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# Deporting Grandma: Why Grandparent Deportation May Be the Next Big Immigration Crisis and How to Solve It

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*This Article explores the issue of grandparent caregiver deportation. The phenomenon of grandparents raising grandchildren is not new, but the number of children being raised by grandparents is at an all-time high and growing. Numerous circumstances can lead to a grandparent's assumption of caregiving responsibilities, but in most cases, grandparents assume this role because there is no one else. For thousands of children, grandparents are the only family they have, and without them these children would be placed in foster care and subject to the serious problems that plague children in foster care. The importance of grandparent caregivers cannot be understated. Consequently, laws and policies that impact grandparent-headed households deserve special care and attention.*

*Specifically, this Article focuses on the impact of immigration law on grandparent-headed families. A growing problem facing many of these households is the grandparent caregiver's immigration status. Many grandparent caregivers are undocumented immigrants who face the ever present, and increasing, threat of deportation. Such deportation can be devastating for their U.S. citizen grandchildren. The Immigration and Nationality Act, which controls who may enter and remain in the United States, contains exceptions to deportation. One such exception is the "hardship" exception, which authorizes cancellation of the removal of a deportable alien if such removal would cause hardship to a category of persons, defined in the statute as consisting of the "alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted*

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for permanent residence.” Grandchildren are absent from this list and, consequently, courts have found grandparents are ineligible for cancellation of removal.

This Article argues that, given the unique circumstances that typically lead to the assumption of primary caregiving by grandparents, the hardship exception should be amended to make grandparents eligible for cancellation of removal. It further argues that such a change will have a significant and beneficial impact despite the extremely high bar for cancellation of removal and the infrequency with which it is granted in the case of parental deportations. As this Article will demonstrate, the circumstances surrounding grandparent caregiving are often quite different from parental caregiving. Grandparents are likely to assume caregiving only after the child has already undergone significant hardship; they are typically the last relative caregivers before a child is placed in foster care and they usually do not have legal custody and thus cannot take their grandchildren with them if deported. Cancellation of removal in parental deportation cases is almost unheard of, but if grandparents qualified for cancellation of removal they might frequently meet the criteria for such relief.

#### TABLE OF CONTENTS

INTRODUCTION .....	195
I. THE DIFFICULTIES OF BEING A GRANDPARENT CAREGIVER.....	198
A. Grandparent Caregivers Raise Children Who Have Already Faced Significant Hardship.....	199
B. Social Policy Undervalues Grandparent Caregivers, Many of Whom Face the Added Burden of Poverty- Related Hardship .....	200
C. Noncitizen Grandparent Caregivers Face the Added Threat of Deportation .....	204
II. QUALIFYING HARDSHIP FOR CANCELLATION OF REMOVAL: CURRENTLY A HIGH BAR FOR GRANDPARENT CAREGIVERS TO MEET .....	207
A. The INA Purposefully Creates a High Bar for Qualifying Hardship .....	207
B. Gonzales Recinas Upholds a High Bar for Qualifying Hardship .....	210
C. The Ninth Circuit Precludes Grandparent Caregivers from Qualifying Hardship .....	213
III. GRANDPARENT DEPORTATION: SATISFYING THE HARDSHIP CRITERIA .....	215

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2009]	Deporting Grandma	195
A.	<i>Potential Deportation Should Satisfy the Hardship Criteria when Grandchildren Have Already Faced Significant Hardship</i> .....	215
B.	<i>Potential Deportation Should Satisfy the Hardship Criteria when Grandparent Caregivers Lack Custody of Their Grandchildren</i> .....	218
C.	<i>Potential Deportation Should Satisfy the Hardship Criteria when It Results in Grandchildren Entering Foster Care</i> .....	223
IV.	RECOGNIZING THE NEED TO AMEND THE CURRENT HARDSHIP LAWS .....	225
A.	<i>Current Discretionary Remedies Are Not Sufficient</i> .....	225
B.	<i>Increased Legal Recognition of Grandparent Caregivers Suggests a Trend Toward Increasing Support at the State and Federal Level</i> .....	227
C.	<i>Family Unity Is a Cornerstone of U.S. Immigration Law and Must Be Preserved in the Grandparent Caregiver Context</i> .....	231
D.	<i>Due Process Requires an Amendment to the Hardship Provision</i> .....	235
V.	CONGRESS SHOULD AMEND THE QUALIFYING RELATIVES PROVISION OF THE HARDSHIP EXCEPTION.....	240
A.	<i>The Statute Should Be Amended to Provide for Grandparent Caregivers</i> .....	241
B.	<i>Amending the Statue is Feasible and Comports with Immigration Law Objectives</i> .....	244
C.	<i>Adoption as an Alternative Means of Staying Deportation</i> .....	247
D.	<i>Permitting Cancellation of Removal for Primary Caregiving Grandparents Makes Good Economic and Policy Sense</i> .....	249
	CONCLUSION.....	251

## INTRODUCTION

The number of children being raised by grandparents is at an all-time high, and this trend shows no sign of abating.<sup>1</sup> For thousands of

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<sup>1</sup> Amy Goyer, *Intergenerational Relationships: Grandparents Raising Grandchildren*, AARP, Feb. 1, 2006, [http://www.aarpinternational.org/resourcelibrary/resourcelibrary\\_show.htm?doc\\_id=545720](http://www.aarpinternational.org/resourcelibrary/resourcelibrary_show.htm?doc_id=545720) (“In the U.S., and across the globe, growing numbers of children are being raised by their grandparents or other relatives. The 2000 U.S. Census reported 4.5 million children living in grandparent-headed homes (a 30% increase from

children, grandparents are the only family they have. Grandparents are the only people keeping these children out of the foster care system<sup>2</sup> and away from the devastating problems that plague children in foster care.<sup>3</sup> A study in the *Journal of Aging and Social Policy* dubbed grandparents the “‘silent saviors’ for families struggling with relationship, economic and social instability.”<sup>4</sup> Given the importance of grandparent caregiving, special care and attention must be directed toward laws and policies that impact grandparent-headed households.

Recently, immigration law has begun to have a significant impact on many of these families.<sup>5</sup> A growing problem facing many grandparent-headed households concerns the grandparent caregiver’s immigration status. Many grandparent caregivers are undocumented immigrants who face the ever present and increasing threat of deportation.<sup>6</sup> By 2012, the Department of Homeland Security plans to deport all undocumented immigrants currently living and working in the United States.<sup>7</sup> If successful, this will result in the deportation of

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1990).”). Currently, grandparents raise 6.3 percent of all U.S. children under age eighteen. Thirteen percent of all African American children, 8 percent of all Hispanic children, and 4 percent of all Caucasian and Asian children live with grandparents. Even larger percentages of “Native American children are being raised by grandparents — with some Indian Tribes estimating up to 60% of their children in this living situation.” *Id.*; see also TAMMY L. HENDERSON & MICHELLE L. STEVENSON, GRANDPARENTS REARING GRANDCHILDREN: RIGHTS AND RESPONSIBILITIES 1 (Va. Coop. Extension 2009), available at <http://www.pubs.ext.vt.edu/350/350-255/350-255.pdf> (noting that more grandparents are “caring for [grandchildren] now than ever before”).

<sup>2</sup> See Michelle L. Stevenson et al., *Vital Defenses: Social Support Appraisals of Black Grandmothers Parenting Grandchildren*, 20 J. FAM. ISSUES 182, 200 (2007) (reporting that most common reasons given by black grandmothers who assume caregiving responsibilities for grandchildren was desire “to keep the children out of the foster care system”); see also HENDERSON & STEVENSON, *supra* note 1, at 1 (identifying desire to “prevent placement in foster care” as one of main reasons for grandparent caregiving); Meredith Minkler, *Intergenerational Households Headed by Grandparents: Contexts, Realities, and Implications for Policy*, 13 J. AGING STUDIES 199, 205 (1999) (stating that reason grandparents assumed caregiving was to avoid having their grandchildren placed in foster care).

<sup>3</sup> See, e.g., Jill Chaifetz, *Listening to Foster Children in Accordance with the Law: The Failure to Serve Children in State Care*, 25 N.Y.U. REV. L. & SOC. CHANGE 1, 7-8 (1999) (detailing “incalculable” human loss attributable to failures and hardships in foster care system).

<sup>4</sup> See Casey E. Copen, *Welfare Reform: Challenges for Grandparents Raising Grandchildren*, 18 J. AGING & SOC. POL’Y 193, 197 (2006).

<sup>5</sup> *Id.*

<sup>6</sup> See *infra* notes 7-8.

<sup>7</sup> Carol Rose & Christopher Ott, *Inhumane Raid Was Just One of Many*, BOSTON GLOBE, Mar. 26, 2007, at 9A (citing U.S. DEP’T OF HOMELAND SEC., OFFICE OF DETENTION AND REMOVAL, STRATEGIC PLAN, 2003-2012, ENDGAME (2003), available at

approximately twelve million people,<sup>8</sup> thousands of whom are the primary caregivers to U.S. citizen children.

The Immigration and Nationality Act (“INA”) governs immigration and the role of immigrants in the United States.<sup>9</sup> The act controls which persons can enter and remain in the United States as well as when and why an immigrant may be deported.<sup>10</sup> The act also contains exceptions to deportation. One such exception is the “hardship” exception, which authorizes cancellation of the removal of a deportable alien.<sup>11</sup> To qualify for the hardship exception, the alien must prove that deportation would cause hardship to a qualified person. Under the INA, qualified persons include the “alien’s spouse, parent, or child” who is a U.S. citizen or a lawful resident.<sup>12</sup> The list of qualified persons does not include grandchildren. Consequently, the Ninth Circuit recently held that grandparents are ineligible for cancellation of removal under the hardship exception.<sup>13</sup>

This Article argues that, given the unique circumstances that typically lead to the assumption of primary caregiving by grandparents, the hardship exception should be amended to make grandparents eligible for cancellation of removal. This Article further argues that such a change will have a significant and beneficial impact despite the extremely high bar for cancellation of removal and the infrequency with which it is granted in the case of parental deportations. As this Article demonstrates, the circumstances surrounding grandparent caregiving are often quite different from parental caregiving. Grandparents are likely to assume caregiving only after the child has already undergone significant hardship; they are typically the last relative caregivers before a child is placed in foster care; and they usually do not have legal custody and thus cannot take their grandchildren with them if they are deported. Cancellation of removal in parental deportation cases is almost unheard of, but if grandparents qualified for cancellation of removal, they are likely to satisfy the criteria for such relief more frequently than parent caregivers.

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<http://www.aclum.org/pdf/endgame.pdf>).

<sup>8</sup> JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S., at i (2006), available at <http://pewhispanic.org/files/reports/61.pdf>.

<sup>9</sup> See Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, §§ 102-04, 66 Stat. 163, 173-74 (codified as amended at 8 U.S.C. §§ 1101-537 (2006)).

<sup>10</sup> See *id.*

<sup>11</sup> 8 U.S.C. § 1229b(b)(1) (2000).

<sup>12</sup> *Id.*

<sup>13</sup> See *infra* Part II.C.

All undocumented immigrant grandparents are potentially subject to deportation orders that could force them to abandon their U.S. citizen grandchildren. However, this Article will primarily focus on undocumented Hispanic grandparents and their U.S. citizen grandchildren. I have chosen to concentrate on Hispanic grandparents and grandchildren because they are the immigrant population most impacted by the threat of grandparent deportation.<sup>14</sup> Nevertheless, it is important to recognize that this problem impacts any undocumented immigrant grandparent caregiver.

Part I of this Article explores the important role served by primary caregiver grandparents. Part II discusses the particular problems faced by noncitizen primary caregiver grandparents and their grandchildren. Part III argues that if a primary caregiver grandparent is eligible for cancellation of removal, the hardship caused by his or her deportation would often meet the level required for cancellation of removal. Part IV examines the feasibility of amending the hardship statute. Part V argues that the hardship statute must be amended to include grandchildren as qualifying relatives and discusses the feasibility and benefits of enacting this change.

#### I. THE DIFFICULTIES OF BEING A GRANDPARENT CAREGIVER

Grandparent-raised children experience a host of difficulties not experienced by the typical child. They often come from broken and abusive homes, they suffer learning and behavioral problems, and they frequently live in significant poverty. In addition to these problems, a growing number of grandchildren also face the possibility of having their grandparent caregiver deported. The need for grandparents to assume a primary caregiving role is not limited to citizen grandparents and their grandchildren. Many undocumented immigrant grandparents assume a primary caregiver role for their grandchildren, and for these families, the specter of deportation is an ever-present threat.

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<sup>14</sup> Hispanics are the “fastest growing group in America.” Ediberto Román, *The Alien Invasion?*, 45 HOUS. L. REV. 841, 895 (2008). Hispanics comprise “over 45% of all newcomers to this country.” Jennifer Gordon, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1165 (2008). And Hispanics also comprise the largest percentage of undocumented immigrants. See PASSEL, *supra* note 8, at ii (noting that 78% of undocumented immigrant population is from Mexico and Latin America). In addition, Hispanics have a greater incidence of kinship care arrangements than other racial groups. See *infra* notes 48-51 and accompanying text.

A. *Grandparent Caregivers Raise Children Who Have Already Faced Significant Hardship*

A myriad of circumstances can lead to a grandparent's assumption of caregiving responsibility. For example, when Gwendolyn McCoy was fifteen years old she was statutorily raped and impregnated by her mother's boyfriend.<sup>15</sup> Recognizing that her mother could not provide a safe and stable home, Gwendolyn moved in with her grandparents, the Altizers. The Altizers offered to care for Gwendolyn and her infant son.<sup>16</sup>

Similarly, when John Moore Jr. suffered personal tragedy and had nowhere to go, his grandmother opened her home to him.<sup>17</sup> John Jr. was less than a year old when his mother died.<sup>18</sup> John Jr.'s father was unable to care for him, so John Jr. went to live with his grandmother, Inez Moore. There he joined his cousin, Dale, whom Ms. Moore was also caring for.<sup>19</sup>

A third grandmother, Mrs. Dwere, assumed caregiving responsibilities for her grandsons under similarly unfortunate circumstances. The boys' mother, T., was an unwed teenager with a criminal record for numerous thefts in the state of Michigan. T. had never been in a position to care for her sons, and after T.'s arrest and imprisonment, her parental rights were terminated. Mrs. Dwere then formally adopted her grandsons.<sup>20</sup>

The above stories illustrate the importance of grandparent caregivers, and the circumstances that lead to their assumption of caregiving. However, these stories are not uncommon. Grandparent caregiving is on the rise.<sup>21</sup> More than 4.4 million children live in

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<sup>15</sup> See *Garska v. McCoy*, 278 S.E.2d 357, 358-59 (W. Va. 1981).

<sup>16</sup> It should be noted that Gwendolyn spent the majority of her childhood being raised by her grandparents as well. When she tried living with her mother, she became pregnant and returned to her grandparents. *Id.*

<sup>17</sup> See *Moore v. City of E. Cleveland*, 431 U.S. 494, 496-97, 505 n.16 (1977).

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

<sup>19</sup> Dale's father, Dale Moore Sr., also lived in the home. John's father was living with the family at the time of trial but not at the time the citation was issued. See *id.* at 497 n.4.

<sup>20</sup> See Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for Impermanence*, 34 CAP. U. L. REV. 405, 447-49 (2005).

<sup>21</sup> See Ann R. Pebley & Laura L. Rudkin, *Grandparents Caring for Grandchildren: What Do We Know?*, 20 J. FAM. ISSUES 218, 223 (1999) ("[A] significant part of the change in the absolute number of children living in grandparent-headed households is simply due to a change in the age structure of the U.S. population . . . . Nonetheless, the majority of the change in numbers was due to a moderate increase in the propensity of children to live with their grandparents . . . .").

grandparent-headed households.<sup>22</sup> Of these, more than 1.5 million are being raised exclusively by grandparents.<sup>23</sup> This represents a 50 percent increase since 1990.<sup>24</sup>

In addition, children raised by grandparents are not typical children. These children have experienced some of the worst poverty and hardship in America.<sup>25</sup> In most cases, the events that led children to their grandparents' households have made their lives incredibly difficult. Grandparent caregivers are most likely to take on full-time parenting roles after parents experience serious problems such as drug use, incarceration, or mental illness. Other times, grandparents become primary caregivers because the children have been abused or neglected.<sup>26</sup> Hispanic grandparents typically assume caregiving responsibilities under similarly stressful and stigmatizing circumstances, but with the added stress of potential deportation.<sup>27</sup> Because the hardship statute does not protect grandparents, noncitizen Hispanic grandparents have little hope of fighting deportation.<sup>28</sup>

*B. Social Policy Undervalues Grandparent Caregivers, Many of Whom Face the Added Burden of Poverty-Related Hardship*

Although children end up in grandparent care and foster care for similar reasons, grandparent care provides a superior environment in which to raise children. Foster children typically live in three or more homes per year, and the lack of a permanent, loving caregiver is

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<sup>22</sup> Copen, *supra* note 4, at 195.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See *Grandparents Raising Children: Skipping a Generation*, *ECONOMIST*, June 16, 2007, at 84.

<sup>26</sup> *Id.*; see Stevenson et al., *supra* note 2, at 183 (noting that grandparents often assume parental role when parents are unable to parent their children "because of illness, incarceration, financial stress and parental death because of AIDS or other illnesses"); see also Copen, *supra* note 4, at 195.

<sup>27</sup> Hispanic grandparents "provide care in response to crises, including substance abuse, teen pregnancy, female incarceration and HIV/AIDS." See Stevenson et al., *supra* note 2, at 183.

<sup>28</sup> See Esme Fuller-Thomson & Meredith Minkler, *Central American Grandparents Raising Grandchildren*, 29 *HISP. J. BEHAV. SCI.* 5, 13 (2007). Hispanic grandparents are four times more likely to become caregivers for their grandchildren than their white counterparts. However, a significant number of Hispanic grandparents co-parent with the child's parents. For purposes of this article, the only relevant rate is the incidence of primary caregiving. According to Fuller-Thomson and Minkler's study, approximately 5 percent of Hispanic grandparents are primary caregivers for their grandchildren. See *id.* at 10-13.



detrimental to their health and development.<sup>29</sup> In contrast, grandparent-raised children typically have a stable and permanent home with a loving caregiver.<sup>30</sup> Grandparent homes provide a positive environment for children that far exceeds the benefits of alternative living arrangements such as foster care or other governmental institutions.<sup>31</sup> Given these advantages, many child psychologists have concluded that placing children with grandparents may be the optimal arrangement once children have experienced a breakdown in their nuclear family.<sup>32</sup>

Remarkably, the benefits of grandparent care occur despite the significant obstacles faced by grandparent caregivers. The majority of grandparent-headed households are low income, including anywhere from 19 to 37 percent with incomes less than the federal poverty level.<sup>33</sup> In fact, when compared with their nonchildrearing peers,

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<sup>29</sup> See Roy Grant, *The Special Needs of Children in Kinship Care*, 33 J. GERONTOLOGICAL SOC. WORK 17, 20 (2000).

<sup>30</sup> *Id.* at 29 (“In kinship care there are generally fewer changes in placement than in traditional foster care. Custody is likely to either remain with the relative or be restored to the parent and the child is likely to remain in his community of origin (without disrupting pre-existing school placement and health care arrangements).”); David J. Herring, *Kinship Foster Care: Implications of Behavioral Biological Research*, 56 BUFF. L. REV. 495, 516-18 (2008) (“The odds of feeling a part of the family are three times as high for foster children living with grandparents, aunts and uncles as compared to foster children living in unrelated foster homes.” (quoting Mark F. Testa, *The Quality of Permanence — Lasting or Binding?: Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption*, 12 VA. J. SOC. POL’Y & L. 499, 524 (2005))).

