
CHILDREN AND PARENTS, INNOCENCE AND GUILT

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Professor Stephen Lee's review essay¹ engages accurately and insightfully with my book, *Immigration Outside the Law*. I am grateful, and this short response tries to return the favor by discussing Lee's essay, which proceeds in two parts. First, he raises questions about my reliance on *Plyler v. Doe*² — a case involving unauthorized children — as a core analytical element in a book that addresses unauthorized migrants in general.³ Second, Lee explains what he calls a “membership as brokering” approach to understanding the claims of some unauthorized migrants to be treated as Americans in waiting.⁴ Professor Lee's two ideas are linked, as are the two parts of my response. For both of us, the connection is one between a conceptual puzzle and its solution. Lee sees something puzzling in my analysis and offers a solution by way of friendly amendment. I am not convinced that the conceptual puzzle exists in quite the form that he describes, but he raises perceptive questions, and I find much that is persuasive and valuable in Lee's membership-as-brokering solution. At the same time, there is one significant analytical distinction between membership as brokering and the overall argument in *Immigration Outside the Law*.

The first part of my response acknowledges that organizing the book around *Plyler* prompts fair questions about the differences between children and adults who are in the United States without lawful status. I share Professor Lee's view that these differences are typically exaggerated. Indeed, *Immigration Outside the Law* tries to unsettle any dichotomy that contrasts the claims of “innocent” children with the claims of “guilty” parents. Second, I welcome Lee's perceptive analysis of membership as brokering; it is a discerning way of understanding the claims of unauthorized migrants to be treated as Americans in waiting. At the same time, the persuasive power of the idea of membership as brokering may be limited because it assumes the answer to a central, disputed question about unauthorized migration.

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¹ Stephen Lee, *Growing Up Outside the Law*, 128 HARV. L. REV. 1405 (2015) (reviewing HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* (2014)).

² 457 U.S. 202 (1982) (holding that the state of Texas violated the Equal Protection Clause of the U.S. Constitution by conditioning a child's access to K-12 public education on lawful immigration status).

³ Lee, *supra* note 1, at 1412–15.

⁴ *Id.* at 1426–46.

READING *PLYLER*

Professor Lee asks fair questions about the role that *Plyler* plays in *Immigration Outside the Law*. He asks whether a comprehensive analysis of unauthorized migration can rely heavily on a U.S. Supreme Court decision that concerned the constitutional rights of children in the context of access to K–12 public education. In making this point, Lee is right that arguments in favor of legalization for unauthorized children often assume or assert that children who were brought to the United States by their parents have claims to belonging that are much stronger than the claims of unauthorized migrants who came as adults. This innocent child/guilty adult dichotomy confers on children what Lee calls “membership as innocence.”⁵ This dichotomy appears in arguments for the DREAM Act⁶ and the Deferred Action for Childhood Arrivals (DACA) program, which provides temporary administrative relief from removal for children who arrived in the United States at a young age.⁷ An idea often heard in support of both the DREAM Act and DACA is that children should not suffer for their parents’ choices to violate immigration law.

Professor Lee writes accurately that *Immigration Outside the Law* “subtly defies the innocent child/culpable adult dichotomy.”⁸ This observation leads him to question my reliance on *Plyler*, especially since I acknowledge that the case probably would have come out the other way if it had not been about K–12 public education. As the book’s Introduction chronicles, convincing Justice Powell to cast the swing vote for the narrow 5–4 majority required Justice Brennan to tether his opinion to a narrow understanding of the facts. *Plyler* has turned out

⁵ *Id.* at 1417.

⁶ See, e.g., Mariela Olivares, *Renewing the Dream: DREAM Act Redux and Immigration Reform*, 16 HARV. LATINO L. REV. 79, 86 (2013) (“The narrative of DREAM Act advocacy . . . has consistently focused on the innocence of the children in having or acquiring undocumented status.”); *The DREAM Act: Good for Our Economy, Good for Our Security, Good for Our Nation*, WHITE HOUSE, <http://www.whitehouse.gov/sites/default/files/DREAM-Act-WhiteHouse-FactSheet.pdf> [<http://perma.cc/5VN2-4DGF>] (last visited Mar. 6, 2015) (noting that the DREAM Act “applies to those brought to the United States as minors through no fault of their own”).

