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Draconian Discrimination: One Man's Battle With U.S. Immigration Law
For Fairness, Justice, and American Citizenship

DRACONIAN DISCRIMINATION: ONE MAN'S BATTLE WITH U.S. IMMIGRATION LAW FOR FAIRNESS, JUSTICE, AND AMERICAN CITIZENSHIP

By: Rachel Zoghlin, UNROW Human Rights Impact Litigation Clinic¹

“I was born into my father’s arms,” David responded emphatically when I asked him about his relationship with his mother. David’s father, Ronald, has been his teacher, his guardian, his provider, and his support for his entire life. He taught David to be strong and gentle, proud and humble. David inherited Ronald’s kind eyes, his honest nature, his palpable presence, and his immovable strength. The first, last, and only time David met his mother was on January 23, 1965 — the day he was born. Ronald raised two children, David and his sister Roxanne, as a single parent.

When David was a young boy, Ronald immigrated to the United States to start a new life for his family. In October 1972, at the age of seven, David joined his father in New York. A year later, Ronald naturalized (became a U.S. citizen), and believed that David was now a citizen as well. David lived the typical American life: he went to public schools, was an avid fitness buff, and eventually started his own business as a personal trainer. Unfortunately, in the late 1980s, David fell in with the wrong crowd. He was convicted of assault and drug possession, sentenced to federal prison in suburban Texas, and soon became a target for immigration authorities, who questioned his citizenship.

In the 1990s, Immigration and Naturalization Services (INS) tried several times to remove David from the United States. In 1992, INS initiated removal proceedings against David, a process that may result in deportation. Although those proceedings were terminated, four years later, INS again initiated removal proceedings against David. After hearings on the matter, the Judge presiding over David’s case concluded that David had derived citizenship from his father’s naturalization and terminated removal proceedings. Because David is a U.S. citizen and because

the U.S. government can never deport U.S. citizens, the Judge reasoned, INS could not deport him.

In 2008, Immigration and Customs Enforcement (ICE), the agency formerly known as INS, initiated removal proceedings against David for a third time. Infuriated, bewildered, and confused, David fought again to stay in the only country he has ever called home. “How can they deport me if I’m a U.S. citizen?” he thought. Upon transfer to mandatory immigration detention in January 2009, David sought pro bono legal assistance and was put in touch with the UNROW Human Rights Impact Litigation Clinic at American University Washington College of Law.

UNROW challenged ICE’s attempt to deport David before an Immigration Judge and before the Board of Immigration Appeals. UNROW argued that David became a citizen in 1973, at the age of eight, when his father naturalized. The Government responded by arguing that the relevant law — which has now been repealed — never permitted the child of an unwed father to automatically naturalize when his father naturalized. According to the Government, while the child of a divorced parent or the child of an unwed mother automatically became a U.S. citizen when that parent naturalized, the child of an unwed father could not. David, who had believed that he was a U.S. citizen for 35 years, was suddenly an “alien” in his own country. David feared the worst was imminent: deportation to Jamaica, a country completely unknown to him.

While David battled for his citizenship and the right to stay in his country, he languished in immigration detention. At any given time, ICE has around 32,000 people in detention, including U.S. citizens and immigrants who have never committed any crime.² Throughout his detention, David continually proved himself as an upstanding man, a

hard worker, and a leader. In fact, he was consistently rewarded with esteemed work positions and compliments from the detention center staff. Despite his excellent character, however, bureaucracy and financial burdens meant that David was shuffled from place to place. In the dead of night, ICE authorities moved him from suburban Maryland (a mere half hour drive for his lawyers and a three hour drive for his family) to Batavia, New York, a rural suburb of Buffalo (a seven hour drive for his lawyers and an eight hour drive for his family). Even though David is Jewish, both detention centers frequently infringed upon David's religious freedom by denying him kosher meals. The detention centers failed to protect David from harm and provided inadequate medical care when a nonimmigrant inmate serving a felony sentence attacked David, breaking his nose. In an environment worse than federal prison, with unsafe conditions, inadequate medical care, and violations of his religious freedom, like a phoenix, again and again "King David" rose from the ashes and fought to be free in the country he called home.

