For over twenty-five years, scholars have observed how family law intersects with immigration law. Just as Crim-Imm scholarship successfully identified the ways in which the (purported) civil proceedings of immigration law needed the extra constitutional protections found in criminal law, Famigration offers the potential to transform the way in which immigration law operates. What can happen if scholars systematize critical family law concepts into the conception and practice of immigration law?

This Article is an effort to revisit the immigration law's onerous definition of hardship that a citizen child faces when his or her undocumented parent faces deportation. The current law recognizes that the harm citizen children face is often devastating and irreparable. However, immigration law permits only unconscionable hardship to be a basis to stop the parents' deportation. This Article proposes that Guardians Ad Litem has a critical role in intervening in immigration proceedings. Family courts then are a way to reform immigration procedures and practice to ensure that citizen children are not harmed under the status quo.

How Guardians Ad Litem Can Reinterpret Hardship In Immigration Proceedings

Kari E. Hong*

Family law can—and should—have a transformative impact on how Congress recognizes and defines which family members will be admitted into the country. I am not the first person to make such a suggestion. To the contrary, there is a significant and growing conversation of scholars who are exploring the intersection of family and immigration law—Famigration, if you will—and highlighting such areas how child custody determinations are shaped by immigration status[1] and how immigration status is conferred (and restricted) based on the parent-child and marital relationships.[2]

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[1] David B. Thronson, Custody and Contradictions: Exploring Immigration Law As Federal Family Law in the Context of Child Custody, 59 Hastings L.J. 453, 510, 512-13 (2008) ("When a parent's unauthorized status is the result of an immigration system that fails to take the best interests of children into account and denies agency to children, incorporating consideration related to and arising from the parent's status would validate not only immigration law's conclusion about the parent's status but also the premises and system that led to that conclusion."); Kerry Abrams, Immigration Status and the Best Interests of the Child Standard, 14 Va. J. Soc. Pol'y & L. 87, 88 (2006) ("What this essay does do is to identify the analytic problems with the Rico court's treatment of immigration status, and to use the case as an opportunity to consider how courts and

Scholars are also engaging in a vital normative discussion, positing how family law can alter some procedural protections and substantive aspects of immigration law. "Thinking of immigration law as family law . . . reveals the extent to which it is out of step with deeply held societal values and, in some instances, constitutional principles."[3]

The normative conversations hopefully will ripen into cognizable legal claims. Indeed, why shouldn't the best interests of citizen children—or the liberty interests that a citizen receives in her marriage—be a check on the draconian impact that immigration law can in separating citizens from their non-citizen family members?

In a 5-4 decision, *Kerry v. Din* rejected the notion that the denial of a visa violated a citizen's "own constitutional right to live in this country with her husband."[4] In a 2-1 decision, the Ninth Circuit rejected the incorporation of the Convention on the Rights of the Child into domestic law to recognize that the vital

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legislatures could improve the way in which they consider immigration status in child custody cases.").

[2] Shani M. King, U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward A Functional Definition of Family That Protects Children's Fundamental Human Rights, 41 Colum. Hum. Rts. L. Rev. 509, 513 (2010) ("What this Article suggests is that the notion of parenthood that is reflected in U.S. immigration law should be reconsidered and modified to reflect a definition grounded in relationships and care, or what has been described by Professor Nancy Dowd in a slightly different context as "nurture." This would likely include, for example, "the psychological, physical, intellectual, and spiritual care" of children."); Stephen H. Legomsky, Rationing Family Values in Europe and America: An Immigration Tug of War Between States and Their Supra-National Associations, 25 Geo. Immigr. L.J. 807, 816 (2011) (survey of US and EU restrictions and admissions of immigrants based on family relationships); Bridgette A. Carr, Incorporating A "Best Interests of the Child" Approach into Immigration Law and Procedure, 12 Yale Hum. Rts. & Dev. L.J. 120, 123-24, 159 (2009) ("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. 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. This Article argues for statutory reform *124 incorporating a "best interests of the child" approach into immigration law and procedure.)

[3] David B. Thronson, supra n. 1, at 510; see also Bridgette A. Carr, Incorporating A "Best Interests of the Child" Approach into Immigration Law and Procedure, 12 Yale Hum. Rts. & Dev. L.J. 120, 159 (2009) (querying how the best interests of the child doctrine can be employed in the asylum and hardship contexts to recognize the interests of a child in the adjudication of a non-citizen parent's immigration status).