⁷ See, e.g., President Barack Obama, Remarks on Immigration (June 15, 2012) (transcript available at <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration> [<http://perma.cc/NE33-UT4F>]) (“[W]e are a better nation than one that expels innocent young kids.” (emphasis added)). See generally Memorandum from Janet Napolitano, Sec’y of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., et al. (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<http://perma.cc/9A6T-GYLJ>]. On November 20, 2014, President Obama announced an expansion of eligibility for DACA, as well as a new deferred action program for some parents of children who are U.S. citizens or lawful permanent residents. See Press Release, White House, Office of the Press Sec’y, Fact Sheet: Immigration Accountability Executive Action (Nov. 20, 2014), <http://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action> [<http://perma.cc/3KDK-W89T>].

⁸ Lee, *supra* note 1, at 1417.

to be a high-water mark for the constitutional rights of the unauthorized, so Lee writes: “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.”⁹

But *Immigration Outside the Law* is not a legal brief, and the constitutional holding in *Plyler* is just the starting point of the book’s analysis. The very fact that *Plyler* is a slender reed as constitutional law precedent makes the decision all the more significant for its engagement with three core policy issues: the meaning of unlawful presence, the role of state and local governments, and the integration of unauthorized migrants. These cross-currents met in *Plyler* and have continued to swirl across the American political and social landscape for more than a generation since the decision.

My arguments for treating many unauthorized migrants — and not just children — as Americans in waiting are not based on simple extrapolation from *Plyler* as a constitutional law decision. Instead, I look closely at the meaning of unlawful presence, and at how and why the unauthorized population of the United States has grown to about eleven million today. As Chapter One explains, the history of unauthorized migration has been one of selective immigrant admissions since early in the twentieth century. Racial perceptions have been highly influential, with newcomers from Asia and Latin America much more likely than Europeans to be merely tolerated as a flexible, disposable, and often unauthorized labor force. European newcomers were much more likely to be welcomed as Americans in waiting.

U.S. policies have created conditions in source countries that incentivized or even compelled migration to the United States, sometimes even in violation of U.S. immigration laws. With a lawful admissions scheme that has been too selective to supply the workers that employers demand, the U.S. government has acquiesced in millions of unauthorized workers who have been drawn by the economy to take jobs, often settling in the United States with their families. The inevitable corollary to selective admissions is selective enforcement. The government has vast discretion not only to arrest, detain, and deport some unauthorized migrants, but also at the same time to heed economic imperatives and take no action against most.

In short, unauthorized migration to the United States is a story of labor and race, and of de facto government policy that tolerates and acquiesces in unauthorized migration. This context is the foundation of one argument that unauthorized migrants should be treated as Americans in waiting. This idea, grounded in what I have called

⁹ *Id.* at 1426.

“immigration as contract,” is that they came at employer invitation and government acquiescence in spite of the letter of immigration law. An additional argument based on “immigration as affiliation” supports these unauthorized migrants’ claims to be Americans in waiting by emphasizing their ties and contributions over years of living in the United States.¹⁰ These contract- and affiliation-based arguments are closely related to each other. For example, one likely rebuttal to unauthorized migrants’ claims to be treated as Americans in waiting based on their ties is that they acquired those ties illegitimately. A persuasive reply is that the unauthorized population of the United States is a consequence of de facto government policy — an argument based on immigration as contract.

By developing these two general arguments for treating unauthorized migrants as Americans in waiting, *Immigration Outside the Law* delves much deeper than *Plyler*, beginning with the exploration of the meaning of unlawful presence in Chapter One, continuing through Chapter Three’s discussion of unauthorized migrants as Americans in waiting, and concluding with Chapter Seven’s analysis of temporary worker programs and international economic development. Throughout the book, I build on the idea that any innocent child/guilty parent dichotomy disregards strong contract- and affiliation-based claims of unauthorized migrants — whether children or adults — to be treated as Americans in waiting.

MEMBERSHIP AS BROKERING: ITS POWER AND ITS LIMITS

Having emphasized the puzzle posed by starting *Immigration Outside the Law* with *Plyler*, the second half of Professor Lee’s review essay offers a solution in the form of an “even stronger” defense of the notion that unauthorized migrants are Americans in waiting.¹¹ The heart of his intervention is membership as brokering as a way of understanding the role of immigrant children in their families and in American society more generally.¹² Lee views it as essential to recognize that the children of unauthorized parents are brokers who act as social and cultural intermediaries for their parents. This perspective, he explains, offers alternative reasons not to separate the claims of children to be treated as Americans in waiting from the claims of their

¹⁰ See Jeffrey S. Passel et al., *As Growth Stalls, Unauthorized Immigrant Population Becomes More Settled*, PEW RESEARCH CTR. (Sept. 3, 2014), <http://www.pewhispanic.org/2014/09/03/as-growth-stalls-unauthorized-immigrant-population-becomes-more-settled> [http://perma.cc/C4QZ-HFPS] (reporting that as of 2013, unauthorized immigrant adults had been in the United States for a median of nearly thirteen years and that “a shrinking share [had] been in the country for less than five years — 15% in 2012, compared with 38% in 2000”).

