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# Sanctuary from De Facto Deportation: The New Sanctuary Movement and De Facto Deportation Claims for Children Challenging Illegal immigrant Parents' Removal Orders

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SANCTUARY FROM DE FACTO DEPORTATION:  
THE NEW SANCTUARY MOVEMENT AND DE FACTO  
DEPORTATION CLAIMS FOR CHILDREN CHALLENGING  
ILLEGAL IMMIGRANT PARENTS' REMOVAL ORDERS

*Kristin Maun*

I. INTRODUCTION

In 2006, Elvira Arellano took sanctuary in the Adalberto United Methodist Church in Chicago.<sup>1</sup> The thirty-one-year-old Mexican national sought sanctuary to avoid deportation and possible separation from her eight-year-old son, a United States citizen.<sup>2</sup> In the months that followed, Arellano's case spurred the inception and development of the New Sanctuary Movement (NSM).<sup>3</sup> The NSM has built upon the history of the concept of sanctuary and the Sanctuary Movement of the 1980s to help undocumented immigrants with children who are United States citizens and promote their cause of family unity.<sup>4</sup> Though the NSM claims all the services it provides are legal, doubt exists regarding their claim that they are not breaking the law when harboring illegal immigrants and providing them aid.<sup>5</sup>

One form of assistance the NSM provides is legal aid.<sup>6</sup> The church leader providing Arellano and her son sanctuary, Reverend

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<sup>1</sup> *Illegal Immigrant Deported after Leaving Church*, MSNBC (Aug. 20, 2007, 12:54 PM), [http://www.msnbc.msn.com/id/20284646/ns/us\\_news-life/t/illegal-immigrant-deported-after-leaving-church/#.Tp7uWE-kAgs](http://www.msnbc.msn.com/id/20284646/ns/us_news-life/t/illegal-immigrant-deported-after-leaving-church/#.Tp7uWE-kAgs).

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

<sup>3</sup> *The Convening*, NEW SANCTUARY MOVEMENT, <http://www.newsanctuarymovement.org/the-convening.htm> (last visited September 26, 2010).

<sup>4</sup> *Building on a Powerful Tradition*, NEW SANCTUARY MOVEMENT, <http://www.newsanctuarymovement.org/build-tradition.htm> (last visited September 26, 2010).

<sup>5</sup> Kara L. Wild, *The New Sanctuary Movement: When Moral Mission Means Breaking the Law, and the Consequences for Churches and Illegal Immigrants*, 50 SANTA CLARA L. REV. 981, 999 (2010).

<sup>6</sup> *An Invitation to Join the New Sanctuary Movement*, NEW SANCTUARY MOVEMENT, <http://www.newsanctuarymovement.org/invitation.htm> (last visited Sept. 14, 2011).

Walter L. Coleman, represented Arellano's son Saul in court.<sup>7</sup> Saul sued to have his mother's removal order declared null and void; he claimed the removal order violated his constitutional rights as a citizen and constituted de facto deportation.<sup>8</sup> Though Saul's claim was unsuccessful in court, it established a new type of claim for the citizen children of illegal immigrants and a new method for the NSM to advance their cause of family unity.<sup>9</sup> Claims of de facto deportation could change whether removal orders of aliens with citizen children are constitutional.<sup>10</sup>

This comment will give an overview of past and present sanctuary movements, the legal strategies they have formulated to defend those whom they shelter, and their impact on immigration law and policy. Then it will examine the particular strategy of de facto deportation—the NSM's legal strategy of choice—to understand what is necessary to establish the claim, and whether it could nullify an alien parent's removal order. Next, it will analyze two legal principles underlying de facto deportation claims: the right of a child to be raised by his parents and the right of a citizen child to reside in the United States, to determine whether current court opinions have accurately dealt with the legal and practical realities of these interests. Finally, this comment will conclude with an analysis of how current political trends will affect the future of the NSM and claims of de facto deportation.

## II. HISTORY OF THE SANCTUARY MOVEMENT

### A. The Sanctuary Movement

The Sanctuary Movement defined itself as a coalition of religious organizations driven by a moral imperative to protect immigrants from unjust treatment by the United States government.<sup>11</sup> The Sanctuary Movement began in response to the 1980 Refugee Act.<sup>12</sup>

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<sup>7</sup> Coleman v. United States, 454 F. Supp. 2d 757, 759 (N.D. Ill. 2006).

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

<sup>9</sup> See Coleman, 454 F. Supp. 2d at 768–69; cf., Jessie M. Mahr, *Protecting our Vulnerable Citizens: Birthright Citizenship and the Call For Recognition of Constructive Deportation*, 32 S. ILL. U. L.J. 723, 730 (2008).

<sup>10</sup> Cf. Mahr, *supra* note 9, at 730.

<sup>11</sup> Rose Cuison Villazor, *What Is a "Sanctuary"?*, 61 SMU L. REV. 133, 140 (2008).

<sup>12</sup> *Id.* at 139–40.

The Refugee Act allowed for the granting of asylum to refugees who met the statutory requirements.<sup>13</sup> The Act defines a “refugee” as:

[A]ny person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .<sup>14</sup>

After the passage of the Refugee Act in the 1980s, thousands of refugees came to the United States from El Salvador and Guatemala to apply for political asylum, fleeing violence and political oppression.<sup>15</sup> In Guatemala, a civil war resulted in the death of 50,000 people and the disappearance of 100,000 more.<sup>16</sup> In El Salvador, the military executed over 10,000 people.<sup>17</sup> Though the refugees from Central America met the statutory requirements for asylum, their applications were routinely denied.<sup>18</sup> While 5,500 Salvadorians applied for asylum, only two were approved.<sup>19</sup> From the passage of the Refugee Act in 1980 to 1986, only three percent of Central American refugees seeking political asylum were approved.<sup>20</sup> For some refugees, the denial of political asylum was a death sentence.<sup>21</sup> A study by the American Civil Liberties Union found that 130 of the Salvadorians who were denied political asylum and deported to El Salvador were tortured, killed, or disappeared.<sup>22</sup>

This routine denial of Central Americans’ asylum claims led the formation of the Sanctuary Movement.<sup>23</sup> The Sanctuary Movement had two goals: to change the immigration status of the Salvadorian and Guatemalan immigrants to “extended voluntary departure;” and to bring peace and economic justice to the El Salvador and Guatemala regions.<sup>24</sup> Members of the Sanctuary Movement made com-

<sup>13</sup> *Id.* at 139; *see generally* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended at 8 U.S.C. §§ 1157-59 (2000)).

<sup>14</sup> 8 U.S.C. § 1101(a)(42) (2000).

<sup>15</sup> Villazor, *supra* note 11, at 139.

<sup>16</sup> Michael J. McConnell, *Sanctuary Movement - Immigration and Naturalization Service*, Chicago Religious Task Force on Central America, JRANK.ORG, <http://www.jrank.org/cultures/pages/4415/Sanctuary-Movement.html> (last visited Sept. 21, 2010).

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

<sup>18</sup> *See id.*

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

<sup>20</sup> *Id.*

<sup>21</sup> *See id.*

<sup>22</sup> McConnell, *supra* note 16.

