.latimes.com/2013/aug/07/nation/la-na-nn-dream-9-released-immigration-detention-20130807> [<http://perma.cc/K5WV-356T>].

⁷⁵ See Cindy Carcamo, *Immigrant Rights Activists at Odds over 'Dream 9'*, L.A. TIMES, Aug. 10, 2013, <http://articles.latimes.com/2013/aug/10/nation/la-na-ff-dreamer-protest-20130811> [<http://perma.cc/8H22-DTQ2>].

⁷⁶ One former DREAMer activist puts it this way: "The DREAMer narrative disciplines and censors a lot of undocumented people. It brings notions of who's a good immigrant, and who needs to prosper in the U.S." Von Diaz, *How 5 DREAMers Are Rethinking Their Role in the Immigrant Rights Movement*, HUFFINGTON POST (Apr. 28, 2014, 3:42 PM), http://www.huffingtonpost.com/2014/04/28/dreamers-immigrant-rights_n_5227646.html [<http://perma.cc/CKT5-AQUT>] (internal quotation marks omitted); see also Volpp, *supra* note 13, at 94 (noting that one of the motivations behind the push for the mass legalization of DREAMers was the view that they were "innocent victims" within the unauthorized immigration process).

⁷⁷ See GARY Y. OKIHIRO, MARGINS AND MAINSTREAMS: ASIANS IN AMERICAN HISTORY AND CULTURE 62 (1994).

⁷⁸ *Id.*

⁷⁹ See JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 11 (2011), <http://www.pewhispanic.org/files/reports/133.pdf> [<http://perma.cc/8P5J-UJYT>] (noting that 1.3 million, or 11% of the total unauthorized immigrant population, claims a nationality from an Asian country).

to draw attention to the specific ways in which they experience their unauthorized status.⁸⁰

III. MEMBERSHIP AS BROKERING

Here is what we have so far: (1) Motomura has made the case that unauthorized immigrants are best understood in many cases as Americans in waiting; and (2) to support this claim, Motomura has built out from the landmark (but limited) decision, *Plyler*. In the process, Motomura suggests that many of the reasons earning unauthorized youth a reprieve against removal can, with minor adjustment, also do the same for unauthorized immigrants more generally. In other words, what is true of childhood arrivals is more or less true of adulthood arrivals. Of course, much of this is contested. And while Motomura and others persuasively argue that moral evaluations of unauthorized immigrants tend to be stripped of context and nuance, in the end, one is left to wonder whether leaning so heavily on *Plyler* hurts more than helps any effort to defend the granting of membership benefits to unauthorized immigrants generally — that is, to children and adults alike.

In this Part, I propose an alternate basis for membership. I want to suggest that it is not children's moral innocence that makes them suitable candidates for membership benefits, but rather their ability to facilitate the integration of their immigrant family members. This alternative theory of membership, what I call membership as brokering, can help bolster the pursuit of a generally applicable account of unauthorized immigrants.⁸¹ Immigrant children may very well stand apart from adults, but not for the reasons *Plyler* and many DREAM Act supporters suggest.

The intellectual basis of membership as brokering is a burgeoning literature on immigrant youth that has documented the different ways in which immigrant youth “broker” or “mediate” a variety of transactions on behalf of their parents. A theory of membership as brokering

⁸⁰ See Matt O'Brien, *S.F. State Student Who Shouted at Obama Has History of Gutsy Protests*, SAN JOSE MERCURY NEWS, Nov. 26, 2013, http://www.mercurynews.com/breaking-news/ci_24600284/s-f-state-student-who-shouted-at-obama [<http://perma.cc/PBS5-G5R7>]; Nadia Hussain, *Not Your Model Minority: Asian Americans and the Immigration Fight*, HYPHEN (Oct. 18, 2013, 2:35 PM), <http://www.hyphenmagazine.com/blog/archive/2013/10/not-your-model-minority-asian-americans-and-immigration-fight> [<http://perma.cc/4BQK-FRST>].

⁸¹ To be fair, Motomura acknowledges the brokering work performed by children of immigrants, but he says very little on the subject:

[A]ll children who are acculturated in the United States, but especially those with lawful status or citizenship, can serve as cultural brokers between their parents and mainstream society. A central aspect of this brokering role is translating between their parents and teachers, not only to and from the English language but also to and from the culture of the school system and [U.S.] society in general. (p. 181)

suggests that unauthorized youth should be granted membership benefits because stabilizing their status will allow them to help their parents proceed along the path to integration. In contrast to membership as innocence, which invites a debate over whether membership claims asserted by childhood arrivals are morally comparable to those asserted by adulthood arrivals, membership as brokering makes the case that unauthorized youth can help shape membership claims *on behalf of* their parents.

After defining the key concepts underlying membership as brokering, I identify specific contexts in which immigrant youth help their parents and family access various goods, services, and networks available in the mainstream. As I explain, the brokering work performed by childhood arrivals (and children of immigrants generally) fits within immigration law's larger vision of member selection in which current members sponsor and facilitate the integration of new members. While the vast majority of childhood arrivals lacks the formal ability to sponsor their parents, they operate as quasi-sponsors to the extent that they help their parents transition toward and adapt to social, political, and economic life in the United States.

A. *What is Brokering?*

Let me begin by defining two core concepts. The first is integration. At the broadest level of abstraction, integration describes the process by which newcomers are culturally and linguistically absorbed into the mainstream.⁸² This phenomenon has long enjoyed scholarly attention. In 1928, Professor Robert Park compared the changing of society through immigration to the unrest caused by political revolution, observing that the “most obvious difference between revolution and migration is that in migration the breakdown of social order is initiated by the impact of an invading population, and completed by the contact and fusion of native with alien peoples.”⁸³ Today, most immigration scholarship has unburdened itself of such thinly veiled xenophobia. A variety of views populate social science journals and tend to strike a more respectful tone toward immigrants.⁸⁴ Moreover, a new wave of social scientists has moved beyond inelastic visions of

⁸² See Alejandro Portes & Alejandro Rivas, *The Adaptation of Migrant Children*, FUTURE CHILD., Spring 2011, at 219, 221–22. Throughout this Review, I use the terms “incorporation” and “integration” interchangeably.

⁸³ Robert E. Park, *Human Migration and the Marginal Man*, 33 AM. J. SOC. 881, 885 (1928).

⁸⁴ I discuss below, for example, the segmented assimilation account of incorporation, which helps articulate a limit to the kind of integrative work that children can do on behalf of their parents. See *infra* pp. 1429–30. For a helpful summary of the different accounts of incorporation or assimilation, see Portes & Rivas, *supra* note 82, at 219, and Min Zhou, *Segmented Assimilation: Issues, Controversies, and Recent Research on the New Second Generation*, 31 INT'L MIGRATION REV. 975 (1997).

people “over there” coming “here” to be with and like “us.” Rather, they envision assimilation as a bidirectional process — a process of giving and taking, one in which mainstream norms are being changed even as they are changing immigrants.⁸⁵ They recognize that integration — or incorporation, as these scholars refer to it — can be a messy process reflecting a complex interaction between internal group characteristics and external institutional factors.⁸⁶

Social institutions play an important part in the incorporation process. A number of sociolegal scholars conceptualize institutions as “a web of interrelated norms, social meanings, implicit expectancies, and other ‘taken-for-granted’ aspects of reality, which operate as largely invisible background rules in social interaction and construal.”⁸⁷ As Professors Shannon Gleeson and Roberto Gonzales observe, “[W]hile immigration policies are pivotal to shaping immigrant outcomes, it is institutions that mediate these policies in their implementation.”⁸⁸ Thus, in the immigration context, because a number of immigration restrictions and rules focus on work, K–12 schools, and higher education, these institutions offer useful opportunities for examining the pace at which and degree to which immigrants are integrated into the United States.⁸⁹

Timetables can vary within the integration process. Programs like DACA, for example, assume that the pace of incorporation is related to the age at which an individual migrates. Consider two twenty-year-old men who migrated from Mexico through unauthorized channels. Assume that one migrated ten years ago while the other migrated last year. While the law prohibits both men from working in U.S. labor markets, we would assume that the noncitizen who migrated earlier would be more integrated into the mainstream than the one who migrated more recently as measured by linguistic and cultural acquisi-

⁸⁵ See Portes & Rivas, *supra* note 82, at 223; see also Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 232–33.

⁸⁶ See Zhou, *supra* note 84, at 976–77.

⁸⁷ Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 479 (2000); see also Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC'Y REV. 11, 15–16 (2005).

