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# Finding A Path for Children in United States Immigration Law

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## **Introduction**

Child welfare laws in the United States have evolved over time; however, one area of the law that has been stymied is the application of modern United States welfare law in the context of immigration proceedings. In the United States, immigration law and child welfare law function in their own respective spheres. Currently, the United States relies on immigration law to adjudicate immigration proceedings and turns a shoulder to child welfare laws, even if children are involved in such proceedings. The United States federal government has provided care for at least 5,000 children of immigrants, having deported or detained their parents.<sup>1</sup> The number is growing day by day. Between January and June of 2011, the United States deported more than 46,000 parents of citizen children.<sup>2</sup> This figure illustrates the importance the role of children has in deportation proceedings that are taking place in the United States. Even more disturbing is the fact that many of these children are citizens of the United States, indicating that our immigration law fails to consider children and their best interests in this country's immigration practices.

Putting the problem into context, suppose that a citizen child is born to non-citizen parents. When that child turns eight, his non-citizen parent becomes detained and determined to be in the United States illegally. As a result, the parent becomes a detainee of the United States and the child becomes a ward of the State until immigration proceedings are complete. If the United States determines that the individual must be deported as a result of their illegal status, it seems just and fair to then consider the status of the child. Generally in these proceedings, the interests of the child are overlooked and immigration laws prevail. This result sends the parent to their home country with the child, if the parent is fit. What about the child's interest as a United

States citizen? The child has a right to grow in America and be given a democratic opportunity, but has no avenue to express such interests.

United States law is too rigid regarding these matters; the law has yet to develop a proper nexus between immigration law and child welfare law. Modern times call for a more flexible approach to handling immigration proceedings involving children. The movement away from parental rights and toward children's autonomy suggests that the United States needs to reevaluate and reconstruct the manner in which immigration proceedings involving children are carried out. In order to find a reasonable solution we must 1) evaluate United States immigration law; 2) evaluate United States child welfare law; and 3) find a compromise between each by analyzing international standards.

### **Immigration Law in the United States**

In the United States, 8 U.S.C.A. § 1227 regulates the deportation of aliens and is the primary statute explaining immigration removal proceedings. The section makes no reference to a child's interest nor in anyway denotes the use of United States welfare laws in determining an alien's child's rights in deportation proceedings.<sup>3</sup> Therefore, "under United States immigration law, children who are accompanied by non-citizen parents who are directly affected by immigration proceedings have no opportunity for their best interests to be considered."<sup>4</sup> In most instances, the determination by the court to deport a non-citizen parent results in the child being deported as well.<sup>5</sup> Ultimately the choice lies with the parent(s) on whether to take the child with them or leave the child behind.<sup>6</sup>

United States immigration proceedings, however, do provide a means of escaping deportation for non-citizens in violation of 8 U.S.C.A. § 1227. Under 8 U.S.C. § 1231(b)(3), deportation may be terminated when there is a threat to an alien's life or freedom.<sup>7</sup> Again, the language used by the United States Congress fails to take into consideration any harm that may threaten a parent's child. Courts have routinely dismissed arguments made, in lieu of §1231(b)(3), for the potential harm or threat to citizen children in a parent's deportation proceeding. There does remain an escape route for parents who believe their children may suffer as a result of a deportation proceeding; however a rigorous standard must be satisfied. 8 U.S.C.A. § 1229b provides that the United States Attorney General may cancel removal of an alien if: (1) the alien has resided in the United States for 5 or more years and has resided continuously for at least 7 years; (2) the alien has good moral character; (3) the alien has no convictions; and (4) removal will result in exceptional and extreme undue hardship to an alien's spouse, parent, or child who is a United States citizen.<sup>8</sup> The exception illustrates consideration for potential harms that may occur to a citizen child. But here, the statute dictates a burdening standard calling for exceptional and extreme hardship.<sup>9</sup>

The Seventh Circuit in *Sofinet v. INS*, extended an exception to deportation when an alien is able to demonstrate (1) the likelihood of success on the merits; (2) that irreparable harm will occur if stay is denied; and (3) the potential harm to the movant outweighs the harm the INS will suffer.<sup>10</sup> Most of the cases involving an exception to deportation require some type of physical persecution to oneself, meaning the alien must in fact be threatened. In these instances, it must be more likely than not that an individual's life or freedom would be threatened because of race, religion, nationality, membership in a group or political opinion.<sup>11</sup> The burden of proof is always on the movant to demonstrate a clear probability that they will face some form of persecution.<sup>12</sup>