[4] Kerry v. Din, __ S. Ct. ___, at *10 (2015) (J. Kennedy and J. Alito, concurring)

reality that a deportation action[5] against a parent does more than "affect[] his or her children indirectly."[6]

The bold attempt to reform U.S. immigration policies with the judicial tools of due process or the international norms of best interests of the child is not unthinkable. Other countries have relied on family law doctrines to stop the deportation of a child's parents. Both Australia and Canada requires a deportation proceeding against a non-citizen parent to consider the impact that any state action would have on the best interests of the parent's child, as that term is defined by international treaties.[7] Although not yet recognized by U.S. courts, the conversations about Famimigration are then timely and urgent. In the light of the fact that 18 years have passed without meaningful immigration reform, searching in family law for potential remedies is not at all a misplaced journey.[8]

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[5] In 1996, Congress replaced the terms "deportation" (for individuals inside of the country) and "exclusion" (for individuals who legally never entered the country) proceedings with "removal" proceedings. *See* Illegal Immigration Report and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) ("IIRIRA"). Given that most individuals are familiar with the term deportation rather than more technical term of removal, this article will use the term deportation to refer to all immigration proceedings. Even though removal proceedings is the term for deportation, an alien is charged with either deportable grounds or inadmissibility grounds to ascertain whether the removal can be effected. *Compare* INA § 237 (deportability grounds) with INA § 212 (inadmissibility grounds).

[6] Cabrera-Alvarez v. Gonzales, 423 F.3d 1006, 1010–11 (9th Cir. 2005) (when evaluating the cancellation of removal remedy, the "exceptional and extremely unusual hardship" standard to a qualifying child pursuant to 8 U.S.C. § 1229b(b)(1)(D) implicitly raises the best interests of a child, but not in a primary way. "By contrast, a removal proceeding like the instant one directly "concerns" only the alien parent; it affects his or her children indirectly.). The dissenting judge, Judge Harry Pregerson, noted that "[s]adly, our cancellation of removal statute does not honor the concept of family values and the need to keep families together. . . . [The hardship] standard is so difficult to satisfy that there is only one published BIA decision that grants cancellation of removal after finding that the requisite "exceptional and extremely unusual hardship" existed. " Cabrera-Alvarez, 423 F.3d at 1014 (Pregerson, J., dissenting).

[7] *See* Minister of State for Immigration & Ethnic Affairs v. Teoh (1995), 183 C.L.R. 273, 289 (Austl.) (holding that the phrase "actions concerning children" encompasses a parent's immigration proceeding, particularly where the parent's primary argument involves the hardship to his or her children); Baker v. Canada [1999], 2 S.C.R. 817 (holding that the Convention's "best interests of the child" principle was relevant to interpreting the deportation statute, despite the lower court's holding that "deportation of a parent was not a decision 'concerning' children within the meaning of [A]rticle 3" of the Convention).

[8] In 1996, Congress passed Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) ("IIRIRA"). IIRIRA

In this Article, instead of relying on constitutional norms and international ideals, I seek a more modest means to reform domestic immigration law. There is a patchwork of existing federal and state law that provides for judicial protection for citizen children whose parents are in deportation proceedings. This Article argues that the existing guardian ad litem procedures can—and should—be employed in immigration court when the parent of a citizen child is facing deportation.

Part I focuses on the "exceptional and extremely unusual" hardship standard that is used to determine if parents of citizen children have sufficient equities to remain in the United States. Prior to 1997, undocumented immigrants who had citizen children were able to legalize their status upon a showing that, inter alia, their deportation to their native country would result in an extreme hardship to their citizen child. Under the old law, immigration law recognized the harm that deportation caused citizen children, including the diminished educational opportunities and career prospects and the loss of emotional ties that would incur when separated from family members (such as grandparents, aunts, uncles, and cousins) in this country. In 1997, Congress changed the hardship standard from "extreme" to "exceptional and extremely unusual." In a contested series of decisions, the Board of Immigration Appeals ("BIA"), the agency charged with interpreting immigration law, elected to rewrite the hardship to be an

