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Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents

Bill Piatt *

The United States has not been able to stop illegal immigration into this country.[1] Having failed in our attempts to directly halt the flow of undocumented[2] aliens, we have turned to indirect methods to stop it. Recently, for example, employer sanctions[3] were added to a list of mechanisms, including denial of public assistance,[4] in an attempt to break the

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1 The feeling that this country has "lost control over its borders" has been enunciated repeatedly in analyses of our immigration policies. *See, e.g.*, REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL OF THE UNITED STATES, ILLEGAL ENTRY AT U.S.-MEXICAN BORDER: 7 MULTIAGENCY ENFORCEMENT EFFORTS HAVE NOT BEEN EFFECTIVE IN STEMMING THE FLOW OF DRUGS AND PEOPLE (1977). *See also* Simpson, *Should Congress Adopt the Pending Immigration Reform and Control Act*, 57 REFERENCE SHELF: THE PROBLEM OF IMMIGRATION 76 (S. Anzovin ed. 1985). Most recently, a major motivating factor in the passage of the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. 99-603, 100 Stat. §§ 101, 102 (1986) (codified as amended at 8 U.S.C. §§ 1324a, 1324b (1982)), was this same fear that the United States had lost control of the borders to illegal immigration. For a compilation of the legislative history of IRCA, see 1986 U.S. CODE CONG. & ADMIN. NEWS 5649.

A succinct expression of this concern can be found in the dissenting opinion of Justice Starr in Shin v. INS, 750 F.2d 122, 130 (D.C. Cir. 1984):

> [T]his Nation has lost control of its borders. Not only does the Nation seem powerless to curb the tide of illegal immigration in the first instance, but the process of returning whence they came those who are now illegally here has become so protracted and complicated that the cost of an able immigration lawyer is in effect a ticket of admission permitting those unlawfully here to remain indefinitely.

Id.

No one is certain how many illegal immigrants there are in the United States. Within the last ten years estimates have ranged from three to six million (Plyler v. Doe, 457 U.S. 202, 218 n.17 (1982)) to as many as eight to ten million (Note, *Undocumented Aliens: Education, Employment and Welfare in the United States and New Mexico*, 9 N.M.L. REV. 99 n.1 (1978-1979), citing *The "Illegals,"* Time, Oct. 16, 1978, at 58). Yet, claims of a flood of undocumented immigrants is often based upon speculation, and the best estimate actually may be between two to three million persons, increasing at 100,000 to 300,000 persons per year. *See* Passell, *Undocumented Immigration*, IMMIGRATION AND AMERICAN PUBLIC POLICY (R. Simon ed. 1986).

2 Some writers prefer to use the word "undocumented" rather than "illegal" because they believe the latter term is pejorative. *See, e.g.*, Note, *Analysis of An Analogy: Undocumented Children and Illegitimate Children*, 1983 U. ILL. L. REV. 697, 697 n.1. It is this writer's experience that the terms generally are used interchangeably to refer to persons who are in this country without proper authority. Both will be employed throughout this article in deference to common usage and with no disrespect intended by the use of one term in place of the other. The Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. §§ 1101(a)(3), 1251(a) (1982) speaks in terms of "deportable aliens."

3 IRCA § 210. The reason advanced for the imposition of employer sanctions in IRCA was to "close the back door" on illegal immigration by removing the "magnet" of employment which attracts aliens here illegally. *See* H.R. REP. No. 682(I), 99th Cong., 2d Sess. 46 (1986), *reprinted in part in*, 1986 U.S. CODE CONG. & ADMIN. NEWS 5649-50.

4 State attempts to limit benefits to aliens have been subjected to strict scrutiny and held to be an unlawful intrusion into the federal immigration powers. *See* Graham v. Richardson, 403 U.S. 365 (1971). However, federal limitations which deny benefits to undocumented or illegal aliens or even deny assistance to lawful permanent resident aliens until they have resided in the United States for five years have been upheld as part of the broad immigration powers of the federal government. *See* Mathews v. Diaz, 426 U.S. 67 (1976). Due primarly to inconsistent case law, a lack of coordination among federal and state agencies, and the confusion resulting from trying to adapt INS definitions to social services programs, the eligibility for public assistance of aliens and even lawfully admitted

forces attracting undocumented people to this country. In our zeal to make life in this country less desirable for the undocumented person and to discourage illegal immigration, we have sometimes, as our courts tell us, gone too far. We have punished children of the undocumented to discourage those parents from staying here and to discourage other parents and potential parents from either illegally bringing their children to this country or from giving birth here to United States citizen children.[5] Unfortunately, there is a major inconsistency. Courts will intervene to prevent administrative officials from making the educational or economic circumstances of citizen children within the country more difficult because of their parents' undocumented status. Courts will generally *not* intervene to prevent officials from making the educational or economic circumstances of these same children more difficult when they are effectively removed from this country by the deportation of their parents. This article examines the validity of these sanctions against United States citizen children for the purpose of discouraging illegal immigration.

I. Judicial Intervention in Public Assistance Cases

The most succinct expression of the principle that it is unconstitutional to punish children in order to discourage the illegal immigration of their parents can be found in a case involving illegal alien children. In *Plyler v. Doe*,[6] the Supreme Court considered a challenge to a Texas legislative scheme that withheld from local school districts any state funds for the education of children not legally admitted into the United States and authorized the districts to deny these children enrollment.[7] The Court concluded that such a scheme was inconsistent with the equal protection clause of the fourteenth amendment. It noted that unsanctioned entry into the United States is a crime and that those who have entered unlawfully are subject to deportation.[8] The Court acknowledged persuasive arguments which supported the view that a state may withhold its beneficence from those whose very presence within the United States is the

residents varies. *See* Wheeler & Levanthal, *Aliens' Rights to Public Benefits*, 20 CLEARINGHOUSE REV. 911 (1986). IRCA prohibits newly legalized aliens from receiving public assistance under certain programs for five years beginning on the date an alien was granted lawful temporary resident status. IRCA § 201(h).

5 With the exception of children born to foreign officials, a child born in the United States is a citizen of this country by virtue of the fourteenth amendment to the United States Constitution and 8 U.S.C. § 1401(a)(1) (1982). Not everyone is satisfied with this state of the law. *See* P. SCHUCK & R. SMITH, CITIZENSHIP WITHOUT CONSENT - ILLEGAL ALIENS IN THE AMERICAN POLITY (1985), *reviewed by* Neuman, *Back to Dred Scott* (Book Review), 24 SAN DIEGO L. REV. 485 (1987). It is interesting to note that minority people have had difficulty obtaining judicial recognition of their citizenship, notwithstanding their birth in this country. *See* Elk v. Wilkins, 112 U.S. 94 (1884) (Decided after the fourteenth amendment was enacted, this case held that Native Americans born in United States were not United States citizens); Scott v. Sanford (Dred Scott Case), 60 U.S. (19 How.) 393 (1857) (This case, decided prior to the fourteenth amendment, held that Blacks were not citizens.); *but cf.* United States v. Wong Kim Ark, 169 U.S. 649 (1898) (A child born to Chinese alien parents is a United States citizen. One might observe that, even though the Supreme Court reached the "right" result under the fourteenth amendment, it is remarkable that the case even needed to be brought.)

6 457 U.S. 202 (1982).

7 *Id.* at 205.

