

# CHOICELESS CHOICES: DEPORTATION AND THE PARENT-CHILD RELATIONSHIP

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## I. INTRODUCTION

In distinct ways, deciding where children live is a central concern of both family law and immigration law. Family law establishes protections for private decisions about where children live through limits on outside intervention in the family, while providing avenues for state intervention when necessary to protect children. As such, family law sets parameters on decisions regarding where children live. Immigration law similarly sets parameters on where children live by sanctioning and proscribing the decisions of individuals and families to live within national boundaries. In both realms, the parent-child relationship plays a key role.

In shaping decisions about where people live, family law and immigration law constantly and inevitably interact. Family relationships, especially the parent-child relationship, are critical in shaping the framework that delineates who is permitted to enter and remain in the United States under immigration and nationality law. In turn, the operation of immigration law has a tremendous impact on family integrity as it intrudes and sometimes conflicts with choices that families make about where to live. The often-divergent goals of family law and immigration law make this a volatile and conflicted mix.

There is tremendous potential for inconsistency as immigration law and family law intersect. The vindication of immigration law goals often results in the compromise of family integrity, and achievement of family integrity often can be accomplished only in violation of immigration laws. As family law and immigration law collide, children routinely are caught in the middle. This is especially true when immigration law reaches different conclusions about the legal rights of parents and children to remain in the United States.

This article explores the rights of children and parents as they converge and diverge at the intersection of family law and immigration law. The explicit focus of this work is children in the care of their parents. A wealth of scholarship regarding unaccompanied minors has provided insight regarding the shortfalls of our immigration system in response to children who arrive in the United States alone.<sup>1</sup> This is vital work that already has influenced passage of

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<sup>1</sup> See, e.g., Jacqueline Bhabha, "More Than Their Share of Sorrows": *International Migration Law and the Rights of Children*, 22 ST. LOUIS U. PUB. L. REV. 253 (2003); Gregory Zhong Tian Chen, *Elían or Alien? The Contradictions of Protecting Undocumented Chil-*

measured legislative reform,<sup>2</sup> and there is no question that this work should continue and expand. Nevertheless, in addressing the serious needs of vulnerable unaccompanied children, we cannot lose sight of the fact that they are the exception, while children who immigrate to this country with their parents are the rule.<sup>3</sup> Additionally, beyond immigrant children, many more U.S. citizen children live in the United States in “mixed status” families, that is families in which all family members do not share the same immigration status or citizenship.<sup>4</sup> This article examines the immigration and citizenship rights of children in families, particularly in situations where immigration law stands in opposition to family integrity.<sup>5</sup>

Discussing the immigration and citizenship rights of children in families requires situating these rights among other rights of children, such as rights to family, support, nurture, development and protection. Children’s immigration and citizenship rights can be, or appear to be, in direct tension with these other fundamental rights or with the rights of their parents. In addressing the issue of

*dren Under the Special Immigrant Juvenile Statute*, 27 HASTINGS CONST. L.Q. 597, 599 (2000); Cecelia M. Espenosa, *Good Kids, Bad Kids: A Revelation About the Due Process Rights of Children*, 23 HASTINGS CONST. L.Q. 407 (1996); Christopher Nugent & Steven Schulman, *Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children*, 78 INTERPRETER RELEASES 1569 (2001); Katherine Porter, *In the Best Interests of the INS: An Analysis of the 1997 Amendment to the Special Immigrant Juvenile Law*, 27 J. LEGIS. 441 (2001); Jacqueline Bhabha, *Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children*, 7 U. CHI. L. SCH. ROUNDTABLE 269 (2000); Guy S. Goodwin-Gill, *Unaccompanied Refugee Minors: The Role and Place of International Law in the Pursuit of Durable Solutions*, 3 INT’L J. CHILD. RTS. 405, 410 (1995); Irene Scharf & Christine Hess, *What Process is Due? Unaccompanied Minors’ Rights to Deportation Hearings*, 1988 DUKE L.J. 114 (1988); Jacqueline Bhabha & Wendy A. Young, *Through a Child’s Eyes: Protecting the Most Vulnerable Asylum Seekers*, 75 INTERPRETER RELEASES 757, 760 (1998); Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INT’L J. REFUGEE L. 84, 93 (1999).

<sup>2</sup> See, e.g., Homeland Security Act of 2002, 6 U.S.C. § 279 (2002) (transferring custody, care, and placement of “unaccompanied alien children” from the disbanded Immigration and Naturalization Service to the Office of Refugee Resettlement); Christopher Nugent & Steven Schulman, *A New Era In The Legal Treatment Of Alien Children: The Homeland Security And Child Status Protection Acts*, 80 INTERPRETER RELEASES 233, 236 (2003).

<sup>3</sup> I have argued elsewhere regarding the negative impact that the dominant paradigm of immigration law has on the plight of unaccompanied minors. David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 992–94 (2002). Improving our understanding of how immigration law treats children in families can help us understand how it perceives children alone.

<sup>4</sup> Of families with children and headed by a non-citizen, eighty-five percent are mixed status families. MICHAEL F. FIX, WENDY ZIMMERMAN & JEFFREY S. PASSEL, *THE INTEGRATION OF IMMIGRANT FAMILIES IN THE UNITED STATES* 15 (The Urban Institute 2001). Even more striking, looking at the entire population of the United States, one of every ten children lives in a mixed status family. *Id.*

<sup>5</sup> Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law’s Conflicted Answers*, 32 HOFSTRA L. REV. 273, 276 (2003) (“While current family-related immigration provisions have been analyzed in light of their impact on marriage and family formation, much less work has been done on the influence deportation has had on these entities. Much of the analysis of immigration law tends to focus on how immigration rules regulate and channel immigration of individuals, rather than on the impact they have on the migration of families and couples.”).

where children live in the context of immigration and nationality law, this paper ultimately attempts to reconcile an acknowledgement of children as rights holders with the complex realities of children as members of families. It is this interplay of rights and realities that ultimately determines where children live.

Part II of this article uses the frameworks of derivative asylum and cancellation of removal to contextualize the potential for conflict between parents and children that is inherent in the operation of immigration law. It identifies critical tensions between family integrity, child protection and the rights of children and parents that are inherent in the everyday collision of immigration law and family law. Immigration law frequently places parents in the position of arguing for immigration relief by asserting that they will make decisions that expose children to harm.

In Part III, the article examines baseline understandings of the parent-child relationship in family law, immigration and nationality law. It reviews constitutional dimensions of children's interests in protection of the parent-child relationship and contrasts these with the more limited notions of family integrity and the absence of considerations for children's interests found in immigration and nationality law. It reveals the inclination of immigration and nationality law to assimilate children's status to that of their parents, and exposes situations where this impulse is frustrated.

Part IV analyzes instances where the potential for tension between family integrity and the operation of immigration and nationality laws peaks, i.e. when children hold claims to immigration and citizenship status in the United States that their parents do not share. It reviews cases where children's citizenship rights are inconsistent with parental and governmental decisions that parents leave the country to explain the centrality of the parent-child relationship in both federal immigration determinations and state family law decisions regarding families facing removal. It also resolves the confusion of federal and state roles that often results when immigration and family law clash, asserting the primacy and limits of the state courts in deciding matters regarding the parent-child relationship.

Finally, with a better developed understanding of the role of the parent-child relationship at the intersection of immigration and family rights, Part V returns to the questions raised in Part II regarding the protection of children in the context of the deportation of parents. Immigration and family law best achieve the advancement of children's interests when they operate with awareness of each other but with fidelity to their own aims and processes.

## II. THE EVERYDAY COLLISION OF FAMILY LAW AND IMMIGRATION LAW

Collisions between the operation of immigration law and fundamental principles of family integrity are common. The situation of the Olowo family serves as a vivid example, demonstrating the potential for conflict between immigration law and family integrity, between children and parents.

### A. *The Olowo Family*

Esther Olowo, a legal permanent resident of the United States living in Chicago, was the mother of twin nine-year-old daughters when she became involved in a scheme to assist the six-year-old child of her husband's friend to enter the United States.<sup>6</sup> Olowo traveled to the Bahamas, located the child, and attempted to return to the United States with the child by presenting to custom officials a false U.S. birth certificate for the child.<sup>7</sup> The entire operation was not particularly sophisticated and quickly unraveled.<sup>8</sup> U.S. immigration authorities allowed Olowo to return to the United States, but placed her in removal proceedings after her arrival.<sup>9</sup>

Olowo sought relief from removal by claiming asylum, arguing that if returned to Nigeria, she and her daughters would face persecution because her daughters would be subjected to female genital mutilation ("FGM").<sup>10</sup> Olowo, a member of the Yoruba tribe, had herself been subjected to FGM at age twelve, and she asserted that "she and her husband [would] be unable to protect the children because FGM [was] a tribal tradition and a 'cultural requirement.'" <sup>11</sup> She further argued that "the whole family [would] have to return to Nigeria if she [were] removed because her husband would not be able to care for the children on his own."<sup>12</sup>

The Immigration Judge ruled that Olowo "could not 'bootstrap a claim for asylum based upon fear of harm to her children' because" the children were legal permanent residents of the United States and thus were not required to return to Nigeria with her.<sup>13</sup> On appeal, the Seventh Circuit agreed, ruling that "claims for 'derivative asylum' based on potential harm to an applicant's children are cognizable only when the applicant's children are subject to 'constructive deportation' along with the applicant."<sup>14</sup> Here, the Seventh Circuit affirmed the Immigration Judge's decision that the facts did not support a claim

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<sup>6</sup> *Olowo v. Ashcroft*, 368 F.3d 692, 695 (7th Cir. 2004).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 696.

<sup>9</sup> *Id.* The government charged that Olowo was inadmissible under § 212(a)(6)(E)(i) of the Immigration and Nationality Act as a non-citizen who "at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of law." 8 U.S.C. § 1182(a)(6)(E)(i) (2000).

<sup>10</sup> *Olowo*, 368 F.3d at 697.

<sup>11</sup> *Id.* at 698. Such claims are often referred to as "derivative asylum" claims despite the absence of express statutory authority for a parent to claim derivative status based on a child's asylum claim. See 8 U.S.C. § 1158(b)(3) (2000). It is more accurate to conceptualize the mother's claim as asserting that harm to her daughters would constitute persecution against the mother herself because the mother would be powerless to stop the act and would be forced to witness the pain and suffering of her daughters. See *Abay v. Ashcroft*, 368 F.3d 634, 641 (6th Cir. 2004). For discussion of the much debated issue of extending asylum to parents on the basis of harm to their children, see Marcelle Rice, *Protecting Parents: Why Mothers and Fathers Who Oppose Female Genital Cutting Qualify for Asylum*, 04-11 IMMIGR. BRIEFINGS 1 (2004).

<sup>12</sup> *Olowo*, 368 F.3d at 698. Olowo's daughters and husband all held legal permanent resident status in the United States.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 701.

for derivative asylum because the daughters were legal permanent residents and under no compulsion to leave the United States.<sup>15</sup>

The Seventh Circuit did not stop with its denial of Olowo's asylum claim. It stated, "[w]e are concerned deeply by the representations that Ms. Olowo made at her administrative hearing that, if removed, she would take her daughters back to Nigeria and allow them to be subjected to FGM."<sup>16</sup> Accordingly, "we cannot overlook the fact that Ms. Olowo has announced in an official proceeding her intention to allow her daughters to face FGM in Nigeria rather than arrange for them to remain in the United States."<sup>17</sup> The court noted that the "notion that Ms. Olowo's daughters will be removed to Nigeria and subjected to this brutal procedure offends our sense of decency, and allowing Ms. Olowo to make this decision unilaterally disregards the legal rights of the children."<sup>18</sup>

Acting on this expressed concern, the opinion continues:

At oral argument, we asked counsel for the [Department of Homeland Security] if the Department had alerted state authorities that Ms. Olowo had expressed the intent to expose her daughters to the threat of FGM. Counsel replied that, to her knowledge, the [Department] had not, but she undertook to relay our concerns to the Department. We trust that the [Department] will address this situation and inform the Illinois state authorities that, despite the children's right to remain in the United States, Ms. Olowo plans to take her daughters with her to Nigeria to face what she characterizes as the very real possibility that they may be subjected to FGM.<sup>19</sup>

Perhaps not confident in the Department of Homeland Security to follow through, the court continued:

We also direct the Clerk of this court to send a copy of this opinion to the appropriate office of the Illinois Department of Children and Family Services . . . and the Illinois State's Attorney for Cook County, whose duty it is to represent the people of the State of Illinois in proceedings under the Juvenile Court Act of 1987 . . . , which protects minors from parents who allow acts of torture to be committed on minors . . . .<sup>20</sup>

The court further "assume[d] that state authorities also would assess and assert the rights of the children under the International Child Abduction Remedies Act . . . and Article 13(b) of the Hague Convention on the Civil Aspects of International Child Abduction . . . ."<sup>21</sup> Finally, the Court concluded that "[i]n proceedings under the Juvenile Court Act, Ms. Olowo's daughters will be afforded the opportunity that immigration proceedings do not provide—representation of their best interests."<sup>22</sup>

One possible narrative emerging from this case is a mother's concern for the safety of her children, premised on an assumption that the children will leave the United States with her. Yet the court spins a narrative of children needing protection from their mother's decision, premised on an assumption that the children will stay behind. Clearly, this situation creates deep tensions

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 702.

<sup>18</sup> *Id.* at 703.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 703-04.

<sup>21</sup> *Id.* at 704.

<sup>22</sup> *Id.*

between the operation of immigration law and fundamental concerns about family integrity, child protection and child and parent decision-making. Derivative asylum claims like that made by Olowo involve high stakes situations, but they are not very common, at least relative to the large numbers of immigrants in the United States. The precise tensions raised in this scenario, however, arise everyday in a much more common situation where parents make similar claims about the harm their children will suffer due to deportation.

### *B. Cancellation of Removal—Exceptional and Extremely Unusual Hardship to Children*

The argument that deportation will cause harm to children is the centerpiece of one of the most commonly sought forms of immigration relief, cancellation of removal.<sup>23</sup> The potential tensions between children and parents raised in *Olowo* are present well beyond the derivative asylum context.

Each year, thousands of claims for cancellation of removal involve the exact sort of parental decision that the Seventh Circuit questioned in *Olowo*.<sup>24</sup> While variations on this form of immigration relief have long existed, cancellation of removal in its current form was adopted in 1996. It provides:

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

- (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
- (B) has been a person of good moral character during such period;
- (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title (except in a case described in section 1227(a)(7) of this title where the Attorney General exercises discretion to grant a waiver); and
- (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.<sup>25</sup>

The ten year presence and moral characters requirements are significant limitations on this relief, but for purposes of this article the critical piece is the requirement to establish that parents' removal "would result in exceptional and extremely unusual hardship" to children who are citizens or legal permanent residents.<sup>26</sup>

<sup>23</sup> 8 U.S.C. § 1229b(b)(1) (2000).

<sup>24</sup> The EOIR Statistical Yearbook for 2004 reports 6,393 grants of cancellation of removal for the year. It is likely that claims for cancellation will increase as the long-term undocumented population of the United States continues to grow, meaning that more persons will still be undocumented after meeting the ten year presence requirement. Some special forms of cancellation cases are not subject to this cap. OFFICE OF PLANNING AND ANALYSIS, U.S. DEPT. OF JUSTICE, FY 2004 STATISTICAL YEARBOOK R3 (2005).

<sup>25</sup> 8 U.S.C. § 1229b(b)(1). Prior to the creation of cancellation of removal in 1996, a form of relief called suspension of deportation existed, and relief was available based on hardship not only to legally present relatives but also to the deportees themselves.

<sup>26</sup> Variations of cancellation of removal also apply to persons already granted legal permanent resident status, *id.* § 1229b(a)(1), and children and spouses who have been battered or subjected to extreme cruelty by U.S. citizens or legal permanent residents. *Id.* § 1229b(b)(2).

Parents theoretically can argue hardship to children in two basic ways. First, they can assert that if children are left behind, separation will cause hardship. Second, they can argue that if children leave with the parent, they will face hardship in the destination country.

Virtually no one makes the first argument. Hardship, perhaps even exceptional hardship, is unavoidable when children are forced to separate from their parents. But the statute further requires that harm be "extremely unusual."<sup>27</sup> Harm is a typical result of removal because "[d]eportation rarely occurs without personal distress and emotional hurt."<sup>28</sup> Moreover, separation from family members is "simply one of the 'common results of deportation or exclusion [that] are insufficient to prove extreme hardship.'"<sup>29</sup>

Parents' hesitancy to argue hardship based on leaving children in the United States is enhanced by agency case law that is highly skeptical of any parental decision to separate from children, so much so that the government requires parents to present additional proof of the intention to separate.<sup>30</sup> Doubting that separation can result in the requisite harm, the Board of Immigration Appeals considers

the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If . . . no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.<sup>31</sup>

The rationale for this approach expressly acknowledges the expected harm from separation and seeks to deny a means by which every parent of a U.S. citizen or legal permanent resident child could qualify for immigration relief.<sup>32</sup>

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<sup>27</sup> In determining what is "unusual" courts have uniformly found that the correct comparison group is that of other children accompanying deported parents, not children with citizen parents who face no threat of removal and family separation. *Jimenez v. INS*, No. 96-70169, 1997 WL 349051, at \*1 (9th Cir. June 25, 1997) (unpublished disposition) ("The common results of deportation or exclusion are insufficient to prove extreme hardship.").

<sup>28</sup> *Sullivan v. INS*, 772 F.2d 609, 611 (9th Cir. 1985).

<sup>29</sup> *Jimenez*, 1997 WL 349051, at \*3.

<sup>30</sup> "Where an alien alleges that extreme hardship would be suffered by his United States citizen child were the child to remain in this country upon his parent's deportation, the Board will not give such a claim significant weight based on either the mere assertion that the child would remain here or an indirect reference to such a possibility. The claim that the child will remain in the United States can easily be made for purposes of litigation, but most parents would not carry out such an alleged plan in reality. Therefore we will require, at a minimum, an affidavit from the parent or parents stating that it is their intention that the child remain in this country, accompanied by evidence demonstrating that reasonable provisions will be made for the child's care and support (such as staying with a relative or in a boarding school)." *In re Ige*, 20 I. & N. Dec. 880, 885 (B.I.A. 1994) (denying suspension of deportation because parents did not assert intention to leave child in an affidavit nor did they explain how such a plan could be carried out); *Jimenez*, 1997 WL 349051, at \*5 (allowing the BIA to ignore hardship that would result from leaving the child in the United States where parent "failed to present any concrete evidence indicating that the child would remain in the United States and that reasonable provisions would be made for him.").

