

Article

Incorporating a “Best Interests of the Child” Approach Into Immigration Law and Procedure

Bridgette A. Carr †

United States immigration law and procedure frequently ignore the plight of children directly affected by immigration proceedings. This ignorance means decision-makers often lack the discretion to protect a child from persecution by halting the deportation of a parent, while parents must choose between abandoning their children in a foreign land and risking the torture of their children. United States immigration law systematically fails to consider the best interests of children directly affected by immigration proceedings. This failure has resulted in a split among the federal circuit courts of appeals regarding whether the persecution a child faces may be used to halt the deportation of a parent. The omission of a “best interests of the child” approach in immigration law and procedure for children who are accompanied by a parent fails to protect foreign national and United States citizen children. Models for eliminating these protection failures can be found in United States child welfare law and procedure, international law, and the immigration law of other nations, such as Canada. Building from these models, the United States must implement and give substantial weight to the best interests of directly affected children in its immigration law and procedure.

† Visiting Assistant Clinical Professor, University of Michigan Law School. The author is deeply appreciative of the invaluable feedback received from Professors Marisa Cianciarulo, Stephanie Crino, Colette Routel, Kim Thomas, Vivek Sankaran, Cynthia Starnes, and David Thronson as well as the assistance from her research assistant Jacob Walker.

INTRODUCTION

Esther Olowo is a native and citizen of Nigeria, and the mother of minor twin daughters who are legal permanent residents of the United States.¹ When Esther was twelve years old, she was subjected to female genital mutilation.² During her removal proceedings, Esther told the immigration judge that she feared for the safety of her daughters.³ Esther knew that, if the judge ordered her deported, her daughters would have to accompany her because her husband could not care for them on his own.⁴ To protect her daughters from the horrors of female genital mutilation, Esther applied for asylum.⁵ At the asylum hearing, Esther told the immigration judge that she would be powerless to prevent her daughters from being subjected to female genital mutilation if she were deported.⁶

The immigration judge denied Esther's claim on the basis that Esther had already been a victim of female genital mutilation and therefore did not have a well-founded fear of persecution. The immigration judge could not consider Esther's fear for her children because her children had the legal right to stay in the United States.⁷ On appeal, the Seventh Circuit concurred with the immigration judge, but the Seventh Circuit did not stop there. Recognizing the danger to Esther's children, who were legally entitled to remain safely in the United States, the court made the unprecedented move of ordering that Esther be reported to state child welfare authorities to protect Esther's children from female genital mutilation.⁸

The *Olowo* case is a poignant example of the reality facing many families and children ensnared in the United States immigration system. Children like Esther's are often directly affected⁹ by immigration law and

1. *Olowo v. Ashcroft*, 368 F.3d 692, 695-98 (7th Cir. 2004).

2. *Id.* at 698.

3. *Id.*

4. *Id.*

5. *Id.* at 697 (noting that Olowo applied for asylum on the ground that "she and her twin daughters are members of a social group that is subjected to female genital mutilation in Nigeria, and that she fears that they will undergo this procedure if they return there with her.").

6. *Id.* at 698.

7. *Id.* at 700.

8. *Id.* at 703:

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

(internal citations omitted).

9. For purposes of this Article, the phrase "directly affected child" refers to any child directly affected by an immigration decision. This could mean either a child born in the United States or a foreign-born child. In addition, the relationship between the individual and the directly affected child need not be a parent-child relationship, but may be any relationship

procedure, yet have no voice and no access to the immigration system because of the failure of immigration law and procedure to consider their interests.¹⁰ This lack of access, combined with gaps in protection,¹¹ makes accompanied children¹² who are directly affected by immigration decisions extremely vulnerable. Accompanied children may be members of families where all members of the family have the same status or they may be members of mixed-status families.¹³ In contrast with unaccompanied¹⁴ or

that is affected by the immigration decision, such as that between a grandparent and grandchild, where the grandparent is the primary caregiver for the child. The phrase "directly affected child" can be found in Canadian immigration law, which defines a "directly affected child" as

a Canadian or foreign-born child (and could include children outside of Canada). The relationship between the applicant [for immigration relief] and "any child directly affected" need not necessarily be that of parent and child, but could be another relationship that is affected by the decision. For example, a grandparent could be the primary caregiver who is affected by the immigration decision, and the decision may thus affect the child.

CITIZENSHIP AND IMMIGRATION CAN., IMMIGRANT APPLICATIONS IN CANADA MADE ON HUMANITARIAN OR COMPASSIONATE GROUNDS, IP 5 at 15 (2008).

10. See David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 980 (2002) ("[L]ife-altering determinations in immigration matters routinely are reached without consideration of the voices and viewpoints of children who are directly involved."). In fact, in United States immigration law,

"child" is a term of art limited to "an unmarried person under twenty-one years of age" who falls into one of six categories. To qualify in any of these categories requires a particular relationship with a parent, such as birth in wedlock, creation of a stepchild relationship, "legitimation," or adoption. Immigration law never employs the term "child" except in relationship to a parent, and, therefore, does not conceive of a "child" existing outside this relationship.

Id. at 991.

11. David Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453, 477 (2008):

The related and sometimes interwoven laws of immigration and nationality exhibit a striking lack of consistency in the treatment of children What emerges is not a thoughtful and reasoned pattern but rather a haphazard scheme, occasionally to the random benefit of children yet often capriciously harmful.

12. For purposes of this Article, the phrase "accompanied child" refers to a child in the care of a parent.

13. A "mixed-status family" is one in which family members do not all share a single citizenship or immigration status. In 2005 there were 6.6 million families in which the head of the family or the spouse was unauthorized, and 3.1 million children in these families were United States citizens. See JEFFREY S. PASSEL, PEW HISPANIC CENTER, *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.*, at ii (2006), available at <http://pewhispanic.org/files/reports/61.pdf>.

14. The phrase "unaccompanied child" is often defined as "any person under the age of eighteen who is separated from both parents and is not being cared for by an adult who, by law or custom, has a responsibility to do so, and who is an asylum seeker, recognized refugee or other externally displaced person." Linda Piwowarczyk, *Our Responsibility to Unaccompanied and Separated Children in the United States: A Helping Hand*, 15 B.U. PUB. INT. L.J. 263, 264 (2006) (quoting Andre Sourander, *Behavior Problems and Traumatic Events of Unaccompanied Refugee Minors*, 22 CHILD ABUSE & NEGLECT 719 (1998)). This definition will be used for purposes of this Article.

separated¹⁵ children, accompanied children face a bigger risk of being invisible in the United States immigration system and face the additional risk of having conflicting interests¹⁶ with their parents.¹⁷ The potential issues facing accompanied children vary based on their own citizenship and whether they have the same interests as their parents.¹⁸

Under current United States immigration law, accompanied children who are directly affected by immigration proceedings have no opportunity for their best interests to be considered.¹⁹ The failure of immigration law and procedure to incorporate a "best interests of the child" approach ignores a successful means of protecting children that is common both internationally and domestically.²⁰ This Article argues for statutory reform

15. In addition to the term "unaccompanied child," the term "separated child" is often used. A separated child is one who is accompanied by an adult, but is not with a parent, legal guardian, or customary caretaker, but perhaps with a trafficker, sibling, or acquaintance. Jacqueline Bhabha, *Seeking Asylum Alone: Treatment of Separated and Trafficked Children in Need of Refugee Protection*, 42 INT'L MIGRATION 141, 147 n.2 (2004).

16. I have used the word "interests" to describe the child's own view of his or her plight if removed. I am not, even with my use of examples, *infra* Part II, stating that all children will feel one way about a certain set of facts. My examples are purely for illustrative purposes to highlight the potential problems that might arise.

17. In focusing on accompanied children, this Article does not intend to minimize the unique vulnerabilities or plight of separated or unaccompanied children. However, the issues facing separated and unaccompanied children have been written about extensively. Consistent with this Article, scholarship on the plight of separated and unaccompanied children includes a call for a "best interest of the child" standard to be applied in cases involving such children. See Jacqueline Bhabha, "Not a Sack of Potatoes": *Moving and Removing Children Across Borders*, 15 B.U. PUB. INT'L L.J. 197, 205 (2006); Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INT'L J. REFUGEE L. 84, 95-98 (1999); Christopher Nugent, *Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT. L.J. 219, 219-21 (2006). Though the unique issues facing separated and unaccompanied children are beyond the scope of this Article, the changes advocated in this Article are intended to extend to all children directly affected by immigration law and policy, including separated and unaccompanied children.

18. Another issue for accompanied children is the fact that individuals in removal proceedings are not entitled to a free, court-appointed attorney. See Immigration and Nationality Act (INA) § 292, 8 U.S.C. § 1362 (2006). This means that often the directly affected children will be involved in proceedings in which their parents are representing themselves pro se. This lack of representation increases the possibility that a child's plight will go unnoticed by the decision-maker. From 1994 through 2005, 17% of asylum cases were heard without an attorney representing the applicant. Those cases resulted in significantly more denials than cases with an attorney present (93.4% compared with 64.0%). Transactional Records Access Clearinghouse (TRAC), Immigration Judges tbl.1 (2006), <http://trac.syr.edu/immigration/reports/160>.

19. Some may wonder how the deportation context is any different from a criminal proceeding in which a child's parent may be imprisoned. The true analogy to a criminal proceeding would be one in which sentencing the parent to prison would mean the parent may take the child to prison with him or her. The reality that a parent may force a child to "voluntarily depart" the United States means that the parent's removal is an action concerning a child. To ignore this reality is to potentially put United States citizen and legal permanent resident children at risk of great harm. One needs to look no further than the *Olowo* case to see the possibility of persecution happening to legal permanent resident children as a result of their mother's removal. See *Olowo v. Ashcroft*, 368 F.3d 692, 695-98 (7th Cir. 2004).

20. The phrase the "best interests of the child" is used in both international law and domestic law. See *infra* Part I. Despite its prevalence as a standard, there is no agreed-upon

incorporating a “best interests of the child” approach into immigration law and procedure. A “best interests of the child” determination is necessary to protect children like Esther’s and, more importantly, to protect children whose parents fail to object to the harm they would face if they were ordered removed. Many children in danger of persecution have no one to speak for them.

Part I examines both domestic and international use and reliance on the “best interests of the child” approach as one way to provide effective protection to children. Part II uses hypothetical examples to describe the gaps in protection for children directly affected by immigration proceedings in the United States. Part III explores the current use of a “best interests of the child” standard in domestic immigration law. This Part also identifies a split among the federal circuits created by the varied approaches to incorporating the interests of children. Part IV highlights the use of the “best interests of the child” approach in Canadian immigration law. Part V discusses the changes that would be required to incorporate a “best interests of the child” approach into the substance and procedure of United States immigration law. Finally, this Article concludes with a call for reform of immigration law and procedure in order to effectively protect all children directly affected by immigration proceedings.

I. THE PREVALENCE OF THE “BEST INTERESTS OF THE CHILD” APPROACH IN DOMESTIC AND INTERNATIONAL LAW

In both domestic and international law, a common legal standard for cases involving children is the “best interests of the child” standard.²¹ The United States immigration system runs counter to this prevailing norm. Most United States immigration proceedings include no determination regarding the best interests of the child,²² although such proceedings

definition for the “best interests of the child.” In fact, “there is now widespread appreciation that the child’s best interests are a policy goal and not an administrable legal standard.” Katherine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL’Y & L. 5, 15-16 (2002). For the purposes of this Article, the “best interests of the child” approach refers to both a process that is child-centered and allows the voice of a child to be heard and a substantive legal standard that considers the “safety, permanency, and well-being of the child” in immigration proceedings. See AMY THOMPSON, CENTER FOR PUBLIC POLICY PRIORITIES, *A CHILD ALONE AND WITHOUT PAPERS* 16 (2008) (noting that “U.S. child welfare standards for the best interest of the child are defined in federal law as prioritizing the safety, permanency, and well-being of the child in all proceedings involving children” and arguing for an adoption of such a standard for unaccompanied children in return and repatriation processes).

21. See D. Marriane Blair & Merle Hope Weiner, *Resolving Parental Custody Disputes – A Comparative Exploration*, 39 FAMILY L.Q. 247, 247 (2005).

22. Thronson, *supra* note 10, at 980 (“Broader debates about children’s rights have largely bypassed immigration law and efforts to develop workable, child-centered approaches in immigration law have gained little footing. Immigration law and decisions continue to reflect conceptions of children that limit their recognition as persons and silence their voices.”).

frequently result in decisions that directly affect the placement of children.²³ This failure to analyze the best interests of the child in immigration proceedings results in a failure to protect many children caught up in the United States immigration system. Addressing these issues will require changes in both immigration procedure and substantive law, since both currently devalue "children's interests and their roles in families."²⁴ Certain areas of United States domestic law, such as child welfare, have a history of focusing on the best interests of the child²⁵ and should serve as a guide for the treatment of children in immigration proceedings.

