# ISSUES OF FAMILY SEPARATION: AN ARGUMENT FOR MOVING AWAY FROM ENFORCEMENT-ONLY SOLUTIONS TO OUR IMMIGRATION "PROBLEM"

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*Please do not deport my parents because you will also deport a girl who only has a year left of high school and a dream to become something more than the daughter of illegal immigrants.*[1]

*What happens to the hope of a single child—anywhere—can enrich our world, or impoverish it.*[2]

In October 2005, Ruby Arcos, a United States citizen and daughter of undocumented immigrants, wrote to the Ninth Circuit begging them to let her finish high school and to stop the deportation of her parents.[3] She implored the court to consider her future and that of her four U.S. citizen siblings.[4] However, the Ninth Circuit's affirmed the decision to deport them and Ruby's parents, who had lived in the United States for eleven years, were deported to their native country by the Department of Homeland Security (DHS).[5] Judge Pregerson dissented from the court's opinion and prayed that as soon as possible "the good men and women in our Congress will ameliorate the plight of families like the [petitioners] and give us humane laws that will not cause the disintegration of such families."[6]

In 2008, it was estimated that four million U.S. born children of unauthorized

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1. Memije v. Gonzales, 481 F.3d 1163, 1167 (9th Cir. 2007) (letter from the sixteen year old child of undocumented parents who will be deported to Mexico).

2. Barack Obama, *Remarks by the President to the United Nations General Assembly* (Sept. 23, 2009), *in* THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY, http://www.whitehouse.gov/the_press_office/remarks-by-the-president-to-the-united-nations-general-assembly/.

3. *Memije*, 481 F.3d at 1166-67.

4. *Id.* at 1165.

5. *Id.* at 1164. The court in *Memije* found that it lacked jurisdiction to review this petition because Section 242(a)(2)(B)(i) of INA eliminated its "jurisdiction over decisions by the Board of Immigration Appeals that involve the exercise of discretion." *Id.* at 1164. The Memije family had failed to establish the requisite "exceptional and extreme hardship" standard. *Id.*

6. *Id.* at 1165-66 (Pregerson, J., dissenting) (quoting Cabrera-Alvarez v. Gonzales, 423 F.3d 1006, 1015 (9th Cir. 2005).

immigrants could be impacted by draconian immigration laws that disregard a child's best interest and family unity.[7] During a speech to the United Nations General Assembly, President Obama stated that he considered the right to security and peace fundamental for "our children."[8] Yet, an American child's right to security and peace are violated every time she is forced to make a choice between a life without her mother or father in the United States or leaving the only country she has ever known.

## I. INTRODUCTION

Current legislation and the expansion of enforcement-only immigration initiatives are ineffective in targeting the toughest criminals, detrimental to family unity, and often end up penalizing citizen children. As used in this article, the concept of enforcement-only immigration reform includes the expansion of the definition of an aggravated felony under immigration law, workplace and home raids carried out by the U.S. Immigration and Customs Enforcement (ICE), and state and local enforcement of federal immigration law.

Being tough on crime is part of our political reality, but it is time for Congress to address the devastating consequences that an enforcement-only immigration policy has on immigrant families by developing pro-family immigration legislation that protects citizen children like Ruby Arcos. Most deported immigrants are removed for committing non-violent crimes.[9] A large number of these individuals have citizen children who depend on them for their well-being and will be forced to leave the country as a result of the parent's deportation.[10] Moreover, serious human rights concerns arise when an immigrant parent is detained and subsequently deported.[11]

The harsh immigration laws put in place in 1996[12] are detrimental to immigrant families because they force families to make impossible choices between their children's right to remain in the United States and the right to live together.[13] Unlike the rest of the developed world, immigration law in the United

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7. JEFFREY S. PASSEL & D'VERA COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES (2009), http://pewhispanic.org/files/reports/107.pdf [hereinafter TRENDS IN UNAUTHORIZED IMMIGRATION] ("The number of children of unauthorized immigrants increased by 1.2 million from 2003 to 2008….").

8. Obama, *supra* note 2.

9. *See* HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY 5-6 (2007), *available at* http://www.hrw.org/sites/default/files/reports/us0707_web.pdf [hereinafter FORCED APART] ("In 2005, 64.6 percent of the immigrants deported were removed for non-violent offenses like drug convictions, illegal entry, and larceny; 20.9 percent were removed for violent offenses; and 14.7 percent were removed for 'other' crimes.").

10. *See* Passel & Cohn, *supra* note 7, at ii.

11. *See infra* Part III.

12. Anti-Terrorism and Effective Death Penalty Act, Pub. L. N. 104-132, 110 Stat. 1214 (1996) [hereinafter AEDPA]; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [hereinafter IIRIRA], Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

13. *See generally* IIRIA. For a discussion of the right to family see discussion, *infra* Part

States does not allow for judicial discretion in deportation proceedings of non-citizens that will also result in the deportation of citizen children. In the United States, such proceedings occur when the non-citizen[14] has committed certain types of crimes defined under the Immigration and Nationality Act (INA).[15] This amounts to a devaluation of citizen children's rights. The non-citizen parent who has committed a crime is unable to request humanitarian waivers or a stay of deportation based on her family ties in the United States.

Children's rights are also devalued because under the immigration code, children cannot petition for their parents to become lawful residents.[16] If their parents are deported to their country of origin these children are deprived of having a relationship with their parents.[17] Although at one time judges were given discretion in weighing the best interest of the child and family unity, current immigration law can lead to mandatory deportation for both lawful permanent residents and unlawful immigrants, regardless of their extensive ties to the United States.[18]

First, this comment argues that the United States should use international laws and norms to develop legislation that properly balances the rights of children and families to remain together with the national policy of deterring immigrants from committing crimes within our borders. Second, it encourages a departure from enforcement-only solutions to the immigration "problem" which leads to involuntary family separation and ultimately penalizes children.[19] A broad category of aggravated felonies and an enforcement-only response to our immigration "problem" is detrimental to immigrant families and communities,

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III.

14. For the purposes of this paper, "non-citizens" are lawful permanent residents, temporary residents, undocumented immigrants, immigrants who might be in between status, and immigrants with a variety of different visas.

15. Immigration and Nationality Act, 8 U.S.C. § 1101-1525 (2010) [hereinafter INA]; *see also* FORCED APART, *supra* note 9, at 49-50 (finding that over 60 countries required that the issue of family unity and child's best interest be evaluated by deportation authorities when a non-citizen is deported from his place of residence.).

16. *See* 8 U.S.C. § 1151(b)(2)(A)(i) (2010) ("For purposes of this subsection, the term 'immediate relatives' means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age.").

17. *See* David B. Thronson, *You Can't Get Here From Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL'Y & L. 58, 60 (2006) ("[T]he existence of even close family relationships with persons permitted to live in the United States does not inevitably or even usually provide feasible avenues for legal immigration."); *see* Kerry Abrams, *Immigration Status and the Best Interest of the Child*, 14 VA. J. SOC. POL'Y & L. 87, 88 (2006) (concluding that in most cases "the immigration status of a parent is likely to be an irrelevant factor in determining the best interests of the child").

18. *See* Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 260 (2003) (describing the subordination of "family integrity" in immigration removal considerations).

19. As used in this article, enforcement-only immigration reform includes the expansion of the definition aggravated felony under immigration law, workplace and home raids carried out by ICE, and state and local enforcement of federal immigration law.

leads to trauma in children, and weakens the authority of the American immigration system at home and abroad.[20] Therefore, legislators should draw upon international law and domestic family law to draft new regulations aimed at protecting the lives of citizen children. Finally, in disregarding the concept of family unity, the United States is alone in the developed world in prohibiting immigration judges from considering the issues of family unity and a child's best interest in deportation and removal proceedings of her parent.[21] It should remedy this inequality by allowing judges to balance the rights of children with the crimes committed by their parents.

This article will explore the effects of immigration laws on family unity under three common scenarios. In the first scenario, a non-citizen is seeking to adjust her status and the government learns of an aggravated felony, which results in the non-citizen being placed in removal proceedings.[22] In the second scenario, an undocumented immigrant is arrested and put in deportation proceedings as a result of a contact with a deputized police officer, or a workplace or home raid.[23] In the third scenario, a permanent resident enters the United States after being abroad, but after completing immigration the agent discovers information about an aggravated felony, contacts ICE, and they then begin the removal process. In all three scenarios, a discussion of the shortcomings of current U.S. immigration law as it impacts U.S. born children whose non-citizen parents are put into deportation proceedings requires situating these children at the intersection of immigration law, criminal law, international law, and family law.[24]

Part II of this article is a brief history of immigration and deportation policy in the United States. This history reflects an early commitment to international norms.[25] This comment argues that the expansion of the definition of an aggravated felony and the repealing of certain humanitarian waivers in 1996 led to immigration law changes with severe consequences for immigrant families. The goals of both the 1996 laws[26] and the new enforcement initiatives are to remove the criminal non-citizen from the United States and to keep the United States safe.[27] This goal has long been recognized as encompassed within the plenary

20. Jaya Ramji-Nogales, *A Global Approach to Secret Evidence: How Human Rights Law Can Reform Our Immigration System*, 39 COLUM. HUM. RTS. L. REV. 287, 348 (2008) (discussing the usefulness of human rights treaties in finding guidance between balancing national security concerns and due process concerns of non-citizens).