<sup>31</sup> Oliver W. Edwards & Andrew P. Daire, *School-Age Children Raised by Their Grandparents: Problems and Solutions*, 33 J. INSTRUCTIONAL PSYCHOL. 113, 113-14 (2006) (“Living with someone who loves and is willing to raise them and the opportunity to maintain the family connection and history are distinct advantages for children in these alternate families.”). At least one study has shown that children raised by grandparents “evidenced better physical health and fewer behavioral problems than children living with only one biological parent.” *Id.* at 115 (citing J.C. Solomon & J. Marx, “*To Grandmother’s House We Go*: Health and School Adjustment of Children Raised Solely by Grandparents”, 35 GERONTOLOGIST 386, 386-94 (1995)). In addition, studies have shown that placement with relatives reduces the trauma of separation and offers greater opportunity for contact with parents. See Helaine Hornby et al., *Kinship Care in America: What Outcomes Should Policy Seek?*, 75 CHILD WELFARE 397, 399 (1996).

<sup>32</sup> See Edwards & Daire, *supra* note 31, at 118.

<sup>33</sup> See *Grandparents Raising Children*, *supra* note 25, at 84 (citing 2003 study by Urban Institute). Although the Urban Institute estimates may be slightly high, there is little question that a significant percentage of grandparent-headed households are living in poverty. See, e.g., Copen, *supra* note 4, at 196 (“[On] average, 19% of grandparent-headed households were living in poverty in 1999. . . . Children living in grandparent-headed households with no parents present are three times as likely to be receiving public assistance, but are also twice as likely . . . to be living in poverty, as

grandparents raising grandchildren are 60 percent more likely to live in poverty.<sup>34</sup> Not surprisingly, the majority of grandparent caregivers indicate that they are concerned about money.<sup>35</sup> These statistics are just as alarming for Hispanic grandparent-headed households. Almost half of Hispanic grandparent caregivers live in overcrowded conditions, and approximately 25 percent of these grandparent headed families live below the poverty line.<sup>36</sup> While these statistics don't differentiate between citizen and noncitizen Hispanic grandparents, it is reasonable to presume that these numbers are even higher with regard to undocumented Hispanic households.<sup>37</sup>

Although placement with grandparents is preferable to foster care, these children are still negatively affected by their grandparents' financial conditions. Due to poverty, grandparent-raised children have poorer health and experience more academic and other school-related problems than their parentally-raised peers.<sup>38</sup> Yet such poverty is not inevitable.

The financial condition of grandparent caregivers stems in large part from the law's inability to recognize and unwillingness to respond to

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compared to children living with parents."); *see also* TAVIA SIMMONS & JANE LAWLER DYE, U.S. CENSUS BUREAU, *GRANDPARENTS LIVING WITH GRANDCHILDREN: 2000*, CENSUS 2000 BRIEF 9 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-31.pdf> (showing that 19% of grandparent caregivers had incomes below 1999 poverty level and that in some states percentage was as high as 30%).

<sup>34</sup> Tammy L. Henderson, *Grandparents Rearing Grandchildren on TANF: A Study in Virginia*, 96 J. FAM. & CONSUMER SCI. 10, 11 (2004).

<sup>35</sup> Henderson, *supra* note 34, at 11. There are a number of different factors that contribute to the increased poverty in grandparent-headed households. Such factors include the fact that grandparent caregivers are usually older, they are likely to care for more than one child, many of the children have physical and learning disabilities, and these children typically remain with their grandparents for long periods of time. *See Note, The Policy of Penalty in Kinship Care*, 112 HARV. L. REV. 1047, 1050 (1999) [hereinafter *Penalty in Kinship*]. Studies have shown that even grandparent caregivers eligible for benefits such as federal block grants, known as Temporary Aid to Needy Families ("TANF"), often have problems receiving the payments they are entitled to and on average receive barely half of the national average for foster care payments. *See* Stevenson et al., *supra* note 2, at 191-93 (describing problems that low income black grandmothers experienced with regard to receiving TANF benefits).

<sup>36</sup> Fuller-Thompson & Minkler, *supra* note 28, at 5.

<sup>37</sup> *See infra* Part I.C (describing how undocumented grandparents are even less likely to take part in financial resources available to grandparent caregivers in general).

<sup>38</sup> Oliver W. Edwards, *Teachers' Perceptions of the Emotional and Behavioral Functioning of Children Raised by Grandparents*, 43 PSYCHOL. SCH. 565, 565 (2006). However, as noted above, despite such poverty, grandparent-raised children still experience fewer problems than children in foster care. *See supra* notes 28-32 and accompanying text.

these alternative caregiving arrangements. Despite the demonstrated benefits of grandparent care, the law has been slow to acknowledge and encourage such caregiving arrangements by providing financial and other legal benefits. A significant part of the problem arises from the fact that grandparent caregivers frequently do not have legal custody of their grandchildren.<sup>39</sup> As a result, grandparents often have difficulties receiving health care and other financial benefits on behalf of their grandchildren.<sup>40</sup>

Even if grandparent caregivers manage to obtain financial assistance, what they receive is still significantly less than what is considered adequate in the nonrelative foster care context.<sup>41</sup> The financial help available to foster care providers is uniformly greater than anything

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<sup>39</sup> See Grant, *supra* note 29, at 19 (“[C]ompared with non-familial foster home placements, children in kinship households were less likely to have legal permanency planning.” (citation omitted)). In addition, the law also discourages many eligible grandparents from seeking legal custody because if such grandparents are receiving foster benefits on behalf of their grandchildren then these benefits are significantly higher than anything they could receive as legal custodians. See, e.g., *In re Robert L.*, 80 Cal. Rptr. 2d 578, 579, 583 (Ct. App. 1998) (“The grandparents elected not to seek legal guardianship so that they would remain eligible to receive \$700 per month in foster care benefits . . .”).

<sup>40</sup> *Penalty in Kinship*, *supra* note 35, at 1052 (“Because states are reimbursed for part of their federal foster care expenditures, states have a clear financial incentive to attempt to place children in federal foster care. However, when relatives cannot meet federal foster care eligibility requirements, states have a further financial incentive to extend TANF benefits — rather than state foster care payments — to a child. This incentive is created because monthly TANF benefits are consistently lower than state foster care maintenance payments.”). This difference in payment between foster and kinship care is often justified by the idea that relatives have a moral if not legal obligation to care for these children; “[s]uch a view implies that aid above and beyond the TANF rate (such as foster care maintenance payments) is ‘inducement’ — rather than maintenance for the child’s basic needs — to which a relative caregiver is not entitled.” *Id.* at 1055; see also Henderson, *supra* note 34, at 11 (comparing benefits available under TANF to those available under foster care and noting that “[b]ased on national data for 2000, the average amount paid through TANF was \$238 per month” while “foster care, in 1999, provided an average of \$403 per month”).

<sup>41</sup> Studies have shown that even grandparent caregivers eligible for benefits such as TANF often have problems receiving the payments they are entitled to and, on average, receive barely half of the national average for foster care payments. See, e.g., Stevenson et al., *supra* note 2, at 191-93 (describing problems that low income black grandmothers experienced with regard to receiving TANF benefits); see also Fuller-Thomson & Minkler, *supra* note 28, at 11-12 (discovering that “[g]randparents who were not citizens were approximately 71% less likely to report caregiving responsibilities [and thus receive public assistance] and grandparents who were naturalized citizens had 50% lower odds of reporting caregiving responsibilities than did their Central American peers who were born in the United States”).

available to grandparent caregivers.<sup>42</sup> However, it is extremely difficult for grandparents to receive foster care benefits for raising their grandchildren. The ironic result is that despite the demonstrated benefits of grandparent care, grandparents are financially punished for choosing to care for their grandchildren,<sup>43</sup> and their grandchildren suffer similarly for their decision to avoid traditional foster care.<sup>44</sup> A system that penalizes grandparents for caring for their grandchildren does not serve the best interests of these children or their families.<sup>45</sup> Rather, what this situation demonstrates is that in our society, kinship care is shockingly and unwisely undervalued.<sup>46</sup>

*C. Noncitizen Grandparent Caregivers Face the Added Threat of Deportation*

Even though the majority of children being raised by grandparents are Caucasian,<sup>47</sup> the fastest growing group of children being raised exclusively by grandparents are Hispanic.<sup>48</sup> Hispanic grandparents are

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<sup>42</sup> *Penalty in Kinship*, *supra* note 35, at 1051-52 (“While relatives are entitled to receive federal foster care payments, many are unable to meet the stringent, formalistic licensing requirements for foster parenting, which involve consideration of such factors as sleeping arrangements, number of bedrooms, and minimum square footage of the living quarters.”).

<sup>43</sup> J. Conrad Glass, Jr. & Terry L. Huneycutt, *Grandparents Raising Grandchildren: The Courts, Custody and Educational Implications*, 28 EDUC. GERONTOLOGY 237, 244 (2002) (“Nonrelative foster care is also eligible for other services that grandparents are not. These services included counseling, clothing allowances, and medical and physical evaluations.”); *see, e.g., In re Robert L.*, 80 Cal. Rptr. 2d at 579 (demonstrating how relative caregivers receive less financial support than nonrelative foster parents).

<sup>44</sup> *See Henderson*, *supra* note 34.

<sup>45</sup> *See id.*

<sup>46</sup> *Id.* at 12. *See generally* ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD* 2 (Owl Books 2002) (2001) (arguing that child care is undervalued by our society in general and that it is not considered work but rather something that should be done for free).

<sup>47</sup> Edwards, *supra* note 38, at 566 (“Caucasians comprise the majority of grandparents raising their grandchildren at approximately 50%.”). African Americans comprise approximately 37 percent of children being raised by grandparents, while Hispanic children being raised by grandparents are approximately 12 percent of the total. *Id.*

<sup>48</sup> *See* CHARLES A. SMITH, KAN. STATE UNIV. AGRIC. EXPERIMENT STATION AND COOP. EXTENSION SERV., *GRANDPARENTS AS CAREGIVERS: HEARTBREAK AND HOPE* 1 (2006), available at <http://www.oznet.ksu.edu/library/famlf2/MF2744.pdf> (examining grandparent primary caregivers in Kansas and noting that “fastest growing segment of children living in grandparent-headed homes are Hispanic”); *see also* Copen, *supra* note 4, at 195 (“African-American and Latino grandparents have an increased likelihood of taking on an extensive caregiving role, primarily because of differing family composition and unique role expectations regarding grandparenting.”); Grant,

nearly twice as likely to be caring for grandchildren.<sup>49</sup> However, unlike their white or black peers, significant numbers of Hispanic grandparents are undocumented immigrants<sup>50</sup> and, thus, face the threat of deportation.<sup>51</sup> Consequently, Hispanic children raised by undocumented grandparents experience the same host of social ills as their grandparent-raised peers but must cope with the additional threat of their grandparent's deportation.<sup>52</sup>

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*supra* note 29, at 18 (“[T]here is no evidence of an increase among non-Hispanic whites, the greater incidence of kinship care arrangements being seen primarily among racial and ethnic minority groups.”).

<sup>49</sup> Denise Burnette, *Latino Grandparents Rearing Grandchildren with Special Needs: Effects on Depressive Symptomatology*, 33 J. GERONTOLOGICAL SOC. WORK 1, 2 (2000).

<sup>50</sup> Although it is difficult to know exactly how many children are being raised by undocumented immigrant grandparent caregivers, such statistics imply the numbers may be quite significant: “The current undocumented immigrant population in the United States is estimated to be anywhere from ten to twelve million and is increasing by approximately five hundred thousand each year.” Merav Lichtenstein, Note, *An Examination of Guest Worker Immigration Reform Policies in the United States*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 689, 689 (2007). “Over 92% of recently arrived Mexican non-citizens live with a family member, meaning they are living with someone they are related to by birth, marriage or adoption” and “[t]here are 3.2 million children who are citizens of the United States by birth, who live in households where at least one parent is an undocumented immigrant.” *Id.* at 724. In fact, it is estimated that “nearly one out of every ten U.S. families with children is of ‘mixed status.’” Victor C. Romero, *The Child Citizenship Act and the Family Reunification Act: Valuing the Citizen Child as Well as the Citizen Parent*, 55 FLA. L. REV. 489, 497 n.44 (2003).

<sup>51</sup> The threat of deportation is not confined to undocumented immigrants. Rather, the threat of deportation is faced by all noncitizen caregivers. “[A] lawful permanent resident is subject to all applicable grounds for removal and to placement in removal proceedings. This has long been the accepted understanding of the immigration law.” *In re Smriko*, 23 I. & N. Dec. 836, 841 (B.I.A. 2005) (citing *In re Bahta*, 22 I. & N. Dec. 1381, 1382 n.2 (B.I.A. 2000), and *In re Garcia-Alzugaray*, 19 I. & N. Dec. 407 (B.I.A. 1986)); see also INA § 237, 8 U.S.C. § 1227(a) (2000) (explaining that legal permanent residents are subject to deportation for engaging in deportable conduct).

<sup>52</sup> See *supra* Part I.A (describing reasons children are placed in grandparent care). Not counting undocumented immigrants, sources such as the U.S. Census Bureau and U.S. Department of Human Services statistics indicate that “[a]mong Hispanics, 7.4% of children, more than 600,000, lived with grandparents in the absence of their biological parents.” Grant, *supra* note 29, at 18. In addition, the number of Hispanic children being raised by grandparents is also likely to increase in comparison with other groups, given the fact that “the most significant characteristic of the Chicano family has been identified as familism” and that “Mexican-Americans, when compared with Anglo-Americans, are more likely to rely on relatives for emotional support.” Monique L. Hawthorne, Comment, *Family Unity in Immigration Law: Broadening the Scope of Family*, 11 LEWIS & CLARK L. REV. 809, 825-26 (2007) (quoting Carol Sanger, *Immigration Reform and Control of the Undocumented Family*, 2 GEO. IMMIGR. L.J. 295, 313 (1987), and citing Susan E. Keefe et al., *The Mexican-American Extended Family as an Emotional Support System*, 38 HUM. ORG. 144 (1979)).

If that were not enough, these children also experience a range of further difficulties stemming directly from their grandparents' undocumented status. For example, grandchildren raised by undocumented grandparents are at an even greater risk of poverty than typical grandparent-raised children because their grandparents' status makes them ineligible to receive many federal and state financial support services.<sup>53</sup>

In addition, because noncitizen grandparents live with the constant fear of deportation and the possibility of being forced to abandon their grandchildren to the foster care system, these grandparents rarely participate in the few federal and state benefit programs that are available to them. The fear that such participation could alert immigration authorities to their undocumented status outweighs their very real need for financial assistance.<sup>54</sup> Therefore, in addition to living with the dread of their grandparents' deportation, children raised by undocumented noncitizen grandparents also need to struggle with

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<sup>53</sup> See Checklist of Federal Benefit Programs Available to Documented and Undocumented Workers, <http://www.workingforamerica.org/documents/checklist.asp> (last visited Aug. 11, 2009); see also Fuller-Thomson & Minkler, *supra* note 28, at 5, 7, 15 (noting that, in general, only 1% of Hispanic caregivers living in poverty were receiving social assistance and numbers are even less for undocumented grandparents who are "not eligible for social welfare and other support services"). In addition, it should be noted that there is an increasing movement to bar undocumented immigrants from additional benefits such as attending public universities and partaking in other state services. See Marcia A. Yablon-Zug & Danielle Holley-Walker, *Not Very Collegial: Exploring Bans on Undocumented Immigrant Admissions to State Colleges and Universities*, 3 CHARLESTON L. REV. (forthcoming Spring 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1360995](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1360995).

<sup>54</sup> See, e.g., *In re B & J*, 756 N.W.2d 234, 237 (Mich. Ct. App. 2008) (describing case where unrelated agency alerted immigration authorities to applicant's undocumented status); Hirokazu Yoshikawa et al., *Access to Institutional Resources as a Measure of Social Exclusion: Relations with Family Process and Cognitive Development in the Context of Immigration*, 121 NEW DIRECTIONS FOR CHILD & ADOLESCENT DEV. 63, 65-66 (2008) (finding that groups with higher proportions of undocumented parents had lower levels of access to checking accounts, savings accounts, credit and drivers' licenses, and this lack of access was associated with higher economic hardship and psychological distress among parents and lower levels of cognitive ability of their children.). See generally Virginia Martinez et al., *A Community Under Siege: The Impact of Anti-Immigration on Latinos*, 2 DEPAUL J. FOR SOC. JUST. 101, 134 (2008) (noting that both undocumented and documented immigrants "decrease their involvement in community activities designed to educate, inform and assist them because they fear harassment by police or immigration officers"); Kathryn Fanlund, Comment, *Our Safety or Their Lives?: Legislative Changes Impacting Immigration and the Risk Posed to Immigrant Women*, 23 WIS. J.L. GENDER & SOC'Y 135, 140 (2008) (citing San Francisco study showing that 64% of undocumented women who were victims of domestic violence "said that their fear of deportation was the primary reason why they chose not to seek social services").

receiving less money and fewer resources than other grandparent-raised children.<sup>55</sup> Amending the INA's hardship exception to include grandchildren would alleviate many of these additional problems that stem from a grandparent caregivers' undocumented status.

II. QUALIFYING HARDSHIP FOR CANCELLATION OF REMOVAL:  
CURRENTLY A HIGH BAR FOR GRANDPARENT CAREGIVERS TO MEET

The hardships grandparent-raised children experience are extreme. The additional difficulty that would result from their grandparents' deportation is almost unimaginable. Although the INA intentionally created a high bar for qualifying hardship, the hardships experienced by these grandchildren are exactly the type of hardships Congress sought to prevent when it included the hardship exception as part of the INA. However, because grandchildren are not listed as qualifying relatives under the act, grandchildren facing the prospect of their grandparents' deportation are denied the opportunity to even present this argument.

A. *The INA Purposefully Creates a High Bar for Qualifying Hardship*

Section 240A of the INA creates a tremendously high bar for qualifying hardship. This difficulty was intentional. The INA's hardship exception states:

The Attorney General may cancel removal of . . . an alien who is inadmissible or deportable from the United States if the alien . . . (D) *establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.*<sup>56</sup>

<sup>55</sup> Fuller-Thomson & Minkler, *supra* note 28, at 15 ("Despite their high levels of financial vulnerability, less than 1% of grandparent caregivers in the [Fuller-Thomson, Minkler] study were receiving social assistance.").

<sup>56</sup> INA § 240A(b)(1), 8 U.S.C. § 1229b(b)(1) (2000) (emphasis added). The above hardship provision represents a change from an earlier provision, which only required "extreme hardship," as opposed to extremely unusual hardship. Compare INA § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1994) (repealed 1996), with INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D) (containing new requirement that hardship must be "exceptional and extremely unusual"). As with many other aspects of immigration law, the 1996 amendments made relief under the hardship provision more difficult, but clearly such relief was not eliminated. Consequently, immigration law continues to consider the effect of removal on the noncitizen's family.

Congress revised the language of the hardship exception in 1996 when it passed the Illegal Immigrant Reform and Immigrant Responsibility Act ("IIRIRA").<sup>57</sup> The purpose of the change was to make qualification harder. Before adopting its present language, the statute only required "extreme hardship."<sup>58</sup> The current version of the hardship exception requires both "exceptional" and "extremely unusual" hardship. This change was made in response to two very specific concerns, neither of which relate to grandparent caregivers. Consequently, the amended hardship statute does not indicate Congress's desire to foreclose all possible expansions of the hardship exception.