A. The "Best Interests" Approach in Domestic Law Outside of the Immigration Context

The "best interests of the child" approach has a long history in domestic law outside of the immigration context. The law and procedure of child custody and of child abuse and neglect reflect the importance of considering the directly affected child's best interests.²⁶

In the United States, the child custody law in every state "embraces the 'best interests' standard."²⁷ The emergence of a "best interests of the child" approach in the United States occurred during the period from 1790 to 1890.²⁸ In the context of child abuse and neglect, states have been required since the early 1970s to provide guardians ad litem for all children in child abuse and neglect proceedings.²⁹ The role of the guardian ad litem was not

23. See Thronson, *supra* note 11, at 454 ("[W]ithout analysis or rationale, federal decisions enforcing immigration law routinely function as child custody determinations.").

24. Thronson, *supra* note 11, at 480.

25. See Gary A. Debele, *A Children's Rights Approach to Relocation: A Meaningful Best Interests Standard*, 15 J. AM. ACAD. MATRIMONIAL L. 75, 81 (1998).

26. See Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, 110 Stat. 3063 (codified as amended at 42 U.S.C. § 5106a(b)(2)(A)(ix)(1)-(11) (2000 & Supp. V 2005)).

27. Blair & Weiner, *supra* note 21, at 247 (citing IRA MARK ELLMAN, CHIEF REPORTER'S FOREWORD TO PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, at xviii (American Law Institute 2002)); see also *Report of the Working Group on the Best Interests of the Child and the Role of the Attorney*, 6 NEV. L. J. 682, 682 (2006) [hereinafter *Report of the Working Group*] ("[B]est interests' advocacy and best interests models of representation frequent many jurisdictions and individual attorney practices when the client is a child.").

28. Debele, *supra* note 25, at 81. This emergence coincided with "a dramatic shift away from the father's common law rights to custody and control of their children toward a more modern emphasis on the need to nurture, care for, and love of the child." *Id.*

29. See Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, § 4(B)(2)(G), 88 Stat. 4, 7 (1974) (codified as amended at 42 U.S.C. §§ 5101-5119c (2000 & Supp. V 2005)). The guardian ad litem requirement was not given much thought during the bill's passage:

[The guardian ad litem requirement] was not included in the original version of the bill passed by the Senate. The issue was only addressed in later committee hearings owing to the testimony of Brian Fraser, then a staff attorney for the National Center for Prevention of Child Abuse and

defined until 1996, in an amendment to the Child Abuse Prevention and Treatment Act providing that a guardian ad litem's role is to obtain "first-hand a clear understanding of the situation and needs of the child; and to make recommendations to the court concerning the *best interests of the child*."³⁰ Unlike a lawyer, who is retained by a client, a guardian ad litem is an officer of the court who is bound to protect the child's interests, which may not be the same as the child's expressed preferences.³¹

Just as guardians ad litem must protect a child's interests, lawyers who represent children in child abuse and neglect cases must also address the "best interests of the child" standard. The use of a "best interests of the child" approach has been the focus of much debate within child advocacy communities.³² The American Bar Association has promulgated standards for lawyers representing children in child abuse and neglect cases.³³ These standards include guidance regarding how a lawyer should determine a child's interests.³⁴

In light of the current scholarly debate, it is impossible to point to one legal standard defining the "best interests of the child" approach in domestic law. It is, however, possible to identify the priorities of the "best

Neglect at the University of Colorado. Fraser's testimony, which then became the basis for a law review article, advocated that the guardian ad litem be appointed as a special guardian legally obligated to do everything within his power to ensure a just judgment that is in the child's best interests, including acting as investigator, counsel, advocate, and guardian.

JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 33 n.12 (2007) (citing Brian Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian ad Litem*, 13 CAL W.L. REV. 16, 29 (1976)).

30. Child Abuse Prevention and Treatment Act Amendments of 1996, § 107(b)(2)(A)(ix)(I) (emphasis added). This amendment also specified the guardian ad litem as "an attorney or a court appointed special advocate (or both)." *Id.*

31. See ABA Standards for Lawyers Who Represent Children in Abuse and Neglect Cases, A-2 (1996) [hereinafter ABA Standards].

32. See Jean Koh Peters, *The Roles and Content of Best Interest in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505, 1524-63 (1996) (critiquing four models of best interest lawyering and proposing a fifth model integrating components from the original four); see also *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301, 1309 (1996) [hereinafter *Recommendations of the Conference*] (finding that lawyers use too much discretion on behalf of child clients, including in "best interests" determinations and, instead, a more appropriate focus for the lawyer would be on the child's legal interests); *Report of the Working Group*, supra note 27, at 683. ("[T]he best interests per se is not an acceptable standard to define the scope, goals, or duties of legal representation, but may be one among many factors taken into account during representation.").

33. ABA Standards, supra note 31.

34. ABA Standards, supra note 31, at B-5:

The determination of the child's legal interests should be based on objective criteria as set forth in the law that are related to the purposes of the proceedings. The criteria should address the child-specific needs and preferences, the goal of expeditious resolution of the case so the child can remain or return home or be placed in a safe, nurturing, and permanent environment, and the use of the least restrictive or detrimental alternatives available.

interests" approach. Procedurally, the "best interests" approach prioritizes allowing the child to have a voice.³⁵ Substantively, the "best interests" approach prioritizes the child's safety, permanency, and well-being.³⁶ It is these priorities — voice, safety, permanency, and well-being — that immigration law and procedure must incorporate.

B. The "Best Interests" Approach in International Law: The Convention on the Rights of the Child

In international law, one of the clearest statements regarding the "best interests of the child" standard can be found in the United Nations Convention on the Rights of the Child (CRC).³⁷ The CRC, however, did not originate the concept in international law; thirty years prior to the CRC, the United Nations Declaration on the Rights of the Child introduced the idea that "the best interests of the child shall be the paramount consideration."³⁸

The ideals of the Declaration on the Rights of the Child were formalized into obligations when the CRC was adopted in November 1989.³⁹ The United States became a signatory to the CRC in 1995.⁴⁰ One of the fundamental principles of the CRC is the "best interests of the child" standard. This standard is set forth in Article 3, which states, "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."⁴¹ The "best interests of the child" standard in the international context has been called an "umbrella provision" and is invoked often as a guiding principle of interpretation for other articles and rights in the CRC.⁴²

35. See Koh Peters, *supra* note 32, at 1566 (highlighting the need to begin with the "child in her context" when determining the child's best interest); see also *Recommendations of the Conference*, *supra* note 32 (recommending that, when a child has the capacity to direct representation, the child must be allowed to set the goals of the representation in the same manner as an adult client); *Report of the Working Group*, *supra* note 32, at 684 (finding that a child's lawyer must ascertain and zealously advocate for the child's wishes); *ABA Standards*, *supra* note 31, at B-4.

36. See *ABA Standards*, *supra* note 31, at B-5.

37. Convention on the Rights of the Child (CRC), G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989).

38. Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), princ. 2, 14 U.N. GAOR Supp. No. 16, U.N. Doc. A/4354 (Nov. 20, 1959).

39. CRC, *supra* note 37, at pmbl.

40. See *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006*, at 328, U.N. Doc. ST/LEG/SER.E/25 (Vol. I) (2007), available at <http://treaties.un.org/doc/source/publications/MTDSG/English-I.pdf> [hereinafter *Multilateral Treaties Deposited*]; Press Release, White House Statement on U.S. Decision to Sign U.N. Convention on Rights of the Child (Feb. 10, 1995), available at <http://www.ibiblio.org/pub/archives/whitehouse-papers/1995/Feb/1995-02-10-us-to-sign-un-convention-on-rights-of-child.text>.

41. CRC, *supra* note 37, at art. 3(1) (emphasis added).

42. See, e.g., Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159,

The CRC “is the most universally adopted of all human rights charters, ratified by all but two countries in the world within the first ten years of its existence.”⁴³ In fact, coinciding with the principles of the CRC, “virtually all nations are guided by the precept that the primary consideration underlying any [child] custody decision must be the best interests of the child.”⁴⁴

As both domestic and international law have recognized, a “best interests of the child” approach is essential in protecting children. When a system like the United States immigration system fails to incorporate such an approach, children affected by that system are at risk.

II. AT RISK AND OFTEN INVISIBLE: THE PLIGHT OF DIRECTLY AFFECTED ACCOMPANIED CHILDREN IN DOMESTIC IMMIGRATION PROCEEDINGS

In the United States, a “best interests of the child” approach is not available in the immigration system for children accompanied by a parent. Accompanied children face various degrees of risk and invisibility depending on whether their immigration status and interests are aligned with those of their parents. In each of the four Sections below, the risk and invisibility of the accompanied child is assessed based on whether the child’s status and interests align or conflict with those of the parent.⁴⁵

A. Accompanied Child in Same-Status Family with Aligned Interests

Accompanied children often have the same status as their parents,⁴⁶ which means that neither the child nor the parent has permission to remain in the United States. When an accompanied child has the same status and interests as his or her parent, that child has the greatest likelihood of being protected, especially when the parent advocates on behalf of the child. Even when status and interests align, however, an accompanied child may not be able to access effective protection if the parent fails to advocate on behalf of the child.

171 (1998)..

43. Thronson, *supra* note 10, at 988 (citing Barbara Bennett Woodhouse, *Keynote Address at the Symposium on Legal Reform and Children’s Human Rights*, 14 ST. JOHN’S J. LEGAL COMMENT. 331, 333 (2000)). The United States and Somalia have signed but not ratified the CRC. See *Multilateral Treaties Deposited*, *supra* note 40, at 328.

44. Blair & Weiner, *supra* note 21, at 247.

45. In order to provide consistency with the facts of the *Olowo* case and because of the stark protection gaps it highlights, I have used female genital mutilation as the basis for the scenarios in this Article.

46. As of March 2004, in families in which the head of the household was undocumented, approximately one-third, or 1.6 million, of the children were also undocumented. JEFFREY S. PASSEL, PEW HISPANIC CENTER, UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS, BACKGROUND BRIEFING PREPARED FOR TASK FORCE ON IMMIGRATION AND AMERICA’S FUTURE 20 (2005), available at <http://pewhispanic.org/files/reports/46.pdf>.

The current approach in immigration law and procedure operates under the tacit assumption that children have the same status and interests as their parents. Consider Scenario 1:

Fatima is from Mali. She and her nine-year-old daughter Uma entered the United States less than one year ago on visitor visas after Fatima's husband died. Fatima applied for asylum based on her own past persecution as the victim of female genital mutilation. Fatima's asylum application also included Fatima's fear of future persecution of female genital mutilation being performed on her daughter. As a widow, Fatima cannot protect Uma from female genital mutilation.

Under these facts, Fatima's and Uma's cases will most likely be combined into a single proceeding.⁴⁷ In the United States, removal proceedings can take place without a child's knowledge, let alone the child's participation.⁴⁸ It is also possible that an asylum claim for Uma will not even be filed, and that her story will simply be told through her mother's claim.⁴⁹ When cases are consolidated, a decision is usually made only on the lead applicant's case.⁵⁰ If Fatima, the lead applicant, is granted asylum, then Uma will be granted asylum as a derivative and both of them will be able to remain safely in the United States.⁵¹

As Scenario 1 illustrates, the current approach in immigration law and procedure sometimes results in effective protection in cases where accompanied children have the same status and interests as their parents. However, even in these situations, accompanied children may be ignored, and thereby denied effective protection.

Changing the facts only slightly from Scenario 1 shows how, even when there is an alignment of status and interests, the current approach can result in a failure of effective protection for accompanied children. Consider Scenario 2:

47. See David Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1181-82 (2006).

48. The immigration judge may waive the presence of a minor child when at least one of the child's parents or legal guardians is present. 8 C.F.R. § 1003.25 (2008).

49. *Id.*; see also *Salameda v. INS*, 70 F.3d 447, 451 (7th Cir. 1995) ("In order to economize on its limited resources, the INS usually does not bother to institute a formal deportation proceeding against an alien who is likely to depart anyway, such as the minor child of parents who are being deported.").

50. Since children who are accompanying or will be joining a parent can be granted asylum if the parent is granted asylum, decisions are usually only given on the parent's case and the child receives the same status. See INA § 208(b)(3)(A), 8 U.S.C. § 1158(b)(3)(A) (2006).

51. *Id.* However, under United States asylum law, children cannot claim their parents as derivatives. See Thronson, *supra* note 47, at 1181 n.83 ("Children who are U.S. citizens ultimately may petition for their parents but only when they reach age 21, the age at which immigration law ceases to consider them children.") (citing 8 U.S.C. § 1151(b)(2)(A)(i) (2000)).