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significantly altered the nature of immigration law by focusing on restricting and limiting those who are eligible for relief. In a dramatic break from the modern immigration laws, first established in 1952, IIRIRA has relied on numerous procedural and substantive changes to exclude a large number of non-citizens who had otherwise been eligible to remain in the United States. For instance, those with minor, and even serious, criminal convictions who had been eligible to remain in the country are no longer able to do so. Under IIRIRA, "a large number individuals—including lawful permanent residents—have been convicted of aggravated felonies because Congress expanded the definition and applied it retroactively to prior offenses. The term "aggravated felony" is a misnomer because it implies that the offense is the worst of the worst. Congress first created the term aggravated felony in 1988, which it limited to murder, drug trafficking crimes, illicit trafficking in firearms, and illicit trafficking in explosives. In 1990, Congress expanded the definition to include (1) particular violent crimes if an imposed sentence was five years or more; (2) more drug offenses; and (3) offenses that occurred under state law and in foreign countries. In 1996, Congress passed IIRIRA and expanded the nature and number of crimes that constitute aggravated felonies to approximately 18 categories of crimes. The current definition includes non-violent drug offenses, misdemeanors, and minor offenses for which sentences were suspended in their entirety. The current crimes are also retroactive in effect, which means that many individuals who were convicted and served their sentences years ago, are newly vulnerable to removal even though the offense did not have serious, or even any, immigration consequences at the date of the conviction." Kari E. Hong, Removing Citizens: Parenthood, Immigration Courts, and Derivative Citizenship, 28 Geo. Immigr. L.J. 277, 310 (2014).

"unconscionable" one, no only met with the citizen child has a dire medical illness that cannot receive care in the native country.

Despite numerous criticisms, the legal debate appears over. The BIA's decisions on the meaning of hardship is not reviewed by federal courts (a change under the 1997 judicial review limitations). In 2002, all BIA judges who were sympathetic to non-citizens were fired by Attorney General Ashcroft. The denial rates went from 59% to 93%. As noted by the president of the immigration judge union,[9] the chilling effect of this action is felt on the bench.

This is where family law has a crucial role in interpreting immigration law. The harm that deportation causes children is undisputed. Family courts have means to protect citizen children from similar harm. It is time then to import the procedures and practices that exist in family court to immigration court to prevent further harm to citizen children whose parents face deportation.

Part II surveys the history and contemporary practice of the guardian ad litem procedure. [This survey will examine how the patchwork of state and federal statutes are designed to protect children from harm. Deportation would fall under this rubric. In addition, Rule 17 of the Federal Rules of Civil Procedure permit guardians ad litem to be appointed in federal proceedings.]

Part III ends with outlining the proposal to have the hardship standard reinterpreted through family law. Because citizen children have protections under family law, immigration courts may not exclude the family law procedures and practices. As a matter of statutory interpretation, the best interests of the child has to be considered when determining how the term "hardship" is to be interpreted. Instead of the current unconscionable standard—measured in the aggregate so that any harm suffered by many cannot be a cognizable harm to one—it must be interpreted to account for the potential harm the specific child faces. Moreover, the presence of guardians ad litem in immigration proceedings should be permitted. The role and presence of guardians ad litem will ensure that the actual harms the specific child faces will not be ignored when evaluating whether the parent of a citizen child may remain or be deported.

PART I: Why The Very Problematic Hardship Standard Found in The Cancellation of Removal Remedy Cannot Be Remedied In Immigration Courts

[9] Yes, they have a union. Immigration judges are considered employees of the DOJ and do not have the protections of Article III judges.

A. Why The Focus Is On Children With Lawful Status And Their Undocumented Parents

For starters, I am focusing only on children with lawful status (citizens or green card holders) whose parents are without lawful immigration status. The most recent estimate provides that this population numbers 3.7 million adults,[10] which is approximately 33% of the estimated 11.3 million undocumented immigrants living in the United States.[11]

Immigrant children who are unaccompanied minors—those whose parents are either not in the United States or, if present, are incapable of providing care—have existing protections under immigration and family law.[12] Children without status whose parents likewise are without status are beyond the scope of this

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[10] In November 2014, "the Migration Policy Institute launched a new data tool and additional estimates on where those who qualify are located by state. Importantly, the tool provides estimates on specific ties to the U.S. that may make an immigrant eligible for relief. For example, the data shows how many individuals ages 15 and older reside with at least one U.S.-citizen child and for how long they have lived in the U.S. Up to 3.7 million undocumented immigrants who are parents U.S. citizens or LPRS have lived in the country for at least five years could be eligible for relief if they also pass a background check and pay any back taxes." Available at: http://immigrationimpact.com/2014/11/21/beneficiaries-obamas-immigration-executive-action/#sthash.diyFXB3J.dpuf.

