

Excerpt (Pgs. 90-98) from Chapter Three of Show Trials: How Property Gets More Legal Protection Than People in Our Failed Immigration System

DEPORTING AMERICAN CITIZEN CHILDREN

“Family” is considered to be one of the most significant components of life, and the family unit is one of the most important social institutions in our country. Presidents extol the centrality of family to America’s values in speeches,¹³⁸ and sociologists teach why families play such a pivotal role in a person’s life and in the life of a community and nation.¹³⁹ This is not an American creation; it is part of the fabric of humanity from time immemorial. For this reason, the Universal Declaration of Human Rights—championed by Eleanor Roosevelt and adopted by the United Nations General Assembly in 1948—formally states that the “family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”¹⁴⁰ While each generation debates the changing contours of the family unit, none dispute that the family unit is critical; indeed, it is precisely because the family unit is so critical that society engages in debates over the exact definitional nature of family.¹⁴¹

Given these precepts, it is no surprise that the United States Supreme Court has concluded that the Constitution protects the “right to live together as a family” because family is an “enduring American tradition.”¹⁴² As explained, “[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”¹⁴³ Precisely because family is a key cornerstone of our society and our individual liberties, the Supreme Court has constitutionally protected the family unit,

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recognizing that “individuals draw much of their emotional enrichment” from family members and that these bonds play “a critical role in the culture and traditions of the Nation.”¹⁴⁴ For these reasons, the Supreme Court has long held that there is a private realm of family life free from government interference, absent the most compelling of circumstances to justify an intrusion upon the integrity and sanctity of the family unit.¹⁴⁵ We now turn to one such American family to assess our loyalty to these statements in the immigration arena.

Diego Alvarado was born in Mexico. Too poor to go to school, he had to go to work at age 13 simply to help support his family. This is certainly not an uncommon path for many of the third world’s children, who find themselves unable to attend a school and instead must work in one form or another simply to survive. Later, Diego met Juanita and they married. They lived in Mexico and had their first daughter there, Teresa. Desperate for a better life for themselves and for their daughter, Diego and Juanita braved the risks of travel to the United States and managed to enter in 1989 when Teresa was only one.

Diego found a job and went to work to support his family. Juanita also worked to support the family. They settled in a standard suburb of Los Angeles, somewhat inland, a middle-class community with churches and baseball diamonds littered throughout the town. Over time, Diego and Juanita had three more children all born here in the United States. Victoria was born in 1991. Diego, Jr. was born in 1992. The youngest, Angelo, was born in 1994.

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Over the years other Alvarado family members migrated to the United States, including Diego's parents who moved to the United States to be near Diego, Juanita, and the children. Likewise, Juanita's family also came to the United States, resided in the same community, and some of them became naturalized citizens. Two of Diego's brothers lived next door to the Alvarado family. Many other family members lived within a fifteen-minute drive of them, and all the extended family engaged together as almost all extended families do in America, enjoying picnics, children's sports events, church, and other significant life events.

Since they came to the United States, Diego and Juanita never returned to Mexico. They paid taxes, and never received any social welfare. Their life was built here and their family rooted here, and the kids grew as Americans. The children were bilingual, but spoke English predominantly. The youngest children did not even read or write Spanish. All four children attended school in the United States and were exceptional students. Their scholastic awards were numerous and included Perfect Attendance, Student of the Month, and Honor Society Awards. The children's Principal explained, "Diego and his family are good citizens who are and will continue to make positive contributions to society."

Angelo, the youngest child, suffered from chronic and severe asthma and used several prescription drugs to prevent potentially fatal asthma attacks. He used an inhaler machine with a breathing mask every morning and night, took antihistamine pills daily,

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and took prescription inhaler treatments every six hours. When he suffered an asthma attack, he had to take a five-day course of prescription drugs.

In short, the Alvarado family was the standard American family. They built a successful prototypical American life in their community, working multiple jobs, building a better life for their children, and giving their children the opportunities they never had. Like all families, things were no doubt not perfect, but they worked hard to earn the life they lived, they paid taxes, and they contributed to their community in a positive manner.

One day in 2000, the INS came knocking on their door and served the family with deportation papers seeking to return the family to Mexico. The family asked for the benefit of the hardship laws, the same laws we discussed in Chapter 2 where we discussed Sam, Pablo, and Jose's plights. The Alvarado family went before an immigration judge to plead their case. The immigration judge asked them to establish three things under the law: that they had good moral character, that they had been here for 10 years continually, and that deportation of the parents would inflict extreme hardship on the citizen children.

The Alvarados presented their case. They provided testimony to demonstrate their long and connected life in America, their community ties, their children's success in school, and the lack of any connection the children had to Mexico. They also explained Angelo's health issues and the absence of any comparable medical care in Mexico for Angelo. At trial, the children's Principal testified in their support, explaining that Diego

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and Juanita demonstrated exemplary behavior as positive, contributing members of society. Similarly, the School District's School Psychologist offered positive testimony, finding that "leaving this school and moving to Mexico will be very detrimental to [the children's] education and [their] plans of attending college" and will "be harmful to [the children's] academic and social development." In short, the Alvarados told their American immigrant story of hard work to create a better life for their children, and they sought to avail themselves of the benefits of the hardship laws.

The same day the immigration judge heard the testimony, he rejected their case. The immigration judge decided that removal of the family to Mexico would not result in "exceptional and extremely unusual hardship" to the citizen children. The immigration judge acknowledged that there are differences in education and health care between Mexico and the United States and that there are other adjustments associated with relocating to Mexico. The immigration judge however decided that these difficulties were inconsequential because they are the same essentially as all hardships suffered by a deportation.