Fatima is from Mali. She and her nine-year-old daughter Uma entered the country less than one year ago on visitor visas after Fatima's husband died. Fatima applied for asylum based on her involvement in an opposition political party in Mali. She fears for her own safety and the safety of her family if she is forced to return to Mali. Fatima was a victim of female genital mutilation when she was a child and hopes it will not happen to her daughter Uma. Fatima does not think to tell the decision-maker about this fear because she is most worried about her actions in the opposition party.⁵²

Under these facts, the likely consolidation of Uma's case with Fatima's could result in a failure to consider Uma's case individually and, consequently, a failure to provide her with effective protection. Undocumented children like Uma, who have no legal right to stay in the United States, constitute sixteen percent of the United States undocumented population.⁵³ Undocumented children have the right to apply for asylum individually,⁵⁴ but children whose parents are in removal proceedings are often, as Scenario 2 illustrates, rendered invisible.⁵⁵ In

52. The U.S. immigration system has multiple points of entry and multiple layers of decision-making. Individuals may enter the immigration system by choice (e.g., submitting an application for relief) or because the government requires it (e.g., receiving a notice to appear in immigration court). Depending on the entry point and the relief requested the initial decision-maker on the individual's case may be an officer or an immigration judge. For purposes of this Article I have used the word "decision-maker" as a general term for individuals within the immigration system who make decisions about applications for relief.

53. Passel, *supra* note 13.

54. There is no lower age limit on the right to claim asylum. Jacqueline Bhabha, *Children as Refugees and Displaced Persons: "More Than Their Share of Sorrows": International Migration Law and The Rights of Children*, 22 ST. LOUIS U. PUB. L. REV. 253, 266 (2003) (citing Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3 (1), Dec. 10, 1984, 1988 U.S.T. LEXIS 202, 1465 U.N.T.S. 85, 114; Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Inter-Am. art. III, para. 3, Nov. 22, 1984 C.H.R., OAS/Serv.L/V/II.66, doc. 10, rev. 1, (1984); OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, art 1., paras. 1-2, Sept. 10, 1969, 1001 U.N.T.S. 45, 47; Convention Relating to the Status of Refugees, arts. 32-33, July 28, 1951, 19 U.S.T. 6223, 6276, 189 U.N.T.S. 150, 174-76; Universal Declaration of Human Rights, pmbll., G.A. Res. 217A(III), U.N. GAOR, 3rd Sess., art. 14, U.N. Doc. A/810 (Dec. 12, 1948)).

55. See Bhabha, *supra* note 54, at 254:

Whereas considerable attention had been paid to the social welfare and tracing needs of child refugees living in camps or found internally displaced and separated from their families, the legal and procedural obstacles facing child asylum seekers were generally unacknowledged. It was assumed that children could be dealt with under the procedures directed at families - that where the head of household or parent was eligible for refugee protection, the child would be too; and that if protection was refused, arrangements for the family would include the children. This set of assumptions was based on two largely unquestioned premises: first, that child asylum seekers traveled with their families and could be subsumed with the family asylum application, and second, that children could have no independent claim to asylum in their own right

some cases, independent asylum claims of children may not even be articulated, even if the child has the strongest claim for asylum. In the United States, when a parent accompanies a child refugee applicant, the child's claim is "typically subsumed under that of the parent and is not considered separately."⁵⁶ This invisibility can have dire consequences. If Fatima wins her political asylum claim, then Uma will be allowed to stay as a derivative.⁵⁷ However, if Fatima loses, then Uma will be removed along with her mother. Failing to provide an individualized determination on Uma's case, or even a process for advancing Uma's claim independent of Fatima's, will result in Uma being completely invisible and unprotected in the immigration process.

Accompanied children with the same status and interests as their parents are often invisible in the immigration system. They have access to effective protection when the parent's claim is successful or when the parent actively advocates on behalf of the child. These children are at risk, however, when a parent's claim fails or when a parent neglects to notify the immigration decision-maker of the plight of the accompanied child. The risk of invisibility highlighted in Scenarios 1 and 2 is exacerbated when an accompanied child's interests conflict with those of his or her parent.

over and above the family's claim.

(explaining that historically the difficulties and needs of unaccompanied children were hidden from public view and arguing that "scholars, policy makers, and advocates consider the position of child migrants independently [of their families]"). See generally Progress Report on Refugee Children and Adolescents, including UNHCR's Strategy for Follow-Up to the Report on the Impact of Armed Conflict on Children, EC/47/SC/CRP.19 (Oct. 1, 2001), <http://www.unhcr.org/protect/PROTECTION/3d0da0355.html> (explaining that refugee children are often "invisible" in policymaking because refugees are often thought of as a uniform group and that there is a tendency to think of refugee children simply as dependants of adults).

56. WOMEN'S COMMISSION FOR REFUGEE WOMEN & CHILDREN, PRISON GUARD OR PARENT?: INS TREATMENT OF UNACCOMPANIED REFUGEE CHILDREN 5 (2002), available at http://www.womenscommission.org/pdf/ins_det.pdf; see also *Salameda v. INS*, 70 F.3d 447, 451 (7th Cir. 1995) ("In order to economize on its limited resources, the INS usually does not bother to institute a formal deportation proceeding against an alien who is likely to depart anyway, such as the minor child of parents who are being deported."); *Alexandrova v. INS*, No. 97-3932, 1998 U.S. App. LEXIS 20612 (6th Cir. 1998) (per curiam) (unpublished table decision) (noting that, despite independent claims by his wife and child, the father "was the sole witness to testify. His testimony related solely to his own eligibility for asylum.").

57. See INA § 208(b)(3)(A), 8 U.S.C. § 1158(b)(3)(A) (2006) (allowing children who accompany parents to be granted the same asylum status as the parents). Highlighting this problem is not an argument in favor of eliminating derivative asylum claims. Many cases could be such that a parent has the strongest claim and the child has no claim to asylum, and therefore a consolidation of cases results in the child staying in the United States as a derivative simply because of the parent receiving protection. However it should not be the case, as the system currently operates, that, even if the child has the strongest claim in a family unit, the child often loses access to protection by virtue of being in a family.

B. Accompanied Child in Same Status Family with Conflicting Interests

An accompanied child with the same status as his or her parent but who does not share the same interests is often completely invisible in the current immigration system. When the interests of the parent and child conflict and the parent condones or misapprehends the persecution facing the child, there is almost no chance that the child's fate will be considered by the decision-maker. In fact, United States immigration law fails to protect children whose parents may be participating in, or condoning, the persecution experienced by the child.⁵⁸

Slight alterations to Scenarios 1 and 2 above illustrate this risk of invisibility. Consider Scenario 3:

Fatima is from Mali. She and her nine-year-old daughter Uma entered the country less than one year ago on visitor visas after Fatima's husband died. Fatima applied for asylum based on her involvement in an opposition political party in Mali. She fears for her own safety and the safety of her family if she is forced to return to Mali. Fatima had female genital mutilation performed on her when she was ten years old. Fatima does not oppose this practice and, if returned to Mali, Uma will have it performed on her when she turns ten.

As described above, in the United States immigration system, it is highly unlikely that Uma will have an individualized hearing or even a determination on her claim.⁵⁹ If her mother is not removed, Uma will indirectly be protected from female genital mutilation.⁶⁰ If, however, Uma's mother is removed, Uma will also be removed and persecuted without ever having had her claim evaluated or even heard.

C. Accompanied Child in Mixed-Status Family with Aligned Interests

Children who have a legal right to stay in the United States and whose

58. Courts have recognized that a parent may be a persecutor. *See, e.g., Bah v. Gonzales*, 462 F.3d 637, 647 (6th Cir. 2006) (Lawson, J., concurring in part and dissenting in part) ("Family members, including parents, may persecute each other, and therefore they may be the source 'of a well-founded fear of persecution on account of . . . membership in a particular social group.'") (quoting 8 U.S.C. § 1101 (a)(42)(A)).

59. *See supra* Part II.A.

60. This scenario assumes that the United States laws against female genital mutilation, 18 U.S.C. § 116 (2006), and the child abuse protection mechanisms available to all children in the United States either prevent Fatima from attempting female genital mutilation on her daughter if they stay in the United States, or protect Uma if such an attempt is made.

parents are put in removal proceedings also face the danger of being rendered invisible. However, their invisibility is due to the fact that in most cases there is no avenue for immigration decision-makers to take their interests into account. Sadly, decision-makers have recently been making the blanket assumption that these children can stay in the United States, and the reality of their family lives is ignored.

Accompanied children in mixed status families frequently have permission to remain in the United States because they received citizenship as a result of their birth in the United States.⁶¹ However, there is often a significant gap between what is legally permissible and the reality of these children's lives. Accompanied children may have legal permission to remain in the United States, but will be directly affected by the decision of the immigration system because their parents will relocate them when removed from the United States.

The *Olowo* case described in the Introduction presents such a scenario: the accompanied children had a parent who shared their interests but not their status. Esther Olowo advocated for the interests of her legal permanent resident children. She told the immigration court that her daughters would be persecuted as a direct result of her removal.⁶² For many accompanied children in this situation, immigration decision-makers would simply ignore the plight of the children,⁶³ since the immigration proceeding only rules on the removal of the parent.⁶⁴ However, the Seventh Circuit realized that ignoring the reality of the direct effect of Olowo's removal on her legal permanent resident children would put the children at risk of persecution. In response to this reality, the court turned to what it deemed to be the only available alternative: referring the case to the child protection services of Illinois in order to protect the children.⁶⁵

From a protection perspective, this outcome allows the children to be protected from the harm of female genital mutilation; from a child welfare or family unity perspective, however, this approach is problematic. The immigration system essentially made a custody decision by deporting the

61. In 2005 there were 6.6 million families in which the head of the family or the spouse was unauthorized, and 3.1 million children in these families are United States citizens. Passel, *supra* note 13, at ii.

62. *See Olowo v. Ashcroft*, 368 F.3d 692, 692 (7th Cir. 2004).

63. In certain cancellation of removal cases, decision-makers are explicitly required to evaluate the impact of removal on the United States citizen or legal permanent resident child. In order to obtain relief, an applicant must prove that his or her removal would "result in exceptional and extremely unusual hardship to" the individual's United States citizen or permanent resident child, spouse, or parent. INA §240A(b)(1), 8 U.S.C. § 1229b(b)(1) (2006).

64. In fact, courts have consistently rejected "constructive deportation" arguments on behalf of children. *See, e.g., Abebe v. Gonzales*, 432 F.3d 1037, 1048 (9th Cir. 2005) ("[T]he concept of 'constructive deportation' should not apply here because the Petitioners' daughter, a United States citizen, has a legal right to remain in this country"); *Abay v. Ashcroft*, 368 F.3d 634, 645 (6th Cir. 2004) ("To the extent recent cases suggest that [constructive deportation] has continuing currency, they do so in the context of concrete indications the child would be forced to accompany the deported parent.") (emphasis added).

65. *Olowo*, 368 F.3d at 703.

mother. While the state child protection system utilizes a “best interests of the child” approach, the option that may be best – the children remaining with their mother – will no longer be available because of the immigration decision. The disconnect between these two systems, combined with the lack of a uniform “best interests of the child” approach in the immigration system, means children like Esther’s will either be harmed or abandoned.

For accompanied children in mixed status families who have the same interests as their parents, there is one exception to the invisibility faced by children like Esther’s. The accompanied child’s interests may be recognized when the parent of the accompanied child qualifies for one form of cancellation of removal.⁶⁶ The requirements for this type of cancellation of removal include proving that the individual’s removal would cause exceptional and extremely unusual hardship to their United States citizen or legal permanent resident child, spouse, or parent.⁶⁷

Under this form of relief from removal, certain United States citizen and legal permanent resident children are not as invisible as they are in other forms of relief, since the hardship that such children would suffer upon the deportation of the parent is a factor in determining the parent’s eligibility for relief. However, even if one assumes that the “exceptional and extremely unusual hardship” standard is a proxy for a best interests analysis,⁶⁸ this approach fails to protect children in families where the parent has not been in the United States for the requisite physical presence requirement.

Accompanied children in mixed-status families who have the same interests as their parents have an even higher risk of invisibility and failure of protection than the accompanied children described in the scenarios above. Absent cases in which the parent qualifies for cancellation of removal, accompanied children in mixed status families whose interests align with those of their parents typically have no access to the immigration process or other protection. These risks are the highest, however, for children in mixed status families with conflicting interests.