¹¹ Lee, *supra* note 1, at 1407.

¹² See *id.* at 1426–46.

parents. These reasons seem to contrast with my combined contract-and-affiliation framework for treating unauthorized migrants as Americans in waiting.

For Professor Lee, it is crucial that unauthorized children, by acting as brokers, enable their families to integrate into U.S. society more successfully than they would without the children. In turn, these parents have enhanced claims to be treated as Americans in waiting. A similar focus on the likely integration of unauthorized migrants was evident in the legalization provisions of the Immigration Reform and Control Act of 1986¹³ (IRCA). One of IRCA's requirements for legalization was proof of some English-language ability and knowledge of U.S. civics and history¹⁴ — in other words, proof of some basis for successful integration.

Membership as brokering views unauthorized migrants as families, not as separate individuals who happen to be children and adults. Lee explains that “youth can help shape membership claims *on behalf of* their parents.”¹⁵ Later he writes: “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.”¹⁶ Lee calls these children “quasi-sponsors”¹⁷ and urges reforms in U.S. immigration law to treat these families as Americans in waiting. For example, current law allows U.S. citizen children to file immigrant petitions for their parents only after the children turn twenty-one years of age.¹⁸ Explaining that this rule fails to recognize the brokering role of children,¹⁹ Lee calls for allowing broker-children to sponsor their parents.²⁰ So amended, the law would reject the child-adult dichotomy, with the emphasis on families reflecting a generational sense of time.

What seems clear — and what Lee acknowledges — is that only parents of broker-children would benefit directly from a membership-as-brokering approach to the claims of unauthorized migrants to be treated as Americans in waiting. That said, Lee is right that membership as brokering is an important argument for both legalization and administrative relief from deportation for unauthorized migrants who are parents of U.S. citizen or lawful permanent resident children. Membership as brokering thus adds to the conceptual foundation for

¹³ Pub. L. No. 99-603, 100 Stat. 3359.

¹⁴ *Id.* § 201, 100 Stat. at 3396 (codified at 8 U.S.C. § 1255a (2012)).

¹⁵ Lee, *supra* note 1, at 1427.

¹⁶ *Id.* at 1445.

¹⁷ *Id.* at 1443.

¹⁸ See 8 U.S.C. § 1151(b)(2)(A)(i).

¹⁹ See Lee, *supra* note 1, at 1443–46.

²⁰ *Id.* at 1445–46.

the new Deferred Action for Parental Accountability (DAPA) program, announced by President Obama in November 2014. Under DAPA, some parents of children who are U.S. citizens or lawful permanent residents may apply for temporary administrative reprieves from deportation and work authorization.²¹

Membership as brokering is also the basis for sound criticism of DAPA for having excluded the parents of DACA recipients — that is, the parents of children who have grown up in the United States without lawful status. Here, Lee's perspective offers an essential corrective to a narrower view of DAPA that sees administrative relief from deportation for the parents of children who are U.S. citizens and permanent residents as a way of safeguarding those children's citizenship or immigration status.²² According to this narrower view, the parents of DACA recipients — of children without durable lawful status — have weaker claims. With membership as brokering, however, it matters much more that brokering by children, regardless of their immigration or citizenship status, fosters the integration of their families. More generally, even if membership as brokering doesn't apply to unauthorized migrants without children, it has foundational analytical value because its emphasis on families and generations captures much of the conceptual basis for treating unauthorized migrants as Americans in waiting.²³

And yet, membership as brokering helps with only half of the necessary analytical framework for thinking about unauthorized migrants. The reason is that a comprehensive argument for treating unauthorized migrants as Americans in waiting has two parts. One explains why *all* immigrants — whether lawfully or unlawfully present — should be treated as Americans in waiting. The other part explains

²¹ See Press Release, *supra* note 7.

