Mothers Without Borders: Undocumented Immigrant Mothers Facing Deportation and the Best Interests of Their U.S. Citizen Children

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MOTHERS WITHOUT BORDERS: UNDOCUMENTED IMMIGRANT MOTHERS FACING DEPORTATION AND THE BEST INTERESTS OF THEIR U.S. CITIZEN CHILDREN

ABSTRACT

This note addresses how deportation of undocumented immigrants affects the U.S. citizen children of those immigrants. The author examines this issue by studying the story of Marta Escoto, a woman facing deportation and also the mother and sole caregiver of a U.S. citizen child with a severely debilitating disease. If Escoto is deported and forced to return to her home country of Honduras, her daughter will likely be unable to continue to receive adequate and necessary health care. Mothers like Escoto who face deportation often plead the well-being of their children, but few can satisfy the high burden of proving that an extreme hardship will befall their children if their mother is deported. The author argues that while the proposed Child Citizen Protection Act attempts to remedy these problems, it does not go far enough. The Act would lower the burden of proof from extraordinary circumstances to mere consideration of the best interests of the citizen children. The author asserts that enactment of a law requiring such consideration is necessary to protect the rights of U.S. citizen children born to undocumented immigrants, children like Escoto's daughter.

INTRODUCTION

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INTRODUCTION

Marta Escoto was arrested at a clothing factory where she worked to support her two children.¹ When immigration officials raided the

factory, they handcuffed Escoto along with over 350 other undocumented immigrants and quickly relocated her without an opportunity to contact her children. Fortunately for both Escoto and her children, Escoto had relatives living in the area. Her sister worked at a nearby textile factory that was not raided. Escoto's sister learned of the raid from members of the close-knit immigrant community in which they lived and immediately began caring for Escoto's two children. Many families in the area were not so lucky, however, and dozens of children were left with babysitters or waiting with their teachers long after the school day had ended.

Escoto's situation is not unusual; many immigrant parents are arrested and separated from their children each year. The raid on the Massachusetts factory where Escoto worked with hundreds of illegal immigrants occurred on an otherwise normal day in March 2007. Unlike similar raids, however, it resulted in the mass removal of so many parents from the community in such a short period of time that the Massachusetts state governor declared the aftermath a "humanitarian crisis." Immigration officials determined which detainees were the sole providers for their children, as in Escoto's case, and identified the primary care provider in the event both custodial parents had been detained. Within days, immigration officials released dozens of detainees with tracking devices strapped to their legs. Other individuals were allegedly released "off the books," silently allowed to return to their homes without documentation.

Eight days after her arrest, Escoto was removed from where she was detained in a Texas holding center, thousands of miles from her home and the location of her arrest, and taken to an airport. Without explanation, she was placed on a plane; Escoto's plane landed in

2. Id.
3. Id.
4. Id.
5. See id. (stating that Escoto's sister learned of the raid while at work in a nearby garment factory, presumably receiving the news from other immigrants).
6. Id.
7. Waveney Ann Moore, As Immigration Status Divides Families, 'You Can Feel the Fear,' ST. PETERSBURG TIMES, July 30, 2007, at 1A.
8. The federal agency in charge of the raid, formerly known as the Immigration and Naturalization Service (INS), has been renamed the United States Citizenship and Immigration Services (USCIS). U.S. Citizenship and Immigration Services, www.uscis.gov/portal/site/uscis (last visited Jan. 18, 2009).
10. Id.
11. Id.
12. Id.; see also Deborah Howell, A Call That Should Have Been Made, WASH. POST, Mar. 25, 2007, at B06.
13. Id.
14. Id.
Boston, however, not deporting her to her native Honduras as she feared. Escoto was dropped off in the parking lot of a discount store where she met with her family. Immigration officials had recorded Escoto's illegal presence and, in lieu of explanation, left her with a slip of paper announcing the date and location of her assigned deportation hearing.

The Massachusetts raid and its ensuing events illustrate the growing tension between U.S. government interests in homeland security and population management and the strong values that society places upon family unity and a strong work ethic. Escoto is a criminal in the eyes of the U.S. justice system and a threat in the eyes of many middle-class Americans. Yet she also epitomizes the American woman, despite her illegal status: She struggles as a working single mother to support her children in a country they call home, even though her mere presence constantly threatens their personal safety. For better or worse, Escoto is joined by an increasing number of single women who cross into the United States each year in search of a better future for themselves and their families.

I. DEPORTATION OF UNDOCUMENTED IMMIGRANTS AND THE CHILDREN INVOLVED

Approximately twelve million undocumented adult immigrants live in the United States. Although there is no way to collect accurate data on a population that strives to remain unseen, a recent study estimated that more than one in twenty American children have at least one undocumented immigrant parent. When the Immigration

15. Id.
16. Id.
17. Id.
18. See id.
22. Moore, supra note 7.
Customs Enforcement detains immigrants, it sometimes detains their immigrant children as well, but these children are also left stranded at school or in childcare. Many of these children are American citizens whose constitutional rights should not be ignored.