Although the Court in *Sofinet* focused on physical persecution, the Sixth Circuit in *Abay v. Ashcroft* has considered an element of psychological persecution. Psychological persecution pertains to harm on a third party including an alien's children.<sup>13</sup> In *Abay*, the Court remanded deportation extending the *Sofinet* standard to include psychological persecution.<sup>14</sup> The Court in *Niang v. Gonzales*, found that harm to a citizen child constitutes sufficient psychological harm that extends to the child's alien parent.<sup>15</sup> Here, the court extended the per se rule, stating that psychological harm cannot exist without the alien parent showing some form of accompanied harm.<sup>16</sup> As a result, the possibility of persecution to a child is irrelevant absent a showing of potential harm to the parent. Regarding similar circumstances, the Eighth Circuit has adopted the position that derivative claims cannot be brought for fear of a child's persecution. The Fifth and Eleventh Circuits have taken the same stance. For example, the Fifth Circuit in *Osigwe v. Ashcroft* held, that alien parents "were ineligible for asylum under the general asylum provisions."<sup>17</sup> As for the Eleventh Circuit, the Court in *Axmed v. Gonzales* stated, "an alien parent who has no legal standing to remain in the United States, may not establish a derivative claim for asylum by pointing to the potential hardship of their American born children."<sup>18</sup> To further demonstrate the disparity amongst the Circuits, although a decision was not issued, the Ninth Circuit has shown movement toward the potential to protect children.<sup>19</sup> In *Abebe v. Gonzales*, the Court supported the possibility for granting relief on derivative claims in remanding a case to consider the parent's claim for asylum based on fear that their daughter would be subject to persecution if deported.<sup>20</sup>

Although the Fourth and Sixth Circuits find psychological harm to a parent to derive from potential harm to citizen children; the Fifth, Seventh and Eleventh Circuit's limitations to apply the standard to only physical persecution demonstrates that the circuits are split on the

deportation exception.<sup>21</sup> The Seventh Circuit's ruling in *Oforji v. Ashcroft* furthers this split. There the Court found that an alien couldn't bring derivative claims based on a child(ren)'s potential persecution to prevent deportation.<sup>22</sup> There is a marked split amongst the Circuits that must be resolved. There is a need for consensus when one Circuit considers a child's interest and another that fails to.<sup>23</sup>

The Courts, regardless of the standard they apply, recognize the unfortunate dilemma set forth in immigration proceedings. For example, the Seventh Circuit acknowledges that non-recognition of a child's persecution may result in harm to that child, but is reluctant to allow claims because Congress has yet to provide an avenue to seek relief [absent decisions by the Attorney General to halt deportation].<sup>24</sup> Congress has long taken the position that parental interests outweigh those of children in an immigration proceeding.<sup>25</sup> For instance, if a parent is going to be deported, it is the parent(s) decision to take the child with them. Congress believes this outweighs the State's interest in protecting the citizen child and breaking up the family unit. Courts realize that not all children are sufficiently represented in the immigration proceeding context. The Courts understand that children's interests are visible when parent's take an interest in the child and are seeking to protect the child as well as themselves. In this situation, Courts do not typically see a need to evaluate a child's separate interest because the parent(s) acts on behalf of their child's well being.<sup>26</sup> A more concerning situation, in the Court's opinion, is when a child's parent(s) fails to represent their child's best interest.<sup>27</sup> In a sense, the child becomes invisible to the Court. It is this latter situation that beckons the need for a best interest of the child analysis in immigration deportation cases.<sup>28</sup>

## Children's Rights and Use of the Best Interest in Child Welfare Law

The discussion in this section refers to the application of child welfare laws to citizen children and its potential to play a role in an alien parent's immigration proceeding. The United States welfare system has evolved into two overall considerations in its application of the law.<sup>29</sup> One aspect focuses on the protection of parental rights; the other is maintaining the individual rights of children.<sup>30</sup>

Older case law in the United States provides that parents once had the sole right to control the upbringing of their children. In cases such as *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, the Supreme Court found that parental decisions are a liberty protected under the Fourteenth Amendment.<sup>31</sup> The opinions suggest that children are not "the mere creature[s] of the state."<sup>32</sup> These early decisions assume that parents tend to care for their children and make decisions that benefit them.<sup>33</sup> Further, the Courts found that there is an interest in maintaining familial relationships by having parents as sole decision makers.<sup>34</sup> The Court's aspiration was to prevent government intrusion into the privacy of the family unit. Court holdings that determine parental decision-making is in the best interest of the child ignore the fact that in some cases parents fail to consider their children's best interest in the first place. Past Court decisions are on the assumption that parents will always protect their child's interest, without requiring that they actually do so.

