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## A TAXONOMY OF THE HARDSHIPS CHILDREN OF IMMIGRANT PARENTS FACE FOLLOWING PARENTAL DEPORTATION AND RECOMMENDATIONS TO PROTECT THE CHILDREN'S RIGHTS

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A TAXONOMY OF THE HARDSHIPS CHILDREN OF  
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BY HEATHER SANBORN

INTRODUCTION

After seven years of marriage, the birth of three children, and with a fourth on the way, A.B.'s<sup>1</sup> marriage deteriorated, and she found herself filing for divorce. At the conclusion of the divorce, A.B. was awarded the majority of parenting time and her ex-husband, E.B., was ordered to pay substantial child support.<sup>2</sup> While this story is not at all uncommon, what happened next is only familiar to a smaller number of families. One weekend, when A.B. was expecting her ex-husband to pick the children up for a visit, he never showed up.<sup>3</sup>

It was a month later that A.B. learned her ex-husband, an undocumented immigrant from Mexico, had been deported.<sup>4</sup> A.B.'s child support ceased, and her four children were permanently separated from their father.<sup>5</sup> A.B.'s ex-husband cannot be located and A.B. faces the decision of struggling to raise her children on her teacher salary or quitting her job in order to get the financial help from the state that she needs.<sup>6</sup> Her oldest children ask about their father daily, and A.B. is at a loss as to what to tell them.<sup>7</sup> The deportation of E.B. has led to noticeable anxiety and distress for A.B.'s oldest children.<sup>8</sup> And, sadly, A.B.'s children are a part of a growing generation negatively impacted by the deportation of their parents.

The most recent census data indicates that 4.1 million children live with at least one undocumented parent, and eighty-five percent of those

1. The names of the people involved have been changed to provide anonymity.
2. Interview by Heather H. Stirton with A.B. (May 20, 2018).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

children are U.S. citizens or lawful residents.<sup>9</sup> This means at least 4.1 million children live with the anxiety of having a parent deported. A 2015 report found that between 2009 and 2013, 500,000 parents of American children were deported—about 100,000 a year.<sup>10</sup> Seventy-two percent of the parents deported were not involved in violent crimes and seventy-percent of individuals involved in deportation proceedings had lived in the United States for more than ten years with the median length of residency being fourteen years.<sup>11</sup>

The Obama Administration took note of the needs of United States citizen children facing the loss of one or both of their parents through the deportation process and implemented the Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”) program.<sup>12</sup> The DAPA program had the potential to protect approximately five million children by providing parents with limited visas to enable them to stay in the United States and care for their children for a limited period of time.<sup>13</sup> However, in 2015, the DAPA program was challenged by twenty-six states in the Fifth Circuit and a preliminary injunction was entered against the program.<sup>14</sup> The challenges eventually made it to the Supreme Court, where the judgment was affirmed by an equally split Court.<sup>15</sup>

In 2016, Donald Trump was elected President of the United States. In June 2017, President Trump rescinded the DAPA program indefinitely.<sup>16</sup>

9. Randy Capps, Michael Fix & Jie Zong, *A Profile of U.S. Children with Unauthorized Immigrant Parents*, MIGRATION POL’Y INST. (Jan. 2016), <https://www.migrationpolicy.org/sites/default/files/publications/ChildrenofUnauthorized-FactSheet-FINAL.pdf> [https://perma.cc/M799-88LK].

10. Randy Capps et al., *Implications of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families*, MIGRATION POL’Y INST. (Sept. 2015), <https://www.migrationpolicy.org/sites/default/files/publications/ASPE-ChildrenofDeported-Lit%20Review-FINAL.pdf> [https://perma.cc/6TZZ-9E28].

11. See *Forced Apart (By the Numbers): Non-Citizens Deported Mostly for Nonviolent Offenses*, HUMAN RIGHTS WATCH (Apr. 15, 2009), <https://www.hrw.org/report/2009/04/15/forced-apart-numbers/non-citizens-deported-mostly-nonviolent-offenses> [https://perma.cc/2BNG-8A5F].

12. See Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, to León Rodriguez, Director, U.S. Citizenship and Immigration Services, Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, and R. Gil Kerlikowske, Commissioner, U.S. Customs and Border Protection (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_act](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_act) [https://perma.cc/NC9J-ATD6].

13. See Rodrigo Ugarte, *Immigration: 5.5 Million US Citizen Children Affected by DAPA Decision*, Report Says, LATIN POST (June 24, 2015, 3:16 PM), <http://www.latinpost.com/articles/61929/20150624/immigration-5-million-citizen-children-affected-dapa-decision-report.htm> [https://perma.cc/Y7GK-CP2R].

14. See *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015), *aff’d as revised*, 809 F.3d 134 (5th Cir. 2015).

15. *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016).

16. U.S. DEP’T OF HOMELAND SEC., *RESCISSION OF MEMORANDUM PROVIDING FOR DEFERRED ACTION FOR PARENTS OF AMERICANS AND LAWFUL PERMANENT RESIDENTS (“DAPA”)* (June 15,

Not only was DAPA rescinded, but under the Trump administration individuals no longer needed to have a criminal history in order to be deported—increasing the number of non-criminal deportations by 171% in 2017 compared to 2016.<sup>17</sup> The Trump Administration's mission to deport undocumented individuals has drawn significant media attention. Particularly, after the government implemented a “zero tolerance” policy<sup>18</sup> and the Trump Administration began separating recently-arrived immigrant children from their families and holding them in deplorable conditions, there was a public outcry to keep families together, and the judicial system was called upon to reunite families.<sup>19</sup>

However, the deportation of parents already living in the U.S. without a legal immigration status often does not garner the same level of public scrutiny. It is well documented that children with deported parents suffer from a wide range of emotional, physical, and economic issues.<sup>20</sup> Yet, these children also face legal barriers including reuniting with their parent, being permanently separated from their parent if their parent loses their parental rights following deportation, or never receiving court-mandated support from their deported parent.

This note will provide a taxonomy of the complex legal issues children and families face when a parent is deported through the examination of different family situations and the nuanced issues each family faces. The note will then proceed to make recommendations for each circumstance on how to ensure the interests of children are better protected until a more wide-sweeping overhaul of the United States immigration system occurs.

2017), <https://www.dhs.gov/news/2017/06/15/rescission-memorandum-providing-deferred-action-parents-americans-and-lawful> [https://perma.cc/T5WU-S67N].

17. Tal Kopan, *How Trump Changed the Rules to Arrest More Non-Criminal Immigrants*, CNN (Mar. 2, 2018, 9:20 AM), <https://www.cnn.com/2018/03/02/politics/ice-immigration-deportations/index.html> [https://perma.cc/5M5B-6JUZ] (“In Trump’s first year, US Immigration and Customs Enforcement arrested 109,000 criminals and 46,000 people without criminal records—a 171% increase in the number of non-criminal individuals arrested over 2016.”).

18. *Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration*, U.S. DEP’T JUST. (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> [https://perma.cc/3FFS-D9NB] (statement of Attorney General Jeff Sessions) (“I have put in place a ‘zero tolerance’ policy for illegal entry on our Southwest border.”).

19. Joanna Walters, *Judge orders US to reunite families separated at border within 30 days*, THE GUARDIAN, (Jun. 27, 2018, 13:10 EDT), <https://www.theguardian.com/us-news/2018/jun/27/us-immigration-must-reunite-families-separated-at-border-federal-judge-rules> [https://perma.cc/7LSV-GSM4]; *M.M.M. ex rel. J.M.A. v. Sessions*, 347 F. Supp. 3d 526, 528 (S.D. Cal. 2018) (stating “less than two months following implementation of the zero tolerance policy, approximately 2,600 families were separated, sparking national protests and condemnation”).