Concern for the future of these citizen children has risen in the discussion on immigration reform. This concern sometimes surfaces in the decision of an immigration judge not to deport an undocumented parent. It also appears in the very existence of the legislative bill which is the subject of this note. Undocumented immigrants who are parents of citizen children have argued that their deportation violates the constitutional rights of their children. By deporting the child’s parent and legal guardian, the United States Citizenship and Immigration Services (USCIS) substantially interferes with the citizen child’s rights to be raised by a parent and to live within the United States. The Fourth Circuit addressed this issue, however, and found that “deportation of the alien parent[] does not violate any constitutional rights of the citizen child.”

Marta Escoto’s four-year-old daughter suffers from a severely debilitating disease. She is unable to walk and her body absorbs only a limited number of nutrients. Escoto’s brothers, sisters, nieces, nephews and two adult children all live in Massachusetts, but Escoto is the sole provider for her young children. Before her arrest, Escoto was earning $7.50 an hour. As is common in the business of sweatshops and in the employment of undocumented workers, Escoto’s boss extracted twenty dollar “fees” from employee paychecks for offenses that ranged from speaking while working to spending more than two minutes in the restroom.


25. But see Gallanosa v. United States, 785 F.2d 116, 120 (4th Cir. 1986) (holding that there is no violation of a citizen child’s rights when her parent is deported).


27. Id. at 264.


29. See, e.g., Gallanosa, 785 F.2d at 117.

30. Id. at 120.

31. Id.

32. Shulman, supra note 1.

33. Id.

34. Id.

35. Id.

Over the years, despite these hardships, Escoto managed to support her family and provide health care for her daughter. A glitch in her daughter’s health care occurred after Escoto was detained in Texas. Her daughter missed an appointment with her gastroenterologist. If Escoto is deported and she takes her children with her, her daughter, a United States citizen, could face a painful life without necessary medical treatment.

For the first time, Escoto and her family may count her daughter’s disease as a blessing and not a curse. If deporting Escoto means depriving a citizen child of vital medical care, the immigration judge presiding over Escoto’s deportation hearing may allow her to remain in the United States. Whether Escoto and her family must leave their life in Massachusetts to begin one of poverty in Honduras may well depend upon whether Congress passes a new bill and it goes into effect before Escoto’s hearing.

Representative José E. Serrano of New York has submitted a bill to allow immigration judges to consider the best interests of U.S. citizen children when deciding whether to deport one or both of the children’s undocumented immigrant parents. If passed into law, the bill would codify what was once a common practice within the United States. For the first time in years, U.S. domestic law on immigration and deportation might come close to alignment with related international standards.

37. Id.
38. Id.
39. Id.
41. Susan L. Kamlet, Comment, Judicial Review of “Extreme Hardship” in Suspension of Deportation Cases, 34 AM. U. L. REV. 175, 175 (1984) (discussing that an alien’s deportation may be suspended if she can demonstrate that deportation will result in “extreme hardship” to herself or to family members lawfully residing in the United States).
45. Starr & Brilmayer, supra note 26, at 222, 259, 264 (showing that the United States has been reluctant to incorporate international norms into domestic law, such as
Part I of this note provided an introduction to the problem of deporting undocumented immigrants when such action may result in the deportation of one or more U.S. citizen children. Part II reviews the emergence and evolution of judicial discretion in determining whether to deport an alien when her deportation would negatively impact one or more citizen children. Part III examines what it means to consider the best interests of a child, focusing on when extraordinary circumstances or extreme hardship exist. Part IV surveys current practices and the manner in which immigration judges consider the interests of citizen children during their parent's deportation hearing. Part V explores the effects of judicial discretion on the outcome of deportation hearings and the future of immigrant mothers and their citizen children. Finally, this note concludes by critically examining the effectiveness of Serrano's bill.

II. THE EVOLVING STANDARD OF HARDSHIP IN DEPORTATION HEARINGS

As early as 1937, courts recognized the importance of considering the well-being of a detainee's children when determining whether to deport an immigrant mother.46 Nunez was the sole caregiver for her three citizen children when immigration officials detained her.47 Her case received academic attention when a *Yale Law Journal* article criticized the court's final holding that the mother, along with her three young citizen children, must be deported.48 After the death of the children's father, Nunez strove to provide for her children with what little she had.49 Unlike Escoto's situation and that of modern immigrant parents of citizen children facing deportation today, Nunez legally resided in the United States.50 It was illegal at the time, however, for immigrants to receive public assistance.51 Nunez was prosecuted for violating this law when she sought and received benefits on behalf of, and for the benefit of, her citizen children.52

by refusing to ratify the 1989 Convention on the Rights of the Child which bans the separation of children from their parents unless under exceptional circumstances).


47. *Id.* at 1007.