⁸⁸ Shannon Gleeson & Roberto G. Gonzales, *When Do Papers Matter? An Institutional Analysis of Undocumented Life in the United States*, INT'L MIGRATION, Aug. 2012, at 1, 3–4.

⁸⁹ See, e.g., Leisy Abrego, *Legitimacy, Social Identity, and the Mobilization of Law: The Effects of Assembly Bill 540 on Undocumented Students in California*, 33 LAW & SOC. INQUIRY 709 (2008) (discussing the impact of making in-state tuition rates available to undocumented students on undocumented student legal consciousness). As Motomura observes: “[I]ntegration is fundamentally and inevitably local. It takes place in neighborhoods, schools, workplaces, and similar small-scale, localized venues for interaction with others” (p. 165).

tion, and indeed, this is what *Plyler* envisioned when it invalidated Texas's exclusionary scheme.⁹⁰

Beyond age of immigration, other structural factors such as race, socioeconomic status, and gender all play their part.⁹¹ As sociologist Professor Min Zhou observes, many assimilationist scholars often assume that there is a “unified core of American society, be it ‘nonethnic’ America or ‘middle’ America, into which immigrants are expected to assimilate, and that, with enough time, assimilation will eventually occur among all immigrants and their offspring regardless of national origins, phenotypical characteristics, and socioeconomic backgrounds.”⁹² The reality is much more complicated, and the complications can dictate one's chances of success in the incorporation process. Segmented assimilation theorists suggest that rather than thinking of the children of immigrants or second-generation Americans as assimilating into U.S. society broadly, it is probably more accurate to think of them as assimilating into *different* segments of society.⁹³ Some segments of society occupy more privileged positions than others, and this difference often translates into a difference in the kinds of outcomes a child can expect to achieve. For example, identifying with disadvantaged native-born minority groups and adopting the corresponding racial identities, such as black or Latino, can lead to “downward assimilation,” a process by which immigrant children of color become of working age only to confront many of the same hurdles as their native-born counterparts.⁹⁴ These hurdles may involve entry into and success within educational institutions⁹⁵

⁹⁰ See *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (describing public schools as “sustaining our political and cultural heritage”).

⁹¹ See generally EDWARD E. TELLES & VILMA ORTIZ, *GENERATIONS OF EXCLUSION* (2008).

⁹² Zhou, *supra* note 84, at 981.

⁹³ See Jessica Tovar & Cynthia Feliciano, “Not Mexican-American, but Mexican”: *Shifting Ethnic Self-Identifications Among Children of Mexican Immigrants*, 7 *LATINO STUD.* 197, 200 (2009).

⁹⁴ Professor Devon Carbado offers a similar vocabulary for dealing with the phenomenon of downward assimilation. Although naturalization is typically associated with the legal process by which noncitizens become citizens, Carbado argues that American racism also imposes a form of naturalization in which individuals are rendered racially cognizable. See Devon W. Carbado, *Racial Naturalization*, 57 *AM. Q.* 633, 637–38 (2005). This account of racial naturalization explains how Carbado, as a black British immigrant, became “naturalized” when a police officer stopped and harassed him and his brother one night while they were driving. See *id.* at 633–36. Carbado explains that this police interaction “helped to integrate [him] into an American black identity” thereby facilitating his “Americanization.” *Id.* at 635.

⁹⁵ See Leisy J. Abrego & Roberto G. Gonzales, *Blocked Paths, Uncertain Futures: The Postsecondary Education and Labor Market Prospects of Undocumented Latino Youth*, 15 *J. EDUC. FOR STUDENTS PLACED RISK* 144, 147–48 (2010) (noting that most undocumented youth live in “de facto segregated areas of dense poverty,” *id.* at 147, which deters “the academic progression of the children, shaping their future life chances,” *id.* at 148); Roberto G. Gonzales, *On the Wrong Side of the Tracks: Understanding the Effects of School Structure and Social Capital in*

or diminished work opportunities and stunted economic mobility.⁹⁶

A second concept is brokering. If immigrants are incorporated into their communities by engaging a variety of social and economic institutions, then brokering explains how immigrants, and in particular adult immigrants, access those institutions. Immigrants often lack access to resources that help facilitate participation in society at large. Exclusion from these networks, in turn, disrupts an immigrant's ability to attain social goods and services that exist beyond an immigrant's immediate community.⁹⁷ Therefore, immigrants often turn to third parties to fill this gap; these other parties provide access to other networks immigrants would otherwise lack. In other words, if incorporation represents a journey immigrants are expected to follow, then brokers act as guides on this journey.

The resources these entities broker can be diverse, ranging in form from consumer-related information to the availability of direct services, and they can touch upon a variety of needs, covering everything from the serious (like HIV/AIDS testing and treatment) to the somewhat trivial (like free or discounted tickets to circuses).⁹⁸ Sometimes the nature of the brokering involves informal translation across language dif-

the Educational Pursuits of Undocumented Immigrant Students, 85 PEABODY J. EDUC. 469, 474 (2010) (observing that California Latino students lag behind their Asian and white counterparts at every step of the university process).

⁹⁶ See ALEJANDRO PORTES & RUBÉN G. RUMBAUT, LEGACIES: THE STORY OF THE IMMIGRANT SECOND GENERATION 59–62 (2001); see also Portes & Rivas, *supra* note 82, at 223–24 (summarizing work that supports the notion that “children of immigrants can expect to assimilate into the racial and ethnic categories seen as ‘theirs’ by the host society,” *id.* at 224); Carola Suárez-Orozco & Irina L.G. Todorova, *The Social Worlds of Immigrant Youth*, NEW DIRECTIONS FOR YOUTH DEV., Winter 2003, at 19–20 (recognizing both race and class as limiting realities); Zhou, *supra* note 84, at 979 (“[A] disproportionately large number of immigrant children has converged on underprivileged and linguistically distinctive neighborhoods . . . [where] the immigrants and their children come into direct daily contact with the poor rather than with the middle class . . .”).

⁹⁷ The reasons for exclusion can be complex and varied. One obvious basis of exclusion is language. Most immigrants come from countries where English is not spoken as the primary language, which imposes entry costs. See Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1011–15 (2007). Some scholars have observed that, in the context of the poor, predominant theories on access to valuable resources include social isolation theory, which posits that poverty “disconnects people from middle-class social networks,” and deinstitutionalization theory, which argues that concentrated poverty creates an absence of leadership in affected neighborhoods. Mario Luis Small et al., *Why Organizational Ties Matter for Neighborhood Effects: Resource Access Through Childcare Centers*, 87 SOC. FORCES 387, 387 (2008).

⁹⁸ Mario Luis Small, *Neighborhood Institutions as Resource Brokers: Childcare Centers, Interorganizational Ties, and Resource Access Among the Poor*, 53 SOC. PROBS. 274, 282 tbl.3 (2006) (listing a variety of resources childcare centers broker on behalf of the poor); see also Small et al., *supra* note 97, at 390 (defining resources as “capital, information, personnel and even ‘products or services for distribution within the community’” (quoting ROLAND L. WARREN, *THE COMMUNITY IN AMERICA* 260 (3d ed. 1978))).

ference.⁹⁹ Other times, the brokering occurs in more formal terms, where an organization acts as a bridge between the immigrant and other service-providing organizations.¹⁰⁰ But one characteristic these brokers all share is some level of trustworthiness. Brokers engage immigrants within “safe spaces” where they simultaneously provide immigrants with valuable information *and* agree not to share any information with other public entities that might raise the possibility of adverse immigration consequences.¹⁰¹

The universe of brokers is diverse, and a number of scholars have documented the brokering work performed by labor organizations,¹⁰² “hometown associations,”¹⁰³ community-based organizations,¹⁰⁴ and childcare centers.¹⁰⁵ A subset of this literature focuses on immigrant youth. This work reinforces the notion that immigrant youth possess a greater familiarity with “American” cultural norms and have greater access to social networks than their parents.¹⁰⁶ The beneficiaries of these brokering services are often parents, but they can include a much broader set of individuals, including siblings, grandparents, neighbors, teachers, and other community members.