The earlier Courts' rulings allow for the interests of children to be ignored. These decisions recognize the interest the State has in its citizen children. Although early Courts focused on impeding government intrusion into the family, the impact was felt much further. In *Wisconsin v. Yoder*, the decision to allow parents to have a right to teach their children sheds

light on the idea that a child's interest may not have been taken into consideration.<sup>35</sup> *Wisconsin v. Yoder*, however, did conclude that children did not have a right to choose their education, their parents did. In this case the Court's dissent noticed that by allowing parents, instead of State run schools, to teach children lacks a guarantee of furthering the State's interest in teaching democratic values to its citizen children.<sup>36</sup> The idea that allowing parents to teach what they wish may run afoul of a State's interest became an issue. Promoting the growth of children in their understanding of democratic principles and disregarding a potential future interest in that child neglects the State's interest in ensuring that children are given an opportunity. The State has an obligation to allow children to be able to develop in a society where democratic principles are prevalent. The State takes an interest in the growth of its citizens and children being raised in an unfit matter. This revelation has opened the door to a modern stance in child welfare law, focusing on the second consideration in welfare law; the child's interest.

The movement towards granting children's rights developed after the decision in *Wisconsin v. Yoder*. The idea that parental control could be a form of oppression began to emerge. Generally, a child does have a right to be free from adult control that does not serve their interest. The State has a role in furthering this principle by protecting children, specifically citizen children.<sup>37</sup> Children's rights soon included protection rights, right to be free from harm, rights to autonomy which results in the ability for one to have the right to make choice's regarding their own life.<sup>38</sup> In a movement away from old case law, the Court in *Prince v. Massachusetts* held that the State has an interest in the health and future of its citizen children.<sup>39</sup> As noted above, the State has an interest in teaching children the fundamental values of a democratic society.<sup>40</sup> In *Bethel v. Fraser*, the Court notes the importance of school in its role in teaching children values essential for "citizenship in the Republic."<sup>41</sup> Further, in *Mozert v.*



*Hawkins County Board Of Education* the Court states that exposing children to liberal values and ideas are necessary for their future role as citizens.<sup>42</sup> The Court in *Mozert* objected to parent's disagreement with certain philosophies taught in a public school.<sup>43</sup> The Court reasoned that not only would supporting the parent's rights be harmful to the children, but also to the State.<sup>44</sup>

The State's prevailing interest in these contexts is that children become functioning members of a democratic society by instilling in them the principles that make such a society.<sup>45</sup> The idea of exposing children to diverse views is a means of ensuring that children become full citizens capable of interacting in a social, cultural and political context.<sup>46</sup> In this same light, it has been argued that providing citizen children with these rights benefits the State as well.

Progressive reformers suggest children's duties are no longer obedience to parents, but instead preparation for citizenship. Citizenship, based on teaching of liberty and democratic principles, gives growth to our democracy. Progressives go as far as to argue that survival of the nation rests on the rights of children to be taught in a manner, which makes them functioning citizens of our society.<sup>47</sup> The Supreme Court in *Brown v. Board of Education* explained that segregation undermined "the very foundation of good citizenship... and denial of educational opportunities denies children the tools necessary for their future role as citizens".<sup>48</sup> In a more recent case, *Grutter v. Bollinger*, the Court emphasized the importance of educational opportunities as critical in "sustaining our political and cultural heritage".<sup>49</sup>

Citizen children born to alien parents may never be given such an opportunity absent a consideration of their best interests. In the cases mentioned, the Courts were determining welfare issues in the context of a citizen family. The reasoning set forth by the Courts above is absent in immigration proceedings involving alien parents and citizen children. It is not a matter of discussion because a child's interest is never at stake when an immigration court is deciding

whether or not to deport a parent. In these matters, the parents are the ultimate deciders of whether their children will remain with them or stay in the United States. It is time that the immigration courts maintain the State's interest in a child's connection to America.

In *Nguyen v. INS*, the court upheld the constitutionality of an immigration statute that confers citizenship on foreign children born to American mothers.<sup>50</sup> Why would the State consider the interests of a non-citizen child's connection to America more than its own citizen children? The system lacks coherence on this matter. Assuming that a maternal connection is so strong, the Court in *Nguyen* provides citizenship to children born to American mothers.<sup>51</sup> It would only seem fair to maintain this connection between citizen children and their alien mothers if the goals of our government are to instill democratic values in children in lieu of what their parent's aspirations are.<sup>52</sup> "The State must guard not only [children's] current liberty, but also their future liberty. It thus must deny all others, including parents, the right to deprive their young either of their basic liberty during immaturity, or their ability to develop the capacity to exercise their future liberty."<sup>53</sup>

It is clear that there is a conflict between parental and child's rights in the welfare context. Citizen children, regardless of a parent's status, are an interest of the State when the parent is unfit. In a deportation instance, when a parent is found to be fit or unfit the child is generally taken as a ward of the State because of their citizen status and the alien status of their parent. Ultimately the State has an interest in reunification in this context, absent some other showing of unfitness. Reunification preserves the family unit, which the State assumes is in the interest of both the parent and child. Children are dependent on their parents and many times reunification ensures that they can remain dependent until adulthood.<sup>54</sup> A compelling reason in which the State supports reunification is that the State does not want to impede on family

relations. Too much State involvement, although it may provide independence for the child, may in fact deter the independence of the family as a whole and their ability to make sound decisions.