50. *Id.*

51. *Id.*

52. *Id.* at 1008. The court does not go into detail on the legality of this law discriminating against aliens, but it is reasonable to assume that it was enacted in an effort to stem the perceived tide of state funds going into the pockets of noncitizens.
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The California district court that first heard Nunez's appeal from her INS deportation ruling found that "sound public policy, based on the welfare of American children, demand[s] the mother's presence" in the United States. The court referred to policy arguments akin to those used today in support of Representative Serrano's bill. It pointed out that Nunez's only crime was receipt of public assistance for the benefit of her U.S. citizen children; the court further found that should Nunez be deported for her crime, someone else would need to care for her children. The court logically concluded that even with Nunez out of the country, state funds would still be used to care for her children (albeit received by someone other than Nunez). Thus the state would be no better off with Nunez gone, and it might actually bear more of a burden if it took on the task of finding a caregiver for the children.

The circuit court's decision to overrule the district court clearly reflects the social climate surrounding Nunez's appeal. At the time, millions of impoverished Americans were migrating to the sunny state of California in hope of finding work. Instead, they found cities packed with equally poor, like-minded souls. Leo M. Alpert mocks the members of the appellate court by stating that the "sound sense [of the district court] decision was overruled by the pundits on the circuit court."

The effect of the economic and social climate on deportation hearings during the Great Depression is evident in the stark contrast between Nunez and a case which came little more than ten years later during the economic boom of Post-World War II America.

55. Nunez, 18 F. Supp. at 1008.
56. Id.
57. Id. The court does not go into detail on the subject, but it is worth noting the unlikelihood that the individual left caring for Nunez's children would be a U.S. citizen. Ironically, by deporting Nunez for receiving state assistance as an alien, the state was simply changing which alien would receive state assistance to care for the three children. In California at the time, single immigrant mothers like Nunez lived in communities of other immigrants and were unlikely to have non- alien friends with whom they might leave their children. KEVIN STARR, ENDANGERED DREAMS: THE GREAT DEPRESSION IN CALIFORNIA 65 (1996). Churches and other charitable organizations were overwhelmed with trying to feed the onslaught of other Americans surging into the state, and it is doubtful any would be willing to care for three non-orphans. Id. at 226-27.
58. Ex parte Nunez, 93 F.2d 41, 42 (9th Cir. 1937).
60. Id.
Mrs. T--- came to the United States in 1946 on a six month visitor's card.\textsuperscript{63} She remained within the United States beyond six months, during which time she married and gave birth to a child.\textsuperscript{64} T---'s husband successfully petitioned to remain legally within the United States, but T---'s petition was denied.\textsuperscript{65}

When the Board of Immigration Appeals (BIA) heard T---'s case, T--- argued that the court should interpret the legal requirement of an "economic detriment" as encompassing all of a citizen child's needs, including the "love and care of his mother and father in an unbroken home."\textsuperscript{66} Independent of her husband's finances, T--- had over $100,000 in financial resources with which to care for her child.\textsuperscript{67} The government insisted that economic detriment should only encompass financial hardship, as was traditionally the case.\textsuperscript{68} INS attorneys argued that although T--- would likely leave her child behind with her husband if she were deported, the family could easily afford to hire a caretaker for the citizen child, so he would suffer no economic detriment.\textsuperscript{69} T---'s counsel, however, argued that "no amount of [hired caregivers] can take the place of . . . [the] love and care of his mother."\textsuperscript{70} The BIA ultimately suspended the deportation of Mrs. T---, stating that "it is our conclusion that to enforce the departure of this appellant from the United States would . . . result in a serious economic detriment to this minor United States born child."\textsuperscript{71}

Congress passed the Immigration and Nationality Act (INA) in 1952 to codify current statutes and common practices such as the

\begin{itemize}
  \item \textsuperscript{63} Id. at 707.
  \item \textsuperscript{64} Id.
  \item \textsuperscript{65} Id. at 708.
  \item \textsuperscript{66} Id. at 710.
  \item \textsuperscript{67} Id. at 709.
  \item \textsuperscript{68} Id. at 710.
  \item \textsuperscript{69} Id. at 709. This was long before it was socially acceptable for a male single parent to raise his children alone.
  \item \textsuperscript{70} Id. That a U.S. citizen will suffer an economic detriment should the court deport the person who operates the child's home makes sense. One must remember, however, that the court is stating that a child will suffer this harm — a child who, when his or her parents are deported, must rely on a paid caregiver. \textit{Id. at 710}.
  \item \textsuperscript{71} Id. at 710. An editor's note in the case quotes from another 1949 BIA decision, in which the BIA stated that it had considered the subject of economic detriment to . . . families resulting from the deportation of alien women in many cases . . . . We have held in such cases that economic detriment does result to a citizen child, because he is deprived of his mother's care and half the maintenance for the home when his mother must be supported abroad. A minor child needs the care and attention of an older person, and in the absence of its mother, economic detriment results from the expense of paying someone else to operate the home. \textit{Id. at 711} (citations omitted) (quoting \textit{In the Matter of S---}, unreported A-6246223, BIA, August 9, 1949).
\end{itemize}
public policy decision in *In the Matter of T*... The rule replaced the outdated economic detriment test with the broader language of "extreme hardship." The BIA was instructed to "stop any deportation so long as the alien met certain 'residency and character requirements' and could show that the deportation would cause 'extreme hardship'" to herself or any U.S. citizen. The family-friendly fifties saw the integrity of the family unit become a prominent measuring tool for the BIA, and courts often held that the "'most important single [hardship] factor may be the separation of the alien from family living in the United States.'"