<sup>31</sup> *In re Ige*, 20 I. & N. Dec. at 885.

<sup>32</sup> "[I]f a parent's eligibility for suspension of deportation could be established by demonstrating that an infant or unemancipated child abandoned in the United States would face extreme hardship, then the birth of a United States citizen child or the presence of a lawful permanent resident child would likely render any alien parent who had been in the United

Consequently, “absent proof of extreme hardship to a child if he returns to his parents’ native country with them, we will generally consider the decision to leave the child in the United States to be a matter of personal choice.”<sup>33</sup>

The standard for relief is high. To qualify for relief, parents must demonstrate hardship to children “substantially different from, or beyond that which would normally be expected from the deportation of an alien with close family members here.”<sup>34</sup> Generally, hardship is insufficient for relief on ground that children will not have the same levels of education, health care and economic opportunities that they would have in the United States.<sup>35</sup> The Fifth Circuit has described the standard to qualify for relief as encompassing hardship that is “uniquely extreme, at or closely approaching the outer limits of the most severe hardship the alien could suffer and so severe that any reasonable person would necessarily conclude that the hardship is extreme.”<sup>36</sup> Indeed, this “onerous standard is so difficult to satisfy that there is only one published [Board of Immigration Appeals] decision that grants cancellation of removal after finding that the requisite ‘exceptional and extremely unusual hardship’ existed.”<sup>37</sup>

In practice then, qualifying for cancellation of removal requires parents to make exactly the sort of argument that the Seventh Circuit questioned in *Olowo*. For the cancellation statute to apply, it is a prerequisite that children be citizens or legal permanent residents. In other words, the children in this framework are never compelled by immigration law to leave the United States. And parents in this framework argue that they would take children with them and that this will result in “exceptional and extremely unusual hardship.”

### C. *Everyday Decisions*

The derivative asylum situation in *Olowo* and the more common cancellation of removal situation highlight the tension between current immigration laws and children’s rights to family integrity and protection from harm.

First, when parents actually are removed from the United States, their children will either accompany them or stay behind. How and where are tensions between children’s immigration rights to stay in the United States and their

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States for [the requisite time period] eligible for suspension, even if the child would not face extreme hardship abroad.” *Id.* at 885-86.

<sup>33</sup> *Id.* at 886. The Ninth Circuit has rejected that idea that the BIA can presume there will be no separation, *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1426 (9th Cir. 1987), but also has upheld the BIA’s ability to require affidavits and other evidence of separation. *Perez v. INS*, 96 F.3d 390, 393 (9th Cir. 1996).

<sup>34</sup> *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 65 (B.I.A. 2001). “Congress has never accepted the theory that minor American-born children of deportable aliens must, or even should, remain in the United States, and that living with their deportable parents in their home country would result in ‘extreme hardship’ to them.” *Matter of Piggot*, 15 I & N. Dec. 129, 131 (B.I.A.1974) (Torrington, dissenting).

<sup>35</sup> *Jimenez v. INS*, No. 96-70169, 1997 WL 349051 (9th Cir. June 25, 1997) (unpublished disposition).

<sup>36</sup> *Hernandez-Cordero v. INS*, 819 F.2d 558, 563 (5th Cir. 1987).

<sup>37</sup> *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1014 (9th Cir. 2005) (Pregerson, J., dissenting). The Board of Immigration Appeals is generally the final authority since agency decisions regarding the existence of hardship are largely insulated from court review. *See* 8 U.S.C. § 1252(a)(2)(B) (2000); *Romero-Torres v. Ashcroft*, 327 F.3d 887, 891-92 (9th Cir. 2003).



rights to be cared for by their parents resolved? What interests and rights do children have regarding this consequential decision about where they will live? What voice do children have in this process of determining where they will live?

Second, the removal of parents from the United States must be expected to result in change and hardship to their children, regardless of whether the children stay in the United States or leave with their parents. In making cancellation of removal and derivative asylum claims, parents expressly argue that their decision will cause great harm to their children. In fact, with derivative asylum and cancellation of removal the only path the parent can take that both avoids risk of harm for the children while preserving family integrity often is to express a willingness to place children at risk outside the United States. When parents make decisions that potentially place children in harm, how does the operation of immigration law accommodate considerations of child protection? Can parents' willingness to place children at risk, even to avoid other risk, result in the removal of children from parents? Is state involvement appropriate to protect children from harm in such instances, and if so what parameters guide the state's intervention?

Responses to these questions require some understanding of the ways in which underlying frameworks shape the parent-child relationship both inside and outside the context of immigration law. With this baseline established, the article will revisit the situation of the Olowo family and applicants for cancellation of removal.

### III. THE PARENT-CHILD RELATIONSHIP AND PROTECTING CHILDREN'S INTERESTS

At its core, the Seventh Circuit decision in *Olowo* challenged the extent to which parents who face removal can make decisions about where their children live. For the court, allowing parents to decide "unilaterally" about taking their children in potential harm "disregards the legal rights of the children."<sup>38</sup> Before turning to analysis of how immigration law complicates decisions about where, and with whom, children will live, this article explores some baseline principles about the rights and roles of children in making such decisions.

This is, of course, a discussion of children's rights and interests. Therefore, a discussion of parents' rights and responsibilities necessarily follows.<sup>39</sup> The Seventh Circuit's invocation of the rhetoric of children's rights demonstrates the manner in which notions of children's rights can be vague and slippery.<sup>40</sup> Children's rights are often impossible to isolate from the context of

<sup>38</sup> *Olowo v. Ashcroft*, 368 F.3d 692, 703 (7th Cir. 2004).

<sup>39</sup> See Martha Minow, *Whatever Happened to Children's Rights*, 80 MINN. L. REV. 267, 287 (1995) (noting that conceptions of children's rights have "failed to secure a coherent political or intellectual foundation, not to mention a viable constituency with political clout").

<sup>40</sup> The court's passing reference to parental kidnapping conventions and statutes is not helpful and indicates that the court did not have a firm grasp of the substance and source of the children's rights in such a situation. The International Child Abduction Remedies Act and §13(b) of the Hague Convention on the Civil Aspects of International Child Abduction are only applicable if there is in fact an abduction, where one parent takes a child against the

parents and family. As such, thinking in adversarial terms about children and parents is not always particularly accurate or helpful. Moreover, the existence of children's rights often reveals little about whether children can independently exercise these rights or whether they will rely on adults to determine and promote their interests. This section, therefore, approaches its discussion of children's rights and interests in the context of family and the parent-child relationship.

The first subsection reviews long established doctrine regarding the parent-child relationship's role in promoting children's interests and in setting limits on state intrusion into the family. The next subsection contrasts this with the treatment of the parent-child relationship in the particular context of immigration law.

#### A. *Protecting Children's Interests through the Parent-Child Relationship*

The word "family" is not mentioned in the U.S. Constitution.<sup>41</sup> Still, the Supreme Court has consistently found families to be within the reach of the federal Constitution, defending family integrity primarily by strongly protecting the parent-child relationship from outside interference.<sup>42</sup> With respect to the parent-child relationship, the Court's primary approach has been to stress

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wishes of the other parent. Hague Convention on the Civil Aspects of International Child Abduction, art.13(b), Oct. 25, 1980, T.I.A.S. No. 11,670 and 42 USC §§ 11601, 11603 (2000).

<sup>41</sup> In contrast, many international human rights instruments expressly acknowledge family. See Universal Declaration of Human Rights art. 16(3), G.A. Res. 217A, at 71, U.N. GAOR, 3d sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."); 1966 International Covenant on Civil and Political Rights art. 23(1), Dec. 19, 1966, U.N.T.S. No. 14668 ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."); International Covenant on Economic, Social and Cultural Rights art. 10(1), G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (Dec. 16, 1966) ("The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society . . ."); Organization of American States, American Convention on Human Rights art. 17(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the state."); African [Banjul] Charter on Human and Peoples' Rights art. 18(1), Jan. 20, 1982, 21 I.L.M. 58, ("The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral."); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov 4, 1950, 213 U.N.T.S. 222 (entered into force 3 Dec. 1953) ("Everyone has the right to respect for his private and family life . . .").

<sup>42</sup> *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."). More than 80 years ago, the Supreme Court recognized that among the liberties protected by the Due Process Clause of the Constitution is the right of parents to "establish a home and bring up children, . . . [a right] essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). See Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 688 (2001) ("[T]he U.S. Constitution provides parameters that limit the states' ability to define and regulate family rights and obligations.").

parents' role in raising their children.<sup>43</sup> Indeed, the Court's most basic concept of a family is as "a unit with broad parental authority over minor children."<sup>44</sup> This "concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."<sup>45</sup> Parents, under this concept, are charged with the care and custody of their children. They are both empowered and burdened with responsibility for the growth and development of their children.

The emphasis on parents in this framework is not dismissive of children's rights as it might appear at first glance. Discussions of rights tend to focus on adults rather than children because, in part, the real needs and dependency of children at various stages of development fit poorly with notions of autonomy and individual choice associated with traditional rhetoric about rights. In such discussions, the existence of rights often is falsely equated with the exercise of rights.<sup>46</sup> Yet thinking about the existence of rights separately from the exercise of rights allows us to envision parents as empowered, not to usurp children's rights, but rather to vindicate them.<sup>47</sup>

Recognizing that children lack the capacity to exercise certain rights and make certain decisions, the framework merely asserts that these decisions are made by a parent, as the adult with the most intimate knowledge of the child, rather than by some other adult.<sup>48</sup>

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<sup>43</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (finding that it is "cardinal . . . that the custody, care and nurture of the child reside first in the parents"). In fact, "the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by" the Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see also Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

<sup>44</sup> *Parham v. J.R.*, 442 U.S. 584, 602 (1979). *See also Pierce*, 268 U.S. at 534-35 (affirming that parents have the right, and duty, "to direct the upbringing . . . of children under their control"); *Reno v. Flores*, 507 U.S. 292, 310 (1993) (noting that "our society and this Court's jurisprudence have always presumed [parents] to be the preferred and primary custodians of their minor children").

<sup>45</sup> *Parham*, 442 U.S. at 602. *See also* John E. Coons, Robert H. Mnookin & Stephen D. Sugarman, *Puzzling Over Children's Rights*, 1991 BYU L. REV. 307, 343-44 (1991) ("Children continually grow and develop new capacities and independent preferences. Every issue of liberty involves a relationship between relatively formed, unchanging adults and a child who is in subtle yet constant transformation. With age and experience, the child's autonomy becomes more easily imaginable, while the rationale for restraint of that autonomy becomes more confusing.").

<sup>46</sup> Annette Ruth Appell, *Uneasy Tensions Between Children's Rights and Civil Rights*, 5 NEV. L.J. 141, 150 (2004) ("[C]hildren [may] lack the capacity necessary for agency, but they have needs and interests that the law can define and protect."); Berta Esperanza Hernandez-Truyol, *Asking the Family Question*, 38 FAM. L.Q. 481, 488 (2004) (describing international law norms that parents have primary responsibility for promoting their children's rights and that children's best interests are parents' "basic concern").

<sup>47</sup> "When laws are enacted that protect a child's relationship with his parents and siblings, the parental rights doctrine can be said to advance the rights and interests of children." MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* 37 (2005).

<sup>48</sup> "Children's lack of autonomy does not affect their status as rights holders; it only alters the protections required to give those rights effect." Thronson, *supra* note 3, at 990 (arguing that it is possible to create a more child-centered perspective by characterizing parents as the principal guardians of children's rights). *See also* Appell, *supra* note 42, at 713 ("If a judge or another adult substitutes for the parents, the child is not less restricted, just subject to

This framework also empowers parents to make judgments about what capacity children have and to decide when children are ready to assume responsibility for certain types of judgments and tasks.<sup>49</sup> As a result, parents are the primary source of constraint and encouragement in the lives of children. Parents decide children's readiness for specific experiences, and the state plays a small legal role in most children's lives.<sup>50</sup> Parents, therefore, intervene in children's lives on a constant basis as a means to foster growth and development while direct state involvement is noticeably absent from the lives of most children.

Assigning parents the responsibility for decisions related to children's growing autonomy ensures that the advancement of children's interests is not left to chance or diffused among rival adults and institutions. In fact, it is when children's lack of autonomy is invoked for purposes of supporting state, rather than parental, interference with children's liberty that notions of diminished autonomy are least reconcilable with more individualistic notions of children rights.<sup>51</sup> Using parents to accommodate for children's lack of autonomy and capacity allows the state to minimize its role in families.

Aside from the mere practicality of placing primary responsibility for children's nurture with parents, limiting the state role in families promotes democracy by creating space in which private forces, rather than state forces, control socialization and influence the development of values.<sup>52</sup> Children then, look to parents for moral and intellectual guidance. It is not the province of the state to interfere simply because the state may disagree with the values and world views that parents choose to advance.<sup>53</sup>

This framework proceeds, sometimes uncomfortably, from the presumption that "natural bonds of affection lead parents to act in the best interests of

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someone else's decision-making about what is best for the child or what the child actually wants."); Coons et al., *supra* note 45, at 349 ("Enforcing the child's own will may be imaginable in a limited set of cases, but the claim that these instances epitomize victories for human liberty is not so easy to sustain. Perhaps the primary assurance of the child's liberty lies in the sovereignty of the normal parent whose affection and self-interest combine to make the child's autonomy a principal goal of the family.").

<sup>49</sup> Coons et al., *supra* note 45, at 341 ("[S]ince dependency ends gradually, society must determine just when young persons should be given the legal right to make autonomous decisions regarding a wide range of particular matters.").

<sup>50</sup> *Id.* at 343 ("[T]he parental power to determine the child's readiness for some particular activity is not an exotic exception. It is the rule. Rarely does the state impose specific constraints which override the license of tolerant guardians . . . . Most of the subordination experienced by children is due to parental discretion, not a general societal rule.").

<sup>51</sup> These include instances where the Court has supported government imposed limitations on children's liberty with the argument that "juveniles, unlike adults, are always in some form of custody." *Schall v. Martin*, 467 U.S. 253, 265 (1984) (upholding New York statute authorizing pretrial detention of juveniles). *See also Reno v. Flores*, 507 U.S. 292, 302 (1993) ("[W]here the custody of the parent or legal guardian fails, the government may (indeed, we have said must) either exercise custody itself or appoint someone else to do so.") (internal emphasis omitted). For a strong critique of *Flores*, see Espenosa, *supra* note 1, at 437-50.

<sup>52</sup> Appell, *supra* note 42, at 707-09.

<sup>53</sup> Appell, *supra* note 46, at 144 ("Parents thus have a fundamental right to rear their children according to private values and the state is prohibited from interfering with individual families based on a disagreement about those values as they relate to the child's interests.").

their children.”<sup>54</sup> Because this is not a universal reality, “a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.”<sup>55</sup> Still, as noted above, state interference with parental decisions is not the norm, and thus it not something that is permitted lightly.<sup>56</sup> As “a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of the parent to make the best decisions concerning the rearing of that parent’s children.”<sup>57</sup>

This is perhaps especially true when custody of children is at stake, because this can have an irreparable impact on the parent-child relationship. If the state attempts to alter parents’ custody of children, it must adhere to stringent procedural requirements. The Constitution prohibits removal of children from parental custody without first addressing the parents’ fitness.<sup>58</sup> Further, if the state seeks the more drastic step of permanently terminating parental rights, a two-tiered process is required.<sup>59</sup> First, before a state “may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.”<sup>60</sup> At the initial stage, the parent-child relationship is still intact and “the State cannot presume that a child and his parents are adversaries.”<sup>61</sup> Second, only after a court finds a parent unfit, may the court consider the interests of the child independent of the parent.<sup>62</sup> This strong constitutional protection

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<sup>54</sup> *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

<sup>55</sup> *Id.* at 603 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972)).

<sup>56</sup> State reluctance to intervene in families is not without cost or criticism. Characterizing the family as private can reinforce patterns of violence against children and women. See Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 984-86 (1991).

<sup>57</sup> *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000).

<sup>58</sup> *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

<sup>59</sup> *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 37 (1981) (noting that state intervention to terminate the relationship between a parent and a child must be accomplished by procedures meeting the requisites of the Due Process Clause).

<sup>60</sup> *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982). “The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.” *Id.* at 753.

<sup>61</sup> “[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.” *Id.* at 760. See also *Nicholson v. Williams*, 203 F. Supp. 2d 153, 235 (E.D.N.Y. 2002) (noting that the “interest in not being forcibly separated by the state is shared by parents and children”); *Troxel*, 530 U.S. at 68 (stating that in evaluating state intervention into the family, courts must apply a “presumption that fit parents act in the best interests of their children”).

<sup>62</sup> In general, “‘the best interests of the child’ is not the legal standard that governs parents’ or guardians’ exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.” *Reno v. Flores*, 507 U.S. 292, 304 (1993) (citing *R.C.N. v. State*, 141 Ga. App. 490, 491 (1977)). “We have little doubt that the Due Process Clause would be offended ‘[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.’” *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (quoting *Smith v. Org. of Foster Families*, 431 U.S. 816, 862-63 (1977)).

for the parent-child relationship serves, among other purposes, as a bulwark against unfounded attempts at outside interference.<sup>63</sup>

Under this framework, specific decisions about where children live are placed firmly in the hands of parents unless the parents are proven unfit so as to justify state intervention.<sup>64</sup> A child's domicile, closely related to residence, is similarly linked to the domicile decisions of parents.<sup>65</sup> Parents thus have "the affirmative right to determine the country, city, and precise location where the child will live. This is one of the primary rights of . . . custodial parent[s]."<sup>66</sup> It also is firmly accepted that parents determine who lives in the home, and it is not extremely unusual to see parents decide that their children are best served by living in some arrangement other than the traditional nuclear family setting.<sup>67</sup>

As a baseline then, absent parental unfitness, the state will not interfere with parents' decisions about where their children live. Indeed, the idea that parents generally decide where and how children live is so firmly established that it seems entirely unremarkable. Certainly, it would be unusual to see the state involved in everyday decisions by parents to move with their children down the block, across the country or even around the world. In contrast, state

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<sup>63</sup> "Central to the Court's decision in *Santosky* is its view that any effort to sever the parent-child relationship, as a constitutional matter, must begin with an inquiry that is parent-focused. *Santosky* thus stands for the critical principle that before the state may sanction interference in the relationship between a parent and a child, there must be some threshold showing—independent of what may be in the best interest of the child—that the parent's conduct falls beneath some minimum acceptable threshold." Bruce A. Boyer & Steven Lubet, *The Kidnapping of Edgardo Mortara: Contemporary Lessons in The Child Welfare Wars*, 45 VILL. L. REV. 245, 253 (2000) (internal emphasis omitted).