The first reason for the revision was Congress's concern that a recent Board of Immigration Appeals ("BIA") case had weakened the "extreme hardship" standard. The BIA case held that removing aliens who had become acclimated to the United States constituted a significant hardship that could justify suspension of deportation.<sup>59</sup> In the wake of this BIA ruling, Congress changed the standard from "extreme hardship" to "exceptional and extremely unusual hardship."<sup>60</sup> This change emphasized that an alien must show some evidence of hardship "to his spouse, parent, or child" significantly greater than what would normally be expected to occur as a result of the alien's deportation.<sup>61</sup> The purpose of this change was to reduce the number of people who qualified for the hardship exception.<sup>62</sup>

The second reason Congress changed the hardship standard was in response to jus soli citizenship concerns. The right of jus soli is the right of all persons born on American soil to automatically receive United States citizenship.<sup>63</sup> One of the primary concerns with jus soli, or birth right citizenship, is the fear that pregnant women will cross the United States border to give birth and then use the resulting

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<sup>57</sup> See Pub. L. No. 104-208, § 240A(b)(1)(D), 110 Stat. 3009-546, 3009-594 (1996).

<sup>58</sup> See *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 61-62 (B.I.A. 2001) (discussing change in language of statute).

<sup>59</sup> The Congressional report on the IIRIRA cited to the case of *In re O-J-O*, 21 I. & N. Dec. 381 (B.I.A. 1996), in which the BIA found that the 24-year-old alien had developed such strong ties in the United States that deporting him back to Nicaragua would cause "significant hardship on a social and psychological level." *Id.* at 385.

<sup>60</sup> Elwin Griffith, *Admission and Cancellation of Removal Under the Immigration and Nationality Act*, 2005 MICH. ST. L. REV. 979, 1023-26 (citing H.R. REP. NO. 104-828, at 213 (1996) (Conf. Rep.)).

<sup>61</sup> *Id.* at 1027.

<sup>62</sup> THOMAS A. ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 592 (5th ed. 2003).

<sup>63</sup> Ragini Shah, *Sharing the American Dream: Towards Formalizing the Status of Long-Term Resident Undocumented Children in the United States*, 39 COLUM. HUM. RTS. L. REV. 637, 654 (2008).



citizen child as an anchor to bring the rest of the family into the United States.<sup>64</sup> To ensure that such children could not serve this purpose,<sup>65</sup> the IIRIRA strengthened the hardship provision and eliminated judicial review of BIA hardship decisions.<sup>66</sup> Congress believed that changing the hardship standard from “extreme” to “exceptional and extremely unusual” would prevent pregnant women from crossing the border to give birth and then arguing that the parent’s deportation constituted an extreme hardship justifying cancellation of removal.

Allowing grandchildren to serve as qualifying relatives under the hardship statute does not thwart either of these purposes. Regarding the first purpose, the hardship to grandchildren is substantial and is not simply the hardship that attends to “any alien’s deportation.” Rather, as explained below, the hardship to grandchildren caused by their grandparents’ deportation is exactly the type of “exceptional and extremely unusual” hardship that would satisfy the statute’s current standard.

As for the second concern, grandparents are obviously not crossing the border to give birth to their grandchildren,<sup>67</sup> and given the high bar to claiming hardship, it would be a rare case where a grandparent became a primary caregiver in an attempt to take advantage of the hardship exception.<sup>68</sup> Consequently, including grandchildren as

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<sup>64</sup> Brooke Kirkland, Note, *Limiting the Application of Jus Soli: The Resulting Status of Undocumented Children in the United States*, 12 BUFF. HUM. RTS. L. REV. 197, 203-04 (2006). It is interesting to note that although this belief regarding jus soli is widely held, the concern seems largely illusory. “[T]he concept that such a change would stem abuse of the immigration system ‘eras[es] the economic and political context in which . . . [it] is occurring.’ ” *Id.* at 204 (citations omitted). In 1995 Congress commissioned a three-year study on this issue, after which the Chair of the Commission of Immigration Reform noted that “[i]n three years and dozens of hearings, consultations and expert discussions, no one has ever reported to the Commission that the vast majority of births to illegal aliens are anything more than a reflection of the large number of illegal aliens who are here.” *Societal and Legal Issues Surrounding Children Born in the United States to Illegal Alien Parents: Joint Hearing on H.R. 705, H.R. 1363, H.J. Res. 64, H.J. Res. 87, H.J. Res. 88, and H.J. Res. 93 Before the Subcomm. on Immigration and Claims and the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 50 (1995) (prepared testimony of the Honorable Barbara Jordan, Chair, United States Commission on Immigration Reform).

<sup>65</sup> See ALEINIKOFF ET AL., *supra* note 62, at 592.

<sup>66</sup> See John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of INS v. Ventura*, 18 GEO. IMMIGR. L.J. 605, 616 (2004) (discussing limiting judicial review to certain BIA decisions).

<sup>67</sup> *But see Surrogate Mom Gives Birth to Her Grandchildren*, HAMILTON SPECTATOR, Oct. 10, 2007, at A8.

<sup>68</sup> If grandparents became primary caregivers absent the typical scenario leading to

qualifying relatives under the hardship exception is not at odds with the purpose behind the most recent changes to the hardship provision.

*B. Gonzales Recinas Upholds a High Bar for Qualifying Hardship*

*In re Gonzales Recinas*<sup>69</sup> is the seminal case setting out the standard for cancellation of removal under the “exceptional and extremely unusual hardship” standard. The facts in *Gonzales Recinas* are extremely rare; as a result, this case sets out a difficult and, some argue, almost unattainable standard for cancellation of removal. However, although such facts may be rare in the parental deportation context, facts indicating a similar level of hardship may not be nearly as uncommon in the context of grandparent deportation.

In *Gonzales Recinas*, the noncitizen facing deportation was a 39-year-old single mother of six.<sup>70</sup> She was a native and citizen of Mexico, but she had no immediate family left in Mexico.<sup>71</sup> Her parents, her siblings, and four of her children were all citizens or lawful permanent residents of the United States, and *Gonzales Recinas*’s employment was only possible because the children had a caregiver grandmother who watched the children while their mother worked.<sup>72</sup>

The *Gonzales Recinas* court described the standard for cancellation of removal as a “hardship that is substantially beyond that which would ordinarily be expected to result from the person’s departure,” but does not need to rise to the level of being “unconscionable.”<sup>73</sup> In finding that *Gonzales Recinas*’s deportation would create sufficient hardship, the court distinguished this case from previous cases denying cancellation of removal under the hardship exception.

The court relied on two earlier cases, *In re Andazola-Rivas*<sup>74</sup> and *In re Monreal-Aguinaga*,<sup>75</sup> as the “starting points for any analysis of exceptional and extremely unusual hardship.”<sup>76</sup> In those cases, returning United States citizen children to Mexico with their parents

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assumption of grandparent care, they would be unlikely to qualify for the exception. See *infra* Part II.B (discussing hardship standard).

<sup>69</sup> 23 I. & N. Dec. 467, 467 (B.I.A. 2002).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 471.

<sup>72</sup> *Id.* at 469-70.

<sup>73</sup> *Id.* at 468.

<sup>74</sup> 23 I. & N. Dec. 319 (B.I.A. 2002).

<sup>75</sup> 23 I. & N. Dec. 56 (B.I.A. 2001).

<sup>76</sup> *Gonzalez Recinas*, 23 I. & N. Dec. at 469; see also *Andazola-Rivas*, 23 I. & N. Dec. at 319; *Monreal-Aguinaga*, 23 I. & N. Dec. at 56.

did not create the requisite hardship for a number of reasons. The court's holdings turned on two distinctive factors.

First, the court focused on the location of family members. In *Monreal-Aguinaga*, returning the children to their parent's country would actually reunite them with family members.<sup>77</sup> In *Andazola-Rivas*, the court did not consider the mother's family that was in the United States, but only because these family members did not have proper documentation and the court therefore could not consider them to be "located" in the United States.<sup>78</sup> Thus, even though the parents in *Monreal-Aguinaga* and *Andazola-Rivas* did not qualify for the hardship exception, the *Gonzales Recinas* court concluded that both cases demonstrated that the location and status of family members is a significant consideration for determining hardship.

In contrast, when the court then considered this factor with regard to *Gonzales Recinas*, the court held that the mother's deportation constituted hardship. The court emphasized that "respondent and her children ha[d] no close relatives remaining in Mexico," and that her "entire family live[d] in the United States, including her permanent resident parents and five United States citizen siblings."<sup>79</sup> Additionally, the children had a very close relationship with their grandmother who lived nearby.<sup>80</sup> In fact, the court found the grandmother's caregiving crucial, noting that it "enabled [the mother] to support her children within a stable environment."<sup>81</sup>

The second decisive factor in the court's hardship determination concerned the availability of a "strong system of family support" that could provide additional emotional and financial assistance.<sup>82</sup> The court noted that in the United States, the *Gonzales Recinas* children had the benefits of an extended family that furnished emotional and financial support, including a caregiving grandmother.

Conversely, if the mother were deported to Mexico, the *Gonzales Recinas* children would be "entirely dependent on their single mother

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<sup>77</sup> The children's mother was already living in Mexico. See *Gonzalez Recinas*, 23 I. & N. Dec. at 469.

<sup>78</sup> Given their undocumented status, these family members were subject to deportation. Consequently, they were distinguishable from the family members in *Gonzales Recinas* who were all residing lawfully in the United States and thus were "unlikely to be subject to immigration enforcement and will probably remain in the United States." *Id.* at 472.

<sup>79</sup> *Id.* at 469-70.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 471.

<sup>82</sup> *Id.*

for support.”<sup>83</sup> According to the court, the fact that the mother was a single parent increased the hardship the children would face upon their return to Mexico. Unlike the children in *Monreal-Aguinaga* and *Andaloza-Rivas*, the Gonzales Recinas children would “be completely dependent on their mother’s ability, not only to find adequate employment and housing, but also to provide for their emotional needs.”<sup>84</sup> The court emphasized the fact that respondent was a “single parent who [was] solely responsible for the care of six children who has no family to return to in Mexico.”<sup>85</sup> For the court, these were “critical factors that distinguish[ed] her case from many other cancellation of removal claims.”<sup>86</sup> Thus, the court found the location of family members and the mother’s lack of a familial support structure to be the major factors in making its hardship determination.

*Gonzales Recinas* created a high bar for cancellation of removal.<sup>87</sup> However, the qualifying hardship in *Gonzales Recinas* pales in comparison to what grandchildren will suffer in the typical grandparent caregiver deportation case. In *Gonzales Recinas*, the determinative factor indicating hardship was that Gonzales Recinas had no family in Mexico. Sending a single mother to Mexico to care for six children with no familial help constituted an extremely unusual hardship. The typical grandparent deportation case demonstrates a similar, if not greater, degree of hardship. Most deported grandparents will not be able to take their grandchildren with them when they leave. As a result, these children are likely to remain in the United States.<sup>88</sup> However, as discussed above, grandparents typically care for their grandchildren to avoid placing the children in foster care. Therefore, the deportation of primary grandparents will result in many

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<sup>83</sup> *Id.* at 471. The court noted that this factor distinguished them from children in *Monreal-Aguinaga* and *Andazola-Rivas*.

<sup>84</sup> *Id.* Other factors the court found relevant were that the children had spent their entire lives in the United States, had never traveled to Mexico, had difficulty speaking Spanish, and could not read or write Spanish. Further, the court noted that the children “experience difficulty speaking Spanish and do not read or write in that language.” *Id.* at 470.

<sup>85</sup> *Id.* at 471.

<sup>86</sup> *Id.*

<sup>87</sup> Griffith, *supra* note 60, at 1030 (describing *Gonzales Recinas* as BIA’s chance to “show how tough it would be in its assessment of ‘exceptional, and extremely unusual hardship’ ”); see also Monica Gomez, Note, *Immigration by Adverse Possession: Common Law Amnesty for Long Residing Illegal Immigrants in the United States*, 22 GEO. IMMIGR. L.J. 105, 118 n.88 (2007) (citing *Gonzales Recinas* to support proposition that “[t]he standard for ‘extreme and unusual hardship’ is very high”).

<sup>88</sup> See *supra* Part II.A-B (discussing grandparent versus parent deportation).

of these children being placed in foster care.<sup>89</sup> Leaving children with no family to care for them results in a significantly greater hardship than the hardship the Gonzales Recinas children faced.

C. *The Ninth Circuit Precludes Grandparent Caregivers from Qualifying Hardship*

Two recent Ninth Circuit cases highlight the particular problems facing Hispanic children raised by undocumented grandparents and demonstrate how courts are likely to handle hardship petitions involving grandparent primary caregivers under the current immigration statutes. In *Moreno-Morante v. Gonzales*<sup>90</sup> and *Lopez-Vasquez v. Gonzales*,<sup>91</sup> grandparents filed for cancellation of removal pursuant to the hardship exception.<sup>92</sup> In both cases, the grandparents were the primary caregivers for their U.S. citizen grandchildren. Given their caregiving role, the grandparents argued that the term “child” should be read to include grandchildren when the grandparents and grandchildren are in a “de facto parent-child relationship.”<sup>93</sup> In both cases, the court rejected this argument, finding that “Congress, through the plain language of the statute, [has] precluded this functional approach to defining the term ‘child.’”<sup>94</sup> According to the courts, the language of the hardship exception was unambiguous and, thus, they had no option but to deny such petitions.

Both the *Moreno-Morante* and *Lopez-Velazquez* courts based their holdings on the Supreme Court’s decision in *INS v. Hector*.<sup>95</sup> In *Hector*, the petitioner aunt argued that deportation would result in extreme

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<sup>89</sup> See *supra* notes 1-4 and accompanying text (describing how grandparents typically assume caregiving to keep children out of foster care); see also *infra* Part III.B (describing how grandparents often do not have legal custody of their grandchildren, thus eliminating any option to take children with them).

<sup>90</sup> 490 F.3d 1172 (9th Cir. 2007).

<sup>91</sup> 234 F. App’x 706 (9th Cir. 2007) (filed concurrently with *Moreno-Morante*). Such decisions are not confined to the grandparent context and have been rejected in other kinship care cases as well. See, e.g., *Gutierrez-Granados v. Mukasey*, 255 F. App’x 161, 162 (9th Cir. 2007) (finding that U.S. citizen niece could not be considered qualifying relative for primary caregiver uncle); see also *Suriel de Batista v. Gonzalez*, 494 F.3d 67, 70 (2d Cir. 2007) (finding petitioner ineligible for discretionary waiver of inadmissibility under 8 U.S.C. § 1182(d)(11) (2006) because child she attempted to smuggle into United States was nephew whom she treated as her own child and who was not her “spouse, parent, son, or daughter”).

<sup>92</sup> See also 8 U.S.C. § 1229b(b)(1)(D) (2000).

<sup>93</sup> See *Lopez-Vasquez*, 234 F. App’x at 707.

<sup>94</sup> *Id.* (citing *INS v. Hector*, 479 U.S. 85, 90 (1986)).

<sup>95</sup> 479 U.S. 85 (1986).

hardship for her teenage nieces, who were living with her. The Court rejected this argument, explaining: “[T]he Board is not required . . . to consider the hardship to a third party other than a spouse, parent, or child, as defined by the Act. Congress has specifically identified the relatives whose hardship is to be considered, and then set forth unusually detailed and unyielding provisions defining each class of included relatives.”<sup>96</sup>

*Hector* was not a particularly compelling hardship case. The nieces in *Hector* had moved in with their aunt to go to school in the United States, but they also had concerned and loving parents back in Dominica.<sup>97</sup> Because the girls voluntarily separated from their parents, separation from their aunt would hardly seem an extreme hardship.<sup>98</sup>

Given these facts, the Court could easily have adopted the lower court’s conclusion — that separation from their aunt would not result in extreme hardship and that this was not a de facto parent-child relationship — but the Court declined to take this course of action.<sup>99</sup> Instead, the Court found the hardship statute clear and explicit, and accordingly ruled that it could only consider hardship to a spouse, parent, or child.<sup>100</sup>

The *Hector* Court recognized that it could be “argued that the line should have been drawn at a different point and that the statutory definitions deny preferential status to [some] who share strong family ties.”<sup>101</sup> However, it also noted that it is a policy question where to draw the line, further noting that “policy questions [are] entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress.”<sup>102</sup> The Court pointed out that Congress has refined the term “child” numerous times and that additional changes must be left to congressional discretion.<sup>103</sup>

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<sup>96</sup> *Id.* at 89.

<sup>97</sup> *Id.* at 86.

<sup>98</sup> *See id.*

<sup>99</sup> *Id.* at 87-88.

<sup>100</sup> *Id.* at 88.

<sup>101</sup> *Id.* at 89.

<sup>102</sup> *Id.* (citing *Fiallo v. Bell*, 430 U.S. 787, 798 (1977)).

<sup>103</sup> *Id.* at 90 n.6 (“As originally enacted, the statute defined a ‘child’ as an unmarried legitimate or legitimated child or stepchild under 21 years of age. Congress has since repeatedly fine-tuned the definition of ‘child.’ There have been no less than four separate amendments, each adding to or refining the definition. In light of this history of close congressional attention to this specific issue, we are especially bound to pay heed to the plain mandate of the words Congress has chosen.” (internal citations omitted)).

*Hector, Moreno-Morante, and Lopez-Vasquez* all demonstrate that the category of relatives specifically delineated in the hardship statute are the only relatives a court will consider for cancellation of removal. These cases further demonstrate that if grandparents are ever going to qualify for cancellation of removal, this change will not come from the courts but will have to come from Congress. It is time for Congress to recognize the exceptional and extremely unusual hardship caused by the deportation of grandparent primary caregivers.

### III. GRANDPARENT DEPORTATION: SATISFYING THE HARDSHIP CRITERIA

In many instances, the deportation of a grandparent primary caregiver will result in “exceptional and extremely unusual hardship” to their citizen grandchildren. Consequently, if grandchildren were considered qualifying relatives under the hardship statute, then many primary caregiver grandparents would qualify for relief. An examination of recent hardship cases demonstrates that the deportation of grandparent caregivers is exactly the type of hardship the provision aims to prevent.

#### A. *Potential Deportation Should Satisfy the Hardship Criteria when Grandchildren Have Already Faced Significant Hardship*

The deportation of grandparent primary caregivers can create extreme hardship. In some, if not many, instances, this hardship would satisfy the current standard for cancellation of removal due to hardship. The extreme hardship caused by grandparent deportation becomes obvious when one considers the example of Gwendolyn McCoy, discussed above.<sup>104</sup> Imagine if Gwendolyn’s grandparents were deportable aliens. Gwendolyn was raised by her grandparents and they were her only caregiving family.<sup>105</sup> Her father abandoned her, and Gwendolyn’s mother was so unfit that when she attempted to care for her daughter, Gwendolyn was raped and impregnated by her mother’s boyfriend.<sup>106</sup> Consequently, Gwendolyn’s grandparents, the Altizers, provided the only stable and loving environment available to Gwendolyn and her son. But imagine if Gwendolyn’s grandparents were deported. What would happen to Gwendolyn? Where would she go? Would she lose her son?

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<sup>104</sup> See *supra* Part I.A.

<sup>105</sup> See *Garska v. McCoy*, 278 S.E.2d 357, 358-59 (W. Va. 1981).

<sup>106</sup> *Id.* at 359.