20. See generally Capps, *supra* note 10.

## I. BACKGROUND OF PARENTAL DEPORTATION

With approximately 100,000 parents being deported each year, there is no doubt children are being affected by the deportation of at least one parent.<sup>21</sup> And the evolving landscape of United States immigration law continues to expand who is eligible for deportation. For example, the Supreme Court noted that

[w]hile once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The ‘drastic measure’ of deportation or removal . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes.<sup>22</sup>

So, while parental deportation may once have only affected a small number of American children, now the majority of immigrant children are living with the fear of losing their parent(s).<sup>23</sup>

Once an immigrant is placed into deportation proceedings an Immigration Judge determines if the individual will be deported.<sup>24</sup> If the Immigration Judge issues a removal order, the individual will be kept in detention or may be provided with a date by which they must leave the country.<sup>25</sup> For immigrant parents, one of the most difficult decisions they will need to make is if their children will return with them to the country of their citizenship or if the children will remain in the US. Parents in this difficult position can apply for a waiver of deportation based on “extremely unusual hardship.”<sup>26</sup> Immigration judges determining if an individual should be deported are often called upon to consider the “extreme hardship” standard.<sup>27</sup>

21. *See generally id.*

22. *Padilla v. Kentucky*, 559 U.S. 356, 356 (2010) (citations omitted).

23. Families are now not reporting sexual abuse or seeking benefits, including nutrition assistance, out of fear of being deported. *See* Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, N.Y. TIMES (April 30, 2017), <https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html> [<https://perma.cc/DKF2-HF4J>]; Molly Redden, *Undocumented Immigrants Avoid Vital Nutrition Services for Fear of Deportation*, THE GUARDIAN (May 9, 2017, 1:02 PM), <https://www.theguardian.com/usnews/2017/may/09/undocumented-immigrants-wic-nutrition-services-deportation> [<https://perma.cc/V8GW-8BXM>].

24. *Executive Office for Immigration Review: An Agency Guide*, U.S. DEP’T JUST. (December 2017), [https://justice.gov/eoir/page/file/eoir\\_an\\_agency\\_guide/download](https://justice.gov/eoir/page/file/eoir_an_agency_guide/download) [<https://perma.cc/JVD6-XQ8Y>].

25. *Id.*

26. 8 U.S.C.A. § 1229b(b)(1)(D) (Westlaw through Pub. L. No. 116-63).

27. *Id.*

Currently, the statute allowing a stay of deportation based on extreme hardship states:

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, subject to paragraph (5); 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>28</sup>

The way courts interpret this language, however, leads to the vast majority of parents not being granted a stay of deportation, despite the real consequences for the children of either being left behind in the United States or forced to move to a country they know little to nothing about.

According to the Board of Immigration, a U.S. citizen child's hardship must be "substantially different from, or beyond, that which would normally be expected from the deportation of an alien with close family members here."<sup>29</sup> All Circuits have unanimously held that the constitutional rights of citizen children are not violated by depriving them of their parents by deporting them.<sup>30</sup> Additionally, courts have held while "economic factors are relevant in any analysis of extreme hardship, economic detriment alone is

28. *Id.*

29. *I.N.S. v. Abudu*, 485 U.S. 94, 104 (1988).

30. *See Newton v. I.N.S.*, 736 F.2d 336, 343 (6th Cir. 1984) (finding "no constitutional rights of citizenship implicated in the decision to deport" the parents of U.S. citizen children); *Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1091 (9th Cir. 2010) (citation omitted) (finding "no fundamental right to reside in the United States simply because other members of [an alien's] family are citizens"); *Payne-Barahona v. Gonzales*, 474 F.3d 1, 2 (1st Cir. 2007) ("The circuits that have addressed the constitutional issue . . . have uniformly held that a parent's otherwise valid deportation does not violate a child's constitutional right."); *see also* Joanne Joseph, *The Uprooting of the American Dream: The Diminished and Deferred Rights of the U.S. Citizen Child in the Immigration Context*, 24 CORNELL J. L. & PUB. POL'Y 209, 217 (2014) (discussing the fact that children have the right to return to the United States when they are eighteen if they leave the country with their deported parents, and they therefore do not lose their rights, their rights are preserved). It is also worth noting that children may not bring lawsuits on behalf of their parents, but can only bring a suit on behalf of themselves. Federal courts are precluded from exercising subject-matter jurisdiction over "any cause or claim by or on behalf of any alien arising from the decision or action by [DHS] to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." *Hamdi ex rel. Hamdi v. Napolitano*, 620 F.3d 615, 620–21 (6th Cir. 2010) (citing 8 U.S.C. § 1252(g)).

insufficient to support a finding of extreme hardship.”<sup>31</sup> And “the mere loss of current employment, the inability to maintain one’s present standard of living or to pursue a chosen profession, separation from a family member, or cultural readjustment do not constitute extreme hardship.”<sup>32</sup> These statements lay bare the extraordinarily high threshold parents must overcome in order to remain with their American citizen children.

Generally, courts will only give weight to the burden placed on the children left behind when the deportable parent has “a qualifying child with very serious health issues, or compelling special needs in school. A lower standard of living or adverse country conditions in the country of return are factors to consider only insofar as they may affect a [child], but generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship.”<sup>33</sup> But as this note examines, few cases are available to evidence that children’s hardships are taken into consideration when Immigration Judges decide if a parent qualifies under the extreme hardship standard.

And the application of the extreme hardship standard is unevenly applied by judges based on their sole discretion—pointing to judges that want to deport being allowed to, and judges that do not fundamentally want to deport being able to use their discretion to save families.<sup>34</sup> Yet, it is well understood that deporting a parent has disastrous effects on children.<sup>35</sup> Reports from clinical psychologists who met with families affected by parental deportation concluded that “*the level of post-traumatic stress disorder and anxiety rivaled that seen in war torn countries like Bosnia*. The kids can’t concentrate, and are being mistakenly diagnosed as having behavioral problems when their symptoms are actually caused by stress, de-

31. *Palmer v. I.N.S.*, 4 F.3d 482, 488 (7th Cir. 1993); *Mejia-Carrillo v. U.S. I.N.S.*, 656 F.2d 520, 522 (9th Cir. 1981); *Matter of O-J-O*, Interim Decision 3280 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880 (BIA 1994).

32. *In re Pilch*, 21 I. & N. Dec. 627, 630–31 (BIA 1996) (order dismissing appeal) (citing *Marquez-Medina v. I.N.S.*, 765 F.2d 673 (7th Cir. 1985); *Bueno-Carrillo v. Landon*, 682 F.2d 143 (7th Cir. 1982); *Chokloikaew v. I.N.S.*, 601 F.2d 216 (5th Cir. 1979); *Banks v. I.N.S.*, 594 F.2d 760 (9th Cir. 1979); *In re Koojoory*, 12 I. & N. Dec. 215 (BIA 1967) (order dismissing appeal).

33. *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 63–64 (BIA 2001).

34. See Satya Grace Kaskade, *Mothers Without Borders: Undocumented Immigrant Mothers Facing Deportation and the Best Interests of Their U.S. Citizen Children*, 15 WM. & MARY J. WOMEN & L. 447, 464 (2009).

35. See JONATHAN BAUM ET AL., IN THE CHILD’S BEST INTEREST?: THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION, 5-8 (Laurel E. Fletcher et al. eds., 2010) (finding children who experienced immigrant parental separation suffer from behavioral challenges with respect to eating, sleeping and controlling emotions).

pression, and anxiety resulting from [separation].”<sup>36</sup> It is being left to Immigration Judges’ discretion on how an American citizen child’s life will be impacted based on the judge’s application of the extreme hardship standard.

Further, federal courts often lack jurisdiction in many cases to review an Immigration Judge’s decision. For example, in *Memije v. Gonzales*, the Ninth Circuit ruled “[s]ection 242(a)(2)(B)(i) of the Immigration and Naturalization Act expressly eliminates our jurisdiction over decisions by the Board of Immigration Appeals that involve the exercise of discretion . . . [w]e lack jurisdiction to review the Immigration Judge’s discretionary determination that [Plaintiffs] failed to establish the requisite exceptional and extremely unusual hardship to their United States citizen children, and are therefore ineligible for cancellation of removal.”<sup>37</sup>

But the court’s dissent pointed out the reality of not being able to intervene. The dissent articulated that the two plaintiffs in the case were a married couple with four minor children, all of whom were American citizens that were born in the U.S.<sup>38</sup> Both parents were gainfully employed and had bought a home in California.<sup>39</sup> The oldest daughter of the couple was in her final year of high school, taking Honors and Advanced Placement classes in order to attend college, and had never lived in Mexico, nor had her three younger siblings.<sup>40</sup> The dissent stated that the deportation of the parents was leading to the de facto deportation of all four children, forcing the two youngest children to be unable to attend school due to the high costs in the parent’s native land of Mexico and the likelihood the family would be poor, and the two older children would never be able to attend college.<sup>41</sup> The dissent concluded that “[r]emoval of the petitioners will result in extreme and unusual hardship to their four United States citizen children. Removal of the parents will deny all four children the opportunity to develop their full potential in the country of their birth.”<sup>42</sup> Yet, the Judge’s dissent could do nothing to prevent the fate of these children.