Language brokering as it is carried out by immigrant youth is best understood as involving “interpret[ation] and translati[on] performed by bilinguals in daily situations without any special training.”¹⁰⁷ Yet

⁹⁹ Children often play this role in relation to their immigrant parents. See Marjorie Faulstich Orellana et al., *Accessing Assets: Immigrant Youth's Work as Family Translators or “Paraphrasers,”* 50 SOC. PROBS. 505, 507–08 (2003); Lucy Tse, *Language Brokering Among Latino Adolescents: Prevalence, Attitudes, and School Performance*, 17 HISP. J. BEHAV. SCI. 180, 181–83 (1995); Abel Valenzuela, Jr., *Gender Roles and Settlement Activities Among Children and Their Immigrant Families*, 42 AM. BEHAV. SCIENTIST 720, 728–29 (1999).

¹⁰⁰ One study found that community centers played an active role in brokering relationships between community members and service providers. In one particular case, the center identified a speech therapist for a mother who was worried about her child’s muteness. In another instance, the center was able to invite the Health Department to conduct an eye examination of a community member’s child. See Small et al., *supra* note 97, at 394–95.

¹⁰¹ See Orellana et al., *supra* note 99, at 519–20 (noting that youth sometimes refrain from answering questions posed by legal and state institutions as a way of protecting parents against critique and judgment for their parents’ personal choices); see also S. Karthick Ramakrishnan & Celia Viramontes, *Civic Spaces: Mexican Hometown Associations and Immigrant Participation*, 66 J. SOC. ISSUES 155, 165 (2010) (describing hometown associations as “safe spaces for the civic and political activation of undocumented immigrants . . . [that] do not keep track of the documentation status of their members”).

¹⁰² See Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers’ Organizations*, 38 POL. & SOC’Y 552, 563–71 (2010).

¹⁰³ See WILL SOMERVILLE ET AL., MIGRATION POL’Y INST., HOMETOWN ASSOCIATIONS: AN UNTAPPED RESOURCE FOR IMMIGRANT INTEGRATION? 1 (2008); Ramakrishnan & Viramontes, *supra* note 101, at 156.

¹⁰⁴ See JANELLE S. WONG, DEMOCRACY’S PROMISE: IMMIGRANTS & AMERICAN CIVIC INSTITUTIONS 91 (2006).

¹⁰⁵ See Small et al., *supra* note 97, at 389.

¹⁰⁶ See Suárez-Orozco & Todorova, *supra* note 96, at 21–22.

¹⁰⁷ Tse, *supra* note 99, at 181.

translating across language difference does not fully capture what immigrant youth do. Brokering studies reveal that youth brokers possess a certain level of maturity given that many of their duties might be thought of as “adult-like” work. Immigrant children often assist their parents in pursuing a variety of claims and benefits in contexts as complicated as workers’ compensation,¹⁰⁸ immigration, insurance, and rental contracts.¹⁰⁹ Thus, much rides on the ability of children to serve as bridges connecting their families and communities to services available to English-speaking citizens. In this way, children operate as “conduits of information and opportunities for their family and community” and can help shape the extent to which their families and communities can interact with mainstream goods and services providers.¹¹⁰

One final observation on the concept of brokering: while brokering scholars arrive at the issue of immigrant youth through a variety of avenues, their journeys all tend to start from the assumption that children have agency, autonomy, and decisionmaking capacities. Sometimes, this assumption is stated explicitly,¹¹¹ but often it is recognized implicitly. Many areas of the law and much of legal culture treat children as passive extensions of their guardians (usually parents, but sometimes the state) who make decisions on their behalf.¹¹² (Recall that the innocent child/culpable adult dichotomy treats children as passive accessories in their parents’ lawless behavior.) The brokering literature stands in sharp contrast to these reductive impulses of the

¹⁰⁸ See Valenzuela, *supra* note 99, at 735–36.

¹⁰⁹ See Robert S. Weisskirch & Sylvia Alatorre Alva, *Language Brokering and the Acculturation of Latino Children*, 24 HISP. J. BEHAV. SCI. 369, 373 tbl.1 (2002).

¹¹⁰ Tse, *supra* note 99, at 191. Of course, children do not always play such a role in immigrant families. Indeed, in many families, only parents migrate, leaving the children behind in sending countries. Parent-child relationships in those families bear a stronger resemblance to the “dependent child” model that animates much of American law and legal culture. See JOANNA DREBY, *DIVIDED BY BORDERS* 137–40 (2010) (explaining that once children in sending countries reach the age of migration, they depend on their parents’ social networks to find employment opportunities in the U.S. labor market).

¹¹¹ See, e.g., Marjorie Faulstich Orellana, *The Work Kids Do: Mexican and Central American Immigrant Children’s Contributions to Households and Schools in California*, 71 HARV. EDUC. REV. 366, 368 (2001) (stating that an “important guiding framework” to the author’s project on immigrant children’s work was “to view children as actors, agents, and ‘experiencers’ who participate in the social relations and practices of their daily lives . . . rather than as the passive recipients of adults’ socialization or teaching practices”).

¹¹² See generally Paul Arshagouni, “But I’m an Adult Now . . . Sort of”: *Adolescent Consent in Health Care Decision-Making and the Adolescent Brain*, 9 J. HEALTH CARE L. & POL’Y 315 (2006); Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL’Y 275 (2006); Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265 (2000); David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 FORDHAM URB. L.J. 393 (2010); David B. Thronson, *You Can’t Get Here from Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL’Y & L. 58 (2006).

law. This body of work captures the difficult, adult-like choices that youth must make from very early on in their lives.

B. Examples of Brokering

Let me say a bit more. The brokering literature demonstrates that immigrant youth play an important part in helping their family members, especially their parents, adjust to life in the United States. In many instances, children help their parents access goods and services that they could not access but for the help of a broker. Roughly speaking, empirical scholars have documented children's engaging in brokering duties within three realms: (1) work-related and other economic transactions; (2) political activity and socialization; and (3) legal claims and claims-making.

1. *Work-Related and Other Economic Transactions.* — Economic productivity resides at the heart of many stories about citizenship and immigration. Immigrants, so the story goes, work long and hard. The reasons why they do so are many. Some pin it on immigrants' work ethic. Others point to the constant threat of deportation hovering over the lives of unauthorized and temporary workers. In the past, still others argued it was because immigrants could do so much despite eating so little.¹¹³ But whatever the reason, almost all of the stories about these famously hardworking immigrants have been about adults, about those who are well beyond the years they spent or would have spent in grade school. Immigrant children are largely absent from this story. Indeed, immigrant children are indistinguishable from citizen children in this regard. They are seen as "economically worthless, but emotionally priceless."¹¹⁴ The reality is that children bolster and enable their immigrant parents' economic opportunities in a variety of ways.

A useful starting point is a 1999 study by Professor Abel Valenzuela in which he surveyed and interviewed sixty-eight adults and children in Mexican-origin immigrant households.¹¹⁵ The study was designed to gather information on how adults perceived the help their children gave them with integrating "into U.S. culture and society in general," as well as to learn what roles and activities older children "recalled undertaking in helping their newly arrived households to settle."¹¹⁶ Not a single interview suggested that children helped their parents find or secure employment.¹¹⁷ This is not surprising given that such opportunities would typically fall beyond children's networks. But

¹¹³ See AM. FED'N OF LABOR, SOME REASONS FOR CHINESE EXCLUSION, S. DOC. NO. 137, at 7, 9 (1st Sess. 1902).

¹¹⁴ VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD 96 (1985).

¹¹⁵ Valenzuela, *supra* note 99, at 726.

¹¹⁶ *Id.* The study did not include interviews with minor children. See *id.* at 740.

¹¹⁷ See *id.* at 734.

Valenzuela's study did find that children assisted their parents by serving as "surrogate parents in which they under[took] nanny or parent-like activities in the caring of younger household members and in other household tasks."¹¹⁸ Parents would often entrust their older immigrant children with disciplinary responsibilities over their younger children and would consult them on household decisions such as paying bills or making large consumer purchases.¹¹⁹

Professor Marjorie Faulstich Orellana's ethnographic work supports the conclusion that immigrant children, especially older immigrant children, take on parenting duties to help their parents maximize their work opportunities. Orellana's three-year study examined Mexican and Central American immigrant children in communities across California.¹²⁰ She found that in Los Angeles's Pico Union neighborhood, for example, which lacks readily available or affordable child-care services, parents often relied on their children to care for their younger siblings.¹²¹ Orellana notes that immigrant children would probably face similar expectations of caring for their siblings in their home countries, but that they would have more support from their extended family and communities, thus highlighting how the immigration process intensifies the surrogate parenting burdens foisted onto immigrant children.¹²²

Immigrant children also assist their parents by engaging in work themselves. Sometimes this can mean pursuing work opportunities for the benefit of the family,¹²³ but often it can mean performing waged work without earning wages themselves. This waged work can range from helping parents carry out work in the service industry, such as doing cleaning and janitorial work,¹²⁴ to performing piecework at home, such as helping to assemble goods to be sold to local consum-

¹¹⁸ *Id.* at 729.