8 *Id.*

product of their own unlawful conduct.[9] Nonetheless, the Court concluded that these arguments should not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants.[10] The illegal parents would have the ability to conform their conduct to societal norms and remove themselves from the state's jurisdiction. But, the children could neither affect their parents' conduct nor their own status. The Supreme Court concluded that even if the state found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice:[11]

> Visiting . . . condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual — as well as unjust — way of deterring the parent.[12]

Plyler involved illegal alien children. There would seem to be no logical reason why the principle of not punishing children for the sins of their parents should not apply with at least equal force to United States citizen children.[13] The California Supreme Court relied in part upon *Plyler* in holding that the equal protection clause of the California Constitution does not permit the state to disadvantage citizen children eligible for governmental assistance on the basis that they live with undocumented siblings in *Darces v. Woods*.[14]

The California Supreme Court in *Darces* noted that the United States Supreme Court has consistently struck down legislation discriminating against illegitimate children for the reason that it is illogical and unjust to deprive a child simply because its natural father has not married its mother.[15] The California Supreme Court felt it should be similarly hostile to legislative classifications that deprive eligible children of governmental beneficence simply because they are brothers or sisters of undocumented aliens.[16] Reviewing *Plyler*, the California Court concluded that a strict level of scrutiny would be the appropriate standard of review; the primary underpinning of *Plyler* — that innocent children cannot be explicitly disadvantaged on the basis of their status of birth — applied regardless of whether the benefits were welfare benefits or education.[17] The *Darces* Court disagreed with the proposition that *Plyler* was

9 *Id.* at 219.

10 *Id.*

11 *Id.* at 220.

12 *Id.* citing Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972). Numerous articles have examined *Plyler*. *See, e.g.*, Several Authors, *Undocumented Aliens: Beyond* Plyler v. Doe, 15 J.L. & EDUC. 1 (1986).

13 In addition to the cases and discussion in notes 6-39, *see also infra* notes 119-24 and accompanying text.

14 35 Cal. 3d 871, 679 P.2d 458, 201 Cal. Rptr. 807 (1984).

15 *Id.* at 887-88, 679 P.2d at 468-69, 201 Cal. Rptr. at 817-18 citing Trimble v. Gordon, 430 U.S. 762 (1977); Gomez v. Perez, 409 U.S. 535, 538 (1973); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972). *See also* Note, *supra* note 2, at 697.

16 *Darces*, 35 Cal. 3d at 887-88, 679 P.2d at 469, 201 Cal. Rptr. at 818.

17 *Id.* at 891, 679 P.2d at 471, 201 Cal. Rptr. at 820.

distinguishable because it involved education and noted Justice Powell's concurring opinion which suggests *Plyler* is equally applicable in a welfare context:

> If the *resident* children of illegal aliens were denied welfare assistance, made available by government to all other children who qualify, this also — in my opinion — would be an impermissible penalizing of children because of their parents' status.[18]

The courts have intervened in other contexts to stop punishment of citizen children where the proposed scheme had the same purpose as the Texas statutes in *Plyler* — to discourage illegal immigration. In *Doe v. Miller*,[19] for example, citizen children and their undocumented parents obtained an injunction against implementation of policies of the Illinois Department of Public Aid which forced the parents either to withdraw food stamp applications on behalf of their children or disclose information about their alien status under the threat of being reported to the Immigration and Naturalization Service as illegal aliens.[20] After reviewing the applicable statute and regulations, the court concluded that as citizens, the plaintiff children were eligible for food stamps if the finances and resources of the household in which they lived fell below the level set and determined by defendants.[21] The court noted that the plaintiff parents did not apply for benefits for themselves, but rather, only on behalf of the citizen children.[22] It concluded that irreparable injury would occur to the children and their parents if an injunction did not issue for the reason that defendants' policies "unlawfully penalize [citizen] children for the alien status of their parents by subjecting the parents to intrusive, unnecessary questioning about their immigration status and threatening to report them to INS if they insist on applying for benefits for their children."[23] Regarding plaintiffs who arguably would not qualify for food stamps irrespective of the immigration status of the parents, the court concluded:

> Whenever defendants' policies and practices force an application for benefits to be withdrawn by placing parents of these plaintiffs in a quandary, they have been irreparably harmed because their right to have applications made on their behalf processed without regard to the alienage status of their parents has been compromised in a way that a subsequent remedy at law cannot adequately remedy; this is so even if plaintiffs' applications, if processed, could be denied on other grounds.[24]

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18 *Id.* at 892, 679 P.2d at 472, 201 Cal. Rptr. at 821 (citing Justice Powell's concurring opinion in *Plyler*, 457 U.S. at 239 n.3).

19 Doe v. Miller, 573 F. Supp. 461 (N.D. Ill. 1983).

20 *Id.* at 469.

21 *Id.* at 462-63, 468.

22 *Id.* at 465.

23 *Id.* at 468.

24 *Id.* The case was finally resolved by a consent decree which included, in part, a change in policies so that no inquiry may be made into the immigration status of household members not applying for benefits for themselves. *See, Children's Right to Food Stamps Upheld*, 7 YOUTH L. NEWS 10-11 (Mar.-Apr., 1986).

A citizen child successfully challenged the policies of the City and State of New York and their social services departments, which denied publicly funded daycare services to him on the ground that his mother was an illegal alien, in *Ruiz v. Blum*.[25] The court did not reach the plaintiff's due process and equal protection challenges.[26] Rather, it found the application of a New York state regulation[27] and a city policy paralleling it[28] which denied him benefits solely on the basis of his mother's status invalid under Title XX of the Social Security Act.[29]

The Idaho Supreme Court rejected an Idaho county's attempt to exclude citizen children of illegal alien parents from indigent health care in *Intermountain Health Care, Inc. v. Board of Commissioners of Blaine County*.[30] The court found no merit to the county's argument that a child's residence be deemed that of the illegal alien father and that therefore the child could not be a resident of Idaho entitled to the health care. A concurring opinion cites *Plyler* and *Ruiz* and finds "somewhat shocking"[31] the county's assertion that the child's citizenship was irrelevant and that the child and her parents were "legally indistinguishable."[32]

Both a federal district court in Wisconsin and a Washington state court rejected a Department of Health and Human Services policy under which citizen children of undocumented parents were prevented from receiving benefits under the Aid to Families with Dependent Children — Unemployed Parents Program.[33] While the decisions were based upon statutory grounds, the federal decision, citing *Plyler*, would find citizen children of undocumented parents a suspect classification requiring an intermediate level of scrutiny.[34]

Another area where a court has intervened is the attempt by the United States Department of Housing and Urban Development ("HUD") to enforce a regulation[35] which would prohibit citizens and lawful residents of the United States from receiving federally subsidized housing solely because they live with ineligible aliens. In the case of *Yolano-Donnelly Tenant Association v. Pierce*,[36] Judge Milton Schwartz issued a nationwide injunction on November 14, 1986, barring the implementation of this so-called "alien rule."[37] Citizenship requirements imposed by *local governments* upon tenants of HUD's rental housing programs previously

25 549 F. Supp. 871 (S.D.N.Y. 1982).

26 *Id.* at 877.

27 St. Dept. of Soc. Serv. Reg. 403.7, set forth in *Ruiz*, 549 F. Supp. at 875 n.18.

28 Policy Statement, N.Y. City Dept. of Soc. Services III.C.12(b), cited in *Ruiz*, 549 F. Supp. at 875 n.19.

29 *Ruiz*, 549 F. Supp. at 877.

30 109 Idaho 412, 707 P.2d 1051 (1985).

31 *Id.* at 416 n. 2, 707 P.2d at 1055 n.2.