<sup>23</sup> *See id.*

<sup>24</sup> Wild, *supra* note 5, at 987.

mitments to extending sanctuary and opposing the United States' "illegal and immoral" policies in public statements.<sup>25</sup> But the motivation behind these commitments varied: some members were dedicated to sanctuary as a moral imperative, while others focused on sanctuary as a method of political change.<sup>26</sup>

These distinct motivations resulted in different strategies of assisting immigrants by members of the Sanctuary Movement.<sup>27</sup> Most provided food, shelter, clothing and medical assistance, but some members smuggled refugees across the border and hid them from authorities in what was known as "evasion services."<sup>28</sup> Members of the Sanctuary Movement disagreed on whether their actions were legal.<sup>29</sup> Some argued providing sanctuary was legal humanitarian assistance.<sup>30</sup> Others believed it was form of civil disobedience to draw attention to the plight of Salvadorian and Guatemalan immigrants.<sup>31</sup>

#### B. Responses to the Sanctuary Movement

Ultimately, the Sanctuary Movement's means resulted in the federal prosecution of its members.<sup>32</sup> In 1984, authorities arrested sixty members of the Sanctuary Movement on federal charges of smuggling, transporting, and concealing illegal aliens.<sup>33</sup> In *United States v. Aguilar*, sixteen members of the Sanctuary Movement presented a mistake-of-law defense regarding the 1980 Refugee Act.<sup>34</sup> The defendants claimed they did not know the immigrants they were assisting were illegal under the 1980 Refugee Act.<sup>35</sup> Essentially, the defendants tried to claim that according to their interpretation of the 1980 Refugee Act, the immigrants were legally in the United States and, therefore, they did not know they were breaking the law when

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Wild, *supra* note 5, at 987.

<sup>28</sup> *See id.*

<sup>29</sup> *Id.* at 988.

<sup>30</sup> *Id.* at 988.

<sup>31</sup> *Id.* at 987–88.

<sup>32</sup> Wild, *supra* note 5, at 988.

<sup>33</sup> *Id.* at 989.

<sup>34</sup> *Id.* *See also* *United States v. Aguilar*, 883 F.2d 662, 667 (9th Cir. 1989) *cert denied* 111 S.Ct. 751 (1991).

<sup>35</sup> *Id.*; *see also* Gregory A. Loken & Lisa R. Bambino, *Harboring, Sanctuary, and the Crime of Charity under Federal Immigration Law*, 28 HARV. C.R.-C.L. L. REV. 119, 138–39, 138 n.98 (1993).

they assisted them.<sup>36</sup> However, the trial court did not allow this defense, and the Ninth Circuit later upheld this ruling because, “a mistake about the applicability of the Refugee Act of 1980 to the asylum claims of an alien is a mistake of law for which ignorance is no excuse.”<sup>37</sup>

Additionally, the defendants in *Aguilar* claimed the Free Exercise Clause protected their actions because they believed they had a religious imperative to provide sanctuary.<sup>38</sup> The court rejected this defense as well.<sup>39</sup> The defendants also claimed a “necessity defense.”<sup>40</sup> The sanctuary workers stated the routine denial of Central Americans’ claims for asylum left them with no other option but to harbor the refugees to save their lives.<sup>41</sup> The court rejected this defense, finding that defendants failed to prove there were no other legal alternatives available to them.<sup>42</sup> Ironically, the Immigration and Naturalization Services (INS) later admitted in a court settlement “the

federal government had systematically discriminated against Salvadoran and Guatemalan asylum applicants, thereby making the legal process useless for the vast majority of them.”<sup>43</sup>

The only defense the court considered was the claim that the statute’s harboring provisions were not meant to criminalize the harboring of illegal aliens, unless there was a specific intent to conceal them from immigration authorities.<sup>44</sup> But the Ninth Circuit found the defendants had acted with criminal intent to conceal the illegal immigrants from detection by the INS, rendering this defense unsuccessful as well.<sup>45</sup> Eight members of the Sanctuary Movement were convicted, six for smuggling and two for concealing, harboring, or transporting illegal aliens.<sup>46</sup>

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<sup>36</sup> *Aguilar*, 883 F.2d at 671.

<sup>37</sup> Loken & Bambino, *supra* note 35, at 140. See *Aguilar*, 883 F.2d at 667.

<sup>38</sup> *Aguilar*, 883 F.2d at 694. See also, U.S. CONST. amend. I.

<sup>39</sup> *Id.* at 695.

<sup>40</sup> *Id.* at 690. See also Loken & Bambino, *supra* note 35, at 139.

<sup>41</sup> *Aguilar*, 883 F.2d at 690.

<sup>42</sup> *Id.* at 693. See also Loken & Bambino, *supra* note 35, at 140.

<sup>43</sup> Loken & Bambino, *supra* note 35, at 140.

<sup>44</sup> Wild, *supra* note 5, at 990. See *Aguilar*, 883 F.2d at 689–90, Loken & Bambino, *supra* note 35, at 140–41.

<sup>45</sup> *Aguilar*, 883 F.2d at 690. See Loken & Bambino, *supra* note 35, at 141.

<sup>46</sup> Wild, *supra* note 5, at 990; see *Aguilar*, 883 F.2d at 666–67 n.1.

Despite the prosecution of its members, the Sanctuary Movement achieved success during the 1990s as the United States made changes to immigration policies; particularly the grant of special refugee status to Guatemalan and Salvadoran refugees.<sup>47</sup> However, the government also lowered the *mens rea* threshold for harboring illegal aliens, tightening the grip of its policies.<sup>48</sup> Where previously the felony standard was “willingly and knowingly” harboring illegal immigrants, it became a felony to merely act in “knowing or in reckless disregard of the fact” of the immigrant’s status.<sup>49</sup>

### III. THE NEW SANCTUARY MOVEMENT

#### A. The Beginning of the New Sanctuary Movement

Arellano’s case instigated the formation of the New Sanctuary Movement (NSM) in August 2006.<sup>50</sup> Arellano came to the United States in 1997 and moved to Oregon where she met Saul’s father.<sup>51</sup> She gave birth to Saul in December of 1998, and two years later moved to Chicago, where she found employment as a housekeeper at O’Hare International Airport.<sup>52</sup> Authorities arrested Arellano at the airport in 2002 during a security sweep.<sup>53</sup> She was convicted of violating two immigration laws: crossing the border illegally in 1997, and working under a false Social Security number in 2002.<sup>54</sup> As the result of her conviction, she was scheduled for deportation in August 2006.<sup>55</sup>

Arellano sought sanctuary in the Chicago church because she feared deportation would separate her from her son.<sup>56</sup> Saul’s father never acknowledged his son, and his whereabouts were unknown in 2006, making Arellano Saul’s only family in the United States.<sup>57</sup> If

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<sup>47</sup> Wild, *supra* note 5, at 990.

<sup>48</sup> *Id.* at 990-91.

<sup>49</sup> 8 U.S.C. § 1324 (2006); Wild, *supra* note 5, at 991. *See also* Loken & Bambino, *supra* note 35, at 162-63.

<sup>50</sup> Wild, *supra* note 5, at 995-96.

<sup>51</sup> *Coleman v. United States*, 454 F. Supp. 2d 757,760 (N.D. Ill. 2006).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Illegal Immigrant Deported*, *supra* note 1.

<sup>57</sup> *Coleman v. United States*, 454 F. Supp. 2d 757,760 (N.D. Ill. 2006).