<sup>64</sup> Deciding where children live is an important aspect of parental custody. "Child custody is not a single right but, rather, a bundle of rights. These rights include the right to physical possession of the child; to decide where the child will live and with whom the child will associate; to collect the child's earnings; to control the child's religious and secular education; to make medical decisions; and to grant and withhold permission to travel, worship, work, and marry. Along with rights of custody come responsibilities: the duties to feed, clothe, house, educate, protect, and supervise the child. In intact families, both parents share these rights." Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 FAM. L.Q. 815, 816 (1999). Most custody disputes are not between parents and children but between parent and parent. Situations where parents split and compete for custody abound, but are beyond the scope of this article.

<sup>65</sup> *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989) ("Since most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents."); *Rosario v. INS*, 962 F.2d 220, 224 (2d Cir. 1992) ("A minor's domicile is the same as that of its parents, since most children are presumed not legally capable of forming the requisite intent to establish their own domicile."); Jay C. Laubscher, *A Minor of 'Sufficient Age and Understanding' Should Have The Right to Petition for the Termination of the Parental Relationship*, 40 N.Y.L. SCH. L. REV. 565, 568 (1996) ("In most jurisdictions . . . legal disabilities of children include the inability to establish their own domicile.").

<sup>66</sup> *Gonzalez v. Gutierrez*, 311 F.3d 942, 949 (9th Cir. 2002) (emphasis in original); see also *In re Marriage of Burgess*, 913 P.2d 473, 483 (Cal. 1996) (noting presumptive right of parent to change residence of children); *In re Marriage of Condon*, 73 Cal. Rptr. 2d 33, 39 (1998) (noting that the *Burgess* decision followed "national trend").

<sup>67</sup> See *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977) (holding that "the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns").

intervention would be expected if a six-year-old child were found abandoned by parents and living alone, or living with parents and subjected to abuse.<sup>68</sup>

This framework is not an abandonment of children's rights, but a recognition that parents are charged with protecting children's interests. Children, as well as parents, have a fundamental, constitutionally protected interest in the preservation of the parent-child relationship. In giving this right effect, parents play the visible role in decisions about where children live, and in this role, they give life to children's interests in preserving the parent-child relationship. Meanwhile, the state does not interfere unless parents prove unfit. In such instances, the state stands ready to assert children's rights to protection. Children's rights and interests are a fundamental part of this scheme.

As we shall see, in the immigration realm, the state plays a much more direct role in sanctioning or proscribing decisions about where to live and children's interests are much less prominent.

### B. *Children in Immigration and Nationality Law*

While citizenship and immigration laws certainly influence lives in a variety of profound ways,<sup>69</sup> one core function they serve is to circumscribe the ability of persons to legally enter or remain in the United States.<sup>70</sup> As such, laws that determine citizenship, the allocation of immigrant visas and relief from removal all have profound effects on the ability of individuals and families to decide where they will live. Family relationships, and in particular the parent-child relationship, play a prominent role in the structuring of immigration and nationality law.

As will be seen, immigration and citizenship provisions generally promote keeping children and parents together. Because the application of immigration and nationality laws mimics the results achieved by constitutional protections of the rights of children and parents in family integrity, it is easy to assume that these protections of family integrity are at work in shaping immigration and citizenship frameworks. Upon closer examination, however, it is apparent that other goals are predominantly served by immigration and citizenship provi-

<sup>68</sup> This becomes more complicated as a child grows older and develops more autonomy. "When a [parent-child] conflict arises, there is always a latent issue whether the state should support the parental will, or whether it should permit or even assist the child's will." Coons et al., *supra* note 45, at 344. In the absence of parental unfitness, "[r]ecognizing the child's right to move out of the house would raise a . . . troubling set of questions. If the child runs away from home with state approval, ought this not terminate the parents' responsibility for the child including the obligation to pay for the child's necessities? . . . If the state in addition provides safe homes for fickle runaways, what would remain of parental authority." *Id.* at 348-49.

<sup>69</sup> Linda Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1068 (1994) ("[An] analysis of membership has two essential dimensions, one concerned with the admission and exclusion of aliens and the other with their social status once present."). See also Kevin R. Johnson, *The End of "Civil Rights" As We Know It? Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1483 (2002); Raquel Aldana & Sylvia R. Lazos, "Aliens" in *Our Midst Post-9/11: Legislating Outsiderness within the Borders*, 38 U.C. DAVIS L. REV. 1683, 1684 (2005) (examining "restrictive laws and policies aimed at noncitizens in the name of national security").

<sup>70</sup> See generally Michael Walzer, *The Distribution of Membership, in* BOUNDARIES: NATIONAL AUTONOMY AND ITS LIMITS 1, 1-36 (Peter G. Brown & Henry Shue eds., 1981).

sions. Protecting children and their interests is not a priority of immigration law.

### 1. *Aligning Children's Immigration Status with that of Parents*

At the most general level, three major programs determine eligibility to immigrate to the United States: family-sponsored immigration, employment-based immigration, and diversity immigration.<sup>71</sup> Outside these three major programs, other forms of immigration relief operate on much smaller scales and include provisions that prohibit the government from returning persons to particular countries where they would face persecution or torture.<sup>72</sup>

Family-sponsored immigration provisions result, by far, in the largest number of determinations regarding eligibility to immigrate to the United States.<sup>73</sup> Generally, family-sponsored immigration provisions permit citizens and legal permanent residents to petition for the immigration of certain family members who fall in particular categories.<sup>74</sup> In particular, parents are able to petition for children who are under age twenty-one.<sup>75</sup> Additionally, children may qualify as "derivative" to parents who are principal beneficiaries of the other two major programs, employment-based and diversity visas.<sup>76</sup> As beneficiaries of parents' immigration petitions and as derivatives, children comprise approximately one-third of all legal immigration to the United States.<sup>77</sup> Therefore, the parent-child relationship plays a significant role within the dominant framework of the immigration system.

The ability of parents to bring their children to the United States has led some to identify family unity as an important value underlying immigration law. But while family relationships do form the basis of much of legal immigration, narrow definitions of family<sup>78</sup> and long wait times frustrate the actual-

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<sup>71</sup> STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 241 (Foundation Press 4th ed. 2005).

<sup>72</sup> See 8 U.S.C. §1158 (2000) (concerning asylum); *id.* § 1231 (2000) (concerning withholding of removal); 8 C.F.R. § 208.16 (2005) (concerning relief pursuant to the Convention Against Torture).

<sup>73</sup> The Bureau of Citizenship and Immigration Services reports that in 2004, 65.6% of legal permanent immigration to the United States was accomplished through family-sponsored immigration. OFFICE OF IMMIGRATION STATISTICS, DEPARTMENT OF HOMELAND SECURITY, U.S. LEGAL PERMANENT RESIDENTS: 2004 3 (2005).

<sup>74</sup> See 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a) (2000). The immigration and citizenship status of the sponsoring petitioner and the relationship to the beneficiary determine the priority given the petition, and some petitions face waits of many years. *Id.* Perhaps unsurprisingly, traditional nuclear families fare best under the statutory scheme. See Linda Kelly, *Family Planning, American Style*, 52 ALA. L. REV. 943, 955-60 (2001); Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 AM. J. COMP. L. 511, 528 (1995); Demleitner, *supra* note 5, at 276 (asserting that despite the diminished reality of traditional, nuclear families immigration law continues its reliance on assumptions on this dominant model).

<sup>75</sup> See 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a).

<sup>76</sup> 8 U.S.C. § 1153(d) (2000). For example, the spouse and minor children of the recipient of an employment-based immigrant visa may qualify to accompany the principal immigrant.

<sup>77</sup> Thronson, *supra* note 3, at 994.

<sup>78</sup> See generally Victor C. Romero, *Asians, Gay Marriage and Immigration: Family Unification at a Crossroads*, 15 IND. INT'L & COMP. L. REV. 337 (2005); Kelly, *supra* note 74; Motomura, *supra* note 74; Demleitner, *supra* note 5.



ity of preserving or restoring family integrity.<sup>79</sup> Moreover, a claim that immigration and nationality law promote family integrity in general is too broad. To the extent that the statutory scheme of immigration law promotes the goal of family integrity, it does so only by providing parents with opportunities to align their children's status with their own. Children in this scheme are denied agency to extend immigration status to their parents. A closer examination of the statutory framework demonstrates this distinctive result.

First, for purposes of immigration law, a "child" only exists in relation to a parent.<sup>80</sup> Meeting the definition of "child" requires satisfaction of qualifying conditions, all of which require demonstration of the dependency of the child on the parent.<sup>81</sup> Further emphasizing notions of dependency, immigration law reserves the power to recognize and establish a parent-child relationship for immigration purposes to the parent, and makes it unavailable to a child.<sup>82</sup> As a result, any immigration eligibility benefit that accrues to an individual based on being a "child" necessarily is filtered through a parent upon whom the child is dependent.

As noted above, within the family-related immigration framework, parents who qualify to immigrate often may petition for children or may include them as derivatives. Children, in contrast, can do neither for their parents.<sup>83</sup> The qualifier "may" in describing the parents' options is worth noting, because the decision to include children in a petition is left to the discretion of the parent. Under immigration statutes, children cannot force parents to act on their

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<sup>79</sup> Emma O. Guzman, *The Dynamics of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996: The Splitting-Up of American Families*, 2 SCHOLAR 95 (2000). "[C]ountry quotas for foreign nationals have caused a substantial waiting time for the spouses and minor children of so-called 'green card' holders. Such waiting periods may help explain the large number of undocumented family members in the United States. Often spouses and children migrate before their legal status is secured." Demleitner, *supra* note 5, at 282-283 (2003).

<sup>80</sup> The Immigration and Nationality Act provides distinct definitions of child for statutory provisions relating to immigration and provisions relating to nationality. The differences are minor and without import for the purposes of this article. See 8 U.S.C. § 1101(b)(1) (2000) (defining "child" for purposes of immigration provisions); *id.* § 1101(c)(1) (defining "child" for purposes of nationality provisions).

<sup>81</sup> For a fuller discussion of how notions of dependency are embedded in the immigration law definition of child, see Thronson, *supra* note 3, at 991-92.

<sup>82</sup> *Id.* (describing how immigration law "recognizes a 'child' only through parental action").

<sup>83</sup> Children who are U.S. citizens ultimately may petition for their parents but only when they reach age 21, the age at which immigration law ceases to consider them children. 8 U.S.C. § 1151(b)(2)(A)(i) (2000). A child also cannot include a parent as a derivative to a family petition. *Id.* Further, derivative status extends only one generation, so that young parents who otherwise would qualify as derivatives cannot immigrate together with their own children. *Id.* Also, children cannot apply under the diversity visa lottery because applicants must be high school graduates or have equivalent education or work experience. *Id.* § 1153(c)(2). While children are not directly prohibited from applying for employment-based immigrant visas, it is highly unlikely that they would have the requisite education or job experience to qualify. See *id.* § 1153(b). See also Jacqueline Bhabha, *The "Mere Fortuity" of Birth? Are Children Citizens*, in 15(2) DIFFERENCES: A JOURNAL OF FEMINIST CULTURAL STUDIES 91, 95 (2004) (discussing the "striking asymmetry in the family reunification rights of similarly placed adults and minor children").

behalf.<sup>84</sup> While perhaps assuming that most parents will act in the best interests of their children, immigration statutes impose absolutely no obligation upon parents to do so.

To the extent that the framework for family-sponsored and derivative immigration tends to achieve family integrity, it does so by ceding control over a child's status to parents and by denying opportunities for children to achieve legal status as children without their parents. Parents who are successful in navigating the immigration system may include their children with them or may petition later for their children to join them. If the parents' attempts to immigrate fail, the attempts of their derivative children will fail as well. In other words, this framework is set up in a manner that seeks to ensure that children will not acquire any immigration rights denied to parents through family related immigration. The system is geared to assimilate children's status to that of their parents, not the other way around. In this way, children are passively advanced through the process by successful parents and are held back by unsuccessful parents. Either way, the family related immigration system anticipates children with their parents, not alone.

Importantly, although this version of family integrity does, in most instances, tend to keep children together with parents, it has no concern for where the family ends up or for children whose parents are unable to or choose not to assist them.<sup>85</sup>

## 2. *Naturalized Parents, Naturalized Children*

Naturalization laws function somewhat differently from immigration statutes, but promote the same result of assimilating children's status to that of their parents. Again, children lack agency. Even if they meet all other eligibility requirements, children are specifically barred from applying for naturalization.<sup>86</sup> At the same time, many children whose parents naturalize automatically

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<sup>84</sup> See *Fornalik v. Perryman*, 223 F.3d 523, 527-28 (7th Cir. 2000) (finding that a child had no ability to force his father to include him in an immigration petition that extended to other family members including the child's mother). An "unfortunately common problem with the family-based immigration regime . . . [is that] [d]erivative beneficiaries are just that—derivative—meaning that they have few rights of their own and instead depend on the competence and cooperation of the principal immigrant." *Id.* Under the Violence Against Women Act, spouses and children who have been battered or subjected to extreme cruelty may qualify to "self-petition." 8 U.S.C. §§ 1154(a)(1)(A)(iii), (B)(iii) (2000). Self-petitioning is not available if the principal stops short of battery or extreme cruelty, or simply fails to act on behalf of a beneficiary out of incompetence or choice.

<sup>85</sup> *Perdido v. INS*, 420 F.2d 1179, 1181 (5th Cir. 1969) ("Not every family with diverse citizenship among its members can be reunited in this country.").

<sup>86</sup> 8 U.S.C. § 1445(b) (2000) ("No person shall file a valid application for naturalization unless he shall have attained the age of eighteen years."). The Congressional power to limit naturalization is firmly established. See U.S. Const. Art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish a uniform Rule of Naturalization"); *United States v. Ginsberg*, 243 U.S. 472, 474 (1917) ("An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare."); *INS v. Pangilinan*, 486 U.S. 875, 884 (1988) (holding that court lacked power to confer citizenship in violation of limitations imposed by Congress in exercise of its exclusive constitutional authority over naturalization).

and immediately become citizens of the United States, benefiting from one of the few provisions of immigration and nationality law that alters status without a lengthy application process.<sup>87</sup> Under this scheme, children (at least while still children) cannot become citizens unless a parent does.<sup>88</sup> This approach again rewards the children of successful parents and disadvantages children of parents who, whether by choice or by lack of qualification, do not naturalize.

As a result, if immigrant parents do not naturalize and later face removal, their minor children who became legal permanent residents along with them will not be U.S. citizens. If these deported parents elect to take their children with them, these children will generally be returning to a country where they remain citizens.<sup>89</sup> Alternately, a parent who has taken the final step of naturalizing has solidified lasting ties with the United States. Assimilating the child's status to the parent's citizenship status removes the threat of parent-child separation through the child's subsequent deportation.<sup>90</sup> Family integrity is facilitated, again in the narrow sense that the status of children is assimilated to that of their parents.

### 3. *Motivations and Goals*

The tendencies of both the family related immigration system and the naturalization system are the same. While they generally promote family integrity, more precisely, they evidence a strong preference that children's immigration and citizenship status be assimilated to that of their parents. To achieve this limited form of family integrity, immigration and nationality law provide avenues to align the status of children to that of their parents, and simultaneously shun paths by which children can independently achieve status that their parents do not. Neither does the law allow children to extend status to their parents.

The tendency of immigration and nationality laws to keep children with parents perhaps is motivated in part by altruistic impulses and concern for the parent-child relationship, but other factors plainly are at work that advance national interests without regard to the individual families involved. Providing parents with options to immigrate their children with them is "a critical aspect of integrating and stabilizing migrant populations."<sup>91</sup> The presence of family members here "also reduces remittances abroad—a useful benefit for receiving countries since the immigrants will spend the money on consumption or invest-

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<sup>87</sup> 8 U.S.C. § 1431(a) (2000).

<sup>88</sup> Prior to the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (2000), the naturalization of both parents, or a parent having legally established sole custody, was required before a child automatically acquired citizenship.

<sup>89</sup> See *infra* at subsection IV.B. This action may result in children also losing their U.S. immigration status, assimilating to the non-status of their parents. *Lepe-Guitron v. INS*, 16 F.3d 1021, 1025 (9th Cir. 1994) ("The BIA has held that when a parent *abandons* his or her permanent resident status, minor children of the parent also lose permanent resident status.").

<sup>90</sup> See Victor C. Romero, *The Child Citizenship Act and the Family Reunification Act: Valuing the Citizen Child as Well as the Citizen Parent*, 55 FLA. L. REV. 489 (2003) (discussing ways in which race and class narratives related to foreign-born children adopted by U.S. citizen parents undergirded support for the Child Citizenship Act).

<sup>91</sup> Demleitner, *supra* note 5, at 286.

ment in their new home country.”<sup>92</sup> While this helps explain extending some options to parents to extend status to children, other rationales are at work in denying similar agency to children in the immigration and citizenship realm to extend status to parents or to achieve status that their parents do not share.<sup>93</sup>

The United States has a longstanding policy against extending immigration status to persons who will need public support. Emma Lazarus’s myth of welcoming the tired and poor has never been an accurate portrait of U.S. immigration policy. The first general immigration act “excluded idiots, lunatics, convicts, and persons likely to become a public charge.”<sup>94</sup> Inadmissibility grounds for persons with mental disabilities or criminal backgrounds still exist, though they have changed over the years. The denial of admission to those likely to become a public charge remains intact.<sup>95</sup> Because children alone are highly likely, at least in the short term, to become public charges, immigration laws work against their presence when unaccompanied by an adult. Of course, if children with legal immigration status had the ability to extend status to their parents, then the public charge concern could be met by parents ready to immigrate and support their children.

Further, the denial of agency to children to extend status to parents in this statutory framework is a quite conscious choice. Congress intended precisely the imbalance of agency between parents and children that the immigration and naturalization frameworks achieve.<sup>96</sup> This is partially a reflection of children’s perceived capacity and autonomy. Because “minor children do not ordinarily determine where their own home will be, much less the family home, Congress recognized a rational distinction when it limited the category of those who could confer immigration benefits on their parents to persons over age twenty-one years of age . . . . [Congress] did not give the privilege to those minor children whose parents make the real choice of family residence.”<sup>97</sup>

Of course, the characterization of parents as making the “real choice” obscures the fact that even when parents do make choices regarding residence they frequently are giving effect to children’s rights and interests.<sup>98</sup> Denying

<sup>92</sup> *Id.* at 294-95.