32 *Id.*

33 Doe v. Reivitz, 85-C-0793 (E.D. Wisc., July 22, 1986); Garcia v. Rahm, *cited in* Henry, *Citizen Children of Undocumented Parents Win Right to Welfare Benefits*, 7 YOUTH L. NEWS 8 (Sept.-Oct., 1986).

34 Doe v. Reivitz, 85-C-0793 (E.D. Wisc., July 22, 1986).

35 Restriction on Use of Assisted Housing, 51 Fed. Reg. 11198 (April 1, 1986), *as amended*, 51 Fed. Reg. 26876 (July 28, 1986) (codified as amended in scattered sections of 24 CFR).

36 No. S-86-0846 MLS (E.D. Cal., July 15, 1986).

37 Plaintiffs contended that the regulations exceeded the scope of the statute (42 U.S.C. § 1436a (1982)) by which they were implemented, violated due process and equal protection, violated the Administrative Procedure Act and other federal statutes, and constituted an abuse of agency discre-

had been held invalid.[38] *Yolano* apparently is the first time that the *federal* imposition of such a requirement has been enjoined.[39]

Regarding the right of a citizen child of an undocumented parent to receive public assistance, it is clear that the courts will protect the child against the claim that the child is somehow less eligible to receive benefits because of the undocumented status of the child's parents. As has been seen, courts have expressed sensitivity to the general principle of not punishing children for the misdeeds of their parents. Courts will not require a citizen child to waive the right to benefits nor require the parents to turn themselves in to the INS as a condition to the child receiving assistance. They will protect the right of the child to the physical presence of the child's undocumented parents, at least to the extent of not requiring the citizen to forego public housing assistance because of the presence of an undocumented family member. However, the waters become much more muddied in the immigration context, the area to which this discussion turns.

II. Judicial Restraint in Immigration Cases

When undocumented parents become involved in deportation proceedings, the issue no longer is whether the citizen children should face hardship in the form of denial of public assistance. At this point, the issue becomes whether the children should face economic, linguistic, educational, cultural, or emotional hardship by virtue of the deportation of their parents. Courts demonstrate greater reluctance to intervene to prohibit this hardship than in the public assistance cases.

Citizen children, for example, have not been successful in pressing the view that the deportation of their undocumented parents is tanta-

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tion. Plaintiff's Complaint, Yolano-Donnelly Tenant Ass'n v. Pierce, No. S-86-0846 MLS (E.D. Cal., July 15, 1986).

In regard to the constitutional arguments, plaintiffs argued that low-income citizens have a right to financial assistance for housing under 42 U.S.C. § 1436a (1982). The "alien rule" disqualifies citizens and lawful residents from public housing where an unlawfully admitted alien is present in the household. The rule requires citizens to decide whether to forego governmental assistance or to separate themselves from those family members who are undocumented. In virtually all cases, the decision to remain together as a family would compel participants in the housing subsidy program to move. Thus, as a result of the rule, citizens in a family with undocumented persons would face a significant penalty for living together as a family. Plaintiffs argued that such a scheme violated the due process right of cohabitation with one's relatives and in support cited Moore v. City of East Cleveland, 431 U.S. 494 (1976). Plaintiffs also argued that Halet v. Wend Investment, 672 F.2d 1305 (9th Cir. 1982) which cites Roberts v. United States Jaycees, 468 U.S. 609, 619-620 (1984) protected the right of cohabitation with one's relatives as an aspect of the right of free association. Memorandum of Points and Authorities in Support of Plaintiffs Motion for a Temporary Restraining Order Preliminary Injunction, Yolano-Donnelly Tenant Ass'n v. Pierce, No. S-86-0846 MLS (E.D. Cal., July 15, 1986). In granting the injunction, Judge Schwartz found that the plaintiffs raised "serious questions on the merits of this case" with respect to three claims, including the fifth amendment right to cohabitate with one's family. Memorandum and Order, Yolano-Donnelly Tenant Ass'n v. Pierce, No. S-86-0846 MLS (E.D. Cal., July 15, 1986).

38 *See* Lopez v. White Plains Hous. Auth., 355 F. Supp. 1016 (S.D.N.Y. 1972).

39 The significance of such a limitation upon federal authority will be discussed at *infra* notes 90-137 and accompanying text. HUD has recently withdrawn its proposed appeal of Judge Schwartz's order granting a preliminary injunction, *see* California Rural Legal Assistance Memorandum, Yolono-Donnelly Tenant Ass'n v. Pierce, No. S-86-0846 MLS (E.D. Cal., July 15, 1986), and apparently is awaiting further congressional action. Interview with Michael C. Blank, Attorney for Plaintiffs in *Yolano-Donnelly* (Apr. 16, 1987).

mount to the *de facto* deportation of the child — a violation of the child's constitutionally protected rights to live in this country, to associate with family members, and to be guaranteed due process and equal protection of the laws.[40] The apparent dilemma that deportation either deprives American citizen children of their right to be brought up in the United States, with attendant benefits, or deprives them of their right to a family life with their natural parents has been answered with the conclusion that when infant citizens reach an age of discretion they can, if they so choose, return to the United States to live.[41] Thus, courts conclude that departure with deported parents would merely postpone — not bar — residence in the United States of an American citizen if he or she should ultimately choose to live here.[42] This approach ignores the fact that if the child chooses not to be separated from his or her parents, the child effectively will be denied a free public education and other benefits during the child's formative years while awaiting the arrival of the age of discretion.

There is some possibility of statutory relief available to the infant citizen faced with deportation. Section 244(a)(1) of the Immigration and Nationality Act[43] provides, in part, for the suspension of deportation and adjustment of status to that of a lawfully admitted permanent resident for an alien who meets certain conditions. These conditions include the requirements that the alien have been physically present in the United States for at least the preceding seven years and that the alien be a person of good moral character during that time.[44] Further, the alien must show that deportation would result in "extreme hardship" to the alien, or to the alien's citizen or permanent resident child.[45] However, an alien parent is not automatically granted the favored status and deportation proceedings halted "merely" because the alien has a citizen child.[46] "The 'mere existence' of a citizen child, without more, neither validates an otherwise invalid claim of extreme hardship to the alien nor automatically establishes extreme hardship to the child."[47] The inconvenience to a citizen child of being removed from the country is not enough.[48] Courts have struggled to determine their role in deciding how much hardship a child must endure before it becomes "extreme."

40 *See* Acosta v. Gaffney, 558 F.2d 1153 (3d Cir. 1977); *but cf.* dissenting opinion of Justice Douglas and Justice Black in Hintopoulos v. Shaughnessy, 353 U.S. 72 (1957).

41 *Acosta*, 558 F.2d at 1158.

42 *Id.* at 1154 n.1. *Cf.* Tischendorf v. Tischendorf, 321 N.W.2d 405 (Minn. 1982), *cert. denied*, 460 U.S. 1037 (1983) (where child objects to removal, child's constitutional right to remain in this country does not prevent the child's removal to a foreign country by his custodial parent).

43 Immigration and Nationality Act § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1982).

44 *Id.*

45 *Id.* Relief may also be obtained by the alien upon a showing of hardship to a citizen or resident spouse or parent. *Cf.* Tovar v. INS, 612 F.2d 794, 797 (3d Cir. 1980) (grandmother could claim extreme hardship to citizen grandchild who lived with her because the relationship resembled parent-child).