[11] According to the Pew Research Center's statistics published on November 18, 2014, "There were 11.2 million unauthorized immigrants in the U.S. in 2012, a total unchanged from 2009, and currently making up 3.5% of the nation's population. (Preliminary estimates show the population was 11.3 million in 2013.) The number of unauthorized immigrants peaked in 2007 at 12.2 million, when this group was 4% of the U.S. population." Available at: http://www.pewresearch.org/fact-tank/2014/11/18/5-facts-about-illegal-immigration-in-the-u-s/

[12] "[A]bandoned, abused, and neglected child migrants [may qualify for] . . . 'Special Immigrant Juvenile Status' (SIJS). This benefit, which is a pathway to legal permanent residence and citizenship, is the only area within federal immigration law that requires a state court to take action in order for immigration authorities to consider an individual's eligibility for relief." Laila L. Hlass, States and Status: A Study of Geographical Disparities for Immigrant Youth, 46 Colum. Hum. Rts. L. Rev. 266 (2014). The estimated size of this population is approximately 1,120,000 children. Id. at 274 & n.37. "Under current law, the [family court] order must indicate that 1) the child is dependent on the court or the court has placed the child in the custody of an individual or entity, often through a legal proceeding related to foster care, guardianship, or custody; 2) reunification with one or both parents is not viable due to abandonment, abuse, neglect, or a similar basis; and 3) it is not in the best interests of the juvenile to be returned to her country of origin. Once the state court order is obtained, the youth can petition the federal government for a SIJS visa. If DHS approves a child for SIJS status, he or she is immediately eligible to apply for legal permanent residence. . . ." Id. at 280

Article. Because the statutes I discuss have jurisdiction over children under the jurisdiction of state and federal courts, I am limiting my discussion just to children with legal status, those with citizenship or lawful permanent residence.[13] This Article then looks at families with mixed status—those with lawful children and undocumented parents.[14]

B. The Very Problematic "Exceptional and Extremely Unusual Hardship" Standard

Under current immigration law, the most readily available remedy that permits an undocumented parent of a citizen child to obtain status is called cancellation of removal.[15]

Much has been made about the flaws in the current immigration law. One of the most notable is the absence of ways by which someone without status is able to affirmatively move into legal status. This critique is an important one because it was not always this way.

Prior to 1997's IIRIRA law, one of the hallmarks of the modern immigration scheme was the way in which an undocumented person could earn lawful status. Under the old law, if someone lived in the United States for seven years, was a person of good moral character (defined as paying taxes, steady

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[13] Despite the exclusion of undocumented families, my hope is that future discussions may focus on that population.

[14] Patrick Glen also looked at immigration remedies for this population. See Patrick Glen, The Removability of Non-Citizen Parents and the Best Interests of Citizen Children: How to Balance Competing Imperatives in the Context of Removal Proceedings, 30 Berkeley J. Int'l L. 1, 3 (2012) ("As the issue currently stands, the main focus is on the removal of non-citizen parents who have citizen children and to what extent the interests of those children should affect the removability of the parents. Thus, the subject of the instant article is on how the interests of citizen children should weigh in the balance of determining whether a non-citizen parent or parents should be removed. Rather than approach the issue solely from the perspective of US immigration law and policy, this article offers a comparative assessment of US domestic law and policy with that of the United Kingdom.") This article is an survey and discussion of which remedies are available to parents of citizen children and the degree to existing law weighs which various factors in granting admission.

[15] If an adult receives asylum, his or her child, as that term is defined under immigration law, will eligible for status as a derivative beneficiary. The circuits are split on the question of whether the harm that a citizen child faces if returned to the native country—such as genital mutilation or recruitment into criminal gangs—is enough to confer asylum to the adult parent. "Since 2003 . . . the theory that persecution to a child could constitute persecution to a parent has been diminished or overturned in a number of federal circuits. See Carr, supra n.1 at 140 (citing cases).

employment, and not committing serious crimes), made contributions to his or her community (defined as citizen family, friends, neighbors, and co-workers), and would experience "extreme hardship" in his or her native country, he or she would receive a green card.[16] Known as "suspension of deportation," this remedy was generous in extending status to various individuals with and without citizen family members.[17] This remedy then had the result of also capturing the best and the brightest and those whose contributions were important and notable.[18]