In family courts around the country, the best interests of the child are used as the standard when making determinations about custody, upbringing-

36. JAMES D. KREMER ET AL., *SEVERING A LIFELINE: THE NEGLECT OF CITIZEN CHILDREN IN AMERICA’S IMMIGRATION ENFORCEMENT POLICY*, 70 (Katherin Fennely et al. eds., 2009) (emphasis added); *United States v. Aguilar*, 133 F. Supp. 3d 468, 477–78 (E.D. N.Y. 2015).

37. 481 F.3d 1163, 1164 (9th Cir. 2007) (internal citations omitted).

38. *Id.* (Pregerson, J., dissenting).

39. *Id.* at 1165.

40. *Id.*

41. *Id.*

42. *Id.*



ing, and where a child will reside.<sup>43</sup> A common proposal is to use the best interest standard when determining if a deportable parent qualifies for a stay of deportation.<sup>44</sup> In countries that have ratified the Convention on the Rights of the Child (which include all countries except the United States<sup>45</sup>), the best interests of immigrant children are taken into consideration when determining if a parent will be deported.<sup>46</sup> The United States, not being a signatory of the Convention on the Rights of the Child, does not use the international standard of the interests of the child. And “[i]n both domestic and international law, a common legal standard for cases involving children is the ‘best interests of the child’ standard. The [U.S.] immigration system runs counter to this prevailing norm.”<sup>47</sup>

Indeed, courts have rejected the use of the “best interests standard” finding “it will very rarely be in a child’s best interests to have a parent deported. Therefore, if this standard were to be applied in all removal proceedings indirectly impacting a child, this would create a huge loophole in the law, and deportations would be very few and far between.”<sup>48</sup>

Yet, even with judicial recognition of the plight of children whose parent(s) are deported, the following cases will demonstrate deportation continues, and with varying ghastly effects based on the specific circumstances of different types of families.

## II. SITUATIONS WHERE BOTH PARENTS OR A SINGLE PARENT ARE DEPORTED

When both parents are set to be deported, the first question they must decide is if their children will remain or accompany them to the country of the parent’s citizenship. For many parents, this difficult decision is based

43. D. Marianne Blair & Merle H. Weiner, Resolving Parental Custody Disputes—A Comparative Exploration, 39 FAM. L. Q. 247 (2005) (“The custody law in every state in the United States . . . embraces the ‘best interest’ standard.”).

44. For a fuller analysis of using the best interests standard, see Nikki Smith, *Children’s Rights Nationally and Internationally During the Deportation of Their Parents or Themselves Does the Right to Sovereignty Trump the Best Interest of the Child?*, 5 THE CRIT: CRITICAL LEGAL STUD. J. 2012.

45. Sarah Mehta, *There’s Only One Country That Hasn’t Ratified the Convention on Children’s Rights: US*, ACLU (Nov. 20, 2015), <https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens> [<https://perma.cc/MBX6-WFGN>].

46. Bridgette A. Carr, *Incorporating a “Best Interests of the Child” Approach to Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 124-27 (2009).

47. *Id.*

48. Saldana ex rel. Saldana v. Holder, No. 3:15-cv-105, 2015 U.S. Dist. LEXIS 44023, at \*9 (S.D. Ohio Apr. 2, 2015) (citing Lopez v. Franklin, 427 F. Supp. 345, 349 (E.D. Mich. 1977)) (noting that “an argument could be made in every one of these cases that from an objective socio-economic perspective[,] the ‘best interests of the child’ would be to remain in the United States rather than return to the parents’ native land.”).

on providing an uncertain future to a child in a country where they possibly don't speak the language and may never have traveled to, or hoping their children will be better off by leaving them in the United States. In some instances, a deportable parent is required to make an immediate decision if their children will accompany them back to their native home.<sup>49</sup> The Board of Immigration states that when a deportable parent's child "is below the age of discretion . . . it is his parents' decision whether to take him along or to leave him in this country when and if they are deported."<sup>50</sup> Families, time permitting, may be allowed to find a suitable guardian for their minor child.<sup>51</sup> But in the worst of scenarios, children are left to be wards of the state, and parents run the risk of having their parental rights terminated.<sup>52</sup>

A particularly concerning case regarding the deportation of both parents and the significant consequences is the Michigan case of *In re B and J*.<sup>53</sup> The children B and J (one a citizen and one not) had been taken into custody by child services while an investigation into alleged abuse was ongoing.<sup>54</sup> Both parents did not have a legal immigration status.<sup>55</sup> Shockingly, the children services agency reported the two parents to immigration officials and the parents were deported.<sup>56</sup> The state then had the parents' rights terminated based on the parents having been deported and not being able to find services in the parent's home country to support reunification—despite *not finding any abuse*.<sup>57</sup> Fortuitously, the parents were able to appeal the case and their rights were restored.<sup>58</sup>

49. "At the hearing, the IJ repeatedly prevented [Plaintiff] from testifying in support of his application. For example, the IJ required [Plaintiff] to choose whether his two-year old daughter . . . would stay in the United States or return with him to Mexico. When [Plaintiff] could not make such a critical decision at a moment's notice, the IJ precluded him from testifying about the hardship [minor child] would suffer if separated from her father." *Cardenas-Morfin v. Ashcroft*, 87 F. App'x 629, 631 (9th Cir. 2004) (unpublished).

50. *Liu v. U.S. Dep't of Justice*, 13 F.3d 1175, 1177 (8th Cir. 1994).

51. *Id.*

52. In 2018 two states implemented laws allowing parents facing deportation to designate a caregiver for their children without losing their parental rights. See Teresa Wiltz, *If Parents Get Deported, Who Gets Their Children?*, PEW TRUST (Oct. 25, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/25/if-parents-get-deported-who-gets-their-children> [<https://perma.cc/QK5D-ZTNM>].

53. 279 Mich. App. 12, 14–15 (2008).

54. *Id.* at 15.

55. *Id.* at 19.

56. *Id.*

57. *Id.*

58. *Id.* at 19–20.

And recently, a family was torn apart in California when two parents were deported and chose to leave their four children in the U.S.<sup>59</sup> The mother, an oncology nurse, and father had entered the U.S. without legal permission three decades past.<sup>60</sup> They owned their home and attempted to obtain a legal immigration status.<sup>61</sup> Under President Obama, the parents' deportation was stayed and they were able to obtain work visas.<sup>62</sup> However, after the Trump administration changed immigration policy, the couple were deported and their oldest daughter now cares for the younger three children.<sup>63</sup>

When parents are removed and they do not have a plan in place for their child, or they do not have anyone to act as a guardian, children face a myriad of issues by being left in the care of the State. And despite the Supreme Court holding the "interest of parents in the care, custody, and control of their children [being] perhaps the oldest of the fundamental liberty interests recognized by [the] Court" and that "so long 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," it is clear the State is interfering with the family when deporting parents.<sup>64</sup>

Recent estimates indicate there are 5,100 children in foster care that have either a parent detained or a parent that has been deported.<sup>65</sup> This number represents 1.25 percent of the total foster care population, and if these rates continue through the next five years, at least 15,000 additional children will face threats to reunification with their detained and deported mothers and fathers.<sup>66</sup> And housing children in foster care is exceptionally expensive for the United States. With the average cost of caring for a foster child, per year hovering around \$19,000, the United States is spending upwards of \$97 million per year by deporting parents.<sup>67</sup>

For example, in *Fairfax County Department of Family Services v. Ibrahim*, a father and mother from Ghana had three children while living in

59. Levi Bridges, *Separated from their kids by deportation, these parents raise their family long-distance*, PRI (July 25, 2018), <https://www.pri.org/stories/2018-07-25/separated-their-kids-deportation-these-parents-raise-their-family-long-distance> [https://perma.cc/8V6F-3ZW2].