Arellano were deported to Mexico, she would face either leaving her son alone in the United States or taking him to Mexico with her.<sup>58</sup>

Reverend Coleman provided sanctuary for Arellano and her son, becoming the first to do so in the NSM.<sup>59</sup> Like its predecessor, the NSM defines itself as a coalition of religious organizations protecting immigrants from immoral treatment by the United States government.<sup>60</sup> The primary motivation of the NSM is protection against an assault on family unity.<sup>61</sup> NSM has four criteria that immigrant family members must meet to be eligible for the organization's services. First, they must be under an order of deportation and still engaging in the legal process. Secondly, they must have American citizen children, and third, they have a good work record. Finally, they must have a viable case under current law.<sup>62</sup> *Arellano* became the first case for the NSM and set the standard for all other cases it would accept.<sup>63</sup>

## B. Legal Justification of the New Sanctuary Movement

Members of the NSM provide the families with a place to live, material support, spiritual support, and legal assistance.<sup>64</sup> But the legality of these services is questionable.<sup>65</sup> Unlike the previous Sanctuary Movement, the NSM insists that all of its methods are legal.<sup>66</sup> According to the Immigration and Nationality Act (INA): “[A] person is guilty of a felony who with knowing or in reckless disregard of the fact that an alien has come to, entered or remains in the U.S. in violation of law conceals, harbors or shields from detection or

<sup>58</sup> *Boy Fighting Mom's Battle to Stay in U.S.*, CBS NEWS (Jul. 2, 2010), <http://cbs.news.com/stories/2006/11/14/world/main2181120.shtml>.

<sup>59</sup> *Churches Providing Sanctuary for Illegal Immigrants*, PBS (June 18, 2007), [http://www.pbs.org/newshour/bb/social\\_issues/jan-jun07/sanctuary\\_06-18.html](http://www.pbs.org/newshour/bb/social_issues/jan-jun07/sanctuary_06-18.html).

<sup>60</sup> *See Prophetic Hospitality: Strategy for a New Movement*, NEW SANCTUARY MOVEMENT, <http://www.newsanctuarymovement.org/hospitality.htm> (last visited Sept. 11, 2011).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Cf.* Celeste Kennel-Shank, *Living in God's House*, SOJOURNERS (Sept. & Oct. 2007), available at <http://www.sojo.net/index.cfm?action=magazine.articles&issues=soj0709&article=070910a>.

<sup>64</sup> *Prophetic Hospitality: Strategy for a New Movement*, *supra* note 60.

<sup>65</sup> *Id.*

<sup>66</sup> *See Legal Help & Support*, NEW SANCTUARY MOVEMENT, <http://www.newsanctuarymovement.org/legal.htm> (last visited September 11, 2011).



attempts to conceal, harbor or shield from detection, such alien in any place . . . .”<sup>67</sup>

Harboring is defined as, “the act of affording lodging, shelter or refuge to a person, esp. a criminal or illegal alien.”<sup>68</sup> By providing illegal immigrants a place to live, the NSM is harboring illegal aliens.<sup>69</sup> It is also evident that the members are acting with “knowing or in reckless disregard” of the immigrants’ illegal statuses because they are aware of their illegal statuses when they provide them support.<sup>70</sup> Therefore, the NSM is acting illegally when it provides sanctuary to illegal immigrants.<sup>71</sup>

NSM argues that it is not violating the law because the congregations sheltering illegal immigrants are not concealing the immigrants from detection.<sup>72</sup> According to the NSM, all cases decided under the statute “involve defendants who simply kept silent about the aliens’ presence, rather than individuals who have reported the aliens’ presence to the INS but who have continued to shelter them.”<sup>73</sup> This defense specifically relies on the holding in *Aguilar* that the harboring provisions of the statute were not meant to criminalize harboring illegal aliens, unless there was a specific intent to conceal them from immigration authorities.<sup>74</sup> But it is unlikely this defense would be successful in a prosecution of NSM members.<sup>75</sup> One of the defendants in *Aguilar*, Father Anthony Clark, was convicted of harboring an illegal alien for giving a seventeen-year-old boy food and a place to stay, even though he knew the boy was an illegal immigrant.<sup>76</sup> Although Clark acted with humanitarian motives and did not actively conceal the boy, he was still found guilty.<sup>77</sup> Under *Aguilar*, even if members of the NSM are not actively concealing the identities of illegal immigrants, as long as they provide shelter

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<sup>67</sup> 8 U.S.C. § 1324(a)(1)(A)(iii)(2006).

<sup>68</sup> BLACK’S LAW DICTIONARY 784 (9th ed. 2009).

<sup>69</sup> *Id.*; see 8 U.S.C. § 1324(a)(1)(A)(iii) (2006).

<sup>70</sup> Wild, *supra* note 5, at 1004.

<sup>71</sup> *Id.*; see also 8 U.S.C. § 1324(a)(1)(A)(iii)(2006).

<sup>72</sup> See *Legal Help & Support*, *supra* note 66.

<sup>73</sup> *Id.*

<sup>74</sup> *Cf.* Wild, *supra* note 5, at 990.

<sup>75</sup> *Infra* note 77.

<sup>76</sup> Loken & Bambino, *supra* note 35, at 124–25.

<sup>77</sup> See *id.*

and aid they can be charged and convicted of a felony under the INA.<sup>78</sup>

NSM also relies on the Comprehensive Immigration Reform Act of 2006.<sup>79</sup> Title II, 274(3)(b) of this Act exempts individuals or organizations that provide an illegal immigrant with “humanitarian assistance, including medical care, housing, counseling, victim services, and food, or to transport the alien to a location where such assistance can be rendered.”<sup>80</sup> However, the Comprehensive Immigration Reform Act of 2006 never became law, so it would not provide a successful defense if members of the NSM were ever charged with crimes.<sup>81</sup> Other defenses based on the humanitarian motives or religious imperatives of providing sanctuary are also unlikely to be successful because they were not successful when argued in *Aguilar*.<sup>82</sup> Thus, despite the humanitarian motives and the attempt at legal justification, members of the NSM are acting unlawfully when providing sanctuary to illegal immigrants and could face prosecution for the felony of harboring an illegal alien under the INA.<sup>83</sup>

#### IV. CAPACITY, STANDING AND JURISDICTION IN CLAIMS OF DE FACTO DEPORTATION

Elvira Arellano's case is the first NSM attempt to challenge the deportation of an illegal immigrant with a U.S. citizen child, and is a new approach to the claim of de facto deportation.<sup>84</sup> Immigrant parents under removal orders had brought previous claims of de facto deportation by on behalf of their children, who would have suffered constructively deportation because of the execution of the order.<sup>85</sup> Effectively, the NSM created a new legal strategy for citizen children to nullify the deportation orders of their alien parents.<sup>86</sup>

<sup>78</sup> *Id.* at 125–26; see Wild, *supra* note 5, at 988.

<sup>79</sup> See generally Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 274 (3)(b)(2006).

<sup>80</sup> Comprehensive Immigration Reform Act of 2006, S.2611, 109<sup>th</sup> Cong. §274(3)(b)(2006).

<sup>81</sup> *S. 2611: 109th Congress: Comprehensive Immigration Reform Act of 2006*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s109-2611> (last visited September 26, 2010).

<sup>82</sup> Wild, *supra* note 5, at 1005–6.

<sup>83</sup> *Id.*

<sup>84</sup> *Coleman v. United States*, 454 F. Supp. 757, 759 (N.D. Ill. 2006).

<sup>85</sup> See *Oforji v. Ashcroft*, 354 F.2d 609, 615 (7th Cir. 2003); *Salameda v. I.N.S.*, 70 F.3d 447, 451 (7th Cir. 1995).

<sup>86</sup> *Coleman*, 454 F. Supp. at 759; *Oforji*, 354 F.2d at 615; *Salameda*, 70 F.3d at 451.