As the number of undocumented immigrants rose in the late eighties and early nineties, however, the BIA began to institute a "per se rule that rejected the need to consider the hardship to a child when the parent was deported." In so doing, the BIA relied upon a 1982 amendment to the INA which made consideration of hardship to U.S. citizens merely "discretionary." Federal courts, more attuned to the rule of law than the fear of encroaching immigrants, disapproved of the BIA's habitual failure to even consider the effect of a parent's deportation upon citizen children. The Ninth Circuit explicitly denounced this practice in an opinion reminding the BIA that their discretion was tempered by a "statutory rule [proclaiming] that the hardship to citizen children is a relevant factor for the BIA to consider in determining extreme hardship."

Despite successive reprimands within the decisions of appellate courts reviewing BIA decisions, the BIA increasingly failed to employ the statute, even when the effect upon citizen children was couched in extreme hardship arguments presented during deportation hearings. Finally, in 1994, the Ninth Circuit reiterated that compliance with the law required the BIA to "'consider the specific circumstances of citizen children and reach an express and considered conclusion as to the effect of those circumstances upon those children.'"

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72. 8 U.S.C. 1229b (b)(1)(D) (2006). Originally approved by Congress in 1952, the Act has since been amended many times and is currently codified in Title 8 of the U.S. Code.
73. Id.
74. Starr & Brilmayer, supra note 26, at 261 (quoting INA § 212(c)).
75. Contreras-Buenfil v. INS, 712 F.2d 401, 403 (9th Cir. 1983) (citing Mejia-Carrillo v. INS, 656 F.2d 520, 522 (9th Cir. 1981)).
77. Kamlet, supra note 41, at 184-85.
78. Cerrillo-Perez v. INS, 809 F.2d 1419, 1426 (9th Cir. 1987).
79. Id.
81. Delmundo v. INS, 43 F.3d 436, 443 (9th Cir. 1994) (quoting Cerrillo-Perez, 809 F.2d at 1426).
Congress sided with the BIA in 1996 when it repealed those sections of the INA upon which the Ninth Circuit relied. The IIRIRA effectively made it more difficult for an immigrant mother to receive a waiver and avoid deportation. Although the INA already required a showing of hardship to the immigrant’s citizen children, the IIRIRA required proof that the immigrant’s “removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.”

The BIA used this higher burden of proof to refuse a waiver to the mother of two citizen children in Salcido-Salcido v. INS. The hearing examiner found that Salcido had met every condition for waiver apart from extreme hardship to her citizen children. Salcido argued that because she would have no means of supporting herself, much less her children, if she were deported to Mexico, she would be forced to leave her children in the United States. Salcido argued that effectively losing their mother would pose an extreme hardship upon her citizen children. Both the initial INS judge hearing her case and the BIA held that family separation alone did not meet the requirement of an extreme hardship because such separation would result from parental choice. On appeal, the federal circuit court found that the BIA “acknowledged that ‘family unity is an important consideration,’ but it erroneously concluded that Salcido’s ‘decision to separate from her children [was] a personal choice.’”

Salcido initially appears to merely be one of many situations in which the circuit court substituted its own definition of hardship for that used by the INS and the BIA. Salcido demonstrates, however, the ease with which INS and BIA judges choose not to apply the law to the facts.
on the matter of whether family separation was an extreme hardship or parental choice. Specifically, the court held that family separation met the requirement of exceptional and extreme hardship only when the immigrant had made specific plans or arrangements to leave her citizen children when she was deported. That decision was made two years earlier when the petitioning immigrant mother, Perez, had acknowledged that she had not considered whether she would leave her children with a caretaker in the United States if she were deported. Salcido, in contrast, was able to provide evidence that she had already made arrangements to leave her daughters in the care of her mother and husband in the event of her deportation. The circuit court ultimately reversed the BIA’s decision to deny Salcido’s waiver of deportation and remanded the case.

III. THE BEST INTERESTS OF THE CHILD STANDARD

The logical opposite of hardship is the situation most beneficial to a child. As early as 1849, the Supreme Court of Illinois acknowledged that while a court “may not disregard the natural rights of parents . . . the best interest of the child must be primarily consulted” when deciding a custody dispute. “Best interests” has become the “guiding star” for courts and is incorporated into the legal codes of many states. Just what is in the best interest of a particular child is difficult to define, however. As one judge explained, “[s]tandards of mathematical precision are neither possible nor desirable in this field; much must be left to the trial judge’s experience and judgment. Underlying each case are predictions as to the possible future development of a child, and these are beyond truly accurate forecast.”