46 Choe v. INS, 597 F.2d 168 (9th Cir. 1979).

47 Wang v. INS, 622 F.2d 1341, 1348 (9th Cir. 1980), *rev'd on other grounds*, 450 U.S. 139 (1981).

48 *Id.*

After reviewing the legislative history[49] and case precedent, the Ninth Circuit, in *Wang* v. *Immigration & Naturalization Service*[50] decided in 1980 that the phrase "extreme hardship" should be construed liberally to attain its ameliorative purpose. It determined that when an allegation of such hardship to a citizen child is presented to the Board of Immigration Appeals ("Board"),[51] among the factors to be considered by that body in determining whether the effects of the parents' deportation are "sufficiently deleterious" are medical problems, the age of the child and the effect on the child's education, separation from other family members in the United States, and the difficulty of adjusting to a new country.[52] The Ninth Circuit decided that the Board had erred in its determination that there was no evidence of "extreme hardship" to justify a hearing in the situation where two United States citizen children of Korean parents had spent their entire lives (the children were 10 and 7 at the time of the decision) in the United States, did not speak Korean, and might face economic hardship. The court remanded the case for more thorough consideration.[53] The United States Supreme Court reversed.[54] The Court determined that the Attorney General and his delegates have the authority to construe "extreme hardship" narrowly should they deem it wise to do so and that the Ninth Circuit encroached upon that authority.[55] It quoted with approval a statement in the dissent below:

> [B]y using the majority opinion as a blueprint, any foreign visitor who has fertility, money, and the ability to stay out of trouble with the police for seven years can change his status from that of tourist or student to that of permanent resident without the inconvenience of immigration quotas. This strategy is not fair to those waiting for a

49 *Id.* at 1345 n.2.

50 622 F.2d 1341, 1346, *rev'd on other grounds*, 450 U.S. 139 (1981).

51 The Attorney General is given discretion under 8 U.S.C. § 1254(a)(1) (1982) to suspend the deportation. He or she may delegate these powers. 8 U.S.C. § 1103 (1982). Such authority has been delegated to special inquiry officers whose decisions are subject to review by the Board of Immigration Appeals. *Wang*, 450 U.S. at 140 n.2. The Board is a separate body in the Department of Justice and separate from the Immigration and Naturalization Service which is also part of the Justice Department. The Board is not a statutory body, and exists only by virtue of the Attorney General regulations. The Attorney General created the Board, fixed its powers, and retained the right to abolish it. *See* C. GORDON & E. GORDON, IMMIGRATION AND NATIONALITY LAW, § 1.8 (Student Ed., 1985).

52 *Wang*, 622 F.2d at 1348 n.7, 1349.

53 *Id.* at 1349. *See also* Israel v. INS, 710 F.2d 601, 605 (1983), where the Ninth Circuit observed:

> In *Wang*, we held that the petitioners' claim that their deportation would impose economic, cultural and educational hardship upon their citizen children considered together with the claim that deportation would impose severe economic hardship on themselves and their children constituted a prima facie case of extreme hardship sufficient to reopen the deportation proceedings. 622 F.2d at 1349. Our decision in *Wang* was however summarily reversed by the Supreme Court. INS v. Wang, 450 U.S. 139, 101 S.Ct. 1027, 67 L.Ed.2d 123 (1981).

54 INS v. Wang, 450 U.S. 139 (1981).

55 Secondly, and more fundamentally, the Court of Appeals improvidently encroached on the authority which the Act confers on the Attorney General and his delegates. The crucial question in this case is what constitutes "extreme hardship." These words are not self-explanatory, and reasonable men could easily differ as to their construction. But the Act commits their definition in the first instance to the Attorney General and his delegates, and their construction and application of this standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute.

Id. at 144.

quota.[56]

Wang and subsequent cases provide no clear definition of "extreme hardship" nor of the role courts will play in its definition and application. Other than telling us "because Congress said so," the cases provide no other answer why citizen children must suffer any hardship, let alone "extreme hardship," before they will be allowed to remain in this country with their undocumented parents. Ninth Circuit cases are illustrative.

In *Barrera-Leyva v. Immigration & NaturalizationService*,[57] the Ninth Circuit issued a pre-*Wang* opinion holding that the Board should consider the aggregate effect of the breakup of close family ties, the difficulty of citizen children adjusting to a new country (including the age of the children, with younger age mitigating adjustment difficulties), and economic and personal hardships from different living conditions which in the aggregate would constitute "extreme hardship."[58] However, following the Supreme Court's decision in *Wang*, the Ninth Circuit concluded upon rehearing[59] that it had erred and affirmed the Board's denial of the *Barrera-Leyva* petition.[60]

In *Prapavat v. Immigration & Naturalization Service*,[61] the Ninth Circuit had issued another pre-*Wang* decision reversing a Board finding of no "extreme hardship." Upon a post-*Wang* rehearing, the court affirmed its reversal.[62] Citing other pre-*Wang* Ninth Circuit decisions,[63] it concluded that the Board abused its discretion in failing to take into account the cumulative effect of the adverse consequences of deportation in determining whether a citizen child would suffer the requisite "extreme hardship."[64]

The Ninth Circuit found abuse of discretion where the Board had failed to consider both favorable and unfavorable aspects of claims of "extreme hardship" in *De La Luz v. Immigration & Naturalization Service*.[65] It required the Board to consider the hardship to citizen children if separated from their mother and any consequent costs for the care and placement of the children at public expense.[66] The Ninth Circuit also

56 *Id.* at 145 (quoting *Wang*, 622 F.2d at 1352 (Godwin, J., dissenting)).

57 637 F.2d 640 (9th Cir. 1980).

58 *Id.* at 644-645.

59 Barrera-Leyva v. INS, 653 F.2d 379 (9th Cir. 1981).

60 *Id.* at 380.

61 638 F.2d 87 (9th Cir. 1981).

62 Prapavat v. INS, 662 F.2d 561 (1981).

63 Villena v. INS, 622 F.2d 1352, 1357, 1359 (9th Cir. 1980); Choe v. INS, 597 F.2d 168, 170 (9th Cir. 1979).

64 The existence of a citizen child, deportation to an underdeveloped country that offers minimal opportunities for suitable employment, the child's lack of knowledge of that country's language, her health problems, and the economic loss from the forced liquidation of the Prapavats' assets must all be assessed in combination.

The Board's disposition of this case does not exhibit a proper consideration of the relevant factors. Failure to properly consider those factors is an abuse of discretion. Phinpathya v. INS, 657 F.2d 1083, 1086 (9th Cir. 1981). Accordingly, we must reverse the Board's order as to both petitioners and remand for further proceedings consistent with this opinion.

Prapavat, 662 F.2d at 563.

65 713 F.2d 545 (9th Cir. 1983).