Reverend Coleman, who provided sanctuary for Arellano and her son, brought a claim as Saul's next friend.<sup>87</sup> Coleman sued in federal court for a judgment declaring that the deportation of Arellano is, as a matter of law, a *de facto* deportation of her son in violation of his constitutional rights as a citizen of the United States.<sup>88</sup> To avoid dismissal, Coleman had to prove that Coleman had capacity to sue on behalf of Saul; that Saul had standing to negate his mother's removal order; and that federal district courts had subject matter jurisdiction to adjudicate claims of *de facto* deportation.<sup>89</sup>

#### A. Capacity of a NSM Member to Bring a Claim on Behalf of a Minor Citizen Child Challenging an Immigrant Parent's Removal Order

Coleman's capacity was essential to the potential success of Saul's *de facto* deportation claim and of future claims by the NSM.<sup>90</sup> If Coleman could bring a claim to challenge the deportation order of an illegal immigrant on behalf of the immigrant's citizen child, other members of the NSM could do so as well.<sup>91</sup>

A minor child who does not have a guardian may be represented by a next friend, as Coleman did in this case, to sue or defend on the minor's behalf.<sup>92</sup> To serve as a next friend, three criteria must be met: "the next friend must (1) provide an adequate explanation as to why the real parties in interest . . . cannot bring the suit themselves, (2) be dedicated to minors' best interests, and (3) have some significant relationship with the minors."<sup>93</sup> The latter two conditions are easily satisfied: Coleman provided housing, material support, and spiritual support for Saul and his mother, demonstrating his dedication to the minor's interests and his relationship to the minor.<sup>94</sup> The first condition, however, posed a more difficult question: why did Arellano not bring the claim on Saul's behalf as his guardian?

It is most likely that this was a strategic move to separate the legal interests of the parent from the legal interests of the child. In

<sup>87</sup> *Coleman*, 454 F. Supp. at 759.

<sup>88</sup> *Id.* See also BLACK'S LAW DICTIONARY 1142 (9th ed. 2009) (defining "next friend" as "A person who appears in a lawsuit to act for the benefit of an incompetent or minor plaintiff, but who is not a party to the lawsuit and is not appointed as a guardian")

<sup>89</sup> *Id.* at 759 n. 1, 762–63, 766.

<sup>90</sup> See FED. R. CIV. P. 17(c)(2).

<sup>91</sup> See *id.*

<sup>92</sup> *Id.*

<sup>93</sup> *T.W. v. Brophy*, 954 F. Supp. 1306, 1309 (E.D. Wis. 1996) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 163–64 (1990)).

<sup>94</sup> *Illegal Immigrant Deported*, *supra* note 1.

briefs, Coleman alleged that courts denied previous claims by citizen children to stay removals of alien parents because the parents brought the claims.<sup>95</sup> Coleman represented only Saul's legal interests. This provided an opportunity for the court to determine whether the removal order of Saul's mother constituted his de facto deportation, violating his constitutional right as a citizen to remain in the United States, without addressing the effect of the removal order on Arellano.<sup>96</sup> So, the Coleman meets the next friend criteria.<sup>97</sup>

#### B. Standing of a Citizen Child to Bring a Claim Challenging an Immigrant Parent's Removal Order

Because Coleman brought the claim on Saul's behalf, Saul had to establish standing to challenge his mother's removal order.<sup>98</sup> The defendants argued that Coleman "[could not] assert any claim or controversy against any of the federal defendants, as he is not the subject of any proceeding before the federal defendants, nor is he the subject of the removal order."<sup>99</sup> The court rejected the defendant's arguments and determined a citizen child does have standing to bring a claim challenging the removal order of his parent.<sup>100</sup>

Saul meets the three traditional requirements of standing, allowing him to assert a valid claim.<sup>101</sup> First, he would have suffered an injury-in-fact if the order of removal were executed against his mother, because he would have been forced to choose whether he will leave the United States with his mother or remain in the United States without her.<sup>102</sup> That is a concrete, actual, and imminent harm.

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<sup>95</sup> Pl.'s Reply to the Def.s' Mot. to Dismiss. 2, July 19, 2006.

<sup>96</sup> *Id.*

<sup>97</sup> *Coleman v. United States*, 454 F. Supp. 2d 757, 759 n.1 (N.D. Ill. 2006); see *Whitmore*, 495 U.S. at 163.

<sup>98</sup> *Coleman*, 454 F. Supp. 2d at 763.

<sup>99</sup> Def.s' Reply Br. in Supp. of Mot. to Dismiss. 5, Sept. 20, 2006.

<sup>100</sup> *Coleman*, 454 F. Supp. 2d at 763.

<sup>101</sup> *Coleman v. United States*, 454 F. Supp. 2d 757, 763 (N.D. Ill. 2006) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)) (noting the three requirements of standing as

First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.)

<sup>102</sup> *Id.* at 764.

The court also determined that although Saul was not the subject of the removal order or any proceeding before the defendants, he did have standing to bring the claim because his injury was unique from his mother's injury.<sup>103</sup> His mother's injury was forced removal from the United States, while Saul's injury was the decision he would face because of his mother's removal.<sup>104</sup> Second, there was a causal connection between the injury and the conduct of the defendants.<sup>105</sup> If the United States Immigration and Customs Enforcement executed the removal order, it would have caused Saul's injury.<sup>106</sup> Finally, a favorable decision would redress the injury.<sup>107</sup> If the court voided the removal order of Arellano, he would not have to choose between leaving his country and leaving his mother.<sup>108</sup> Therefore, a citizen child like Saul had standing to bring a de facto deportation claim challenging an immigrant parent's removal order.<sup>109</sup>

### C. Subject Matter Jurisdiction of Federal District Courts to Adjudicate Claims of De Facto Deportation

In addition to challenging Saul's standing to bring a claim of de facto deportation, the defendants also challenged the subject matter jurisdiction of the Court to adjudicate the claim.<sup>110</sup> The defendants argued that Saul was bringing a claim on behalf of his mother, an alien, and the court lacked jurisdiction.<sup>111</sup> According to 8 U.S.C. 1252(g), "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."<sup>112</sup> However, the court did not accept the defense's challenge to subject matter jurisdiction because Saul, a U.S. citizen, brought the claim.<sup>113</sup> Of course, if Saul's claim had been successful, the court would have declared the removal order void, constituting an adjudication of Arella-

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 764.

<sup>106</sup> *Coleman*, 454 F. Supp. 2d at 764, n.4, 5.

<sup>107</sup> *Id.* at 764–65.

<sup>108</sup> *Id.* at 763–64, 764 n.4.

<sup>109</sup> *Id.* at 765.

<sup>110</sup> *Id.*

<sup>111</sup> Def.s' Reply Br. in Supp. of Mot. to Dismiss. at 5.

<sup>112</sup> 8 U.S.C. § 1252(g) (2006).

<sup>113</sup> *Coleman*, 454 F. Supp. 2d at 765.

no's case.<sup>114</sup> However, the court stated that if it nullified the removal order based on Saul's claim, the court was only granting Saul's requested remedy, even if it is an "incidental benefit" to Arellano.<sup>115</sup> The court concluded it had subject matter jurisdiction to adjudicate Saul's claim and the power to grant him the remedy he sought.<sup>116</sup>

#### V. DE FACTO DEPORTATION CLAIMS BY CITIZEN CHILDREN CHALLENGING THE REMOVAL ORDERS OF ALIEN PARENTS

The *Coleman* court established that members of the NSM may have capacity to bring a claim of de facto deportation on behalf of a minor citizen child challenging an immigrant parent's removal order and to do so has the advantage of separating the child's legal interests from the interests of the parent.<sup>117</sup> It also established that a citizen child like Saul might have standing to bring a de facto deportation claim challenging an immigrant parent's removal order and federal district courts have subject matter jurisdiction to adjudicate de facto deportation claims.<sup>118</sup> The final issues remaining are the elements of a de facto deportation claim and whether such a claim can successfully nullify an immigrant parent's removal order.