D. Accompanied Child in Mixed Status Family with Conflicting Interests

Accompanied children in mixed status families whose interests do not

66. To qualify for cancellation of removal undocumented individuals must have resided continuously for at least ten years in the United States, be of good moral character, not have been convicted of any crimes that would make them deportable or inadmissible, and show that their removal would cause exceptional and extremely unusual hardship to their United States citizen or legal permanent resident child, spouse, or parent. 8 U.S.C. §1229b(b); 8 C.F.R. §§ 1240.11(a), 1240.20 (2008).

67. *Id.*

68. See *infra* Part III.B. (comparing the “best interests” approach with the “exceptional and extremely unusual hardship” standard).

align with those of their parents may be the most vulnerable in the United States immigration system. The invisibility problem of accompanied children in same status families⁶⁹ seems like a minor issue compared to the complete lack of access to any type of protection mechanism faced by accompanied children in mixed status families with conflicting interests. To see this result, simply change the facts of the *Olowo* case. Imagine that Esther Olowo had not opposed female genital mutilation. In such a situation she would not have voiced the plight of her daughters to the immigration court, and the Seventh Circuit would not have referred the case to child protective services. As a result, Esther would have been ordered removed, taken her daughters with her, and allowed them to be subjected to female genital mutilation. When there is a conflict of interest, there is simply no venue where the persecution facing Esther's daughters can be exposed.⁷⁰

Regardless of the child's status or interests, every accompanied child directly affected by immigration proceedings is at risk of being unable to access protection. Whether this invisibility and protection failure stems from a parent's benign omission to raise the child's claim, from the parent's participation in the persecution of the child, or from the child's legal status, it can be solved by incorporating a "best interests of the child" approach into the domestic immigration system.

III. THE CONSIDERATION OF THE INTERESTS OF CHILDREN IN DOMESTIC IMMIGRATION LAW

The plight of children directly affected by immigration decisions has not been completely ignored by United States law and policy.⁷¹ In fact, the United States has already considered, and sometimes incorporated, a "best interests of the child" analysis for certain children directly affected by immigration proceedings. Use of the "best interests of the child" approach in domestic immigration law ranges from being mandated by statute to complete absence, depending on the type of relief available to the child.

69. See *supra* Part II.A-B.

70. For an accompanied child in a mixed status family with an alignment of interests, cancellation of removal provides a venue for the plight of the child to be put forward. When a parent's interest conflicts with the child, cancellation of removal does not provide such a venue. A parent applying for cancellation of removal defines and articulates the exceptional and extremely unusual hardship the child will face. If the parent does not identify or put forward a hardship, it will not be part of the claim.

71. In 1998, the Immigration and Naturalization Service (INS) issued guidelines for children's asylum claims. INS GUIDELINES FOR CHILDREN'S ASYLUM CLAIMS, FILE 120/11.26 (1998) available at http://www.abanet.org/publicserv/immigration/ins_guidelines_for_children.pdf.

A. Best Interests Applied: Special Immigrant Juvenile Status

Unaccompanied or separated children may apply for a unique form of relief, special immigrant juvenile status (SIJS).⁷² To be eligible for SIJS relief, an applicant must be declared a dependent of a juvenile court in the United States, be deemed eligible and continue to be eligible for long-term foster care, and have been the subject of judicial or administrative proceedings in which it was determined that it was not in the best interests of the minor child to be returned to his or her country of nationality or country of last habitual residence.⁷³ The analysis for this form of relief includes a “best interests of the child” determination by a non-immigration judge adjudicator with special expertise in issues facing children.⁷⁴

B. A Nod to Best Interests: Cancellation of Removal

For accompanied children, cancellation of removal is the only form of relief explicitly requiring any examination of their plight.⁷⁵ An immigration judge adjudicating an application for cancellation of removal for a parent of a United States citizen or lawful permanent resident child is required by law to evaluate certain hardships facing the child; however, many decisions on cancellation of removal include almost no analysis regarding this element of relief.⁷⁶ To qualify for cancellation of removal, individuals must meet certain physical presence, admissibility, and hardship requirements.⁷⁷ The hardship requirement is whether the legal permanent resident or United States citizen child will face “exceptional and extremely unusual hardship”⁷⁸ if the parent is removed. This is a very high bar.⁷⁹ In addition, the analysis often fails to consider the true impact on the

72. INA § 101(a)(27)(J), 8 U.S.C.A. § 1101(a)(27)(J) (West, Westlaw through Dec. 2008 amendments).

73. *Id.*

74. See 8 C.F.R. § 204.11(d)(2)(iii) (2008).

75. For the requirements of cancellation of removal, see *supra* note 66.

76. Hardships facing the child are usually put forward by the parent who is named in the removal proceeding. As discussed above, in Section II.B., when there are conflicting interests this can be problematic for the child.

77. See *supra* note 66.

78. INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D) (2006); see Linda Kenepaske, *Basics of Removal Proceedings in Immigration Law*, in PRACTISING LAW INSTITUTE, BASIC IMMIGRATION LAW 289 (2008) (“Criteria for establishing extreme hardship include: age of the subject; conditions of health; political and economic conditions in the country to which the alien will be returning; emotional effect of separation from family”); see also *In re Ige*, 20 I. & N. Dec. 880, 881-82 (B.I.A. 1994); Mark R. von Sternberg, *Cancellation of Removal Under the Immigration and Nationality Act: Emerging Restrictions on the Availability of “Humanitarian” Remedies*, in PRACTISING LAW INSTITUTE, BASIC IMMIGRATION LAW 365-368 (2008); S. Adam Ferguson, *Not Without My Daughter: Deportation and the Termination of Parental Rights*, 22 GEO. IMMIGR. L.J. 85, 101 (2007) (citing Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law’s Conflicted Answers*, 32 HOFSTRA L. REV. 273, 298 (2003)).

79. Ferguson, *supra* note 78, at 101 (noting that the exceptional and extremely unusual

child. The Board of Immigration Appeals (BIA),⁸⁰ in *In re Monreal-Aguinaga*, found that forcing Daisy and Eric, both United States citizens, to leave with their father did not meet the bar.⁸¹ The BIA made this finding despite the fact that Eric, who was around nine at the time, testified that he would like to stay in the United States.⁸² However, the court conducted "no other assessment of the impact on the children of separation from their childhood home and customary family circle."⁸³

The analysis required for cancellation of removal is preferable to the total invisibility facing many children in immigration proceedings, since it at least examines certain interests of the child during removal proceedings. However, it does not go far enough: there is a difference between a "best interests" analysis and an "exceptional and extremely unusual hardship" analysis.⁸⁴

Assuming *arguendo* that a "best interests" analysis is the equivalent of the "exceptional and extremely unusual hardship" analysis, this form of relief still fails to measure up to the "best interests" standard. Cancellation of removal does not provide a venue for children to express their own views about what is in their best interests, nor does it provide a mechanism for the court to obtain independent evidence about the best interests of the child.⁸⁵ This approach does not evaluate permanency for the child. Cancellation of removal also excludes many children directly affected by their parents' immigration proceedings, as it does not protect undocumented accompanied children. Moreover, because of its physical residency requirement, cancellation of removal does not consider the interests of United States citizen and legal permanent resident children of

hardship requirement is "very difficult to satisfy"); *see, e.g.*, *INS v. Ha Wang*, 450 U.S. 139, 145 (1981) (holding that a "narrow interpretation is consistent with the 'extreme hardship' language, which itself indicates the exceptional nature of the suspension remedy"); *Marquez-Medina v. INS*, 765 F.2d 673, 677 (7th Cir. 1985) ("[T]he loss of a job along with its employee benefits does not entail extreme or unique economic hardship."); *Diaz-Salazar v. INS*, 700 F.2d 1156, 1160 (7th Cir. 1983) (holding that "economic conditions in an alien's homeland are not a dispositive factor in a suspension hearing," and that the petitioner required "some factor beyond the general misery attendant upon deportation" to "justify relief under the extreme hardship standard"), *cert. denied*, 462 U.S. 1132 (1983).

80. The Board of Immigration Appeals is the administrative appellate body charged with interpreting immigration statutes and regulations and reviewing decisions by Immigration Judges.

81. *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56 (B.I.A. 2001).

82. *Id.* at 64.

83. Thronson, *supra* note 10, at 979 (citing *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56).

84. *But see Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1012 (2005) (finding that cancellation of removal does include a best interests determination because the child's "'best interests' are merely the converse of 'hardship.'")

85. Again, there is no venue for the child independent of what the parent puts forward. As discussed above, there are numerous reasons why a parent may not provide such evidence; individuals in removal proceedings often do not have lawyers and/or have to prepare their case from detention. In contrast, in both child abuse and SIJS proceedings, an advocate whose interests do not conflict with those of the child adduces evidence on behalf of the child's best interests. *See supra* note 30.

individuals who have been in the United States for less than ten years. As Judge Posner noted in his concurrence in *Oforji v. Ashcroft*:

The seven-year (now ten-year) rule has only a tenuous relation to the hardship of children whose parent is ordered deported. What is true is that the longer the children have lived in the United States, the greater the hardship to them of being sent back to their parent's native country — one of the unappetizing choices facing these children and a choice made more excruciating the longer they remain here and become acclimated to American ways. But the length of time a child has lived in the United States depends on when she was born as well as on when her parent came to the United States. . . . The seven-year (or ten-year) rule is irrational viewed as a device for identifying those cases in which the hardship to an alien's children should weigh against forcing her to leave the country.⁸⁶

The recognition that hardship to a child should be a factor in granting relief to a parent is an important step toward protecting accompanied children. However, this approach, as applied in cancellation of removal cases, fails to protect many children who are at risk of persecution.

C. Best Interests Implied: T and U Visas

Implicit in the "bests interests of the child" analysis in United States child welfare law is an assumption that, until proven otherwise, it is in the best interests of children to remain with their parents.⁸⁷ Domestic immigration law seems to have adopted this premise in certain areas. Individuals under the age of twenty-one who qualify for either a T or U Visa⁸⁸ may petition for visas for their parents.⁸⁹ However, this respect for

86. *Oforji v. Ashcroft*, 354 F.3d 609, 620 (2003).

87. See Linda D. Elrod, *Summary of the Year in Family Law*, 27 FAM. L.Q. 485, 501 (1994) (noting the presumption "that it is in the best interests of the child to be with natural parents unless the parent abandoned the child, the parent's immoral conduct adversely affects the child's interests, or the parent is unfit to have custody"); see also Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 19 (1997) (stating in the context of adoption that "[t]here is simply no issue as to whether it would be in the best interests of the child for her to remain with her biological parents, or for her to be adopted, because of the strong presumption that a child belongs with her biological parents.").

88. T and U visas are nonimmigrant visas available for foreign nationals who have been victims of certain crimes. To qualify for a T visa an applicant must show that he or she

- (I) is or has been a victim of a severe form of trafficking in persons . . . ;
- (II) is physically present in the United States . . . on account of such trafficking . . . ;
- (III)(aa) has complied with any reasonable request for assistance in the . . . investigation or prosecution of acts of trafficking . . . ;
- (bb) is unable to cooperate . . . due to physical or psychological trauma;

the family unit, which allows the child to be the source of immigration relief for his or her parents, is unique to T and U visas and is not standard throughout immigration law.

D. Best Interests Through the Back Door: Asylum, Withholding of Removal, and Protection Under the Convention Against Torture

Though United States immigration law does not refer explicitly to the "best interests of the child" standard outside of the SIJS context, immigration decision-makers have historically been sensitive to the plight of the directly affected children of immigrant parents who fear persecution or torture. In the United States, individuals who fear persecution or torture may apply for asylum,⁹⁰ withholding of removal,⁹¹ or relief under the Convention Against Torture (CAT).⁹² Decisions refusing to consider the harm faced by a directly affected child when evaluating the lead applicant's claim for protection from persecution or torture have only arisen in the past few years:

Prior to 2003, we are not aware of a single instance wherein a court questioned the premise that harm faced by an applicant's child is relevant to the applicant's own asylum claim. In fact the

(cc) or has not attained 18 years of age; and
(IV) . . . would suffer extreme hardship involving unusual and severe harm upon removal . . .

INA § 101(a)(15)(T), 8 U.S.C.A. § 1101(a)(15)(T) (West, Westlaw through Dec. 2008 amendments). Additionally, the applicant must meet certain eligibility requirements under INA § 212, 8 U.S.C. § 1182 (2006), and must not have committed a severe form of trafficking in persons. See § 1101(a)(15)(T)(i); INA § 214(o)(1), 8 U.S.C. § 1184(o)(1) (2006).

To qualify for a U visa, an applicant must show that he or she has suffered substantial abuse due to being a victim of certain criminal activity; the applicant (or the parent, guardian or next friend if the applicant is under sixteen) possesses information concerning that criminal activity and assists or will assist in the investigation or prosecution; and the criminal activity violated the laws of the United States or occurred in the United States. 8 U.S.C. § 1101(a)(15)(U); see also INA § 214(p), 8 U.S.C.A. § 1184(p) (West, Westlaw through Dec. 2008 amendments).