Courts do recognize the position they are placed in when deciding to reunite a family. Many times deportation of a fit parent results in a child being sent to a poorer and less developed county. Although the State shows an interest [in domestic welfare cases] of ensuring that a child is raised on democratic principles; they fail to go as far as to divide a family when a parent is being deported to a country that will never provide an American child with these teachings.<sup>55</sup> Courts generally support reunification, but have determined that sending a child to harm's way may reason to keep children from their parents. The Court determined in *Olowo v. Ashcroft*, that reunification was not proper when an alien mother intended to return to Nigeria with her child because the child was possibly going to suffer female genital mutilation in that country.<sup>56</sup> This case illustrates the major complications involving immigration proceedings. If the child was not under the State's welfare system, the mother would have taken the child and likely not spoke of the child's interest against persecution in Nigeria. Here, the interest of the child was considered in light of the mother's failure to object to the harm that would have occurred if she had been deported.<sup>57</sup> Immigration proceedings lack any insight into the child's interest, absent a case like *Olowo*, when a child that is taken and spoken for by the State.

### **Policy Considerations In Examining A Child's Best Interest**

Reunification is the most prevalent result in immigration proceedings. However, the *Olowo* case sheds light on the importance of considering a child's well being when determining whether to allow their parents to make all decisions and speak on their child's behalf.<sup>58</sup> In the

context of recognizing a child's interest, there are important policy considerations that must be taken into account. First and foremost is inquiring about the child's current and future health.<sup>59</sup> As was the case in *Olowo*, the child's future health was in question if they ended up reunited with their mother and sent to Nigeria.<sup>60</sup> Physical health is a consideration that becomes apparent in analyzing the facts of each case, however a more elusive health factor is the impact on a child's mental health. Determining which is less detrimental to the mental health of a child is difficult task to assign to a judge deciding whether to deport an alien parent. What has less of a negative impact on the child; separation, deportation to a less developed country, or being raised under the State's welfare system? Furthermore, the developmental health of the child is also at issue. Is growing up separated from their parent more beneficial to development than being raised in a country where poverty and low literacy rates prevail? These considerations must be made on a case by case basis, but the number of factors that must be taken into account show that a child's interest are important and should matter in determining whether to deport an alien parent and allow their child to follow that same path.

Another policy matter that plays a key role in this context is *jus soli*.<sup>61</sup> *Jus soli* is applied in American law and confers automatic citizenship on children who are born on United States soil despite a parent's undocumented or alien status.<sup>62</sup> This doctrine places Courts in the predicament of occasionally abandoning American citizens when parents must be deported. If, for policy matters we eliminate this practice, the issue of determining whether or not to keep citizen children in the United States or allow them to reunite with their parents becomes moot. Children would be assumed to be the citizenship of their parents and determinations to reunite would not be necessary because the issue of protecting the State interest in citizens would be non-existent.

Reconsideration of jus soli has garnered much attention over the recent years. The increase of illegal immigrants entering the United States to give birth to “anchor babies” has become a major problem.<sup>63</sup> The term, “anchor baby”, describes a child born on American soil, which upon reaching the age of twenty-one can sponsor the immigration of family.<sup>64</sup> The child serves as the anchor in order to achieve the purpose of admitting family to the United States based on his jus soli citizenship.<sup>65</sup> Suggestions to reform jus soli citizenship include amending birth right citizenship to only include children born to citizen parents.<sup>66</sup> This change could be remarkably influential in cases regarding deportation. Consideration, in this context, would no longer have to be given to children born of alien parents. It would simplify proceedings, only needing to consider the parents’ deportation status. The State would no longer retain an interest in an alien’s child because law would no longer deem them a citizen; they would lose it at birth because of their parent’s non-citizen status. A policy change would in a sense create a United States born “alien” status that would receive no rights of an American citizen although they were born here. There are large implications of implementing a policy of this nature. A classification of this sort would apply predominantly to immigrant mothers of a minority race, raising the possibility of racial discrimination issues.<sup>67</sup> On the other end of the spectrum, the handling of immigration deportation proceedings become more just as applied to children. Use of the best interest standard and determining whether to break up a family would not need to be considered, making judgments less harsh. However, there does exist an immigrant who retains asylum in the United States seeking a better way of life for their children and relies on jus soli to ensure that their children are granted American citizenship. Does the United States government have an obligation to those that seek to live in a democratic society? For a nation founded on liberty and freedom a drastic change to jus soli may be unjust and run against the foundations of our nation.

A policy change of this sort would be a drastic change and one that does not seem plausible. Becoming an American citizen is a wish many seek to have fulfilled and eliminating jus soli would seem contrary to protecting the integrity of American citizenship. The effects would likely give rise to other citizenship issues and create more problems. The positive impact would only apply to a miniscule portion of immigration law.