66 De La Luz v. INS, 713 F.2d 545, 546 (9th Cir. 1983).

remanded another case to the Board so it could give proper consideration to non-economic hardship factors that separation from family members would cause a citizen child.[67] The court cited pre-*Wang* cases[68] for the proposition that separation from family members alone can constitute extreme hardship to a child.[69]

In another post-*Wang* decision, *Phinpathya v. Immigration & Naturalization Service*,[70] the Ninth Circuit again found an abuse of discretion where it determined that the Board failed to consider factors involved in uprooting an epileptic child from her community and moving her to Thailand. On *certiorari*, the Supreme Court reversed[71] on the ground that the Ninth Circuit erred in applying a broad definition of the continuous physical presence requirement of the statute:

> In *INS v. Jong Ha Wang*, we rejected a relaxed standard for evaluating the "extreme hardship" requirement as impermissibly shifting discretionary authority from INS to the courts. 450 U.S., at 146. Respondent's suggestion that we construe the Act to broaden the Attorney General's discretion analogously would shift authority to relax the "continuous physical presence" requirement from Congress to INS and, eventually, as is evident from the experience in this case, to the courts. We must therefore reject respondent's suggestion as impermissible in our tripartite scheme of government. Congress designs the immigration laws, and it is up to Congress to temper the laws' rigidity if it so desires.[72]

Some post-*Wang* cases in other circuits have reversed and remanded Board decisions denying suspension of deportation. In *Ravancho v. Immigration & Naturalization Service*,[73] the Third Circuit remanded so that the Board could consider all relevant factors including previously unavailable psychiatric evaluation of the effects of returning a citizen child to a foreign country. While the court determined that as a result of *Wang* the scope of judicial review would be narrow, such review would extend at least to a determination as to "whether the procedure followed by the Board in a particular case constitutes an improper exercise of that discretion."[74] As the Ninth Circuit did in *Prapavat*,[75] the *Ravancho* majority required the Board to consider the cumulative effect of all evidence and not the matters in isolation.[76]

The Fifth Circuit reversed and remanded where it found a failure in the Board's part to consider cumulatively the hardship factors pertaining to parents and citizen children.[77] Interpreting *Wang* to mean that there would not be much, if any, scope for substantive judicial review of Board

67 Mejia-Carrillo v. INS, 656 F.2d 520 (9th Cir. 1981).
68 *Id.* at 522 (citing Urbano de Malalvan v. INS, 577 F.2d 589, 593-594 (9th Cir. 1981)); Yong v. INS, 459 F.2d 1004, 1005 (9th Cir. 1972); Bastidas v. INS, 609 F.2d 101, 104-105 (3d Cir. 1979).
69 *Mejia-Carrillo*, 656 F.2d at 522.
70 673 F.2d 1013 (9th Cir. 1981).
71 INS v. Phinpathya, 464 U.S. 183 (1984).
72 *Id.* at 195-96.
73 658 F.2d 169 (3d Cir. 1981).
74 *Id.* at 176.
75 Prapavat v. INS, 662 F.2d 561 (9th Cir. 1981).
76 658 F.2d 169, 175-76 (3d Cir. 1981).
77 Ramos v. INS, 695 F.2d 181 (5th Cir. 1983).

decisions even under an abuse of discretion standard, the Fifth Circuit concluded nonetheless that judicial review remains available to ensure that the alien has had a fair and full consideration of his claims when an application for suspension of deportation is denied.[78]

Still, it is not clear how much hardship a citizen child must endure before the INS will find it extreme; it is also unclear how much hardship is required before a court will overturn an INS finding of no "extreme hardship." Recently, the Fifth Circuit upheld the Board's determination that the economic and social difficulties petitioner and his United States-born daughter might suffer from being thrust into Iran's current cultural upheaval did not amount to "extreme hardship." In *Youssefinia v. Immigration & Naturalization Service*,[79] the court determined that absent a complete failure to consider a relevant hardship factor, it could only inquire as to whether the decision of the Attorney General or his delegate was arbitrary, irrational or contrary to law.[80] Similarly, in another case, the Fifth Circuit declined to weigh the hardship factors to a citizen child and upheld the Board's determination that the advantages the child would lose if moved to Mexico did not constitute "extreme hardship."[81] Whether deferential opportunities for treatment of speech defects of a citizen child can amount to "extreme hardship" is the type of decision that *Wang* left to the INS. In *Holley v. Immigration & Naturalization Service*[82] the Board's decision not to reopen a case to take evidence on the issue of hardship was affirmed by the First Circuit. The Seventh Circuit similarly refused to overturn an immigration judge's determination that a citizen child should readily adapt because of her tender years to conditions in Mexico.[83]

In the case of *Balani v. Immigration & Naturalization Service*,[84] the Sixth Circuit found no abuse of discretion where the Board considered separately the hardship to a citizen child and alien parent and concluded that the fact that the citizen child might have better economic and educational opportunities in the United States did not even make out a *prima facie* showing of "extreme hardship." Even though the *Balani* court found that "it is difficult to define the Supreme Court's reason for summarily reversing this [Ninth Circuit *Wang*] decision,"[85] it concluded *Wang* intended matters of immigration to be left with the INS and to be reviewed only upon a showing of abuse of discretion.[86] The court noted that even if it were to reverse the Board's decision because of the Board's failure to consider all the hardship factors as an integrated whole, the decision would be susceptible to the same summary reversal visited upon the Ninth Circuit in *Wang* on the theory that these factors together do not

78 *Id.* at 185-86.
79 784 F.2d 1254 (5th Cir. 1986).
80 *Id.* at 1262 citing Sanchez v. INS, 755 F.2d 1158, 1160 (5th Cir. 1985).
81 Luciano-Vincente v. INS, 786 F.2d 706 (5th Cir. 1986).
82 727 F.2d 189 (1st Cir. 1984).
83 Bueno-Carrillo v. Landon, 682 F.2d 143, 146 (7th Cir. 1982).
84 669 F.2d 1157 (6th Cir. 1982).
85 *Id.* at 1162.
86 *Id.*

constitute "extreme hardship" as a matter of law.[87] The Ninth Circuit agreed with this approach in finding no abuse of discretion in a case where the Board considered the effect of separation of citizen children from friends and a familiar environment.[88] However, the court concluded that there was no "extreme hardship" after considering the alleged hardships to parents separately from alleged hardships to citizen children.[89]

While the exact role courts will play in defining and applying the "extreme hardship" test is not certain, two points are clear. First, citizen children have no constitutional right to remain in this country with their undocumented parents. Second, the fact that those children will find circumstances more difficult outside the United States does not require the suspension of the deportation of their parents. The concern shown for the educational and economic circumstances of these children in the public assistance cases withers in the deportation context. The next section turns to analyzing the reasons for the discrepancy in order to determine whether it should continue.

III. Should Courts Continue to Allow Imposition of Hardship Upon Citizen Children in Parental Deportation Cases?

Courts effectively require citizen children to face difficult economic or educational circumstances as the price for the choice of their undocumented parents to maintain the family unit intact, yet they prohibit administrative officials from imposing such difficulties in public assistance cases. A simple explanation for this discrepancy is that courts consistently approve limitations upon the constitutional protections ordinarily afforded United States citizens when immigration issues are involved.[90] However, further inquiry seems necessary. Should the courts continue to be hamstrung in the situation where the policy, questionable or unjust after *Plyler*, of allowing citizen children to suffer all but "extreme hardship" in the deportation context appears to be inconsistent with other immigration policy?

A. *Immigration Limitations Upon Substantive Rights*

Courts have found the power to control immigration inherent in the national sovereignty.[91] They have determined that this power is political in character and therefore subject only to narrow judicial review.[92] Congress regularly makes rules with judicial approval in the exercise of its broad power over immigration and naturalization that would be unac-

87 *Id.* at 1162 n.5.

88 Israel v. INS, 710 F.2d 601 (9th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984).

89 *Id.* at 605.

90 *See infra* notes 91-105 and accompanying text.

91 *Plyler*, 457 U.S. at 226 (1982); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889).