21. FORCED APART, *supra* note 9, at 49-50.

22. This happens when the non-citizen adjusts status based on marriage, employment or another family-based immigration benefit. This can also happen when an undocumented immigrant marries a U.S. citizen and then applies for lawful permanent residence. 8 U.S.C. §§ 1255(e), (k), (i) (2010).

23. *See infra* Part II.

24. *See* Thronson, *supra* note 17.

25. *See* Chae Chan Ping v. U.S. (The Chinese Exclusion Case), 130 U.S. 581, 603 (1889) ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation.").

26. As used in this paper, the 1996-laws mean the AEDPA and the IIRIRA.

27. FORCED APART, *supra* note 10, at 17-18 (quoting Representative McCollum, who said

powers of the government in regulating our borders.[28] The 1996 laws have also had unintended consequences like deporting non-citizens who have committed minor crimes and splitting up families. A disproportionate number of non-citizens are deported for minor crimes that do not threaten public safety.[29] Even assuming that these enforcement responses to immigration are able to target only the most dangerous criminals, the question remains whether these policies are fair when they are balanced against an individual's right to family unity.

Part III of this article explores immigration laws and policies in the United States as they affect mixed families. The mixed family is a recent phenomenon in American society and encompasses immigrant families in which the immigration statuses of family members are diverse. This section provides a brief overview of the growth of American families affected by both the new changes in immigration law in the last decades and the implementation/creation of enforcement-only immigration reform. The section defines the mixed family and the limitations of immigration law in affording rights to citizen children with respect to their immigrant parents. Recent changes in immigration law unfairly burden citizen children whose parents could be deported by imposing decades of punishment for actions for which these children bear no fault. Second, it discusses the challenges placed on family unity by harsh immigration laws, arguing that enforcement-only immigration responses unduly traumatize children regardless of whether the response is a work site raid, a home raid, or a routine procedure.[30] Additionally, this section attempts to dispel some of the stereotypes put forth by the popular media and anti-immigrant groups by showing that "mixed families" have members that are gainfully employed and make invaluable contributions to their community[31]

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that criminal alien provisions that were part of the AEDPA were important because oftentimes "terrorists or would be terrorists are criminal aliens and . . . [t]he sooner we get them out of the country . . . the less likely we are to have . . . acts of terrorism . . . We need to kick these people out of the country.").

28. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 587-88 (1952) ("That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the nation over the alien . . . .").

29. *See* FORCED APART, *supra* note 9, at 23-25 (quoting Senator Ted Kennedy, who noted that "[a]n immigrant with an American citizen wife and children sentenced to 1-year probation for minor tax evasion and fraud . . . would be treated the same as ax murderers and drug lords"); *see also* DORESEY & WHITNEY LLP, SERVING A LIFELINE: THE NEGLECT OF CITIZEN CHILDREN IN AMERICA'S IMMIGRATION ENFORCEMENT POLICY 32 (2009), http://www.dorsey.com/files/upload/DorseyProBono_SeveringLifeline_ReportOnly_web.pdf [hereinafter DORSEY & WHITNEY LLP] (explaining that many people arrested by ICE are not criminals but "are undocumented immigrants who just happen to be at a home, often with U.S. citizen children, or other locations that ICE agents raid").

30. *See infra* Part.III.C.1.

31. DORSEY & WHITNEY LLP, *supra* note 29, at 17 ("The economic benefits derived from the currently undocumented labor force, and the potential adverse consequences of strict enforcement in lieu of meaningful reform, are significant at both a macro and micro level."); *see also* Cerrillo-Perez v. INS, 809 F.2d 1419, 1424 (9th Cir. 1987) (noting that undocumented

Finally, the section discusses current legislation proposed by Representative Jose E. Serrano (D-NY) and Representative Lynn Woolsely (D-CA) which afford greater protections for the citizen child of immigrant parents.[32] Although both of these bills would provide some protection of citizen children's rights, they fall short of protecting family unity and are still working within the enforcement model of immigration reform.

Part IV of this paper is a discussion of international law regarding the concept of family unity.[33] International norms treating involuntary family separation as a violation of international law are slowly emerging.[34] Family unity is not foreign to our legal system or to our immigration law. In fact, the concept of a child's best interest and family unity are part of our domestic family law.[35] One of the main goals of our immigration system is family reunification and unity. To respect both our immigration law and our international obligations, Congress should develop legislation that protects citizen children and their family. This section also explores the difference between the European courts and U.S. courts in balancing national security interests with family unity and concludes that the European model manages to strike a better balance. Finally, in Part V, this comment concludes that a more fair balance between the right to deport unwanted immigrants and protecting the right to family unity must be struck.

## II. IMMIGRATION AND DEPORTATION IN THE UNITED STATES

### *A. Immigration and Deportation*

A review of the long history of immigration law in this country reveals an initial adherence to both international legal norms and the concept of family unity.[36] However, the complex system that eventually crystallized into the current

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parents who had lived in the United States for over ten years were gainfully employed and had strong community ties).

32. H.R. 1176, 110th Cong. (2007); Humane Enforcement and Legal Protections for Separated Children Act of 2009, H.R. 3531, 111th Cong. (2009).

33. The concept of family unity includes the best interest of the child. *See* Thronson, *supra* note 17, at 84 (discussing the citizen child's personal interests and how they are affected by the disruption of family unity in deportation situations).

34. Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 215 (2003) (discussing how various treaties, such as the African Charter on the Rights and Welfare of the Child, the Universal Declaration of Human Rights, and the Convention on the Rights of the Child, oppose involuntary family separation as violating family privacy, parental rights, the right to marry, children's rights, and the family as an institution).

35. Thronson, *supra* note 18, at 67 (noting that "the ubiquitous 'best interests of the child standard'. . . governs or influences many decisions affecting children").

36. *See* Act of Mar. 3, 1891, ch. 551 26 Stat. 1084 (federal statute placing restrictions on immigration which stated that "this section shall not be held to exclude persons living in the United States from sending for a relative or friend who is not of the excluded classes under such regulations as the Secretary of Treasury may prescribe"); *see also* Mae Ngai, *How Grandma Got Legal*, LOS ANGELES TIMES, July 28, 2006, at 13, http://articles.latimes.com/2006/may/16/opinion/oe-ngai16 ("There were so few restrictions on

immigration system, as well as the conditions that render an individual deportable, ultimately resulted in a significant departure from the norms of the rest of the developed world.[37]

There is no explicit power in the Constitution which enables Congress and the Executive to order the deportation of aliens; however, the power to deport has been inferred from the Naturalization, Commerce and War Powers clauses.[38] This inferred power, along with the concept of sovereignty, constitutes the plenary powers of Congress to regulate immigration.[39] As early as 1892, the U.S. Supreme Court embraced the international legal concept that "every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominion."[40] Early immigration cases were also clear in holding that deportation was not a form of punishment.[41] Instead, early deportation laws were aimed at deporting aliens who should not have entered the United States in the first place.[42] Until the middle of the twentieth century, the power to restrict immigration had been used primarily to restrict the entry of certain "undesirables."[43] Nevertheless, it was not long before the power to deport was applied to certain non-citizens who had committed crimes in the United

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immigration in the 19th and early 20th centuries that there was no such thing as 'illegal immigration.'").

37. FORCED APART, *supra* note 9, at 45 ("When Congress changed deportation law in 1996 it broke with international human rights standards in ways never before attempted in the United States.").

38. U.S. CONST. art. I, § 8, cl. 4; U.S. CONST. art. I, § 8, cl. 3. (commerce clause); U.S. CONST. art. I, § 8, cl. 11 (war powers clause); Bryan Lonegan, *American Diaspora*: *The Deportation of Lawful Residents from the United States and the Destruction of Their Families*, 32 N.Y.U. REV. L. & SOC. CHANGE 55, 58 (2007).

39. *See Chae Chan Ping v. U.S.*, 130 U.S. at 609 ("The power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States . . . .").

40. Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893). *See also Chae Chan Ping*, 130 U.S. at 604-603 ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation.").

41. *Fong Yue Ting*, 149 U.S. at 730 (holding that due process does not apply to deportation proceedings, which were merely administrative and did not amount to punishment for a crime); *see also* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) ("[T]he power . . . to forbid the entrance of foreigners . . . belongs to the political department of the government . . . ."); Fiallo v. Bell, 430 U.S. 787, 794 (1977) ("[T]he power to expel or exclude aliens is a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.").

42. Lonegan, *supra* note 38, at 59.

43. Historically, "undesirables" were considered individuals with mental illness, criminals, and the mentally and physically handicapped. *See* Chinese Exclusion Act, ch. 376, § 2, 22 Stat. 214 (1882) ("[I]f on such examination there shall be found among such passengers any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge . . . such persons shall not be permitted to land."); *see also Nishimura*, 142 U.S. at 659 ("Congress has often passed acts forbidding the immigration of particular classes of foreigners . . . .").

States.[44]

Despite the power to deport non-citizens who had committed crimes, there were discretionary waivers of deportations for which non-citizens could apply.[45] Although at one point immigration judges were granted discretion, the passage of the Anti-Terrorism and Effective Death Penalty Act (AEDPA)[46] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[47] effectively transformed the system into one of mandatory deportation. Restricting the entry of certain undesirables into our border is not the same as deporting those who have committed crimes after developing ties in the United States and have become undesirable.

When an immigrant is deported or removed from the place where she has raised her family, families lose the ability to raise their children as they see fit.[48] Because the immigrant might not be able to obtain work in her native land, her family can often suffer economic hardship.[49] In some cases, the non-citizen who is being deported has no close ties to her country of birth; in other cases she may not even speak the language. As a result, her return to her country of citizenship can be extremely traumatic for her citizen children.[50]

If the immigrant has been deported because of an aggravated felony, she might never be able to return to the United States.[51] The biggest injustice is to the

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44. *See, e.g.*, Bugajewitz v. Adams, 228 U.S. 585, 590 (1913) (finding an alien prostitute deportable for crimes of prostitution in the United States, and dismissing her constitutional claims).

45. *See* 8 U.S.C. § 1182(c) (1994) ("Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General . . . ."), *repealed by* IIRIRA § 304(b); *see also* AEDPA.

46. *See generally* AEDPA.

47. IIRIRA § 304(b).

48. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (finding the right to "establish a home and bring up children" as a liberty interest protected by due process).

49. See generally *Judge H. Lee Sarokin,* Debunking the Myth That Deportation Is Not Punishment*, THE HUFFINGTON POST (Oct. 14, 2009), http://www.huffingtonpost.com/judge-h-lee-sarokin/debunking-the-myth-that-d_b_321329.html ("The consequences of deportation can be so harsh that they are at least the equivalent of prison time, or even worse.").*

50. *See generally* Fong Yue Ting v. United States, 149 U.S. 698, 749 (1893) (Brewer, J. dissenting) ("[I]f a banishment of this sort is not a punishment, and among the severest of punishments, it would be difficult to image a doom to which the name can be applied."); *see* Julianne Hing, Seth Wessler & Jorge Rivas, *Torn Apart by Deportation*, COLORLINES (Oct. 22, 2009), http://colorlines.com/archives/2009/10/torn_apart_by_deportation.html.

51. *See* 8 U.S.C. § 1182(a)(9)(A)(i) (2006) (rendering immigrants inadmissible for readmission after a deportation on the grounds of an aggravated felony conviction). Judge Haddon Lee Sarokin, concurring in *Scheidemann v. Immigration and Naturalization Service*, asserted that deportation is a criminal punishment:

My concurrence is mandated by the unrealistic conclusion in longstanding Supreme Court precedent that deportation is not a form of criminal punishment, but rather a civil remedy aimed at excluding unwanted aliens . . . . The legal fiction that deportation following a criminal conviction is not punishment is difficult to reconcile with reality . . . . [In this case, the non-citizen] entered the country at age twelve; he has lived here for thirty-six years; he has been married to an American citizen for twenty-four years; he has raised three children all of whom are

immigrant's citizen child.[52] The removal proceeding of a child's parent can be extremely traumatic for the child either because the child will be deported along with her parent to their non-native country or because the child is forced to live without her parent in the United States. Ultimately, these two results are devastating for citizen children because they were not the ones who violated the law.[53] Yet, under U.S. law, deportation is considered merely an administrative proceeding, not a form of punishment.[54]

### 1. Immigration Law Pre-1996

Although immigration law prior to 1996 was not a guarantee against family separation, non-citizens convicted of an aggravated felony had an opportunity to request relief under § 212(c) of the INA and appeal their case to an immigration judge.[55] In 1952, the McCarran-Walter Act established the procedures that govern the current immigration system affecting undocumented immigrants, lawful permanent residents, and temporary visitors convicted of certain crimes.[56] Immigrants who committed crimes of "moral turpitude"[57] and those who were convicted of violating a controlled substance law or unlawful possession of an automatic weapon were considered deportable prior to the passage of the AEDPA and the IIRIRA.[58]

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American citizens; his elderly parents are naturalized citizens . . . ; he has no ties to Columbia . . . .

Scheidemann v. Immigration and Naturalization Service, 83 F.3d 1517, 1526-27 (3d Cir. 1996) (Sarokin, J., concurring).

52. *Memije* v. Gonzales, 481 F.3d 1163, 1165. (9th Cir. 2007) (Pergerson, J., dissenting) (finding that removal of the Memije parents would have devastating effect on the education of their four citizen children); *see generally* Families for Freedom, http://www.familiesforfreedom.org (last visited Mar. 19, 2011) (FFF is a defense network by and for families facing deportation in New York city. They see themselves as survivors and organizers against what they state is the cruelest civil proceeding in America: the separation of families through deportation).

53. *See* Plyler v. Doe, 457 U.S. 202, 220 (1982) ("[T]hose who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including. . . deportation. But the children of those illegal entrants are not comparably situated.").

54. *See Bugajewitz*, 228 U.S. at 590 (arguing that "[i]t is thoroughly established that Congress has the power to order the deportation of aliens whose presence in the country it deems hurtful. [Deportation is not] a punishment; it is simply a refusal by the Government to harbor persons whom it does not want"); *see also* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("[A] deportation proceeding is purely a civil action, to determine eligibility to remain in this country, not to punish. . . . .").

55. INA § 212 (c), *repealed by* IIRIRA § 304(b).

56. The Immigration and Nationality Act of 1952, H.R. 13342, 82d Cong. (1952), *available at* http://www.state.gov/r/pa/ho/time/cwr/87719.htm (developing and detailing the deportation process,, limiting immigration based on a quota system, etc). *See also* FORCED APART, *supra* note 9, at 11.

57. The term "moral turpitude" is undefined under immigration law and is defined by case law. The Courts usually hold that the term includes crimes with a sentence of over a year, which were committed within the first five years from the date when the immigrant entered the United States. FORCED APART, *supra* note 9, at 18.

58. Jordan v. De George, 341 U.S. 223, 227 (1951) (stating that "moral turpitude" was

Although Congress took significant measures to expand the categories for deportable aliens prior to 1996, these new laws brought about the most serious changes in immigration law.[59] First, the AEDPA drastically expanded the category of "aggravated felonies" which result in mandatory deportation.[60] Second, the IIRIRA repealed the availability of humanitarian waivers for some non-citizens and removed the discretion from immigration judges in certain cases, replacing these with a single "cancellation of removal" process.[61]

Before 1996, an immigrant who was subject to deportation because of a criminal conviction could challenge the deportation or removal proceeding if she was: (1) a non-citizen spouse, parent, or child "of a U.S. citizen or legal permanent resident" who," upon evidencing that they would suffer extreme hardship could ask the judge to waive the deportation based on an a crime of moral turpitude" or possession of less than 30 grams of marijuana;[62] or (2) a lawful permanent resident applying for a § 212(c) discretionary waiver.[63] The § 212(c) waiver allowed an immigration judge to balance the adverse factors evidencing the applicant's undesirability as a resident with the social and humane considerations presented on her behalf.[64]

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deeply rooted in the common law including disbarment of attorneys and revoking licenses of medical practitioners) (citing *In re* Kirby, 10 S.D. 322 (1897), Bartos v. United States District Court, 19 F.2d 722 (1927)). The Court continued:

[A]ny alien . . . who is hereafter sentenced more than once to such a term of imprisonment [one year or more] because of conviction in this country of any crime involving moral turpitude, committed at any time after entry . . . shall, upon the warrant of the Attorney General, be taken into custody and deported . . . .