In 1997, Congress intentionally reduced the number of individuals who would lawfully be admitted into the country. In a deliberate act, Congress repealed suspension of deportation and replaced it with the "cancellation of removal" remedy.[19] Instead of 7 years, 10 years was required. Instead of crediting affirmative contributions to qualify for relief, the law restricted status only to those whose departure from the United States would cause "exceptional and extremely unusual hardship" to children, parents, and spouses who were citizens or lawful permanent residents.[20]

The Board of Immigration Appeals ("BIA"), which is the agency charged with interpreting immigration statutes and overseeing immigration court decisions, routinely interpreted this term very narrowly.

In *Andazola-Rivas*, a 30-year-old single mother had entered in the United States 15 years earlier and had two children, aged 11 and 6, both of whom were citizens by birth.[21] Although she had only a sixth grade education, she had the same job for the past four years, which provided her with family health insurance and a retirement plan. She had purchased her own house, two cars, and had $7,000 in savings.[22] Her mother and siblings—although without status—lived in the United States and helped her care for her children. The father of the children lived with her and financially contributed to the family's needs. Ms. Andazola-

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[16] Cites to statutes. Case examples.
[17] Case examples. E.g., Single man, recovering alcholic received hardship based on losing contact to AA.
[18] Get cites. Get examples of how gay people were obtaining status because the relationship to the citizen, although not legal, was recognized as a source of current support and, if removed, would place a citizen in a position of moving to a third-world country or separating from a partner. Also, Mendiola case---man who painted school murals, initiated anti-gang education, raised 3 citizen children, etc. would have received this status.
[19] Get cites to legislative history. Also, introductin of 10,000 annual cap served the restriction purpose.
[20] Cites to statutes.
[21] In re Andazola-Rivas, 23 I. & N. Dec. 319, 324 (BIA 2002)
[22] Id.

Rivas attended a church and volunteered with her child's school. Her children were in perfect health and were doing well in school.

If returned to Mexico, Ms. Andazola-Rivas would not have the family support system that permitted her to care for her children. Given her own limited education, she feared she would not find a job in Mexico with comparable benefits and pay. In addition, the citizen children did not speak Spanish fluently, were close to their U.S. relatives, in particular their grandmother who cared for them daily, and were not close to any relatives in Mexico.

The immigration judge had found that the citizen children would "face complete upheaval in their lives and hardship that could conceivably ruin their lives." Finding the anticipated hardship "unconscionable," he granted relief.

The BIA disagreed and reversed, explaining that "[a]lthough the hardships presented might have been adequate to meet the former 'extreme hardship' standard for suspension of deportation, we find that they are not the types of hardship envisioned by Congress when it enacted the significantly higher "exceptional and extremely unusual hardship" standard."[23] To qualify for cancellation of removal, the non-citizen must "demonstrate that his or her removal would cause hardship to his or her qualifying relatives that is 'substantially different from, or beyond, that which would normally be expected from the deportation of an alien with close family members here.'"[24]

The BIA agreed that the citizen children would be greatly disadvantaged. The BIA noted that (1) there was no guarantee that her children—although U.S. citizens were not citizens of Mexico—would even be permitted into Mexico's schools; and (2) if admitted, they were guaranteed only 9 years of education.[25] However, given that the children would not "be deprived of all schooling or of an opportunity to obtain any education", the BIA agreed with the Government's position that Ms. Andazola-Rivas and her citizen children are "in the same position as hundreds, if not thousands, of other Mexican nationals who have spent a considerable period of time in this country."[26]

The BIA contended that the potential hardship this family faced was "simply not substantially different from those that would normally be expected upon removal to a less developed country. Although the hardships presented here might have been adequate to meet the former 'extreme hardship' standard for suspension of deportation, we find that they are not the types of hardship

[23] In Re Andazola-Rivas, 23 I. & N. Dec. 319, 324 (BIA 2002)
[24] Id. at 321.
[25] Id. at 323.
[26] Id. at 322.

envisioned by Congress when it enacted the significantly higher 'exceptional and extremely unusual hardship' standard."[27]

This decision, along with the other companion decisions interpreting the new hardship standard, achieved the goal of greatly restricting the numbers and types of immigrants who were permitted to remain in the United States. By 2015, the BIA has only granted one published case in which it found the facts met the new hardship standard.[28]

Before the immigration courts, the new hardship standard is being met. But instead of by citizen children in good health, who are doing well in school, and who have prospects for a successful future, the applicants who prevail have citizen children with substantial illnesses, disabilities, and significant dependence on government assistance.[29]

C. The Opportunity To Reinterpret The Statutory Meaning of Hardship

The new hardship standard is the means by which mixed-status families are separated or, to remain together, cut off the citizen child's academic, athletic, economic, and health benefits that the citizen child was receiving in this country. Although the admission of parents of the most vulnerable children and post-1997 exclusion of those children typically deemed the best and the brightest, begs a

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[27] Id. at 324.