92 Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976).

ceptable if applied to citizens.[93] Moreover, congressional and administrative limitations upon the rights of United States citizens are upheld by the courts in the context of the immigration laws.[94] Thus, in *Kleindienst v. Mandel*,[95] United States citizens unsuccessfully challenged the power of the Attorney General to deny a visa to an alien who, as a proponent of "the economic, international, and governmental doctrines of world communism,"[96] was ineligible to receive a visa under the Immigration and Nationality Act[97] absent a waiver by the Attorney General. Citizen plaintiffs in *Kleindienst* argued their first amendment rights were abridged by denial of the visa.[98] The court held that "when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant."[99]

Further illustration of the limited judicial scrutiny of immigration laws even when United States citizens interests are involved can be seen in the case of *Fiallo v. Bell*.[100] There, the Supreme Court upheld statutory discrimination which denied immigration benefits based upon the relationship of illegitimate children to their citizen fathers, even though such benefits were available based upon the relationship of illegitimate children to their citizen mothers.[101] The Court applied a limited scope of judicial inquiry into the immigration legislation and noted that no conceivable subject exists over which the legislative power of Congress is more complete than that of the admission of aliens.[102] It cited with approval cases which had long recognized that the power to expel or exclude aliens is a fundamental sovereign attribute exercised by the government's political departments largely immune from judicial control.[103] The Court noted plaintiff's arguments that the case before it should be distinguished from previous immigration cases on the grounds that no previous case involved "double-barrelled" discrimination based on sex and illegitimacy, infringed upon the due process rights of citizens and legal permanent residents, or implicated the fundamental constitutional interest of United States citizens and permanent residents in a familial relationship.[104] However, the Court rejected these arguments. It affirmed its limited judicial review even in the face of constitutional

93 Mathews v. Diaz, 426 U.S. 67, 79-80 (1976). Consider the fact that we provide public assistance to citizens afflicted with mental or physical disabilities, yet exclude such people from immigrating to our country. *See* 8 U.S.C. § 1182(a) (1982) for these and other grounds for exclusion.

94 Kleindienst v. Mandel, 408 U.S. 753, 770 (1972). *See also* Fiallo v. Bell, 430 U.S. 787 (1977) (Marshall, J., dissenting) and *infra* notes 100-105 and accompanying text.

95 408 U.S. 753 (1972).

96 *Id.* at 756.

97 8 U.S.C. § 1182(a)(28)(D) (1982).

98 *Kleindienst*, 408 U.S. at 760.

99 *Id.* at 770.

100 430 U.S. 787 (1977).

101 *Id.* at 799-800.

102 *Id.* at 792.

103 *Id.* citing Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Lem Moon Sing v. United States, 158 U.S. 538 (1895); Fong Yue Ting v. United States, 149 U.S. 698 (1893); The Chinese Exclusion Case, 130 U.S. 581 (1889).

104 *Id.* at 794.

claims of citizens and concluded, "[w]e can see no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in *Kleindienst v. Mandel*, a First Amendment case."[105]

As a result of the holdings in *Kleindienst*, *Fiallo*, and *Wang*, it is not likely that the courts will scrutinize the congressional policy choice of allowing imposition of all but "extreme hardship" upon citizen children to discourage the illegal immigration of their parents. Such an approach begs the question whether courts should continue to refuse all but the most limited review if there are conflicting congressional policy choices. It also leaves unresolved a determination of the validity of the imposition of hardship upon children after *Plyler* — under circumstances where there are serious questions whether such imposition is just. These issues are addressed in the discussion which follows.

B. *Is There a "Broad Congressional Policy Choice" That Would Justify Continued Harsh Treatment of Citizen Children in the Deportation Context?*

Obviously, Congress did not enact the "extreme hardship" language and entrust its definition to the Attorney General because it wanted to hurt children for the sake of hurting children. It apparently enacted the provision, the Supreme Court in *Wang* tells us, because otherwise any foreign visitor with fertility, money, and the ability to stay out of trouble for seven years could gain United States residency.[106] That would not be fair, the Court says, to persons waiting as a result of a quota to enter this country.[107] The policy then appears to impose a burden on the citizen children of undocumented parents that other children do not bear in order to discourage illegal immigration. It results in the breakup of families where the undocumented parents are deported, leaving their citizen children behind. Apparently, these disabilities are imposed to maintain the "fairness" of a quota system for those who are waiting for their turn to immigrate.

Such a policy, if that was Congress' intent, is inconsistent with other provisions favoring family unification. In fact, in constructing the current system of quotas and preferences, Congress explicitly made reunification of families its foremost consideration.[108] Congress has made it abundantly clear that in providing preferential status to relatives of United

105 *Id.* at 795. See a further analysis of these issues in Schmidt, *Immigration Benefits for Children Born Out of Wedlock and for their Natural Fathers: A Survey of the Law*, 16 SAN DIEGO L. REV. 1 (1978).

106 *Wang*, 450 U.S. at 145 (quoting *Wang*, 662 F.2d at 1352 (Goodwin, J., dissenting)). *See also supra* note 54 and Lee v. INS, 550 F.2d 554, 556 (9th Cir. 1977):

> In view of the relative ease with which aliens can enter this country as students or visitors, and they delay their departure long enough to produce citizen children, the proposition urged by this petitioner (that he was the father of an American-born child and as such deportation would create extreme hardship to his family) would virtually do away with the limitations imposed by Congress upon immigration.

107 *Wang*, 450 U.S. at 145 (quoting *Wang*, 622 F.2d at 1352 (Goodwin, J., dissenting)).

108 *Developments in the Law: Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1351 (1983), (citing S. REP. No. 748, 89th Cong., 1st Sess. 13 (1965)), *reprinted in*, 1965 U.S. CODE CONG. & ADMIN. NEWS 3328, 3332.

States citizens, its concern was directed at the problem of keeping families of United States citizens and immigrants united.[109] Throughout the Immigration and Nationality Act[110] other preferential treatment is afforded undocumented relatives, including parents of United States citizens without the necessity of a showing of "extreme hardship" to the child.[111] In fact, even though this point was for some reason ignored by the courts in *Wang* and other cases,[112] those same undocumented parents who were deported when they failed to show "extreme hardship" to their citizen children would be eligible for lawful immigration without being subject to a quota once the citizen child turned twenty-one years of age.[113]

Further, such a policy is now obsolete after Congress enacted The Immigration Reform and Control Act of 1986 ("IRCA").[114] Congress explicitly has made available a program of legalization for foreign visitors who have been here illegally for five years,[115] who have been able to "stay out of trouble" during that time,[116] and who have money.[117] This,

109 *Fiallo*, 430 U.S. at 795 n.6 (1977).

110 *See supra* note 2.

111 Waivers of various grounds of exclusion that would otherwise bar entry into this country are available to parents of United States citizens. *See, e.g.*, 8 U.S.C. § 1182(b) (1982) (waiving illiteracy exclusion) and 8 U.S.C. 1182(g) (1982) (waiving mental retardation and tuberculosis exclusions). No showing of "extreme hardship" is required. However, waivers of other grounds do require a showing of "extreme hardship." *See* 8 U.S.C. § 1182(h) (1982) for waiver of criminal grounds, prostitution and marijuana offenses. *See also* 8 U.S.C. § 1251(f) (1982): "Undocumented person otherwise admissible who obtained entry to this country by fraud or misrepresentation may, in the discretion of the Attorney General, not be deported if that alien is the parent, spouse or child of a U.S. citizen (or permanent resident)."

112 *See supra* notes 40-89 and accompanying text.

113 8 U.S.C. § 1151(b) (1982).

114 *See supra* note 1.

115 IRCA § 201(a)(2) requires the alien to establish that he entered the United States before Jan. 1, 1982, and that he resided continuously in this country in an unlawful status since such date and through the date the application for legalization is filed.

116 IRCA §§ 201(a)(4), 201(b)(1)(C)(ii) require a showing that the alien has not been convicted of any felony or of three or more misdemeanors committed in the United States.