The Supreme Court has held that “a parent’s desire for and right to ‘the companionship, care, custody and management of his or her

94. Id. (referring to Perez v. INS, 96 F.3d 390 (9th Cir.1996)).

95. Perez, 96 F.3d at 393.

96. Id.

97. Salcido-Salcido, 138 F.3d at 1293-94. Whether a mother about to be deported even has a choice about taking her children with her or leaving them behind is discussed in Part III.

98. Id.

99. Miner v. Miner, 11 Ill. 43, 49 (Ill. 1849).


children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.' 102 Furthermore, the Court has found that the right to "bring up children" is a fundamental liberty, the denial of which requires courts to meet certain due process requirements. 103

American children, as citizens in their own right, have "a constitutionally protected interest in the companionship" of their parents. 104 It follows, then, that "United States citizen children are deprived of a fundamental liberty interest [when] their parents are deported from the United States." 105 Both immigration judges and the BIA must consider the parental rights of a mother about to be deported and the constitutional rights of her citizen children when deciding whether to grant an immigrant mother's petition for a waiver. 106 Congress recognized these congruent rights when it determined that judges ought to allow an immigrant to remain within the United States when extraordinary circumstances exist. 107 Congress agreed that if a mother's deportation will wreak an exceptional hardship on her citizen children's lives, she should be allowed to remain within the United States. 108

Mexico's Ibero-American University found in the 1990s that nearly half of Mexico's residents suffered from malnutrition. 109 Such a study supports the discussion in Salcido that some immigrant mothers fear that they will be completely unable to support their children if they are deported to Mexico and therefore feel obligated to leave their children in the United States. De facto deportation occurs when the children of an immigrant mother are deported by default upon denial of their mother's petition. 110

The hardship wrought upon a child through relocation from his or her childhood home country of the United States to a nation like Mexico is difficult to quantify. 111 One list of potential negative effects

105. Id. at 496.
106. Id. at 499-500.
108. Id.
110. Guzmán, supra note 80, at 135.
111. See generally Amity R. Boye, Note, Making Sure Children Find Their Way Home, 69 BROOK. L. REV. 1515 (2004) (examining the challenges children face when placed in foster care in a country other than the one in which the child's family resides).
includes "psychological harm incurred in adjustment... and relocation to an economically, culturally, [and] socially inferior country." The alternative for mothers who want to protect their children from such trauma is to leave their children with friends or family members in the United States. Some immigrants, however, are deported soon after arrival and may not yet know anyone in the United States willing to care for their children. In extreme, but all too common occurrences, a mother may be deported without the opportunity to arrange for any sort of care for her children.

Children left behind when a parent is unexpectedly deported might become wards of the state. Social workers may place children of deported immigrants in foster care or put them up for adoption, as the social workers are often unable or simply unwilling to arrange placement with family abroad. These small U.S. citizens are often left alone after raids like the one that took Marta Escoto from her family. A public school administrator, in an interview on the subject, said that many of the children left behind "were born in America, and [the United States] forgot about their rights during the raids, because they were left parentless." Officials seized approximately 500 immigrants during raids in 2002 and 2003, detained 3,700 immigrants in 2005, and arrested about 4,000 immigrants during raids in 2006. For children whose parents are not quickly released, the effects of family separation often lead to post-traumatic stress disorder, separation anxiety, and depression. Best interests, then, may be difficult to define, but "extraordinary circumstances" and "extreme hardship" are easy to identify.

IV. OFORJI V. ASHCROFT AND THE FAILURE TO CONSIDER THE BEST INTERESTS OF THE CHILDREN

Congress previously recognized, at least to some extent, that the current system of immigration enforcement often victimizes U.S.

112. Id. at 1539.
113. Id. at 1540 (discussing the "best interests" argument in support of the children of immigrants growing up in U.S. households rather than with family members in a foreign country).
114. See id. at 1516.
115. See, e.g., Shulman, supra note 1, at A6 (discussing a raid on illegal immigrant workers in which immigration officials detained parents without providing an opportunity to arrange for child care).
117. Id. at 1537-40.
118. Shulman, supra note 1.
119. Garcia, supra note 23 (emphasis added).
120. Id.
121. Id.
citizen children. The most important safeguards in place to protect these children are the sections of the IIRIRA allowing mothers to request that the hardship imposed upon their children be considered during their own deportation hearings. Unfortunately, if an immigrant does not know that the effect of a parent’s deportation upon citizen children should affect the outcome of deportation proceedings, it appears unlikely that she will present a successful argument without the aid of an attorney. If an immigration judge already considers the potential hardship to the children, he or she is already considering the child’s best interests. Conversely, if judges follow the BIA default practice of ignoring the effect that deporting an immigrant will have on her citizen children, it seems reasonable to assume that they will continue to deport mothers and their citizen children despite laws requiring action in the children’s best interests.