*Jordan*, 341 U.S. at 225. Along with crimes of moral turpitude, aggravated felonies are the two broad categories that can be the basis or an individual's deportation. This article focuses on aggravated felonies because the definition includes relatively minor crimes.

59. In 1988, Congress passed the Anti-Drug Abuse Act which expanded the list of "aggravated felonies" and the type of relief available for immigrants put in deportation proceedings. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7344(a), 102 Stat. 4181, 4470-4471 (1988). *See also* Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 4978, 5048 (1990) (defining crimes of violence for which the possible penalty was at least five years as aggravated felonies); The Immigration and Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320-22 (1994) (adding additional weapons offenses, some theft and burglary offenses, prostitution, tax evasion, and certain categories of fraud as aggravated felonies).

60. AEDPA § 440(d) (expanding the list of deportable offenses). *See also* INA § 101(a)(43) (listing offenses constituting "aggravated felonies").

61. IIRIRA § 348.

62. FORCED APART, *supra* note 9, at 13.

63. This list is not exhaustive and there were other waivers available for non-citizens whose life or freedom would be threatened in the country of deportation. *See* I.N.S v. St. Cyr, 533 U.S. 289, 295-96 (2001) (noting that between 1989 and 1995, approximately 10,000 lawful resident aliens were granted waivers under 212(c)).

64. *In Re* Matter of Marin, 16 I. & N. Dec. 581 (BIA 1978) (alien bears the burden of demonstrating that his application merits favorable consideration. Under section 212 (c) the favorable conditions included factors such as family ties in the U.S., residence of long duration in the United States (especially if the inception of the residence commenced at a young age), hardship to the respondent and her family if she was deported, service in the U.S. armed forces, business or property ties, history of employment and in the case of a criminal record proof of

### 2. Immigration Law since 1996

In 1996, Congress passed certain laws which drastically changed the immigration system and further strained "mixed families." These new laws were both more punitive than the earlier Acts, in that they expanded the aggravated felony category, and more restrictive, in that they limited the ways that a non-citizens could appeal for leniency in their deportation proceedings. First, the AEDPA expanded the list of criminal convictions that would render a non-citizen an "aggravated felon" and make him eligible for removal.[65] Second, under the IIRIRA, offenses and crimes of violence with a one-year penalty were deemed to be aggravated felonies.[66] Under the current statutes, the term aggravated felony encompasses murder, rape, violent crimes, burglary offenses, crimes including fraud or deceit, illicit trafficking of a controlled substance, forgery, obstruction of justice and bribery, and an attempt or conspiracy to commit any of the crimes listed above.[67] The passing of the IIRIRA also eliminated the § 212(c) relief and replaced it with a limited cancellation of removal process for certain permanent residents.[68]

Although the § 212(c) waivers did not offer great protection for families, the revocation of the waiver completely obliterated family unification as a consideration within deportation/removal proceedings.[69] Under § 212(c), lawful

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genuine rehabilitation and any other evidence demonstrating "good moral character"). *See also In Re* Catalina Arreguin de Rodriguez, 21 I. & N. Dec. 38 (BIA 1995). A non-citizen was convicted of importing marijuana in violation of a federal statute. After her conviction, Catalina was placed in deportation proceedings, she subsequently applied for a waiver under § 212(c) of the INA. On appeal, the BIA granted the appeal after considering "the adverse factors evidencing the applicant's undesirability as a permanent resident with the social and humane considerations presented in her behalf." The court found that her long residence and her five United State citizen children were major equities to be considered in the applicant's favor. The court granted her waiver and allowed Aguerrin de Rodriguez to remain in the U.S. and continue taking care of her five citizen children. *But see In re* Matter of Buscemi 19 I. & N. Dec. 628 (BIA 1988) (non-citizen who had committed a drug crime and showed no signs of rehabilitation was deported despite extensive ties to the United States and 17 years of residence).

65. AEDPA § 439(e).

66. IIRIRA, § 321(a).

67. INA § 101(43)(A)-(U).

68. A large number of non-citizens are barred from raising defenses to deportation. Non-citizens who have been convicted of aggravated felonies have no right to raise an INA § 240(A) or a INA § 212(h) defense. Prior to 1996, the following grounds were available to non-citizens who wanted to cancel their deportation: "a judicial recommendation against deportation; suspension of deportation; 212(h) waiver of deportation; 212(c) waiver of deportation and withholding." FORCED APART, *supra* note 9, at 25. Narrow relief is granted under INA § 240A(a) to immigrants who have been lawful permanent residents for at least five years, have lived in the U.S. for a minimum of seven years, and have not been convicted of an "aggravated felony." The lawful permanent residency requirement eliminates this waiver for most undocumented immigrants. INA § 240(a).

69. Starr & Brilmayer, *supra* note 18, at 260-61 (noting that even before 1996, the INA waiver provisions considered family ties as a measures of U.S. interests, not an individual right). *See also* Immigration and Naturalization Service v. Wang, 450 U.S. 139 (1981) (holding that legal permanent resident parents of American children with extensive ties do not meet the

permanent residents (LPRs)[70] present in the United States for seven years who were convicted of a crime could be granted discretionary relief if they could show that the positive factors outweighed the negative ones.[71] Positive factors included "family ties within the United States, duration of residence in the United States . . . hardship to family if deportation occurred, service in U.S. armed forces, history of stable employment, and other evidence attesting to the non-citizen's good character."[72] Negative factors included the severity of the crime and a low possibility of rehabilitation.

Under the AEDPA, the hardship waiver right was obliterated.[73] Regardless of the number of non-citizens being deported, the question still remains as to whether the deportations are serving the purpose for which they were enacted. That is, are the 1996 laws effectively targeting violent non-citizens, making our country safer and speeding up the process of deportation?

### *B. Targeting Criminal Immigrants*

An enforcement-only response to immigration is founded on the belief that non-citizens who commit violent crimes are a threat to our society and should be deported.[74] Although the current immigration statutes have been in force for over a decade, there was little known about how often the aggravated felony provision was being used.[75] A new report sheds new light on the number of non-citizens

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"extreme" hardship requirement under 8 U.S.C. § 1254(a)(1)).

70. *Lawful Permanent Resident* (LPR), US CITIZENSHIP AND IMMIGRATION SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=070695c4f635f010VgnVCM1000000ecd190aRCRD&vgnextchannel=b328194d3e88d010VgnVCM10000048f3d6a1RCRD (last visited March 18, 2011).

71. *In Re* Catalina Arreguin de Rodriguez, 21 I. & N. Dec. 38 at 42-43 ("Here, we have weighed the negative fact of the applicant's only conviction, the mitigating facts of her minor role and efforts toward rehabilitation, and the favorable facts of record, which include nearly 20 years of lawful residence and two minor dependent children, and we find that relief under section 212(c) of the Act is warranted in this instance.").

72. *See generally id.* (discussing the aggravating and mitigating factors used in assessing such cases); *see also* FORCED APART, *supra* note 9, at 13 (noting that other factors considered by immigration judges included the seriousness of the crime, record of immigration or other types of crimes).

73. AEDPA. Not all members of Congress thought that the removal of 212(c) was a step in the right direction. Senator Kennedy instead "argued against the bill's 'one size fits all approach' that eliminated hearings balancing non-citizens' interests in remaining in the country against the government's interest in deportation." FORCED APART, *supra* note 9, at 28.

74. Among others, Senator McCollum voiced his preference for deportation as the appropriate response:

[O]ften times we find that terrorists or would-be terrorists are criminal aliens and we are not deporting them in a proper fashion. We do not have the right procedures for that. They are allowed to stick around here a long time. The sooner we get them out of the country, the better procedures we have for that, the less likely we are to have that element in this country either create the actual acts of terrorism or directing them in some manner. We need to kick these people out of the country and have the procedures to do that.

1315 Cong. Rec. H2258-59 (daily ed. March 14, 1996) (statement of Sen. McCollum).

75. *How Often Is The Aggravated Felony Statute Used*, TRAC IMMIGRATION,

being deported, the crimes they have committed, and the impact these deportations have had on mixed families.[76]

The data on the criminal conduct which formed the basis for deportation reveals that non-citizens have been arrested for a wide variety of offenses.[77] The figures also show a consistent annual increase in the number of deportations.[78] The increase in deportations could be due to stepped-up enforcement or an increase in the non-citizen population.[79] The current undocumented immigration estimate is 11.9 million.[80] Undocumented immigrants are *per se* deportable.[81] The majority of non-citizens deported entered the United States without being inspected by a U.S. border official at a port of entry, but others had overstayed their visas.[82] However, 179,038 non-immigrants were "legally present in the U.S. and were subsequently deported on criminal grounds after serving their criminal sentences."[83]

Twenty percent of the non-citizens who were deported on criminal grounds were legally present in the country.[84] Lawful permanent residents and immigrants who possessed other visas (students, temporary workers, etc.) were legally present in the United States.[85] Of this twenty percent, seventy-seven percent of non-citizens legally present in the country were deported for committing non-violent offenses.[86] On the other hand, non-citizens illegally in the country made up

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http://trac.syr.edu/immigration/reports/158/; *see also New Data on the Processing of Aggravated Felons,* TRAC IMMIGRATION, http://trac.syr.edu/immigration/reports/175/ (last visited Feb. 16, 2011).