Even assuming Gwendolyn and her son would be granted residency in her grandparents' country of citizenship, she would not necessarily leave with them. When Gwendolyn attempted to have her grandparents adopt her son, the child's father intervened to prevent the adoption and seek custody himself.<sup>107</sup> Given the father's objection to the adoption, it is very likely the father would also have objected to any attempt to remove the child from the United States.<sup>108</sup> Courts are very receptive to such objections because international moves will negatively affect noncustodial parents' abilities to maintain a relationship with their children. As a result, courts have frequently denied custody to parents seeking to relocate internationally.<sup>109</sup> It is therefore not unreasonable to assume that if the Altizers were deported, Gwendolyn would have remained in the United States. Unfortunately, it is also realistic to assume that without any family to care for her, Gwendolyn would have been placed in foster care and, in all likelihood, separated from her baby.<sup>110</sup> Due to a lack of appropriate facilities, teenage mothers and their children are frequently separated by foster care placement.<sup>111</sup>

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<sup>107</sup> *Id.*

<sup>108</sup> See Merle H. Weiner, *Codification, Cooperation and Concern for Children: The Internationalization of Family Law in the United States Over the Last Fifty Years*, 42 FAM. L.Q. 619, 621-23 (2008) (describing legal considerations for parents wishing to relocate internationally).

<sup>109</sup> See, e.g., *Daghir v. Daghir*, 441 N.Y.S.2d 494, 497 (App. Div. 1981), *aff'd*, 439 N.E.2d 324 (N.Y. 1982) (denying custody to mother who planned to remove her children to France, and noting that although custodial parents have right to remarry and move to distant locale, decision to bear children encompasses obligation to protect child's relationship with noncustodial parent); *In re Kades*, 202 N.Y.S.2d 362, 366 (Sup. Ct. 1960) (denying award of custody to mother residing in Australia because court found move would deny child close and loving relationship with her father); *Bergstrom v. Bergstrom*, 296 N.W.2d 490, 494 (N.D. 1980) (denying mother right of custody upon evidence that child would reside in Norway and noting that transatlantic flights are costly and that, consequently, allowing move would effectively preclude father from ever seeing his child); *Davidyan v. Davidyan*, 327 A.2d 139, 141 (Pa. Super. Ct. 1974) (approving award of custody to mother who planned return to her native Scotland, but stating that all factors being equal, resident is preferable to nonresident in custody award context because former was more amenable to court's continuous supervision and control), *aff'd after remand*, 327 A.2d 145 (Pa. Super. Ct. 1974).

<sup>110</sup> See, e.g., Teen Parents in Foster Care Act, S.B. 1178, 2004 Leg., 2003-04 Sess. (Cal. 2004), available at [http://leginfo.ca.gov/pub/03-04/bill/sen/sb\\_1151-1200/sb\\_1178\\_bill\\_20040928\\_chaptered.pdf](http://leginfo.ca.gov/pub/03-04/bill/sen/sb_1151-1200/sb_1178_bill_20040928_chaptered.pdf) (noting that "babies born to dependent teen parents are more likely to be separated from their birth families than babies born to teen parents who are not in the dependency system").

<sup>111</sup> Whether Gwendolyn would remain with her son in foster care would be uncertain. "[T]he placement of both the teenage mother and her child together is contingent on the availability of a trained foster care provider or group home that is



It is easy to envision a similarly alarming scenario if Mrs. Dwere had also been a deportable alien. Because Mrs. Dwere was a citizen, she was able to adopt her grandchildren after the termination of their mother's parental rights. However, if Mrs. Dwere had been a deportable alien, it is doubtful that she would have sought such an adoption.<sup>112</sup> Attempting to adopt the children could have alerted the immigration authorities to her illegal status. Consequently, it is unlikely that Mrs. Dwere would have pursued this course of action and, thus, she would not have had the legal custody necessary to take the children with her if she were deported.

If Mrs. Dwere attempted to take the children with her despite her lack of formal custody, it is very probable the children's mother would have objected. In the termination proceedings, it was only after much counseling by the children's legal advocates that the mother was willing to concede that termination was in their best interests and drop her objection to the termination.<sup>113</sup> Given her reluctance to allow termination, it is not unreasonable to suppose that if Mrs. Dwere were subject to deportation, the mother would have objected to the removal of her children from the United States. Such an objection would have prevented the move. As long as the mother retained legal custody, removing the children against her wishes would have been impossible. Under the International Parental Kidnapping Crime Act,<sup>114</sup> it is a federal crime to take a child internationally against the wishes of a custodial parent. Further, the Hague Convention mandates that signatory countries return any such children.<sup>115</sup> Consequently, if Mrs.

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willing to take both the teen and her child." U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, *Second Chance Homes: Providing Services for Teenage Parents and Their Children* (Oct. 2000), <http://aspe.hhs.gov/hsp/2ndchancehomes00> (last visited Oct. 7, 2009). In addition, if the child's father were to seek custody there is a strong likelihood that the mother's placement in foster care would weigh against her in a custody determination. *But see* URBAN INST., *WHAT ABOUT THE DADS?: CHILD WELFARE AGENCIES' EFFORTS TO IDENTIFY, LOCATE, AND INVOLVE NONRESIDENT FATHERS* 16 (2006), *available at* [http://www.urban.org/UploadedPDF/411316\\_nonresident\\_fathers.pdf](http://www.urban.org/UploadedPDF/411316_nonresident_fathers.pdf) (suggesting that fathers rarely get custody of children even when child is placed in foster care).

<sup>112</sup> See *supra* note 54 (noting that many undocumented aliens are wary of attempting adoption because it could alert immigration authorities to their undocumented status). Further, in the case of Mrs. Dwere, it is unlikely that she would have sought such an adoption because the sole reason she sought an adoption in the first place was to secure additional state and federal benefits which she would still not have been entitled to as an undocumented alien.

<sup>113</sup> See Coupet, *supra* note 20, at 449.

<sup>114</sup> International Parental Kidnapping Crime Act of 1993, 18 U.S.C.A. § 1204 (West 2000 & Supp. 2006).

<sup>115</sup> See Hague Convention on the Civil Aspects of International Child Abduction

Dwere were deported, the three boys would have remained in the United States and wound up in foster care, separated from their grandmother and, in all likelihood, from each other.<sup>116</sup>

Such examples begin to illustrate why grandparent deportation creates significantly greater hardships than parental deportation.

*B. Potential Deportation Should Satisfy the Hardship Criteria when Grandparent Caregivers Lack Custody of Their Grandchildren*

Because most grandparents do not have legal custody of their grandchildren, these grandchildren are less likely to leave with their deported grandparents than children of deported parents. As a result, the deportation of a grandparent caregiver is more likely to result in significant hardship. In typical parental deportation cases, children leave with their deported parents.<sup>117</sup> Many have argued that such deportation qualifies as exceptional hardship, but this is a losing argument.<sup>118</sup> Such removal does not qualify as exceptional hardship.<sup>119</sup>

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art. 1, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 49, available at [http://www.hcch.net/index\\_en.php?act=conventions.pdf&cid=24](http://www.hcch.net/index_en.php?act=conventions.pdf&cid=24).

<sup>116</sup> See Patricia Wen, *Pay Hike Eyed on Foster Siblings Incentive to Keep Children Together: DSS Program May Have Cash Incentive*, BOSTON GLOBE, Aug. 19, 2002, at A1 (describing foster care system as one that often splits siblings).

<sup>117</sup> Typically, under U.S. immigration law, the potential separation of a child from its deported parent is not a decisive factor in removal decisions. "It is assumed that the family could be reunited in another country." Nora V. Demleiter, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law's Conflicted Answers*, 32 HOFSTRA L. REV. 273, 299 (2003) (citing *Patel v. INS*, 638 F.2d 1199, 1206 (9th Cir. 1980)); see also *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 56, 65 (B.I.A. 2001). An interesting related question concerns the deportation of parents of children placed in foster care. As with grandparent primary caregivers, these parents do not have the ability to take their children with them should they be deported. However, although such parents could also arguably raise the argument that their deportation would create a hardship for a qualifying U.S. citizen, the fact that these children are already in foster care appears to doom such arguments. In a majority of such cases, courts find that the parent's deportation, rather than justifying cancellation of removal, justifies termination of parental rights. See, e.g., *United States v. Hernandez-Baide*, 392 F.3d 1153, 1155 (10th Cir. 2004) (finding that termination of parental rights was acceptable consequence of deportation and thus did not justify downward departure for her crime of illegal re-entry). But see *Fairfax County Dep't of Family Servs. v. Ibrahim*, No. 0821-00-4, 2000 WL 1847638, at \*1 (Va. Ct. App. Dec. 19, 2000) (refusing to terminate father's parental rights upon his deportation). Unlike grandparent deportation cases in which foster care is a hardship, the above cases concern family situations in which the state has adjudged foster care to be preferable to the children remaining with their parents.

<sup>118</sup> In fact, this issue is being raised again through a lawsuit brought by 150 U.S. citizen children protesting their parents' deportation, but, as immigration experts agree, their likelihood of success is slim. See Laura Wides-Munoz, *More than 100 Kids*

Congress has rejected the idea that U.S. citizen children who return with their parents to their parents' country of origin experience an "extremely unusual hardship." As U.S. citizens, these children have a right to remain in the United States; but this does not include the right to remain in the United States with their parents.<sup>120</sup> Immigration authorities assume children will accompany their deported parents, and are extremely skeptical of parental decisions to separate from their children.<sup>121</sup> Parents intending to separate must present the government with proof of their intention to separate.<sup>122</sup> Moreover, even if parents

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*Sue over Parents' Deportations*, USA TODAY, June 17, 2009, [http://www.usatoday.com/news/nation/2009-06-17-deportation\\_N.htm](http://www.usatoday.com/news/nation/2009-06-17-deportation_N.htm); see also *infra* Part IV.D (discussing such constitutional challenges).

<sup>119</sup> The implications of deporting primary caregiver grandparents are quite different from those that inure in the more typical parental deportation case. In this typical case, there is a U.S. citizen child with an alien parent or parents. In these cases the citizen child, although eligible to remain in the United States, typically leaves with the deported parents. Therefore, the hardship in those situations is that the United States citizen child will have the hardship of not growing up in the United States. Previously, the hardship the citizen child faced by leaving the country could be considered. See, e.g., *INS v. Wang*, 450 U.S. 139, 144-45 (1981) (explaining that BIA had authority to consider whether deportable aliens' children would face economic hardship or educational deprivation when determining extreme hardship). However, since the 1996 changes, it is well settled that this does not qualify as "exceptional and extremely unusual hardship." *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 65 (B.I.A. 2001) (explaining that "exceptional and extremely unusual hardship" means "beyond[] [what] would normally be expected from the deportation of an alien with close family members here").

<sup>120</sup> See *In re Piggot*, 15 I. & N. Dec. 129, 131 (B.I.A. 1974) (Torrington, J., dissenting).

<sup>121</sup> See David B. Thronson, *Choiceless Choices, Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1171 (2006).

<sup>122</sup> See *Jimenez v. INS*, No. 96-70169, 1997 WL 349051, at \*5 (9th Cir. June 25, 1997) (allowing BIA to ignore hardship that would result from leaving child in United States where parent "failed to present any concrete evidence indicating that the child would remain in the United States and that reasonable provisions would be made for him"); Thronson, *supra* note 121, at 1171 n.30 (citing *In re Ige*, 20 I. & N. Dec. 880, 885 (B.I.A. 1994) ("Where an alien alleges that extreme hardship would be suffered by his United States citizen child were the child to remain in this country upon his parent's deportation, the Board will not give such a claim significant weight based on either the mere assertion that the child would remain here or an indirect reference to such a possibility. The claim that the child will remain in the United States can easily be made for purposes of litigation, but most parents would not carry out such an alleged plan in reality. Therefore we will require, at a minimum, an affidavit from the parent or parents stating that it is their intention that the child remain in this country, accompanied by evidence demonstrating that reasonable provisions will be made for the child's care and support (such as staying with a relative or in a boarding school)."); see also *Perez v. INS*, 96 F.3d 390, 393 (9th Cir. 1996) (upholding BIA's ability to require affidavits and other evidence of separation).

are able to show that the child will remain in the United States, the BIA has held that “absent proof of extreme hardship to a child if he returns to his parents’ native country with them, we will generally consider the decision to leave the child in the United States to be a matter of personal choice.”<sup>123</sup>

Critics such as Professor David Thronson of the University of Nevada School of Law argue that this policy was developed to “deny a means by which every parent of a U.S. citizen or legal permanent resident child could qualify for immigration relief.”<sup>124</sup> Whether or not such criticisms are correct with regard to parental deportation,<sup>125</sup> they have no relevance to the issue of grandparent deportation.

In the majority of grandparent deportation cases, a grandparent’s separation from his or her grandchild is not a choice. Grandparents typically do not have custody of their grandchildren and thus they could not bring their children with them if they wanted to. Many of these children are not citizens of their grandparents’ country and thus have no right to reside there.<sup>126</sup>

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<sup>123</sup> *In re Ige*, 20 I. & N. Dec. 880, 886 (B.I.A. 1994).

<sup>124</sup> Thronson, *supra* note 121, at 1171 (citing *In re Ige*, 20 I. & N. Dec. at 885-86 (“[I]f a parent’s eligibility for suspension of deportation could be established by demonstrating that an infant or unemancipated child abandoned in the United States would face extreme hardship, then the birth of a United States citizen child or the presence of a lawful permanent resident child would likely render any alien parent who had been in the United States for [the requisite time period] eligible for suspension, even if the child would not face extreme hardship abroad.”)); *see also supra* Part II.A (discussing *jus soli* doctrine).

<sup>125</sup> As Professor Thronson notes, the Catch-22 of the “exceptional and extremely unusual hardship” provision with regard to parents is that in order to use this exception, parents must show that bringing their children with them would be an exceptional and extremely unusual hardship. But since such children are not compelled to go with their parents, any parental decision to place them in such a situation calls the parents’ decision and fitness into question. *See* Thronson, *supra* note 121, at 1168 (citing *Olowo v. Ashcroft*, 368 F.3d 692, 695 (7th Cir. 2004) (noting that deportable mother claimed extreme hardship because she claimed that if her daughters returned with her to Nigeria they would be subject to female genital mutilation)).

<sup>126</sup> *See, e.g.,* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1951 (2000) (noting that “[t]he United States is hardly unique in its regulation of when and how noncitizen family members who are outside the country may immigrate to join family members who are within the country”); *see also* Michael J. Trebilcock & Matthew Sudak, *The Political Economy of Emigration and Immigration*, 81 N.Y.U. L. REV. 234, 281 (2006) (“One of the key ingredients of immigration policy in most developed countries is a quota system that restricts the number of immigrants that will be accepted each year in each major admission category (independent immigrants, family immigrants, and overseas refugees).”). *See generally* Hiroshi Motomura, *The Family*

Moreover, even if the grandparents' country would permit the child to reside there, removing the child from the United States is not a decision that the grandparents have the right to make. It is the custodial parent who has the legal right to determine where their child will reside.<sup>127</sup> Both domestic<sup>128</sup> and international law<sup>129</sup> protect this right. Thus, a grandparent could not remove his or her grandchild over the custodial parent's objection, and there is good reason to expect that parents will often object.

In the majority of cases, grandparents provide care with the hope that the parents will be able to reassume their parental responsibilities,<sup>130</sup> and parents hold these expectations as well. Parents frequently object to actions that they fear will hinder their resumption of parental rights in the future. Thus, it can be assumed that many parents would object to their child's departure with a grandparent,<sup>131</sup> given that it would hinder their reunification goal.<sup>132</sup> In addition, even

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*and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 AM. J. COMP. L. 511, 511-12 (1995) (exploring question of how family ties should be taken into account by immigration law).

<sup>127</sup> Parents have the affirmative right to determine the country, city, and precise location where the child will live. "This is one of the primary rights of . . . custodial parent[s]." *Gonzalez v. Gutierrez*, 311 F.3d 942, 949 (9th Cir. 2002); see also *In re Marriage of Burgess*, 913 P.2d 473, 483 (Cal. 1996) (noting presumptive right of custodial parent to change residence of children); *In re Marriage of Condon*, 73 Cal. Rptr. 2d 33, 39-40 (Ct. App. 1998) (describing *Burgess* decision as following "national trend").

<sup>128</sup> See International Parental Kidnapping Crime Act of 1993, 18 U.S.C.A. § 1204 (West 2000 & Supp. 2006).

<sup>129</sup> See Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 115, art. 1.

<sup>130</sup> See Rebecca O'Neill, *Grandparents Raising Grandchildren in Illinois — Establishing the Right to a Continuing Relationship Through Visitation, Custody, and Guardianship in 2007: Where We've Been, Where We Are and Where We Need to Go*, 38 LOY. U. CHI. L.J. 733, 762 (2007) ("Often grandparents provide care for their grandchildren with the hope that the parent will someday assume their parental responsibilities."); Prevention and Recovery Services, *Grandparents Raising Grandkids*, <http://www.parstopeka.com/grgindex.asp> (last visited Oct. 7, 2009) ("Almost without exception, grandparents continue to have hope that their child, the parent of their grandchildren, will eventually become a responsible parent and resume their rightful role as a loving parent.")

<sup>131</sup> This assumes the child's parents are in the United States; there will be cases where the children's parents may have already been deported to the country to which the grandparents are also being deported and in such situations this would not be a concern.

<sup>132</sup> For example, "[n]o fewer than ten jurisdictions utilize a clause denying the parent whose rights have been terminated 'any right to object to the adoption or otherwise participate in the adoption proceedings' as an initial mechanism to deny a parent from re-entering the child's life." Daniel Starret, Note, *A Plea for Permanence*

if a parent has no desire for unification, it is still possible that they would object because of their own intention<sup>133</sup> to use their child as the basis of a hardship claim.<sup>134</sup>

Given the above reasons, grandchildren are much less likely to leave with their deported grandparents than children of deported parents. Unlike parental deportation cases, cases involving the deportation of grandparent primary caregivers will frequently result in the separation of children from their grandparent caregivers, leaving these children with no familial caregivers whatsoever. The *Gonzales Recinas* court found that leaving children with only one relative to provide for their emotional needs constituted an exceptional hardship.<sup>135</sup> In the case of grandparent deportations, many of these children will be left without a single relative to provide support. In such cases, the loss of a primary caregiving grandparent must surely be considered a significant hardship.<sup>136</sup>

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*After Termination of Parental Rights: Protecting the Best Interests of the Child in Ohio*, 56 CLEV. ST. L. REV. 419, 440 (2008). Such legislation indicates that given the opportunity, many parents who are not exercising custody would still object to the loss of a potential relationship with their child.

<sup>133</sup> I recognize that this is a controversial argument often used by anti-immigration advocates in their arguments against jus soli citizenship. See generally Mary Romero, "Go After the Women": Mothers Against Illegal Aliens' Campaign Against Mexican Immigrant Women and Their Children, 83 IND. L.J. 1355, 1361 (2008) (describing attacks on birthright citizenship as one of most alarming aspects of current anti-immigrant fervor). The author does not agree with the anti-immigration goal of such arguments but does consider the possibility that some undocumented immigrants will attempt to use their children for this purpose.

<sup>134</sup> See *In re Adoption of A.M.H.*, 215 S.W.3d 793, 806 (Tenn. 2007) (discussing how lower court terminated parental rights based on its conclusion that parents were simply using child to avoid deportation).