<sup>93</sup> The acknowledgement that children lack agency in the current statutory framework of immigration law is not an endorsement of this result. The statute’s adopted approach is not inevitable, and has far reaching negative consequences. See Bhabha, *supra* note 83, at 95.

<sup>94</sup> 1 Charles Gordon, Stanley Mailman, & Stephen Yale-Loehr, *Immigration Law and Procedure*, § 2.02[2] (Matthew Bender Co., 2005).

<sup>95</sup> See 8 U.S.C. § 1182(a)(4) (2000) (“Any alien who, in the opinion of the consular officer at the time of the application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.”).

<sup>96</sup> See *Faustino v. INS*, 302 F.Supp. 212, 214 (S.D.N.Y. 1969), *aff’d* 432 F.2d 429 (2d Cir. 1970), *cert. denied* 401 U.S. 921 (1970) (rejecting challenge to aspect of statutory scheme that denied children the ability to petition for parents). After extensively reviewing legislative history, the court indicated that “[h]ere it is clear that Congress envisioned this case almost in its essential detail and sought to prevent the very result here desired [by plaintiff].” *Id.*

<sup>97</sup> *Perdido v. INS*, 420 F.2d 1179, 1181 (5th Cir. 1969).

<sup>98</sup> Bhabha, *supra* note 83, at 96 (“This asymmetry reflects an anachronistic set of assumptions about the nature of family life in a globalized era. It assumes the absolute primacy of parental rather than child migration considerations.”).

immigration rights to children not only inhibits independent choices by children, it also denies parents the opportunity to help children make choices to effectuate children's interests. More broadly, the "assumption that children's immigration status must derive from that of their parents rather than vice versa recalls an earlier set of gendered assumptions—that women traveled with or followed their husbands, but not vice versa."<sup>99</sup> The conscious choice to deny agency to children within immigration and nationality law frameworks is firmly entrenched, but hardly inevitable.<sup>100</sup>

Beyond a limited view of the role that children's interests play in decisions about where families live, the statutory scheme is a reaction to the citizenship of children born in the United States.<sup>101</sup> By limiting the agency of children, a parent "illegally present in the United States cannot gain a favored status merely by the birth of his citizen child."<sup>102</sup> Therefore, "a woman who is otherwise a deportable alien does not have any incentive to bear a child (who automatically becomes a citizen) whose rights to stay are separate from the mother's obligation to depart."<sup>103</sup> Stripping children of agency for family-sponsored immigration thus works as a barrier to the legal immigration of undocumented parents. Given the broad Congressional power to prescribe the conditions and terms by which noncitizens may come into the United States as immigrants,<sup>104</sup> it is unsurprising that constitutional challenges to this statutory framework have failed.<sup>105</sup>

Importantly, as noted above, the limited version of family integrity achieved in immigration and nationality law is indifferent to place. It promotes

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

<sup>100</sup> *Id.* at 99 (noting that the "one-way descending flow of familial transmission of citizenship, from parent to child rather than from child to parent, is accepted as a natural rather than a constructed asymmetry.")

<sup>101</sup> See *infra* section III.B.4.c.

<sup>102</sup> *Lee v. INS*, 550 F.2d 554, 555 (9th Cir. 1977); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1425-26 (9th Cir. 1987); *Ramirez-Durazo v. INS*, 794 F.2d 491, 498-99 (9th Cir. 1986).

<sup>103</sup> *Oforji v. Ashcroft*, 354 F.3d 609, 618 (7th Cir. 2003). See also *Faustino v. INS*, 302 F. Supp. 212, 215-16 (S.D.N.Y. 1969), *aff'd* 432 F.2d 429 (2d Cir. 1970) (providing in appendix transcripts of Senate hearings that discuss desire to draft provisions so in manner to avoid extending immediate admission to parents on the basis of the birth of child in the United States).

<sup>104</sup> "Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)). Generally, Congress may "provide some—but not all—families with relief from various immigration restrictions that would otherwise hinder reunification of the family in this country." *Id.* at 797 (finding that Congress may discriminate between mothers and fathers in setting parameters for family-based immigration). See also *Matthews v. Diaz*, 426 U.S. 67, 79-80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."); *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (upholding statute prohibiting visas to proponents of communism).

<sup>105</sup> *E.g.*, *Perdido v. INS*, 420 F.2d 1179, 1181 (5th Cir. 1969) (finding no denial of equal protection in statutory provisions providing that citizen children over age twenty-one can petition for parents but minor children cannot); *Dimaren v. INS*, 398 F. Supp. 556, 561 (S.D.N.Y. 1974) ("Entry into this country by aliens has always been a matter of Congressional discretion and Congress did not give minor children the ability to confer immigration benefits on their parents."); *Faustino*, 302 F. Supp. at 214.

no preference for a family staying in the United States over leaving. Indeed, both immigration and naturalization systems facilitate a family in which children follow parents abroad over a situation in which children remain in the United States without parents. As such, the scheme fails to account for the full range of children's interests and the parents' role in articulating and advancing these interests.

The imbalance in agency between parent and child, however, should not obscure the fact that children are among the primary beneficiaries of these statutory schemes.<sup>106</sup> Given the complexities of the immigration process, children in families generally benefit from the guidance of their parents. As parents successfully move the family through the immigration process, they shoulder the responsibilities of the immigration process—a benefit to children. Similarly, if the family encounters difficulty in immigrating, children in families have adult parents to seek legal representation and guide the family through the formalities of immigration proceedings. As discussed below, it is when immigration law fails in its attempts to assimilate children's status to that of their parents that tensions between immigration law and family integrity are brought to the fore.

#### 4. *When Children Do Not Share Status with Parents*

The overall tendency of immigration and naturalization law to assimilate children to their parents' status is not accomplished without exceptions. Despite the important role of family in establishing eligibility to immigrate to the United States, immigration rights, once achieved, are ultimately held by individuals and not by families. This means that it is entirely possible, and in certain circumstances likely, that parents and children will not share the same immigration or citizenship status.<sup>107</sup> There are three primary ways in which this result occurs.

##### a. *Unaccompanied Minors*

For a wide array of reasons, thousands of children do arrive at the borders alone.<sup>108</sup> In the absence of a parent, immigration law does not regard these "unaccompanied minors" as "children," and immigration law does not tailor substantive or procedural protections to their age or development.<sup>109</sup> Unac-

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<sup>106</sup> Approximately one-third of all permanent immigration visas are granted to children as dependents or derivatives. Thronson, *supra* note 3, at 994 n.101 and accompanying text.

<sup>107</sup> It is increasingly common that family members do not share a single immigration status. Of families with children and headed by a non-citizen, eighty-five percent are mixed status families. FIX, ZIMMERMAN & PASSEL, *supra* note 4, at 15. Even more striking, looking at the entire population of the United States, one of every ten children lives in a mixed status family. *Id.* Of poor children, fifteen percent live in mixed status families. *Id.* In immigrant rich areas, these figures are even higher—forty-seven percent of children in Los Angeles live in mixed status families. *Id.*

<sup>108</sup> See, e.g., Bhabha, *Lone Travelers*, *supra* note 1, at 269.

<sup>109</sup> Thronson, *supra* note 3, at 1000 ("substantive and procedural rules do virtually nothing to account for the possibility of children in proceedings unaccompanied by parents"). In one of the few immigrant related provisions of the Homeland Security Act of 2002 that was not restrictive, § 462(g)(2)(A)-(C) transfers from the disbanded Immigration and Naturalization Service to the Office of Refugee Resettlement the custody, care, and placement of "unac-

accompanied minors, who are not “children” under immigration and nationality law definitions, sit uncomfortably outside the dominant framework in which family related immigration strips children of agency. Unaccompanied minors thus are situated at another extreme where they are forced to function as adults without accommodation based on their level of development.<sup>110</sup>

Though excluded from any ability to claim an immigration benefit based on family, unaccompanied minors otherwise have the same rights as adults to file for immigration relief for which they might qualify, including such forms of relief as asylum or protection from removal pursuant to the Convention Against Torture.<sup>111</sup> In addition, a form of immigration relief known as special immigrant juvenile status is available to some undocumented children who are dependent upon a juvenile court.<sup>112</sup>

The narrowed range of immigration options available to unaccompanied minors are among the most complex, both procedurally and substantively. While the special difficulties faced by unaccompanied minors are outside the scope of this article, it is worth noting that these difficulties are compounded by the deeply ingrained notions of children only as dependents that constitute the dominant paradigm of immigration law.<sup>113</sup> While many children benefit from the passive role of dependent through family related immigration, the dominance of this view makes the immigration system even more difficult for children who do not fit this pattern.

Children as unaccompanied minors and state dependents may acquire legal immigration status in the United States independently of their parents. When they do so, however, they are often unable to reunite with parents because the dominant paradigm still blocks them from petitioning for family members.

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accompanied alien children,” defined as children without lawful immigration status in the U.S. who have not attained 18 years of age, and who have no parents or legal guardians in the U.S., or no parents or legal guardians in the U.S. who are available to provide care and physical custody. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (November 25, 2002). See Nugent & Schulman, *supra* note 2, at 236 (“The primary change for unaccompanied alien children resulting from the HSA is structural, inasmuch as responsibilities for the care, custody, and placement of unaccompanied alien children are simply transferred from the INS to the ORR. Yet, the effect that switching responsibilities from a law enforcement agency to a human services agency will have on the discrete population of more than 5,000 alien children in INS custody annually cannot be understated.”).

<sup>110</sup> Thronson, *supra* note 3, at 1002 (“Children are treated as adults not because they are determined to be sufficiently mature to effectuate rights without special procedures or supports. Rather, they simply are not ‘children’ under immigration law and no provision is made to distinguish them from adults.”); see also Bhabha & Young, *Not Adults in Miniature*, *supra* note 1, at 84; Bhabha & Young, *Through a Child’s Eyes*, *supra* note 1, at 757.

<sup>111</sup> See, e.g., *Gonzalez v. Reno*, 212 F.3d 1338, 1347 n.8 (11th Cir. 2000) (affirming that any person, regardless of age, may apply for asylum); *Lusingo v. Gonzalez*, 420 F.3d. 193 (3d Cir. 2005) (overturning Board of Immigration Appeals denial of asylum application of 16-year-old Tanzanian youth who arrived in the United States for a Boy Scout Jamboree).

<sup>112</sup> For a fuller discussion of special immigrant juvenile status, see Thronson, *supra* note 3 at 1005-13. To qualify for special immigrant juvenile status, a family court must determine that reunification with parents is not a viable option. 8 C.F.R. § 204.11 (2000). Further, children who attain legal immigration status through state dependency are specifically barred from ever petitioning for their parents. 8. U.S.C. § 1101(a)(27)(J) (2000).

<sup>113</sup> See Thronson, *supra* note 3, at 1003.

*b. Deportation of Parents*

Although the role of family is critical in shaping who qualifies to immigrate to the United States, when a person faces removal from the United States it is as an individual, not as a family unit.<sup>114</sup> The deportation of parents, therefore, is a common avenue by which parents' immigration status loses alignment with that of their children. Removal proceedings may result in an order of deportation against a parent that does absolutely nothing to affect directly the immigration status of a child or other family members. As discussed below, if a child who is not deportable under immigration law leaves the country with the parent in this situation, it is on the basis of the parent-child relationship, not the mandate of immigration law.<sup>115</sup>

Removals from the United States have increased since immigration law reforms in 1996 dramatically altered the number of criminal offenses that can lead to an individual's removal.<sup>116</sup> Still, it is an inaccurate stereotype to conclude that most persons deported are criminals. Despite the increase in removals based on criminal grounds, "most removals take place because non-citizens do not have the requisite documents, such as visas or permanent residency papers, to stay and/or work in a foreign country."<sup>117</sup>

As discussed below, situations in which parents are ordered removed while children remain settled in the United States with legal immigration status pose some of the most difficult questions.

*c. Jus Soli and the Creation of Mixed Status Families*

Finally, the citizenship concept of *jus soli*, the right of the land, extends U.S. citizenship to children born in the United States. The Fourteenth Amendment provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."<sup>118</sup> With only a very few narrow exceptions, the Supreme Court has interpreted the Fourteenth Amendment to mean that all children born in the United States are U.S. citizens at birth, regardless of the immigration status of their parents.<sup>119</sup> In sharp contrast to the naturalization

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<sup>114</sup> *But see* 8 USC §§ 1182(a)(3)(B), 1227(a)(4)(B) (2000) (making spouses and children deportable based solely on their relationship to a noncitizen involved in terrorist activity). This provision took effect May 11, 2005 and its validity has not yet been tested. *See also* Lori A. Nessel, *Forced to Choose: Torture, Family Reunification and United States Immigration Policy*, 78 TEMP. L. REV. \_\_\_, (forthcoming Winter 2005) (on file with author).

<sup>115</sup> *See infra* at section IV.B.

<sup>116</sup> *See* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1950–54 (2000).

<sup>117</sup> Demleitner, *supra* note 5, at 296.

<sup>118</sup> U.S. Const. amend. XIV, § 1. This mandate is incorporated into statute at 8 U.S.C. § 1401 (2000).

<sup>119</sup> *Elk v. Wilkins*, 112 U.S. 94 (1884) (holding that Native Americans born within the United States but within tribal authority were not "subject to the jurisdiction" of the United States and thus did not acquire U.S. citizenship at birth). Citizenship at birth is now conferred to affected Native Americans by statute. 8 U.S.C. § 1401(b) (2000). The Court later clarified that the only other persons falling outside the "subject to the jurisdiction" clause are "children born of enemy aliens in hostile occupation, and children of diplomatic representatives of a foreign state." *United States v. Wong Kim Ark*, 169 U.S. 649, 682 (1898). For a



system, this constitutional rule often results in children attaining U.S. citizenship even though their parents do not.

Through the three avenues just discussed, immigration of unaccompanied minors, removal of parents, and *jus soil* citizenship, children and parents often have disparate rights regarding the ability to reside legally in a particular country. It is in these situations, when the impulse of immigration and nationality law to assimilate children's status to that of parents is frustrated, that the intersection of immigration law and family law is most complex. In such situations, the parent-child relationship is perhaps most vulnerable.

#### IV. WHEN IMMIGRATION LAW AND FAMILY INTEGRITY CLASH

The potential for tension between family integrity and the operation of immigration and nationality laws peaks when children hold claims to immigration and citizenship status in the United States that their parents do not share. In the reverse situation, immigration law is more likely to provide an avenue for parents to extend status to their children and thus preserve the option of living together in the United States. But the lack of agency for children in the statutory framework of immigration law denies children the ability to extend status to their parents. It is quite common that immigration law provides no legal means for children to live with the parents in the United States although there is no reason to question the parents' concern and competence regarding their children. On the other hand, because immigration and nationality law do not account for children's interests or parents' fitness, there is a grey area in which the application of immigration law may implicate child protection concerns.

When families settle in the United States and the intervention of immigration law results in a parent being ordered removed, the framework of immigration law burdens families with hard choices. Under the statutory framework, either children must stay in the United States and be separated from their removed parent or parents, or they must leave with their parents.<sup>120</sup> The former option threatens family integrity and the latter diminishes children's right to stay in the United States. Unsurprisingly, families have challenged this framework, seeking a third option of keeping the family together in the United States.

This section explores responses to the difficult situations where children's immigration and citizenship rights to remain in the United States are in tension with family integrity.

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view questioning whether *jus soli* citizenship is constitutionally mandated, *see* *Oforji v. Ashcroft*, 354 F.3d 609 (7th Cir. 2003) (Posner, J., concurring).

<sup>120</sup> The child,

as an American citizen, has an uncontested legal right to remain in this country, if the order [to deport parents] is enforced he must either suffer to be separated from his natural parents (an unlikely event in view of his tender years) or leave with them—in violation, it is contended, of his constitutional rights, privileges and immunities. In practical terms, the impact of the order expends its force as much upon the infant as upon the parents.

*In re* Amoury, 307 F. Supp. 213, 215 (S.D.N.Y. 1969).

### A. *Removing Citizens*

Situations in which parents determine that they will take their U.S. citizen children outside the United States are commonplace. In most instances, such decisions are unremarkable and there is no question that children in the family will accompany their parents. In most of these situations, there is no immigration law that compels the U.S. citizen child to leave the United States. For example, at one end of the spectrum, the event could be as simple as a foreign vacation or even a brief border crossing to get the better view of Niagara Falls from the Canadian side.<sup>121</sup> At the other end, it could involve a decision to move the family permanently to a location outside the United States.<sup>122</sup> When parents decide to take their children outside the United States, can children successfully resist leaving the country on the basis of their immigration or citizenship status?

#### 1. *The Case of Harald Schleiffer*

In 1980, ten-year-old U.S. citizen Harald Schleiffer filed a civil rights action seeking to enjoin enforcement of an Indiana state court order that awarded Harald's custody to his mother in Sweden and that ordered Harald's father to arrange for Harald's travel.<sup>123</sup> Invoking the Due Process and Equal Protection Clauses of the Fourteenth Amendment, Harald argued that "the Indiana decree amounts to a 'deportation' from the United States and that a citizen cannot be deported."<sup>124</sup>

The court disagreed, emphasizing Harald's dependency and the "primary role of the parents in the upbringing of their children."<sup>125</sup> The court stated, "we cannot assume that at age 10 1/2 Harald is mature enough to become emancipated and to provide for himself. To comply with Harald's petition to enjoin the Indiana decree would be to leave Harald without a parental custodian."<sup>126</sup> As Harald had not alleged that his mother was unfit in any way, the court refused to interfere with his mother's choice of where to live.<sup>127</sup> Leaving "Harald . . . in the care, custody and control of his mother necessarily implies some restriction upon Harald's own preferences, such as his desire to live in the United States. But . . . the tradeoffs implicit within family life do not necessarily deny Harald his constitutional rights."<sup>128</sup>

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<sup>121</sup> Even so innocent a trip as this can be fraught with immigration consequences. See Monica Skrautvol, *ASU grad's immigration status still uncertain: 3-year deportation battle on hold for now*, The Arizona State University Web Devil (Aug. 22, 2005) <http://www.asuwebdevil.com/issues/2005/08/22/news/693468>.

<sup>122</sup> See *In re Polovchak*, 454 N.E.2d 258, 261 (Ill. 1983).

<sup>123</sup> *Schleiffer v. Meyers*, 644 F.2d 656, 658 (7th Cir. 1981). The court assumed, on the record before it, that "Harald is acting upon his own preference." *Id.* at 661.