¹¹⁹ *See id.*

¹²⁰ *See* Orellana, *supra* note 111, at 367–69.

¹²¹ *Id.* at 378.

¹²² *See id.*

¹²³ *See* Valenzuela, *supra* note 99, at 732–33 (providing instances of immigrant children earning and contributing their wages to the household). As is the case with the parents themselves, these work opportunities are formally limited to children with citizenship or work authorization, but, like their unauthorized parents, unauthorized immigrant children can find work opportunities nonetheless. *See* DREBY, *supra* note 110, at 137–38 (recounting a story of a fourteen-year-old Mexican migrant working on a landscaping crew with his father in the United States).

¹²⁴ One of Valenzuela's interviewees reported the following:

I remember that when I was younger, we used to work. We were in junior high, and my sister and I would go clean offices with my father. We would be out there until 11 at night. We cleaned the offices, throwing trash away, dusting, things like that. And sometimes we had to talk to the managers to get supplies and things like that.

Valenzuela, *supra* note 99, at 733.

ers.¹²⁵ Scholarship on immigrant entrepreneurialism and small businesses helps round out the picture. In her work addressing the community experiences of Korean and Chinese American small family businesses, Professor Lisa Sun-Hee Park found that a number of immigrant children's family lives were intertwined with their families' small businesses, in which they acted as the representative or face of the business.¹²⁶ Interviews with these children reflect their self-understanding as "problem solvers" or "translators" in their family businesses, roles that require them to translate legal papers, interact with the public, and oversee a variety of bills and contracts, all of which gives them, in the words of one of Park's subjects, "a weird, superficial sense of superiority."¹²⁷ Park contrasts this type of work, which is "not discretionary but required for family survival," with "white, middle class, and suburban" teenage work, which is motivated less by financial need and more by a desire for income for discretionary purchases.¹²⁸

Of course, shining a light on the work that children perform draws attention to the norms discouraging (not to mention the laws prohibiting) child labor.¹²⁹ It also provides context for the claim that children of unauthorized immigrants often suffer learning and other developmental disadvantages in their formative years.¹³⁰ At the same time, this empirical work represents an important first step in correcting misperceptions about children and their contributions in immigrant families. For example, while it may be easy to write off child labor as a third-world malady, the reality is much more complicated. As Professor Miri Song observes, in the British context, "The overall image conveyed of Chinese families, and presumably of other immigrant families engaged in ethnic businesses, has been that Chinese parents are rather ruthless and hard-hearted in their manipulation of children's labor. Chinese children's lives are filled with dirty work and misery —

¹²⁵ Some of Orellana's subjects reported putting price stickers on items sold at Toys "R" Us or helping string together necklaces to be sold at a local market. See Orellana, *supra* note 111, at 376.

¹²⁶ See Lisa Sun-Hee Park, *Asian Immigrant Entrepreneurial Children*, in CONTEMPORARY ASIAN AMERICAN COMMUNITIES 161, 168 (Linda Trinh Võ & Rick Bonus eds., 2002).

¹²⁷ *Id.*

¹²⁸ *Id.* at 170.

¹²⁹ See generally Timothy P. McElduff, Jr. & Jon Veiga, Note, *The Child Labor Deterrence Act of 1995: A Choice Between Hegemony and Hypocrisy*, 11 ST. JOHN'S J. LEGAL COMMENT. 581, 584-96 (1996) (describing unsavory child labor practices and both U.S. and international laws passed to combat them); Jeremy S. Sosin, Note, *The Price of Killing a Child: Is the Fair Labor Standards Act Strong Enough to Protect Children in Today's Workplace?*, 31 VAL. U. L. REV. 1181, 1200-01 (1997).

¹³⁰ See HIROKAZU YOSHIKAWA, IMMIGRANTS RAISING CITIZENS 127-29 (2011) (describing likely effects from limited finances and social connections).

end of story.”¹³¹ These kinds of categorically negative and simplistic depictions distract us from more nuanced realities, and these realities, in turn, can help us revisit truths that we have long held to be self-evident, such as the assumption that intrafamily support runs from parents to children.¹³² The economic contributions of immigrant children demonstrate that support can also run in the other direction, from children to parents. And it is this support that enables immigrant parents to work as long and as hard as they do.

2. *Political Activity and Socialization.* — Political engagement and activity is often seen as the paradigmatic example of citizenship activity.¹³³ Not surprisingly, traditional political science theory assumed that political activity would tend to follow from citizenship, or more to the point, that immigrants would not engage in the political process unless and until they acquired citizenship.¹³⁴ We now know that this is not the case. As it turns out, a new generation of scholars has documented that citizenship and political activity need not proceed in that order. These scholars have shown that immigrants often engage in political activity before acquiring citizenship¹³⁵ and that they do so sometimes even where they have little or no prospect of acquiring legal status or citizenship.¹³⁶ Against this backdrop, consider the process of political socialization, by which I mean “the process of acquiring or developing attitudes, values, beliefs, skills, and behaviors related to public affairs and politics.”¹³⁷ As with theories of economic support, traditional accounts of political socialization assumed that it was a unidirectional process in which parents influenced the political views of their children.¹³⁸ In other words, the assumption has been that the parents are the “socializers” while children are the “socialized.”

¹³¹ MIRI SONG, HELPING OUT: CHILDREN’S LABOR IN ETHNIC BUSINESSES 3 (1999).

¹³² See, e.g., *id.* at 13.

¹³³ See, e.g., Bosniak, *supra* note 40, at 470–72 (describing modern participatory theories of citizenship).

¹³⁴ See WONG, *supra* note 104, at 198.

¹³⁵ See *id.*

¹³⁶ See Irene Bloemraad & Christine Trost, *It’s a Family Affair: Intergenerational Mobilization in the Spring 2006 Protests*, in RALLYING FOR IMMIGRANT RIGHTS 180, 185 (Kim Voss & Irene Bloemraad eds., 2011) (noting the presence of undocumented immigrants in the 2006 immigration-reform protests); Ramakrishnan & Viramontes, *supra* note 101, at 159 (explaining that while the leadership of hometown associations tends to be comprised of immigrant men with permanent residence or citizenship, the membership bodies include undocumented immigrants).

¹³⁷ Bloemraad & Trost, *supra* note 136, at 181; see also Janelle Wong & Vivian Tseng, Note, *Political Socialisation in Immigrant Families: Challenging Top-Down Parental Socialisation Models*, 34 J. ETHNIC & MIGRATION STUD. 151, 151 (2008) (describing political socialization as “the process through which individuals acquire their particular political orientations — their knowledge, feeling[s] and evaluations regarding their political world”).

¹³⁸ See Bloemraad & Trost, *supra* note 136, at 188.

But a closer examination demonstrates that this process often can be bidirectional within immigrant families.¹³⁹

The most obvious way in which immigrant children inform their parents' political views is one of the same ways they help their parents in work-related matters (as discussed earlier) and in claims-making settings (as will be discussed shortly): through the direct translation of materials. Immigrant parents may have a keen interest in learning about public affairs and political matters, and children, with their English proficiency, can facilitate this learning through routine tasks like translating information found in newspapers, on television and the Internet, and in other outlets.¹⁴⁰

But immigrant children inform their parents' political socialization in other, more substantive ways. In a study of adult immigrant children in the Los Angeles area, Professors Janelle Wong and Vivian Tseng found that political views can "trickle[] up" just as they "trickle down" within immigrant families.¹⁴¹ Wong and Tseng's data support the finding that immigrant children not only directly translated political materials for their parents, but also in a much deeper sense, they translated political ideas by explaining broad concepts like U.S. political institutions, governmental policies, major political events, or certain political measures, such as laws and ballot propositions (of which there are many in California).¹⁴² Wong and Tseng's findings also confirm the notion that immigrants experience varying degrees of marginalization. According to Wong and Tseng, the surveyed participants were at times more likely to perform political translation work when both of their parents were immigrants than when at least one parent was born in the United States.¹⁴³ Their survey data showed that this difference was most pronounced when the political matters involved the President, the Supreme Court, Congress, citizenship, or naturalization; less pronounced — in fact, statistically insignificant — when the matters involved elections, political parties, freedom of speech, or democracy; and that there was "virtually no difference" on matters in-

¹³⁹ See *id.* at 188–89.