<sup>135</sup> *In re Gonzalez Recinas*, 23 I. & N. Dec. 467, 471 (B.I.A. 2002) ("[T]he respondent's four United States citizen children are entirely dependent on their single mother for support. . . . This increases the hardship the children would face upon return to Mexico, as they would be completely dependent on their mother's ability, not only to find adequate employment and housing, but also to provide for their emotional needs."). The court also considered separation from a nonprimary caregiving grandmother a hardship. The court noted the importance of "assistance" respondent received from her mother. *Id.*

<sup>136</sup> Another hardship factor that is typically considered yet usually not found significant enough to justify cancellation of removal is the hardship caused by differences in educational opportunities. In both *Monreal-Aguinaga* and *Andazola-Rivas*, respondents claimed that their children's education would suffer, yet in *Monreal-Aguinaga* the court found it significant that the eldest child could speak, read and write Spanish. *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 64 (B.I.A. 2001). And in *Andazola-Rivas* the court found: "Mexico likely will not provide the respondent's children with an education equal to that which they might obtain in the United States. However, the respondent has not shown that her children would be deprived of all

C. *Potential Deportation Should Satisfy the Hardship Criteria when It Results in Grandchildren Entering Foster Care*

The primary reason grandparents assume caregiving responsibilities is to keep their grandchildren out of foster care.<sup>137</sup> Unnecessary placement in foster care should meet the criteria for hardship.<sup>138</sup> The

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schooling or of an opportunity to obtain any education.” *In re Andazola-Rivas*, 23 I. & N. Dec. 319, 323 (B.I.A. 2002). In the case of grandchildren, such concerns regarding the difference in educational opportunities could perhaps not be so easily dismissed. Children being cared for by grandparent caregivers are children who are already at a much greater risk for academic problems than the typical child. See Pebley & Rudkin, *supra* note 21, at 231 (discussing problems frequently experienced by grandparent-raised children).

<sup>137</sup> See Stevenson et al., *supra* note 2, at 200-01 (noting that of 15 grandmothers in study, 6 “responded that they wanted to keep the children out of the foster care system . . . and felt they had no other choice but to assume care themselves”); see also Copen, *supra* note 4, at 196 (describing “pressure that grandparents feel to save their families from dissolution, as well as rescue their grandchildren from the bureaucratic ‘stranger care’ of the foster care system”).

<sup>138</sup> One might argue that a problem with finding that foster care qualifies as extreme hardship is that many deportable parents could claim that it would leave their children in the United States and thus subject them to foster care in an attempt to qualify for cancellation of removal. However, as discussed above, the BIA has already addressed a variation of this argument. As the court stated in *In re Ige*, unless the child would suffer extreme hardship upon returning with their parents, then the decision to leave the children in the United States will be considered a personal choice. The *Ige* court also required that the evidence demonstrating the child will remain in the United States must also include evidence that reasonable accommodations will be made for the child’s care and support; it is unlikely that foster care would qualify. See *In re Ige*, 20 I. & N. Dec. 880, 885 (B.I.A. 1994). Further, if this choice would subject children to extreme hardship, such as a decision to place children in foster care, then the BIA could, as they have done in other contexts, assume that the parents would not make such a decision.

For example, in cases in which children are threatened with female genital mutilation if they were to return home with their parents, the BIA assumes that parents will leave such children in the United States. See, e.g., *In re A-K*, 24 I. & N. Dec. 275, 279-80 (B.I.A. 2007) (finding it “factually questionable” that “the respondent’s two United States citizen children would return with respondent to Senegal . . . if the respondent truly believes that they would definitely be tortured there”). Further, in the female genital mutilation context, courts have found that any parent who made such a decision risked forfeiting their parental rights. See, e.g., *Olowo v. Ashcroft*, 368 F.3d 692, 704 (7th Cir. 2004) (alerting state officials to investigate mother after she presented asylum claim in which she stated that if deported to Nigeria her daughters would return with her and likely be subject to female genital mutilation). Consequently, if foster care were to be found an extreme hardship for purposes of cancellation of removal, any parent who would willingly subject their child to foster care could run the risk of forfeiting their parental rights and thus their ability to qualify for cancellation of removal due to their status as the parent of a U.S. citizen child.

hardships faced by children in foster care are well established. Children in foster care commonly experience multiple placements, which prevent them from ever establishing connections or security.<sup>139</sup> They lack access to medical, dental, and mental health services<sup>140</sup> and disproportionate numbers of these children do poorly in school and drop out. These problems continue after the children leave foster care. Many of these youths become poor, homeless, unemployed, sick, or addicted to drugs or alcohol. Many eventually end up in prison.<sup>141</sup>

Adding the hardship of foster care to the hardships grandparent-raised grandchildren have already experienced should qualify as an “exceptional and extremely unusual hardship.” As discussed above, grandparent-raised children already experience many more difficulties than children raised by parents. Due to their early negative life experiences, such children are much more susceptible to social and emotional distress<sup>142</sup> and academic problems<sup>143</sup> than their parent-raised peers. For these children, grandparents are their lifeline. The problems they experience are only bearable because grandparents have assumed the role of primary caregiver.

Living with grandparents gives these children a chance to succeed.<sup>144</sup> Primary caregiver grandparents positively affect their grandchildren’s psychological well-being and healthy development into adulthood.<sup>145</sup> Studies show that attachment to a nurturing relative

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<sup>139</sup> See Bobbe J. Bridge, *Reflections on the Future of Child Advocacy*, 41 U. MICH. J.L. REFORM 259, 261 (2007) (citing PEW COMM’N ON CHILDREN IN FOSTER CARE, *FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE* 9 (2004), available at <http://pewfostercare.org/research/docs/FinalReport.pdf>); see also Catherine Goodman et al., *Grandmothers as Kinship Caregivers: Private Arrangements Compared to Public Child Welfare Oversight*, 26 CHILD. & YOUTH SERV. REV. 287, 289 (2004) (noting many studies that have addressed well-being of children in child welfare system and that “[c]onsistent results have suggested substantial disadvantages in behavior, health and school performance”).

<sup>140</sup> See Bridge, *supra* note 139, at 261.

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

<sup>142</sup> Edwards, *supra* note 38, at 566, 570 (“Children who live in environments of chronic poverty, poor early parent-child relationships, family conflict or disorder, negative life events and abuse, and who endure early childhood trauma are vulnerable to maladjustment . . . [and] often lead children to become at high risk to develop emotional and behavioral problems that will adversely affect their school functioning.”).

<sup>143</sup> Grandparent-raised children have been observed to have problems with concentration, hyperactivity, depression, oppositional-defiant behavior, attention deficit hyperactivity disorder, temper tantrums, mood swings and social isolation. *Id.* at 566.

<sup>144</sup> *Id.*

<sup>145</sup> Copen, *supra* note 4, at 195.



caregiver may prevent many of the developmental disadvantages that these children are in danger of experiencing due to the difficult circumstances that have led them to their grandparents' homes.<sup>146</sup> As a result, the hardship that would inure at the loss of a primary caregiver grandparent is a hardship that is both significant and unreasonable. To add the loss of a primary caregiving grandparent on top of the loss these children have already experienced is not only a significant hardship; it is an unjust one.

Congress has indicated that cancellation of removal due to hardship is to be applied sparingly, but the unique circumstances surrounding the lives of grandparent-raised children demonstrate that its application in these circumstances is appropriate. Caregiver grandparents are the sole caregivers for children whose lives have already been unimaginably difficult. The deportation of grandparent caregivers will add to these hardships by forcing grandparents to abandon their grandchildren and ultimately result in their grandchildren's placement in foster care. This unique and terrible series of events constitutes a tremendous hardship. If the hardship exception recognized grandchildren as qualifying relatives, this hardship could satisfy the requirements for cancellation of removal. Because grandchildren are not qualifying relatives, there is no remedy sufficient to grant them relief.

#### IV. RECOGNIZING THE NEED TO AMEND THE CURRENT HARDSHIP LAWS

The current discretionary remedies are not sufficient to alleviate the hardship caused by the deportation of grandparent caregivers. A more permanent remedy is needed to address this hardship. The growing recognition of the importance of grandparent caregivers coupled with the long-standing family unity goals of immigration law indicates that now is the appropriate time to tackle the issue of grandparent caregiver deportation. Moreover, such a limited category of qualifying relatives may actually be unconstitutional.

##### A. *Current Discretionary Remedies Are Not Sufficient*

Immigration law recognizes that there will be instances where hardship concerns warrant cancellation of removal, yet the INA does not provide a specific avenue for relief.<sup>147</sup> In those situations,

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<sup>146</sup> Goodman et al., *supra* note 139, at 289.

<sup>147</sup> In *In re C-V-T*, 22 I. & N. Dec. 7, 7 (B.I.A. 1998), the Board described how such discretion was to be applied to cancellation of removal cases under 240A of the Immigration and Nationality Act. Among the various factors the Board stated should

immigration judges arguably have the power to grant discretionary relief to persons “even if they do not meet the statutory eligibility criteria.”<sup>148</sup> In cases involving rare but compelling facts, such discretionary relief is an adequate safety net.<sup>149</sup> However, discretionary remedies are not sufficient for dealing with the deportation of grandparent primary caregivers.

First, the hardship caused by the deportation of primary caregiver grandparents is not a rare and singular occurrence. Rather, such hardship will occur in the majority of grandparent caregiver deportations. Second, this discretion is arguably too discretionary for the problem of grandparent deportation. There is nothing preventing immigration officials from using their discretion to conclude that grandparent deportation never results in sufficient hardship for cancellation of removal.<sup>150</sup>

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be considered were “the social and humane considerations,” “family ties within the United States,” “hardship to the respondent and his family,” and “value and service to the community.” *Id.* at 9-10. Grandparent caregivers fulfill all these criteria; thus, even without a change to the language of the hardship statute, immigration judges could have the discretion to cancel orders of removal and should exercise such discretion in the case of primary caretaker grandparents.

<sup>148</sup> See ALENIKOFF ET AL., *supra* note 62, at 593. This is a controversial position. Clearly immigration judges have the discretionary power not to cancel removal of those eligible for cancellation. “[Section] 240A provides that the Attorney General may cancel removal of eligible noncitizens.” *Id.* at 592 (citing *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 77 (1957) (considering earlier form of relief and noting that: “suspension of deportation is a matter of discretion and administrative grace, not mere eligibility; discretion must be exercised even though statutory prerequisite elements have been met”)). It is less clear, however, whether this discretionary power includes the power to cancel removal in cases, such as that of primary caregiver grandparents, where the petitioner unquestionably does not meet the statutory requirements. Nonetheless, such an understanding of the immigration judge’s discretionary power is supported by the canon of statutory construction, sometimes invoked by courts, “that ambiguities in deportation grounds should be resolved in favor of the alien, in view of the hardship that deportation inflicts.” Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 620-21 (2006) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 499 (1987), and *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948)).

<sup>149</sup> The use of discretion serves an important role in immigration policy. “Discretion can permit flexibility over time to adapt policies to changing circumstances, without the need to resort to cumbersome procedures of statutory amendment or notice and comment rulemaking.” Neuman, *supra* note 148, at 621. Such discretion allows agencies to respond to political and social changes, and thus allows the agency “to temper the rigidity of statutory rules with attention to exceptional circumstances.” *Id.*

<sup>150</sup> The BIA would continue to have the discretion to find that a particular grandparent’s deportation did not pose a sufficient hardship. However, a statutory change would prevent them from finding that a grandparent’s deportation could never

Discretionary remedies alone are not sufficient safe guards; however, discretionary remedies could produce positive results if Congress amends the hardship statute. Including grandchildren in the category of qualifying relatives would demonstrate Congress's recognition that grandparent deportation imposes significant hardships. The amendment would allow immigration officials to use their discretion to grant relief in deportation cases involving grandparent caregivers.<sup>151</sup>

*B. Increased Legal Recognition of Grandparent Caregivers Suggests a Trend Toward Increasing Support at the State and Federal Level*

Federal and state laws increasingly recognize the importance of grandparent caregivers.<sup>152</sup> In recent years the federal and state governments have been developing policies to help grandparent

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serve as the requisite hardship. In *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (per curiam), the Supreme Court explained the significant deference given to the Attorney General's office in such matters, explaining that it has "the authority to construe 'extreme hardship' narrowly should they deem it wise to do so." *Id.* at 144.

<sup>151</sup> For example, agency discretion could also be used to avoid initiation of deportation proceedings against certain grandparents in the first instance, thus eliminating the need for discretionary relief under the hardship statute subsequently. Similarly, immigration officials could consider the use of deferred action in grandparent cases. Deferred action, often labeled "nonpriority" status, is granted "based on the severe hardship removal proceedings" placed on the deportable alien. Leon Wildes, *The Deferred Action Program of The Bureau of Citizenship and Immigration Services: A Possible Remedy For Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819, 820, 822-23, 827 (2004) ("As long as a final order of removal has been issued and no other available relief seems possible, if deportation would for any reason cause a grave injustice to the alien, deferred action is considered."). Family hardship and separation is currently the number one reason for use of this discretionary remedy, and family hardship was even more prevalent a reason for deferred action than physical illness. *Id.* at 830 tbl.3 (noting that separation of families or hardship accounted for 29.1% of cases where deferred action was recommended). Deferred action cases demonstrate the seriousness with which family separation and hardship cases are treated. For example, one deferred action case involved a parent convicted of a drug offense who nevertheless was given deferred action status "because the alien was the sole provider for his family." *Id.* at 834 n.81. Another example of the greater leniency in deferred action decisions is a case where a Polish man whose mother and stepfather were permanent residents and received deferred action status based on the fact that removing him would result in his being "deprived of a loving relationship with the members of his immediate family." *Id.* at 834 n.82. Such deferred action cases demonstrate that the recognition of the severe hardship caused by family separation is considered so great that it has even allowed "criminals, drug dealers, and aliens who are mentally deficient or physically impaired to remain in the United States." *Id.* at 823-24.

<sup>152</sup> See Pebley & Rudkin, *supra* note 21, at 219 (noting that "many policy makers have come to see grandparents as a safety net for grandchildren"). *But see* Glass & Huneycutt, *supra* note 43, at 244 (stating that "[g]randparents often report that they frequently feel like second-class citizens in the eyes of the government").

caregivers provide for their families.<sup>153</sup> State lawmakers have begun to enact initiatives aimed at supporting grandparent caregivers, and numerous states now make strong efforts to place children with relatives rather than in foster care.<sup>154</sup> States are also granting grandparents more legal control over the children in their care. For example, many states have implemented laws enabling grandparent caregivers to give medical consent for their grandchildren,<sup>155</sup> enroll these children in school,<sup>156</sup> and wield power of attorney.<sup>157</sup>

In addition, state funding for grandparent caregivers has also increased in recent years. For example, in 2006, Arizona appropriated \$1 million for a grandparent kinship care program,<sup>158</sup> California established a KinGAP Plus Program,<sup>159</sup> and Kansas set up a grandparents-as-caregivers program for grandparents who have been given custody of a child.<sup>160</sup> Some states are even beginning to offer

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<sup>153</sup> *Grandparents Raising Children*, *supra* note 25, at 84.

<sup>154</sup> See National Conference of State Legislatures, Highlights of Recent Kinship Care State Legislative Enactments (Feb. 2008), <http://www.ncsl.org/programs/cyf/kinshiphigh.htm> (last visited Oct. 7, 2009) (highlighting recent legislation enacted to promote placement of children with relatives).

<sup>155</sup> *Id.* (“Thirty two states (AZ, AR, CA, CO, CT, DE, FL, GA, HI, ID, IN, KS, LA, MD, MS, MO, MT, NV, NM, NY, NC, ND, OH, OK, PA, SC, SD, TX, UT, VA, WA and WY) and the District of Columbia have enacted legislation to enable grandparent and other relative caregivers to access medical care and treatment for children.”).

<sup>156</sup> *Id.* (“Thirty states (CA, CT, DE, HI, IN, IA, LA, MD, MI, MO, MT, NE, NJ, NM, NC, ND, OH, OK, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, WI and WY) allow caregivers to enroll children in schools.”).

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

<sup>158</sup> H.B. 2290, 47th Leg., 2d Reg. Sess. (Ariz. 2006) (amending kinship care program requirements to allow kinship caregiver who is child’s grandparent to receive clothing and personal allowances of up to \$75 per child per month and one-time transitional assistance of up to \$300 per child, and providing for appropriation of \$1 million for fiscal year 2006-07 to Department of Economic Security for purposes of administering these costs).

<sup>159</sup> See Legislative Analyst’s Office, California Spending Plan 2006-07, at ch. 3 (2006), available at [http://www.lao.ca.gov/2006/spend\\_plan/spending\\_plan\\_06-07.html](http://www.lao.ca.gov/2006/spend_plan/spending_plan_06-07.html) (“Budget legislation established the KinGap Plus program in order to (1) increase payments to relatives who become guardians to former foster children with special needs and (2) serve youth exiting the probation system to relative care. The budget redirected the existing KinGap funding into KinGap Plus and included an additional \$8 million to fund these changes. The budget also adds \$2.5 million in funding for county programs that provide support and services to relative caregivers of foster children.”).

<sup>160</sup> See National Conference of State Legislatures, *supra* note 154. Other states have also established funding programs. In 2005 Maine enacted a Guardianship Subsidy Program funded by a federal Title IV-E waiver. “In 2004, Virginia’s Senate Bill 35 created a Subsidized Custody Program for children in foster care whose custody has been transferred to relative caregivers.” *Id.*

grandparents grants so they can pay for help with the kids during periods when school is not in session.<sup>161</sup> In addition to monetary support, many states are also starting to provide more resources and support for grandparent caregivers. Examples include counseling regarding what kind of health care is available and advice on how to help with homework.<sup>162</sup> One state has recently created subsidized housing exclusively for grandparents raising grandchildren.<sup>163</sup> State-based organizations are also increasingly helping grandparent caregivers as well. Organizations such as the Area Agencies on Aging<sup>164</sup> and State Units on Aging (“SUA”)<sup>165</sup> have begun developing programs to aid grandparent caregivers and their families.<sup>166</sup>

The growing recognition of the importance of grandparent caregivers is not confined to the state level. New federal legislation is also benefiting grandparent caregivers. Legislation such as the 2006 amendments to The Older Americans Act includes a program offering states grants to help grandparent caregivers.<sup>167</sup> The LEGACY Act of

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<sup>161</sup> *Grandparents Raising Children*, *supra* note 25, at 84.

<sup>162</sup> See, e.g., Pennsylvania Department of Aging, Pennsylvania Grandparents Raising Grandchildren: A Six-Part Fact Sheet Series, <http://www.aging.state.pa.us/aging/cwp/view.asp?a=557&Q=254747> (last visited Sept. 16, 2009) (describing programs offering advice for grandparents raising grandchildren).

<sup>163</sup> See Press Release, Senator Clinton Joins with Grandparents and Other Caregivers to Call for Better Support for Kinship Caregivers (Mar. 12, 2007), *available at* <http://www.gu.org/documents/A0/BriefingReleasesg.pdf> (last visited Oct. 2, 2009).

<sup>164</sup> See National Association of Area Agencies on Aging, About n4a, <http://www.n4a.org/about-n4a/> (last visited Sept. 16, 2009) (describing organization as one that “advocates on behalf of our member agencies for services and resources for older adults and persons with disabilities”).

<sup>165</sup> See National Association of State Units on Aging, State Units on Aging, [http://www.nasua.org/about\\_nasua/state\\_units\\_on\\_aging.html](http://www.nasua.org/about_nasua/state_units_on_aging.html) (last visited Sept. 16, 2009) (“State Units on Aging (SUAs) are agencies of state and territorial governments designated by governors and state legislatures to administer, manage, design and advocate for benefits, programs and services for the elderly and their families and, in many states, for adults with physical disabilities.”).