When the parent of a citizen child is faced with deportation today, the applicable statute, 8 U.S.C. § 1229b(b), provides citizen children only the following consideration:

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

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

This means that the immigrant mother of a citizen child will be deported, even if it causes exceptional and extremely unusual hardship to her citizen daughter, unless the mother can prove that she has been present in the United States for at least ten years.

The story of Doris Oforji, whose two young daughters faced female genital mutilation upon deportation, is an example of how current legislation provides a ready excuse for judges who prefer deportation over waivers, despite evidence that the well-being of

123. Id.
125. Id.
citizen children is at stake. Oforji arrived in the United States from Nigeria on April 4, 1996. She was pregnant at the time and later gave birth to a second daughter while in the United States. Oforji arrived in the United States from Nigeria on April 4, 1996. She was pregnant at the time and later gave birth to a second daughter while in the United States. Oforji requested asylum based on the fact that she was a member of the Ogoni Tribe, which had organized a political movement to petition the regime of General Sani Abacha for basic social services (such as "roads, schools, potable water"). Members of the "Movement for the Survival of the Ogoni People" were routinely arrested and tortured by the Nigerian government. Oforji testified that her husband had been arrested at their home and killed.

Officials detained Oforji upon her arrival and charged her "with being an alien seeking to procure entry by fraud or willful misrepresentation, as well as an alien not in possession of a valid immigration document." Oforji admitted that she did not have a valid immigration document but claimed that she indeed sought asylum and was not willfully misrepresenting her fear of persecution. Oforji's initial hearing before an immigration judge took place more than sixteen months after she was detained, on August 28, 1997. Despite testimony that Oforji had suffered female genital mutilation and that her daughters faced the same consequence if returned to Nigeria, the judge denied her petition. Oforji filed a timely appeal which the court did not address until October 7, 2002, a full five years later. "Pursuant to statutory streamlining procedures," the BIA affirmed the original judge's decision without issuing an opinion. Again, Oforji filed a timely appeal, "arguing that the BIA incorrectly denied her claims and that the BIA's streamlined process was invalid."

The Seventh Circuit Court upheld the immigration judge's finding that Oforji lacked credibility. They doubted her hearing testimony because the hearing examiner had found that statements made

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126. Female genital mutilation is an internationally recognized form of torture. Oforji v. Ashcroft, 354 F.3d 609, 612, 615 n.2 (7th Cir. 2003).
127. Id. at 611.
128. Id. at 619-20.
129. Id. at 611-12.
130. Id. at 612.
131. Id. at 614.
132. Id. at 611.
133. Id. at 611-12. In order to obtain asylum and remain lawfully within the United States, an alien or immigrant must prove that "she has suffered past persecution or... she has a well-founded fear of future persecution" should she return to her country of origin. 8 C.F.R. § 208.13(b) (2008).
134. Oforji, 354 F.3d at 612.
135. Id.
136. Id.
137. Oforji v. Ashcroft, 354 F.3d 609, 612 (7th Cir. 2003).
138. Id.
139. Id. at 614.
by Oforji when first detained conflicted with her later hearing and trial testimony.\(^{140}\) The court doubted that Oforji was a member of the "Movement for the Survival of the Ogoni People" because she did not have a "membership card or letter from a party representative" to prove membership.\(^{141}\) Once it determined that Oforji was not credible, the court could overlook Oforji's statements that deportation would result in persecution for her political views.\(^{142}\) In addition, the court found that Oforji faced no further threat of torture if she returned to Nigeria because she herself had already suffered female genital mutilation.\(^{143}\)

Once the court found that Oforji had proven no grounds for her own asylum petition, it considered her request for derivative asylum as the mother of citizen daughters who would face female genital mutilation if they returned to Nigeria.\(^{144}\) Oforji's petition now resorted to an argument that if she were deported, two U.S. citizens, her daughters, would face constructive, or de facto, deportation as well.\(^{145}\) Serrano's bill to allow consideration of the best interests of a child may well have been inspired by what the court said next. The court held that Oforji must be deported to Nigeria because she did not first enter the United States legally, nor has she resided in the United States for the required continuous seven [now ten]-year period. Thus she does not qualify for the "exceptional hardship" claim for her child under 8 U.S.C. § 1229b(b)(1)(D). Although the threatened hardship for her children is apparent, there is no statutory or regulatory authority for Oforji to have her own deportation suspended because she fears for her children if they return to Nigeria with her. Of course, as indicated above, as United States citizens they have the right to stay here without her, but that would likely require some form of guardianship — not a Hobson's choice, but a choice no mother wants to make. Given the undesirable consequences of the choice she has to make, Oforji is in effect requesting that we amend the law to allow deportable aliens who have not resided here continuously for seven or ten years to attach derivatively to the right of their citizen children to remain