89. See 8 U.S.C. § 1101(a)(15)(U)(ii), (T)(ii)(I).

90. To qualify for asylum, an applicant must demonstrate that he or she is unwilling or unable to return to his or her country because of past persecution or a "well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A) (defining "refugee"); see INA § 208, 8 U.S.C. § 1158(b)(1)(A) (2006) (stating that a grant of asylum is based on a finding that the applicant is a refugee under § 1101(a)(42)(A)).

91. To qualify for withholding of removal, an applicant must demonstrate that his or her life or freedom would be threatened because of the applicant's race, religion, nationality, membership in a particular social group, or political opinion. INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (2006).

92. To be eligible for relief under the Convention Against Torture an applicant must establish "that it is more likely than not he or she would be subjected to torture if removed." 8 C.F.R. §§ 208.16(c)(2), 1208.16(c)(2) (2008).

government itself furnished relief to several parents on the basis of evidence that their removal would put citizen children at risk of FGC [female genital cutting]. For example, the former Immigration and Naturalization Service (INS) issued a stay of deportation in 1994 to Nigerian national, Ms. Virginia Anikwata, when she applied for CAT protection, asserting that her citizen daughter's subjection to FGC would constitute torture as to Ms. Anikwata herself. . . . Likewise an IJ in Oregon granted withholding of removal to a woman whose U.S. citizen daughters would face the "extreme hardship" of FGC if she were deported.⁹³

In addition, prior to 2003, federal courts seem to have agreed that grave harm to an applicant's child could form the basis of an applicant's persecution or torture claim.⁹⁴ Since 2003, however, the theory that persecution to a child could constitute persecution to a parent has been diminished or overturned in a number of federal circuits.⁹⁵ Only the Sixth Circuit has affirmed this theory and granted protection to a parent on the basis of the child's claim.⁹⁶

In 2003, the Seventh Circuit, in *Oforji v. Ashcroft*, forcefully denied a parent's claim for relief based on fear of persecution of the child.⁹⁷ Though just one year earlier, in *Nwaokolo v. Ashcroft*, the Seventh Circuit had granted a stay of removal based on the parent's fear for her daughter,⁹⁸ the *Oforji* Court held 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.⁹⁹

The facts of *Oforji*, like *Nwaokolo*, involved a parent seeking protection

93. Marcelle Rice, *Protecting Parents: Why Mothers and Fathers Who Oppose Female Genital Cutting Qualify for Asylum*, IMMIGRATION BRIEFINGS, Nov. 2004, at 1, 2 (internal citations omitted).

94. *Id.*; see also *Nwaokolo v. INS*, 314 F.3d 303, 304 (7th Cir. 2002) (finding that applicant has a better than negligible chance of proving that "she and her daughter, an United States citizen, will suffer irreparable injury if she is removed from the United States at this time").

95. The Seventh Circuit is the most hostile to parent-child claims, while the Sixth Circuit has affirmed these types of claims. The Fourth, Fifth, Eighth, Ninth and Eleventh Circuits have used approaches in between the approaches of the Sixth and Seventh Circuits. See *infra* notes 103, 106, 107, 109, and 113 and accompanying text.

96. See *infra* discussion of *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004).

97. See *Oforji v. Ashcroft*, 354 F.3d 609, 618 (7th Cir. 2003).

98. In *Nwaokolo*, the Seventh Circuit granted a stay of removal for a woman who had a four-year-old United States citizen child, recognizing that the four-year-old would have "no choice" but to return to Nigeria with her mother. 314 F.3d at 309 (7th Cir. 2002). Ms. Nwaokolo feared her daughter would have female genital mutilation performed on her if she went to Nigeria. *Id.* at 304.

99. *Oforji*, 354 F.3d at 618.

based on the risk of female genital mutilation to the child. Despite these similar facts, the Seventh Circuit stated in *Oforji* that "the law is clear that citizen family members of illegal aliens have no cognizable interest in preventing an alien's exclusion and deportation."¹⁰⁰

The Seventh Circuit reiterated its support for this position in its decision in the *Olowo* case.¹⁰¹ In *Olowo*, "the Seventh Circuit cited *Oforji* for the principle that a court may not weigh potential hardship to a family member with LPR [legal permanent resident] status or citizenship in the adjudication of an asylum claim."¹⁰²

The Fourth Circuit has also narrowed the availability of relief for a parent fearing persecution of his or her child. In *Niang v. Gonzales*,¹⁰³ the court denied withholding of removal to a mother who feared her United States citizen daughter would be subject to female genital mutilation if she were returned to Senegal. The Fourth Circuit cited to the reasoning of *Oforji* that hardship to a child cannot be used for a parent's claim.¹⁰⁴ The Fourth Circuit went beyond this reasoning and "announced a new, *per se* rule that psychological harm without 'accompanying physical harm' [to the parent] cannot establish persecution."¹⁰⁵ In the Fourth Circuit under *Niang*, therefore, the possibility of physical persecution against the child is irrelevant unless a parent will also experience physical harm.

The Eighth Circuit, relying on both *Niang* and *Oforji*, has adopted the position that "an applicant may not establish a derivative claim for withholding of removal based upon the applicant's child's fear of persecution."¹⁰⁶ The Fifth and Eleventh Circuits have issued unpublished denials of parent-child claims in the female genital mutilation context, though neither circuit has issued precedential decisions regarding these types of claims. The Fifth Circuit decision *Osigwe v. Ashcroft*¹⁰⁷ provided minimal analysis in upholding the denial of the parents' claim. The court held that the parents, who applied for asylum based on fear of female genital mutilation against their daughter, were "ineligible for asylum under the general asylum provisions."¹⁰⁸ The Eleventh Circuit, in *Axmed v. Gonzales*, upheld the BIA's denial of a motion to reopen the case of a Somali woman who claimed she feared her United States citizen daughter would suffer female genital mutilation if she were removed.¹⁰⁹ In *Axmed*, the

100. *Id.*

101. *Olowo v. Ashcroft*, 368 F.3d 692 (7th Cir. 2004).

102. Rice, *supra* note 93, at 4 (citing *Olowo* at 701).

103. 492 F.3d 505, 507 (4th Cir. 2007).

104. *Id.* at 512-13.

105. Lisa Frydman & Kim Thuy Seelinger, *Kasinga's Protection Undermined? Recent Developments in Female Genital Cutting Jurisprudence*, 13 BENDER'S IMMIGR. BULLETIN 1073, 1093 (Sept. 1, 2008) (citing *Niang*, 492 F.3d at 512).

106. *Gumaneh v. Mukasey*, 535 F.3d 785, 789 (8th Cir. 2008).

107. 77 Fed. Appx. 235, 235-236 (5th Cir. 2003).

108. *Id.*

109. *Axmed v. Gonzales*, 145 Fed. Appx. 669 (11th Cir. 2005).

Eleventh Circuit relied in part on *Oforji* for the proposition 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 the potential hardship of their American-born children.”¹¹⁰

While certain circuits do not even evaluate the effect of deporting the parent of a United States citizen or legal permanent resident when analyzing the claim of the parent,¹¹¹ the Ninth and Sixth Circuits offer the possibility of a different approach to these types of cases. The Ninth Circuit has not issued a decision on the merits of a parent-child case, but it has signaled its support for granting relief in these cases. In *Abebe v. Gonzales*, the Ninth Circuit remanded a case to the BIA to consider the parents’ eligibility for asylum based on their fear that their daughter would be subject to female genital mutilation in Ethiopia.¹¹² This remand signals the potential for success in protecting children by raising their plight in their parents’ case. Protecting children when a parent is in removal proceedings has been given explicit support in the Sixth Circuit.

The Sixth Circuit’s approach to parent-child cases, at least when accompanied children have the same status as their parents, is in direct opposition to the Fourth, Seventh, and Eighth Circuits. In *Abay v. Ashcroft*, the Sixth Circuit found a woman from Ethiopia eligible for asylum based on her fear of being persecuted by being unable to protect her daughter from female genital mutilation.¹¹³ Although this approach does protect certain children, it is imperfect and does not provide the same access and protection ensured by a “best interests of the child” approach.

As described in Scenario 3 above, if Abay had not opposed female genital mutilation, or if she had supported it, she would not have claimed that her daughter’s female genital mutilation would amount to her own persecution.¹¹⁴ Absent Abay’s fear of her daughter’s female genital

110. *Axmed*, 145 Fed. Appx. at 675. The Eleventh Circuit also cited to *Azanor v. Ashcroft*, 364 F.3d 1013, 1021-22 (9th Cir. 2004) for this same proposition, but this was a mis-cite: “In *Azanor*, the Ninth Circuit did not reach the merits of the parent-child issue and instead remanded the mother’s CAT [Convention Against Torture] claim to the BIA to consider the proper legal standard.” Frydman & Seelinger, *supra* note 105, at 1095.

111. See *supra* discussion of Fourth, Fifth, Seventh, Eighth and Eleventh Circuits, p.199-200. Despite its position on parent-child claims, the Seventh Circuit has acknowledged that United States citizen children are treated “as badly as aliens” in situations in which the asylum claim of the non-citizen parent is denied:

[t]here is nothing in the record about the father of the younger girl. Probably, then, the only condition in which the girls could remain in the United States after their mother returned to Nigeria would be as foster children. That is the same unlovely status they would occupy were they aliens granted asylum while their mother was deported. So although they are citizens they are treated as badly as aliens.

Oforji v. Ashcroft, 354 F.3d 609, 620 618 (7th Cir. 2003) (Posner, J., concurring) (noting that, for an asylum applicant from Nigeria with two United States citizen daughters, the Seventh Circuit had affirmed the decision to deport the mother).

112. *Abebe v. Gonzales*, 432 F.3d 1037, 1043 (9th Cir. 2005).

113. *Abay v. Ashcroft*, 368 F.3d 634, 642-643 (6th Cir. 2004).

114. See *supra* Part II.B (highlighting the risks in the United States immigration system for

mutilation, Abay and her daughter would have been deported to Ethiopia and her daughter would have become a victim of female genital mutilation.

After the *Oforji* and *Abay* decisions, the BIA adopted the Seventh Circuit's approach for parent-child cases.¹¹⁵ In a decision on a parent-child case in the Fifth Circuit, the BIA, lacking precedent from the Fifth Circuit itself, adopted the approach used by the Seventh Circuit in *Oforji*.¹¹⁶ In *In re A-K-*, the BIA faced facts similar to those in *Abay*, but came to the opposite conclusion.¹¹⁷ *A-K-* was a citizen of Senegal seeking to protect his two United States citizen daughters from female genital mutilation.¹¹⁸ The immigration judge granted withholding of removal on two grounds. First, the immigration judge found that *A-K-*'s daughters would "more likely than not be forced to undergo female genital mutilation in the future in Senegal."¹¹⁹ Second, the immigration judge made an alternative grant of withholding of removal to *A-K-* on "'humanitarian grounds' based on the severity of the potential harm to his children."¹²⁰

The government appealed the immigration judge's decision to the BIA, which vacated the grant of withholding of removal on both grounds.¹²¹ As to the first ground, the BIA found the facts of the *A-K-* case to be "nearly identical" to the facts of *Oforji*¹²² and distinguished the *Abay* decision based on the difference in status between *Abay*'s daughter and *A-K-*'s daughters.¹²³ Even though the BIA relied on the Seventh Circuit's

accompanied children who have the same status as their parents but conflicting interests).

115. BIA decisions are binding on Immigration Judges and all officers and employees of the Department of Homeland Security. 8 C.F.R. § 1003.1(g) (2008). Historically the BIA has followed a federal circuit court's precedent in cases arising within the jurisdiction of that circuit. *In re Anselmo*, 20 I. & N. Dec. 25, 31-32 (B.I.A. 1989).

116. See *In re A-K-*, 24 I. & N. Dec. 275 (B.I.A. 2007).

117. See *id.* at 275-276.

118. *Id.*

119. *Id.*

120. *Id.* at 279.

121. The discussion *infra* focuses on the BIA's decision on the first ground. The BIA vacated the humanitarian ground based on their interpretation that there is no discretionary component in a humanitarian grant of withholding of removal under INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (2006), and that this form of relief may not be granted if a "probability of qualifying persecution to the applicant is not shown." *In re A-K-*, 24 I. & N. Dec. at 279.

122. *In re A-K-*, 24 I. & N. Dec. at 277; see *Oforji v. Ashcroft*, 354 F.3d 609 (7th Cir. 2003), discussed *supra*, p. 199-200.