<sup>166</sup> Copen, *supra* note 4, at 201-02.

<sup>167</sup> Older Americans Act Amendments of 2006, Pub. L. Nos. 109-365, -371 to -374 (codified as amended at 42 U.S.C. §§ 3001, 3030s (2006)) (“The Assistant Secretary shall carry out a program for making grants to States with State plans approved under section 307, to pay for the Federal share of the cost of carrying out State programs, to enable area agencies on aging, or entities that such area agencies on aging contract with, to provide multifaceted systems of support services . . . for grandparents or older individuals who are relative caregivers.”). Another act that makes benefits available to grandparent primary caregivers is the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which makes TANF benefits available to grandparent led households, permitting grandparents to receive foster care benefits. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193,

2003 helps to address the housing needs of grandparent caregivers.<sup>168</sup> Acknowledging the importance of grandparent caregiving has also led to changes with regard to federal block grants, known as Temporary Aid to Needy Families ("TANF").<sup>169</sup> TANF funding has been available to grandparent-headed households since 1996.<sup>170</sup> Today, more than half of all states are providing hardship exemptions to the TANF work requirements.<sup>171</sup> These exemptions shield grandparent caregivers from federal sanctions for not fulfilling such requirements.<sup>172</sup>

Congress continues to propose legislation that will benefit grandparent caregivers. This reflects a growing federal awareness of the issues grandparent caregivers face. As a presidential hopeful, Senator Hillary Clinton proposed the Kinship Caregiver Support Act.<sup>173</sup> Senator Clinton stated that such legislation "can remove the[] unnecessary barriers [facing kinship caregivers] and address the

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§ 101, 110 Stat. 2105, 2110 (codified as amended at 42 U.S.C.A. § 601 (2009)); Stevenson et al, *supra* note 2, at 184. However, it should be noted that the Adoption and Safe Families Act of 1997 ("ASFA") restricts federal reimbursement of these funds to states unless relatives meet the same licensing standards as nonrelatives. "This act places enormous pressure on states to treat relative and non-relative caregivers the same although both groups may be dealing with widely different social and economic circumstances." Copen, *supra* note 4, at 197.

<sup>168</sup> See Living Equitably: Grandparents Aiding Children and Youth Act of 2003 (LEGACY Act of 2003), Pub. L. No. 1080-186, § 203, 117 Stat. 2685, 2690 (directing Secretary to carry out five-year pilot program in connection with supportive housing program that provides assistance to private nonprofit organizations for expanding supply of intergenerational dwelling units for intergenerational families, directing Secretary to report on such program's effectiveness, and authorizing specified appropriations).

<sup>169</sup> TANF block grants are federal money administered by state, territorial and tribal agencies. "Citizens can make application for TANF at the respective agency administering the program in their community. The federal government does not provide TANF assistance directly to individuals or families." U.S. Department of Health and Human Services, Administration for Children and Families, About TANF, <http://www.acf.hhs.gov/programs/ofa/tanf/about.html> (last visited Sept. 16, 2009).

<sup>170</sup> TANF benefits were made available to grandparent caregivers under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 101, 110 Stat. 2105, 2110 (1996).

<sup>171</sup> See Mandatory Work Requirements, 42 U.S.C.A. § 607(e) (West Supp. 2009) (setting out work requirement for eligibility). However, "[g]randparents who are caring for children can apply for a 'child-only' grant, in which children receive TANF assistance. In this case, grandparent caregivers would not receive any TANF benefits and would be exempt from federal work requirements." Copen, *supra* note 4, at 198.

<sup>172</sup> Copen, *supra* note 4, at 199.

<sup>173</sup> "[T]he Kinship Caregiver Support Act, proposed by the Senate is a program that would assist kinship caregivers in navigating through existing state programs and services." *Id.* at 202; see also Press Release, Senator Clinton, *supra* note 163.

unique challenges facing kinship caregivers struggling to do the right thing for our children . . . .”<sup>174</sup>

Unfortunately, although the federal government has begun to recognize the importance of grandparent care in other contexts, this recognition has not yet reached the immigration arena. In some ways this is surprising given the fact that family unity is a common feature of international human rights treaties and arguably the defining feature of U.S. immigration law.

*C. Family Unity Is a Cornerstone of U.S. Immigration Law and Must Be Preserved in the Grandparent Caregiver Context*

A stable family life is important to the development of healthy children.<sup>175</sup> Many nations recognize family unity as a fundamental human right.<sup>176</sup> Consequently, protection of the family unit is a common provision in laws and treaties involving human rights.<sup>177</sup>

Organizations that oversee compliance with global human rights conventions advocate for balance between the public interest justifying deportation and the interference with family life that occurs as a result.<sup>178</sup> For example, Article Nine of the United Nation’s Convention on the Rights of the Child promises that “States Parties shall ensure that a child shall not be separated from his or her parents against their will . . . .”<sup>179</sup> Similarly, Article Sixteen of the Protocol of

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<sup>174</sup> Press Release, Senator Clinton, *supra* note 163.

<sup>175</sup> See *supra* note 30 and accompanying text.

<sup>176</sup> See Motomura, *supra* note 126, at 534 (citing Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 18, 1979, 51 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 386 (F.R.G.) (holding that “Article 6 of the Basic Law protects marriages between aliens and between an alien and a German citizen and, therefore, decided that the deportation order had to be proportional to the perceived harm to the public interest if the alien were not deported”)) (noting that “German constitutional law does not treat immigration cases as analytically distinct from cases that do not involve immigration issues”).

<sup>177</sup> See, e.g., Moustaquim v. Belgium, 13 Eur. Ct. H.R. 802, 809, 815 (1991) (suspending deportation order of Moroccan national for two years based on court’s conclusion that order of deportation violated his right to family life under article 8 of European Convention for Protection of Human Rights and Fundamental Freedoms because such punishment was “disproportionate to the legitimate aim pursued”); see also Djeroud v. France, 14 Eur. Ct. H.R. 68, 69, 76, 79 (1991) (finding that deportation of Algerian national whose entire family lived in France would violate article 8); Berrehab v. Netherlands, 11 Eur. Ct. H.R. 322, 322, 331 (1988) (finding deportation would violate article 8 because it would result in familial separation).

<sup>178</sup> Neuman, *supra* note 148, at 622 n.31.

<sup>179</sup> G.A. Res. 44/25, at 5, U.N. GAOR, 44th Sess., 61st plen. mtg., U.N. Doc. A/44/736 (Nov. 20, 1989). In addition, the preamble states that “the family, as a

San Salvador, the human rights treaty of the Organization of American States, provides that “[e]very child has the right to grow under the protection and responsibility of his parents.”<sup>180</sup> Article Eight of the European Convention on Human Rights states that “[e]veryone has the right to respect for his private and family life” and that “[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with law and is necessary . . . .”<sup>181</sup> These treaties recognize the importance of the family as a fundamental unit of society and that family unity is a basic human right that must be given support and protection.

Although the United States is not a party to any of these treaties,<sup>182</sup> U.S. immigration law has long recognized the importance of family unity and the harms that removal imposes on deportable immigrants, their relatives and communities.<sup>183</sup> This recognition led to the creation of deportation exceptions permitting persons subject to removal to remain in the United States under certain circumstances.<sup>184</sup> The 1996 amendments to the INA made relief from removal more difficult, but even under the current immigration regime, the law continues to recognize the hardships that can result from removal and grant relief from removal in certain situations — particularly those that harm families.<sup>185</sup>

The “family based immigration system” is “the cornerstone of our immigration policy.”<sup>186</sup> Implicit in this description is the belief that

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fundamental group of society and the natural environment for the growth and well being of its members and particularly children, should be afforded the necessary protection and assistance so it can fully assume its responsibilities within the community.” *Id.*

<sup>180</sup> Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), Nov. 17, 1988, O.A.S.T.S. No. 69, *reprinted in* 28 I.L.M. 161, 167 (1989).

<sup>181</sup> Convention on Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5 (entered into force Sept. 3, 1953).

<sup>182</sup> Giovanna I. Wolf, *Preserving Family Unity: The Rights of Children to Maintain the Companionship of Their Parents and Remain in Their Country of Birth*, 4 IND. J. GLOBAL LEGAL STUD. 207, 219 (1996).

<sup>183</sup> ALEINIKOFF ET AL., *supra* note 62, at 146, 582.

<sup>184</sup> *Id.*; *see also* Neuman, *supra* note 148, at 621-22 (noting that prior to 1940, in sympathetic cases Congress would enact private immigration bills for relief of named individuals, and that after 1940, power of administrative discretion to suspend deportation was given to immigration service).

<sup>185</sup> *See supra* Part II.A (discussing changes to IIRIRA).

<sup>186</sup> Hawthorne, *supra* note 52, at 810; *see also* Thronson, *supra* note 121, at 1180 n.73 (citing NANCY RYTINA, OFFICE OF IMMIGRATION STATISTICS, DEP’T OF HOMELAND SEC., ANNUAL FLOW REPORT: U.S. LEGAL PERMANENT RESIDENTS: 2004, at 3 (2005), *available at*



family unity is a “natural right.” Family reunification is an extension of this right.<sup>187</sup> The INA expresses concerns for the protection and reunification of families.<sup>188</sup> Recognizing this, the Supreme Court explained that the INA was aimed at the “problem of keeping families of United States citizens and immigrants united.”<sup>189</sup>

In addition to this historic concern with family, current immigration legislation cites family unity as a policy goal. For example, the Comprehensive Immigration and Reform Act of 2006 used the term “family unity” nine times throughout the document.<sup>190</sup> Although scholars often argue that U.S. immigration law should be more responsive to family unity concerns, there is little debate that family unity is an explicit interest of U.S. immigration law.<sup>191</sup>

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<http://www.dhs.gov/xlibrary/assets/statistics/publications/FlowReportLegalPermResidents2004.pdf>) (“The Bureau of Citizenship and Immigration Services reports that in 2004, 65.6% of legal permanent immigration to the United States was accomplished through family-sponsored immigration.”).

<sup>187</sup> See *In re Chung Toy Ho*, 42 F. 398 (D. Or. 1890) (“[A] Chinese merchant who is entitled to come into and dwell in the United States is thereby entitled to bring with him, and have with him, his wife and children. The company of the one, and the care and custody of the other, are his by natural right; and he ought not to be deprived of either.”). One example of the strong policy of family unity already recognized in U.S. immigration law is an exception to the INA on the ground of deportability for smuggling family members. “Unlike the trafficking charges, the Service has recognized that persons will go to extraordinary lengths to provide family unity and have acknowledged a waiver so that the effort need not have been in vain or necessitates its repetition.” Nicole L. Ezer, *The Intersection of Immigration Law and Family Law*, 40 FAM. L.Q. 339, 365 (2006) (citing INA § 212(d)(11), 8 U.S.C. § 1182(d)(11) (2006)). In addition, human rights law also describes family unity as a fundamental human right. The International Covenant on Civil and Political Rights describes the family as “the natural and fundamental group unit of society . . . entitled to protection by society and the state.” International Covenant on Civil and Political Rights, art. 23(1), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

<sup>188</sup> See Cynthia A. Anderfuhren-Wayne, *Family Unity in Immigration and Refugee Matters: United States and European Approaches*, 8 INT’L J. REFUGEE L. 347, 352-53 (1996).

<sup>189</sup> *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977) (quoting H.R. REP. NO. 85-1199, at 7 (1957), *reprinted in* 1957 U.S.C.C.A.N. 2016, 2020); *see also* *Kaliski v. Dist. Dir. of INS*, 620 F.2d 214, 217 (9th Cir. 1980) (noting that INA has “human purpose . . . to reunite families”); *Delgado v. INS*, 473 F. Supp. 1343, 1348 (S.D.N.Y. 1979) (describing family reunification as “the foremost policy underlying the granting of preference visas under our immigration laws”).

<sup>190</sup> See Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 601(b)(1) (as passed by Senate, May 25, 2006) (discussing family unity with regard to residency requirements, employment requirements, tax repayment requirements, criminal record clearance, and required basic citizenship skills).

<sup>191</sup> See, e.g., Demleiter, *supra* note 117, at 306 (“Except in unusual circumstances [U.S. courts] fail to consider the practical impact of deportation on other family

Three current immigration policies reflect the importance of family unity. First, relatives of U.S. citizens receive significant preference in immigration. Family-sponsored immigration is directly responsible for the majority of legal immigration into the United States, accounting for sixty-three percent of all legal immigration in 2006.<sup>192</sup> The closer the family relationship, the more preference such immigrants receive. To illustrate, the “immediate relatives” category of the INA provides that if an individual falls within the statute’s definition of an immediate relative, the individual is not subject to the numerical limitations placed on other types of family members.<sup>193</sup> Second, the INA’s family preference categories provide additional visa allotments for certain categories of family members even if the members do not qualify as “immediate relatives.”<sup>194</sup> Finally, the INA’s derivative beneficiaries provisions permit the spouses and children of immigrants admitted under a family preference category to enter under the same preference category with the same waiting period.<sup>195</sup>

The INA’s hardship exception demonstrates a similar concern for family unity. The exception permits cancellation of removal when “that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.”<sup>196</sup> This exception correctly demonstrates concern for

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members, especially minor children . . . . The approach of United States law may not be surprising despite frequent assertions regarding the importance and value of family and children.”); Hawthorne, *supra* note 52, at 818 (“Immigration law incorrectly focuses on a static concept of family that excludes other presently-existing U.S. family models.”). Such critics also note that the United States has failed to sign the United Nations convention on the rights of the child.

<sup>192</sup> David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453, 478 (2008) (citing KELLY JEFFERYS, U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ANNUAL FLOW REPORT: U.S. LEGAL PERMANENT RESIDENTS: 2006, at 1 (2007), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/IS-4496\\_LPRFlowReport\\_04vaccessible.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/IS-4496_LPRFlowReport_04vaccessible.pdf)). Of the 1,266,264 total admissions as permanent residents, 803,335 were through the family-sponsored program. *Id.* at 480 n.130.

<sup>193</sup> INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2006) (defining immediate relatives as “children, spouses, and parents of a citizen of the United States”).

<sup>194</sup> Hawthorne, *supra* note 52, at 817 (citing INA § 203(a)(1), 8 U.S.C. § 1153(a)(1)-(4) (2006)). One example is the adult children of a U.S. citizen.

<sup>195</sup> The purpose of this last provision is to “avoid separating nuclear families.” Hawthorne, *supra* note 52, at 817 (citing INA § 203(d), 8 U.S.C. § 1153(d) (2006)).

<sup>196</sup> 8 U.S.C. § 1229b(b)(1) (2000); see *supra* note 56 (noting that current hardship provision, INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D) (2000), was changed from earlier provision, INA § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1996) (superseded), which only required “extreme hardship”). As with many other aspects of immigration

family unity, but its definition of family is too narrow. The hardship provision only considers hardships to the noncitizen's "spouse, parent or child." Hardship to grandchildren is not a permissible consideration, regardless of the fact that a grandparent caregiver's removal may actually cause greater hardship than that resulting from the deportation of a parent.<sup>197</sup> Consequently, although the well-established rules of statutory interpretation support judicial decisions limiting the exception to children, parents and spouses, they are nevertheless at odds with the larger family unity concerns underlying the hardship exception and U.S. immigration law in general.

*D. Due Process Requires an Amendment to the Hardship Provision*

The 1996 amendments to the INA significantly curtailed the role of courts in the immigration context. Prior to the amendments, courts could review and overturn an immigration judge's discretionary denials.<sup>198</sup> The 1996 amendments significantly restricted judicial review of an immigration judge's exercise of discretion in deportation proceedings.<sup>199</sup> Courts can still oversee the legal and constitutional boundaries of administrative discretion. However, within those boundaries courts cannot examine the exercise of discretion for inconsistency or abuse.<sup>200</sup> As a result, decisions regarding extreme hardship are unreviewable.<sup>201</sup>

Even though the role of courts in discretionary decisions is limited, courts may still hear constitutional challenges to discretionary decisions. The exclusion of grandchildren from the hardship

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law, the 1996 amendments made relief under the hardship provision more difficult, but the fact that Congress did not eliminate the hardship exception demonstrates that Congress intends immigration law to continue to consider the effect of removal on the noncitizen's family.

<sup>197</sup> See *supra* Part III.B (discussing parental deportation).

<sup>198</sup> "Judicial review of immigration officials' discretion waxed and then waned over the course of the twentieth century. Initially, officials developed discretionary exceptions to exclusion and deportation during a period when courts intervened only on habeas corpus. Applying traditional habeas doctrines, they sought to keep deprivations of liberty within the bounds of law, scrutinizing removal orders for legal error. Cognizable violations included errors of law in determinations of eligibility for discretionary relief, also characterized as failure to exercise discretion. The Administrative Procedure Act of 1946 expanded both the procedural vehicles and substantive scope of judicial review once it took effect in immigration law in the 1950s." Neuman, *supra* note 148, at 626-27.

<sup>199</sup> *Id.* at 625.

<sup>200</sup> *Id.* at 626.

<sup>201</sup> *Id.* at 628.

exception may be unconstitutional. The Supreme Court has repeatedly held that the U.S. Constitution protects certain fundamental rights pertaining to the family.<sup>202</sup> The Court stated that “[i]f any freedom not specifically mentioned in the Bill of Rights enjoys a ‘preferred position’ in the law it is most certainly the family.”<sup>203</sup> Additionally, the Court specifically protects the constitutional right of families to live together.<sup>204</sup>

In *Moore v. City of East Cleveland*, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment required the Court to strike down a city zoning ordinance that defined “family” too narrowly.<sup>205</sup> The ordinance’s definition of “family” did not encompass the grandmother-headed household. The Court found that the ordinance placed an unconstitutional burden on family unity.<sup>206</sup> In addition, the Court specifically noted that the constitutional protections afforded to parents in family rights cases is “shared with grandparents . . . who occupy the same household” and “take on major responsibility for the rearing of the children.”<sup>207</sup> Consequently, the Court held that such an infringement of family unity is a deprivation of liberty and impermissible under the Due Process Clause.<sup>208</sup>

In addition to a general right to family unity, the Supreme Court holds that children have a constitutionally protected interest in preserving the parent-child relationship.<sup>209</sup> In *Quilloin v. Walcott*,<sup>210</sup> the

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<sup>202</sup> See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 498-99 (1977) (right of family unity); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (right to have abortion); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (right to control child’s education); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (fundamental right to marry); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (right of privacy); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (right to direct children’s upbringing and education); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (same).

<sup>203</sup> *Moore*, 431 U.S. at 511 (Brennan, J., concurring).

<sup>204</sup> *Id.* at 506.

<sup>205</sup> *Id.* at 494.

<sup>206</sup> *Id.* (“When government intrudes on choices concerning family living arrangements . . . the Court must examine carefully the importance of the government interests advanced and the extent to which they are served by the challenged regulation.”).

<sup>207</sup> *Id.* at 505 (citing *Yoder*, 406 U.S. at 231-33, *Pierce*, 268 U.S. at 534-35, and *Meyer*, 262 U.S. at 399-401).

<sup>208</sup> *Id.* at 494.