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140. Id.
141. Id. It is hard to imagine that a group of individuals from a tribe lacking "roads, schools, and potable water" would have the resources and take the time to create membership cards. Id. at 611. The idea that members would keep such documents, even if created by the group, is even more far-fetched when one considers the fact that the current government of Nigeria routinely arrested and tortured members of the Movement. Id.
142. Id. at 614.
143. Id. at 615.
144. Id. at 614-15.
145. Id. at 615.
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in the United States. Any such amendment is for Congress, not the courts, to consider.\textsuperscript{146}

Although additional information about Doris Oforji and her family is unavailable, Oforji testified that she had no one in the United States with whom she could leave her daughters.\textsuperscript{147} If, as is likely, Oforji's testimony is credible, then her deportation resulted in her own persecution upon return, and her daughters have both undergone female genital mutilation.\textsuperscript{148}

The Seventh Circuit emphasized that its decision would bind future courts which might otherwise cancel the removal of a mother whose citizen daughter would be forced to undergo female genital mutilation (FGM).\textsuperscript{149} The court stated that although prior cases have suggested that the threat of FGM to a United States citizen child resulting from the alien parents' deportation is a relevant factor to be considered . . . we now hold that 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 potential hardship to the alien's United States citizen child in the event of the alien's deportation.\textsuperscript{150}

The court suggested that Oforji could decide whether her daughters would remain in the United States or return to Nigeria.\textsuperscript{151} Because Oforji had no friends or family with whom to leave her daughters, her only option would have been to relinquish custody to the U.S. government (which had clearly not proven itself interested in their well-being).\textsuperscript{152}

The judges deciding Oforji's case gave little weight to her words and even less to the evidence she presented about what faced her and her daughters if they were sent back to Nigeria.\textsuperscript{153}

\begin{itemize}
\item \textsuperscript{146} Id. at 617 (emphasis added).
\item \textsuperscript{147} Id. at 612.
\item \textsuperscript{148} Oforji v. Ashcroft, 354 F.3d 609, 614 (7th Cir. 2003). Female genital mutilation, an excruciatingly painful practice, is among the forms of torture from which individuals may be granted asylum in the United States. \textit{Id.} at 615. Female genital mutilation "involves the partial or entire removal of the clitoria, as well as the scraping off of the labia majora and labia minora." Marianne Sarkis, Female Genital Cutting (FGC): An Introduction, http://www.fgmnetwork.org/intro/fgmintro.php (last visited Jan. 23, 2009). Painkillers are generally unavailable or not used. \textit{Id.} Some girls have even bled to death as a result. \textit{Id.}
\item \textsuperscript{149} \textit{Oforji}, 354 F.3d at 618.
\item \textsuperscript{150} Id.
\item \textsuperscript{151} Id. at 618.
\item \textsuperscript{152} Id. at 612.
\item \textsuperscript{153} See, e.g., \textit{id.} at 614 (doubting Oforji's testimony and denying her request to remain in the United States); \textit{id.} at 612 (describing the likelihood that Oforji's daughters will be forced to undergo FGM if they move to Nigeria with Oforji).
\end{itemize}
V. THE POTENTIAL IMPACTS OF JUDICIAL DISCRETION IN DEPORTATION HEARINGS

The non-profit organization Human Rights Watch has stated that "[e]ach day, deportations . . . separate U.S. citizen children from their parents, spouses from each other, and generally disrupt the fabric of American communities." Some judges, however, attempt to do what is in the best interests of children in proceedings over which they preside. The story of a nine-year-old boy from New York provides yet another illustration of the contrast between those who will do what they can to deport undocumented immigrants and those who will do what they can for those immigrants but find their hands tied by current laws. The boy came into contact with authorities when he accompanied his sick mother to the emergency room in the middle of an August night in 1999. The woman arriving at the hospital was an undocumented immigrant, but her son was a U.S. citizen. The woman had lived in the United States for over fifteen years, but her ill health and resulting inability to earn a living wage led her to relinquish her son to foster care a number of times. Because his mother was too ill to leave the hospital, the boy was once more placed in the custody of the state. Social workers decided that the mother had proven herself unfit to parent, overlooking the fact that she did everything she could to care for her child. When the family's case came before a family judge, he denied the state's petition for custody and ordered that New York provide the woman with sufficient social services to enable family reunification in nine months.

The city of New York appealed the judge's ruling and insisted that the woman had no right to services. Where welfare laws had previously allowed courts to require the provision of social services with the goal of keeping children out of the foster care system, the City argued that new laws stripped any such power. The woman,

156. Id.
157. Id.
158. Id.
159. Id.
160. Id.
161. Id.
162. Id.
163. Id.
164. Id.
the City argued, was an undocumented worker with no rights to speak of, and as she was unable to provide for her child, he must be placed in the (already overburdened) foster care system. It is unlikely that social workers have reunified this young boy, an American citizen, with his mother. The story, which appeared in a New York Times article, provided no names, so it is impossible to track the case. If an immigration judge hears this mother’s case in a deportation hearing, the outcome will depend upon whether the judge values the well-being of the citizen child or the power to deport an undocumented mother. If the judge values the well-being of the citizen child, he or she could find that deportation of the mother will cause the boy an exceptional and unusually extreme hardship: He will either face a dangerous and difficult life in his mother’s country of origin, Trinidad, or in the New York foster care system. A finding of exceptional and extremely unusual hardship will enable the judge to grant the boy’s mother a stay of deportation. Conversely, if the judge focuses on his power to deport an undocumented immigrant, he will find that no extraordinary circumstances or extreme hardship exist: The boy, like hundreds of other citizen children, will be raised in the foster system, moving from house to house every few months without a parent or a home.