123. "[*Abay*] involved a decision where the daughter of the alien in removal proceedings had no lawful status in the United States and could not legally remain in the country in the event of her mother's removal in order to avoid persecution," whereas *A-K-*'s daughters were United States citizens. *In re A-K-*, 24 I. & N. Dec. at 277 (citing *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004)). This is a distinction without a difference, however, because a parent may not obtain derivative asylum status through his or her child; though a child without status may obtain asylum whereas a child who is a United States citizen may not, both children will be equally unable to prevent their parents from being deported unless the parent herself obtains relief. See *supra* note 51. The status of the child should not be the focus of the inquiry, therefore, but rather what will actually happen to the child upon the parent's deportation. If the child will also leave if the parent is deported, the parent should receive asylum based on whether the child will be persecuted and, if so, whether the persecution of the child amounts to persecution of the parent.

approach, the BIA neither mentioned the plight of the children nor made a referral to child protective services as was done in *Olowo*, despite the factual similarities between the two cases.¹²⁴

The failure of the BIA to mention the analysis and approach in *Olowo* highlights the unusual nature of the *Olowo* decision. Like *Olowo*, A – K – requested relief based on fear that his children, who had lawful status, would be persecuted upon his deportation. Dismissing as “speculative” an inquiry as to what would actually happen to the minor children if their father were removed, the BIA instead focused on the fact that the children were not legally required to accompany their father to Senegal.¹²⁵

[T]he statement of the Immigration Judge [that “members of respondent's family and respondent's wife's family, as well as other members of the Fulani tribe, would take whatever steps were necessary to insure that respondent's two young U.S. citizen daughters were subjected to the FGM procedure if returned to Senegal,”] is highly speculative and *assumes that the respondent's two United States citizen children would return with the respondent to Senegal*, which is factually questionable if the respondent truly believes that they would definitely be tortured there.¹²⁶

The BIA did not provide any evidence to support its skepticism toward A – K –’s testimony and the immigration judge’s assumption that the children would go to Senegal with their father.¹²⁷ It seems the BIA based its decision regarding the plight of the United States citizen daughters on its belief that, if A – K – were telling the truth about what would happen to his children in Senegal, he simply would not take them there.¹²⁸ Perhaps this maneuvering allowed the BIA to ignore its role in effectively deporting the United States citizen daughters to a country where they would be persecuted; sadly, this formalistic approach to protection results in no protection at all in cases like A – K –.¹²⁹

For directly affected children in immigration proceedings, access to protection when the parent’s and child’s interests align will depend on geography. If the child and parent reside in the Sixth or Ninth Circuits they may be able to access protection. If the child and parent reside in any

124. *In re A – K –*, 24 I. & N. Dec. at 277.

125. *Id.*

126. *Id.* at 280 (emphasis added).

127. Moreover, there was no adverse credibility finding against A – K –. *Id.*

128. This skepticism toward the claim that the daughters would return with their father conflicts with the BIA’s approach in *In re Ige*, where the BIA actually required evidence that the children would *remain in the United States* after their parents were deported. See *In re Ige*, 20 I. & N. Dec. 880, 885 (B.I.A. #1994). No such evidence was required in *In re A – K –*.

129. Arguably, the Seventh Circuit felt this route was not a possibility, which is why, in *Olowo*, they made the unusual move of referring the case to child protective services. *Olowo v. Ashcroft*, 368 F.3d 692, 703-704 (7th Cir. 2004).

of the other circuits, the BIA's decision in *In re A – K* – is controlling, and protection will be denied. For children and parents in the Seventh Circuit, not only will they be unable to access protection, they must also fear that, in light of *Olowo*, children will be taken into custody of the state based on testimony in immigration proceedings.

IV. BEST INTERESTS APPROACH IN IMMIGRATION LAW: THE CANADIAN MODEL

Unlike the United States, Canada has incorporated a "best interests of the child" approach into its immigration law and proceedings.¹³⁰ The United States and Canada share analogous immigration histories and immigration flows, and have developed immigration systems that have many similarities.¹³¹ In fact, Canada admits a greater proportionate share of immigrants to North America than the United States.¹³² Most importantly for the purpose of this Article, Canada and the United States have mutually agreed that they both provide effective protection¹³³ for individuals seeking protection under the Convention Relating to the Status of Refugees,¹³⁴ in that an individual must make a claim for asylum in the

130. Canadian immigration law provides for the appointment of a best interests designee for directly affected children and allows the child's best interests to be a component for immigration relief for the child's parent. See *infra* notes 137 and 147. A survey of immigration law and procedure in foreign countries is beyond the scope of this Article. However, Canada is not the only country to incorporate a "best interests of the child" approach into their immigration system. Australia has found the "best interests of the child" standard to be relevant to proceedings involving the deportation of a parent. See *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 C.L.R. 273, 289 (Austl.).

131. Monica Boyd, U.N. International Symposium on International Migration and Development, June 28-30, 2006, *Gender Aspects of International Migration to Canada and the United States* at 1, U.N. Doc. UN/POP/MIG/SYMP/2006/08 ("Both [the United States and Canada] share many similarities in their immigration histories."); see *id.* at 2-3 (explaining that both the United States and Canada view migrants as permanent and admit most with the right to live permanently and that both countries also have similar approaches for individuals who will enter only on a temporary basis).

132. *Id.* at 1. This makes Canada's model a good evaluative tool to determine whether incorporating a "best interests of the child" approach leads to opening the proverbial floodgates to immigrants. Since Canada admits a greater proportionate share of immigrants than the United States, it is plausible to assume that Canada shares similar concerns about opening the floodgates to immigrants and therefore would resist implementing a policy that would encourage this type of immigration.

133. See Safe Third Country Agreement, U.S. – Canada, pmb., Dec. 5, 2002, available at <http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp> (last visited Mar. 15, 2009) [hereinafter Safe Third Country Agreement]; see also Immigration and Refugee Protection Act (IRPA) § 102(a) (2001) c. 27 (Can.) (requiring any country designated as a safe third country by the Canadian government to comply with Article 33 of the Convention Relating to the Status of Refugees and Article 3 of the Convention Against Torture). See generally Memorandum, David A. Martin & Yvonne Lamoureux, Treatment of Gender-Based Asylum Claims in the United States: Memorandum Prepared for the Attorney General of Canada (Mar. 31, 2003) (on file with author) (analyzing gender-based claims in the United States after the implementation of the Safe Third Country Agreement in response to criticism that gender-based claims were less likely to be successful in the United States in comparison to Canada).

134. Convention Relating to the Status of Refugees, July 28, 1951,

first of the two countries he or she arrives in, with some limited exceptions.¹³⁵ All of the scenarios analyzed in Part II of this Article center around a directly affected child's ability to access protection. Since these two countries are supposed to provide effective protection from *non-refoulement*,¹³⁶ the protection provided by the Canadian "best interests of the child" approach should be the minimum for the United States immigration system. However, for children who are directly affected by United States immigration law, there is a significant difference between the protection available in the United States and Canada.

A. "Best Interests of the Child" Designee

Unlike in the United States, immigration law in Canada requires the designation of a representative for both unaccompanied and accompanied children who are the subject of proceedings.¹³⁷ The representative is designated at the time of the immigration hearing by the presiding member of the Refugee Division making the immigration decision.¹³⁸ The mandatory criteria for designating a representative for child refugee claimants includes that the "person must not be in a conflict of interest situation with the child claimant such that the person must not act at the expense of the child's best interests."¹³⁹ The person chosen as the designated representative must "be willing and able to fulfill the duties of a representative and to act in the 'best interests of the child.'"¹⁴⁰ For accompanied children, the designated representative is usually a parent.¹⁴¹

19 U.S.T. 6223, 189 U.N.T.S. 150, available at http://www.unhcr.ch/html/menu3/b/o_c_ref.htm.

135. See Safe Third Country Agreement, *supra* note 133, at art. 4, para. 1. These include exceptions for family members, unaccompanied minors, document holders and other public interest exceptions. *Id.* at art. 4, para. 2.

136. See Safe Third Country Agreement, *supra* note 133, at pmb1.

137. See IRPA § 167(2) (2001) c. 27 (Can.) (requiring the designation of a representative for all persons under the age of 18 years who are the subject of proceedings).

138. IMMIGRATION AND REFUGEE BOARD OF CAN., CONVENTION REFUGEE DETERMINATION DIVISION (CRDD) HANDBOOK 10-8 (1999), available at http://www.irb.gc.ca/eng/brdcom/references/legjur/rpdspr/guide/documents/handbook_e.pdf [hereinafter CRDD HANDBOOK].

139. IMMIGRATION AND REFUGEE BOARD, CHILD REFUGEE CLAIMANTS PROCEDURAL AND EVIDENTIARY ISSUES, GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE IMMIGRATION ACT (Sept. 30, 1996), available at <http://www.cisr-irb.gc.ca/eng/brdcom/references/pol/guidir/Pages/ChiEnf.aspx> [hereinafter CANADIAN GUIDELINE].

140. *Id.* at Part II. The duties of the designated representative are the following: to retain counsel; to instruct counsel or to assist the child in instructing counsel; to make other decisions with respect to the proceedings or to help the child to make those decisions; to inform the child about the various stages and proceedings of the claim; to assist in obtaining evidence in support of the claim; to provide evidence and be a witness in the claim; [and] to act in the best interests of the child.

Id.

141. See *id.* This approach strikes the right balance vis-à-vis immigration law and family

However, if a parent is in conflict with the child's interest or is unable to act in the best interests of the child, the parent will not be appointed the child's designated representative.¹⁴²

The Canadian "best interests of the child" approach also attempts to reduce the invisibility of accompanied children in refugee proceedings. The Canadian Guideline requires that even when a child's claim is heard jointly with that of his or her parents, a separate refugee determination be made.¹⁴³ In addition, while a child's claim is usually heard jointly with that of his or her parents, a child's claim may be heard separately if a joint hearing is "likely to cause an injustice."¹⁴⁴

B. Best Interests in Humanitarian and Compassionate Relief

The Canadian consideration of the best interests of the child does not end with the appointment of a representative for all children in proceedings. Canadian law also allows for the consideration of the best interests of the child when a parent is facing removal from Canada and the child has the right to remain.¹⁴⁵ A parent in such a situation can apply for permanent residency in Canada through a humanitarian and compassionate (H&C) relief application.¹⁴⁶ When considering applications for H&C relief, decision-makers must take into account "the best interests of the child directly affected."¹⁴⁷ Judicial interpretation of these provisions has provided guidance on how to apply the "best interests of the child" inquiry in such situations.¹⁴⁸ The Federal Court of Appeal held that:

law. It respects the sanctity of the family, unless the parent is in a conflict of interest situation with the child.

142. *Id.* at Part I (explaining the role of the "Designated Representative").

143. *Id.* (explaining the three categories of children who make refugee claims).

144. Convention Refugee Determination Division Rules SOR/93-45, 10(3) (Can.).

145. The child could either have refugee status in Canada or be a Canadian citizen. This situation is analogous to the mixed status scenarios described above. *See supra* Part II.C-D.

146. *See* CITIZENSHIP AND IMMIGRATION CANADA, APPLYING FOR PERMANENT RESIDENCE FROM WITHIN CANADA: HUMANITARIAN AND COMPASSIONATE CONSIDERATIONS (2006). For parents who have already received permanent residency, Canadian law allows for the best interests of the child to help a parent overcome a failure in meeting the requirement of continuous physical presence. *Id.*

147. IRPA § 25(1) (Can.). In addition, § 67(1)(c) of the IRPA empowers the Immigration Appeal Division to grant an appeal if, "taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief . . ."

148. *See Baker v. Canada*, [1999] 2 S.C.R. 817, ¶ 75 (Can.):

[In making H&C decisions,] the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H&C claim even when children's interests are given this consideration. However, where the interests of children are minimized . . . the decision will be unreasonable.

The “best interests of the child” are determined by considering the benefit to the child of the parent’s non-removal from Canada as well as the hardship the child would suffer from either her parent’s removal from Canada or her own voluntary departure should she wish to accompany her parent abroad. Such benefits and hardship are two sides of the same coin, the coin being the best interest of the child.¹⁴⁹

This approach does not mean, however, that simply having a child will prevent an individual’s deportation from Canada or that there is a prima facie presumption that the children’s best interests will prevail.¹⁵⁰ Instead, the discretion created by H&C relief is to allow decision-makers to have flexibility to approve of “deserving cases not anticipated” by other immigration legislation.¹⁵¹

The Canadian model – appointing a best interests designee, determining a child’s refugee status separately from the parents, and considering the “best interests of the child” – can, if implemented correctly, address the issues raised by both the *Olowo* case and the scenarios described above.¹⁵² Regarding Scenarios 1 and 2, where a directly affected child shares the same status and interest as the parent, the Canadian model can ensure that the child’s claim is not invisible. Regarding Scenario 3, in which the parent and child share the same status but have conflicting interests, the appointment of a best interests designee whose interests do not conflict with those of the child will increase the likelihood that the decision-maker will be made aware of the child’s plight. Finally, for situations like the one facing Esther Olowo, the Canadian model would allow for a grant of H&C relief, rather than a referral to child protection proceedings.