117 IRCA §§ 201(a)(4)(A), 201(b)(1)(C)(i) require a showing that the alien is admissible to the United States as an immigrant. This excludes persons likely to become public charges under 8 U.S.C. § 1182(a)(15) (1982). The exclusion cannot be waived, IRCA § 201(d)(2)(B)(ii)(II), but does not apply if the alien can show self-support, IRCA § 201(d)(2)(B)(iii). It also excludes "paupers, professional beggars or vagrants." 8 U.S.C. § 1182(a)(8) (1982). While no mention of "fertility" of the alien appears in IRCA, the Ways and Means Committee's amendment to IRCA expressed explicit concern for the well-being of the citizen children of the newly-legalized aliens by guaranteeing them access to public assistance:

> Committee on Ways and Means Amendment. - The Committee amendment clarifies that for purposes of public assistance programs under the jurisdiction of the Committee on Ways and Means, the 5-year disqualification for the amnesty group applies only to the AFDC program and only with regard to the newly legalized aliens. It does not apply to the following programs: child welfare services, child support enforcement, foster care and adoption assistance, SSI, or the social services block grant. In addition, the Committee amendment would clarify that the disqualification does not apply to U.S. citizen children in families that are otherwise disqualified under this section. The amendment would also prescribe the method for treating the income and needs of the disqualified members when determining the eligibility of the U.S. citizen child.

H.R. REP. No. 99-682 (III), 99th Cong., 2nd Sess., *reprinted in*, 1986 U.S. CODE CONG. & ADMIN. NEWS, 5971-97. *See* IRCA § 201(h).

too, is arguably "not fair" to those who have been waiting for a quota.[118]

There appear to be doubts about the existence of a "broad congressional policy" which would allow harsh treatment of United States citizen children in order to adhere to a rigid quota system. The courts should recognize this fact and consider giving greater scrutiny to the "extreme hardship" interpretation by the INS, particularly in view of the arguments to follow.

C. *After* Plyler, *Can Sanctions Be Imposed Upon Citizen Children to Discourage The Illegal Immigration of Their Parents?*

After *Plyler*, there seems to be a serious question we need to ask about *Wang*: If it is illegal to "visit condemnation upon the heads of illegal alien children"[119] (in the form of denying them a public education) for the misdeeds of their parents (illegal immigration into the United States), then why do we tolerate visiting condemnation upon the heads of citizen children (in the form of the deportation of their parents, and in effect, them too) for the same sins of the parents?[120] After all, *Plyler* tells us that "even if the state found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."[121]

Perhaps the reason for the difference is that in *Wang* the United States government, not a state, was attempting to control the conduct of adults by acting against their children. Immigration matters are generally left to the federal government with only a narrow role available to the states.[122] Perhaps this explains the apparently irreconcilable discussions in *Wang* and *Plyler* about directing the onus of parents' misconduct against their children. Nonetheless, the major deficiency of the statute in *Plyler* apparently was not that a state law impacted on immigration matters. Rather, the problem with the act was that it was directed against children and imposed its discriminatory burden on the basis of a legal characteristic over which children can have little control.[123] After *Plyler*, a court should appropriately reexamine the validity of allowing the Attorney General to create a narrow interpretation of "extreme hardship" because that section also is directed against children and imposes its discriminatory burden on the basis of a legal characteristic (alien status of their parents) over which children can have little control. The notion that this principle should apply to federal as well as state action finds support in the unchallenged *Yolano-Donnelly* injunction and in the *Doe v. Reveitz* decision.[124]

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118 IRCA also updates the "registry" law, which allows legal recognition for persons who have been in this country since Jan. 1, 1972. *See* IRCA, § 203. This, too, is arguably "unfair" to those who may have had to wait for a quota.

119 *Plyler*, 457 U.S. at 220.

120 Note that *Plyler* was decided subsequent to *Wang*, *Kleindienst*, and *Fiallo*. *Phinpathya* was decided after *Plyler*, but did not reach the issue of interpretation of "extreme hardship."

121 *Plyler*, 457 U.S. at 220.

122 *Id.* at 225.

123 *Id.* at 220.

124 *See supra* notes 33-39 and accompanying text.

D. *What if the "Broad Congressional Policy" Which Vests Broad Discretion in the Attorney General to Determine "Extreme Hardship" is "Unjust"?*

It certainly must be encouraging to those who feel that children should not be punished for the acts of their parents to recognize that when called upon, courts will intervene when administrative officials seek to deny public assistance to citizen children of undocumented parents. At the same time, these people might feel discouragement in the recognition that courts *must* intervene because of the apparent willingness and enthusiasm of those officials to impose such sanctions.[125] It is logical to assume that many other such cases occur without judicial intervention because the indigent children denied assistance constitute the societal group which is perhaps least likely to have the resources to press a demand for the benefits in the courts.[126] In any event, it is hardly surprising that administrative officials would, mistakenly or intentionally, deny benefits to citizen children given the contradictory signals sent by the courts as to the permissible treatment of these children in the name of immigration control.[127]

The reality is that in a world plagued with massive repression and poverty, if the United States were to suddenly and totally abandon its self-protective policy of limiting access to this country's resources through immigration restrictions and permit all who wished to immigrate to do so, it very likely would threaten the continued existence of our society.[128] But what does it say about our notions of justice when we harbor a willingness to act against our own children in the name of immigration control? What messages do we communicate to ourselves and to the world when our courts, once the immigration law cloak is invoked, turn a blind eye to the reality that our citizen children are hurt in order for our society to strike at their parents?

Plyler cited logic and justice as part of the basis for its holding.[129] At a minimum, despite the considerations of national sovereignty and political issues, the courts should reexamine *Wang* after *Plyler*. Some attention should be paid to what is logical and just about allowing almost absolute discretion in the Attorney General of the United States and his delegates to determine how much hardship a citizen child must endure before the hardship becomes extreme.

International treaties[130] and the Judeo-Christian ethic[131] teach us that children should be honored and respected. Logic dictates that if

125 For example, the defendants' policies and practices in this regard were found to be "blatantly inconsistent" with the food stamp laws in Doe v. Miller, 573 F. Supp. 461, 465 (N.D. Ill. 1983). *See also supra* notes 19-24 and accompanying text.

126 Parents of such children are ineligible for Legal Services Corporation assistance unless they have pending an application for adjustment of status. 45 C.F.R. § 1626.4 (1987). The indigent children themselves, however, should be eligible for such services.

127 It was the author's experience representing citizen children of undocumented parents in a case involving denial of food stamps and medical assistance to them by officials of the State of Kansas that led to the writing of this article. *See* Fuentes v. White, No. 85-4162-R (D. Kan., Apr. 24, 1985). Defendants ultimately provided the assistance.

128 *See Developments in the Law: Immigration Policy and the Rights of Aliens*, *supra* note 108, at 1465.

129 *Plyler*, 457 U.S. at 220 (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972)).

130 *See* International Covenant on Civil and Political Rights, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A16316 (1967), *reprinted in*, 6 I.L.M. 368 (1967):

society will not punish citizen children in the benefits areas,[132] nor illegal alien children in educational matters,[133] it cannot permit the dichotomy that exists in the treatment of citizen children in the immigration context.

Admittedly, legislative, administrative, and judicial forces will continue to attempt to control illegal immigration. But, is it too much to ask of a "civilized society" that it treat its children, at least its citizen children, as "non-combatants" in its war on illegal immigration?[134] Are we going to continue tolerating, especially as it pertains to undocumented parents from war-torn Central America, the requirement that such parents make the "Sophie's Choice"[135] of returning their citizen children to Latin America to face possible imprisonment or death,[136] or leaving the

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Article 24. (1) Every child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. (2) Every child shall be registered immediately after birth and shall have a name. (3) Every child has the right to acquire a nationality.