¹⁴⁰ See Irene Bloemraad & Christine Trost, *It's a Family Affair: Intergenerational Mobilization in the Spring 2006 Protests*, 52 AM. BEHAV. SCIENTIST 507, 520 (2008) (noting that teens influence their parents by translating, among other things, election ballots and state propositions); Orellana, *supra* note 111, at 375 tbl.1 (compiling "Translating Experiences Reported by Children"); Orellana et al., *supra* note 99, at 512–13 tbl.1 (listing ways children assist their parents across seven "domains").

¹⁴¹ Wong & Tseng, *supra* note 137, at 152, 159. Wong and Tseng's study used survey data from 374 participants and interview data from 15 in-depth interviews. See *id.* at 156–58.

¹⁴² See *id.* at 158–60. On the other hand, their in-depth interviews suggest that parents play an active role in the political socialization of their children on matters involving the homeland. See *id.* at 164–65.

¹⁴³ See *id.* at 160.

volving civil rights, welfare, federal or local taxes, or propositions or ballot initiatives.¹⁴⁴

The architecture of Wong and Tseng's study limits our ability to extrapolate larger conclusions about the political brokering habits of immigrant children. Because the study recruited participants through a large urban university in Los Angeles, as Wong and Tseng concede, such a study pulls in relatively advantaged and privileged members of the immigrant community.¹⁴⁵ Moreover, their study design does not make clear whether and to what extent their survey participants were undocumented or came from families with undocumented members,¹⁴⁶ which further limits our ability to infer generalizable observations. Yet Wong and Tseng's study helps unsettle the assumption that the transfer of political knowledge within families runs entirely from parents to children. We can safely conclude that within documented and undocumented immigrant families, children help inform the way their parents view the political world, even if we cannot determine with any certainty the degree to (or the circumstances under) which they do so.

Other studies help bolster this point. Relying on in-depth interviews, Professors Irene Bloemraad and Christine Trost have examined the nature of political mobilization leading up to the 2006 protests calling for immigration reform. Their interview data support the bidirectional story of political socialization in which undocumented children and parents shape each other's views and actions, albeit within a very specific set of circumstances.¹⁴⁷ Importantly, Bloemraad and Trost found that children can influence their parents through indirect means of communication. High school students, it seemed, were able to win over their parents by bringing them in contact with networks to which the parents had access only because of their children.¹⁴⁸ A number of interviews reflected schoolchildren planning to attend protests with their classmates. In several instances, teachers and principals accompanied them, a fact that made the protests seem safer and more legitimate to both the children and their parents.¹⁴⁹

In some instances, citizen and lawfully present children can exert influence over their undocumented parents for no reason other than the status differential — these children do not face the risk of reprisal, thus emboldening them to stake out more politically controversial posi-

¹⁴⁴ *Id.*

¹⁴⁵ *See id.* at 156.

¹⁴⁶ As Wong and Tseng explain, "The targeted sample included first- and second-generation adolescents and young adults (18–25 years old) with immigrant parents, as well as third-plus-generation youth with [U.S.]-born parents." *Id.*

¹⁴⁷ *See* Bloemraad & Trost, *supra* note 136, at 188–89.

¹⁴⁸ *Id.* at 191.

¹⁴⁹ *See id.* at 190–92.

tions. But even where both children and their parents lack legal status, there may be good reasons why children take an active role in the political socialization process. To the extent that one's willingness to engage in risky behavior such as protesting in political rallies is tied to freedom from the fear of deportation, recent scholarship points to intergenerational differences. Professor Leisy Abrego has found that while undocumented parents tended to experience their undocumented status in terms of fear, their children tended to do so in terms of stigma.¹⁵⁰ Similarly, Professor Roberto Gonzales has observed that "unauthorized students are not without the ability to take willing and purposive action in the face of social restraints."¹⁵¹ This willingness to engage the political process, Gonzales suggests, is one of the legacies of *Plyler*. By attending schools, unauthorized youth have developed relationships with teachers and counselors, which give them access to these instructors' networks. These networks, in turn, provide these students the opportunity to join school clubs and participate in community service, which gives them confidence and the opportunity to develop leadership skills.¹⁵²

3. *Legal Claims and Claims-Making*. — Immigrant children also help their parents pursue and realize rights, privileges, and benefits. As was the case in other brokering contexts, children directly translate relevant materials or conversations. Children support their parents' pursuit of claims related to workers' compensation, immigration and naturalization, insurance, contract negotiations, and healthcare,¹⁵³ thus operating as a sort of linguistic bridge.

It would be a mistake, however, to conclude that children operate *merely* as bridges, a sturdy but passive passageway. Rather, children can exercise a great deal of agency and discretion even when simply assisting with their parents' claims. It is true that in this version of brokering, an immigrant has not asked her child for help in deciding whether to pursue a legal claim; the immigrant has made her decision and turns to the child for help in gathering and conveying information. But a child may be more interested in gathering and conveying only *relevant* information rather than all of it. For example, imagine a child having to translate a conversation between her mother and a school official in which the official asks at what age the mother began having children. Knowing that her mother dropped out of school be-

¹⁵⁰ See Abrego, *supra* note 89, at 723–26.

¹⁵¹ Roberto G. Gonzales, *Left Out but Not Shut Down: Political Activism and the Undocumented Student Movement*, 3 NW. J.L. & SOC. POL'Y 219, 221 (2008).

¹⁵² See *id.* at 224.

¹⁵³ See, e.g., Orellana, *supra* note 111, at 375 tbl.1; Orellana et al., *supra* note 99, at 511–21; Park, *supra* note 126, at 168–69; Tse, *supra* note 99, at 188; Valenzuela, *supra* note 99, at 734–37; Weisskirch & Alva, *supra* note 109, at 373 tbl.1.

cause she began having children at a young age, this child may decide to obfuscate or provide a vague answer in order to protect her mother against criticism or judgment.¹⁵⁴ Any attempt to understand these exchanges as simply back-and-forth transfers of information would miss the effect that the young interpreter's personal interest has on the content of the conversation.¹⁵⁵ She is protecting her mother's reputational interests through strategic translating decisions.

Lauding efforts to pursue legal claims might seem foolhardy. Rewarding immigrant youth and their parents for contributing to an American norm of litigiousness might strike some as a strange and untoward arrangement. But what is relevant is that it is an *American* norm. Or perhaps more precisely, it is a contested American norm, and the process of contestation over the meaning of work, the economy, and political issues becomes enriched as unauthorized immigrants participate.¹⁵⁶ Moreover, the motivations driving the pursuit of legal claims can be complex. Sometimes, the catalyst might be narrow self-interest, but an unauthorized immigrant's motivations may also reflect a deep belief in the merits of meritocracy.¹⁵⁷

C. *Putting Youth Brokering in Context*

Viewing immigrant youth as brokers clarifies exactly how children and their parents proceed in the immigration process: slowly, with children taking the lead. Unlike the innocence model, the brokering model does not view membership benefits as a corrective measure to an unfortunate circumstance over which childhood arrivals had no control. Rather, it focuses on the pragmatic benefits of stabilizing the status of childhood arrivals — namely, that it allows the subclass of unauthorized immigrants with the greatest access to mainstream institutions (childhood arrivals) to assist the subclass of unauthorized immigrants with the most intense degree of isolation (adulthood arrivals). Here, I further refine this account by pointing out three limitations to the ability of youth to serve as guides during the integration process.

¹⁵⁴ See Orellana et al., *supra* note 99, at 520.

¹⁵⁵ Professor Muneer Ahmad, for example, has started an important conversation about language interpreters and the ways in which our perception of them as “machine[s], not unlike a telephone” has blinded us to other possibilities that more accurately reflect the complicated and dynamic realities of representing poor immigrants. See Ahmad, *supra* note 97, at 1003.

¹⁵⁶ In the context of the DREAMers, Villazor has made the point that by coming out:

[U]ndocumented immigrants have sought to do more than gain personal acceptance of their identity; they also seek to acquire recognition of their existence from society. That is, they are forcing others to *see* them. . . . These undocumented immigrants are therefore asking others who are not inhabiting the undocumented closet to acknowledge that the DREAMers do exist.

Villazor, *supra* note 62, at 52.

¹⁵⁷ See Abrego, *supra* note 89, at 716, 721.