In contrast with the approach taken by the United States, the Canadian “best interests of the child” model increases access to protection for and visibility of directly affected children in immigration proceedings. However, the Canadian model may still fall short in ensuring the safety, permanency and well-being of all directly affected children. A review of how the best interests designee is appointed is needed to guarantee the designee is not in conflict with the child. Placing the burden of appointing the designee on the decision-maker may create incentives to look past potential conflicts in order to resolve cases more quickly. For cases in which a parent is found to have a conflict of interest with the child, the

149. *Hawthorne v. Canada*, [2002] F.C.A. 475, ¶ 4 (Can.)

150. *See Legault v. Canada*, [2002] 4 F.C. 358, ¶ 13 (Can.) (holding that in H&C applications, there is not a prima facie presumption that the best interests of the child will prevail).

151. *Id.* at 372, ¶ 21.

152. *See supra* Introduction (discussing *Olowo* case) and Part II (presenting scenarios).

child should be appointed a separate lawyer in addition to a best interests designee. Without a lawyer, there is no advocate for the wishes of the child, which may be in conflict with or different from what is determined to be the child's best interest. A best interests designee should be appointed for all children directly affected by immigration proceedings, not simply for those who are subject to proceedings. Finally, in order to increase the ability for children to access protection, the "best interests of the child" should be the primary consideration for H&C-type relief, not simply a consideration.

V. INCORPORATING A "BEST INTERESTS OF THE CHILD" APPROACH FOR DIRECTLY AFFECTED ACCOMPANIED CHILDREN INTO DOMESTIC IMMIGRATION LAW AND POLICY

In order to protect directly affected children in immigration proceedings, United States immigration law and procedure should, at a minimum, incorporate the Canadian "best interest of the child" approach. Statutory reform of this nature would both extend the protections that some directly affected children already receive¹⁵³ and be more consistent with international law.¹⁵⁴ In addition, a best interests approach for directly affected children would bring United States immigration law more in line with other domestic areas of law where children are affected, such as child custody and abuse and neglect.¹⁵⁵ Both substantive and procedural reforms¹⁵⁶ are required to provide effective protection to all directly affected children in immigration proceedings.

A. Procedural Reform

Procedural changes, such as requiring the designation of a best

153. Such as children who qualify for SIJS relief or, perhaps, certain children in some asylum and cancellation of removal cases.

154. See discussion of the CRC, *supra* Part I.B.

155. In fact, some scholars argue there is not a bright line between immigration and family law. See Thronson, *supra* note 11, at 508:

By deciding whether a particular relationship between a child and a parent is worthy of recognition and assigning this relevance in immigration law, immigration law regulates basic family decisions such as where and with whom children will live. It influences private family decisions and behavior as parents and children conform their actions to qualifications set forth in immigration law.

See also *id.* at 510 (discussing *Castro v. United States*, 2007 U.S. Dist. LEXIS 9440 (S.D. Tex. Feb. 9, 2007), an immigration case in which "the operation of immigration effectively functioned to determine the custody of the child for the next three years."); Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625 (2007); Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005).

156. Substantive changes are those which create new claims for relief. Procedural reforms are those which focus on policy and process.

interests representative and providing separate decisions for accompanied children who do not have status to remain in the United States will solve many of the invisibility and lack-of-access problems highlighted above.¹⁵⁷ Invisibility would decrease with the introduction of a designated individual in the proceedings whose role is to determine and advocate for the child's best interests. Simply having a best interests representative as part of the immigration proceedings would help to alert decision-makers that the child's claim is important and must be voiced. In a system that requires individual determinations, it will be much harder for a child's claim to be overlooked, either benignly or purposefully.

1. Best Interests Representative

All children directly affected by immigration proceedings in the United States must have a designated best-interests-of-the-child representative ("best interests representative").¹⁵⁸ This representative should be appointed at the beginning of the immigration procedure¹⁵⁹ after a determination that the best interests representative is not in conflict with the child's interests.¹⁶⁰

Guidelines for who might qualify to be a best interests representative, and who would designate the representatives, would need to be defined. At a minimum, the United States could adopt the criteria used in Canada. Under Canadian law the best interests representative is designated by the division making the immigration decision and the designee must be over eighteen years old, be able to appreciate the nature of the proceedings, be willing and readily able to represent the child, and not have a conflict of interest with the child.¹⁶¹

2. Individual Determinations

For directly affected accompanied children without the right to remain in the United States, an easy way to increase access and visibility is to

157. See *supra* Part II.

158. Child advocates charged with advocating for the best interest of the child are already allowed for certain unaccompanied children. "The Secretary of Health and Human Services is authorized to appoint independent child advocates for child trafficking victims and other vulnerable unaccompanied alien children." 8 U.S.C.A. § 1232(c)(6) (West, Westlaw through Dec. 2008 amendments).

159. One critique of Canada's approach is that it does not require a representative to be designated at the beginning of the process. See CANADIAN COUNCIL FOR REFUGEES, IMPACTS ON CHILDREN OF THE IMMIGRATION AND REFUGEE PROTECTION ACT 21 (Nov. 2004).

160. Similarly to the Canadian approach, the initial appointment of a best interests representative must not be final. The process must be flexible enough that if a conflict of interest arises at any point in the proceedings a new best interests representative could be appointed. See CRDD HANDBOOK, *supra* note 138, at 10-7, 10-8.

161. *Id.* at 10-7.

require individual determinations of their claims for relief.¹⁶² In cases where a parent is granted relief and the child receives derivative relief, this approach may seem redundant or wasteful. However, the reality of most immigration proceedings in the United States is such that when the decision on the parent's case is issued, the time for submitting and gathering evidence has usually passed. If the decision-maker is only required to make a decision on the parent's case, then the decision-maker will gather information and spend time only on that case. The potential gap in protection would arise in a case in which the parent's claim for relief is denied and no evidence regarding the child's claim has been submitted because the decision-maker had not anticipated having to make a determination on the child's independent claim for relief. If individual determinations for all directly affected children without status are too burdensome, the alternative could be to require the staying of any removal order for an accompanied child's parent until a new proceeding could be brought on the child's claim for relief.

Procedural reform of appointing a best interests representative and requiring individual determinations on children's cases would begin to reduce the risks faced by directly affected accompanied children in immigration proceedings. However, procedural reform alone will not protect children in situations like those of Esther Olowo's daughters. To protect Esther's daughters requires substantive reform that makes the "best interests of the child" an element of relief from removal.

B. Substantive Reform

Substantive reform is required in conjunction with the procedural reforms outlined above in order to fully address the protection gaps highlighted by the *Olowo* case and the previously discussed scenarios. A best interests determination must be made for children whose parents are ordered removed and decision-makers must have the discretion to grant relief if the best interests determination requires it. This substantive reform will allow children who are United States citizens or legal permanent residents and who are in mixed status families the right to access the same protection that children without status often have access to.

1. Best Interests Determinations

A best interests representative can advocate for a child's best interests, but any system incorporating a "best interests of the child" approach must also include a venue to make a legal determination of the child's best

¹⁶² Again, this mirrors the Canadian approach. See CANADIAN GUIDELINE, *supra* note 139, at 2.

interest. A “best interests of the child” determination must be made by the immigration decision-maker for directly affected children when their parents are ordered removed.¹⁶³

Respecting the best interest of the child requires, as the Federal Court in Canada recognized,¹⁶⁴ consideration of both the benefit to the child if the parent were not removed and the hardship the child would suffer if only the parent were removed or if the child accompanied the parent. A “best interests of the child” determination is not needed in cases in which a parent is not ordered removed.

2. Increased Decision-Maker Discretion

Substantive statutory reform of United States immigration law is required in order to give effect to “best interests of the child” determinations. To effectively protect directly affected accompanied children, immigration decision-makers must be given discretion to grant relief when it is in the best interests of a directly affected child.¹⁶⁵ Many of the substantive changes required to increase decision-maker discretion in order to give effect to the best interests of the child already exist in other areas of United States immigration law and therefore simply need to be expanded in order to provide protection for all directly affected accompanied children.

Immigration decision-makers in the United States do not have the discretion of their Canadian counterparts to address situations like the one facing Esther Olowo and her twin daughters. Immigration decision-makers need more discretion than they currently have in order to be able to give the best interests of directly affected children primary consideration.

A new form of relief similar to Canada’s H&C relief should be made available to allow decision-makers to protect directly affected accompanied children. Decision-makers should be able to take into account the issues facing directly affected children and must be able to cancel the removal of a parent when the plight of the directly affected child requires it.¹⁶⁶

163. A best interests of the child determination is not required for children whose parents are not ordered removed because presumably those directly affected children will have access to protection mechanisms that are available to all children in the United States. When a parent of a directly affected child is ordered removed, immigration law effectively becomes child custody law, and a best interests of the child determination must be made so that the interests of the directly affected child can be taken into account.

164. *See supra* notes 148-150.

165. A bill that would allow this type of discretion in cases involving only United States citizen children is currently pending in Congress. Under the standard outlined in this bill, the parent of a United States citizen child could be granted relief from removal if the immigration judge determines that such a removal would be “clearly against the best interests of the child.” H.R. 1176, 110th Congress (2007).

166. By allowing family members to remain unified when the best interests of the child require it, this approach respects the constitutional limits on the state’s intervention in the child parent relationship. *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“It is cardinal

Immigration decision-makers should be required to give primary consideration to the best interests of the child when deciding whether the child's parent(s) will receive relief from removal.

While allowing directly affected children to be the basis for immigration relief for a parent, as is done in H&C relief, may initially seem to be a significant departure from current United States immigration law,¹⁶⁷ it is, in fact, simply an extension of an approach already offered to certain foreign national children.¹⁶⁸ Foreign national children who have been victims of human trafficking or other serious crimes in the United States may qualify for T or U Visas,¹⁶⁹ forms of relief which allow them to petition for visas on behalf of their parents.¹⁷⁰ Since the United States immigration system already provides an avenue for certain vulnerable children¹⁷¹ to obtain permission for their parents to remain in or come to the United States, expanding this regime to all directly affected children would make United States immigration law more consistent such that every child would be equally protected.¹⁷² It seems counterintuitive that a foreign national who is a victim of a crime in the United States may receive protection and has a right to reunite with his or her parents but a United States citizen who is at risk of being the victim of a crime may not access protection nor be allowed to remain in the United States with his or her parents.¹⁷³

Increasing judicial discretion to allow parents to remain in the United States when it is in the best interests of the child also respects the structure and history of United States immigration law. Family reunification is the "dominant feature of current arrangements for permanent immigration to the United States."¹⁷⁴ The legislative history of the Immigration and

with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *see also* *Troxel v. Granville* 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children-is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme Court].").

167. United States citizens may petition for their parents, but not until they reach the age of twenty-one. INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2006). In addition, children cannot provide derivative asylum for their parents. *See* 8 U.S.C. § 1158(b)(3) (limiting derivative asylum to the spouse or child of an asylee).

168. T and U visas allow a child to be the basis for a parent's immigration relief. *See supra* note 88 (summarizing eligibility requirements for T and U visas). Giving deference to the plight of a child in order to create an avenue for immigration relief is also in line with historic approaches to this type of claim in the asylum law context.

169. *See supra* note 88 (summarizing eligibility requirements for T and U visas).

170. *See* INA § 101(a)(15)(T)(ii)(I), (U)(ii), 8 U.S.C.A. § 1101(a)(15)(T)(ii)(I), (U)(ii) (West, Westlaw through Dec. 2008 amendments); *see also supra* Part III.C (discussing the availability of immigration relief for a parent when a child receives a T or U Visa).

171. Arguably, as victims of a crime or human trafficking, these children have already demonstrated their vulnerability.

172. The need for such reform from a protection standpoint is illustrated in the scenarios above. *See supra* Part II.

173. *See supra* Part III.C. (highlighting the availability of immigration relief for the parents of foreign national children who receive T or U Visas).

174. THOMAS ALEXANDER ALENIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 319 (4th ed. 1998) (noting the special preferences in U.S. immigration law for

Nationality Act “clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united.”¹⁷⁵ United States immigration law sets aside a large number of visas every year to reunite families of adult citizens¹⁷⁶ and includes a waiver of inadmissibility for “humanitarian purposes, family unity, or when it is otherwise in the public interest.”¹⁷⁷

Implementing a form of relief similar to Canada’s H&C relief would bring immigration law more in line with the United States’ historical approach of respecting families. The Supreme Court has stated that “[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in the Nation’s history and tradition.”¹⁷⁸ In light of this history, protecting the sanctity of family while at the same time protecting children from persecution and torture should not be a controversial policy position. However, the politics of immigration law and policy in the United States mean such an approach will be met with criticism.