CONCLUSION

If Serrano’s bill is passed, the undocumented immigrant mother of a citizen child will have a slightly higher chance of receiving a stay of deportation. She will no longer bear the burden of proving that extraordinary circumstances exist or that an exceptional and unusually extreme hardship will befall her child if she is deported. Instead, the court will grant her petition if she shows that the best interests of her citizen children demand that they remain in the care of their mother and continue living in the United States.

Courts most often decide the rights of citizen children born to citizen parents during custody disputes. The term “best interests” is

165. Id.
166. Id.
167. Id.
169. Bernstein, supra note 155 (describing the boy’s experience rotating through foster homes while his mother was unable to care for him).
171. Id.
172. Id.
173. Miner v. Miner, 11 Ill. 43, 49 (Ill. 1849).
used to determine the future of the child. Representative Serrano’s proposed Child Citizen Protection Act, if passed, will incorporate this phrase into the laws governing the resolution of petitions by undocumented immigrants facing deportation. Because this incorporation is merely permissive, it will have little effect. A mandate is needed to stem the tide of default deportations and railroading of citizen children and their families. Such a mandate would grant a right — one automatically applied to the children of citizen parents — to children of non-citizen parents.

To effectively preserve the constitutional rights of these young citizens, the bill should require immigration judges to consider the effect upon the citizen child, instead of merely providing a statutory basis for the discretionary decisions already made by the few judges willing to look beyond their power to deport and into the life of a citizen child. As the examples in this note show, merely permitting judges to consider the effect a parent’s deportation will have on a child is insufficient. Real change in the way immigration judges decide the fates of families with citizen children will occur only when immigration judges must prioritize the futures of these children.

Approximately five million children living in the United States are cared for by undocumented immigrant parents and three million of these children are U.S. citizens. Political conservatives and anti-immigration groups continue to lobby for crackdowns on immigration and the exportation of all illegal aliens and undocumented workers in the United States. Immigration raids of factories and agricultural businesses employing undocumented immigrants have increased over the last decade. For every two undocumented workers detained by USCIS, one child is left without a caretaker. If Serrano’s bill required judges to consider the effect of a parent’s deportation on a

174. Id.
175. H.R. 1176, 110th Cong. (as referred to House subcommittee, Mar. 19, 2007).
176. Based upon the research examined in this article.
177. Id.
182. Hastings, supra note 179 (citing a study by the National Council of La Raza and the Urban Institute).
citizen child, and was passed, lobbyists and anti-immigration activists would have to recognize the effect that their actions have had on innocent citizen children. Placing consideration of an American citizen child’s welfare at the forefront of the immigration debate could have a powerful impact on the current manner of treatment given to these vulnerable young citizens.

Congress and the USCIS have been grappling for over seventy years with the issue of how to balance the rights of the citizen child with the need for immigration enforcement. Serrano’s bill, as it stands, while well intentioned and a step in the right direction, will serve as a mere cog in the wheel of immigration policy reform.

Just as the courts have shifted their opinions with the changing of public sentiment over the years, so too have the relevant laws changed. Today, the undocumented mother of a citizen child may petition to remain in United States based upon evidence that an exceptional and unusually extreme hardship will befall her citizen child if she is deported. Unfortunately, immigration judges have a high level of discretion when making their determinations. The court system recently denied the mother of two young citizen daughters her application for a stay of deportation. She had no friends in whose care she could leave her daughters, and the two girls have likely undergone the painful and dangerous procedure of female genital mutilation as a result of their mother’s deportation. A strong immigration bill designed to protect the rights of these children is long overdue.

Although Representative Serrano’s proposed bill will not require immigration judges to permit undocumented mothers to remain in the United States if their citizen children face de facto deportation, at least it provides an easier-to-employ statutory basis for those judges who acknowledge the rights of citizen children and wish to permit their formerly undocumented mothers to remain here in the United States to raise their children.

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183. See, e.g., In re Nunez, 18 F. Supp. 1007, 1008 (S.D. Cal. 1937).
188. Id. at 618.
189. Id. at 618.

* J.D., William & Mary, 2009; B.A., Washington State University, 2006. Mothers Without Borders is dedicated to Linda Vanderbilt, a single mother who refused to allow poverty and classicism to limit the beauty of my childhood. Thank you also to my husband, Stephen; I could never have done this without you.