##### A. Early Claims of De Facto Deportation

De facto deportation, also known as constructive deportation, occurs when an alien minor's parent is deported, causing the minor to be effectively deported if he feels he must accompany his parent.<sup>119</sup> The principal case of de facto deportation is *Salameda v. I.N.S.*, in which the Seventh Circuit concluded the de facto deportation of an immigrant minor child who had lived his entire life in the United States constituted an extreme hardship, and accordingly vacated the deportation order against his parents.<sup>120</sup>

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 765–66 (stating "Saul has a cognizable injury that the Court can redress, even if the sought-after relief would have the incidental benefit of nullifying a removal order . . . and even if the Court would not have jurisdiction to grant that relief if Ms. Arellano had brought a claim in her own right").

<sup>116</sup> *Id.* at 765–66.

<sup>117</sup> *Id.* at 762–65.

<sup>118</sup> *Id.*

<sup>119</sup> Amanda Colvin, *Birthright Citizenship in the United States: Realities of De Facto Deportation and International Comparisons Toward Proposing a Solution*, 53 ST. LOUIS L.J. 219, 220–21, 226–27 (Fall 2008).

<sup>120</sup> *Salameda v. I.N.S.*, 70 F.3d 447, 452 (7th Cir. 1995).

Daniel Salameda and his wife came to the United States from the Philippines in 1982 with their two-year-old son, Lancelot.<sup>121</sup> After Salameda's student visa expired, he attempted, unsuccessfully, to renew it, and deportation proceedings began against him and his wife.<sup>122</sup> The case dragged through the courts until 1991, when Salameda requested suspension of the deportation order under section 244(a)(1) of the INA.<sup>123</sup> 8 C.F.R. 1240.65 states that an alien must prove that he has been physically present in the United States for at least seven years.<sup>124</sup> He must prove during that time that he was a person of good moral character and that his deportation would "result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."<sup>125</sup>

The court conceded the Salameda family would experience hardship because of the deportation order.<sup>126</sup> By the time the case reached the Court of Appeals in 1995, Lancelot was fifteen-years-old and had lived most of his life in the United States.<sup>127</sup> Salameda and his wife had also had a second child, a United States citizen, who was seven years old.<sup>128</sup> Because Lancelot was not named in the deportation order and was not a United States citizen, the court considered whether he would be constructively deported by the removal of their parents and whether that constituted an "extreme hardship" sufficient to stay the removal order.<sup>129</sup>

One element of hardship the court considered was Lancelot's American upbringing.<sup>130</sup> The court found Lancelot could not even speak the language of his native country and if he were deported as the result of his parent's removal then it was unlikely he would be able to adjust to Philippine society.<sup>131</sup> Although the INS had not considered the hardship of Lancelot's *de facto* deportation in their initial decision to deport the Salamedas, the Board of Immigration Appeals

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<sup>121</sup> *Id.* at 448.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> 8 C.F.R. 1240.65 (2011).

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

<sup>126</sup> *Salameda*, 70 F.3d at 449.

<sup>127</sup> *Id.*

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

<sup>129</sup> *Id.* at 451.

<sup>130</sup> *Id.*

<sup>131</sup> *Salameda*, 70 F.3d at 451.

found it compelling.<sup>132</sup> The court concluded that the government “failed to offer a rational justification for its order denying the Salamedas’ application for suspension of deportation” and vacated the removal order.<sup>133</sup> The holding in *Salameda* means the de facto deportation of an immigrant child who had been raised in the United States can be a sufficiently extreme hardship to permit suspension of his immigrant parents’ removal order.<sup>134</sup>

The Seventh Circuit distinguished *Salameda* in *Oforji v. Ashcroft*, in which Doris Oforji appealed the denial of her claim for asylum and order of removal.<sup>135</sup> Oforji, a Nigerian citizen, was arrested in 1996 and accused of being an alien seeking to procure entry in the United States by fraud or willful misrepresentation and being an alien not in possession of a valid immigration document.<sup>136</sup> She claimed she was seeking asylum to escape political persecution in her native country and to keep her two daughters, who were United States citizens, from being forced to return to Nigeria with her where they would be forced to undergo female genital mutilation, which the United States considers torture.<sup>137</sup> She testified that her children had no other family in the United States and that her deportation would force them to follow her to Nigeria if she were deported.<sup>138</sup>

The Immigration Court denied her claim for asylum and found her guilty of being an alien not in possession of a valid immigration document.<sup>139</sup> Oforji appealed on behalf of her daughters, basing her claim on “derivative asylum,” a term used interchangeably with constructive deportation.<sup>140</sup> She presented the holding in *Salameda* as precedent for her claim, but the court distinguished her case from *Salameda*.<sup>141</sup> The court focused on the fact that while Lancelot in the *Salameda* case was an immigrant, Oforji’s children were United States citizens and therefore had the option of remaining in the United States even if she were deported.<sup>142</sup> Although Oforji said she was her children’s only family in the United States, the court stated

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<sup>132</sup> *See id.*

<sup>133</sup> *Id.* at 452.

<sup>134</sup> *Id.*

<sup>135</sup> *Oforji v. Ashcroft*, 354 F.3d 609, 611 (7th Cir. 2003).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 612.

<sup>138</sup> *Id.*

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

<sup>140</sup> *Oforji*, 354 F.3d at 614.

<sup>141</sup> *Id.* at 615.

<sup>142</sup> *Id.*



that a guardian could be appointed if the girls remained in the United States without her.<sup>143</sup> The Court also determined that the “exceptional hardship” applied in *Nwaokolo v. I.N.S.*, did not apply to her because she had not entered the United States legally and had not resided in the United States for the continuous seven-year period required by the statute.<sup>144</sup> The Court held:

Undoubtedly, any separation of a child from its mother is a hardship. However, the question before us is whether this potential hardship to citizen children arising from the mother’s deportation should allow an otherwise unqualified mother to append the children’s right to remain in the United States. The answer is no . . . . The law is clear citizen family members of illegal aliens have no cognizable interest in preventing an alien’s exclusion and deportation.<sup>145</sup>

These two cases establish three fundamental rules of de facto deportation claims. First, an immigrant child who will be constructively deported by the execution of a removal order against his parents may have the order vacated by proving extreme hardship resulting from the de facto deportation.<sup>146</sup> Second, an immigrant parent under an order of removal cannot have the order vacated by claiming the extreme hardship U.S. citizen child would suffer as the result of constructive deportation, because the child does not have to leave the United States.<sup>147</sup> Finally, a citizen child does not have a legal interest in preventing the deportation of his parent.<sup>148</sup>

#### B. De Facto Deportation in *Coleman v. United States*

Saul’s claim in *Coleman v. United States* differs in many ways from previous claims of de facto deportation.<sup>149</sup> Most notably, Saul brought the claim and not his mother, the subject of the order of deportation.<sup>150</sup> In *Salameda*, the court considered the extreme hardship to an immigrant child being constructively deported as the result of his immigrant parents’ removal order.<sup>151</sup> In *Oforji*, the court held an immigrant parent could not bring a claim to nullify the removal order based on the extreme hardship that would result from the *de*

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*; *contra* *Nwaokolo v. I.N.S.*, 314 F.3d 303, 304 (7th Cir. 2002).

<sup>145</sup> *Oforji*, 354 F.3d at 617–18.

<sup>146</sup> *Id.* at 617.

<sup>147</sup> *Id.* at 618.

<sup>148</sup> *Id.*

<sup>149</sup> *Coleman v. United States*, 454 F. Supp. 2d 757, 759 (N.D. Ill. 2006).