76. FORCED APART, *supra* note 9, at 1.

77. *Id.* at 27. Human Rights Watch obtained data from ICE regarding the type of non-citizens being deported "for crimes [how many were undocumented, how many had green cards]… the nature and seriousness of the criminal convictions forming the basis for deportation . . . and the family relationships of those deported." *Id.* at 10 (explaining that it took almost two and half years for Human Rights Watch to receive a response). The number of non-citizens deported on criminal grounds between April 1, 1997 and August, 1, 2007 was 897,099. *Id.* at 19. *See also* Lourdes Medrano, *Obama as border cop: He's deported record numbers of illegal immigrants*, CHRISTIAN SCI. MONITOR, Aug. 12, 2010, http://www.csmonitor.com/USA/Justice/2010/0812/Obama-as-border-cop-He-s-deported-record-numbers-of-illegal-immigrants (noting that "the drastic rise in deportations for illegal immigrants since 9/11 has continued under President Obama, hitting record levels in 2009").

78. Medrano, *supra* note 76.

79. From 1990 to 2006, the undocumented immigrant population grew rapidly, but has since stabilized. *Trends in Unauthorized Immigration*, *supra* note 7, at 2.

80. *Id.*

81. Josiah McC. Hayman, *United States Surveillance over Mexican Lives at the Border: Snapshots of an Emerging Regime*, 58 Human Org. 430, 435 (1999) (describing operations used to locate and deport undocumented immigrants, "who are per se deportable"). INA § 237(a)(1).

82. FORCED APART, *supra* note 9, at 24. 'It is of particular concern that there are…7 percent of the total…with an "unknown" immigration status.' *Id.*

83. *Id.* at 25.

84. *Id.* at 27.

85. *Id.*

86. *Id.* at 2.

seventy-three percent of the deported population.[87]

Besides shockingly low numbers of non-citizens being deported for violent offenses,[88] the other surprising revelation of the Report was the poor quality of records being kept by ICE for legally present non-citizens. The ICE data also reveals the different consequences for families depending on the immigration status of the deportee.[89] Permanent residents, who have gained their legal status either through family-based immigration or employment-based immigration, arguably have the strongest claim to be in the United States. Whereas undocumented immigrants were the most likely to be deported, lawful permanent residents have the strongest claims against deportation as a violation of their fundamental right to family unity in their country of primary residence.[90]

The Department for Homeland Security budget for 2010 includes a $5,762,800,000 budget for ICE operations.[91] In a period of economic recession, this expense should be reconsidered, especially because non-citizens commit non-violent crimes, a high number of legal permanent residents are deported, and the process raises serious human rights concerns. First, non-citizens are primarily being deported for committing non-violent crimes. Second, a significant percentage of immigrants being deported are legally present in the country, have significant ties to the United States, and may be members of mixed families.

### *C. Enforcement-only: Raids and the Expansion of Other Initiatives Resulting in Deportations*

Although there are several programs of this kind, this comment focuses on § 287(g), which authorizes state and local enforcement of federal immigration laws.[92] Inter-agency collaboration in immigration control makes immigrant

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87. FORCED APART, *supra* note 9, at 4.

88. *Id.* at 44. This fact is particularly important in light of the fact that an undocumented immigrant is *per se* deportable. Entry into the country without inspection or overstaying a visa are not violent offenses. Crimes rendering an individual deportable: (1) entering the United States illegally (24% of all deportees; (2) driving under the influence of alcohol (7.2%); (3) assault (5.5%); (4) immigration crimes (for example, selling false citizenship papers) (5.5%). Those deported for serious violent crimes committed (1) robbery (2.2%); (2) aggravated assault (1%); (3) intentional homicide (0.3%). *Id*. at 45.

89. FORCED APART, *supra* note 9, at 4.

90. *Id.* at 1-2. Admittedly, the findings of the study are insufficient because they lack information about the marital status of the deportee or her family composition. *Id.* at 10. In a letter received by Human Rights Watch, ICE claimed that they did not track this information. *Id.* at 11. However, because of the growing number of mixed families and U.S.-born children with immigrant parents, we can assume that a considerable number of American families are impacted. *Id.* at 4 ("We estimate that 1,012,734 family members, including husbands, wives, sons, and daughters, have been separated from loved ones by deportations on criminal grounds since 1997.").

91. DEP'T OF HOMELAND SEC'Y, BUDGET IN BRIEF FISCAL YEAR 2010 19 (2010), *available at* http://www.dhs.gov/xlibrary/assets/budget_bib_fy2010.pdf.

92. There are other programs that are being used by ICE to target criminal non-citizens. *See, e.g.*, U.S. Immigration and Customs Enforcement, ICE Agreements of Cooperation in Communities to Enhance Safety and Security (2008), *available at* http://www.ice.gov/news/library/factsheets/access.htm (describing the ICE ACCESS Support and Programs).

families more vulnerable to deportation, abuse, and exploitation.[93] What might be a routine traffic stop for a citizen can lead to a traumatic experience for immigrant families.[94] While it may be true that the Obama administration wishes to abandon workplace and home raids, it has endorsed numerous contracts between ICE and both local law enforcement as a means to combat the issue of illegal immigrant criminality and crimes committed by immigrants.[95]

During the Bush Administration, immigration raids devastated rural communities, exacerbated trauma in immigrant communities, and led to major public outcry.[96] While the movement away from immigration raids is welcomed because it is less traumatizing to a community as a whole, the resulting lack of public outcry may be problematic. Public outcry is important because it allows society to engage in immigration discourse and keeps the government accountable. Moreover, the same procedural and constitutional concerns surrounding immigration raids will still be triggered by inter-agency collaboration efforts, and the effect on immigrant families is not necessarily different.[97]

On September 30, 1996, the IIRIRA added § 287(g), performance of immigration officer functions by state officers and employees, to the INA.[98] In short, this program provides training and assistance to state and local enforcement agencies so that they can perform certain immigration law enforcement functions.[99]

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93. THE HUMAN RIGHTS IMMIGRANT COMMUNITY ACTION NETWORK, GUILTY BY IMMIGRATION STATUS, *available at* http://www.nnirr.org/hurricane/GuiltybyImmigrationStatus2008.pdf (last visited Feb. 15, 2011) ("ICE enforcement raids and operations are used to intimidate and de-stabilize communities, they lead to rampant workplace abuses, deportations violate due process rights. Moreover, the militarization of immigration and border court causes deaths and deliberately violate rights of Indigenous people, workers, migrants and communities of color. Finally, local, county and state ordinances across the country have fueled a climate that condones violence against immigrants.").

94. *See* Smith v. Ashcroft, 295 F.3d 425 (4th Cir. 2002) (this case involved Wayne Smith, a man who was stopped in a routine traffic stop and was subsequently put in deportations proceedings). Although this was before the 287(g) agreements, this case demonstrates the ramifications of a routine traffic stop and the consequences that follow for non-citizens.

95. GUILTY BY IMMIGRATION STATUS, *supra* note 94, at 2; *Latino Groups Criticize Obama on Immigration Raids*, NPR News (Aug. 5, 2009), http://www.npr.org/ templates/story/story.php?story Id=111572284.

96. Bess Chiu Et. Al., *Constitution on ICE: A Report on Immigration Home Raid Operation*, 3 Cardozo Immigration Justice Clinic 3 (New York, NY 2009) (discussing violations of fourth amendment rights during ICE home raids); s*ee also* DHS FACT SHEET, WORKSITE ENFORCEMENT STRATEGY (Apr. 30, 2009), *available at* http://www.ice.gov/doclib/pi/news/factsheets/worksite_strategy.pdf; *and* Julia Preston, *U.S. Shifts Strategy on Illicit Work by Immigrants*, N.Y. TIMES, July 3, 2009, at A1, http://www.nytimes.com/2009/07/03/us/03immig.html?_r=1&scp=1&sq=U.S.%20shifts%20strategy%20on%20illicit%20work%20by%20immigrants&st=cse.