UNROW took the case to the Fourth Circuit Court of Appeals, arguing that, under a constitutional reading of the law, David was a U.S. citizen and, therefore, could not be deported. Although the law did not explicitly recognize the child of an unwed naturalized father as a citizen, a federal court could recognize and rectify the injustice of discriminating against a child based on his status as illegitimate. But, the court did not. In May 2011, two of the three judges on the Fourth Circuit panel affirmed ICE's order of removal against David. The dissenting judge acknowledged that David was among a group of individuals — illegitimate children of naturalized U.S. citizen fathers — for whom automatic citizenship was impossible. He viewed this discrimination as fundamentally unfair and insisted that the court should find David a U.S. citizen.

Throughout David's legal battle to prove his citizenship, ICE imprisoned David in immigration detention. ICE often offers hearings to immigrants to determine whether detention during removal proceedings is necessary and permits some immigrants to leave detention centers on supervised release if they return for scheduled court dates.³ Despite his multiple requests, David was never afforded such a hearing. He was never given the chance to convince a judge that he should be able to spend possibly the last months

of his life in the United States with his family. Fighting for both his freedom and right to remain in the country he loves, David waited in immigration detention for over two-and-a-half years. In July 2011, David's beloved sister Roxanne passed away. Faced with insurmountable grief and the endless battle for survival in immigration detention, David consented to removal to Jamaica, but he did not give up his fight for his citizenship.

In September 2011, UNROW filed a petition for a writ of certiorari on David's behalf, requesting that the Supreme Court consider David's claim to citizenship.⁴ Meanwhile, he was returned to Jamaica, a country he had not seen since he was seven years old. He left with a glimmer of hope that the U.S. Supreme Court would acknowledge the discriminatory nature of the law and affirm that he is indeed a U.S. citizen, enabling him to return. The Supreme Court denied certiorari on January 9, 2012, refusing to hear David's case and leaving intact the Fourth Circuit's rejection of David's citizenship claim.⁵

David's case is far from unique. U.S. citizens make up a "low but persistent" percentage of the nearly half million persons deported each year.⁶ Many individuals who immigrated to the United States with their fathers have later been deported on the grounds that they are the illegitimate children of unwed fathers and, thus, cannot derive automatic citizenship. Now, David can never reenter the United States.⁷ He cannot stop by for a quick visit with his father after a day of work. He will never again see the home where his father raised him or attend a high school reunion. He will not watch his sister's kids — his five nieces and nephews — grow up, unless they visit him in Jamaica. The U.S. government and the U.S. justice system have permanently destroyed this American family.

Calling attention to Attorney General Holder's continued defense of such discriminatory treatment, Judge Roger Gregory of the Fourth Circuit Court of Appeals remarked: "In my home state of Virginia, they used to call ... unwed children *bastards* in the statute, and we got way beyond that draconian and mean-spirited terminology. And so we're still today, we're saying that a[n illegitimate] child should be treated differently?"⁸ The answer to that question, it seems, is yes — at least from the perspective of the Department of Justice and the Supreme Court.

(Endnotes)

¹ Rachel Zoghlin graduated from Vassar College in 2007, American University Washington College of Law, *cum laude*, in 2012, and is a proud alumna of the UNROW Human Rights Impact Litigation Clinic. She currently works at Grossman Law, LLC, an immigration litigation firm in Rockville, MD. Rachel recognizes and thanks Professors Ali Beydoun and Erin Louise Palmer, and her UNROW partners Angad Singh, Brenda Robles, and Elena Landriscina, for their wisdom, support, and friendship. Finally, she offers deep gratitude to David Johnson, for the myriad lessons he taught us on the law, on life, and on the interminable battle for what is just and what is right.

² *No Conviction, No Freedom: Immigration Authorities Locked 13,000 in Limbo*, HUFFINGTON POST (Jan. 27, 2012), http://www.huffingtonpost.com/2012/01/27/immigration-detention_n_1231618.html.

³ See 8 U.S.C. § 1226(c) (2012).

⁴ Petition for Writ of Certiorari, *Johnson v. Whitehead*, 647 F.3d 120 (4th Cir. 2011) (No. 11-378), 2011 WL 4442703.

⁵ *Johnson v. Whitehead*, 647 F.3d 120 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1005 (2012).

⁶ See Julia Preston, *Immigration Crackdown Also Snares Americans*, N.Y. TIMES, Dec. 13, 2011, at A20; see also Paul McEnroe, *U.S. Citizenship No Defense to Deportation Threat*, STAR TRIBUNE (Nov. 27, 2011, 6:59 AM), <http://www.startribune.com/local/north/134541773.html>.

⁷ See 8 U.S.C. § 1326 (2012).

⁸ Transcript from Oral Argument (4th Cir., January 25, 2011), on file with author.