<sup>150</sup> *Id.*

<sup>151</sup> *Salameda v. I.N.S.*, 70 F.3d 447, 451–52 (7th Cir. 1995).

*facto* deportation of her citizen children.<sup>152</sup> In contrast, in Saul's case, the court was not adjudicating his mother's removal order.<sup>153</sup> He was not challenging the removal order, but rather, challenging *de facto* deportation itself as an unconstitutional violation of his rights as an American citizen.<sup>154</sup>

After establishing that Saul had standing to bring the claim and the court had subject matter jurisdiction over the claim, the court considered whether the deportation of Saul's mother constituted *de facto* deportation and whether it was a violation of his constitutional rights as a United States citizen.<sup>155</sup> As a birthright citizen, Saul possessed the right to reside in the United States and an inherent right not to be deported.<sup>156</sup> However, as the court established in *Oforji*, Saul's right to not to be deported did not confer the same right upon his mother.<sup>157</sup> The Court also reiterated *Oforji's* holding that citizen children do not have a legally recognized interest in preventing their parents' deportation.<sup>158</sup> Still, that did not necessarily undermine Saul's claim because he was not attempting to nullify his mother's deportation order by claiming her right to remain in the United States; he was only claiming his own right to remain in the United States.<sup>159</sup>

Despite the distinction, the court found no violation of Saul's constitutional right to reside in the United States because he could remain in the United States even if his mother was deported.<sup>160</sup> Furthermore, even if he did follow his mother to Mexico after her removal, he would retain the right to return to the United States at any time.<sup>161</sup> Because the removal of his mother did not compel Saul to leave the United States or deny him his constitutional right to reside in the United States, it did not violate his constitutional rights and did not constitute *de facto* deportation.<sup>162</sup> After the denial of Saul's

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<sup>152</sup> *Oforji*, 354 F.3d at 618.

<sup>153</sup> *Coleman*, 454 F. Supp. 2d at 760.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 765–68.

<sup>156</sup> *Coleman*, 454 F. Supp. 2d at 766.

<sup>157</sup> *Id.* at 767.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 760.

<sup>160</sup> *Id.* at 767–68.

<sup>161</sup> *Coleman*, 454 F. Supp. 2d at 767–68.

<sup>162</sup> *Id.* at 768–69.

claim, Arellano was arrested and deported.<sup>163</sup> Saul remained in the United States with Coleman and Coleman's family.<sup>164</sup>

### C. The Right of a Child to Be Raised by His Parents

There are several fundamental flaws with the Court's reasoning in *Coleman*. First is the contention, originally asserted in *Oforji*, that citizen children do not have a cognizable interest in preventing the deportation of their immigrant parents.<sup>165</sup> This principle ignores the reality that children have an interest in being raised by their parents.<sup>166</sup>

The right of a child to be raised by his parents is an internationally recognized principle.<sup>167</sup> The United Nations Convention on the Rights of the Child states in Article 9, "Parties shall ensure that a child shall not be separated from his or her parents 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>168</sup> One hundred and ninety-three parties have signed the Convention, internationally recognizing that a child has an interest in being raised by his parents, absent mitigating circumstances such as abuse or neglect.<sup>169</sup> The United States has signed the convention, but is one of only two countries that have failed to ratify it;<sup>170</sup> thus, the Convention does not legally grant a citizen child the right to be raised by his parents in the United States.<sup>171</sup> Though it is not mandatory authority, by signing the Convention the U.S. has recognized the moral principle that a child has an interest in familial support and care.

The concept of a child's interest in being raised by his parents also has a basis in the American legal tradition.<sup>172</sup> As the doctrine of

<sup>163</sup> *Illegal Immigrant Deported*, *supra* note 1.

<sup>164</sup> *Id.*

<sup>165</sup> *Oforji v. Ashcroft*, 354 F. 3d 609, 618 (7th Cir. 2003).

<sup>166</sup> Colvin, *supra* note 119, at 229.

<sup>167</sup> *Id.* at 228.

<sup>168</sup> United Nations Convention on the Rights of the Child art. 9 Sept. 2, 1990, 1577 U.N.T.S. 3.

<sup>169</sup> *Convention on the Rights of the Child: Status of Ratification, Declarations and Reservations*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&lang=en) (last visited Sept. 24, 2011).

<sup>170</sup> *Id.*

<sup>171</sup> See Colvin, *supra* note 119, at 229.

<sup>172</sup> *Id.*

Substantive Due Process developed over the Twentieth Century, many legal decisions have insisted that the fundamental right to parent children implicit in the U.S. Constitution and inherent within the American system of government.<sup>173</sup> In U.S. courts, the relationship between a parent and child “has always been recognized as inherent, natural right, for the protection of which, just as much for the protection of the rights of the individual to life, liberty, and pursuit of happiness, our government was formed.”<sup>174</sup>

Most Supreme Court decisions about familial rights have focused on the fundamental right of a parent to raise his child.<sup>175</sup> These decisions also imply that it is in the child's best interest for him to be raised by his parents.<sup>176</sup> In *Palmore v. Sidoti*, a father sought sole custody of his daughter because her mother had married a man of a different race.<sup>177</sup> Though there were no findings that the mother was in any way unfit to parent, the trial court held it was in the best interest of the child to be raised by her father so she would not be subjected to racial prejudice.<sup>178</sup> Upon review, the Supreme Court determined the deciding factor must be the child's welfare.<sup>179</sup> Given this standard, the Supreme Court found that the potential that the child

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<sup>173</sup> See *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). See also ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1044 (3d ed. 2006) (“The Court broadly defined the term “liberty” in the due process clause to protect basic aspects of family autonomy. The Court said: “Without doubt, [liberty] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”).

<sup>174</sup> *Id.* (quoting *Lacher v. Venus*, 188 N.W. 613, 617 (Wis. 1922)).

<sup>175</sup> See *Troxel v. Granville*, 530 U.S. 56, 66 (2000) (“In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (stating “the history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition”); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (stating “we have recognized on numerous occasions that the relationship between parent and child is constitutionally protected”).

<sup>176</sup> See *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (stating “we have little doubt that . . . the Due Process Clause would be offended “[i]f a State were to attempt to force the breakup of a natural family over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest” (quoting *Smith v. Org. of Foster Families*, 431 U.S. 816, 862–63 (1977))).

<sup>177</sup> *Palmore v. Sidoti*, 466 U.S. 429, 430 (1984).

<sup>178</sup> *Id.* at 431.

<sup>179</sup> *Id.* at 432.

would suffer prejudice did not justify removing an infant child from the custody of its natural mother.<sup>180</sup> *Palmore* affirms a parent's right to raise her child, and it is in the child's best interest to be raised by both his natural parents when possible.<sup>181</sup> Though the Supreme Court has not recognized the right of a child to be raised by his parents in the same way it has recognized the right of a parent to raise her child, there is a logical correlation between the two rights.

The courts in *Oforji* and *Coleman* suggest that the citizen children of deported parents can retain their right to stay in the U.S. by seeking guardians other than their parents. In doing so, they ignore a century's worth of legal decisions adhering to the principle that children are best served when in the custody of their parents.

#### D. Right of a Citizen Child to Legally Reside in the United States

The second fundamental flaw in the *Coleman* court's reasoning is its conception of de facto deportation.<sup>182</sup> The Court fails to adequately analyze what de facto deportation means. De facto is defined as, "actual; existing in fact; having effect even though not formally or legally recognized."<sup>183</sup> Deportation is defined as "the act or an instance of removing a person to another country."<sup>184</sup> Therefore, de facto deportation means that a person suffers deportation as a practical consequence, even if this is not legally recognized as deportation. This is a precise description of Saul's dilemma.