First, immigrant children and youth experience knowledge limitations. Although their English language proficiency allows many children to navigate a variety of interactions on behalf of their parents, their relative inexperience with broad swathes of society and the economy prevents most children from providing anything close to comprehensive brokering services to their parents. While immigrant youth may easily assist their parents with basic economic transactions, such as consumer purchases, or with translating work-related documents, a discernible trend across the studies has emerged in relation to the specialization required for the brokering task. The more specialized the brokering task, the less likely it is that a child can do much more than simply act as a translator for her parents.

For some tasks, youth will simply have no expertise or basis to provide assistance to their parents. Orellana and her coauthors found, for example, that “somewhat fewer students claimed to have experience translating more difficult items such as legal documents, bank statements, or report cards . . . or in more specialized situations, such as at doctor’s offices . . . or parent-teacher conferences.”¹⁵⁸ Anecdotal evidence from the study may indicate that this difference is due to both intimidation and the charged circumstances characteristic of the settings. For example, one interviewee who brokered an interaction at a doctor’s office stated that she was nervous to do so because of potential problems understanding the “big words doctors use.”¹⁵⁹ In the case of an interviewee who had to report her mother’s stolen necklace to the police, the interviewee stated that the situation made her “nervous” and that she was “crying.”¹⁶⁰

Second, brokering work can be taxing to children in terms of their development. Children often serve as surrogate parents to their younger siblings, but this service is born of necessity; low-wage parents must frequently work several jobs, forcing them to empower their children to help carry some of their parental burden.¹⁶¹ Thus, even while children help their immigrant parents incorporate into society by virtue of the comparative assimilative advantage they enjoy, a wider-angled lens reveals that these same children suffer from a disadvantage compared to their classmates with native-born parents. Many of the studies on brokering by immigrant youth either explicitly or implicitly focus on adolescents or teenagers, youth who have reached a

¹⁵⁸ Orellana et al., *supra* note 99, at 514.

¹⁵⁹ *Id.* at 516.

¹⁶⁰ *Id.*

¹⁶¹ See Suárez-Orozco & Todorova, *supra* note 96, at 21; see also Holley A. Wilkin et al., *The Role of Family Interaction in New Immigrant Latinos’ Civic Engagement*, 59 J. COMM. 387, 393–94 (2009) (noting that family interaction and the sharing of resources is a strategy for obtaining the resources a family needs).

level of maturity marked by a certain degree of autonomy and independence. Not surprisingly, these studies say very little on youth during their early childhood years, a time when all children rely heavily on their caretakers.

Professor Hirokazu Yoshikawa, for example, has produced a study of young citizen children of undocumented parents in New York.¹⁶² While he found instances of children providing language brokering services,¹⁶³ he found that the undocumented status of the parents harmed the development of these citizen children in the early years of their lives.¹⁶⁴ Missing out on preschool and early education programs can further exacerbate educational outcomes as immigrant children and the children of immigrants grow older.¹⁶⁵ Thus, brokering operates within a sweet spot. While brokering duties can help immigrant youth establish a sense of confidence, autonomy, and independence, foisting such duties onto children during their early childhood exacerbates a developmental process already hampered by their parents' isolation.

Third and finally, giving children brokering duties may create more discomfort at a time already filled with discomfort. Lisa Sun-Hee Park's study of Chinese- and Korean-owned businesses found that brokering duties often generated a role-reversal in which parents became dependent on children, thus upsetting traditional intrafamilial power dynamics.¹⁶⁶ Several of Park's interviewees expressed the difficulty of being children forced to contend with "adult-like worries" in which they were "expected to deal with adult concerns at the business but behave as a child with [their] parents."¹⁶⁷ Park found that such a role reversal could also have the effect of "compound[ing] the powerlessness that many adult immigrants — particularly men — experience as a result of their new status as a minority in the United States."¹⁶⁸ Brokering may result in a boost of self-esteem to children, but it may come at the cost of a drop in self-esteem for their parents. Orellana and her coauthors' study detailed more sanguine findings on the emotional costs of brokering. They found that children experienced their translating work as "just normal."¹⁶⁹ At the same time, they recognized that a

¹⁶² His study combines longitudinal interview data with participant observation. See YOSHIKAWA, *supra* note 130, at 25–27.

¹⁶³ See *id.* at 9–10.

¹⁶⁴ See *id.* at 17–18.

¹⁶⁵ See MAKI PARK & MARGIE MCHUGH, MIGRATION POLICY INST., IMMIGRANT PARENTS AND EARLY CHILDHOOD PROGRAMS: ADDRESSING BARRIERS OF LITERACY, CULTURE, AND SYSTEMS KNOWLEDGE 14 (2014); see also Motoko Rich, *Trying to Close a Knowledge Gap, Word by Word*, N.Y. TIMES, Mar. 26, 2014, at A12.

¹⁶⁶ See Park, *supra* note 126, at 168–70.

¹⁶⁷ *Id.* at 169.

¹⁶⁸ *Id.*

¹⁶⁹ Orellana et al., *supra* note 99, at 516 (internal quotation marks omitted).

part of brokering requires children to interact with institutions and “authority figures,” which means that they “are potentially witnesses to their parents’ humiliation, infantilization [sic], and mistreatment.”¹⁷⁰

D. Quasi-Sponsorship

Most immigrant admissions operate through a system of sponsorship in which current members select and oversee the integration of new members. Viewing immigrant youth through the lens of brokering demonstrates that childhood arrivals operate as quasi-sponsors. Many childhood arrivals carry out many of the duties typically associated with sponsorship, and yet immigration law offers very few opportunities for them to exercise this power formally, thus highlighting a disconnect between the rules that empower noncitizens to serve as sponsors and the pool of noncitizens well situated to serve in this capacity.

Within the family-based admissions rules, parents can sponsor children; spouses can sponsor spouses; and siblings can sponsor siblings (at least during their adult years).¹⁷¹ As sponsors, parents, spouses, and siblings act not only as anchors within American society, but they also operate as a financial safety net, promising to provide economic support to new members during their transition period.¹⁷² Nowhere in these rules can youth serve as sponsors. These admissions rules do allow individual citizens to sponsor parents, but that right does not vest until the age of twenty-one,¹⁷³ which means only *adult* children can serve as sponsors. Thus, the right to sponsor — that is, the right to select new members of the polity — is not only largely reserved to current members but it is also exclusively reserved for adults. Elsewhere in the immigration code, unauthorized immigrant youth may adjust their status as “special immigrant juvenile[s]” and, as the status suggests, the youth may do so even during their adolescence.¹⁷⁴ But this category applies only to those who have been declared dependents of the state and whose parents are therefore found to be unfit as parents. Thus, special immigrant juveniles receive a curtailed version of membership. Once they obtain their citizenship, they can vote and count on a full range of public goods, but their ability to sponsor new members will never support any application on behalf of their parents.¹⁷⁵

¹⁷⁰ *Id.* at 519.

¹⁷¹ See 8 U.S.C. § 1151(b)(2)(A)(i) (2012); *id.* § 1153(a)(1)–(4).

¹⁷² See *id.* § 1182(a)(4)(C)(ii) (requiring sponsors to file an affidavit of support for beneficiaries of family-based visas); *id.* § 1183a (listing the requirements for filing an affidavit of support).

¹⁷³ See *id.* § 1151(b)(2)(A)(i).

¹⁷⁴ *Id.* § 1101(a)(27)(J)(iii).

¹⁷⁵ See *id.* § 1101(a)(27)(J)(iii)(II) (“[N]o natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.”).

Yet, to the extent that sponsors are expected to shepherd new members through the acculturation and integration process, it is also clear that childhood arrivals are doing precisely that. A prevalent justification for empowering citizens (and to a lesser extent, LPRs) to sponsor family members is that doing so minimizes social externalities by requiring private individuals to absorb the costs of sponsorship.¹⁷⁶ Childhood arrivals, by virtue of having received K–12 schooling, possess a familiarity with the same cultural norms and speak the same language as their citizen and LPR classmates. Moreover, childhood arrivals have access to the same social and economic networks as their citizen peers who possess the formal authority to sponsor new members (once they turn twenty-one years of age). In other words, childhood arrivals are indistinguishable from citizens and LPRs in terms of possessing the right mix of knowledge and information to operate as sponsors.