<sup>209</sup> See *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (citing *Yoder*, 406 U.S. at 231-33, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), and *Meyer*, 262 U.S. at 399-401) (“We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.”); see also *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (“[F]reedom of personal choice in matters of . . . family

Court held that “the Due Process Clause would be offended ‘[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children . . . .’”<sup>211</sup> Such protections should not disappear just because the “parent” is a grandparent.<sup>212</sup> If deporting grandparents deprives children of their only means of family unity, then such deportations raise legitimate constitutional concerns that cannot be answered as easily as the constitutional concerns raised by parental deportation.<sup>213</sup>

As the above examples illustrate, there are cases that support the constitutional right to family unity in the nonimmigration context and that demonstrate that the separation of a child from her family may violate the Constitution. However, in the parental deportation context, such arguments have invariably failed. Courts have rejected numerous cases challenging a family member’s deportation or exclusion on constitutional grounds.<sup>214</sup> In these cases, noncitizen parents argued

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life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”); Bruce A. Boyer & Steven Lubet, *The Kidnapping of Edgardo Mortara: Contemporary Lessons in the Child Welfare Wars*, 45 VILL. L. REV. 245, 253 (2000) (discussing Supreme Court’s decision in *Santosky v. Kramer*, 455 U.S. 745 (1982), in which Court established constitutional requirements for termination of parental rights, and noting: “Central to the Court’s decision in *Santosky* is its view that any effort to sever the parent-child relationship, as a constitutional matter, must begin with an inquiry that is parent-focused. *Santosky* thus stand for the critical principle that before the state may sanction interference in the relationship between a parent and a child, there must be some threshold showing — independent of what may be in the best interest of the child — that the parent’s conduct falls beneath some minimum acceptable threshold.”).

<sup>210</sup> 434 U.S. at 246.

<sup>211</sup> *Id.* at 255 (citing *Smith v. Org. of Foster Families*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring)).

<sup>212</sup> This is assuming the constitutional right is one of family unity, in all its forms, and not simply a parental right but rather a right belonging just as much to the child as to the parent. See, e.g., *Moore*, 431 U.S. at 494 (striking down as unconstitutional housing ordinance which made it impossible for extended family to live together).

<sup>213</sup> The Supreme Court acknowledged in *Landon v. Plasencia*, 459 U.S. 21 (1982), that the deportable aliens’ “right to rejoin [their] immediate family[ ] [is] a right that ranks high among the interests of the individual.” *Id.* at 34 (citing *Moore*, 431 U.S. at 499, 503-04 (plurality opinion), and *Stanley*, 405 U.S. at 651).

<sup>214</sup> See, e.g., Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 UC DAVIS L. REV. 701, 708 (2005) (“The Supreme Court has upheld the exclusion from the United States of a citizen’s alien spouse. Virtually all the U.S. circuit courts have denied that any constitutional right of a citizen — from equal protection to the right to reside in the United States to family unity — is violated or even implicated when the citizen’s noncitizen family members are excluded from the United States or

that their deportation violated their children's constitutional rights.<sup>215</sup> There have been numerous incarnations of this challenge, involving different procedural postures, plaintiff characteristics and articulations of the rights involved.<sup>216</sup> Nevertheless, courts have rejected these challenges in nearly every circuit.<sup>217</sup> Congress's plenary power over immigration supports these decisions.

On the other hand, parental deportation cases do not present strong constitutional challenges because the right to family unity is not infringed in these cases. American citizen children almost always leave with their noncitizen parents and, thus, the parents' deportation does not result in familial separation. Grandparent deportation is different. In the majority of grandparent deportation cases, grandparents and grandchildren will be separated.<sup>218</sup> This creates a strong argument that grandparent deportation violates the constitutional right to family unity.

Nevertheless, even if one assumes grandchildren and grandparents will be separated, Congress's plenary power over immigration still presents an obstacle to any constitutional challenge. Assuming the existence of a constitutional right to family unity,<sup>219</sup> Congress's plenary power over immigration casts doubt on whether this

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not allowed to remain here.").

<sup>215</sup> See, e.g., *Gallanosa ex rel. Gallanosa v. United States*, 785 F.2d 116, 118 n.3 (4th Cir. 1986) (claiming "that the deportation would unconstitutionally deprive their citizen child, Kathryn, of necessary medical help available only in the United States"); *Acosta v. Gaffney*, 558 F.2d 1153, 1157-58 (3d Cir. 1977) (claiming violation of "the fundamental right of an American citizen to reside wherever he wishes"); *Cervantes v. INS*, 510 F.2d 89, 91 (10th Cir. 1975) (claiming violation of Ninth Amendment right to continue to have love and affection of his parents in United States); *Enciso-Cardozo v. INS*, 504 F.2d 1252, 1252 (2d Cir. 1974) (claiming denial of procedural due process because citizen child was not permitted to intervene in deportation proceedings initiated against his alien mother); *De Robles v. INS*, 485 F.2d 100, 102 (10th Cir. 1973) (claiming violation of constitutional right to family unity); *Kruer ex rel. S.K. v. Gonzalez*, No. Civ.A. 05-120-DLB, 2005 WL 1529987, at \*2 (E.D. Ky. June 28, 2005) (arguing deprivation of rights incident to citizenship); *In re Amoury*, 307 F. Supp. 213, 216 (S.D.N.Y. 1969) (asserting equal protection violation because child will be deprived of standard of living and education afforded to other United States citizens of his age and status who continue to reside in the United States).

<sup>216</sup> *Thronson*, *supra* note 121, at 1195.

<sup>217</sup> *Id.*

<sup>218</sup> See *supra* Part I.C.

<sup>219</sup> However, even if *Moore* does demonstrate a constitutional right to family unity, the strength of this right is unclear. The ordinance in *Moore* was reviewed under a degree of heightened scrutiny, but not the strictest scrutiny possible: "[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1971).

protection can extend to the immigration context.<sup>220</sup> Supreme Court precedent demonstrates that in certain circumstances, it is permissible for family-based admission categories to discriminate against noncitizens by drawing lines that would unconstitutionally interfere with family unity outside the immigration context.<sup>221</sup>

In *Fiallo v. Bell*,<sup>222</sup> a class of unwed fathers and their illegitimate children argued that they qualified as immediate relatives under the INA and that denying immigration preference to unwed fathers was unconstitutional. The *Fiallo* Court rejected their challenge, holding that Congress's plenary power over immigration law allowed such classifications.<sup>223</sup>

On the other hand, *Fiallo* does not necessarily demonstrate that all family unity challenges will fail under the plenary power doctrine. In his dissenting opinion, Justice Marshall agreed with the majority that whenever a case involves solely the constitutionality of legislation as it affects aliens, the plenary power doctrine controls. However, Marshall argued that when the rights of U.S. citizens are directly involved, the plenary power doctrine does not control and the Court should examine the constitutionality of the immigration legislation.<sup>224</sup> Although the Court has never explicitly accepted Justice Marshall's conclusions in *Fiallo*, subsequent cases suggest that the Court is beginning to align with Justice Marshall.

Recently, in *Miller v. Albright*<sup>225</sup> and *Nguyen v. INS*,<sup>226</sup> the Supreme Court heard constitutional challenges in the immigration context

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<sup>220</sup> Neuman, *supra* note 148, at 640; see also John Guendelsberger, *Implementing Family Unification Rights in American Immigration Law: Proposed Amendments*, 25 SAN DIEGO L. REV. 253, 269-73 (1988) (arguing that *Moore* principles of family unity should apply to immigration laws governing family unification); Linda Kelly, *Family Planning, American Style*, 52 ALA. L. REV. 943, 959-60 (2001) (arguing that expansive definition of "family" articulated in *Moore* should guide immigration laws' family-reunification provisions, but also noting that it does not).

<sup>221</sup> HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 159 (2006).

<sup>222</sup> 430 U.S. 787, 790-91 (1977).

<sup>223</sup> Further, given that any right to family unity recognized in *Moore* was something less than strict scrutiny, "a federal statute limiting how family unity was accomplished in the immigration realm would survive *Moore*'s heightened scrutiny because of governmental interest in foreign relations, controlling borders, and economics." Augustine-Adams, *supra* note 214, at 708. "Such governmental interests may simply trump family unity rights, if the challenged regulation adequately serves those interests." *Id.*

<sup>224</sup> *Fiallo*, 430 U.S. at 808-09 (Marshall, J., dissenting).

<sup>225</sup> 523 U.S. 420, 424-26 (1998).

<sup>226</sup> 533 U.S. 53, 53 (2001).

because U.S. citizens were party to the suits.<sup>227</sup> Both cases challenged the constitutionality of a provision in the INA, which provides “rules for attainment of citizenship by children born abroad and out of wedlock depending upon whether the one parent with U.S. citizenship is the mother or the father.”<sup>228</sup> In *Miller*, the Court rejected the constitutional challenge, finding that the petitioner lacked standing because she was an alien living outside the United States.<sup>229</sup> However, the *Nguyen* Court found that the petitioner had standing and heard the constitutional challenge. The *Nguyen* Court distinguished itself from the *Miller* Court by noting that in *Miller*, the noncitizen child brought the constitutional challenge. In *Nguyen*, the citizen father brought the challenge. The Court unanimously agreed that the citizen father had “standing to raise the constitutional claim.”<sup>230</sup> In the grandparent deportation context, U.S. citizen grandchildren would bring the constitutional challenge. Consequently, it is arguable that Congress’s power over this immigration issue is not plenary and that a constitutional challenge could be heard by the courts.

A constitutional challenge to the deportation of primary caregiver grandparents is an intriguing possibility, but one wrought with numerous obstacles. Congress exercises plenary power over immigration and the Supreme Court has never held that there is a constitutional right to family unity in the immigration context. Recent case law suggests that challenges brought by U.S. citizens might present an exception, but the success of such a challenge is far from certain. Consequently, the best means of addressing the problem of grandparent caregiver deportation is through an amendment to the hardship statute.

#### V. CONGRESS SHOULD AMEND THE QUALIFYING RELATIVES PROVISION OF THE HARDSHIP EXCEPTION

The time has come for Congress to revise the hardship statute to include additional qualifying relatives. *INS v. Hector* was decided more than twenty years ago, and yet Congress has not reexamined the qualifying relatives provision.<sup>231</sup> In the two decades since the *Hector*

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<sup>227</sup> See *Nguyen*, 533 U.S. at 58 (2001) (“The father is before the Court in this case; and, as all agree he has standing to raise the constitutional claim, we now resolve it.”); *Miller*, 523 U.S. at 451 (expressing doubt that “an alien may assert constitutional objections when he or she is outside the territory of the United States”).

<sup>228</sup> *Nguyen*, 533 U.S. at 58 (citing 8 U.S.C. § 1409 (2000)).

<sup>229</sup> *Miller*, 523 U.S. at 433.

<sup>230</sup> *Nguyen*, 533 U.S. at 58.

<sup>231</sup> Congress has, however, revisited the hardship exception. Concerns that too



decision, there has been an explosion in the number of grandparent caregivers as well as growing legal acknowledgment of their importance and the struggles they face. Consequently, it is time to recognize the special hardship caused by grandparent deportation.

Congress should amend the hardship exception to include grandchildren as qualifying relatives. Including grandparents within the definition of immediate family does not conflict with the trend in recent years creating tougher immigration law and policies. In the alternative, Congress could allow judges to stay a grandparent caregiver's deportation while the grandparent initiates formal adoption proceedings. Both solutions protect grandparent caregivers from deportation and promote family unity. Moreover, these solutions are easy, practical, and financially savvy.

A. *The Statute Should Be Amended to Provide for Grandparent Caregivers*

Deporting grandparent primary caregivers causes real and exceptional hardship to their U.S. citizen grandchildren. The solution is to amend the hardship statute to include grandchildren in the category of qualifying relatives.<sup>232</sup> Restricting qualifying relatives under the hardship criteria to the current limited categories reflects an overly narrow view of the modern family and does not comport with the strong concern for family unity that led to the creation of the hardship exception in the first place.<sup>233</sup>

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many people were qualifying under this exception led Congress to make it stricter, changing it from "extreme hardship" to "exceptional and extremely unusual hardship." See *supra* Part II.A.

<sup>232</sup> Such a change might begin with the passage of a private bill to exempt a particular grandparent caregiver from deportation. "In the early years of our immigration laws, private bills were the primary form of relief from deportation." ALEINIKOFF ET AL., *supra* note 62, at 608-09. And these bills were often used "to create humanitarian flexibility in a law that, if applied as written, would produce harsh results." *Id.* at 787. Further, such bills were often precursors to eventual changes in the law. *Id.* Examples of such private bills being used to create humanitarian changes were private bills to accord nonquota status to the Asian spouses of servicemen stationed in the Far East. These private bills eventually led to the nonquota status of all spouses of American citizens. Another example is the exception to the English literacy requirement of the INA. The current exemption for all naturalization applicants over the age of 50 who have been lawful residents for 20 or more years began as a private bill to exempt a particular elderly female alien from the requirement. However, the passage of such private bills is becoming increasingly rare. *Id.* at 609 (citing Robert Hopper & Juan P. Osuna, *Remedies of Last Resort: Private Bills and Deferred Action Status*, IMMIGR. BRIEFINGS, No. 96-7, June 1997).

<sup>233</sup> In addition, it is somewhat asymmetrical with U.S. citizenship law, which

Many scholars have criticized U.S. immigration laws for allowing narrow definitions of family to frustrate the goals of family unity underlying U.S. immigration law.<sup>234</sup> This is especially true with respect to grandparents, who are frequently recognized as part of the nuclear family under other countries' immigration laws.<sup>235</sup> Countries such as Canada recognize the importance of keeping children with their primary caretaker grandparent. Under Canadian immigration law, the "mother or father of the sponsor's mother or father" is permitted to enter as a member of the family.<sup>236</sup>

In the United States, a change to the hardship statute would mean that many primary caregiver grandparents will qualify for cancellation of removal, but these numbers would be manageable. Hispanic grandparents are the largest population of noncitizen caregiver grandparents; however, the number of Hispanic grandparent caregivers who would qualify for the hardship statute is still relatively small. First, many Hispanic grandparent caregivers are not the children's primary caregivers. Instead, more than three quarters of

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permits a U.S. citizen grandparent to apply for naturalization on behalf of his or her grandchild if the child's parent has died and as long as the child is lawfully in the United States, the applicant-grandparent has lived in the United States for five years, and at least two of those five years were after the child was 14 years old. See 8 U.S.C.A. § 1433(a) (West Supp. 2009).

<sup>234</sup> Thronson, *supra* note 121, at 1180-81 ("[W]hile family relationships do form the basis of much of legal immigration, narrow definitions of family and long wait times frustrate the actuality of preserving or restoring family integrity."); see also Kelly, *supra* note 220, at 955-60; Motomura, *supra* note 126, at 528; Victor C. Romero, *Asians, Gay Marriage and Immigration: Family Unification at a Crossroads*, 15 IND. INT'L & COMP. L. REV. 337, 344 (2005).

<sup>235</sup> See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, 213 U.N.T.S. 222 (guaranteeing "the right to respect for one's private and family life"). When determining the "value of the family life at issue, [the European Court of Human Rights] has looked toward the length and quality of the family relationships as well as the number and location of relatives." Demleiter, *supra* note 117, at 304. The result is that the European Court of Human Rights "protects families . . . to a much greater extent than United States courts do [as it] considers the impact of deportation on the potential deportee's family life and does so in a pragmatic way." *Id.* at 305; see also *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) 21, 45 (1979) (finding that family life includes at least "ties between near relatives," such as grandparents and grandchildren).

<sup>236</sup> Immigration and Refugee Protection Regulations SOR/2002-227 § 117(1)(a) (Can.). Canadian immigration law also provides that "[i]f an orphan is under the age of eighteen and unmarried, Canada will allow him or her to enter as long as the child is 'a child of the sponsor's mother or father,' 'a child of a child of the sponsor's mother or father,' or 'a child of the sponsor's child . . .'" Hawthorne, *supra* note 52, at 828 (citing Immigration and Refugee Protection Regulations SOR/2002-227 § 117(1)(f) (Can.)).

Hispanic grandparents are co-parenting with the child's parent.<sup>237</sup> Second, most Hispanic grandparents who are primary caregivers are already citizens. In fact, studies suggest that noncitizen Hispanic grandparents are 71 percent less likely to be caring for a grandchild than their U.S. citizen-born peers.<sup>238</sup> Consequently, these studies indicate that a significant, but not overwhelming, number of undocumented grandparents would benefit from an amendment to the hardship statute.

Amending the hardship statute to include grandchildren would provide protection to some of the most vulnerable and fragile families. If U.S. immigration law is truly concerned with family unity,<sup>239</sup> then amending the hardship statute to include grandchildren as qualifying relatives should be feasible.

Expanding the definition of family to include grandparents is desirable and does not conflict with recent anti-immigration policies. Recent years have produced significant anti-immigration legislation including the Anti-Terrorism and Effective Death Penalty Act<sup>240</sup> and the IIRIRA.<sup>241</sup> Even though the IIRIRA made qualification under the hardship provision tougher, expanding the category of qualifying relatives to include grandparents does not conflict with these immigration policies.<sup>242</sup> Congress had the opportunity to eliminate the hardship statute in 1996. Instead, Congress chose to amend it.<sup>243</sup> Such action demonstrates Congress's recognition that the hardship provision remains necessary. Immigration judges and the BIA must be

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<sup>237</sup> Fuller-Thomson & Minkler, *supra* note 28, at 13.

<sup>238</sup> *Id.* at 11-12.

<sup>239</sup> See discussion *supra* Part IV.C; see also Romero, *supra* note 50, 491 (citing THOMAS A. ALEINIKOFF ET AL., *supra* note 62, at 319 ("The dominant feature of current arrangements for permanent immigration to the United States is family reunification.")).

<sup>240</sup> Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 15, 18, 22, 28, 40, 42, 50 U.S.C.).

<sup>241</sup> Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.).

<sup>242</sup> A third example, which so far has not become law, was a proposal to amend the provisions of the INA to deny birthright citizenship to the children of undocumented aliens. See MARGARET MIKYUNG LEE, CONG. RESEARCH SERV., REPORT NO. RL33079, U.S. CITIZENSHIP OF PERSONS BORN IN THE UNITED STATES TO ALIEN PARENTS 9-10 (2005), available at <http://openocrs.cdt.org/document/RL33079>. The provision, entitled "To Reform Immigration to Serve the National Interest," "supported the abolition of pure jus soli (birthright citizenship) and limited the conference of citizenship solely to those who are born on U.S. soil and have at least one parent who is a citizen or permanent resident." Kirkland, *supra* note 64, at 202 (emphasis added).

<sup>243</sup> See *supra* Part II.A.

allowed to cancel deportation when such deportation would result in extreme hardship. Amending the category of qualifying relatives to include grandchildren who would suffer extreme hardship if their grandparents were deported comports with this immigration goal.

*B. Amending the Statue is Feasible and Comports with Immigration Law Objectives*

In recent years, Congress proposed two reforms to immigration law that focused on family unity. Examining these reforms provides insight into the likelihood of Congress amending the hardship exception. The Child Citizenship Act (“CCA”) protects noncitizen adopted children from deportation.<sup>244</sup> The Family Reunification Act (“FRA”) would have protected noncitizen parents with felony convictions from deportation.<sup>245</sup> The CCA passed and the FRA did not.

The CCA has two family unity provisions. The first is a citizenship provision which automatically confers United States citizenship upon both biological and foreign-born children who are: (1) under eighteen years old, (2) admitted to the United States as a legal permanent residents, and (3) in the legal and physical custody of at least one U.S. citizen parent.<sup>246</sup> The second provision provides relief from deportation and criminal prosecution for these legal permanent resident children who mistakenly voted in a U.S. election — an action that could otherwise result in their deportation.<sup>247</sup> Congress passed the CCA swiftly and easily. Five months after a single hearing, both the House and Senate passed it unanimously.<sup>248</sup>

Similarly, the FRA would have kept families together by authorizing the Department of Homeland Security to cancel the automatic removal<sup>249</sup> of certain lawful, permanent residents with “aggravated

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<sup>244</sup> Child Citizenship Act of 2000 § 320(a)(1)(2)(3), 114 Stat. 1631, 1631.