A minor child is dependent upon a parent or legal guardian.<sup>185</sup> This is particularly true of immigration law.<sup>186</sup> Under immigration law, a child is an "unmarried person under twenty-one years of age" who falls into one of six categories based on his relationship to his parent.<sup>187</sup> A child is dependent upon a parent to the extent that the child does not exist outside of this relationship in immigration law.<sup>188</sup> Therefore, to deport the parent is to deport the child, even if the child's name does not appear on the deportation order. For example,

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<sup>180</sup> *Id.* at 434.

<sup>181</sup> *See Palmore*, 466 U.S. at 433.

<sup>182</sup> *See Coleman*, 434 F. Supp. 2d at 767-68.

<sup>183</sup> BLACK'S LAW DICTIONARY 479 (9th ed. 2009).

<sup>184</sup> *Id.* at 504.

<sup>185</sup> *Id.*

<sup>186</sup> David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 991 (2002).

<sup>187</sup> *Id.* at 991(explaining 8 U.S.C. § 1101(b)(1)(A)-(F) (2000).)

<sup>188</sup> *Id.*

because the deportation of an immigrant parent has the effect of removing the child, the deportation of Arellano constitutes a de facto deportation of Saul.

Though the court in *Coleman* held Saul's dilemma did not constitute de facto deportation, it failed to establish what would.<sup>189</sup> In *Salameda*, the court found that de facto deportation occurred when a child would be forced to leave the country where he had been raised to accompany his parents to live in a country where he had never been.<sup>190</sup> The extreme hardship on the exiled child was a sufficient basis for vacating the removal order.<sup>191</sup> Saul faced a similar hardship. He has lived his entire life in the United States but to remain with his mother, he would be forced to leave his home to live in a country where he has never been.<sup>192</sup> Saul would suffer extreme hardship because of de facto deportation, sufficient to vacate the removal order based on *Salameda*.<sup>193</sup> However, *Salameda* is not applicable because Saul is a United States citizen and therefore has the option of remaining in the United States after his mother is deported.<sup>194</sup>

The *Coleman* court's assertion that Saul may legally reside in the United States assumes that Saul has the agency to choose whether he will live in the United States or in Mexico.<sup>195</sup> It fails to recognize that Saul is a minor child who is legally and practically dependent upon his mother. The same court could and would not recognize his right to exercise other constitutional privileges, because he is a minor. As a minor child, Saul cannot participate in the political process through voting,<sup>196</sup> enter into the military to serve his country,<sup>197</sup> or legally sign a contract.<sup>198</sup> There are legal and practical limitations to a minor child's rights of citizenship. Yet, despite centuries of legal tradition, the court in *Coleman* contends that a minor child has the legal ability to sever his relationship with his mother and choose the country where he would like to reside.<sup>199</sup> Even if this contention is a technically accurate representation of the law, it is not a realistic as-

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<sup>189</sup> *Coleman v. United States*, 454 F. Supp. 2d 757, 769 (N.D. Ill. 2006).

<sup>190</sup> *Salameda v. I.N.S.*, 70 F.3d 447, 449–451 (7th Cir. 1995).

<sup>191</sup> *Id.* at 452.

<sup>192</sup> *Coleman*, 454 F. Supp. 2d at 760.

<sup>193</sup> *Salameda*, 70 F.3d at 452.

<sup>194</sup> *Coleman*, 454 F. Supp. 2d at 759.

<sup>195</sup> *Id.* at 766.

<sup>196</sup> U.S. CONST. amend. XXVI, § 1.

<sup>197</sup> 10 U.S.C. § 505(a) (2006).

<sup>198</sup> RESTATEMENT (SECOND) OF CONTRACTS §14 (1981).

<sup>199</sup> *Coleman*, 454 F. Supp. 2d at 759.

essment of the capacity of an eight-year-old child; nor is it consistent with the level of responsibility given to children in other spheres of U.S. law.

## VI. THE FUTURE OF THE NEW SANCTUARY MOVEMENT AND DE FACTO DEPORTATION

While claims of de facto deportation advanced by the NSM are legally sound, it is unlikely courts will overrule precedent and recognize them as valid. The current political climate has focused on federal enforcement of current immigration laws and the creation of harsher laws in the states,<sup>200</sup> making it more likely that the NSM will be prosecuted for their methods and that de facto deportation claims will continue to be denied.<sup>201</sup> Though legislation could provide judicial discretion to affirm claims of de facto deportation, such efforts have been unsuccessful.<sup>202</sup> Instead, legislation attacking the citizenship of children of illegal immigrants has been gaining ground and threatening to make such claims moot.<sup>203</sup> These current political trends make it unlikely that the NSM and the claims of de facto deportation it has advanced will be successful in the future.

### A. Enforcement Immigration Laws and Legislation Targeting Illegal Immigrants Make the Success of the NSM and Claims of De Facto Deportation Unlikely

In the wake of the September 11 terrorist attacks, a new focus on restricting illegal immigration and protecting American borders emerged.<sup>204</sup> As the federal government has been prosecuting illegal aliens at an increasing rate,<sup>205</sup> the Obama administration has primarily prosecuted illegal immigrants rather than those who have harbored them.<sup>206</sup> From October 2009 to February 2010, the Obama adminis-

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<sup>200</sup> David Nowicki, *Arizona Immigration Law Ripples through History, U.S. Politics*, THE ARIZONA REPUBLIC, July 25, 2010, available at <http://www.azcentral.com/arizonarepublic/news/articles/20120/07/25/20100725immigration-law-history-politics.html>.

<sup>201</sup> Wild, *supra* note 5 at 999–1000.

<sup>202</sup> Colvin, *supra* note 119, at 230.

<sup>203</sup> *Id.* at 245.

<sup>204</sup> Villazor, *supra* note 11, at 143.

<sup>205</sup> *Id.*

<sup>206</sup> Patrick Oslo, *Obama Increases Prosecutions of Illegal Immigrants while Decreasing Prosecution of Other Crimes*, LA PRENSA SAN DIEGO, (Feb. 19, 2010) <http://laprensa->

tration prosecuted 67,994 illegal immigrants for non-violent, improper entry into the United States.<sup>207</sup> During this time, it conducted only 2,980 prosecutions for bringing in and harboring illegal immigrants, 106 prosecutions for aiding and abetting an illegal entry, and 13 prosecutions for employing unauthorized workers.<sup>208</sup> This administration has focused on the prosecution and deportation of illegal immigrants rather than the prosecution of those who harbor them.<sup>209</sup>

The Obama administration's increased prosecution of illegal immigrants could lead to the eventual prosecution of those who provide sanctuary to illegal immigrants like members of the NSM.<sup>210</sup> Under the Bush administration in 2007, there were 185,944 deportations, while under the Obama administration in 2009 there were 387,790 deportations.<sup>211</sup> If the Obama administration continues to increase the prosecution of illegal immigrants, it is more likely it will also increase the prosecution of those who assist them.

As the federal government has increased its prosecution of illegal immigrants, state governments have been developing tougher immigration enforcement laws.<sup>212</sup> The most well known example is Arizona SB 1070, passed in 2010.<sup>213</sup> This law requires police officers to inquire about a person's immigration status during a lawful stop, detention, or arrest if there is a reasonable suspicion that the person might be an illegal immigrant.<sup>214</sup> It is the conceptual opposite of non-cooperation public sanctuary laws but it was passed for the same purpose of public safety.<sup>215</sup> Those who support the bill claim it is necessary to protect Arizona citizens from violence and crimes committed by illegal immigrants.<sup>216</sup>

The toughening of immigration laws poses several potential consequences for the NSM and de facto claims of deportation. First, it becomes more likely that members of the NSM could be prosecut-

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sandiego.org/editorial-and-commentary/commentary/obama-increases-prosecutions-of-illegal-immigrants-while-decreasing-prosecution-of-other-crimes/.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Garance Burke, *Federal Prosecutions of Immigrants Soar: Obama Continues Enforcement Tactic Championed under Bush*, ASSOCIATED PRESS, (July 15, 2010) <http://www.msnbc.msn.com/id/38272361/>.