The lack of considering a child's best interest in immigration proceedings generally occurs in situations unlike that of *Owolo*.<sup>68</sup> Many cases involve children who are never a ward of the State, whom don't have the State to speak on their behalf. Our judicial system must find a medium in this realm of the law. A nexus that considers both the child and the interest of the State in deporting illegal aliens must be found. In order to find an appropriate resolution, insight must be taken from positions taken around the world regarding children in immigration proceedings. In order to create a more reasonable system in the United States, our government needs to integrate these international principles into the way immigration proceedings are handled at home.

### **Attempting to Find A Sensible Solution**

There must be a change in the way immigration proceedings handle children and their interests in the United States. Application of a best interest of the child standard used in United States welfare cases must be used when courts are deciding whether or not to deport an alien with citizen children. Conclusions drawn from above indicate that there is currently a split amongst the Courts on whether to consider a child's interest. Some Courts are willing to hear derivative claims on the basis of harm to children during deportation, while others are not. In

America, no child's interest is given consideration [absent a parent's interest of that child] in deportation cases where no apparent harm exists.<sup>69</sup>

Examining international law provides insight into how these situations are handled in a more reasonable and sensible matter. The Convention on the Rights of the Child was formed to ensure that children are protected under humanitarian, human rights, and refugee law.<sup>70</sup> The Convention was developed by the standards set forth in the United Nations Declaration on the Rights of the Child which introduced the idea that, "the best interests of the child shall be the paramount consideration."<sup>71</sup> The Convention states, "No child shall be deprived of his or her liberty unlawfully or arbitrarily."<sup>72</sup> Further the Convention seeks to protect a child's right to: (1) physical and legal protection; (2) remain united with their parent(s); (3) care and assistance of developmental needs; (4) participate in decisions regarding their future; (5) means of reunification. The protections the Convention seeks to achieve are the basic principles that need to be examined when deciding the fate of children in a United States' immigration proceeding.<sup>73</sup> These factors help to provide a basic framework to allow Courts to make appropriate decisions with the interests of children in mind. However, the United States has failed to ratify the Convention and thus has no obligation under customary international law to abide by them. Perhaps it is time for the United States to take a stance in protecting not only children's interest; but also children who are citizen's interest as well.<sup>74</sup> The United States reluctance to ratify this treaty suggests that the United States is more concerned with relocating children without first analyzing a child's rights. The United States considers children in the context of non-immigration matters, but has yet to show any movement toward applying the standard any further.

The United States should apply these standards in welfare matters because they did sign onto the Convention, which sets forth, “in all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be primary consideration.”<sup>75</sup> A plain reading of this principle infers that the United States, as a signatory, has an obligation to protect the interests of children taken under the State’s welfare system, however there is no mention that a citizen of the nation must be protected when their parents are being deported. Because the child is not a ward of the State and the parents interest reign supreme in an immigration context, the United States does not need to oblige to these international standards. However, these principles should be read as universal and applying to any situation involving children. The adoption of these principles by the Convention on the Right of the Child indicates that the best interest standard is more universal than the United Nations intended. The United States reluctance to ratify the Convention demonstrates their ignorance of international standards and turning a cold shoulder to the interests of citizen children during immigration proceedings.

Direct application of these principles is demonstrated in Canadian law.<sup>76</sup> In Canada, the best interest of the child approach is incorporated in its immigration proceedings. The United States and Canada have similar immigration history and have immigration systems that resemble one another. Protection under the Canadian best interest approach should be paralleled in United States immigration proceedings. In addition to considering the principles set forth in protecting a child’s rights, Canada goes one step further in providing a child with a best interests representative.<sup>77</sup> The representative acts on behalf of the child in an immigration proceeding involving an alien parent.<sup>78</sup> In Canada, an alien can request permanent residency through a humanitarian and compassionate relief application.<sup>79</sup> When the request is reviewed the decision-



makers must take into consideration “the best interests of the child directly affected.”<sup>80</sup> This process has provided a standard to which courts in Canada apply the best interest approach.<sup>81</sup> Courts in Canada consider the benefit to the child of the parent’s deportation from Canada as well as the hardship the child may suffer from their parent’s removal or their departure to the parent’s domicile.<sup>82</sup> Applying the Canadian model in United States can address many of the difficult issues in the cases that were earlier discussed. Appointment of a representative eliminates the problem of a child’s rights being invisible when a parent fails to represent their child’s interests. In addition, it provides access to be heard in proceedings where the child generally would have no input into the court’s determinations.<sup>83</sup> The Canadian system enables children to have a voice and to have their interests heard. It takes into consideration the developmental interests of the child, the parent’s expectations, as well as the State’s interest in protecting its citizens. An attempt to mirror the Canadian system has been developed as an advocacy project in the United States. The Immigrant Children’s Advocacy Project has been established to provide children with guardian ad litem.<sup>84</sup> The mission of the Project is to “identify and give voice to the child best interests while he or she is subject to an immigration proceeding.”<sup>85</sup> Although not all children are represented in their parent’s proceedings, the establishment of a program of this kind demonstrates the need to recognize the interest of children in an immigration setting. The advocates of this program act as a liaison in the legal system, meeting with the child at least once per week helping the child understand the process and explaining the consequences of the decisions that will be made.<sup>86</sup>