97. GUILTY BY IMMIGRATION STATUS, *supra* note 94 at 9-10.

98. INA § 287(g).

99. Since 2006, over 70,000 people have been deported under the 287(g) program. GUILTY BY IMMIGRATION STATUS, *supra* note 94, at 16; *see also* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION AND NATIONALITY ACT, http://www.ice.gov/partners/287g/Section287_g.htm (last visited Feb. 12,

Local and state enforcement agencies that are interested in participating in the program enter into an agreement with DHS, pursuant to a Memorandum of Agreement (MOA), which allows for local law enforcement officials to receive training from ICE officers.[100]

This program has been presented to Congress and the American people as yet another way to remove dangerous criminal aliens from American communities.[101] According to ICE:

Terrorism and criminal activity are most effectively combated through a multi-agency/multi-authority approach that encompasses federal, state and local resources, skills and expertise. State and local law enforcement play a critical role in protecting our homeland because they are often the first responders on the scene. . .they will often encounter foreign-born criminals and immigration violators who pose a threat.[102]

As of July 10, 2009, there were a total of seventy-four 287(g) agreements across the country.[103] Unfortunately, these arrangements between local police and the DHS provide minimal accountability by ICE and often lead to egregious abuses by local and state law enforcers.[104]

The main concern from community and immigrant rights groups was that the § 287(g) programs would lead to apprehension in immigrant communities, racial profiling, and less inclination to report crimes out of a fear that local and state law enforcers would ask about immigration status.[105] A study done by the Government Accountability Office (GAO) in January 2009 highlighted serious problems with the 287(g) program and reinforced the views held by immigrant rights groups.[106]

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100. *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/partners/287g/Section287_g.htm (last visited Feb. 12, 2011).

101. *Id.*

102. *Id.*

103. *Id. See also* Press Release, Dept. of Homeland Sec., Secretary Napolitano Announces New Agreement For State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements, U.S. DEPT. OF HOMELAND SECURITY (July 10, 2009), http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm.

104. There are many sheriffs across the country who also failed to understand the limitations of 287(g). Randal C. Archibold, *Lawmakers Want to Look At Sheriff in Arizona*, N.Y. TIMES, Feb. 19, 2009, at A12, http://www.nytimes.com/2009/02/14/us/14sheriff.html; *see also* Randal C. Archibold, *Immigration Hard-Liner Has His Wings Clipped*, N.Y. TIMES, Oct. 6, 2009, at A14, http://www.nytimes.com/2009/10/07/us/07arizona.html. Moreover, another major complaint of the 287(g) program has been that race and not crime has propelled the growth of the program and that racial profiling is rampant. *See generally* AARTI SHAHANI & JUDITH GREEN, LOCAL DEMOCRACY ON ICE: WHY STATE AND LOCAL GOVERNMENTS HAVE NO BUSINESS IN FEDERAL IMMIGRATION ENFORCEMENT 2009, *available at* http://www.justicestrategies.org/sites/default/files/JS-Democracy-On-Ice.pdf.

105. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-109, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS 2 (2009), *available at* http://www.gao.gov/new.items/d09109.pdf [hereinafter GAO REPORT].

106. *Id.* at 4.

The GAO's report found that: (1) ICE lacked management control over state and local enforcement agencies; (2) local and state officers used 287(g) to commence removal proceedings against immigrants who committed minor crimes; (3) the scope of the authority delegated to local and state law enforcers remained unclear; and (4) ICE did not define what data should be collected or how it should be tracked by state and local law enforcers.[107]

Undoubtedly, these types of programs will put further strains on mixed families, because they will lead to more contact with immigration agents and officials. At the same time, the move away from home raids and work raids to other more low-profile programs like 287(g) minimizes the ability for public outcry.

A nation has the right to expel immigrants who have broken the law; however, in a majority of countries, other factors are also considered when a state decides to flex its police power.[108] In the United States, immigrants who have committed crimes are put in deportation proceedings once they have completed their criminal sentences. Many of the non-citizens who are being deported under the aggravated felony laws have committed non-violent offenses, and as the DHS data reveals, many of them are legal residents.[109]

The 287(g) program has revealed that police authorities abuse their powers under the agreement and that racial profiling is rampant. Moreover, 287(g) has led to the intimidation of immigrant families and a general reluctance in immigrant communities to cooperate with local authorities because of fear of deportation.[110] Yet, Congress will continue to fund these programs based on a belief that the most violent non-citizens are a threat to our nation. The balance is skewed for many reasons. The data reveals that most non-citizens are being deported for committing non-violent crimes. These immigrants, despite not being legal citizens, have important ties to the United States. The deportation of these non-citizens not only threatens the livelihood of their citizen children, but also raises significant human rights concerns.

## III. IMMIGRATION AND MIXED FAMILIES

Our legal system incorporates a presumption that children, absent neglect and abuse, should be brought up by their parents. Immigration law in the United States, since its inception, has reflected this commitment; however, mixed families have not received the protection they need under the INA.[111] Family unity is a

107. *Id.* at 4-6.

108. HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY THE UNITED STATES DEPORTATION POLICY 6 (2007), *available at* http://www.hrw.org/en/node/10856/section1.

109. *Id.* at 4-6.

110. GAO REPORT, *supra* note 110, at 2.

111. Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084 (federal statute placing restrictions on immigration which stated that "this section shall not be held to exclude persons living in the United States from sending for a relative or friend who is not of the excluded classes

fundamental right protected under the due process clause.[112] The concept of family is also deeply rooted in the Nation's history and is the primary way that cherished values, moral and cultural norms are passed down.[113] The mixed family is a recent phenomenon in the history of U.S. immigration which highlights the important family ties that immigrants have in the United States.[114]

A discussion of the mixed family moves the immigration debate away from the number of undocumented immigrants in the United States, helping to conceptualize immigrants not as a separate population, but as woven into the national fabric.[115] The mixed family encompasses immigrant families in which the immigration statuses are diverse.[116] For the purpose of this article, a mixed family will include a citizen-child and a non-citizen parent (either an undocumented immigrant or a permanent resident). The growth of these families also explains the growth of U.S. born children to undocumented parents.[117] There are a large number of immigration laws which can potentially affect mixed families, but the most traumatic and permanent effect of these laws are the conviction of a parent under the broad aggravated felony statutes and the parent's subsequent deportation.[118] These deportations/removal proceedings, for which no humanitarian waivers are available, strike at the very heart of family unity and children's best interest.

### *A. Immigrating to the United States: Employment and Family*

The discussion of the mixed family is central to the deportation of parents of citizen children.[119] The phenomenon of the mixed family has shown that families

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under such regulations as the Secretary of Treasury may prescribe"). *See generally* THOMAS ALEXANDER ALEINIKOFF ET. AL, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 326-58 (6th ed. 2008) (finding that the dominant feature of our current arrangement for permanent immigration to the United States is family reunification).

112. Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 503-504 (1977); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (due process clause includes the right to "establish a home and bring up children...essential to the orderly pursuit of happiness").

113. *Moore*, 431 U.S. at 503-504.

114. Thronson, *supra* note 17, at 62 (explaining that with more families arriving to the U.S. piecemeal, families often consist of a wide range of immigration statuses).

115. DORSEY & WHITNEY LLP, SEVERING A LIFELINE: THE NEGLECT OF CITIZEN CHILDREN IN AMERICA'S IMMIGRATION ENFORCEMENT POLICY 17-19 (2009), *available at* http://www.dorsey.com/files/upload/DorseyProBono_SeveringLifeline_web.pdf.

116. *Id*. at 64.

117. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CENTER, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 7-8 (2009), *available at* http://pewhispanic.org/files/reports/107.pdf.

118. These laws are traumatic because they can inflict significant psychological trauma on U.S. citizen children. Thronson, *supra* note 17, at 80. The laws have a permanent effect because while certain waivers, even though extremely limited, can help an illegal immigrant come back to the U.S. despite having lived in the U.S. without documentation, they do not apply to non-citizens who have committed aggravated felonies. DORSEY & WHITNEY LLP, *supra* note 29, at 75.

119. Immigrants choose to come to the United States for a variety of reasons, and a large number of immigrants are able to immigrate because of family relationships. Thronson, *supra* note 17, at 62-66. Mixed families are rooted in the communities they live in and are often doing the work that national families would be ashamed to do. *See* Rob Paral, *No Way In: U.S.*

do not divide neatly into legal, citizen, and undocumented statuses. Therefore, policies which are aimed at affecting only the non-citizen immigrant will inevitably affect a much broader group of society. Moreover, the growth of these families reveals that many U.S. citizen children will be impacted by the removal of the non-citizen parent.[120] This article argues that citizen children should not be harmed as a collateral effect of their parents' wrongdoing.[121] In the case of the unauthorized parent, the mixed family highlights the injustice in the immigration system in that citizen children are unable to petition for their parents to be legalized.