60. *Id.*

61. *Id.*

62. *Id.*

63. *See id.*

64. *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000).

65. Anita O. Maddali, *The Immigrant "Other": Racialized Identity and the Devaluation of Immigrant Family Relations*, 89 IND. L.J. 643, 696 (2014).

66. *Id.*

67. Frank Alvarez, *Foster Care Costs: What Happens When Children Aren't Adopted?*, FOSTER CARE NEWSLETTER (Sept. 1, 2017), <http://foster-care-newsletter.com/foster-care-costs-children-not-adopted/#.XCvXk1xKg2w> [B5GW-SZ22].

the United States.<sup>68</sup> The father and mother were incarcerated, and the children went to live with an aunt.<sup>69</sup> After living with the aunt proved to be against the interests of the children, the children were placed in foster care.<sup>70</sup> All three children had disabilities varying in severity.<sup>71</sup>

The father was subsequently deported to Ghana following his incarceration.<sup>72</sup> The state then attempted to abolish his parental rights.<sup>73</sup> The court denied the termination of his parental rights. However, the court found:

[d]espite the department's assertion that it provided services, the department failed to maintain contact with the father or to provide him with any services. It did not keep the father abreast of [the child's] condition or residence, nor did it advise him of the children's new foster care caseworker in April 1999. The children's guardian *ad litem* did not send him an introductory letter, and the children's therapist never addressed reunification with their father. The department knew the father wanted to regain custody upon his release and the mother supported that placement. Nonetheless, the department never evaluated him, assisted in his transition from incarceration, or investigated the possibility of coordinating efforts with an agency in Africa. The trial court found the department's expectation that the father contact the department unreasonable because he did not know who was working with the children. It also found the period of two months after deportation an unreasonably short period in which he was to establish contact.<sup>74</sup>

This case shows the lack of support deported parents receive and how a lower court may terminate a parent's rights with a serious lack of due process.

Another case, in *In re D.S.*, demonstrates how a father had his rights terminated after he was deported and then could not find his children.<sup>75</sup> The father and mother were never married and separated when the children were young.<sup>76</sup> The mother was found to be an unfit parent and the children were placed in foster care.<sup>77</sup> Learning about the children being taken into care, the father attempted to locate the mother after he was deported.<sup>78</sup> The

68. 0821-00-4, 2000 WL 1847638, at \*1 (Va. App. Dec. 19, 2000)

69. *Id.*

70. *Id.* at \*1-2.

71. *Id.*

72. *Id.* at \*2.

73. *Id.*

74. *Id.* at \*3.

75. No. 16-0254, 2016 WL 1359134, at \*1 (Iowa App. Apr. 6, 2016).

76. *Id.* at \*1-2.

77. *Id.*

78. *Id.*

father testified at the termination-of-parental-rights hearing that he did not have contact with the children after he was deported because he could not locate the mother or the children.<sup>79</sup> Nonetheless, the court terminated his rights finding the father had deserted the children.<sup>80</sup> The court found that desertion is not evidenced by intent, but rather a failure to provide the children with physical, emotional or financial support.<sup>81</sup>

Similarly, a father that was deported to Guatemala after being incarcerated had his parental rights terminated, despite not knowing where his children were located.<sup>82</sup> The father did not speak English and would have struggled to speak to the children over the telephone.<sup>83</sup> But the court ruled that posting a newspaper ad (not in Guatemala) and the father appearing to have failed to plan for the children's future (the father hoped to return to the U.S. to collect his children, but was forbidden from doing so because he had been deported) allowed for the father's parental rights to be terminated.<sup>84</sup>

And in Tennessee, a woman was given the option of having her children accompany her to Nigeria or leaving them behind in foster care.<sup>85</sup> After she was deported, the Department of Social Services was unable to provide family services to the woman and her rights were terminated.<sup>86</sup>

Alarminglly, the Tenth Circuit refused to mitigate the prison sentence of a woman deported to Honduras who was arrested after illegally reentering the country for the sole purpose of attending a hearing that would allow her to prevent her parental rights from being terminated.<sup>87</sup> The mother only returned to the U.S. after deportation in order to appear in court to keep parental rights to her eleven-year-old daughter, yet ended up serving twenty-four months in prison for it.<sup>88</sup> These cases demonstrate that parents have little hope of reuniting with their children after they are deported, as they cannot even enter the country to attend a hearing about their rights.

79. *Id.* at \*2.

80. *Id.*

81. *Id.*

82. *Perez-Velasquez v. Culpeper Cty. Dep't of Soc. Servs.*, 0360-0904, 2009 WL 1851017, at \*2 (Va. App. June 30, 2009).

83. *Id.*

84. *Id.*

85. *State Dep't of Children's Servs. v. Ahmad*, No. M2004-02604-COA-R3-PT, 2005 WL 975339, at 1 (Tenn. Ct. App. April 26, 2005).

86. *Id.* at 3.

87. *United States v. Hernandez-Baide*, 392 F.3d 1153, 1155 (10th Cir. 2004).

88. *Id.*

In a rare case to make it to a State supreme court, it was found a man deported to Mexico had his parental rights incorrectly terminated.<sup>89</sup> And while decisions to terminate parental rights of those deported are “frequently reversed” on appeal, because immigrants are often too poor or unable to appeal the termination of their rights following deportation, it is not clear how many parents have their rights terminated following deportation.<sup>90</sup>

It is highly infrequent that the needs of a child are taken into consideration when determining extreme hardship waivers to stay parental deportation. In *Salcido-Salcido v. I.N.S.*, Petitioner Tomasa Salcido–Salcido, a mother to two United States’ citizen children, was initially denied her application for suspension of deportation.<sup>91</sup> The appellate court only overturned the Immigration Judge’s decision by finding one of Ms. Salcido-Salcido’s children was so gravely ill as to qualify for a waiver under extreme hardship.<sup>92</sup>

Nina Rabin, an associate clinical professor of law at the University of Arizona, conducted an insightful study on the issues faced by older children who remained in the U.S. after their parents were deported.<sup>93</sup> Through interviews with thirty-eight children living with either an extended family member or living alone in the U.S., the economic and emotional impact on children who have had one or both parents deported is heart-breaking. From families with only one parent not having citizenship being forced to trek across the border for weekend visits with their deported family member, to children with two deported family members living in a trailer with two other young people in hopes of one day having a better life like their parents wanted for them—the impact of deportation on children is palpable.<sup>94</sup>

89. *In re E.N.C.*, 384 S.W.3d 796, 809 (Tex. 2012).

90. Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C. J.L. & SOC. JUST. 63, 98 (2012); see also *In re Angelica L.*, 277 Neb. 984, 767 N.W.2d 74, 94 (2009) (holding “[t]he fact that a child may enjoy a higher standard of living in the United States than in the country where the child’s parent resides is not a reason to terminate the parental rights of a foreign national”).

91. 138 F.3d 1292, 1293 (9th Cir. 1998).

92. *Id.*

93. Nina Rabin, *Understanding Secondary Immigration Enforcement: Immigrant Youth and Family Separation in A Border County*, 47 J.L. & EDUC. 1, 8 (2018).

94. *Id.*; see also Erica Stief, *Impractical Relief and the Innocent Victims: How United States Immigration Law Ignores the Rights of Citizen Children*, 79 UMKC L. REV. 477, 479 (2010) (discussing a family that attempted to live just over the US/Mexico border to maintain family integrity which led to the breakdown of the family).

### III. RECOMMENDATIONS FOR WHEN ONE OR BOTH PARENTS ARE DEPORTED

It is without question steps need to be taken in order to protect the rights of children whose parents are deported. I suggest several policy changes for families where the children are left in the United States without a parent: first, creating a DAPA like program; second, providing better reunification services; third, developing a subagency to deal with all parents facing deportation; fourth following international law or family law practices and using the best interests standard; and fifth providing children with notice of deportation proceedings and access to a *guardian ad litem* to influence an Immigration Judge's decision in deporting their parent.