[28] As noted by Judge Pregerson in 2005, "that onerous standard is so difficult to satisfy that there is only one published BIA decision that grants cancellation of removal after finding that the requisite "exceptional and extremely unusual hardship" existed") Cabrera-Alvarez, 423 F.3d at 1014 (Pregerson, J., dissenting) (citing *Ariadna Angelica Gonzalez Recinas,* 23 I. & N. Dec. 467 (B.I.A. 2002) (concluding that cancellation of removal was warranted because the mother of six children (four of whom were born in America) was the sole means of economic support for her children, had no comparable means of providing for her children in Mexico, had no close family members in Mexico, her ex-husband did not help to support the children, and the children did not speak Spanish and had never traveled to Mexico). Of note, the BIA is the final authority on this issue. All federal courts "lack authority to review the BIA's ruling that such hardship does not exist." Cabrera-Alvarez, 423 F.3d at 1014 (Pregerson, J., dissenting) (citing 8 U.S.C. § 1252(a)(2)(B); *Romero–Torres v. Ashcroft,* 327 F.3d 887, 891–92 (9th Cir. 2003)). **PRELIMINARY RESEARCH DID NOT FIND OTHERS. CHECK.**

[29] Practice guide. Hinojosa case. Child born with rare genetic condition requiring a team of 10 doctors to routinely advise and monitor health condition. Of note, the child's 2 older brothers, who were straight A students who did later attend college in the United States, would not have been permitted to remain in the United States under the new standard.

policy debate, this article is focused on the pernicious, but not indelible, interpretation of hardship.

Through repetition, the narrative of "exceptional and extremely unusual" hardship is that the BIA's restrictive interpretation is precisely what Congress intended when it last overhauled the immigration system in 1997. There are many reasons to doubt the Congressional awareness, let alone, Congressional intent manifest in this specific term. Discussed elsewhere, IIRIRA overhauled the immigration system, but not through systematic hearings and compromises.[30] Rather, the anti-immigrant forces placed the hundreds of pages in the budget omnibus bill. When passed, many lawmakers were unaware of what they were doing.[31] Even today, given the complexities of immigration law, very few lawmakers can even articulate, let alone defend, the changes that the 1997 law made.[32] But that is policy.

The more relevant concern is how the term "exceptional and extremely unusual" hardship is—and must—be interpreted.

As explained by the dissenting board members—since fired due to their sympathies to non-citizens[33]—"it is more than likely that ***no respondent*** from

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[30] Get citiation.
[31] Cites and newspaper reports.
[32] Cites
[33] "The criticisms that the immigration judges do not have independence from the prosecutor rest on the premise that the Attorney General would exert his or her prosecutorial agenda over the immigration judges and members who serve on the BIA. The fears are not unfounded.

In the matter of hiring, in 2007, Monica Goodling admitted to Congress that the political viewpoints of applicants were taken into account when the DOJ hired attorneys to serve as immigration judges. Individuals who expressed sympathies towards aliens were not hired. Those who expressed a desire to support the Attorney General's prosecutorial agenda were.

During the course of their employment, immigration judges are vulnerable to having their substantive decisions subject them to investigation and discipline. The DOJ issued regulations stating that "freedom to decide cases under the law and regulations should not be confused with managing the caseload and setting standards for review." Such a confusing caveat has been criticized because "the line between administrative, procedural, and substantive issues is not always a bright or obvious one." Judge Marks has suggested that, "Immigration Judges are placed in the untenable position of being classified by the DOJ as attorney employees who are then subject to discipline for the legitimate exercise of their independent judgment as adjudicators." The fear of a disciplinary investigation into a judge's substantive reasoning is not unfounded. The DOJ's Office of Professional Responsibility has initiated investigations of misconduct against certain judges based on the legal reasoning contained in their decisions.