Broadly speaking, immigration to the United States can be divided into family-based immigration and employment-based immigration.[122] U.S. citizens and legal permanent residents can sponsor the immigration of some of their family members.[123] Both family-based type of immigration and employment-based immigration have extensive backlogs of petitions. Even an approved preference petition for a family member often leads to waiting in line for a visa number for years or decades.[124]

For employment-based immigration, the possibility for lawful immigration is equally grim.[125] The number of permanent visas available for the lawful entry of less-skilled workers (the vast majority of the work being done by an immigrant work force in the U.S. is less skilled) is cut off at 5,000 per year worldwide,

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*Immigration Policy Leaves Few Legal Options for Mexican Workers*, IMMIGRATION POLICY IN FOCUS, July 2005, at 2, *available at* http://immigration.server263.com/images/File/infocus/IPC%20No%20Way%20In(1).pdf (foreign-born workers amounted to 39.7% of the U.S. labor force in "farming, fishing, and forestry occupations"; 29 % in "building and grounds cleaning and maintenance occupations"; 21.7% in "production occupations" which includes workers in assembly, food processing, textiles, and apparel; 21.5% in "construction and extraction occupations" (which includes mining); and 20% in "food preparation and serving related occupations"); s*ee generally* DORSEY & WHITNEY LLP, *supra* note 29, at 17-19, 57-64, n.191 (discussing an example of a "domestic disaster area" in Postville, Iowa after non-citizens who made up the majority of the workers in certain industries, had been fast-tracked and deported). Seeing the non-citizen in this context helps dispel the myths that undocumented immigrants do not contribute to American society, push American workers out of the work force, and cripple the U.S. social system. DORSEY & WHITNEY LLP, *supra* note 29, at 17-19.

120. RANDY CAPPS ET AL., THE URBAN INSITUTE, PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN (2007), *available at* http://www.urban.org/uploaded pdf/411566_immigration_raids.pdf.

121. Thronson, *supra* note 18, at 66.

122. DORSEY & WHITNEY LLP, *supra* note 29, at 24-26 (highlighting the disconnect between immigration law and barriers to family unity).

123. INA § 201.

124. DORSEY & WHITNEY LLP, *supra* note 29, at 24. *See also* U.S. DEPT. OF STATE, *Visa Bulletin*, no. 13, vol. IX, Oct. 2009, http://travel.state.gov/visa/frvi/bulletin/bulletin_4575.html (limiting the possibility for lawful path for immigration for a vast majority of the undocumented population).

125. DORSEY & WHITNEY LLP, *supra* note 29, at 25-26. *See also* Paral, *supra* note 124, at 4. (discussing that despite the demand for low-skilled workers, there are few immigrant visas available). The number of green-cards available under the INA based on prospective employment is 140,000 individuals per year. INA § 203(b).

severely limiting the possibility for lawful path to immigration for a vast majority of the undocumented population.[126]

The concept of mixed family status is crucial to understanding the current immigration debate because it demonstrates the most troublesome aspect of enforcement-only immigration responses. Such responses are inadequate because:

If noncitizens of the United States are the only ones who suffer, that might seem to make the outcome less troubling. It is tempting to think that justice in immigration law can be justice on the cheap. But the *real world of immigration law doesn't divide neatly into citizens and aliens*. An enforcement-only approach to the rule of law leads to mistakes that cause devastating harm to many U.S. citizens who may be a noncitizen's husband or wife, father or mother, or child.

When our immigration law system doesn't adhere to the rule of law, then we diminish and devalue what it means for them to be American citizens.[127]

The estimate as of 2008 for undocumented immigrants is 11.9 million, accounting for approximately four percent of the U.S. population.[128] There are many more U.S. citizen children that have parents who are lawful permanent residents. However, as of 2008, there were approximately 5.5 million children of unauthorized immigrants, 4 million of whom were born in the United States.[129]

On both sides of the political spectrum, Americans realize that there are serious problems with our current immigration system. People who defend enforcement-only mechanisms as a means to reforming our immigration system suggest that parents who have unlawfully entered the country or lawful permanent residents who have committed crimes are to be blamed for their children's misfortune.[130] In the context of the undocumented immigrant, this argument assumes that there are lawful pathways to immigration for low-skilled workers; the reality is much different.[131] Unfortunately, many of the previous legal paths to

126. There are other available visas for temporary and guest worker programs. These types of visas pose other important barriers to immigrants who have families in the United States and see their stay as more than temporary. DORSEY & WHITNEY LLP, *supra* note 29, at 25.

127. *Shortfalls of the 1996 Immigration Reform Legislation: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int'l Law of the H. Comm. On the Judiciary*, 110th Cong. 46 (2007) (statement of Hiroshi Motomura, Kenan Distinguished Professor of Law, University of North Carolina School of Law, Chapel Hill).

128. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CENTER, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 1 (2009), *available at* http://pewhispanic.org/files/reports/107.pdf.

129. *Id.* at 7-8. Although there are crucial issues regarding undocumented children and their rights to social services, adjustment of status under the current system, and access to education, this article is concerned with the unfairness posed to the *citizen* child born to permanent residents and undocumented parents under current immigration law. A considerable amount of literature has been generated on the devaluation of children's interest in immigration law as a whole. *See generally* David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 Nev. L. J. 1165 (2006). *See also* Kerry Abrams, *Immigration Status and the Best Interest of the Child*, 14 VA. J. SOC. POL'Y & L. 87 (2006) (discussing immigration and child custody issues).

130. DORSEY & WHITNEY LLP, *supra* note 29, at 23.

131. *See generally* Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration*

immigration would be inconceivable today.[132]

### *B. Issues of Family Unity*

The history of immigration law and the INA at its inception revealed a commitment to the family unit.[133] However, the 1996 laws and the current expansion of enforcement-only immigration reforms test America's true commitment to the family.[134] The United States Supreme Court has traditionally recognized the importance of family and the desire to live together as a fundamental liberty interest protected under the Due Process Clause of the Fourteenth Amendment.[135] The Court found that the Constitution "protects the sanctity of family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[136]

Increased enforcement by DHS and ICE has resulted in thousands of families being split up. The current immigration system has torn apart families by forcing many U.S. children to move back to their parent's native land or remain in the United States under the care of a single parent, a relative, or the state.[137] Remaining in the United States, although seen as a parent's choice, is unfair to the citizen child and does not respect the child's best interest which is to remain in the care of both parents.[138] Moving to another country means that the child is deprived of the social, economic and political benefits that they are entitled to as American citizens.[139]

Nearly every single American state employs a "best interest" test when deciding separation of children from their family.[140] Broadly speaking, states tend

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*Restriction and Deportation Policy in the United States 1921-1965,* 21 LAW & HIST. REV. 69, 106-07 (2003), (discussing the history of illegal immigration in the United States). *See also* DORSEY & WHITNEY LLP, *supra* note 29, at 23. ("In light of the economic and educational deprivation, as well as the threats to safety and well-being, that are often prevalent in their countries of origin, it is not surprising that so many immigrants have concluded that the needs of their families leave them with no meaningful choice but to enter the U.S. illegally.").

132. Mae M. Ngai, Op-Ed., *How Grandma Got Legal*, L.A. TIMES, May 16, 2006, http://articles.latimes.com/2006/may/16/opinion/oe-ngail16.

133. ALEINIKOFF ET AL., *supra* note 116, at 326-58.

134. Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Communities in the Battle of Plenary Power versus Aliens' Rights*, 41 VILL. L. REV. 725, 728-29 (1996).

135. Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 494 (1977); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

136. *Moore*, 431 U.S. at 503.

137. DORSEY & WHITNEY LLP, *supra* note 29, at 81.

138. *Id.* at 81.

139. *Id.* at 40. The separation of a family also violates the rights guaranteed in the Int'l Covenant on Civil and Political Rights (ICCPR), of which the United States is a party. Article 23 holds that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Int'l Covenant of Civil & Political Rights, art. 23, G.A. Res. 2200A (XXI) (Dec. 16, 1966).