There is a valid argument often cited to in court opinions that by allowing parents who do not have a legal immigration status a special classification, a perverse incentive would be created to procreate in the United States. For example, in *Marin-Garcia v. Holder*, the Court found “[i]f an alien could avoid the consequences of unlawful entry into the United States by having a child, it would create perverse incentives and undermine Congress’s authority over immigration matters.”<sup>95</sup> Similarly, in *Ayala-Flores v. INS*, the court noted that a finding that a parent’s deportation deprives their children of their rights as U.S. citizens “would create a substantial loophole in the immigration laws, allowing all deportable aliens to remain in this country if they bear children here.”<sup>96</sup>

However, when looking at the serious consequences children face when they are deprived the care, love, and support of their parents, a balance must be struck to give the next generation of immigrant children—the vast majority of whom are U.S. citizens—the opportunity to be raised by their parents and the need to deter illegal entry into the United States by immigrants. As the Court found in *Plyler v. Doe*, children of undocumented immigrants are vulnerable and blameless and there should be exceptions made when there are children involved.<sup>97</sup>

#### A. DAPA like program

The Obama administration implemented the DAPA program in order to ensure that children would be cared for by their parents.<sup>98</sup> To qualify for DAPA, an unauthorized immigrant would have been required to (1) have a

95. 647 F.3d 666, 672-74 (7th Cir. 2011).

96. 662 F.2d 444, 446 (6th Cir. 1981).

97. 457 U.S. 202, 219-20 (1982).

98. See Capps, *supra* note 10, at V.

son or daughter who is a U.S. citizen or lawful permanent resident; (2) have continuously resided in the United States since before January 1, 2010; (3) be physically present in the United States during November 2014 and at the time of filing a DAPA application; and (4) not be a priority for enforcement under the Department of Homeland Security guidelines issued in November 2014—i.e., not having engaged or been suspected of terrorism; convicted of a felony, significant misdemeanor or three misdemeanors; or been re-apprehended at the border or issued a final deportation order since January 2014.<sup>99</sup>

The DPA policy did not provide a path to legal residence nor allowed the parents to sponsor any other relatives to move to the United States.<sup>100</sup> The program did, however, ensure parents with children who had a legal status in the U.S. would have the basic benefit of being raised by their parents until the age of eighteen. The program was challenged based on the costs associated with states providing qualifying individuals under DAPA with subsidized driver's licenses and unemployment benefits,<sup>101</sup> and an injunction on the program was upheld by an equally divided Supreme Court.<sup>102</sup>

A program like DAPA, particularly for parents who have not been convicted of violent crimes, would enable immigrants to provide for their families and the U.S. economy, as well as provide them with the opportunity to plan for their lives long-term. Rather than giving parents no more than ninety days<sup>103</sup>, as is common, to make life-altering decisions, such as who their children will live with, selling their homes, and packing their belongings, a DAPA like program would provide for dignity and family stability. A DAPA type program fits with the established traditions of the nation of family unity and integrity.<sup>104</sup>

99. Mem. from Jeh Charles Johnson, Secretary of Homeland Security, to Leon Rodriguez, Director, U.S. Citizenship and Immigration Services; Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement; and R. Gil Kerlikowske, Commissioner, U.S. Customs and Border Protection, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents*, (November 20, 2014), [www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action\\_1.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf) [<https://perma.cc/5Y2S-439A>].

100. *Id.*

101. *Texas v. United States*, 809 F.3d 134, 149 (5th Cir. 2015).

102. *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016).

103. 8 U.S.C. § 1231(a)(1)(A) (Westlaw through Pub. L. No. 116-63).

104. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 116-17 (1996) (stating “[c]hoices about marriage, family life, and the upbringing of children are . . . sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard or disrespect.”); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (holding “[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment.”).



*B. A policy requiring better reunification attempts with parents whose children are in foster care.*

Under federal law, the Department of Social Services must show they have made reasonable attempts to prevent removal of children and to reach permanency if children are removed from the home.<sup>105</sup> For all parents, the law requires an individualized case plan—meaning one that is “well defined, specific, and tailored to provide services that will lead to the resumption of a family relationship.”<sup>106</sup> A plan must meet “the unique needs of each family.”<sup>107</sup> Nonetheless, the previously discussed cases demonstrate that this is not always happening.

However, there are cases that demonstrate that it is possible to reunite children with their deported parents or not have the rights of the parents terminated. The case of *Department of Services for Children, Youth and Their Families/Division of Family Services v. G.S., G.J.H.*, is a strong example of how better resources to work with a parent outside of the United States can be employed to ensure that parents’ rights and the interests of the children are accounted for.<sup>108</sup> The father had been deported after he failed to appear in court for a traffic ticket, and the mother’s rights were later terminated after a finding of child abuse.<sup>109</sup> The social workers and the court, in this case, contacted the Mexican consulate and were able to obtain a home-study of the father and allowed the father to have a court-appointed attorney and to participate in hearings telephonically.<sup>110</sup> The court found it was not in the children’s best interests for the father’s rights to be terminated and that the children should be allowed to pursue a relationship with their father, even if it was decided it was not in the children’s best interest to live in Mexico.<sup>111</sup>

Additionally, two states have enacted laws that ensure parents have time to find a guardian for their children when they are facing deportation.<sup>112</sup> If every state were to follow this model, it would at least provide a minimum level of protection to ensure that children are left in the care of a family member or someone known to them, rather than have the children end up in foster care.

105. The ABA Child Welfare and Immigration Project & The Immigrant Legal Resource & Center, *The Reuniting Immigrant Families Act: Reasonable Efforts*, 34 CHIL. L. PRAC. 29, 29 (2015).

106. *In re Mario C.*, 276 Cal. Rptr. 548, 603 (Cal. App. 1990).

107. *Id.*

108. CN160603TNCN1502245, 2017 WL 3493857, at \*6 (Del. Fam. May 22, 2017).

109. *Id.* at \*5.

110. *Id.* at \*6.

111. *Id.*

112. See Interview by Heather H. Stirton, *supra* note 2.

The American Bar Association has also provided recommendations on extending the same rights that prisoners have to access family court proceedings to immigrant parents that are detained.<sup>113</sup> These recommendations include taking into account if an immigrant has minor children when determining if they will be detained during deportation proceedings, ensuring immigrant parents are able to complete home visits to see their family while in detention, and providing immigrants with access to a telephone regularly to make arrangements for their family.<sup>114</sup> While all good suggestions to support family planning and reunification, these recommendations will only be useful prior to deportation and it will ultimately fall to family-law courts to ensure the social service departments caring for children of deported parents make every reasonable attempt to reunite families. Nonetheless, every safeguard that can be employed to ensure deported parents' rights are not terminated is an improvement from the current situation.

*C. Creating a new agency to administer children with deported parents specifically*

A particularly sound suggestion, made by Kaitlyn McKenna,<sup>115</sup> is to create a sub-agency to specifically support children whose parents have been deported.<sup>116</sup> McKenna suggests a sub-agency to help children transition out of foster care following parental deportation and support families to have a more positive experience.<sup>117</sup> I propose to go a step further, building on the American Bar Association's recommendation<sup>118</sup> to have an agency working with families from the moment an immigrant parent is informed of the possibility of deportation. The agency, being comprised of family support specialists and legal experts, would be tasked with ensuring family integrity is advocated for and decisions and planning are done in the best interests of the whole family, even if deportation is inevitable.

Such a program would require detained parents to identify themselves as parents. At the point of identification, a caseworker would be assigned to

113. Sarah Rogerson, *Lack of Detained Parents' Access to the Family Justice System and the Unjust Severance of the Parent-Child Relationship*, 47 FAM. L.Q. 141, 152 (2013).

114. ABA CIVIL IMMIGRATION DETENTION STANDARDS § III.B.1(d), § VI.B.4(b), § VI.B.4(g), § VII.D.1, § X.B.3 (ABA 2012), [https://www.prisonlegalnews.org/media/publications/aba\\_civil\\_immigration\\_detention\\_standards\\_2012.pdf](https://www.prisonlegalnews.org/media/publications/aba_civil_immigration_detention_standards_2012.pdf) [<https://perma.cc/C86E-J3L9>].