<sup>124</sup> *Id.* at 662.

<sup>125</sup> *Id.* at 660 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972)).

<sup>126</sup> *Id.* at 661 (assuming on the record before the court that "Harald is acting upon his own preference").

<sup>127</sup> *Id.* at 667 (Cudahy, J., concurring) ("If Harald is able to remain in the United States contrary to the wishes of his custodial parent, who will assume responsibility for his care? I am reluctant to make a child de facto a ward of the state because of a disagreement over where the family will live.").

<sup>128</sup> *Id.* at 662.

The court also found it important that Harald would remain a U.S. citizen and that he could choose to return to the United States upon reaching an age of emancipation.<sup>129</sup> As such, the court reasoned that Harald's exercise of his constitutional right to live in the United States was not extinguished, but merely delayed.<sup>130</sup> In sum, his "constitutional right . . . to reside in the United States is one of several rights involved in the family relationship. Harald retains his citizenship and his rights to return to the United States as an adult."<sup>131</sup>

## 2. *The Power of the Parent-Child Relationship*

Decisions of courts in the United States in a variety of postures have addressed challenges such as Harald's to the propriety of taking U.S. citizen children outside the country. As a starting point, courts are quick to assert that "[c]itizen children have, of course, an absolute right to remain in the United States."<sup>132</sup> Such a bald assertion is not entirely accurate. More precisely, the starting point for analysis is that the federal government will not compel a U.S. citizen to leave the United States pursuant to the nation's immigration laws.<sup>133</sup> The same statement is true regarding legal permanent residents or holders of any other valid immigration status who have not committed any actions making them deportable. A child's right to not be deported from the United States pursuant to immigration laws, however, is a far cry from a child's right to remain in the United States under any and all circumstances.

The immigration rights of a citizen or legal permanent resident child cannot be viewed in isolation from other factors that influence decisions about where children live. Immigration and citizenship considerations related to the right of children to remain in the United States do not normally triumph over considerations of custody and family integrity. When the issue of taking children abroad has arisen in family courts, they have long done what no immigration court ever could: order U.S. citizens to leave the United States.

For example, in 1882, future U.S. Supreme Court Justice Brewer, then sitting on the Kansas Supreme Court, had no difficulty assigning custody of a child to her grandmother in England.<sup>134</sup> Writing for a unanimous court he stated,

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 662-663.

<sup>131</sup> *Id.* at 663. See also *In re Erich*, 310 A.2d 910, 914 (Del. Ch. 1973) ("In making the appointment [of guardians who reside in Austria] the Court recognizes that the child will remain an American citizen, but there is certainly a chance that an American heritage will be lost.") (internal citation omitted); *Acosta v. Gaffney*, 558 F.2d 1153, 1158 (3d Cir. 1977) (noting that upon reaching adulthood "as an American citizen she may then, if she so chooses, return to the United States to live").

<sup>132</sup> *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1423 (9th Cir. 1987); *Jimenez v. INS*, 116 F.3d 1485, 1997 WL 349051 at \*5 (9th Cir. June 25, 1997) ("As a United States citizen, petitioner's son has an absolute right to remain in the United States."); *Tischendorf v. Tischendorf*, 321 N.W.2d 405, 411 (Minn. 1982) ("It is the fundamental right of an American citizen to reside wherever he wishes, whether in the United States or abroad.").

<sup>133</sup> "Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact." *Ho v. White*, 259 U.S. 276, 284 (1922).

<sup>134</sup> *In re Bullen*, 28 Kan. 781, 1882 WL 1125, at \*3 (1882).

I cannot agree with counsel that it is never the province of the court to expatriate a citizen. In some cases I think the duty so to do is clear and absolute. As, for instance, where parents moving to a foreign country, and leaving their little child here for awhile, come back to claim it, and are hindered by those who have it in possession.<sup>135</sup>

In 1910, the Colorado Supreme Court similarly rejected the argument that “where other things are equal, this court should ‘choose to make of an American-born boy an American citizen rather than a British subject,’ and ‘that he be educated as an American, and not as an Englishman.’”<sup>136</sup> In fact, across the broad spectrum of situations in which family courts find themselves passing on decisions about where parents choose to live with their children, courts regularly affirm the ability of parents to take children outside the United States.<sup>137</sup>

These cases highlight the distinction between holding a right and exercising that right. Nine-year-old Thomas Tischendorf resisted an order to visit his father in Germany and was acknowledged to hold the “right not to be compelled to leave the territory of the United States.”<sup>138</sup> But the Minnesota Supreme Court found that this right “may not become operative unless it can be demonstrated that the child can exercise [the right] intelligently.”<sup>139</sup> The court

<sup>135</sup> *Id.* See also *Mahon v. People ex rel. Robertson*, 119 Ill.App. 497, 1905 WL 1922, at \*2 (Ill.App. 1905) (noting in making a custody determination that “it may sometimes be the duty of the court to expatriate a child who is a citizen”), *rev’d on other grounds*, *Mahon v. People ex rel. Robertson*, 75 N.E. 768, 770 (Ill. 1905) (acknowledging “the power to award the custody of said child to a person who intends to remove the child from the United States to a foreign country”); *Gantner v. Gantner*, 246 P.2d 923, 929 (1952) (“Vallejo contends that this court ‘must as a matter of law . . . give a clear mandate to the trial court . . . that under no circumstances are the children to be taken to Australia . . . until they desire to do so of their own free will and choice.’ Insofar as this contention is based on the theory that the trial court . . . lacks jurisdiction to allow [the parent] to take the children from the state, it is without merit.”).

<sup>136</sup> *Wilson v. Mitchell*, 111 P. 21, 29 (Colo. 1910).

<sup>137</sup> See *Lane v. Lane*, 186 S.W.2d 47 (Mo.App. 1945) (finding no obstacle to mother’s decision “to take the child out of the state and to a foreign country [Mexico]”); *State ex rel. Graveley v. Dist. Ct. 3d Jud. Dist.*, 174 P.2d 565, 572 (Mont. 1946) (“the court may properly permit a parent . . . to take it [a child] to another state, or even to a foreign country”); *Collins v. Collins*, 276 P.2d 321, 323 (Kan. 1954) (“There is nothing in our law . . . which precludes placement of a child with a non-citizen. . . . Indeed, placement abroad with both citizens and non-citizens has been found compatible with the best interests of a child.”); *Church v. Church-Corbett*, 625 N.Y.S.2d 367 (N.Y. App. Div. 1995) (permitting parent to take child to Italy during three year Naval assignment abroad); *Blackwell v. Blackwell* 12 Cal. Rptr. 201 (Cal. Ct. App. 1961) (finding no error in trial judge’s decision allowing parent to move with children outside United States); *Viltz v. Viltz*, 384 So.2d 1348 (Fla. Dist. Ct. App. 1980) (allowing parent to take children to Venezuela); *Tamari v. Turko-Tamari*, 599 So.2d 680 (Fla. Dist. Ct. App. 1992) (granting permission for parent to relocate with child to Israel); *Byers v. Byers*, 370 S.W.2d 193 (Ky 1963) (permitting parent to permanently relocate to South Africa with children). When courts deciding custody disputes act to prevent a parent from removing a child from the United States, its reasons generally relate not to the crossing of borders per se, but to difficulties in non-custodial parental contact that would result from the child moving far away. See, e.g., *O’Shea v. Brennan*, 387 N.Y.S.2d 212, 216 (N.Y. App. Div. 1976) (finding that the permanent removal of the child to Australia by mother would effectively prevent visitation by the father and thus deny the child a continuing relationship with the father).

<sup>138</sup> *Tischendorf v. Tischendorf*, 321 N.W.2d 405, 410 (Minn. 1982).

<sup>139</sup> *Id.*

concluded that “this boy, at the age of nine years, lacked the ability to assess the value of building an enduring relationship with his father” and ordered Thomas to travel to Germany.<sup>140</sup> It is an open, and probably unanswerable in any universal sense, question when children are able to exercise their citizenship and immigration right to remain.<sup>141</sup> Since successful assertion of an immigration or citizenship right to remain might essentially entail separation from parents and emancipation, it seems likely that a high threshold is needed.

A key proposition emerges from these cases that children’s citizenship or immigration status does not override parental decisions to take children out of the country. In the broader context of the parent-child relationship and the child’s emerging autonomy, immigration and citizenship status alone play a limited role in determining whether children remain in the United States.

### B. *Keeping Parents in the United States*

Parents’ decisions to leave the United States are not always voluntary, and a number of constitutional theories have been articulated around the idea that the deportation of parents will result in the “de facto deportation” or “constructive deportation” of their U.S. citizen children. In such instances where citizen children and non-citizen parents share a desire to remain together in the United States, the children’s rights have been asserted as a means to overcome the removal of parents.<sup>142</sup>

#### 1. *The Acosta Family*

Lina Acosta’s parents conceded their deportability under immigration laws shortly after Lina’s birth in the United States, but they asserted that their deportation, “though admittedly valid as against them, will operate, if executed, to deny [Lina] the right which she has as an American citizen to continue to reside in the United States.”<sup>143</sup> In denying this claim, the court principally relied on three rationales.

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<sup>140</sup> *Id.* at 411, 412. See also *Acosta v. Gaffney*, 558 F.2d 1153, 1157 (3d Cir. 1977) (“In the case of an infant below the age of discretion the right [to reside in the United States] is purely theoretical . . . since the infant is incapable of exercising it.”); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1423 (9th Cir. 1987) (discussing children of ages four, eight and nine and concluding that they “are obviously too young to decide for themselves whether to live in Mexico or the United States following their parents’ deportation. Accordingly, their parents would be forced to make this decision for them.”); *Jimenez v. INS*, 116 F.3d 1485, 1997 WL 349051, at \* 5 (9th Cir. June 25, 1997) (“Given the child’s young age, it is unlikely that the child will make this decision for himself.”).

<sup>141</sup> See *Polovchak v. Meese*, 774 F.2d 731, 737 (7th Cir. 1985) (“At the age of twelve, Walter was presumably near the lower end of an age range in which a minor may be mature enough to assert certain individual rights that equal or override those of his parents; at age seventeen (indeed, on the eve of his eighteenth birthday), Walter is certainly at the high end of such a scale . . .”); *Gonzalez v. Reno*, 212 F.3d 1338, 1351 (11th Cir. 2000) (acknowledging right of child to apply for asylum, but upholding determination that six-year-old child lacked capacity to sign and personally submit such an application).

<sup>142</sup> Note that cancellation of removal, discussed above, is a limited statutory version of such relief. It, of course, imposes a number of requirements in addition to the children’s immigration or citizenship status.

<sup>143</sup> *Acosta*, 558 F.2d at 1157.

First, the court's analysis adopted the critical assumption that parents can decide where the child will live even in the context of the parents' deportation and further presumed that parents generally will decide to keep their children with them. The child "must remain with her parents and go with them wherever they go."<sup>144</sup> Alternatively, the parents could "decide that it would be best for her to remain with foster parents, if such arrangements could be made. But this would be their decision involving the custody and care of their child, taken in their capacity as her parents, not an election by [the child] herself to remain in the United States."<sup>145</sup>

Second, the court acknowledged that children independently have rights, flowing from their citizenship status, to remain in the United States. Younger children, however, lack autonomy to exercise these rights and parents are presumed to be the guardians of their children's rights in such cases. Specifically, though a U.S. citizen has a right to remain in the United States, "[i]n the case of an infant below the age of discretion the right is purely theoretical . . . since the infant is incapable of exercising it."<sup>146</sup> When a "child cannot make a conscious choice of residence, whether in the United States or elsewhere, [she] merely desires, if she can be thought to have any choice, to be with her parents."<sup>147</sup>

Third, the court emphasized the child's right of return. The child will, "as she grows older and reaches years of discretion be entitled to decide for herself where she wants to live and as an American citizen she may then, if she so chooses, return to the United States to live."<sup>148</sup> The child's "return to Colombia with her parents, if they decide to take her with them as doubtless they will, will merely postpone, but not bar, her residence in the United States if she should ultimately choose to live here."<sup>149</sup>

Under the court's approach, any decision about children staying or leaving is entrusted to parents, whether exercising their prerogative to decide where their children live or exercising the rights of the children because the children are not sufficiently mature to do so. The court views the children's possible removal from the United States not as a governmental decision but rather as a parental choice. Indeed, immigration laws do not empower the government to force a U.S. citizen to leave the United States, and they do not block U.S. citizen children's later decisions to return. The government cannot and does

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 1158. See also *Newton v. INS*, 736 F.2d 336, 343 (6th Cir. 1984) ("[T]he deportation order against Dr. and Mrs. Newton does not compel them to take the children with them . . . . So if the parents consider it more important for their children to grow up in America and attend American schools, they could conceivably make arrangements for the children to stay . . . ."); *Lopez v. Franklin*, 427 F.Supp. 345, 347 (E.D. Mich. 1977) (rejecting label "de facto deportation," noting that "deportation" is a legal term of art representing the result of official expulsion); *Ayala-Flores v. INS*, 662 F.2d 444, 446 (6th Cir. 1981) ("we presume [parents] wish [child] to reside with them, in Mexico or elsewhere").

<sup>146</sup> *Acosta v. Gaffney*, 558 F.2d 1153, 1157 (3rd Cir. 1977).

<sup>147</sup> *Id.* at 1158.

<sup>148</sup> *Id.* See also *Newton v. INS*, 736 F.2d 336, 343 (6th Cir. 1984) ("Newton children will remain American citizens who have the right to return to this country at any time of their liking"); *Ayala-Flores v. INS*, 662 F.2d 444, 446 (6th Cir. 1981) ("[O]nce she reaches the age of discretion, [she] will be able to decide for herself where she will live, and at that time, she will be free to return and make her home in this country.").

<sup>149</sup> *Acosta*, 558 F.2d at 1158.

not order children to stay or leave, but the court finds no constitutional violation in imposing the choice upon parents.<sup>150</sup>

## 2. *Choiceless Choice*

The court's reasoning in the case of Lina Acosta is highly representative of that employed in similar cases where children's immigration and citizenship rights are asserted to defeat parents' removal. This is true despite procedural variations, differences in ages and diverse articulations of the rights involved.<sup>151</sup> Across these distinctions, these claims have been rejected uniformly by courts in virtually every circuit.<sup>152</sup> Legal scholarship, even where in some cases advocating against the prevailing outcome, has similarly recognized the longstanding, consistent failure of these claims.<sup>153</sup>

<sup>150</sup> *Id.*; see also *Application of Amoury*, 307 F.Supp. 213, 216 (S.D.N.Y. 1969) ("The situation which confronts the infant is due to no act or conduct of the government. It exists because of the conduct of the infant's parents which renders them deportable. The citizen infants of other aliens remain here because their parents are not deportable.").

<sup>151</sup> See, e.g., *Enciso-Cardozo v. INS*, 504 F.2d 1252, 1252 (2d Cir. 1974) (claiming denial of procedural due process because child was not permitted to intervene in the deportation proceedings brought against his mother); *Acosta v. Gaffney*, 558 F.2d 1153, 1157-58 (3d Cir. 1977) (claiming violation of fundamental right of an American citizen to reside wherever he wishes); *Gallanos v. United States*, 785 F.2d 116, 117 (4th Cir. 1986) (claiming violation of constitutional rights of child in need of medical care); *de Robles v. INS*, 485 F.2d 100, 102 (10th Cir. 1973) (claiming violation of constitutional right to a continuation of the family unit); *Amoury*, 307 F.Supp. at 216 (asserting denial of the equal protection of the laws because child will be deprived of the standard of living and education afforded to other United States citizens of his age and status who continue to reside here); *Cervantes v. INS*, 510 F.2d 89, 91 (10th Cir. 1975) (claiming violation of Ninth Amendment right to continue to have the love and affection of his parents in the United States); *Kruer ex rel S,K, v. Gonzalez*, 2005 WL 1529987, at \*2 (E.D.Ky. June 28, 2005) (claiming deprivation of rights incident to citizenship).

<sup>152</sup> E.g., *Enciso-Cardozo*, 504 F.2d at 1254; *Acosta*, 558 F.2d at 1157-58; *Gallanos*, 785 F.2d at 120; *Gonzalez-Cuevas v. INS*, 515 F.2d 1222, 1224 (5th Cir. 1975); *Newton v. INS*, 736 F.2d 336, 343 (6th Cir. 1984); *Mendez v. Major*, 340 F.2d 128, 131 (8th Cir. 1965), *disapproved on other grounds sub nom*; *Kwok v. INS*, 392 U.S. 206 (1968); *Urbano de Malaluan v. INS*, 577 F.2d 589 (9th Cir. 1978); *de Robles*, 485 F.2d 100. The First and District of Columbia Circuits rejected similar claims made by spouses. *Silverman v. Rogers*, 437 F.2d 102, 107 (1st Cir. 1970); *Swartz v. Rogers*, 254 F.2d 338, 339 (D.C. Cir. 1958). The Seventh Circuit has rejected similar arguments raised in slightly different contexts. See *Oforji v. Ashcroft*, 354 F.3d 609, 617 (7th Cir. 2003) (rejecting argument that would in effect "allow deportable aliens . . . to attach derivatively to the right of their citizen children to remain in the United States.").

<sup>153</sup> *Kif Augustine-Adams, The Plenary Power Doctrine After September 11*, 38 U.C. DAVIS L. REV. 701, 708 (2005) ("Virtually all the U.S. circuit courts have denied that any constitutional right of a citizen – from equal protection to the right to reside in the United States to family unity – is violated or even implicated when a citizen's noncitizen family members are excluded from the United States or not allowed to remain here."); Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35, 40-41 (1988) ("Citizen children . . . have not been successful in pressing the view that the deportation of their undocumented parents is tantamount to the de facto deportation of the child – a violation of the child's constitutionally protected rights to live in this country, to associate with family members, and to be guaranteed due process and equal protection of the laws."); Demleitner, *supra* note 5, at 302 n.159 ("United States courts have generally rejected the argument that removal of a parent would amount to a 'de facto deportation' of citizen children."); Edith Z. Friedler, *From Extreme Hardship to Extreme Deference: United*

These cases thus solidly support the proposition that children's valid immigration or citizenship status alone is insufficient to overcome the removal of a parent from the United States. This is not to suggest that this conclusion is beyond challenge.<sup>154</sup> It may be that the potential for serious harm to the child sufficiently affects the rationale to alter the result.<sup>155</sup> Also, related arguments utilizing international human rights rationales have had better success in other countries and a broader human rights framework may provide a foundation for rethinking these cases, a task that is beyond the scope of this article.<sup>156</sup> Nevertheless, the proposition that children's valid immigration or citizenship status alone is insufficient to overcome the removal of a parent from the United States is a firmly established starting point for courts considering the situation of citizen children whose parents face deportation.