<sup>245</sup> Family Reunification Act of 2002, H.R. 1452, 107th Cong. § 2(a)(4)-(5). The FRA was reported out of the House Judiciary Committee on July 23, 2002. 148 CONG. REC. D809 (daily ed. July 23, 2002).

<sup>246</sup> See Child Citizenship Act of 2000 § 320(a)(1)(2)(3), 114 Stat. at 1631.

<sup>247</sup> *Id.* § 237(a)(6)(B). There was a concern that many legal permanent resident children had voted under the mistaken belief that they were citizens and that this CCA provision was an attempt to prevent their deportation for this crime. See 146 CONG. REC. H7774, H7776-H7777 (daily ed. Sept. 19, 2000) (statement of Rep. Jackson-Lee).

<sup>248</sup> 146 CONG. REC. D1168 (daily ed. Nov. 2, 2000).

<sup>249</sup> See INA § 237 (a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2008) (stating that noncitizen is deportable if convicted of aggravated felony); INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (2000) (stating that alien convicted of aggravated felony is not eligible for cancellation of removal).

felony” convictions.<sup>250</sup> However, unlike the CCA, the FRA repeatedly failed to pass.<sup>251</sup>

The purpose of both acts was to prevent the breakup of families through deportation. Immigration scholar Professor Victor Romero argues that the CCA and FRA were “two sides of the same coin of family unity: the CCA focuse[d] on keeping the noncitizen child with the citizen parent, while the FRA aim[ed] to keep the noncitizen parent with the, often citizen, child.”<sup>252</sup> Nevertheless, the easy passage of the CCA and the failure to pass the FRA indicate that Congress perceived the bills differently.

According to Professor Romero, the different treatment of the two bills can be explained by race and class prejudice. Professor Romero suggests that the CCA passed easily because it protected white, middle class families,<sup>253</sup> whereas the FRA failed because it would have mostly protected nonwhite, poor families.<sup>254</sup> If Professor Romero is correct, this suggests that amending the hardship statute to include grandchildren would fail because the amendment would primarily grant relief to poor, nonwhite grandparents.

However, Professor Romero also acknowledges that the different treatment of the two bills could have just as much to do with the child-adult distinction as with a race and class prejudice.<sup>255</sup> The intended beneficiaries of the CCA were children. The FRA benefited adults. Thus, one could argue that Congress was more concerned about protecting children than adults. Looking more closely, the CCA

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<sup>250</sup> For example, under the Act, nonviolent aggravated felons would be able to seek relief from deportation if they: (1) received a sentence of less than four years for no more than one scheme of misconduct, and (2) were not organizers or leaders of the aggravated felony. Family Reunification Act of 2002, H.R. REP. NO. 107-785, at § 2 (2002).

<sup>251</sup> Frank Bill, H.R. 2055, 109th Cong. (2005); Family Reunification Act of 2003, H.R. 2585, 108th Cong. (2003); Family Reunification Act of 2002, H.R. 1452, 107th Cong. (2002); Family Reunification Act of 1999, H.R. 1485, 106th Cong. (1999).

<sup>252</sup> Romero, *supra* note 50, at 497.

<sup>253</sup> See *id.* at 500-01 (“Most adults wanting to adopt in the United States are white, and most children waiting to be adopted, both domestically and internationally, are nonwhite. Thus, many adoptive American families are likely to be ones in which the parents are white and the adopted children are nonwhite. Viewed from this perspective, it is easy to see why the [Child Citizenship Act] was so positively received. Many of the white senators and representatives easily identified with the white United States citizen parents who wanted to make sure their nonwhite adopted children were United States citizens.”).

<sup>254</sup> *Id.*

<sup>255</sup> As Professor Romero notes, the CCA only protected the noncitizen children of citizens who were under eighteen and did nothing to protect those same children who had already reached eighteen. “[T]he CCA does not cover foreign-born children . . . who are older than eighteen years of age.” *Id.* at 504.

concerned sympathetic children — adopted children who were simply asking for the same rights as biological children. The FRA concerned unsympathetic adults — those who had committed aggravated felonies. Thus, one could argue that Congress was more concerned about eliminating differences between biological and nonbiological children rather than eliminating the differences between felonious and nonfelonious adults.

Nevertheless, Professor Romero dismisses the adult-child distinction as an unlikely explanation for the difference. He argues that the FRA would have benefitted children as much as the CCA because “the deportation of citizen children’s noncitizen parents would have a greater emotional and socioeconomic impact on them than on adults.”<sup>256</sup> Professor Romero concludes that the adult-child distinction is not a sufficient explanation.

Professor Romero too easily dismisses the importance of the adult-child distinction. This distinction was significant. The FRA would have protected parents from deportation. Professor Romero assumes that the parents’ deportation will separate children from their parents. However, in most parental deportation cases, the children leave with their parents, so the family remains intact.<sup>257</sup> Consequently, failing to pass the FRA did not result in parents being separated from their children. In contrast, the CCA protects children from deportation. It would be unusual for citizen parents to follow their noncitizen children back to the children’s country of origin.<sup>258</sup> Unlike the FRA, the CCA prevents children from being separated from their parents. Thus, one can argue that the CCA passed because it was more important to the achievement of family unity than the FRA. Alternatively, one might argue that it is less harmful to split up an FRA family than it is to split up a CCA family. There is little doubt that adopted children benefit from remaining with their adoptive parents. However, it is a much more controversial position to argue that children benefit from remaining with parents who have committed felonies.<sup>259</sup>

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<sup>256</sup> *Id.* at 505.

<sup>257</sup> See *supra* Part III.B (discussing assumption that children will accompany their deported parents).

<sup>258</sup> Professor Romero recognizes that “the citizen children do have the option of following their parents” but sees this as no different than the “option open to U.S. citizen parents whose children . . . face deportation.” Romero, *supra* note 50, at 505 n.71. Further, while the children of noncitizens would have the ability to follow their parents after deportation, many citizen parents would not be eligible to live in their child’s country of origin and thus could not follow their children.

<sup>259</sup> Arrest and incarceration are not a *per se* basis for terminating parental rights.

Because it would prevent children from being separated from their primary caregivers, an amendment to the hardship statute to include grandparents should be treated more like the CCA than the FRA. In a typical deportation case, the deportation of parents impacts the child, but it rarely results in the child's separation from their family. This is not true of grandchildren. When primary caregiver grandparents are deported, their grandchildren do not typically accompany them. Instead, these children usually remain in the United States alone, depriving them of the significant benefits of remaining with their grandparents. If Congress's concern for protecting children and preserving family unity outweighs its race or class prejudices, then it will amend the hardship statute to include grandparents. Like the CCA, such an amendment would benefit children by preserving family unity and keeping children with loving caregivers.

### C. Adoption as an Alternative Means of Staying Deportation

Amending the statute to include grandchildren as qualifying relatives is the clearest solution to addressing the hardships caused by grandparent deportation, but there are other possible options. If Congress is unwilling to amend the statute, an alternative would be to permit an immigration judge or the BIA to stay removal proceedings pending an adoption petition by the grandparent.<sup>260</sup> Once a grandparent has formally adopted their grandchild, the grandchild could then serve as a qualifying relative.<sup>261</sup> However, these stays would

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However, they often play a role in such decisions. See, e.g., Nicole S. Mauskopf, *Reaching Beyond the Bars: An Analysis of Prison Nurseries*, 5 CARDOZO WOMEN'S L.J. 101, 112-14 (1998) (noting that many states are willing to speed up "termination of parental rights" proceedings in cases involving incarcerated parent, and that 25 states have statutes regarding termination of parental rights or adoption that are triggered once custodial parent is incarcerated). See generally Philip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. FAM. L. 757, 766-68 (1991) (providing overview of parental rights of prisoners).

<sup>260</sup> Although grandparent caregivers are often the de facto parents of the grandchildren they are raising, de facto parent arguments have been rejected by the courts. See, e.g., *Moreno-Morante v. Gonzales*, 490 F.3d 1172, 1174-75 (9th Cir. 2007) (rejecting petitioner's argument that grandchildren are "de facto" children). Accordingly, the only way for grandparents to become legal parents is through adoption.

<sup>261</sup> Adopted children have all the rights of biological children. See, e.g., WYO. STAT. ANN. § 1-22-114(b) (1977) ("Adopted persons may assume the surname of the adoptive parent. They are entitled to the same rights of person and property as children and heirs at law of the persons who adopted them."). Further, even if the grandparent were still deported, the grandparent would now have the legal right to

have to be lengthy. Before adopted children can serve as qualifying relatives, they need to have been in the legal custody of and have resided with the adopting parent or parents for at least two years.<sup>262</sup>

If adopting grandchildren alleviates the qualifying relative problem, one may wonder why grandparents do not take advantage of this option before a deportation proceeding is initiated. Few primary caregiver grandparents view adoption as an attractive option,<sup>263</sup> and noncitizen grandparents have even greater incentive to avoid it.<sup>264</sup> Frequently, grandparents are reluctant to initiate formal adoption proceedings because they do not want to pit themselves against their child.<sup>265</sup> Furthermore, undocumented grandparents fear that initiating formal adoption proceedings will increase the likelihood of their deportation. Such fears are not unfounded.

*In re B & J*<sup>266</sup> demonstrates that undocumented caregivers risk deportation when they get involved with the government. In *B & J*, officials from the Department of Human Services visited B and J's home to investigate allegations of sexual abuse.<sup>267</sup> During the investigation, officials discovered that B and J's caregivers were Guatemalan citizens residing in the United States illegally.<sup>268</sup> After finding no evidence of abuse, the officials reported B and J's caregivers to U.S. Immigration and Customs Enforcement. Customs officials deported B and J's caregivers, but B and J remained in the United

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take their grandchild with them.

<sup>262</sup> 8 U.S.C.A. § 1101(b)(1)(E)(i) (West 2009) (defining child as "a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years").

<sup>263</sup> See *supra* note 130 and accompanying text (explaining that most grandparents assume caregiving role with hope that parents will be able to resume their parent role in future).

<sup>264</sup> See Michael Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43 WAKE FOREST L. REV. 223, 238 n.90 (2008) ("Grandparents continue to be the primary agents of informal adoption." (quoting ANDREW BILLINGSLEY, *CLIMBING JACOB'S LADDER: THE ENDURING LEGACY OF AFRICAN-AMERICAN FAMILIES* 31-32 (1992))).

<sup>265</sup> See, e.g., *Moreno-Morante*, 490 F.3d at 1172 n.5 (noting that petitioner had suspended his petition to adopt because he did not "want[] to permanently terminate his daughter's parental rights in the hope that she would rehabilitate herself and regain custody"); Barbara Woodhouse, "It All Depends on What You Mean by Home": *Toward a Communitarian Theory of the "Nontraditional" Family*, 1996 UTAH L. REV. 569, 583 n.31 (describing common situation of "grandparent who is reluctant to displace his or her own child as parent").

<sup>266</sup> 756 N.W.2d 234 (Mich. Ct. App. 2008).

<sup>267</sup> *Id.* at 237.

<sup>268</sup> See *id.*



States.<sup>269</sup> Later, the state petitioned the court to terminate the caregivers' parental rights, arguing the caregivers had deserted their U.S. citizen children. As the trial court noted, the state's actions were "morally repugnant," yet they clearly occur.<sup>270</sup> Consequently, it is not surprising that many undocumented immigrants are wary of contacting state officials to formalize their familial relationships.

Due to this distrust of government agencies, many undocumented grandparent caregivers do not seek to formalize their caregiving arrangements through adoption until deportation proceedings have already begun. When their adoption petitions are not finalized before the grandparents are scheduled to be deported, they cannot apply for the hardship exception.<sup>271</sup> This problem is exacerbated by the fact that an immigration judge or the BIA has no authority to stay removal proceedings pending an adoption and, thus, cannot issue a stay without the government's consent.<sup>272</sup> Deportable grandparent primary caregivers face a difficult choice. If they initiate formal adoption proceedings, they fear it will result in deportation. Without formally adopting their grandchildren, they have no exceptions to deportation.

Even if Congress is unwilling to expand the categories of qualifying relatives to include grandchildren, it should give immigration judges and the BIA the power to stay a deportation proceeding pending the outcome of an adoption proceeding. Doing so would allow grandparent caregivers to qualify for the hardship exception.

*D. Permitting Cancellation of Removal for Primary Caregiving Grandparents Makes Good Economic and Policy Sense*

Amending the hardship statute to include grandparent caregivers makes good fiscal sense. For most of these children, the deportation of their grandparents will mean that they have no option but to enter the foster care system. Such a result will not only have detrimental implications for these children, but for society as well. It is no secret that the nation's jails, mental hospitals, and welfare rolls are filled with former foster care children.<sup>273</sup> However, the future ramifications are not the only cause for concern.

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<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 238.

<sup>271</sup> See, e.g., *Colin v. Keisler*, 249 F. App'x 681, 681-82 (9th Cir. 2007) (holding that grandchild would have satisfied definition of qualifying relative if adoption had been completed).

<sup>272</sup> *Id.* at 682 (citing *Moreno-Morante v. Gonzales*, 490 F.3d 1172, 1172 (9th Cir. 2007)).

<sup>273</sup> Chaifetz, *supra* note 3, at 8 ("One study that charted the exit outcomes of

Placing these children in foster care will also have an immediate impact on schools and other students. Many of these children have substantial learning and behavioral problems, which already impact schools.<sup>274</sup> Even with their grandparents' care, these students occupy a disproportionate amount of teachers' time, which decreases the amount of time teachers can spend on the academic and behavioral needs of other students.<sup>275</sup> Without the care and stability of their grandparents, these children's problems will increase, causing more disruption both to their own academic achievement and that of their peers.

Even ignoring these social costs, it would cost billions of dollars to move grandparent-raised children into the foster care system.<sup>276</sup> Currently, there are significantly more children being raised by grandparents and other relatives than children in foster care.<sup>277</sup> Adding these children to the already overcrowded and ineffective foster care system would be an exorbitant expense. Half a million children live in

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California foster care youth painted a bleak picture of former foster care youth unable to meet minimum levels of self-sufficiency and socially acceptable behaviors. More than 23% of the study sample exited from care unsuccessfully: they ran away, refused services, landed in prison, received psychiatric or other hospital treatment, were abducted, or died. Another writer contends that foster care systems feed 40% of their children onto welfare rolls or into prison, and that former foster children are three times more likely to become homeless than the general population. A study published in 1997 found that youth known to the child welfare system are sixty-seven times more likely to be arrested than youth from the general population.”).

<sup>274</sup> See *supra* Part I.A.

<sup>275</sup> Edwards, *supra* note 38, at 570.

<sup>276</sup> For example, a study done in Canada estimated that “[i]f all Ontario kinship children were in foster care homes, the estimated cost in 2001 to support them would exceed \$10.6 million per year.” See AARP International, *Who Is Raising the World's Children?: Grandparent Caregivers: Economic, Social and Legal Implications* (Apr. 4, 2008), [http://www.aarpinternational.org/resourcelibrary/resourcelibrary\\_show.htm?doc\\_id=676636](http://www.aarpinternational.org/resourcelibrary/resourcelibrary_show.htm?doc_id=676636) (last visited Oct. 7, 2009); see also SMITH, *supra* note 48, at 1 (describing money saved by each grandparent-raised child, by noting, “Translated into dollars, Kansas saves an average of \$25,000 a year for every child kept out of the foster care system”).

<sup>277</sup> See Goodman et al., *supra* note 139, at 288 (noting that “it is clear that outside the child welfare system looms the much larger group of private kinship families who may have similar needs but who are not attached to any comprehensive service system”). In addition, relatives often care for siblings and as a result further reduce a state's costs of locating multiple nonrelatives. See Timothy J. Gebel, *Kinship Care and Nonrelative Family Foster Care: A Comparison of Caregiver Attributes and Attitudes*, 75 CHILD WELFARE 5, 7 (1996) (stating that relative caregivers care for average of three children); see, e.g., *Lipscomb v. Simmons*, Civ. No. 87-174-FR, 1987 WL 152357, at \*1 (D. Or. June 30, 1987) (noting that siblings sought foster care funds to enable them to remain in care of their aunt and uncle); *Youakim v. Miller*, 374 F. Supp. 1204, 1206 (N.D. Ill. 1974) (concerning suit by foster parents seeking funds to enable them to care for four of wife's younger siblings).

formal foster care.<sup>278</sup> About one third of these children are living with their grandparents or other relatives.<sup>279</sup> Outside the formal foster care system, approximately two million children reside in informal kinship care arrangements.<sup>280</sup> The foster care system would be overwhelmed if these children suddenly needed foster care. Even if only half of the children living in relative-headed homes moved into the foster care system, this move would cost taxpayers about \$6.5 billion each year.<sup>281</sup> Given these financial implications, some states recognize that it is fiscally desirable to keep these children in informal kinship care, and that such arrangements are better for the children as well.<sup>282</sup>

An immigration policy that encourages dependent children to rely on state support is antithetical to a major objective of immigration law.<sup>283</sup> The typical rationale for deportation is that it will produce an economic benefit for U.S. citizens.<sup>284</sup> However, deporting grandparent caregivers will have the opposite effect — it will quickly become very expensive. To summarize, grandparent care prevents emotional and psychological damage in children, it increases academic success and cognitive development, it reduces the likelihood of drug and alcohol use, unwanted pregnancy, criminal behavior and incarceration, and it saves millions and millions of dollars. Instead of deporting grandparents, perhaps we should throw them a parade.

#### CONCLUSION

Immigration is a hotly contested issue and the impending deportation of twelve million people will undoubtedly fuel such controversies. However, the need to protect vulnerable children should not be a debatable point. The deportation of grandparent caregivers will inflict exceptional and extremely unusual hardship on

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<sup>278</sup> See Generations United, Resources: Kinship Care, <http://ipath.gu.org/Kinsh6261201.asp> (last visited Oct. 17, 2008).

<sup>279</sup> *Id.*

<sup>280</sup> *See id.*

<sup>281</sup> *Id.*

<sup>282</sup> Reed Karim, *The Demands of Second Parenthood*, AARP BULLETIN, Feb. 7, 2006, available at [http://bulletin.aarp.org/yourworld/family/articles/mr\\_johnsons\\_new\\_family\\_sidebar2.html](http://bulletin.aarp.org/yourworld/family/articles/mr_johnsons_new_family_sidebar2.html) (noting that Georgia, California, Ohio, and New Jersey all provide various types of financial support for kinship care providers).

<sup>283</sup> Thronson, *supra* note 121, at 1211 n.240.

<sup>284</sup> See, e.g., Victor Romero, *Postsecondary School Educational Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. J. INT'L L. & COM. REG. 393, 402 (2002) (explaining that “underlying assumption is that undocumented immigrants create a net economic loss to the United States and its states by drawing more upon public funds than they contribute to society”).

thousands of American children. This situation is particularly untenable when the possibility of relief could be so easily achieved. Immigration law provides a hardship exception to parental deportation because it recognizes that such deportation can cause exceptional and extremely unusual hardship to the deportable parent's children. The deportation of primary caregiver grandparents is equally if not more likely to create such hardship. Accordingly, the hardship exception must be amended to include grandchildren as qualifying relatives.