115. Kaitlyn McKenna, a former JD student at Hofstra Law, received second prize in the 2011 Schwab Essay Award.

116. Kaitlyn McKenna, *A Global Perspective of Children's Rights: Advocating for U.S.-Citizen Minors After Parental Deportation Through Federal Subagency Creation*, 45 FAM. L.Q. 397, 401-02 (2011).

117. *Id.*

118. See ABA CIVIL IMMIGRATION DETENTION STANDARDS, *supra* note 114.

ensure their family was aware of their detainment and a legal expert assigned to them to enable them to apply for a stay of deportation based on their unique situation. Because deportation is a civil, and not criminal, proceeding, no equal protection claim would be valid from treating parents—or more specifically, legal guardians—differently from those individuals without legal guardianship responsibilities, based on the serious harm that may be inflicted on a deportable parent’s children. By identifying parents early in the deportation proceeding, a new sub-agency would be able to work with the deportable individual, their family, social services, and the courts to ensure the impact of detainment is minimized for the children of the detained individual. And by formally recognizing a subagency to work with individuals with guardian responsibilities, it would enable improved visibility of the children being impacted by deportation proceedings and aid in the tempering of the negative effects on the children involved.

#### *D. Following International or Family Law Standards*

A common proposal is for the United States to follow the International Convention on the Rights of the Child (“Convention”). The Convention states, “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>119</sup> Because the United States has not ratified the Convention, U.S. courts are not bound by this standard. If the Convention was followed, then the U.S. would have to ensure there was direct contact between parents and children and they could not be separated against their will, “except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”<sup>120</sup> This provision may, in fact, shed light on why the United States has not ratified the convention, as it would undercut immigration law.<sup>121</sup>

Cases from Canada, a country that has ratified the Convention, demonstrate how the international standard of the best interests of the child protects parents from removal. For example, in *Baker v. Canada*, the Court

119. CONVENTION ON THE RIGHTS OF THE CHILD, G.A. RES. 44/25, ART. 3(1), U.N. DOC. A/44/49 (Nov. 20, 1989), <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf>.

120. *Id.* art. 9.

121. Other suggestions on the refusal of ratification of the Convention include undermining the criminal justice system. For example, the United States allows for indefinite incarceration of minors, which is prohibited by the Convention. See Diego Lopez, Comment, *The Time is Now to Ratify the Convention on the Rights of the Child*, 52 U.S.F. L. REV. 477, 487 (2018).

used the standard to determine a non-citizen mother with four Canadian-citizen children should not be deported because of the impact on the children.<sup>122</sup> The Ontario Supreme Court also found that a child's liberty interests are at stake when a parent faces removal, and the Conventions' "principles require that the rights and interests of children be considered in deportation proceedings."<sup>123</sup> The U.S. could also follow similar reasoning and account for the language of the Convention when determining if a parent qualifies for a waiver of deportation under the extreme hardship standard.

But assuming the United States continues to refuse to ratify the Convention, a best interest standard that provides for judicial discretion in weighing the interests of a child on balance with the government's interest in removing the parent could be applied and would not lead to all undocumented parents being allowed to remain in the United States simply because their children were born in the U.S. For example, most states weigh the desires of the family, the physical and mental health of the parties, the ability of children to adjust, and other factors in determining the best interests of the child in a family law court.

By applying similar standards and allowing for subjective judicial decision making in deportation proceedings, judges can look at the unique features of each individual parent in determining the real impact of the parent's deportation against the government's desire to deport. If a parent is a violent criminal and that is how immigration officials became aware of them, a rational basis review would likely find that the children's best interests would likely not be served by keeping the parent in the country. However, in cases where the parent has been law-abiding and providing for their family, the Immigration Judge would be able to provide a stay of deportation by placing the interests of the child at the heart of the decision-making process. By providing Immigration Judge's with more discretion, like Family Law judges possess, the interest of children in the U.S. would be better served.

*E. Providing notice and access to a guardian ad litem for children with deportable parents*

While parents facing deportation do not have access to many due process procedures, such as the right to counsel, the right to a speedy trial, or the right to a habeas corpus petition, children should be afforded increased

122. *Baker v. Canada*, 2 S.C.R. 817 (1999).

123. *Francis v. Canada*, 40 O.R.3d 74 (1998).

rights when they are facing the loss of their parent through deportation.<sup>124</sup> Building on the idea of creating a sub-agency to ensure family integrity is maintained, implementing new policies of ensuring children are given notice of their parent's deportation and the opportunity to testify in court on the hardship that will be caused by the parent's deportation would ensure children's rights to be raised by a parent are upheld.<sup>125</sup>

Additionally, particularly for younger children, providing a *guardian ad litem* to ensure the best interests of the children are represented in deportation hearings would ensure that judges understand the full impact of deporting a parent. In *Gonzalez-Garcia v. U.S. Atty. Gen.*, the plaintiffs, children of a deported parent, argued their due process rights had been violated by not being granted notice, the opportunity to testify, or the benefit of a *guardian ad litem* in their parent's deportation proceedings.<sup>126</sup> The court ruled the children's rights were not violated and Congress would need to statutorily create these rights for the children. And while immigration reform is severely polarizing, a change to ensure children have access to increased resources may be a gentle enough change to be possible. By allowing children an additional protection to losing their parents through statutory provision of a *guardian ad litem*, children will be afforded the opportunity to have their voices heard by an Immigration Judge on what the exact impact on their lives will be if their parent is deported.

#### IV. SITUATIONS WHERE ONE PARENT IS DEPORTED AND THE OTHER REMAINS IN THE UNITED STATES

The issues that single parents and two-parent families face when both are deported are different than families where one parent remains in the U.S. with their children. For example, in cases, such as A.B.'s, once one parent is deported the question of contact with the deported parent and financial support for the children becomes problematic. In 2015 the Supreme Court ruled that there is no constitutional right to be able to live with one's spouse, though in the same term to the Court reaffirmed marriage as

124. See generally Mark Noferi, Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings, 18 MICH. J. RACE & L. 63 (2012) (discussing the lack of due process afforded to immigrants in deportation proceedings).

125. Currently, children are not prohibited from testifying but there is no requirement to even notify them their parent is subject to a removal order. Additionally, parents can be kept in a detention facility thousands of miles away from their family's home effectively making the option of testifying impossible.

126. 317 F. Supp. 3d 1147, 1153–54 (M.D. Fla. 2018).

a fundamental right in *Obergefell v. Hodges*.<sup>127</sup> In *Kerry v. Din*, a U.S. citizen's spouse was not granted a visa and was to be deported back to Afghanistan.<sup>128</sup> The U.S. citizen argued her spouse's deportation infringed on her constitutional right to liberty, but the Court found her constitutional rights had not been violated.<sup>129</sup> And seeing as all circuits have determined a child's rights are not violated by the deportation of a parent, families split by a border is a growing problem.

For example, in *Cabrera-Alvarez v. Gonzales*, Mr. Cabrera-Alvarez entered the United States illegally in 1992.<sup>130</sup> Mr. Cabrera-Alvarez worked as an agricultural worker and he started a family with his partner and had two children.<sup>131</sup> After ten years of living in the United States, Mr. Cabrera-Alvarez was subject to an order of removal.<sup>132</sup> In order to challenge the removal, Mr. Carbera-Alvarez appealed to the Ninth Circuit on the grounds "that the immigration judge in denying his cancellation of removal, interpreted the 'exceptional and extremely unusual hardship' standard, 8 U.S.C. § 1229b(b)(1)(D), in a manner inconsistent with international law and, therefore, in violation of the presumption that Congress intends to legislate in a manner consistent with international law."<sup>133</sup>

Specifically, Mr. Cabrera-Alvarez argued "that the cancellation-of-removal statute must be interpreted consistently with Article 3(1) of the United Nations: Convention on the Rights of the Child ("Convention"), Nov. 20, 1989, 28 I.L.M. 1448, 1459, which states that "[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration." However, the Ninth Circuit affirmed the Immigration Judge to remove by stating:

After considering this evidence, the I[mmigration] J[udge] denied Petitioner's application for cancellation of removal. The I[mmigration] J[udge] explicitly rejected Petitioner's argument regarding the Convention's "best interests of the child" standard, explaining that the Board of Immigration Appeals ("BIA") had made clear that "provisions of international law do not trump" domestic immigration law and noting that Congress "may legislate contrary to the limits posed by international law.