Many public debates surrounding childhood arrivals implicitly recognize the societal benefits of empowering those who enter the United States during their adolescence. Bills like the DREAM Act and administrative programs like DACA categorize youth in terms of age and time, specifically the age at which an individual entered the United States (or overstayed her visa) and the amount of time that has passed. Generally speaking, the younger the age of entry and the more time that has passed, the better equipped an individual might be to serve as a sponsor. At the same time, defenders of the DREAM Act and DACA often focus on the special talents and skills that childhood arrivals possess. These advocates point out that childhood arrivals are high-achieving and entrepreneurial,¹⁷⁷ and they fill labor gaps and do so in the name of patriotism.¹⁷⁸ But a point that often gets missed is how the age of arrival informs the expression of these special talents. While these traits certainly make these noncitizens more sympathetic figures, they also reflect a familiarity with norms animating both the mainstream and the margins of society. And for these reasons, in many ways, childhood arrivals stand as the ideal sponsors — they formed at-

¹⁷⁶ See Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1322–25 (2012).

¹⁷⁷ See 153 CONG. REC. 28,101 (2007) (statement of Sen. Durbin) (“Give these kids a chance. Do not take your anger . . . [about] illegal immigration [out] on children who have nothing to say about this. They were brought to this country, they have lived a good life, they have proven themselves, they have beaten the odds. We need them. Do not turn around and tell me tomorrow that you need H1-B visas to bring in talented people to America because we do not have enough.”). Similarly, in announcing the DACA program, President Obama counseled against “expell[ing] talented young people.” Remarks on Immigration Reform and an Exchange with Reporters, *supra* note 56 (emphasis added).

¹⁷⁸ See Ana Avendaño et al., Labor and Employment Panel, *Arizona v. U.S.: Immigration Policy and the Economy*, 47 REVISTA JURÍDICA UNIVERSIDAD INTERAMERICANA DE PUERTO RICO 21, 47–48 (2013).

tachments to the United States during a key stage of their development and have spent enough time here to help their parents navigate their communities. They are both ambassadors for and advisors to their parents.

Immigration law, like much of many other areas of law, tends to discount the interests of children, trusting that parents or the state will represent those interests on their behalf.¹⁷⁹ Such an assumption worked to the benefit of children in *Plyler*, but only by ignoring their autonomy. We might think of the notion of immigrant youth as brokers as an opportunity to consider a broader array of sponsorship possibilities. Rather than envisioning children as extensions of their parents or as wards of the state, we might also think of them as the bridge connecting their parents to the state.

Embracing the brokering work that children perform invites us to rethink the line separating children and adults within the immigration code. Certainly, one of the benefits of current family-based migration and adjustment rules is clarity. Pegging the sponsoring right to twenty-one years of age creates a bright line that makes allocating immigration benefits fairly easy. At the same time, such a rule is imperfect to the extent it excludes mature adolescents (and some adults between ages eighteen and twenty-one) from the sponsorship enterprise and includes immature adults. Because these youth engage in a variety of the sponsorship duties that immigration law assigns to adults to promote assimilation, the law should likewise afford them the benefits of sponsorship that correspond to these duties. For example, in the context of mass legalization programs, any future DREAM Act bill that makes its way through Congress could not only permit unauthorized youth to adjust their status, but also facilitate their ability to sponsor their parents. This might mean relaxing the “immediate relatives” category to allow a lawfully present noncitizen to sponsor a parent, or it may mean dropping the age of sponsorship below the current threshold of twenty-one years of age. Working out the details of how exactly this line will be relaxed is beyond the scope of this Review, but what this Review does hope to impress is that good and sound reasons support the relaxation of that line.

Setting new age limits that better account for maturity may vary across contexts. But this variance is no different from the larger bodies of laws regulating youth more generally. In most states, driver’s li-

¹⁷⁹ This vision of immigrant youth reflects a dynamic within family law that Professor Laura Rosenbury calls the family law “triangle,” in which legal authority over the child is split between each actor. This “triangle” presupposes that children are either in the care of the home or of school. Furthermore, within the triangle, children have few rights to curtail the authority exercised by parents, teachers, and others who dominate these institutions. See Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 833–35 (2007).

censes can be obtained at the age of sixteen. Contracts can usually be disaffirmed by minors until the age of eighteen.¹⁸⁰ And not all rules are categorical in nature. Laws in the form of standards also regulate youth behavior and acts. A sixteen-year-old may have the right to disaffirm a contract for the purchase of a car, but he will not necessarily escape liability if he demonstrates negligence in a car accident.¹⁸¹ Similarly, transgender youth typically may not obtain hormones to facilitate their identity transformation without parental consent except in certain jurisdictions where they can demonstrate that they are mature minors.¹⁸² All of these laws recognize that different rights and duties attach at different stages of development.

IV. BROKERING AND ADMINISTRATIVE RELIEF

As vehicles for membership, both moral innocence and brokering lead to the same place for childhood arrivals: they should receive membership benefits either in the form of administrative relief such as deferred action (which is what DACA does) or in the form of adjustment of status (which is what the DREAM Act would do). These vehicles part ways on the question of broader applicability. Who else benefits? Membership predicated on moral culpability tends to exclude adulthood arrivals. Motomura (and others) have engaged this debate. Motomura argues that a full accounting of the costs and benefits of unauthorized migration supports policy reforms establishing a pathway to citizenship for a broad cross-section of unauthorized immigrants — for childhood and adulthood arrivals alike. But what about membership as brokering? Can this version of membership justify a similarly large-scale reprieve against removal? In this final Part, I want to suggest that it can do so but only for a subclass of adulthood arrivals. Within the pool of adulthood arrivals, the strongest candidates for relief are those with children who grew up in the United States. Put differently, brokering principles favor traditional family structures, thus excluding childless immigrants.

Youth brokering commonly occurs within immigrant families. Thus, as a theory of membership, it most directly accounts for childhood arrivals and the noncitizens on whose behalf they seek out services and assert rights, most commonly their unauthorized parents living in the United States. A brokering-based account of membership tends to leave out childless unauthorized adulthood arrivals because

¹⁸⁰ See Hartman, *supra* note 112, at 1301.

¹⁸¹ See *id.* at 1305.

¹⁸² See Maureen Carroll, Comment, *Transgender Youth, Adolescent Decisionmaking, and Roper v. Simmons*, 56 UCLA L. REV. 725, 739 (2009); see also Arshagouni, *supra* note 112, at 336–40 (discussing the “mature minor” doctrine); Hartman, *supra* note 112, at 1306–55 (discussing the laws regulating youth access to health services more generally).

they ostensibly lack the key family relationship providing some level of brokering access. In other words, childless adults and “parachute parents”¹⁸³ fall beyond the scope of a brokering-based membership because it is as if they lack the requisite “sponsor.”¹⁸⁴ Thus, brokering facilitates immigrant integration and, so far, that story has largely focused on children brokering on behalf of parents. As a basis for membership, then, brokering does not reach as far as the “full moral accounting” position advanced by Motomura and others. Brokering-based membership does not cast as wide of a net. At the same time, the uniquely bidirectional relationship between children and parents in immigrant families also helps justify recent policy shifts on the scope of administrative relief available to potentially removable immigrants. On November 20, 2014, President Obama announced an expansion of the DACA program, which was originally introduced more than two years earlier.¹⁸⁵ Among other things, this shift in policy expanded the class of unauthorized immigrants eligible for deferred action to include those who have “a son or daughter who is a U.S. citizen or lawful permanent resident.”¹⁸⁶ This shift in policy appeared in one of a string of memos authored by Jeh Johnson, Secretary of Homeland Security, which did little more than announce these shifts. A memo authored by the Office of Legal Counsel (OLC) provides a bit more insight. In explaining why an expansion of the deferred-action program was legally defensible, OLC points to the fact that citizens have the right to sponsor their parents as “immediate relatives” and that while LPRs possess no comparable right, they are invited to adjust their status after a relatively short period of years at which time they too can exercise the sponsor right.¹⁸⁷

Providing deferred action relief to unauthorized parents with citizen and LPR children helps correct an asymmetry in terms of the im-

¹⁸³ I use this term as a twist on the term “parachute kids,” which typically describes unaccompanied minors. See Yuying Tsong, *Parachute Kids and Astronaut Parents*, ORANGE COUNTY REG. (Apr. 29, 2014, 7:45 PM), <http://www.ocregister.com/articles/children-611961-parents-astronaut.html> [<http://perma.cc/PYN7-UVMS>].

¹⁸⁴ Relatedly, unauthorized adults whose children remain in sending countries possess the relevant family-based relationship, but in that instance, the brokering relationship runs in the other direction: to the extent the child has an interest in entering and living in the United States, the parent is better positioned than the child to tap into existing networks and to find work and to access community-level institutions. See, e.g., DREBY, *supra* note 110, at 137–40 (studying families where parents immigrate to the United States to work and leave their children in Mexico).