In order to effectively implement a more just policy concerning children in the United States, the international standards above should be used as a guiding tool. In addition, one way to correct the problem would be through the actions of the legislature. Modifying the immigration

exceptions is a means in which Congress could better protect non-citizen parents and their children. Decreasing the minimum number of years necessary to be in the country as well as lessening the “extreme hardship” standard will allow parents to be given the opportunity to remain in the country and allow their children to be provided the opportunities they deserve as citizens of the United States. Further, Congressional attempts to pursue the ratification of the Convention on the Rights of Children may work in persuading the executive to ratify and implement the standards set forth therein. Ratification would oblige the United States to follow the standards set forth in the Convention and ensure that children’s rights are considered not only in all welfare matters but in immigration proceedings as well.

Another avenue that should be given high regard is paralleling the procedures undertaken by Canada. Permitting or assigning a representative to serve the interest of children would ease many of the issues with the representation of a child. A means of establishing a resource such as the Immigrant Children’s Advocacy Project will provide ample opportunity for children’s interests to be expressed.<sup>87</sup> In addition, advocates serve a child’s interest by taking consideration such things as foster care (if needed), educational services, legal services (beyond the immigration context), therapeutic services, medical care, religious support, nutritional well being, access to communication networks, access to interpreters and recreational programs; to name a few.<sup>88</sup> In effect, the program exceeds representing a child’s best interest. Perhaps implementing this amount of guidance would be too burdensome in its initial establishment, but the Project serves as a positive guide towards a better approach to handling children’s interest in immigration proceedings in the United States. The pilot project can help pave the way for future programs that can be created for citizen children whose parents are in the middle of an immigration proceeding. Although the State takes an interest in its citizens in welfare

proceedings, it lacks when a fit parent is being deported. Providing a guardian ad litem program would fill the gap necessary to protect a child's rights in this setting.

The prevailing idea of reunification runs supreme to the voice of a child's interest in the courtroom. Providing a child with independent legal counsel allows for that representative to serve and openly voice the interest of that child. It is a sufficient means of providing the court with reasons on why a child should not be deported in light of their parent's deportation. Instead of allowing a parent to speak on behalf of the child's interest, the direct interests of the child can be expressed and developed in front of a court, which must determine the fate of that child. The application of the best interest standard should be applied in both the welfare and immigration context. Applying the standard maintains that a citizen child's rights remain intact and ultimately maintains the idea of familial unification.

The entire system needs to be revamped. Instead of having two distinct areas of law, there could be developed a hybrid system in the context of immigration proceedings involving citizen children; an immigration welfare court. A system of this nature provides courts the ability to take into consideration all the parties affected by an immigration proceeding. By paving a new avenue for proceedings to be heard, the establishment of case law and bright line rules regarding families and immigration proceedings can be developed. This would ensure a structured manner of achieving the goals and interest of the State, parents, and children. However, the policy concerns surrounding setting up a new court would be a major issue. There lacks a precedential resort to rely on in both establishing the court and administering its decisions. Administratively, issues would arise from the logistical tasks of establishing such a system. In addition, the feasibility of setting up proceedings of this nature would be a major problem. The fact that the system could provide an avenue for fraud is a real threat. If children's interests must always be

considered then the reason for aliens to procreate for their benefit would likely occur. This would be in direct conflict with the reasons why establishing such a system are necessary. The potential issues that arise appear to heavily outweigh the establishment of a new means of handling immigration proceedings. It is more sensible to find a middle ground in established case law and correct our current system rather than create a new way of dealing with immigration affairs involving children.

### **Conclusion**

The United States' separation of immigration proceedings and child welfare systems has led to the abandonment of citizen children's rights. The archaic system neglects children who may suffer deportation as a result of their parent's status in the country. Although children's interest are generally considered by their parents, the inability of a child to express their rights and interests are lost in the current way the United States handles immigration proceedings. The current split amongst the Circuits indicates that the system needs to be reevaluated.

The strict rules that are followed in the immigration courts do not parallel the best interests standards used when children are considered in the welfare context. Although many children in immigration proceedings are citizens, they are not provided the same opportunities that citizen children receive when there is a welfare offense involving a citizen parent. As a result, the entire system needs to be integrated and developed in accordance to principles set forth internationally. By examining both the Convention on the Rights of the Child and practices in Canada, the United States can reform immigration proceedings to be handled in way that provides children a voice.<sup>89</sup> Implementing a system that allows children's interests to be heard

helps to achieve the goals of the State. It will provide an avenue to determine whether it is in the best interest of the child to remain at home and be given the rights of an American citizen to grow under democratic values, or whether it is proper to deport children because it is in their interest to remain with their parents. The system can be reformed and it is time for a change, a child's voice although soft can have a huge impact on how their life pans out.