127. *Kerry v. Din*, 135 S. Ct. 2128, 2131 (2015); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

128. *Kerry v. Din*, 135 S. Ct. 2128, 2131 (2015).

129. *Id.*

130. 423 F.3d 1006, 1007 (9th Cir. 2005).

131. *Id.*

132. *Id.*

133. *Id.*

This decision effectively led to a family being permanently separated and a tremendous loss of resources for the Cabrera-Alvarez family that remained in the United States. The judge's holding also explicitly spells out that immigration law, and removing undocumented workers, is more important than following internationally accepted guidance on making decisions based on the best interests of children.

A 2018 *Times* Report detailed stories of immigrant families split following the deportation of one parent.<sup>134</sup> One family had lived in the U.S. for over a decade with their two U.S.-born children and had a third on the way when the father—having never even received a speeding ticket—was arrested by immigration officials and deported.<sup>135</sup> The mother, also without a legal immigration status, lives in constant fear of being separated from her three children and faces the challenge of providing for her children in the United States alone.<sup>136</sup>

And deportation is a gendered issue. The Department of Homeland Security does not release the gender composition of deportees. However, research suggests that overwhelmingly it is men who are arrested, detained, and deported. A report by the Warren Institute of the University of California, Berkeley, found that ninety-three percent of detainees were male, even though only fifty-seven percent of the unauthorized population is male.<sup>137</sup> And in a study of Dominican deportees, it was found that eighty-four percent were male,<sup>138</sup> while a report that studied Mexican deportees estimate that eighty-nine percent of those who are deported are male.<sup>139</sup>

These statistics show that children are not just being left in single-parent homes in the U.S., but predominately in single-mother homes. Forty percent of children in single-mother families live in poverty, compared to just twenty-four percent for single-father families living in poverty.<sup>140</sup> Cur-

134. Haley Sweetland Edwards, *How Donald Trump's Immigration Policies Are Splitting Up Families*, TIME (March 8, 2018), <http://time.com/longform/donald-trump-immigration-policy-splitting-families/> [<https://perma.cc/8Q7V-W7GB>].

135. *Id.*

136. *Id.*

137. AARTI KOHLI ET AL., SECURE COMMUNITIES BY THE NUMBERS 5 (2011), [https://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf) [<https://perma.cc/UUB4-4CTE>].

138. DAVID BROTHERTON & LUIS BARRIOS, BANISHED TO THE HOMELAND: DOMINICAN DEPORTEES AND THEIR STORIES OF EXILE (New York: Columbia University Press 2011).

139. JOANNA DREBY, HOW TODAY'S IMMIGRATION POLICIES IMPACT CHILDREN, FAMILIES, AND COMMUNITIES 9 (2012), <https://www.americanprogress.org/wp-content/uploads/2012/08/DrebyImmigrationFamiliesFINAL.pdf> [<https://perma.cc/U2BY-SZUC>] (citing Pierette Hondagneu-Sotelo and Tanya Maria Golash-Boza, *Latino Immigrant Men and the Deportation Crisis: A Gendered Racial Removal Program?* (unpublished manuscript) (held by authors)).

140. WOMEN'S LEGAL DEFENSE AND EDUCATION FUND, READING BETWEEN THE LINES: WOMEN'S POVERTY IN THE UNITED STATES,

rent immigration policies are leaving children of immigrant mothers in very vulnerable positions. And while gender may not, necessarily, need to be weighed by Immigration Judges in making removal decisions, the holistic picture of the impacts on the family, particularly the children, should be weighed.

And when parents are not cohabitating and one of the parents is deported, in addition to facing the issues of cohabitating parents, there also becomes the question of the deported parent providing support for the children left with the parent in the United States. The establishment of child support payments to ensure children are provided for is a fairly routine process in courts across the United States. Every state has its own statutes on the determination of child support, all with the aim of ensuring children are taken care of. However, when a parent with a child support obligation is deported, like in the case of A.B. and her children, the recovery of child support becomes complicated, if not impossible.

In 2016, President Obama signed the Instrument of Ratification for the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (commonly called the “Hague Child Support Convention”).<sup>141</sup> The Hague Child Support Convention, in theory, made it easier for U.S. child-support orders to be enforced internationally. Previously, section 459A of the Social Security Act authorized the Secretary of State to declare foreign countries or their political subdivisions to be reciprocating countries for child support enforcement.<sup>142</sup> Under the Social Security Act, fourteen countries and twelve Canadian provinces had been designated as reciprocating.<sup>143</sup> With the ratification of the Hague Child Support Convention, an additional twenty countries have been added.<sup>144</sup> There have been a few cases that demonstrate the success of the ratification of the convention, particularly in Europe and Canada. In these cases, however, the location of the non-custodial parent was known or the non-custodial parent had assets in the U.S.<sup>145</sup>

<https://www.legalmomentum.org/sites/default/files/reports/reading-between-the-lines.pdf>  
[<https://perma.cc/ZZR6-9U58>] (last visited Oct. 7, 2019).

141. U.S. DEP'T OF STATE PRESS RELEASE, UNITED STATES DEPOSITS ITS INSTRUMENT OF RATIFICATION FOR THE HAGUE CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE (Sept. 7, 2016), <http://www.state.gov/secretary/remarks/2016/09/261631.htm> [<https://perma.cc/9WXZ-9JSU>].

142. 42 U.S.C. 659 § 459 (2019).

143. Notice of Declaration of Foreign Countries as Reciprocating Countries for the Enforcement of Family Support (Maintenance) Obligations 73 Fed. Reg. 72555 (Nov. 28, 2008).

144. Alison M. Smith, *Child Support Enforcement and the Hague Convention on Recovery of International Child Support*, CONG. RES. CTR. (Sept. 22, 2016), <https://fas.org/sgp/crs/misc/R43779.pdf> [<https://perma.cc/H2UY-E365>].

145. Robert G. Spector, *International Family Law*, 47 ABA/SIL YIR 147 (2013).



When the custodial parent does not know the location of the non-custodial parent, particularly if the non-custodial parent has been deported by the U.S. government, recovery of support seems to be next to impossible. While the Office of Child Support Enforcement exists and has a handbook for parents on what to do to collect child support from abroad,<sup>146</sup> collection statistics indicate that the support orders are rarely enforced overseas, particularly when looking at orders served in Mexico. For example, in May 2000, the National Center for Child Support Enforcement reported they had sent 942 cases from the U.S. to the Secretaría de Relaciones Exteriores, Dirección General de Protección y Asuntos Consulares, Oficina de Derecho de Familia (“SRE”) for enforcement.<sup>147</sup> But of the 942 cases, none of those cases has been sent to state courts in Mexico for enforcement.<sup>148</sup>

While there are mechanisms in place to provide recovery of child support, it is impractical to rely on foreign governments to enforce child-support recovery. For example, in Mexico, the SRE is not only tasked with enforcing child-support orders from the US, but also in managing cases involving the abduction of foreign children into Mexico.<sup>149</sup> It is understandable that limited resources would focus on locating abducted children over absconders of child support. And additionally, it is not the place of the U.S. to impose U.S. norms and values onto other countries relating to their family law practices. With the acceptance of the limited practicality of the Hague Child Support Convention, it is clear other measures need to be taken by the U.S. to ensure children in the U.S. are provided for.

*A. Recommendations for when a single parent is deported and another remains in the U.S.*

In addition to the recommendations already suggested, *supra*, there is a need to strengthen relations between countries to track deported individuals to ensure recovery of child maintenance is achieved. Further, the gender of the parent left behind and their ability to provide for their children be considered.

146. OFFICE OF CHILD SUPPORT ENFORCEMENT, WORKING ACROSS BORDERS (April 18, 2016), [https://www.acf.hhs.gov/sites/default/files/programs/css/chapter7\\_0.pdf](https://www.acf.hhs.gov/sites/default/files/programs/css/chapter7_0.pdf) [https://perma.cc/LQY8-DEL7].