This outcome should not be surprising. First, the rationale of the courts that parents in the first instance make decisions about where children live is consistent with decisions about family in the domestic context.<sup>157</sup> Second, halting the deportation of parents on behalf of children would run counter to the dominant paradigm of immigration law in which it is children who assimilate to the status of the parent and not vice versa. As mentioned above, the concern of immigration law that children share their parents' immigration status is indifferent to place and is equally satisfied whether parents and children remain in the United States or leave.

A standard lament on these cases is that they fail to adequately value family integrity, but these decisions can be viewed from a more positive angle. While the families that file these cases certainly have not been successful in achieving their goal of remaining together in the United States, these cases all

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*States Deportation of Its Own Children*, 22 HASTINGS CONST. L.Q. 491, 494 (1995) ("While the Supreme Court has never considered the issue, many courts of appeal and several district courts . . . have unanimously held that the government may deport alien parents without violating the constitutional rights of their citizen children."); Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Alien's Rights*, 41 VILL. L. REV. 725, 726 (1996); Leila Rothwell, *VAWA 2000's Retention of the "Extreme Hardship" Standard for Battered Women in Cancellation of Removal Cases: Not Your Typical Deportation Case*, 23 U. HAW. L. REV. 555, 602 (2001).

<sup>154</sup> See Kelly, *supra* note 153, at 780.

<sup>155</sup> See *Martinez de Mendoza v. INS*, 567 F.2d 1222, 1226 n.8 (3d Cir. 1977) ("if the allegation that *de facto* deportation of Yolanda Carmen Mendoza would expose her to physical danger are correct, they may well be sufficient to raise questions of the constitutionality of such deportation not answered by our decision in *Acosta*.").

<sup>156</sup> See Nessel, *supra* note 114, at \_\_\_\_, (forthcoming Winter 2005) (on file with author); Sonia Starr and Lea Brillmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213 (2003); Demleitner, *supra* note 5. These arguments recently received a setback in the United States when the Second Circuit rejected the analysis of the leading case applying international standards regarding family integrity in the context of removal. *Guaylupo-Moya v. Gonzalez*, 423 F.3d 121, 135 (2d Cir. 2005) (rejecting international law analysis of *Beharry v. Reno*, 183 F.Supp.2d 584 (E.D.N.Y. 2002), *rev'd on jurisdictional grounds sub nom*, *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003)); *Oliva v. U.S. Dep't of Justice*, 433 F.3d 229, 235-36 (2d Cir. 2005) (rejecting *Beharry* analysis).

<sup>157</sup> Of course, in the domestic context parents will often make such decisions that result in giving effect to children's rights and interests. In this context, immigration law denies agency to children and, therefore, strips parents of the ability to effectuate children's rights through parental decisions. See *supra*, text accompanying notes 98-100.



fundamentally reaffirm the strength of the parent-child relationship.<sup>158</sup> This may be of little consolation for a family that faces excruciating choices of separating from children or taking them out of the country, but none of these cases begin to suggest that facing deportation makes parents unfit. These cases serve as a bulwark for families that face losing the ability to make the difficult choices themselves through state challenges to custody.<sup>159</sup> In other words, decisions upholding *de facto* deportations validate the notion that fundamental rights in the parent-child relationship are not weakened by parents' lack of immigration status or even their imminent deportation.<sup>160</sup>

### C. *Protecting Children from Removal*

Deportation, *de facto* or otherwise, is not benign. In some instances, removal from the country "involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself."<sup>161</sup> Indeed, removal from the United States "may result in the loss of all that makes life worth living."<sup>162</sup> While not every decision to remove children from the United States will result in such hardships, the possibility of severe harm is often present. It is one thing to enforce parental decisions to take children out of the country when concerns about children's safety is not at issue, but quite another to order children to accompany parents into danger.

In the domestic context, there plainly are limits to parents' actions that might threaten their children's health and welfare, but deciding where and how a state may intervene is contentious in many, if not most, cases. The role of the state in protecting children when harm is not only potential, but in a distant country, can be even trickier.

#### 1. *The Polovchak Family*

Twelve-year-old Walter Polovchak arrived in the United States from the Ukrainian Soviet Socialist Republic with his parents, Michael and Anna, and

<sup>158</sup> "It is assumed that the family could be reunited in another country, if necessary." Demleitner, *supra* note 5, at 299; Kate Jastram, *Family Unity*, in *MIGRATION AND INTERNATIONAL LEGAL NORMS* 185, 192-193 (T. Alexander Aleinikoff & Vincent Chetail, eds., 2003); *CHILDREN ON THE MOVE* (Japp Doek ed., 1996).

<sup>159</sup> See *In re D.R.*, 2004 WL 423993 at \*8 (Conn. Super. Ct. Feb. 9, 2004) (stating that a mother's "return to Honduras renders her effectively unable to serve as a responsible parent").

<sup>160</sup> See David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 *TEX. HISP. J.L. & POL'Y* 45, 70 (2005).

<sup>161</sup> *Sung v. McGrath*, 339 U.S. 33, 50 (1950). The interest in remaining in the United States is, "without question, a weighty one. She stands to lose the right 'to stay and live and work in this land of freedom.'" *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (*quoting* *Bridges v. Wixon*, 326 U.S. 135, at 154 (1945)). Removal is "always a harsh measure." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). Indeed, it is "a sanction which in severity surpasses all but the most Draconian criminal penalties." *Lok v. INS*, 548 F.2d 37, 39 (2d Cir. 1977); see also *United States ex rel. Klonis v. David*, 13 F.2d 630, 630 (2d Cir. 1926) (*Learned Hand, J.*) ("However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples.").

<sup>162</sup> *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (internal quotations and citations omitted).

two siblings in January 1980.<sup>163</sup> The family initially settled in Chicago with relatives, but after only a few months Walter's parents decided to return to the Ukraine.<sup>164</sup> Walter's seventeen-year-old sister announced she did not want to return, and Michael and Anna accepted this decision but were adamant that their younger children, Walter and his five-year-old brother, return with them.<sup>165</sup> Persuaded by his sister and a cousin, Walter left his parents home with his sister and moved into the cousin's apartment.<sup>166</sup> After several days, Michael Polovchak went to a Chicago police station to enlist the police's help in the return of Walter.<sup>167</sup>

The police quickly brought Walter to the station where he told them that he wanted to stay in the United States rather than return to the Ukraine.<sup>168</sup> Instead of returning Walter to his father, the police "contacted the United States Immigration and Naturalization Service and the Department of State and were instructed by officials of the Department of State that Walter was not to be returned to his parents."<sup>169</sup> The "police also contacted a Cook County judge who recommended that Walter be detained overnight as a runaway and brought to juvenile court the following morning."<sup>170</sup>

The next day, the courtroom was crowded with people eager to involve themselves in the affairs of the Polovchak family. On one side of the courtroom, Walter appeared with an attorney that his cousin had retained for him, joined by a state's attorney, a representative of the Department of Children and Family Services, several police officers and a representative of the Immigration and Naturalization Service.<sup>171</sup> On the other side, Michael and Anna Polovchak, who did not speak English, appeared without counsel or a court-appointed interpreter.<sup>172</sup> Without taking evidence, the court placed Walter in temporary custody of the Department of Children and Family Services.<sup>173</sup> On this same day, unbeknownst to Michael and Anna, the Immigration Service, with the advice of the Department of State, granted Walter Polovchak's petition for asylum.<sup>174</sup>

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<sup>163</sup> *In re Polovchak*, 454 N.E.2d 258, 258-259 (Ill. 1983), *cert. denied sub nom* Illinois v. Polovchak, 465 U.S. 1065 (1984). See generally, *Polovchak v. Polovchak*, 432 N.E.2d 873 (Ill. App. 1981); *Polovchak v. Landon*, 614 F.Supp. 900 (N.D. Ill. 1985); *Polovchak v. Polovchak*, 734 F.2d 18 (7th Cir. 1984); *Polovchak v. Meese*, 774 F.2d 731 (7th Cir. 1985).

<sup>164</sup> *In re Polovchak*, 454 N.E.2d. at 259.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*; *Polovchak*, 432 N.E.2d at 875.

<sup>167</sup> *In re Polovchak*, 454 N.E.2d at 259.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* The police filed a petition for adjudication of wardship, alleging that Walter was "beyond the control of his parents in that he did . . . absent himself from his home without the expressed consent of his parents." *Id.* at 259.

<sup>171</sup> *Id.* at 259.

<sup>172</sup> *Id.* at 259. Clearly, public sentiment sided with Walter. See Boyer & Lubet, *supra* note 63, at 275 ("Everyone 'just knew' it was better for Walter to stay in the United States, rather than remain part of his parents' family.").

<sup>173</sup> *In re Polovchak*, 454 N.E.2d at 260.

<sup>174</sup> *Id.* at 261-262; *Polovchak v. Meese*, 774 F.2d 731, 735 n.8 (7th Cir. 1985) ("The government admits it never advised the Polovchaks of Walter's asylum application.") Walter's application was filed that same day, asserting that "his religion was Baptist and that he did not want to return to the Soviet Union because he would be 'persecuted . . . prevented from

At a subsequent hearing, numerous fact witnesses and the police testified, along with competing experts who agreed that Walter was not beyond parental control. Walter himself testified that "while he lived in the Ukraine his parents provided food and clothing and made sure he went to school."<sup>175</sup> Walter did not like the Ukraine because "there aren't many things to be bought there."<sup>176</sup> Still, the trial judge found Walter to be a minor in need of supervision and adjudicated him a ward of the court.<sup>177</sup>

An appellate court reversed, finding that "in its simplest terms, the situation presented in the instant case is one of family discord caused by a child's disagreement with his parents' decision to return to their homeland."<sup>178</sup> The court also noted:

We have serious doubts as to whether the State would have intervened in this realm of family life and privacy had the parents' decision to relocate involved a move to another city or state. The fact that the parents had decided to move to a country which is ruled under principles of government which are alien to those of the United States of America should not compel a different result.<sup>179</sup>

The Illinois Supreme Court affirmed in 1983, finding under Illinois statutory law that "Walter should have been released to his parents, who were in the courtroom requesting permission to take their son home."<sup>180</sup> These state rulings, however, were complicated by ongoing immigration machinations.

In response to Michael and Anna's initial appellate victory, the federal government had taken the extraordinary step of entering a "departure control order" which prohibited Walter's departure from the United States.<sup>181</sup> By this time, Michael and Anna had returned to the Ukraine with their younger son.<sup>182</sup> The departure control order meant that Walter was not returned to his parents immediately.<sup>183</sup>

Therefore, while the family court litigation was pending, parallel litigation in a federal forum challenged the federal departure control order. Relying on constitutional protections for the parent-child relationship, the district court

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higher education, considered suspect [and] restricted in mobility.'" *Id.* at 733. Same day asylum adjudication is, of course, not business as usual for the immigration service. Walter's subsequent adjustment of status to legal permanent resident slightly more than a year later also was noticeably faster than normal processing.

<sup>175</sup> *Polovchak v. Polovchak*, 432 N.E.2d 873, 876 (Ill. App. 1981).

<sup>176</sup> *Id.*

<sup>177</sup> *In re Polovchak*, 454 N.E.2d at 258.

<sup>178</sup> *Polovchak*, 432 N.E.2d at 879.

<sup>179</sup> *Id.*

<sup>180</sup> *In re Polovchak*, 454 N.E.2d at 263. The court found that "Walter's obstinance stemmed not from his opposition to being returned to his parents but rather from his desire not to return to the Ukraine, an unlikely possibility . . . in view of the interest manifested by the Federal agencies." *Id.* Walter's actions, which could "hardly be characterized those of a runaway, and posed no hazard to him or anyone else, simply do not establish that he was beyond parental control." *Id.* at 264.

<sup>181</sup> *Id.* at 262. The departure control order was issued nine days after Michael and Anna prevailed in the appellate court. *Polovchak v. Landon*, 614 F. Supp. 900, 901 (N.D.Ill. 1985) ("It appears to be undisputed that this order is the only thing which prevents [Michael and Anna] from regaining custody of their son.").

<sup>182</sup> *In re Polovchak*, 454 N.E.2d at 264. They returned to the Ukraine in August 1981. *Polovchak*, 614 F. Supp. at 901.

<sup>183</sup> *In re Polovchak*, 454 N.E.2d at 264.

found that “[s]urely a minor child of tender years does not have the right to control his own destiny, although in some cases this right is taken away from his parents and given to a court.”<sup>184</sup> Given that the state had affirmed Michael and Anna’s ongoing parental roles, the court found that the federal government had overstepped its bounds by interfering in the parent-child relationship, “which has been all but negated by the official action.”<sup>185</sup> The court found that Michael and Anna’s due process rights had been violated by entry of the departure control order without their participation and enjoined its enforcement.<sup>186</sup>

On appeal, the Seventh Circuit affirmed the constitutional violation but dissolved the injunction that the district had entered, remanding “to fashion a remedy that takes into account Walter’s interests as well as those of his parents.”<sup>187</sup> Of most concern to the court was the fact that due to the litigation delay Walter was now just days from his eighteenth birthday. “[I]t would seem patently inequitable at this point to force a seventeen year old against his will to return to a country whose political values and methods he rejects and where he faces a threat of persecution.”<sup>188</sup> The court also placed great importance on the fact that Walter might not be able to return to the United States as an adult, making the decision “grave and potentially irreversible.”<sup>189</sup>

Walter reached the age of eighteen and remained in the United States before the decisions of the courts were effectuated. The practical result of the litigation thus differed sharply from the legal conclusions of both the state and federal court systems.

## 2. *Confusion of Roles*

The multiple fronts of litigation and confusion of roles unnecessarily complicated and delayed an already difficult situation and ultimately caused divergence between the legal conclusions and the practical results.<sup>190</sup> This confusion happened in part because both the state courts and federal immigration officials proceeded from the erroneous assumption that a final determination regarding asylum ultimately would control whether Walter stayed in the United States or returned to the Ukraine.<sup>191</sup> Certainly, the idea that federal and

<sup>184</sup> *Polovchak*, 614 F. Supp. at 902.

<sup>185</sup> *Id.* at 902 (noting that parents’ interests in raising their child would “no doubt . . . apply to a parent’s right to bring up their children as Communists or atheists.”)

<sup>186</sup> *Id.* at 902-03. Federal regulations now reflect the requirement that parents be notified if “a juvenile seeks release from detention, voluntary departure, parole, or any form of relief from removal, where it appears that the grant of such relief may effectively terminate some interest inherent in the parent-child relationship and/or the juvenile’s rights and interests are adverse with those of the parent . . .” 8 C.F.R. § 236.3(f).

<sup>187</sup> *Polovchak v. Meese*, 774 F.2d 731, 732 (7th Cir. 1985).

<sup>188</sup> *Id.* at 737 (stating that as an equitable matter “it is surely relevant that Walter has decided that he does not want to be a communist or an atheist and that his parents have only a few remaining days of his minority to change his mind”).

<sup>189</sup> *Id.* at 737 n.10.

<sup>190</sup> *In re Polovchak*, 454 N.E.2d 258, 262 (Ill. 1983) (“[W]e do not doubt that the multiple litigation and controversy surrounding this case have also adversely affected what should otherwise have been a prompt determination regarding Walter’s custody.”).

<sup>191</sup> The state appellate court worried that “the Illinois MINS statute should not be utilized as a subterfuge to achieve [asylum].” *Polovchak v. Polovchak*, 432 N.E.2d 873, 879 (Ill. App. 1981). Meanwhile, during the state proceedings, the federal government acknowledged hav-

state authorities have different roles is well established, with the complexities of immigration law decisively entrusted to federal authorities<sup>192</sup> and the subtleties of family law among the powers most fully reserved to the states.<sup>193</sup> However, this division of power and decision making does not answer the question of which decision ultimately determined whether Walter stayed or left.

The grant of asylum to Walter did no more than determine that the United States would not deport Walter to the Ukraine.<sup>194</sup> Holding valid immigration or citizenship status means that a person has the option to remain in the United States, but it never means that a person is captive here.<sup>195</sup> If they so choose, persons granted asylum are free to abandon that status, and one way to accomplish this is by returning to the country they fled.<sup>196</sup> This happens, though understandably not often, for a variety of reasons. It may involve a judgment that the situation in the country of origin has improved,<sup>197</sup> or it may simply represent an asylee's judgment that return to the country of origin is a better choice than remaining in the United States.

Parents, when validly exercising the right to decide where children who lack capacity live, may take actions that result in their children abandoning their immigration status, including asylum status.<sup>198</sup> Ultimately, the issue is a family law determination of whether parents can exercise their children's rights

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ing "no direct interest in the legal issues presented," but "suggested" that "any decision regarding the final custody of Walter respect the supremacy of the obligations of the United States under the Refugee Act of 1980 and the international obligations of the United States under the United Nations Protocol Relating to the Status of Refugees." *In re Polovchak*, 454 N.E.2d at 262 (citations omitted).

<sup>192</sup> "That the formulation of [policies pertaining to the entry of noncitizens and their right to remain here] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvan v. Press*, 347 U.S. 522 (1954); *see also Kleindiest v. Mandel*, 408 U.S. 753, 769-770 (1972) ("[P]lenary congressional power to make policies and rules for exclusion of aliens has long been firmly established.").

<sup>193</sup> "One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations. Long ago we observed that '[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'" *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6 (2004) (*quoting In re Burrus*, 136 U.S. 586, 593-594 (1989); *Mansell v. Mansell*, 490 U.S. 581, 587 (1989) ("[D]omestic relations are preeminently matters of state law."); *Moore v. Sims*, 442 U.S. 415, 435 (1979) ("Family relations are a traditional area of state concern.").

<sup>194</sup> 8 U.S.C. § 1158(c)(1)(A) (2000) (stating that the government "shall not remove or return the alien [granted asylum] to the alien's country or nationality or, in the case of a person having no nationality, the country of the alien's last habitual residence").

<sup>195</sup> For example, as the *Schleiffer* court noted, the right of a citizen to stay in the United States is really one manifestation of the larger right of a U.S. citizen to travel.

<sup>196</sup> 8 U.S.C. § 1158(c)(2)(D).