²² See, e.g., *Principles for Children in Immigration Reform*, FIRST FOCUS, <http://firstfocus.org/wp-content/uploads/2013/02/Principles-for-Children-in-Immigration-Reform-with-Organizations.pdf> (last visited Mar. 6, 2015) [<https://perma.cc/GYB5-FPN5?type=pdf>]; *Immigration Reform is Central to Women's Equality: A Fact Sheet*, WE BELONG TOGETHER, <http://www.welongtogether.org/sites/default/files/WBTWomenAndImmigrationFactsheet.pdf> (last visited Mar. 6, 2015) [<http://perma.cc/JKN5-NV54>]; Memorandum from the Congressional Hispanic Caucus to Jeh Johnson, Sec'y of Homeland Sec. (Apr. 4, 2014), http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2014/04/04/Editorial-Opinion/Graphics/CHC_Request%20to%20Jeh%20Johnson.pdf [<http://perma.cc/P6ZB-R4QJ>].

²³ See, e.g., ROBERTO G. GONZALES & ANGIE M. BAUTISTA-CHAVEZ, AM. IMMIGRATION COUNCIL, TWO YEARS AND COUNTING: ASSESSING THE GROWING POWER OF DACA 12 (2014), http://www.immigrationpolicy.org/sites/default/files/docs/two_years_and_counting_assessing_the_growing_power_of_daca_final.pdf [<http://perma.cc/QR59-9URL>]; *Building on the Successes of DACA to Include Our Parents*, UNITED WE DREAM (June 5, 2014), <http://unitedwedream.org/press-releases/building-successes-daca-include-parents> [<http://perma.cc/BA5C-FX9G>]; Letter from Marielena Hincapié, Exec. Dir., Nat'l Immigration Law Ctr., to Jeh Johnson, Sec'y of Homeland Sec., and to Eric H. Holder, Att'y Gen. (Apr. 14, 2014), <http://www.nilc.org/document.html?id=1080> [<http://perma.cc/AU6Q-AV9P>].

why *unauthorized* migrants should be treated as well as lawful immigrants, or in other words, why the lack of lawful immigration status doesn't matter. In *Immigration Outside the Law*, the first part of Chapter Three explains why the integration of all immigrants is essential, and that the key to their integration is treating them as Americans in waiting. The rest of Chapter Three relies on immigration as contract and immigration as affiliation to explain why unauthorized migrants should be treated as Americans in waiting.

The order of these two parts of the analysis doesn't matter much, but both are essential. In an earlier version of what became Chapter Three, I anticipated being asked why my analysis relied on immigration as contract and immigration as affiliation, but not on the third model of immigration that I developed in *Americans in Waiting* — of immigration as a transition to citizenship. I explained that “[t]o argue that unauthorized migrants are Americans in waiting because they are or should be making a transition to membership in U.S. society would be to assume what I need to analyze.”²⁴ Rather, a complete argument requires showing on some basis, “such as immigration as contract or immigration as affiliation, that unauthorized migrants should be treated as well as lawfully present immigrants.”²⁵ Then, along with that explanation, it is essential to show why that treatment should be treatment as Americans in waiting, as opposed to a more begrudging reception.²⁶ *Plyler* reflected this same two-part reasoning. The Supreme Court relied on contract and affiliation to minimize the significance of unlawful status. Only then did the Court treat the children as Americans in waiting and try to foster their integration by protecting their access to K–12 public education.

Distinguishing but linking these two parts of unauthorized migrants' claims brings into sharp relief how my analysis in *Immigration Outside the Law* is distinct from membership as brokering. For reasons that Lee explains with great nuance and insight, membership as brokering is a powerful way of giving expression to how the idea of Americans in waiting might guide the treatment of immigrants. Children play a crucial role in immigrant integration, especially (but not only) when their parents suffer from having no lawful status. Membership as brokering also shows why immigration law should take seriously that children and parents make up multigenerational families and aren't just unrelated individuals. In these ways, Lee's membership-as-brokering analysis bridges the gap between children

²⁴ Hiroshi Motomura, *Who Belongs?: Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359, 378 (2012).

²⁵ *Id.*

²⁶ *See id.*

and parents and thus does vital work to discredit the *child/adult* part of the innocent child/guilty adult dichotomy.

Membership as brokering is powerful as an analysis of children and adults, but realizing its full conceptual value requires that it be combined with a thorough analysis of innocence and guilt. Anyone who is sympathetic to administrative relief and legalization for all unauthorized migrants is likely to see membership as brokering as a convincing way to connect children with adults across the rhetorical divide between innocent children and guilty adults. Yet membership as brokering may do little to persuade a more skeptical audience that emphasizes immigration law enforcement and asks why noncitizens who are in the United States unlawfully have any legitimate claim to the integration that membership as brokering would foster. To answer that central question, the essential foundation is an analysis of innocence and guilt that comes from examining what unlawful presence means. This is the foundation that *Immigration Outside the Law* tries to provide.