See also Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A810 at 71 (1948). The second paragraph of Article 25 provides: "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection." Article 16, paragraph three further provides: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

Professor Richard B. Lillich demonstrates how international human rights instruments are relevant in domestic cases, noting several cases including *Plyler* where international human rights accords may create and then reflect a domestically applicable standard. *See* INTERNATIONAL HUMAN RIGHTS INSTRUMENTS (R. Lillich ed. 1986).

131 *See, e.g.*, *Matthew* 19:13-14 which provides:

Then there were brought unto him little children, that he should put his hands on them, and pray: and the disciples rebuked them.

But Jesus said, "Suffer little children, and forbid them not, to come unto me: for of such is the kingdom of heaven."

and *Mark* 10:36-37, 42 which provides:

And he took a child and set him in the midst of them: and when he had taken him in his arms, he said unto them, "Whosoever shall receive one of such children in my name receiveth me.

"And whosoever shall offend one of these little ones that believe in me, it is better for him that a millstone were hanged about his neck and he were cast into the sea.'

Mark 10:36, 37, 42.

However, as with other sources of authority, the principles appear somewhat inconsistent. *Exodus* 11:5-6 details with approval what may be the ultimate example of "visiting condemnation upon the head of infants for the misdeeds of the parents": "[A]nd all the firstborn in the Land of Egypt shall die from the first born of the Pharoah that sitteth upon his throne, even unto the first born of the maidservant that is behind the mill."

132 *See supra* notes 6-39 and accompanying text.

133 Plyler v. Doe, 457 U.S. 202 (1982). *See also supra* notes 45-89 and accompanying text.

134 In the view of some immigrants' rights advocates, children are used by the INS as pawns in the war on illegal immigration. In their view, the INS uses illegal alien children as "bait" by detaining them in numbers of up to 200 at a time, allegedly mixing them with unregulated adults and strip searching them in view of adults. Faced with either turning themselves in or abandoning custody of their children, most illegal alien parents come forward to claim their children, resulting in their own deportation. Harold Ezell, INS Western-region commissioner, dismissed critics as "bleeding hearts" and "radical activists." *See* P. Dworkin, *End of the Road for Littlest Illegals*, U.S. News & World Report, Apr. 13, 1987, at 23.

135 CBS-Fox Studios 1982.

136 Persons illegally in this country have a possible option of seeking asylum if they are unable to return to their country because of persecution, or a well founded fear of prosecution on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)42(A) (1982), 8 U.S.C. § 1158(a) (1982). However, there appears to be a bias against Central Americans in the application of the current refugee policy. For example, in 1983, 75.8 percent of Iranians and 78.3 of Russians requesting asylum were granted it, as opposed to only 1.5 percent of Guatemalan applicants. In 1984, only 2.5 percent of Salvadoran applicants and 0.4 percent of

children behind without their parents to face an uncertain and inadequate system of economic and social support?[137]

V. Conclusions

One advantage of writing an article such as this is that it affords the writer the luxury of raising many questions without necessarily answering them with any certainty nor paying for implementing any solutions. But, after examining the inconsistencies in congressional policy, reviewing *Plyler*, and weighing matters of logic and justice, it is this writer's conclusion that the courts should begin to scrutinize the decisions of the Attorney General and his delegates regarding "extreme hardship."

At a minimum, courts should utilize the Ninth Circuit's *Wang* approach of requiring a liberal construction of "extreme hardship" to effectuate the ameliorative purpose of the statute. Beyond that approach, courts also should reexamine the constitutional issues involved in the apparent dilemma that requires citizen children to be deprived of either their right to remain in the United States[138] or their right to remain with their parents in a family unit.[139] Eventually, courts should conclude that the deprivation of either right constitutes "extreme hardship" to the child as a matter of law.

There could be a legislative remedy to the dilemma. Congress could create a statutory presumption that deportation of an alien which required the leaving behind a citizen child under, perhaps, fourteen years of age would constitute "extreme hardship" to the alien.[140] Another presumption could be created that deportation of a citizen child's parents with or without the child constitutes "extreme hardship" to the child.[141]

Regarding public assistance, courts should continue to strike down attempts to limit access to public assistance to citizen children of undocumented aliens and recognize first amendment and due process rights of

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Guatemalans received asylum. In 1985, over 40 percent of asylum requests from Chinese refugees and nearly 60 percent of Romanian requests were granted, compared to 3.1 percent of those from El Salvador. These considerations prompted then Governor Toney Anaya to declare New Mexico a "sanctuary" state. *See* Anaya & Lujan, *Sanctuary: Right or Wrong?*, Vista, July 6, 1986, at 18-19 . A sixteen year old Salvadoran described his plight in United States detention: "If I went back, I could be killed or maimed like my cousin who stepped on a land mine. The situation is so bad it's better to stick it out." *See supra* note 133.

137 *See Poor Children's Legal Problems*, 8 YOUTH L. NEWS (Jan.-Feb., 1987).

138 *See* Schneider v. Rusk, 377 U.S. 163, 168 (1964); Kent v. Dulles, 357 U.S. 116, 125 (1958). *But cf.* Acosta v. Gaffney, 558 F.2d 1153 (1977) (in the case of an infant below the age of discretion the right is purely theoretical because the infant is incapable of exercising it).

139 *See* Roberts v. United States Jaycees, 468 U.S. 609 (1984); Moore v. City of East Cleveland, 431 U.S. 494 (1976); Halet v. Wend Investment Co., 672 F.2d 1305 (9th Cir. 1982).

140 Through age fourteen is considered "tender years" in other immigration law contexts. *See* INS Interp. 322.3(b)(2).

If we agree with the assumption that citizen children should not, in effect, be deported, we would also need to reexamine the application to their parents of the seven year residency requirement in INA § 244. Otherwise, we might create a somewhat arbitrary scheme favoring generally the rights of older citizen children over younger with no clear "cutoff" age where the right to remain could be determined by a reading of the statute.

141 Villena v. INS, 622 F.2d 1352, 1360 (9th Cir. 1980) ("Deportation is a drastic measure that may inflict the equivalent of banishment or exile . . . and result in the loss of all that makes life worth living.")

family unity. Further, courts should recognize equal protection and due process deficiencies in any inferior treatment of the category of United States citizens whose parents happen to be undocumented. Explicit judicial recognition of the constitutional infirmities inherent in the mistreatment of citizen children might help send a clear and unequivocal message to administrative officials at all levels of government that these children are not to be mistreated for the misdeeds of their undocumented parents. Such a message might help obviate the need for future litigation in the nature of *Plyler* and *Yolano-Donnelly*.

The implementation of these suggestions undoubtedly would increase the number of undocumented persons who could remain legally in this country. Regarding undocumented parents in this country now, however, many of them would qualify anyway for amnesty under IRCA. Regarding potential new immigrants, the numbers are not clear. Theoretically, by enacting employer sanctions, the major "pull" attracting illegal immigration now has been broken. The INS thus should be more efficient in preventing future illegal immigration without resorting to acting against children.

Despite all the efforts of the INS, it is probable that some aliens will arrive illegally in this country. Some of them will give birth to newborn citizens of the United States of America. The moral and legal dilemma this society will continue to face is this: even though it means some loss of control over its borders, is this country willing to guarantee that these native-born citizens are not native-born second class citizens?