<sup>197</sup> In fact, Walter Polovchak as an adult chose to visit the Ukraine after the collapse of the Soviet Union. Charles Leroux, *Ukrainian Boy Who Defied Parents Is Now All-American Guy*, SEATTLE TIMES, Aug. 22, 1999 at A6.

<sup>198</sup> *Lepe-Guitron v. INS*, 16 F.3d 1021, 1025 (9th Cir. 1994) ("the BIA has held that when a parent *abandons* his or her permanent resident status, minor children of the parent also lose permanent resident status"); *Matter of Zamora*, 17 I & N Dec. 395, 396 (B.I.A. 1980) (voluntary and intended abandonment by the mother is imputed to the [child] applicant"); *Matter of Winkens*, Interim Dec. 2429 (B.I.A. 1975) ("Since the parents' abandonment occurred when the applicant was under their control and custody, this abandonment can be imputed to

to seek or abandon immigration status, or whether parents can take the children out of the United States in spite of the children holding a legal status that prohibits the government from removing them.<sup>199</sup> Respecting the parent-child relationship does not displace or conflict with immigration law, but rather transcends it.<sup>200</sup>

This definitely is not to say that children in Walter's position, especially as they mature and have increased capacity, should have no means to test a parental decision that they believe will threaten their health and welfare. And certainly, decisions about whether parents can appropriately exercise their children's rights will not be uniformly obvious and universally resolved in favor of parents. But the forum in which to consider these difficult questions is a family court and not a federal immigration proceeding because the determinative issue is the exercise of rights within the parent-child relationship, not acquisition or loss of immigration status.

The same conclusion, that the family court is the appropriate forum to raise concerns regarding the parent-child relationship, holds true when parents involuntarily face removal proceedings. The direct issue in immigration proceedings is whether the person who is the subject of the proceeding is entitled to a particular immigration benefit, usually the legal right to remain in the United States. When parents face removal in formal proceedings, their legal permanent resident and U.S. citizen children are not charged with removability, and the children's formal immigration and citizenship rights will not be altered by those proceedings.<sup>201</sup> If parents are ordered removed, subsequent decisions about whether their children will accompany the parents are matters of custody,

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the applicant in turn."); *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000) (upholding parent's decision not to seek asylum for child).

<sup>199</sup> With this in mind, the extraordinary step of the federal government's use of deportation control orders in the Polovchak matter was entirely unfounded. See 8 C.F.R. § 215.2 (2000) (limiting entry of departure control order to instances where departure of an "alien . . . would be prejudicial to the interest of the United States"). A departure may be deemed prejudicial to the interests of the United States where, among other things, doubt exists whether such alien is departing or seeking to depart from the United States voluntarily. *Id.* § 215.3(j). The issue of voluntariness, of course, begs the question of who speaks for children, an issue governed by the parameters of the parent-child relationship.

<sup>200</sup> This is perhaps most apparent in the case of U.S. citizen children. Just as immigration law cannot in any way accomplish the deportation of citizens, it has no application to keep citizens in the country. If there is protection from a parental decision to remove citizen children from the United States must find its source elsewhere. Even the extraordinary use of departure control orders cannot be invoked to prevent a citizen from leaving the United States. See 8 U.S.C. § 1185 (2000).

<sup>201</sup> See, e.g., *Acosta v. Gaffney*, 558 F.2d 1153, 1156 (3d Cir. 1977) ("Lina was, of course, not a party to the deportation proceedings in the INS nor was intervention sought on her behalf in those proceedings."); *Application of Amoury*, 307 F.Supp. 213, 216 (S.D.N.Y. 1969) ("The deportation proceeding was not predicated upon any charge with respect to the infant; consequently he was not entitled to notice or a hearing with respect to the claim that his parents had remained in the United States beyond the time permitted upon their entry."); *Agosto v. Boyd*, 443 F.2d 917, 917 (9th Cir. 1971) ("We discover no basis for conferring standing upon the relatives of an alien to intervene in pending deportation proceedings."); *Emciso* at 1253 (discussing argument that "since the immigration judge has jurisdiction to decide only the question of the deportability of the parent, the child has no substantive rights which may be asserted at the deportation proceeding, and there is, therefore no need to allow him to intervene.").

not immigration. Indeed, this conclusion is the very foundation of the scores of cases firmly rejecting constitutional challenges to the *de facto* deportation of U.S. citizen children.

Federal immigration fora, and federal courts in general, simply are not in the business of deciding sensitive matters regarding the parent-child relationship. Indeed, raising complex issues regarding the parent-child relationship in federal proceedings is pointless because federal courts have no authority to make and enforce custody determinations.<sup>202</sup> The "whole subject of domestic relations, and particularly child custody problems, are generally considered state law matters outside federal jurisdiction."<sup>203</sup> The federal system, therefore, is not the appropriate forum in which to examine the fitness of parents or, subsequently, the welfare of children. Therefore, federal immigration authorities cannot be the ultimate decision makers on matters of custody. If the often unreviewable decisions of immigration authorities represent the last word on family integrity, constitutional protections of the parent-child relationship will be impermissibly diminished.<sup>204</sup>

This division of labor between federal and state authorities does not mean that family courts serve as immigration courts and usurp power to make immigration determinations. Decisions about immigration law are properly before federal authorities, but this does not mean that these decisions on occasion do not need to be informed by state determinations about parent-child relationships.<sup>205</sup> In other words, federal immigration proceedings must respect the integrity of the parent-child relationship in the absence of any state determination that validly alters it.

At this juncture, it is critical to recognize a distinction between children in families and those who are unaccompanied. The right of a child in an intact

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<sup>202</sup> *Johns v. Dept. of Justice*, 653 F.2d 884, 894 n.26 (5th Cir. 1980) ("Federal immigration authorities lack authority to determine the custody of a child or to enforce the custodian rights of others."); *Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978) (finding no federal jurisdiction over grandparents' action seeking custody of Vietnamese orphans airlifted to the United States and placed in foster homes by the federal government). In one limited exception, federal courts share concurrent jurisdiction with state courts under the International Child Abduction Act and the Hague Convention on the Civil Aspects of International Child Abduction, though the primary role of the court in such instances is to determine if a U.S. state court or a foreign court has jurisdiction to determine custody matters regarding a particular child.

<sup>203</sup> *Schleiffer v. Meyers*, 644 F.2d 656, 663 (7th Cir. 1981). Where children filed claims challenging the constitutionality of their *de facto* deportation, one federal court held that "because of the disruptive effect a decision by this Court would have on the custody issues, this Court is compelled to abstain." *Zaubi v. Hoejme*, 530 F. Supp. 831, 835 (W.D. Pa. 1980), *affirmed* 659 F.2d 1072 (3d Cir. 1981) (table).

<sup>204</sup> *See Cabrera-Alvarez v. Gonzalez*, 423 F.3d 1006, 1014 n.1 (9th Cir. 2005) (Pregerson, J., *dissenting*) ("As the Supreme Court recently admonished us in a different context, 'the Constitution may well preclude granting an administrative body the unreviewable authority to make determinations implicating fundamental rights.'").

<sup>205</sup> *In re Adoption of Peggy*, 436 Mass. 690, 698-99 (2002) ("There is no question that immigration law is strictly within the purview of Federal courts. The judge, however, made no determination relative to the child's immigration status. Although it undoubtedly will change as a result of the termination of the father's parental rights, her new immigration status will have to be determined by the proper Federal authorities. The details of how, and when, this may happen are matters that, as a State court, we do not discuss.").

family to exercise the right to seek and effectuate asylum must be assessed in the context of the parent-child relationship. In contrast, when the parent-child relationship is not intact, speculation about parents' decisions should not clutter the adjudication of immigration relief. Tellingly, special immigrant juvenile status, the single immigration provision that specifically considers the interests of children, applies only when "family reunification is not a viable option."<sup>206</sup> Further, the statute creating special immigrant juvenile status goes to great lengths to create a hybrid procedure ensuring that this assessment of family reunification possibilities and children's interests is made in state family courts rather than by immigration adjudicators.<sup>207</sup> The reluctance of federal authorities to facilitate family court determinations when unaccompanied minors are detained upon arrival is one of the major frustrations in the implementation of special immigrant juvenile provisions.<sup>208</sup> Immigration proceedings must not be clouded by federal speculation and assumptions regarding children's and parents' rights, but rather such proceedings must respect and defer to the important state role in making such determinations.<sup>209</sup> Keeping the roles of federal and state authorities distinct will benefit children both in and out of families.

It is not without trepidation that family courts are put forward as the necessarily preferred forum. State family courts can be remarkably parochial and uninformed regarding issues of, and related to, immigration status and life in other countries.<sup>210</sup> But the task of educating family courts to consider cross-border and cross-cultural issues is inevitable given the sharp rise in mixed

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<sup>206</sup> 8 C.F.R. § 204.11 (2000).

<sup>207</sup> See 8 U.S.C. § 1101(a)(27)(J) (2000) (defining state court role in special immigrant juvenile status). "The reliance upon state juvenile courts anticipated in the SIJ statutory scheme signals Congress' recognition that the states retain primary responsibility and administrative competency to protect child welfare . . . [The federal government] lacks the professional and administrative support to make assessments of individual children's mental and physical conditions and their welfare needs." Chen, *supra* note 1, at 609. See also *Reno v. Flores*, 507 U.S. 292, 311 (1993) (disclaiming federal expertise in matters of child welfare).

<sup>208</sup> See, e.g., Chen, *supra* note 1, at 609.

<sup>209</sup> For example, in one recent unaccompanied minor case, a child "allege[d] that his father frequently beat him from the age of 5, using belts, cords, horsewhips, and tree branches. . . . He further allege[d] that his mother once placed his hands on a hot stove burner, and that both parents generally neglected to provide basic medical care, withdrew him from school at age 13, and subjected him to constant emotional abuse. *A.A.-M. v. Gonzalez*, No. C05-2012C, slip op at 1 (W.D. Wash. Dec. 6, 2005). An immigration official "discounted an 'independent psychological evaluation'" and "without ever having spoken to Plaintiff [child] on any occasion, . . . concluded that Plaintiff appeared to be 'seeking [special immigrant juvenile] consent primarily for the purpose of obtaining lawful immigrant status, rather than for the purpose of obtaining relief from abuse or neglect,' and accordingly, withheld consent for [state] juvenile court jurisdiction." *Id.* at 2. A federal district court granted injunctive relief permitting the child access to state court, finding that reliance "on unexplored and unconfirmed inconsistencies in the paper record" and making "extensive, dispositive credibility findings without having engaged Plaintiff [child] in so much as a telephone conversation . . . constitute[d] arbitrary and capricious conduct and an abuse of . . . discretion". *Id.* at 3-4. Federal immigration authorities have neither the training nor the procedures in place to make critical determinations about the parent-child relationship, and they must respect the state role and expertise in this arena. See Rule 10.8.1

<sup>210</sup> Culturally biased judgments are a tremendous concern. "Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias." Santosky v.



immigration status families, and it is no larger a task than would be required to educate federal adjudicators in matters of child protection and family integrity. Also, where family courts are aware of the controlling consequences of their decisions regarding the parent-child relationship, they are not able to dismiss arguments about potential harm that may arise on leaving the country simply by assuming that the issue is not before them. Additionally, state courts have existing mechanisms, completely lacking in federal immigration proceedings, to ensure that children's voices are appropriately incorporated.<sup>211</sup> And, ultimately, it is state courts that have the authority to make the custody determinations that form the real basis of decisions about where children live. Avoiding the confusion of multiple forums is the best way to ensure that real child protective concerns do not slip through the cracks.

### 3. *The Urge to Intervene, or Glasnost Killed the Movie Deal*

The case of Walter Polovchak demonstrates the need in the immigration context for a high threshold standard before interfering with the parent-child relationship. Any decision that severs the parent-child relationship when parents face or choose removal from the country definitely results in a loss of custody and has the potential to operate as a de facto termination of parental rights.<sup>212</sup> The American Safe Families Act ("AFSA") generally requires that states take steps to terminate parental rights and free children for adoption well within timeframes during which parents ordered removed, even under the best scenarios, will be barred from reentering the United States.<sup>213</sup> The removal of Walter from his parents and the litigation combined effectively to end the parent-child relationship until Walter reached the age of majority.<sup>214</sup>

As the Polovchak matter demonstrates, if official disagreements with parental decisions are allowed to serve as grounds to sever the parent-child relationship, children's interests can be hijacked for any variety of agendas advanced by other adults or the government. When this hijacking happens, the interests and rights of children are not advanced, but obscured.

The solution is to focus the inquiry on parents' fitness. It is easy to believe that the Polovchak parents were wrong to resist Walter's desire to stay

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Kramer, 455 U.S.745, 763 (1982) (internal citations omitted). See generally Thronson, *supra* note 160.

<sup>211</sup> Respondents in immigration proceedings have the right to be represented by an attorney, but not at government expense. In contrast, most state proceedings regarding custody have some mechanism to represent children's interests. See, e.g., *Crommelin-Monnier v. Monnier*, 638 So.2d 912, 916 (Ala. Civ. App. 1994) (requiring appointment of guardian ad litem where custodial parent sought to remove child to foreign country).

<sup>212</sup> Even if the deported person again qualifies for a visa, reentry after removal is barred for periods ranging from five years to life depending on the ground of deportation. 8 U.S.C. § 1182(a)(9)(A)(i) (2000).

<sup>213</sup> See 42 U.S.C. 675(5)(E) (2000). In such instances, confusion between "separating" from children and "abandoning" children will pose significant risks to parents' continued relationships with their children. See Carol Sanger, *Separating From Children*, 96 COLUM. L. REV. 375, 420-24 (1996).

<sup>214</sup> The parent-child relationship was "all but negated by the official action of the [Immigration and Naturalization Service]." *Polovchak v. Landon*, 614 F.Supp. 900, 902 (N.D. Ill. 1985).

behind, or were wrong to want to return to the Ukraine in the first instance.<sup>215</sup> But this disagreement alone is insufficient to justify state intervention as a means to undermine a disfavored parental decision. When the disagreement is primarily ideological, state intervention hinders the important role of parents in their children's development of values and morality. Particular vigilance is needed when state intervention is related to the failure of those who sit outside dominant paradigms to conform to hegemonic political and cultural conventions.<sup>216</sup>

Importantly, returning Walter to the Ukraine would have contradicted Walter's expressed desires, and his voice must not be discounted. Certainly, it is possible that children, even young children, have informed and deeply held political and religious convictions. State family courts and advocates absolutely must incorporate sophisticated consideration of children's reasoning into decision making about giving effect to children's desires. But simply because a border is implicated, a child's voice cannot be amplified beyond the consideration it would warrant in other instances where children disagree with parental decisions about where to live. The state appellate court expressed "serious doubts as to whether the State would have intervened in this realm of private life and privacy had the parent's decision to relocate involved a move to another city or state."<sup>217</sup> As children grow, their voice will take on added weight in decisions about where they live, both in formal proceedings and, in most instances, within families.<sup>218</sup> But if children's capacity and autonomy are not sufficient to alter parental decisions about domestic moves, their wishes alone cannot overcome parents' decisions about where to live simply because a move is to another country.

Beyond children's wishes, however, lie important considerations of safety and harm. The state has a vital role in protecting children, even in some instances by acting in ways that contradict children's expressed wishes. Given the ultimate rulings on appeal, it is probable that proceedings in state court, uncluttered and undelayed by federal interference, would have prevented state intervention altering parental custody. It also is apparent that the federal government was eager to grant asylum to Walter. The grey area between the willingness to extend federal immigration protection based on perceived harm to a child and family law reluctance to intervene is troubling.

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<sup>215</sup> Other families certainly have made different choices. The Altmans decided that their son should stay behind when the rest of the family returned to Russia and made arrangements for him to stay with family friends. See *Home is Here, Not Russia*, NY TIMES, March 15, 1987.

<sup>216</sup> See Appell, *supra* note 46, at 158 (noting that historically, "[p]rotecting children generally meant socializing them into white, middle-class protestant values and work ethic"). "[D]isallowing a parent's right to speak for her child merely because of revulsion at her political views would go to the heart of the connection value: a parent's right to educate her child as she deems fit, consistent with her moral, political and religious beliefs. Allowing state action to interfere with this parental right would present a far greater danger to American democracy than the depredations of any foreign dictator." Peter Margulies, *Children, Parents and Asylum*, 15 GEO. IMMIGR. L.J. 289, 304 (2001).

<sup>217</sup> Polovchak v. Polovchak, 432 N.E.2d 873, 879 (Ill. App. Ct. 1982).

<sup>218</sup> Michael and Anna Polovchak, for example, reached different conclusions about the expressed desires of their seventeen-year-old child and twelve-year-old child.

In this instance, it is possible to explain the grey area as representing not differences in state and federal assessments of the impact that return to the Ukraine would have on Walter's health and welfare, but rather the Cold War underpinnings of the matter. No one took any steps to prevent Michael and Anna from returning their younger son to the Ukraine. Genuine concern for Michael and Anna's fitness to decide whether to return a child to the Ukraine necessarily would have brought the younger son into the litigation fray. Despite high rhetoric and emotion, protecting Walter was not the focus of the litigation.<sup>219</sup> In fact, evidence strongly suggests that absent the headlines and federal involvement the family would have quietly returned to the Ukraine and resumed their lives. This is precisely what happened with Walter's parents and younger brother.<sup>220</sup> As Walter's case resolved and he ceased to serve any propaganda purpose as "the littlest refugee," the interest of the federal government and the public dissipated. According to Walter, "[w]e had a movie deal going for a while. Glasnost sort of killed it."<sup>221</sup>

It will not always be correct to ascribe the grey area, between harm which might qualify a child for immigration relief and harm that is sufficient to justify state intervention in the parent's custody role, to speculation based on ideological disagreements. Certainly, in instances where a parent intends to perpetrate harm on children directly, finding parental unfitness is more likely.<sup>222</sup> With a clear and convincing finding of parental unfitness, the state has a critical role in protecting children, even when this means prohibiting parents from removing their children from the United States.<sup>223</sup>

More difficult are cases where harm to children is likely, despite parents' best efforts to protect children. With this difficulty in mind, it is time to return to the case of the Olowo family.

## V. OLOWO REVISITED AND LOOKING AHEAD

Equipped with a better understanding of the considerations at stake when family law and immigration law interact around the parent-child relationship, it is time to return to the matter of Esther Olowo and her twin daughters. Unlike most situations where child protection is at issue, here, as in cancellation of removal cases, it is not other adults but the parent herself who argues that the

<sup>219</sup> "Whatever one thinks of the parties or the principles in the Polovchak case, it is safe to say that the matter was driven more by ideology than child welfare." Boyer & Lubet, *supra* note 63, at 275.