As is a repeating pattern in nearly all the stories on these pages, the BIA in turn summarily agreed with the immigration judge. This then brought the Alvarados to the Ninth Circuit where they filed an appeal in 2005. In our roles as adjunct professors at the Chapman University School of Law, Kyhm Penfil and I were approached with the opportunity to represent them in the Fall of 2005, and we readily agreed. This was not the

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first hardship case I had taken with similar facts of citizen kids essentially being deported, and it was not the last one I was to see. We faced several problems in the appeal.

The legal problem we faced was the law that was discussed in Chapter 2: the law that prohibited the constitutional courts from reviewing immigration court rulings in hardship cases. The political problem we faced was the reality that Congress had failed to pass any laws to protect either citizen children such as Victoria, Diego, Jr., and Angelo or noncitizen children brought here as newborns such as Teresa. The social problem we faced was the dire damage to a family that was being uprooted from its community and extended family, and removed to a foreign land, a land the children had never been to, had no ties to, and, for the youngest three children, a land they were not citizens of and a land whose written language they could not even read or write.

However, there was one beacon of hope that we reached for: the Constitution. Although Congress stripped the constitutional courts of the power to review immigration court hardship decisions, the law was also clear that the constitutional courts retained jurisdiction to assess constitutional violations that occurred in the immigration court. I had previously represented a similar family in a similar situation—the Hernandez family who we will discuss shortly—and mounted a constitutional challenge to their plight by way of a legal theory that was focused on the citizen children’s rights to maintain their family intact and free from government interference, and to stay in their homeland based upon the principles expressed by the Supreme Court and quoted earlier. In that case, for

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the Hernandez family, the constitutional court sidestepped the issue by resolving the case in a different manner.

The Alvarado's case was ideal to revisit that argument. It was an ideal time to use the federal court's proclamations about the sanctity of family to fight to preserve this family. We hoped now that the constitutional court would recognize the importance of the constitutional right to family integrity and unity in this context and therefore impose some limits on the government's power to deport.

Notably, international human rights cases have recognized these types of limits on governmental deportation power. A seminal case from the international human rights arena is called *Winata v. Australia*. There, Australia sought to deport two Indonesians and their 13-year-old son who was an Australian citizen and native. In Australia's courts, the Winata family was ordered deported to Indonesia. The Winata family challenged the deportation in the International Court of Human Rights. The Australian government mounted the exact same arguments the United States government mounted in my cases for the Alvarado and Hernandez families. Specifically, the Australian government argued that the parents could not use their citizen child's status to in effect give status to the parents and, moreover, that the child was not being deported—the parents were. It further argued that the family's integrity was not threatened because the family could depart together. The International Court of Human Rights rejected all these arguments, and in its calculus considered the child's status as a citizen, his connections to his

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homeland, the damage to him in being deported, and ultimately his best interests. It weighed Australia's interest in deporting people without status, and ultimately concluded that the human rights of the child and the rights of families to preserve their integrity trumped Australia's interests in deporting them.¹⁴⁶ These rulings of international courts do not apply to the United States because we have refused to implement legislation subjecting the United States to these international courts.

This time, I was hopeful we could get an American constitutional court to address the constitutional family issue directly under our American Constitution as there were no other issues that could resolve the case short of assessing the constitutional claim. I was hopeful that a constitutional analysis could be employed to reach a result that was consonant with international human rights decisions such as the *Winata* case. The whole time, however, we wondered whether the Alvarado's citizen children would get their own hearing on their claims before they were deported. They have a constitutional right and liberty interest at issue. Would it be assessed? Would that be considered before the children were removed from their homeland with their parents? Would their family or country be taken from them, would their family unit be shattered as it is transplanted to a foreign land where the kids themselves are not even citizens? All these questions were front and center in our briefing to the court, and front and center in our minds. But before we answer these questions, let's look at the process afforded property before property is removed from its owner.

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¹³⁸ President Bush's quote cited in the beginning of this chapter is a good starting point ("Family values do not stop at the Rio Grande," President George W. Bush, 43d President of the United States of America, April 9, 2007).

¹³⁹ Ronald Bolender, Ph.D., *Sociology of the Family* (2009), located at freebooks.uvu.edu/SOC1200/.

¹⁴⁰ Universal Declaration of Human Rights, adopted December 10, 1948, G.A. Res. 217A(III), U.N. Doc A/810 at 78.

¹⁴¹ Historically, a family unit was male-centric, tracing to the *pater familias* of Ancient Rome where the father was the central authoritarian figure in the family unit. Over time in the modern world, families have come to be defined more broadly to include single parent homes, whether male or female centric, and, more recently, same-sex families.

¹⁴² *Moore v. City of East Cleveland*, 431 U.S. 494, 500, 503 n.12 (1977).

¹⁴³ *Moore*, 431 U.S. at 503-04.

¹⁴⁴ *Roberts v. United States Jaycees*, 468 U.S. 609, 618-20 (1984).

¹⁴⁵ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Cleveland Board of Education v. LeFleur*, 414 U.S. 632, 639-40 (1974); *Moore*, 431 U.S. at 503-04.

¹⁴⁶ *Winata v. Australia*, Communication No. 930/2000, U.N. Doc. CCPR/C/72/D/930/2000 (2001). The European Court of Human Rights has ruled similarly regarding the need to consider the child's best interests in any deportation scenario. See *Boultif v. Switzerland*, ECHR 5427/00 (2001).