147. NATIONAL CHILDS SUPPORT ENFORCEMENT AGENCY, WORKING THE CASE WHEN A PARTY IS IN MEXICO [hereinafter *IV-D Survival Guide*], <https://www.ncsea.org/wp-content/uploads/2012/02/IV-D-SURVIVAL-GUIDE.pdf> [864R-H7U5] (last accessed Feb 1, 2019).

148. *Id.*

149. *Id.*

While international agreements to recover child support are in place, ultimately how parents are deported and the information they provide to officials to be passed on to the family members remaining in the U.S. can be improved. If the parent left behind, such as A.B., knows the address of the deported parent, there is an increased chance of being able to instigate a court case in the deported parent's country of citizenship. Incentives may also be introduced to compel payment of child support, such as not allowing re-entry after the statutory period of exclusion is completed if child-support payments go unpaid. The length of exclusion will vary based on the individual, but if an individual is allowed to re-enter the U.S., statutes can be introduced to ensure the re-admittance is not allowed until all required child-support has been paid, incentivizing some parents to provide for their children while excluded from the U.S.

And since children left in single-mother households following deportation are at a greater risk of living in poverty, Immigration Judges should consider gender and each family's holistic circumstances when making decisions about deportation. If a parent is the primary provider for a family and does not have a violent criminal history, a DAPA type program will ensure that children are not left in poverty during their adolescence. By looking at the totality of a family's circumstances, rather than only the immigration status of a parent, children's interest will be better protected and the next generation of immigrant-children will be better equipped to contribute to American society as adults.

#### V. FAMILIES WITH NON-CITIZEN CHILDREN

When a parent and child both do not have a legal immigration status, the children may have the option to apply for Special Immigrant Juvenile Status ("SIJ"). SIJ status was created "to provide undocumented children who lack immigration status with a defense against deportation proceedings."<sup>150</sup> To apply for SIJ, the following are required:

- (1) The juvenile is under the age of 21 and is unmarried; 8 C.F.R. § 204.11(c)(1)–(2);
- (2) The juvenile is dependent on the court or has been placed under the custody of an agency or an individual appointed by the court; 8 C.F.R. § 204.11(c)(3);

150. *In re Dany G.*, 223 Md. App. 707, 712 (2015).

(3) The “juvenile court” has jurisdiction under state law to make judicial determinations about the custody and care of juveniles; 8 U.S.C.A. § 1101(a)(27)(J)(i); 8 C.F.R. § 204.11(a), (c) [amended by the Trafficking Victims Protection Reauthorization Act (“TVPRA”) 2008];

(4) That reunification with one or both of the juvenile’s parents is not viable due to abuse, neglect, or abandonment or a similar basis under State law; 8 U.S.C.A. § 1101(a)(27)(J) [amended by TVPRA 2008]; and

(5) It is not in the “best interest” of the juvenile to be returned to his parents’ previous country of nationality or country of last habitual residence within the meaning of 8 U.S.C.A. § 1101(a)(27)(J)(ii); 8 C.F.R. § 204.11(a), (d)(2)(iii) [amended by TVPRA 2008].

SIJ status benefits only the juvenile; a parent whose child is granted SIJ status may not obtain immigration relief based on the child’s status as a lawful permanent resident or United States citizen.<sup>151</sup> To obtain SIJ, the child must show that they have, effectively, been abandoned by their parents, which can come with the heartache of consciously deciding to separate from a parent without a legal immigration status in order to remain in the United States.

Previously, children without a legal immigration status could apply through the Deferred Action for Children Arrivals (“DACA”) program. DACA, as announced in June 2012 and for the following five years, enabled the following individuals to apply for a form of prosecutorial discretion known as “deferred action”—those who:

- (1) Were under the age of 31 as of June 15, 2012;
- (2) Came to the United States before reaching [their] 16th birthday;
- (3) Have continuously resided in the United States since June 15, 2007, up to the present time;
- (4) Were physically present in the United States on June 15, 2012, and at the time of making [their] request for consideration of deferred action with USCIS;
- (5) Had no lawful status on June 15, 2012;

151. 8 U.S.C. § 1101(a)(27)(J)(iii)(II) (Supp. I 2014) (“no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act”); *In re Estate of Nina L. ex rel. Howerton*, 41 N.E.3d 930, 935 (Ill. App. 1st Dist. 2015).

(6) [Were] currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and

(7) Have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and [did] not otherwise pose a threat to national security or public safety.<sup>152</sup>

The DACA program served as a gateway for nearly 800,000 immigrant youth, the vast majority of whom were working or going to school in the United States.<sup>153</sup> However, on September 5, 2017, President Trump announced that he would end DACA.<sup>154</sup> Court challenges ensued, and in January a federal court in California found that the government's decision to end DACA was based on a mistake of law and, as a result, ordered the reinstatement of the policy on a limited basis.<sup>155</sup> As the DACA rescission works its way through the courts and in the legislature (where there have been numerous attempts to pass a legislation to protect DACA recipients and similarly situated individuals to provide durable status),<sup>156</sup> one fact remains clear: the administration decision to end DACA has instilled uncertainty and fear for thousands of DACA recipients and their families.<sup>157</sup>

#### A. Recommendations

While SIJ status requires a finding of the child being dependent on the court, which often means a parent has voluntarily relinquished their rights

152. U.S. CITIZENSHIP & IMMIGR. SERVS., CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS [hereinafter DACA], (last updated Oct. 6, 2017), <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca> [<https://perma.cc/2SNV-FDCZ>].

153. U.S. CITIZENSHIP & IMMIGR. SERVS., NUMBER OF FORM I-821D, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS, BY FISCAL YEAR, QUARTER, INTAKE, BIOMETRICS AND CASE STATUS FISCAL YEARS 2012-2017 (2017).

154. See U.S. DEP'T OF HOMELAND SEC., RESCISSION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/rescission-deferred-action-childhood-arrivals-daca> [<https://perma.cc/NYX5-UZ56>].

155. *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1048 (N.D. Cal. 2018).

156. See, e.g., *The Dream Act, DACA, and Other Policies Designed to Protect Dreamers*, AM. IMMIGR. COUNCIL (Sept. 6, 2017), <https://www.americanimmigrationcouncil.org/research/dream-act-daca-and-other-policies-designed-protect-dreamers> [<https://perma.cc/VXX9-R679>].

157. See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, DEFERRED ACTION FOR CHILDHOOD ARRIVALS: RESPONSE TO JANUARY 2018 INJUNCTION, <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction> [<https://perma.cc/335Y-SHLZ>]. The DACA program is still available to children that were enrolled in the program prior to its recession in September 2017, but is not accepting any further applications.

to the child to prove dependency, is not ideal, it does provide some protection to children who do not have a legal status. And following the recession DACA and the program not now accepting new applicants, SIJ status is the only safeguard for children.<sup>158</sup>

In order to protect children living in the United States without a legal status, it would be in their best interest for the DACA program to be reinstated. As minor children are brought to the U.S., likely without a meaningful choice, by their family, they should not be removable. DACA gave hope to 800,000 youth<sup>159</sup>, while still allowing family integrity, as SIJ requires the youth to be a dependent of the state. Until the U.S. immigration system undergoes a desperately needed overhaul, the full reinstatement of DACA is the best option for children without a legal immigration status, even though it does not protect against the loss of their parents through deportation.

#### CONCLUSION

Nelson Mandela once said, “there can be no keener revelation of a society’s soul than the way in which it treats its children.”<sup>160</sup> It is clear the way the United States immigration system treats immigrant children reveals a lack of common decency and care for our future generation. While parents are being deported, often for trivial offenses, and they leave behind children in foster care, we are condemning this next generation to instability and often a life of poverty.

Until the U.S. is able to implement a desperately needed overhaul of the immigration system, Immigration Judges and Congress must take basic steps to ensure the rights of children are protected and the status of America on the international stage is not irreparably harmed by witnessing how we treat young people.

158. *Id.*

159. U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 157.

160. Nelson Mandela, President, South Africa, Address at the launch of the Nelson Mandela Children’s Fund, Pretoria (May 8, 1995).