<sup>212</sup> *Id.*

<sup>213</sup> Nowicki, *supra* note 200. See 2010 Ariz. Sess. Laws Chapter 113.

<sup>214</sup> ARIZ. S.B. 1070 59th §2-3 (2010).

<sup>215</sup> Nowicki, *supra* note 200.

<sup>216</sup> *Id.*



ed. Though the NSM claims its legal defenses will prevent prosecution of its members, this article has already established that those defenses are insufficient. It becomes a question of *when* rather than *if* the government will prosecute members of the NSM for harboring illegal aliens. Second, legal and political trends toward deportation of illegal immigrants make it less likely that courts would consider overturning precedent and allow claims of de facto deportation to nullify removal orders again alien parents with citizen children.

#### B. The Current Political Climate Makes Legislation in Support of De Facto Deportation Claims Unlikely

Because established legal precedent rejects the claims,<sup>217</sup> legislation may be necessary to allow courts to recognize claims of de facto deportation. Congressional Representatives have repeatedly introduced legislation to allow judges the discretion to nullify the deportation order of an illegal immigrant in the interests of her child who is a United States citizen.<sup>218</sup> However, the political focus on preventing public sanctuaries along with the increase in prosecutions and deportations of illegal immigrants makes it less likely that such legislation would successfully pass. In 2006, H.R. 5035 was introduced to “provide discretionary authority to an immigration judge to determine that an alien parent of a United States citizen child should not be ordered removed from the United States.”<sup>219</sup> This bill was also referred to a committee and no action was ever taken.<sup>220</sup> In 2007, H.R. 1176 was introduced to “provide discretionary authority to an immigration judge to determine that an alien parent of a United States citizen child should not be ordered removed, deported, or excluded from the United States.”<sup>221</sup> This legislation would have provided courts with the discretionary power to recognize de facto deportation claims. This bill was referred to three committees and no action was ever taken.<sup>222</sup>

Legislation has also been introduced to intervene in specific

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<sup>217</sup> Colvin, *supra* note 119, at 220.

<sup>218</sup> H.R. 5035, 109th Cong. (2d Sess. 2006); H.R. 1176, 110th Cong. (1st Sess. 2007).

<sup>219</sup> *H.R. 5035: 109th Congress: To Provide Discretionary Authority...*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h109-5035> (last visited Nov. 7, 2010).

<sup>220</sup> *Id.*

<sup>221</sup> *H.R. 1176: 110th Congress: To Provide Discretionary Authority...*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h110-1176> (last visited Nov. 7, 2010).

<sup>222</sup> *Id.*

cases of de facto deportation.<sup>223</sup> In 2007, H.R. 2182 was introduced to provide Elvira Arellano and thirty-three other individuals with legal immigrant status and the possibility of applying for permanent residence status, but it never made it out of committee.<sup>224</sup> Two years later, a similar bill was introduced to benefit Arellano and thirty-nine other individuals, but it also never made it out of the committee.<sup>225</sup>

As legislation aimed at supporting claims of de facto deportation has failed, legislation that would make them irrelevant is gaining ground. States have been developing legislation that would prevent the children of illegal aliens from gaining United States citizenship.<sup>226</sup> State legislatures in Arizona and forty other states are considering proposals that would refuse to grant citizenship to children born in the United States if their parents are illegal immigrants.<sup>227</sup> The Fourteenth Amendment provides in part that “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>228</sup> This provision grants “birthright” citizenship to children born in the United States, even if the child’s parents are not in the United States legally.<sup>229</sup> In Arizona, the new legislation would create a special class of birth certificates for children born to parents who cannot prove their United States citizenship.<sup>230</sup> If children like Saul Arellano—born in the United States to immigrant parents—are denied birthright citizenship, then these new claims of de facto deportation cannot be brought because the children will not have standing to bring them or constitutional interests to protect. These new claims of de facto deportation brought by the NSM will become irrelevant. Whether the legislation passes or would survive a constitutional challenge in court is uncertain. Arizona’s bill to take away birthright citizenship<sup>231</sup> and the similar measures being considered in most states

<sup>223</sup> H.R. 250, 112th Cong. (1st Sess. 2011); H.R. 182, 111th Cong. (1st Sess. 2009).

<sup>224</sup> H.R. 2182: 110th Congress: *For the Relief of Elvira Arellano...*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h110-2182> (last visited Nov. 7, 2010).

<sup>225</sup> H.R. 2645: 111th Congress: *For the Relief of Elvira Arellano...*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h111-2645> (last visited Nov. 7, 2010).

<sup>226</sup> S.J. Res. 131, (VA. 2008); H. Res. 30, (MI. 2011); S.J. Res. 15, 213th Leg., (NJ. 2008).

<sup>227</sup> Michael Martinez, *Arizona Legislators Consider Birthright Citizenship Bill*, CNN.COM, Feb. 7, 2011, <http://www.cnn.com/2011/US/02/07/arizona.citizenship/index.html>.

<sup>228</sup> U.S. CONST. amend. XIV, § 1.

<sup>229</sup> *Id.*; see also Martinez *supra* note 227.

<sup>230</sup> See Martinez, *supra* note 227.

<sup>231</sup> *Id.*

prove that legislation drafted to protect the constitutional rights of citizen children will not be successful in the current political climate.

As legislation to provide discretionary authority for courts to recognize claims of de facto deportation continues to fall and new legislation that would undermine those claims continues to rise, de facto deportation claims will not be successful in nullifying the removal orders of illegal immigrant parents with citizen children.

## VII. CONCLUSION

The NSM developed an innovative legal strategy in claims of de facto deportation for citizen children of illegal immigrants.<sup>232</sup> Though Saul Arellano's claim was unsuccessful in court, it presented valid legal and practical grounds for a child to nullify his parent's deportation order and defended the rights of a citizen child to reside in the United States and be raised by his parent whenever possible.<sup>233</sup> Unfortunately, the current political climate has made it unlikely that the NSM and claims of de facto deportation will be successful in the near future. As the Sanctuary Movement members were prosecuted in the past,<sup>234</sup> it has become more likely the same will happen to the current and future members of the NSM. And though the NSM has asserted its methods are legal, it is entirely possible for a court to convict members of harboring illegal aliens. Furthermore, though claims of de facto deportation often meet the necessary requirements for adjudication and assert rights of a child grounded in moral and legal principles, the current political climate has undermined legislative attempts to advance those claims and brought new legislative attacks. Given the state of current law, courts should grant claims of de facto deportation brought by the NSM on behalf of citizen children to nullify their parents' removal orders. Regrettably, current legal and political trends make such recognition improbable.

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<sup>232</sup> See *Coleman v. United States*, 454 F. Supp. 2d 757, 759 (N.D. Ill. 2006).

<sup>233</sup> *Id.*

<sup>234</sup> See generally, e.g., *Presbyterian Church v. United States*, 752 F. Supp. 1505 (D. Ariz. 1990); *United States v. Merkt*, 794 F.2d 950 (5th Cir. 1986); *American Baptist Churches v. Meese*, 666 F. Supp. 1358 (N.D. Cal. 1987).