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<sup>1</sup> Sarah Rogerson, *Unintended and Unavoidable: The Failure To Protect Rule and Its Consequences For Undocumented Parents and Their Children*, 50 *Fam. Ct. Rev.* 580, 582 (2012).

<sup>2</sup> *Id.*

<sup>3</sup> See 8 U.S.C.A. § 1227 (2008). Reviewing the statute in its entirety reveals the lack of mentioning how to handle deportation proceeding regarding citizen children. The statute simply provides the means to which an alien may be deported from the United States.

<sup>4</sup> Bridgette A. Carr, *Incorporating A "Best Interest of the Child" Approach Into Immigration Law and Procedure*, 12 *Yale Hum. Rts. & Dev. L.J.* 120, 124 (2009) (directing her readers attention to *Olowo v. Ashcroft*, 368 F.3d 692, 695-98 (7th Cir. 2004)). See *infra* note 51. Carr notes, that if the child had not been represented by the State the Court would not have considered the child's interests.

<sup>5</sup> *Id.* at 125.

<sup>6</sup> *Salmeda v. INS*, 70 F.3d 447, 451 (7th Cir. 1995)(ruling that the government cannot show potential harm to children to outweigh the deportation of parents absent a showing of harm directly related to the alien parents).

<sup>7</sup> 8 U.S.C. § 1231(b) (2006).

<sup>8</sup> 8 U.S.C.A. § 1229b (2008).

<sup>9</sup> See 8 U.S.C.A. § 1229b(b)(1)(D) (2008).

<sup>10</sup> *Sofinet v. INS*, 188 F.3d 703, 707 (7th Cir. 1999) (quoting *Lucacela v. Reno*, 161 F.3d 1055, 1057 (7th Cir. 1998)).

<sup>11</sup> *Haoua v. Gonzales*, 472 F.3d 227, 232 (4th Cir. 2007).

<sup>12</sup> *Id.*

<sup>13</sup> *Abay v. Ashcroft*, 368 F.3d 634, 643 (6th Cir. 2004).

<sup>14</sup> *Id.* at 644.

<sup>15</sup> *Niang. v. Gonzales*, 492 F.3d 505, 507 (4th Cir. 2007).

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

<sup>17</sup> *Osigwe*, 77 *Fed. Appx.* 235, 235-36 (5th Cir. 2003).

<sup>18</sup> *Axmed*, 145 *Fed. Appx.* 669, 675 (11th Cir. 2005).

<sup>19</sup> See *infra* note 20.

<sup>20</sup> *Abebe*, 432 F.3d 1037, 1043 (9th Cir. 2005).

<sup>21</sup> The Fifth, Seventh and Eleventh Circuits have demonstrated that alien parents are unable to bring derivative claims with regard to their child's well being, while the Sixth Circuit has made these claims admissible. See *supra* notes 4, 5, 6, 10,13, 17, and 18. See *infra* note 22.

<sup>22</sup> *Oforji v. Ashcroft*, 354 F.3d 609, 622 (7th Cir. 2003).