C. Critiques of Proposed Reforms

Critiques of the substantive and procedural reforms suggested above will likely include the scarcity of resources to implement such a plan, the placement of responsibility of the best interests of the child with an agency responsible for interpreting federal immigration law, and the potential for opening the floodgates to immigrants by allowing children to be a source of immigration relief for parents.

immediate relatives of United States citizens).

175. H.R. REP. NO. 85-1199, pt. 2 (1957), *reprinted in* 1957 U.S.C.C.A.N. 2016, 2020.

176. The United States annually sets aside a specified number of visas for the following categories:

1. Unmarried sons and daughters of United States citizens and their children, if any (23,400).
2. Spouses, minor children, and unmarried sons and daughters of lawful permanent residents (114,200).
3. Married sons and daughters, and their spouses and children. (23,400).
4. Brothers and sisters of United States citizens, and their spouses and children, provided the United States citizens are at least 21 years of age (65,000).

INA § 203 (a)(1)-(4), 8 U.S.C § 1153(a)(1)-(4) (2006). There is no annual visa limit for United States citizens who are petitioning for a spouse or unmarried children. There is also no limit for United States citizens who are at least twenty one years of age who wish to bring their parents. 8 U.S.C. § 1151.

177. 8 U.S.C. § 1255(h)(2)(B).

178. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

1. Resources

Appointing best interests representatives will require additional resources, but it will not be extremely resource intensive because the best interests representative will often be the parent. When the parent cannot function as the child's best interests representative, the decision-maker must appoint an appropriately trained individual. Appointing a best interests representative may ultimately conserve resources: if a child's claim is the strongest claim and results in a grant of protection for the child and parent, the case may require fewer appeals, thus saving judicial resources.

2. Role of the Immigration Decision-Maker

Following the Canadian model and allowing immigration decision-makers to designate the best interests representative could result in inadequate protection for children because an agency responsible for interpreting federal immigration law does not have expertise in the area of child protection. One response to this potential problem would be to model the designation and requirements for the best interests representative on state guardian ad litem systems. Adopting state guardian ad litem systems could also be problematic, however, if it resulted in fifty different approaches for federal immigration proceedings.¹⁷⁹

Following the Canadian approach and allowing the immigration decision-maker to make the best interests determination for directly affected children may result in determinations from decision-makers lacking the necessary expertise. In addition to a lack of expertise there is a real risk that, by allowing an immigration decision-maker to make a best interests determination, the federal government would be encroaching even further into a decision making area traditionally reserved to the states.¹⁸⁰ These concerns cannot be overstated, considering that Congress chose not to vest the best interests determination with the immigration decision-maker when developing SIJS relief.¹⁸¹ In addition to drawing on

179. A 1996 study by Jean Koh Peters found very little continuity in the theory or practice of guardians ad litem across the country. See KOH PETERS, *supra* note 29, at 41 (finding that "in many jurisdictions, if not all, it was reported that the practice of guardians *ad litem* and attorneys for children varied wildly *within* the state, from locality to locality, from county to county, even from courthouse to courthouse and lawyer to lawyer.")

180. See Thronson, *supra* note 11 (arguing that certain federal immigration decisions are already functionally child custody determinations).

181. When implementing the SIJS relief, the INS acknowledged that the United States immigration system does not have the expertise or the capacity to make "best interests of the child" determinations. "[I]t would be both impractical and inappropriate for the Service to routinely readjudicate judicial or social service agency administrative determinations as to the juvenile's best interest." Special Immigrant Status; Certain Aliens Declared Dependent on a

the strengths and capacities of each system, the SIJS model replicates the traditional allocation of power between federal and state governments. The federal government has long been acknowledged to have plenary power over immigration matters¹⁸² while state governments regulate matters of family law.¹⁸³ “The reliance upon state juvenile courts anticipated in the SIJ[S] statutory scheme signals Congress’ recognition that the states retain primary responsibility and administrative competency to protect child welfare.”¹⁸⁴

While immigration decision-makers do not have the same expertise as their counterparts in the child welfare system, they are not completely unfamiliar with claims for relief based on the plight of a child. Indeed, immigration decision-makers are familiar with parents’ attempts to protect their children by filing asylum claims or highlighting the plight of their children to meet the “exceptional and extremely unusual hardship” requirement.¹⁸⁵ Yet, unlike decision-makers in the child welfare context, immigration judges do not typically realize when a child is at risk of abuse, abandonment, neglect, or persecution when the parent is contributing to those harms. It is essential to have a mechanism to evaluate the best interests of the child in these types of cases, since “parental rights do not include the right to either inflict harm upon a child or to place a child in a position where he [or she] is likely to be harmed by others.”¹⁸⁶ If a parent does put a child at risk of harm, the state has a duty to protect the child.¹⁸⁷

Juvenile Court, Final Rule, Supplementary Information, 58 Fed. Reg. 42,843, 42,847 (Aug. 12, 1993). The implementation of systems to protect child welfare has generally been left to the states since “[t]he federal government’s more limited regulatory role in child welfare has resulted in comparatively less operation capacity in dealing with individual child welfare cases.” Gregory Zhong Tian Chen, *Eliau or Alien? The Contradiction of Protecting Undocumented Children Under the Special Immigrant Juvenile Statue*, 27 HASTINGS CONST. L.Q. 597, 611 (2000).

182. See *Fong Yue Ting v. U. S.*, 149 U.S. 698, 711 (1893) (stating that the power to deport is “an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare”); see also *Kleindiest v. Mandel*, 408 U.S. 753, 769-70 (1972) (“[P]lenary congressional power to make policies and rules for exclusion of aliens has long been firmly established.”); *Galvan v. Press*, 347 U.S. 522, 531 (1953):

Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government . . . that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government[.]

183. See *In re Burrus*, 136 U.S. 586, 593-94 (1890) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States.”); see also *Thronson*, *supra* note 11, at 456 (“Federal courts have long been quick to invoke the ‘domestic relations exception’ that ‘divests the federal courts of power to issue divorce, alimony, and child custody decrees.’”) (citing *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992)).

184. Chen, *supra* note 181, at 609.

185. See *supra*, Parts III.B., D.

186. Melissa Leavister, Note, *Ambiguity Equals Authority: The Immigration and Naturalization Service’s Response in the Elian Gonzalez Case*, 31 GOLDEN GATE U. L. REV. 219, 235 (2001).

187. Leavister, *supra* note 186, at 235.

In addition, even assuming immigration decision-makers possessed the same expertise and capacity as juvenile court judges, placing the best interests determination outside of the immigration system would help to insulate the determination from concerns related to immigration issues and puts the focus on the protection of the child.

Despite the benefits of utilizing the child welfare expertise and insulating the best interests determination from immigration issues, the hybrid model of the SIJS approach is inapplicable to children who are accompanied and directly affected by immigration proceedings. Unaccompanied children have access to a best interests determination by state courts because they are declared to be dependents of the state. Such a declaration is inappropriate in the context of accompanied children and any approach utilizing this model may seriously undermine the rights of non-citizen parents to retain custody of their children.¹⁸⁸ While directly affected children are not able to utilize the same mechanism for best interests of the child determinations, when possible the expertise and scholarly advances developed in the child advocacy system should be incorporated into immigration regulations and procedures.¹⁸⁹

The risk of federal immigration law encroaching on state child welfare law should diminish if a "best interests of the child" approach is incorporated in immigration law and procedure. If an immigration decision-maker is able to grant relief from removal based on the best interests of the child, there will be fewer situations in which federal immigration law behaves as child custody law.

3. Floodgates and Fraud

Immigration law and policy may be viewed as encouraging and discouraging certain types of immigration. Allowing decision-makers to grant relief to parents when their continued presence in the United States is in the best interests of their children might create incentives for individuals to come to the United States, have children, and then petition to remain in the United States.¹⁹⁰ However, this argument is not supported by the experience in Canada¹⁹¹ or by the approach itself. A "best interests of the

188. Thronson, *supra* note 11, at 462 (highlighting the potential for discrimination and bias on the basis of immigration status in child custody cases).

189. For example, the debate surrounding the uses and roles of guardians ad litem and client-centered lawyer implicates many of the same concerns facing directly affected children in immigration proceedings. See Koh Peters; *Recommendations of the Conference; Report of the Working Group*, *supra* note 32.

190. In fact, the Seventh Circuit in *Oforji v. Ashcroft* highlighted this concern: "Under the present law a woman who is otherwise a deportable alien does not have any incentive to bear a child (who automatically becomes a citizen) whose rights to stay are separate from the mother's obligation to depart." 354 F. 3d 609, 618 (7th Cir. 2003).

191. Canada accepts a greater proportional share of immigrants to North America than the United States. Immigration patterns to Canada have remained similar to those in the

child" determination will not result in a free pass.¹⁹² Many determinations may result in the conclusion that it is in the best interests of the child to voluntarily depart with the parent.

In addition to the concerns about creating incentives for individuals to come to the United States and have children in order to provide an avenue for relief against deportation, another concern about the approaches outlined here is the potential for fraud. "[R]efugees often lack documents attesting to the veracity of their claims of a family relationship."¹⁹³ Compounding this issue is the lack of an international law treaty definition of "family."¹⁹⁴ Different cultures and countries define "family" differently.¹⁹⁵ While these concerns are valid, they are not new. Immigration decision-makers already decide what constitutes a family unit and who possesses the correct documentation when adjudicating other visa applications and forms of relief from removal. The immigration system in the United States must grapple with potential fraud and documentation requirements regardless of whether it incorporates a best interest of the child standard.¹⁹⁶ Such concerns cannot excuse the United States' failure to protect directly affected accompanied children.

CONCLUSION

This Article identifies the ways the United States fails to protect both foreign national and United States citizen children who are directly

United States despite Canada's use of the best interests of the child approach. See Boyd, *supra* note 131 (noting the similar immigration patterns between the United States and Canada).

192. The jurisprudence developed in Canada around the best interests of the child illustrates that this standard is not simply a prima facie presumption of granting relief to the parent. See *supra* notes 148-150. The cancellation of removal context provides some evidence of how a standard in which a child's interest may impact the parent's status would be adjudicated. This is especially relevant in cases in which the decision-maker believes the hardship analysis is equivalent to a best interests of the child standard. See *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006 (9th Cir. 2005) (holding that the hardship analysis for cancellation of removal is consistent with a "best interests" analysis).

193. Kate Jastram and Kathleen Newland, *Family Unity and Refugee Protection*, in *REFUGEE PROTECTION IN INTERNATIONAL LAW* 556, 558 (2003).

194. GERALDINE VAN BEUREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 68 (1998).

195. Because of these differences, Article 5 of the CRC and the European Commission of Human Rights don't focus on creating a finite definition of "family," but instead focus on protecting "family life," which focuses on the substantive role of family members in relation to children rather than family titles. This approach

is consistent with the best interests of the child as it allows a child to maintain links with those relatives who have a substantive role to play in his or her life, and it also gives *locus standi* to family members other than the parents, enabling them to enforce their right to family life against the state.

Id. at 70.

196. The immigration system must already deal with how to document and define family members under current approaches. As examples, these issues could arise in family-based visa petitions, T and U nonimmigrant visa derivative petitions, and asylum applications.

affected by immigration proceedings. Directly affected children in immigration proceedings are at risk of serious harm, including persecution and torture, because of their invisibility and lack of access to protection. These failures of protection are a direct result of the availability of a "best interests of the child" determination to only a subset of children: those who are unaccompanied by a parent. Currently, United States immigration law utilizes a patchwork approach for identifying and protecting the interests of children directly affected by immigration proceedings. This patchwork approach is inconsistent with other domestic law, international law, and the immigration law of other countries, such as Canada.

In order to transform its patchwork protection approach to a seamless blanket of protection for all children, United States immigration law must incorporate a "best interests of the child" determination. This best interests approach must provide a voice to all children directly affected by immigration proceedings. The child's safety, permanency, and well-being must be part of the immigration decision-maker's analysis. Implementing the procedural and statutory reforms outlined in this Article would increase protection for all children directly affected by immigration proceedings. Such reforms would also eliminate the split among the federal circuit courts on the issue of whether the plight of a child may be a factor in deciding a parent's claim for relief. More importantly, however, incorporating the "best interests of the child" approach described in this Article will provide effective protection to all children directly affected by immigration proceedings, including children like Esther Olowo's daughters.