<sup>220</sup> Walter's brother continues to live in the Ukraine. Leroux, *supra* note 197

<sup>221</sup> Jean Davidson, *Still Looking Behind Him: Polovchak Reflects on His Celebrated Defection*, BUFFALO NEWS, Aug. 12, 1990.

<sup>222</sup> See Margulies, *supra* note 216, at 301 (arguing that when "clear and convincing evidence suggests that a parent will engage in activity that asylum law deems to be persecution of the child, one can readily argue that the parent is not fit").

<sup>223</sup> *In re Adoption of Peggy*, 767 N.E.2d 29 (Mass. 2002) (upholding termination of parental rights of foreign national father found to be unfit based, in part, on actions related to female genital circumcision of daughter). "We are aware of no Federal or international law that would operate to divest the Juvenile Court of the power to reach the result it did in these proceedings." *Id.* at 37. "[S]tate juvenile courts generally have jurisdiction over immigrant juveniles within their territory, whether legally admitted into the United States or not." Gao v. Jennifer, 185 F.3d 548, 554 (6th Cir. 1999).

children will face serious harm. The threat to the children, therefore, is not a matter of ideological difference. Because immigration proceedings to remove Esther Olowo initiated the process, analysis will begin there.

*A. Failure to Respect the Parent-Child Relationship in Federal Immigration Proceedings*

Though the Seventh Circuit declared itself concerned for the rights of the Olowo children, its decision completely ignores the children's vital rights. In fact, the court simply waved away the fundamental rights of the children and parents in preserving the parent-child relationship with an unsupported assertion that the daughters "are under no compulsion to leave."<sup>224</sup> As demonstrated in the cases of Harald Schleiffer, Lina Acosta and Walter Polovchak, the fact that children hold immigration or even citizenship status preventing the federal government from deporting them actually reveals very little about whether the children actually can or will stay in the United States.

The court's *Olowo* decision, however, proceeds from the assumption that the children would not leave the United States, even though there is no evidence to this effect.<sup>225</sup> The court was correct in observing that the immigration proceedings did not account for the best interests of the children, but it then proceeded to act precisely as if a determination had been made that it was in the children's best interests to stay and that this would happen. By speculating that the children would not return to Nigeria, the court completely avoided the critical issue of whether the risk of FGM to the daughters could serve as a basis for their mother's asylum.<sup>226</sup> This error undermines the court's entire asylum analysis.

The anomaly created by the court's assumption is that Olowo's claim for asylum would stand on better ground if her daughters had no legal immigration status and the court had conducted its analysis based on the fact that the daughters would leave the country with their parents.<sup>227</sup> The court's approach provides the twisted result that by virtue of holding legal immigration status the children are less likely to remain in the United States with their family intact. Respecting parents' decisions about whether their children will remain or leave closes this perverse gap.

It is clear that the judges found even consideration of taking the children to a place where they might suffer FGM to be unthinkable. The court said it offended "our sense of decency."<sup>228</sup> Notably, at this point in its decision the court cited to the case of Walter Polovchak for support.<sup>229</sup> The court's reaction

<sup>224</sup> *Olowo v. Ashcroft*, 368 F.3d 692, 701 (7th Cir. 2004).

<sup>225</sup> It is error to base a removal decision on an assumption about whether children will stay in the country or leave that is not supported by evidence on the record. *Salinas-Pastora v. INS*, 112 F.3d 517, 1997 WL 199963 (9th Cir. Dec. 13, 1996) (unpublished disposition). The *Olowo* court, moreover, was sufficiently aware that it lacked power to order the children not return to Nigeria that it felt the need to call on Illinois child protective services.

<sup>226</sup> See *Abay v. Ashcroft*, 368 F.3d 634, 636 (6th Cir. 2004) (reversing denials of asylum to mother and daughter where daughter would face FGM in Ethiopia if both returned).

<sup>227</sup> See *Salameda v. INS*, 70 F.3d 447, 451 (7th Cir. 1995) (describing failure to include removable child in his parents' removal proceeding as an "ignoble ploy").

<sup>228</sup> *Olowo*, 368 F.3d at 703.

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

to the possibility that the daughters might return to Nigeria, much like the public reaction in the case of Walter Polovchak, demonstrates that it often is most important to examine our processes precisely when we find alternatives unthinkable. The fact that a possible outcome offends the federal court's sense of decency does not empower the federal court to resort to facile assumption in a federal forum in lieu of thoughtful adjudication of the parent-child relationship in state court with. Perhaps the federal court thought it inevitable that a state court, after principled inquiry would, reach the same result, but this assumption cannot circumvent the need to allow the state court to make that determination.

When parents who otherwise appear to care for their children announce decisions that seem outrageous, this may mean that the parents are dead wrong, but it also may mean that we are not seeing the entire picture or even that we simply disagree. The difficult calculus that leads a parent to decide to take a child out of the country, perhaps even into harm, requires more than passing dismissal.<sup>230</sup> Assessing the wisdom of any decision to separate from children is impossible without serious consideration of the practical realities that this would entail for the children and their care.<sup>231</sup> If parents leave children behind, family separation can be the source of tremendous hardship, and the court cannot blithely assume that parents have not reached an agonizing but ultimately defensible decision.<sup>232</sup>

In fact, the *Olowo* court's easy assumption that because the children have immigration status they will remain in the United States runs counter to the standard thrust of immigration law. As noted above, immigration law broadly incorporates a strong impulse that children follow parents. In the cancellation of removal context, the government even requires special evidence to overcome the presumption that children will accompany parents.<sup>233</sup> In litigation, the government has advanced the position, rejected by the Ninth Circuit, that because "most deportable aliens would not leave their children in the United States . . . there [is] no need for the [Board of Immigration Appeals] to consider the consequences of separation."<sup>234</sup> Further, in an unpublished decision, the Board of Immigration Appeals reopened a removal case to permit an asylum claim similar to that of Esther Olowo.<sup>235</sup> The Board

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<sup>230</sup> "[T]he decision whether citizen children of aliens should remain in the United States and enjoy the benefits of life as Americans is a far closer and more difficult one than the INS acknowledges." *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1426 (9th Cir. 1987).

<sup>231</sup> "[S]eparating from children is not some kind of petulant or symbolic foot-stamping, but action with significant practical consequences. Children must be cared for, and if the nation is at all serious about its commitment to children or their value to the state, they must be well cared for." Sanger, *supra* note 213, at 516.

<sup>232</sup> *Bastidas v. INS*, 609 F.2d 101, 105 (3d Cir. 1979) ("the separation of family members from one another [is] a serious matter requiring close and careful scrutiny"); *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983) ("The most important single [hardship] factor may be the separation of the alien from family . . .") (internal quotations omitted).

<sup>233</sup> See *supra* at pt. II.B.

<sup>234</sup> *Cerrillo-Perez*, 809 F.2d at 1426 (rejecting proposition that the BIA can "adopt a general presumption that separation of parents and children will not occur and thereby relieve itself of its duty to consider applications on an individual basis").

<sup>235</sup> *In re Dibba*, No. A73 541 857 (B.I.A. Nov. 23, 2001) (unpublished disposition).

made clear that the [mother] need not prove that she would take the child with her as part of her burden to demonstrate eligibility for relief, if she has custody of the child. . . . [N]ormally a mother would not be expected to leave her child in the United States to avoid persecution.<sup>236</sup>

Indeed, the government “usually does not bother to institute a formal deportation proceeding against an alien who is likely to depart anyway, such as the minor child of parents who are being deported.”<sup>237</sup>

Against this backdrop, a knee-jerk assumption that parents will separate from their children or that they have chosen to take the children for nefarious reasons is unfounded. It is certainly contrary to constitutional protections for the parent-child relationship that demand a high degree of proof of parental unfitness before separating parents from their children. The idea that parents are free to choose whether to take their children or leave them behind is the edifice on which all the “de facto deportation” cases stand. If parents’ choices are brushed aside without the constitutional protections required by the parent-child relationship, the idea that hardship resulting from parents’ removals is a matter of parental choice is completely undermined.

Valuing the parents’ choice about whether children will stay or leave is not, as the *Olowo* court stated, violative of the children’s rights. The child, like the parent, has a constitutionally protected interest in preserving the parent-child relationship. Given that the alternative to parental care may be institutional care of some form,<sup>238</sup> the stakes for children are high.<sup>239</sup> Given the requirements of AFSA, they are perhaps permanent.

Within the immigration proceeding itself, there is neither capacity nor opportunity to determine parental fitness. Parents’ immigration status says nothing about parental fitness. Further, within immigration proceedings seeking removal only of parents, even where parents argue that their decisions will result in harm to their children, there is absolutely no conflict of interest between parents and children. As in the cancellation of removal context, the statutory framework places parents in the position of highlighting potential harm to their children as a means to avoid this harm. The only interest of parents in such a removal proceeding is avoiding their own removal—in fact, the only decision that the immigration proceedings can make is whether the parents will be removed. No outcome of the immigration proceedings itself, therefore, will result in an order that the child leave the country. If parents prevail, based on the hardship that their children will face, the result is that the children’s rights to both family integrity and continued residence in the United

<sup>236</sup> See *Abay v. Ashcroft*, 368 F.3d 634, 642 (6th Cir. 2004) (quoting *Dibba*, No. A73 541 857).

<sup>237</sup> *Salameda v. INS*, 70 F.3d 447, 451 (7th Cir. 1995) (citing INS Operations Instruction Manual § 242.1a(22)(A)(1)).

<sup>238</sup> See *Orforji v. Ashcroft*, 354 F.3d 609, 620 (7th Cir. 2003) (Posner, J., concurring) (“Probably, then, the only condition in which the [United States citizen] girls could remain in the United States after their mother returned to Nigeria would be as foster children.”). The fact that the *Olowo* daughters’ father held legal permanent resident status is of no import in this calculation, as he apparently agreed with the decision to take the daughters to Nigeria.

<sup>239</sup> See Jill Chaifetz, *Listening to Foster Children in Accordance with the Law: The Failure to Serve Children in State Care*, 25 N.Y.U. REV. L. & SOC. CHANGE 1, 10 (1999) (detailing “incalculable” human loss attributable to failures and hardships in the foster care system).

States are promoted. Giving full respect to parents' decision in this context, therefore, is the only route to a decision that vindicates the full range of children's rights.

In contrast, children are least served when immigration proceedings ignore the protections due the parent-child relationship and thus undermine chances for the family to stay together in the United States. In such instances, the children's desired outcome of living together in the United States is not available. The alternatives, children's separation from parents or exit from the United States, are outcomes that necessarily diminish either the children's rights in the parent-child relationship or their immigration rights.<sup>240</sup> The rights of children are threatened most when the court fails to respect the parent-child relationship and thus reduces the possibility that children's rights will be vindicated.

Further, this respect for parental decisions in the immigration forum does nothing to undermine the children's rights to protection. Only if immigration proceedings, with full respect for the parents' decisions, still result in ordering parents removed will the children face possible removal from the United States by their parents. Only then is the possible need for state protection even an issue.

### *B. Protecting Children from the Consequences of Removal*

The possible need for state intervention to protect Olowo's daughters was properly not decided in their parent's immigration proceeding. The potential need for state protection in such cases does not ripen until parents' immigration status is fully settled. Only when parents' removal is final can it be said that any possible danger to children is remotely imminent. While parents are fighting to remain in the country with their children, there simply is no danger to the children based on removal. Further, a positive outcome for the parent in the immigration proceeding will remove any potential danger. Prior to final adjudication in the immigration matter, giving full respect to parents' decisions is likely the best avenue to ensure that the need for state protection is minimized.

If subsequent child protective proceedings occur, it is important for adjudicators to recognize the nature of the immigration process that parents have just completed. The quirks and details of immigration law frame the arguments that parents advance. This framework can force parents into choiceless choices and provides only a glimpse of their real relationship with their children as parents. The framework results in arguments that are easy to twist. For example, in *Olowo* the Seventh Circuit spun an unsympathetic narrative of the need to protect children from an indecent individual, a petty criminal callously exploiting her daughters to save herself. It is equally possible to tell this as the tale of a frightened mother making an agonizing decision in a last ditch effort to avoid losing her children and her life with them in the United States. The truth may lie somewhere in between, or elsewhere. When state systems evaluate

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<sup>240</sup> "On a more cynical note, one might conclude that the state would like to see a family desert a criminal offender, and assists the family by removing the individual virtually permanently to another country." Demleitner, *supra* note 5, at 299. Any analysis of immigration law probably should not shy away from cynicism, but in these types of cases involving children a conclusion that the institutionally favored result is a dependent child living on state support would run counter to a major impulse of immigration law.

parental fitness and investigate the need for steps to protect children, they must consider that parents working within the immigration framework have been making arguments responsive to that statutory structure. As court rulings clarify immigration options, parents may be expected to reevaluate their decisions about their options for their children. Indeed, while state courts are the preferred forum for determinations relating to the parent-child relationship, it is likely that cases warranting state intervention will be rare.<sup>241</sup>

The factual scenario presented in *Olowo* may be among the most difficult. If the children themselves were seeking relief from governmental action to remove them to Nigeria, they would have a strong case.<sup>242</sup> If the parents were seeking to take the children to Nigeria with the express purpose of having FGM performed, they would be liable for criminal prosecution.<sup>243</sup> But here the parents wanted to avoid harm to the children, and took what steps they could to protect them if they all return to Nigeria. The parents were well positioned to know the risks and hardships associated with them. Evaluating the fitness of parents in such situations must account for the parents' role not as persecutors, but as imperfect protectors within the existing context.<sup>244</sup> The inquiry necessarily will be fact dependent, culturally sensitive and difficult.

As daunting as such decisions are, they are the stock and trade of family courts. While other countries with different risks and opportunities provide challenging factual inquiries and may take much more research than domestic cases, the core of the inquiry and the process is the same. Just as the federal forum should not presume capacity and authority to make custody determinations, the family court should not assume the role of asylum adjudicator. Major challenges will lie with advocates and participants in such proceedings to educate family courts to make reasoned decisions about the parent-child relationship when possible removal to other countries is involved.<sup>245</sup>

The converse of the *Olowo* family's situation is also possible, i.e. there may well be instances where immigration law would not extend immigration relief to children based on harm in another country, but the harm is sufficiently severe to justify state intervention in the parent-child relationship. Protections from removal such as asylum, withholding of removal and deferral of removal under the Convention Against Torture are narrow and may reach only harms, for example, perpetrated on account of particular grounds or acquiesced to by governmental authorities. Moreover, as noted above, U.S. citizens would not

<sup>241</sup> If, for example, the *Olowo* court had respected the parental decision to return with the children to Nigeria, it might have found a basis for relief from the mother's removal. Any need for state intervention would then evaporate. While this outcome would serve the interests of the mother, it also would advance the interests of the children.

<sup>242</sup> *In re Kasinga*, 21 I. & N. Dec. 357 (1996). See also Margulies, *supra* note 216, at 300 (discussing lower burden of proof in asylum matters as opposed to actions that interfere with parental custody).

<sup>243</sup> See 18 U.S.C. § 116 (2000).

<sup>244</sup> See *Nicholson v. Scopetta*, 3 N.Y.3d 357, 370 (2004) (noting that inquiries related to the removal of children from mothers who are victims of domestic violence must focus on "whether she has met the standard of a reasonable and prudent person in similar circumstances").

<sup>245</sup> See generally Amity R. Boye, *Making Sure Children Find Their Way Home: Obligating States Under International Law to Return Dependent Children to Family Members*, 69 BROOK. L. REV. 1515 (2004).



appeal to immigration laws for relief from removal. Again, in such instances the focus of the court needs to remain on the critical issue of parental fitness.

Under this approach, the outcome for the Olowo family is not clear. Avenues for them to remain together in the United States were undermined by a failure of federal decision makers to respect the children's and parents' rights in the parent-child relationship. Any state action related to child protection would have to closely examine the factual situation in the wake of the tainted, but final, immigration determination. To presume the outcome of such a proceeding here on the limited facts available would be to commit the error of the Seventh Circuit. The future for the Olowo family, and many other families making decision about children, will require creative advocacy and thoughtful adjudication of children in the context of their families.

## VI. CONCLUSION

Family law and immigration law play vital yet distinct roles in sorting out the rights and realities that determine where children live. Understanding and respecting these distinct roles is the best way to ensure that children's interests are not lost in the complexities of multiple proceedings or hijacked by competing adult agendas. On the federal front, immigration proceedings must acknowledge that children's interests are neither represented nor protected in parents' removal proceedings and, therefore, those children's interests cannot be impeded by pseudo-determinations of children's rights and speculative assumptions that result in diminishment of children's interests in the parent-child relationship. On the state side, the consequential step of intervention in the parent-child relationship demands serious and thoughtful inquiry into parental fitness, made with awareness that when there is conflict between children and parents, the state's decision usually will be the ultimate determinant of whether children stay in the United States or leave the country with their parents. Immigration law and family law serve disparate goals. When these goals clash, immigration and family court proceedings best achieve the advancement of children's interests when the courts operate with awareness of each other but with fidelity to their own aims and processes.

Any discussion of the statutory framework for derivative asylum and cancellation of removal necessarily shines light on the unacceptable level of hardship to which the nation is willing to subject its citizens and legal permanent resident children in the name of immigration control. There is some comfort that the national eagerness to deport does not translate, in most cases, to a corresponding eagerness to breakup families when parents are removed. But even the possibility that hardship to children may be insufficient to warrant immigration relief to parents while still implicating child protective concerns should result in serious reassessment of the statutory framework.<sup>246</sup>

Moreover, it is simply bad policy to sacrifice children's futures on the altar of immigration control. If citizen children who leave with their parents truly are able to choose to return as adults, the United States needs to muster

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<sup>246</sup> *Cabrera-Alvarez v. Gonzalez*, 423 F.3d 1006, 1014 (9th Cir. 2005) (Pregerson, J., *dis-senting*) (“[Our cancellation of removal statute does not honor the concept of family values and the need to keep families together.]”).

more concern for their development, well being and education as members of our national community.<sup>247</sup> Most children live with their families, but they also are part of our national community. Our immigration and nationality laws that delineate rights to participate in our national community must do better in accounting for the realities of family.

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<sup>247</sup> See Bhabha, *supra* note 83, at 113 (“The child’s enduring presence in the home country is thus not simply an important guarantee for the child of access to the rights and benefits of the community’s social goods; it is also a prerequisite for the exercise of the obligations of citizenship as an adult.”).