Mexico will qualify for cancellation unless the qualifying relative has severe medical problems. I do not believe that was the directive of Congress. Nor is it consistent with our decision . . . in which we rejected an 'unconscionable standard' as higher than required."[34]

Of note, the dissenting board members clarified that the facts on the case should meet the necessary hardship requirement. "[T]he removal of the United States citizen children in this case is not merely a return to a country with a lower standard of living and a poor educational system. It is, in essence, a method of depriving the citizen children of the valued education that they currently enjoy in the United States. This, in turn, is likely to result in a lifetime hardship that deprives the children of an opportunity to obtain the skills necessary to meaningfully participate effectively and intelligently in our open political system."[35]

Because federal courts are not permitted from weighing in on the interpretation of "hardship", the BIA has had the last word. However compelling the facts. However, persuasive the dissent, the seeming unconscionable hardship standard is the law of the law.

Immigration judges are also vulnerable to losing their jobs if their decisions stray too far from the political viewpoint of the Attorney General. The most egregious example of this vulnerability was Attorney General John Ashcroft's actions to reduce the membership of the BIA, the sole appellate body charged with reviewing all immigration court decisions. In 2002, the BIA was facing a 57,000 case backlog, which was causing decisions from any appeal to be issued between seven and ten years. The Attorney General responded to the crisis in two notable ways.

[. . .] The second response was to reduce the Board's size from twenty-three judges to eleven. The Attorney General fired the Board members who had granted cases at rates higher than the BIA's average. "Those who were asked to leave or were encouraged to leave were those who were seen as being out of line with Attorney General Ashcroft's point of view on immigration."

[. . .] Judge Marks has described the current DOJ internal investigations against the decisions of an immigration judge "'with the clear memory of the not-too-distant personnel purge at the BIA" as having a "decidedly chilling effect on Immigration Judges.'" Kari E. Hong, Removing Citizens: Parenthood, Immigration Courts, and Derivative Citizenship, 28 Geo. Immigr. L.J. 277, 334-36 (2014) (citations omitted).

[34] In Re Andazola-Rivas, 23 I. & N. Dec. at 325 (dissenting opinion by Cecelia M. Espenoza, Board Member, in which Lory Diana Rosenberg, Board Member, joined)

[35] Andazola-Rivas, 23 I. & N. Dec. at 328-29 ((dissenting opinion by Cecelia M. Espenoza, Board Member, in which Lory Diana Rosenberg, Board Member, joined) (citing and quoting *Wisconsin v. Yoder*, *supra*, at 221) (quotation marks omitted)

This is where family law has an important opportunity to enter the discussion as to what is meaning of the hardship as it impacts citizen children.

PART II: The History and Contemporary Use of Guardians Ad Litem To Protect Children From Immiment Harm

In this section, I intend to look at the practice and procedure of guardians ad litem. Family courts did not always have them, but once they did, the guardians ad litem were able to play a significant role in advocating for the interests of children.

Of note, Rule 17 of the Federal Rule of Civil Procedure, permits federal courts to have guardians ad litem appointed in federal proceedings. There is no reason as to why this rule cannot apply to federal immigration court proceedings.

PART III. Because Deportation Presents Citizen Children With Imminent and Egregious Harm, Guardians Ad Litem May Enter Immigration Courts To Reinterpret The Hardship Standard

My argument then is that the current BIA interpretation of hardship is untenable and can be reformed by family law procedures in two notable ways.

One, under Chevron, the BIA interpretation of hardship is irrational. The impact that deportation has on citizen children does not serve the best interests of the child. As articulated by the dissenting judges, Congress restricted relief through many other ways in the statute (term of years, expansion of crimes, impact on relatives and not alien). Changing hardship from the old standard to unconscionable is not consistent with how then it should operate.

Two, in assessing the cognizable hardship that a citizen child is permitted to incur from deportation, the proper standard cannot be a relative one, based on an assumption that because masses are harmed, any harm to a specific child—however serious and irreparable—is not legally significant. To the contrary, many state guardian ad litem statutes have "emergency provisions" to protect children from immediate harm. These statutes should be interpreted to permit guardian ad litems to enter immigration courts to advocate for citizen children and weigh in on the best outcome of each specific case.

Immigration courts have an existing relationship with state family courts with respect to unaccompanied minors. This proposal, which merely adds a means to also protect citizen children, then is not without precedent.