¹⁸⁵ See Address to the Nation on Immigration Reform, 2014 DAILY COMP. PRES. DOC. 1 (Nov. 20, 2014).

¹⁸⁶ Memorandum from Jeh Charles Johnson, *supra* note 54, at 4.

¹⁸⁷ See Memorandum from Karl R. Thompson, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, to Sec’y Homeland Sec. & Counsel to the President 26–27 (Nov. 19, 2014), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [<http://perma.cc/639L-TRQX>].

migration benefits available to parents and children. Most individuals are adults when they become parents. Accordingly, current family-based immigration rules allow citizen and LPR parents to sponsor their children at the moment that the relevant relationship — the parent-child relationship — forms.¹⁸⁸ As the OLC memo notes, these same rules also allow citizens to sponsor their parents but only once they reach twenty-one years of age.¹⁸⁹ Thus, a significant gap in time (up to twenty-one years) separates the moment when the parent-child relationship forms and when the citizen child is permitted to exercise the sponsor right.

Assume that a noncitizen parent gives birth to a child while visiting the United States on a temporary visa, thereby conferring citizenship onto the child by birthright.¹⁹⁰ Without deferred action, the parent would be forced into one of two scenarios. In the first scenario, the parent would return to her sending country while she waited for her child to turn twenty-one and sponsor her. But in the meantime, the parent is losing out on valuable “integrative” experiences such as language acquisition, political socialization, and the like. In the second (and probably more likely) scenario, both the parent and child return to the sending country, thus depriving the citizen child of the integrative experiences. Once the child turns twenty-one, he could still exercise the formal right to sponsor his noncitizen parent but he is much less equipped to guide the parent through the integration process. By virtue of spending his formative years abroad, the child lacks the social and cultural capital to meaningfully guide his parent through the integration process. Or to borrow a passage from the *Plyler* Court: “[Education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”¹⁹¹ The deferred-action program creates a third scenario in which neither the future beneficiary (the parent) nor

¹⁸⁸ See 8 U.S.C. § 1151(b)(2)(A)(i) (2012) (defining “immediate relatives” to include “children”); *id.* § 1153(a)(1), (3) (authorizing citizens to sponsor married and unmarried “sons and daughters”); *id.* § 1153(a)(2)(A)–(B) (authorizing LPRs to sponsor “children” and unmarried “sons and . . . daughters”); *id.* § 1153(d) (allowing “children” to be treated as derivative beneficiaries of immigrant visas). Please note that the immigration code defines “children” as “an unmarried person under twenty-one years of age,” while “sons and daughters” refers to those over twenty-one years of age. See 8 U.S.C. § 1101(b)(1) (2012 & Supp. 2014). It’s also worth pointing out that many U.S. citizen parents also have citizen children either through *jus soli* citizenship or through *jus sanguinis*. See 8 U.S.C. § 301(a), (e)–(g) (2012).

¹⁸⁹ See Memorandum from Karl R. Thompson, *supra* note 187, at 26–27; 8 U.S.C. § 1151(b)(2)(A)(i) (noting that while “parents” count as “immediate relatives,” citizen sponsors must be at least twenty-one years of age).

¹⁹⁰ See 8 U.S.C. § 301(a).

¹⁹¹ *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

the future sponsor (the child) is forced into a situation undermining her chances of integration over the long term.

Focusing on the brokering work performed by childhood arrivals also suggests that President Obama and the DHS did not go far enough. The expanded deferred action policy stopped short of granting relief to unauthorized immigrant parents of DACA recipients.¹⁹² According to the OLC, expanding the deferred-action program to include the parents of DACA recipients would deviate from congressional preferences regarding family-based migration.¹⁹³ A part of the problem stems from the OLC's overly restrictive view of the family unification principle. The modern immigration system reflects a strong preference for keeping families together. It is clear from its memo that the OLC views the expanded deferred-action program as a form of humanitarian relief.¹⁹⁴ And without a clear path towards citizenship for either parent or child, the OLC memo conveys a real fear of the slippery slope problem.¹⁹⁵ But the humanitarian element to family unity is just one part of it. The other part involves the integrative benefits of keeping families together. Allowing families to remain together throughout the migration process reflects a belief that the family has a stabilizing effect. While scholars have already developed this point as a matter of doctrine and common sense,¹⁹⁶ brokering scholarship helps establish an empirical basis for this insight. Thus, giving full consideration to the value of family unity also means granting benefits to those who are equipped to act as stabilizers. And because unauthorized immigrant parents with DACA children would fare no worse than those with citizen or LPR children in terms of integration opportunities, there is no reason why family unity could not have served as a basis to go even further in the deferred-action program.

CONCLUSION

Motomura has made the case that unauthorized immigrants are Americans in waiting. By organizing his argument around *Plyler*, Motomura has suggested that the claims to membership made by un-

¹⁹² See Memorandum from Karl R. Thompson, *supra* note 187, at 31–33. For a critique of this aspect of the policy, see Steve Legomsky, *Why Can't Deferred Action Be Given to Parents of Dreamers?*, BALKINIZATION (Nov. 25, 2014, 6:30 PM), <http://balkin.blogspot.com/2014/11/why-cant-deferred-action-be-given-to.html> [<http://perma.cc/7QLL-NEJX>].

¹⁹³ See Memorandum from Karl R. Thompson, *supra* note 187, at 32 (“Extending deferred action to the parents of DACA recipients would . . . expand family-based immigration relief in a manner that deviates in important respects from the immigration system Congress has enacted and the policies that system embodies.”).

¹⁹⁴ See *id.* at 13, 26.

¹⁹⁵ See *id.* at 3.

¹⁹⁶ See Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1637–38 (2007).

authorized youth (whom *Plyler* protected) cannot be separated from those claims made by unauthorized adults. In this Review, I have tried to show how Motomura's case might be bolstered — and the efforts of immigrant rights advocates emboldened — by absorbing the insights of brokering scholarship. But putting the “moral innocence versus brokering” debate to one side, one point should not be forgotten: this book provides an important resource to advocates of immigrant rights who often struggle to explain the parts of “illegal” that are hard to understand.¹⁹⁷ *Immigration Outside the Law*'s clear prose and accessible style help ease this burden that many of us bear.

In closing, I would like to draw attention to one passage that has stayed with me through multiple reads. Motomura opens one of the chapters with a vignette from his childhood about watching fireworks in San Francisco with his father. Motomura writes: “I do not know exactly what my father thought about on those evenings, but I am pretty sure that he considered the Fourth to be a special day — for complicated reasons that many immigrant families share and probably always will” (p. 86). He continues:

Being an immigrant in America and starting a new life here meant everything to him, and yet his Independence Day was always tempered by his doubts of ever truly belonging. Like many immigrants throughout American history, he must have taken some comfort in hoping that his children would. We were, in ways that mattered profoundly to both of my parents, “Americans in waiting” (p. 86).

Motomura then flashes forward decades to 2009, at a moment when Pablo Alvarado, the national coordinator of the National Day Labor Organizing Network, stood before the AFL-CIO to reaffirm the partnership between the labor and immigrant communities and spur Congress to pass a mass legalization program. Alvarado pled, “The very people being called ‘illegal’ — who I prefer to call Americans In Waiting — they, like me, will one day be citizens of this country” (p. 87).¹⁹⁸ It is hard to imagine another legal scholar covering so much ground in so few words, showing how a key moment within the labor movement evinced traces of a quiet childhood moment. This passage, like *Immigration Outside the Law* as a whole, reflects a nuanced and humane account of what has emerged as the policy dilemma of our generation,

¹⁹⁷ See Lawrence Downes, Editorial, *What Part of “Illegal” Don’t You Understand?*, N.Y. TIMES, Oct. 28, 2007, <http://www.nytimes.com/2007/10/28/opinion/28sun4.html> (describing the moral and conceptual problems associated with use of the word “illegal” to describe immigrants or immigration).

¹⁹⁸ The author quotes Pablo Alvarado, Dir., Nat’l Day Laborer Org. Network, Speech at the AFL-CIO Annual Convention 161, 164 (Sept. 14, 2009), <http://www.aflcio.org/content/download/95841/2630221/AFLCIO+9-14-09.pdf> [<http://perma.cc/4C3H-36MG>]. Internal quotation marks have been omitted. Alvarado also employed the same framing when asking others to join the opposition to Arizona SB 1070 (p. 87).

and the clear and direct manner in which Motomura offers this account reaffirms his place as one of the great teachers of our profession.