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- <sup>23</sup> See supra note 21.
- <sup>24</sup> See supra notes 4, 5, 6, 10 and 22.
- <sup>25</sup> See supra note 7.
- <sup>26</sup> Carr, supra note 4, at 129 (“[A] child’s greatest likelihood of being protected, especially when parent advocates on behalf of the child”).
- <sup>27</sup> Carr, supra note 4, at 133.
- <sup>28</sup> Id. (“An accompanied child... who does not share the same interest [as their parent] is often completely invisible in the current immigration system”).
- <sup>29</sup> Marcia Zug, *Should I Stay or Should I Go: Why Immigration Reunification Decisions Should Be Based on Best Interest of the Child*, 2011 B.Y.U. L. Rev. 1139, 1144 (2011).
- <sup>30</sup> Id.
- <sup>31</sup> In *Meyer*, 262 U.S. 390, the Court determined that the State statute restricting the teaching of a foreign language infringed not only on the teacher to conduct his teaching method, but on a parent’s rights to have their children taught in a particular manner. In *Pierce*, 268 U.S., 510, the Court’s decision rested solely on a parent’s Due Process right to determine the education of their child, whether private or public. The Court ruled Oregon’s statute requiring children to attend public school unconstitutional in this light.
- <sup>32</sup> *Pierce*, 268 U.S. at 535.
- <sup>33</sup> Zug, supra note 24.
- <sup>34</sup> See supra note 26.
- <sup>35</sup> *Wisconsin*, 406 U.S. 205 (1972).
- <sup>36</sup> Id. at 238-50 (Stewart, J., dissenting).
- <sup>37</sup> Zug, supra note 24.
- <sup>38</sup> Id. at 1166.
- <sup>39</sup> Id. at 1147 (discussing the Court’s decision in *Prince*, 321 U.S. 158 (1944)).
- <sup>40</sup> See supra note 31.
- <sup>41</sup> *Bethel*, 478 U.S. 675, 682 (1986).
- <sup>42</sup> *Mozert*, 827 F.2d 1058, 1062 (6th Cir. 1987).
- <sup>43</sup> Id.
- <sup>44</sup> Id.
- <sup>45</sup> See supra notes 34, 36, and 37.
- <sup>46</sup> Zug, supra 24, at 1149.
- <sup>47</sup> Id. at 1170.
- <sup>48</sup> *Brown*, 347 U.S. 483, 494 (1954).
- <sup>49</sup> *Grutter*, 539 U.S. 306, 332 (2003)(quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)).
- <sup>50</sup> *Nguyen*, 208 F.3d 528 (2000).
- <sup>51</sup> Id.
- <sup>52</sup> See supra notes 34, 36, and 37.
- <sup>53</sup> Vivian E. Hamilton, *Immature Citizens and the State*, 2010 B.Y.U. L. Rev. 1055, 1060 (2010).
- <sup>54</sup> Zug, supra note 24, at 1171 (discussing Martin Guggenheim, *What’s Wrong With Children’s Rights* (2005), which concludes that ultimately it is in the child’s best interest to have parents make decisions for them because they know more about the child than the State).
- <sup>55</sup> See supra notes 34, 36, and 37.
- <sup>56</sup> *Olowo*, 368 F.3d 692 (7th Cir. 2004). See also, supra note 4.
- <sup>57</sup> Carr, supra note 4, at 125.

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- <sup>58</sup> Id.
- <sup>59</sup> Zug, *supra* note 24, at 1153.
- <sup>60</sup> See *supra* note 51.
- <sup>61</sup> Zug, *supra* note 24, at 1153.
- <sup>62</sup> Id.
- <sup>63</sup> Kevin R. Johnson, “Aliens” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. Miami Inter-Am. L.Rev. 263, 291 (1997).
- <sup>64</sup> Id.
- <sup>65</sup> Priscilla Huang, Anchor Babies, Over-Breeders, and the Population Bomb: The Reemergence of Nativism and Population Control In Anti-Immigration Policies, 2 Harv. L. & Pol’y Rev. 385, 402 (2008).
- <sup>66</sup> Id.
- <sup>67</sup> Id.
- <sup>68</sup> See *supra* note 51.
- <sup>69</sup> See *supra* note 23.
- <sup>70</sup> International Committee of the Red Cross; International Rescue Committee; Save the Children/UK; United Nations Children’s Fund; United Nations High Commissioner for Refugees; World Vision International, Inter-Agency Guiding Principles on Unaccompanied and Separated Children (Jan. 2004), available at <http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=4098b3172>. See also, *infra* note 67.
- <sup>71</sup> Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), *pric.* 2, 14 U.N. GAOR Supp. No. 16, U.N. Doc. A/4354 (Nov. 20, 1959). See also, *infra* note 67.
- <sup>72</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, I.L.M. 1456 (1989).
- <sup>73</sup> Linda A. Piwowarczyk, Our Responsibility To Unaccompanied and Separated Children In the United States: A Helping Hand, 15 B.U. Pub. Int. L.J. 263, 273-74 (2006). See also, *supra* note 67.
- <sup>74</sup> Id. at 273.
- <sup>75</sup> Convention on the Rights of the Child, *supra* note 67, at art. 3(1).
- <sup>76</sup> Carr, *supra* note 4, at 150.
- <sup>77</sup> Id. at 151.
- <sup>78</sup> Id.
- <sup>79</sup> See Citizenship and Immigration Canada, *Applying for Permanent Residence from Within Canada: Humanitarian and Compassionate Considerations* (2006).
- <sup>80</sup> IRPA § 25(1) (Can.).
- <sup>81</sup> See *Baker v. Canada* [1999] F.C.A. 475, P 4 (Can.) (discussing how Humanitarian and Compassionate Consideration should be handled. See *supra* note 79.).
- <sup>82</sup> *Hawthorne v. Canada* [2002] F.C.A. 475, P 4 (Can.).
- <sup>83</sup> Carr, *supra* note 4, at 150.
- <sup>84</sup> Piwowarczyk, *supra* note 73, at 294.
- <sup>85</sup> Id.
- <sup>86</sup> Id.
- <sup>87</sup> Id.
- <sup>88</sup> Id. at 294-95.
- <sup>89</sup> See *supra* notes 75 and 84.