140. DORSEY & WHITNEY LLP, *supra* note 29, at 92 ("In its almost complete disregard of

to take "into account the child's stated interests, stability, contact with relatives, proximity to the parent, developmental needs, and educational opportunities when dealing with custody between two parents."[141] In addition, children's best interests are often advocated by a guardian *ad litem*, or special counsel, that represents a child's best interest.[142] To date, there is no similar provision for children whose parents are put in removal proceedings.[143] As it has been shown, the INA allows for a very narrow consideration of a child's interest when it comes to deportation proceedings (extreme and exceptional hardship), which is hardly ever met.[144] The provision does not apply for non-citizens who have committed an aggravated felony.[145]

### *C. Devaluation of Citizen-children Rights*

Every time a citizen child is forced to be separated from her non-citizen parent or every time that a citizen child is effectively "deported" to a foreign land, there is a devaluation of her rights.[146] Several issues sufficiently highlight the injustice in our current immigration laws and the expansion of enforcement-only efforts at the expense of citizen children.[147] First, a citizen child suffers long term harm as a result of immigration and enforcement policy.[148] Second, a citizen child is unable to sponsor her non-citizen parent for citizenship; rather, when formal removal of the unauthorized parent occurs the child is forced to choose between being separated from the parent or accompanying the parent abroad. The latter is recognized as "de facto" deportation.[149] Finally, the treatment of a citizen child whose non-citizen parent is put in removal proceedings gives little consideration to the child's best interest.

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the 'best interests' of the citizen child, U.S. immigration law stands in stark contrast to the way U.S. society treats children in comparable circumstances when confronting issues and decisions regarding separation of children from their parents.").

141. *Id.* at 93-94.

142. *Id.* at 94.

143. *Id.* at 95.

144. *See* INA § 240A(b). *See also Monreal*, 23 I. & N. Dec. 56 (2001).

145. INA § 240A(b), 8 U.S.C. § 1229 (2006).

146. There is also a violation of international human rights law. *See, e.g,* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III), art. 12 (Dec. 10, 1948) ("No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence."); *id.* art. 16(3) ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."); *see also supra* text accompanying note 145.

147. Because there has been a move away from raids and workplace raids, this article only highlights issues affecting the citizen child whose parent is deported because of an aggravated felony which has come to light either because of an adjustment of status, the non-citizen's re-entry into the country and the non-citizen's parent deportation subsequent to a § 287(g) effort. *See generally* CAPPS ET AL., *supra* note 125 (discussing the long-term impact on children and the trauma experienced by them after raids and detentions of their parents).

148. *Id.* at 50.

149. Acosta v. Gaffney, 559 F.2d 1153, 1155 (3d. Cir. 1977).

### 1. Trauma Subsequent to Enforcement

First, as explained, mixed families are more vulnerable to encounters with police and the state. Second, non-citizen parents who have committed an aggravated felony are subject to removal even if they have citizen children.[150] In some ways, a move away from workplace and home raids will lead to less trauma than being stopped for a traffic violation.[151] However, for children, the trauma of seeing a parent arrested and subsequently deported would be no different whether conducted by ICE or by a deputized officer. During a routine stop by officers, a citizen child may be exposed to racial profiling, or even forced to act as a translator on his/her parent's behalf if his/her parent is unable to communicate in English. Children are resilient, but only to a certain extent after they witness their parents being arrested or detained. In procedures that occur as a result of a § 287(g) agreement (routine traffic stop or being questioned by an officer) where the non-citizen is taken into custody, the effect on the child is not necessarily any different than it would be during a home raid.

Psychological studies have shown that "children who witness their parents being taken into custody lose trust in the parents' ability to keep them safe and begin to see danger everywhere."[152] Although they might be able to overcome a sudden and unexpected arrest, trauma caused by separation can be "greater when it continue[s] for an extended period of time."[153] Moreover, the aftermath of a deportation is extremely distressing for the mixed family because of emotional and financial ramifications.[154] It is emotionally agonizing for a child when a parent is removed from the home and is absent from his/her everyday life as a result of detention or deportation.[155] In immigrant communities where enforcement efforts are most concentrated, "[c]ommunity-wide fear and social isolation [can accentuate] the psychological impact on children."[156] Apart from the anxiety and the other disorders which children exhibit as a result of becoming ensnared in enforcement measures, children may feel excluded from their social networks and suffer harassment by other children because their parents have been branded

150. Thronson, *supra* note 17, at 80.

151. *Compare* CAPPS ET AL., *supra* note 125, at 50-54, *with* Smith v. Ashcroft, 295 F.3d 425 (4th Cir. 2002); *see also* GUILTY BY IMMIGRATION STATUS, *supra* note 94, at 13.

152. Tyche Hendricks, *The Human Face of Immigration Raids in Bay Area: Arrests of Parents Can Deeply Traumatize Children Caught in the Fray, Experts Say*, THE S.F. CHRONICLE, Apr. 27, 2007 at A1, http://articles.sfgate.com/2007-04-27/news/17241684_1_illegal-immigrant-immigration-law-immigrant-advocates (referencing statements made by Dr. Alicia Lieberman, director of the Child Trauma Research Project at UCSF).

153. CAPPS ET AL., *supra* note 125, at 50.

154. *Id* at 41-42.

155. DORSEY & WHITNEY LLP, *supra* note 29, at 67-69.

156. CAPPS ET AL., *supra* note 125, at 50; *see also* Anna Gorman, *U.S.-born Children Feel Effect of Raids*, L.A. TIMES, June 08, 2008, http://articles.latimes.com /2008/jun/08/local/me-children8 ("[A]dvocates and psychologists maintain that arresting parents in front of children and detaining and deporting them is unfair to children.").

criminals.[157] Even short periods of separation (one or two days) remain fresh in a child's memory and cause persistent anxiety.[158] Immigrant families also suffer financially when a parent is detained. In the majority of immigrant families, both parents work, so regardless of who is detained, the economic hardship is felt.[159]

**2. Limited Rights and Barriers to Legal Immigration**

This article examines two explicit ways in which immigration law is inconsiderate of children's rights beyond the case of deportation of the undocumented or lawful permanent resident parent: (1) a "child" may never petition for his undocumented parent;[160] (2) a parent who illegally entered the country is unable to "adjust status" (become legal in this case) while in the United States.[161] The rationale for not allowing children to petition for their parents was that, if the petition was granted, a woman would have the incentive to come to the United States to have her child so as to gain immigration benefits derived from such child.[162] The reality is that families decide to have children for a variety of reasons.[163]

There can of course be situations in which immigrants would come to the United States to have children and gain lawful immigration statuses. However, the immigration law already allows for U.S. citizens to petition certain eligible, foreign-born family members to the United States.[164] Clearly, family reunification is important under our immigration code. There is no reason why it should be the child of the undocumented parent who must bear the burden of the parents lack of immigration papers. The irony is that after having to live in fear for twenty-one years, American children are given the right to sponsor their parents, regardless of whether they entered the country unlawfully.[165] Encouraging a policy that grants legal status as a result of having a U.S. born child is impractical; however, it already happens when that child turns twenty-one and, as such, there are few justifications for this arbitrary age. Yet, the need for family unity for the citizen

157. CAPPS ET AL., *supra* note 125, at 52.

158. *Id*. at 51.

159. PASSEL & COHN, *supra* note 7, at 12-13 (citing labor force statistics that show 94% of male and 58% of female non-citizen immigrants between the ages of 18-64 are in the workforce).

160. INA § 201 (b)(2)(A)(i) (stating that a citizen under twenty-one years of age may not petition for a non-citizen parent).

161. *Id.* § 212(a)(6)(A) (stating that an alien who is present without being properly admitted, paroled, or approved by the Attorney General is inadmissible to receive visas an ineligible to be admitted to the United States); *see also* 8 C.F.R. § 245.1 (describing the categories of aliens who are eligible to apply for adjustment of status); Thronson, *supra* note 17, at 74 ("[A] person who has been in the country unlawfully for more than a year . . . cannot consular process without facing a ten year wait because the consular processing would involve departing the United states.").

162. Thronson, *supra* note 17, at 83-84.

163. *Id*. at 84.

164. INA § 201 (b)(2)(A)(i) (defining immediate relatives as children, spouses, and parents).

165. *Id.*; Thronson, *supra* note 17, at 85.

child is most important when the child is a minor.[166] Disallowing citizen children to petition for their parents unduly burdens the already overburdened mixed family and further violates the rights of citizen children.

A system that has a lawful path to immigration for non-citizen parents of citizen children is consistent with immigration law, protects mixed families, and advances the children's best interests. An ideal system would grant more agency to citizen children to petition for their parents. The petition need not happen *ipso facto* to the citizen child's birth, but should allow for temporary lawful status conditioned upon an immigrant's contribution to society, her employment history, her other ties to the community, and her moral character. This system is preferable to one that encourages mixed families to live in the shadows of our society and denies citizen children their right to petition for their parents' citizenship until after the harm to the children has occurred.[167] If these children are to have a successful future in the United States, they should not be the ones carrying their parents' burden from the start.[168]

The second way the law limits a child's right to unification is that the undocumented immigrant who enters the United States illegally can only readjust her immigration status in her country of origin. Moreover, the parent's unlawful presence in the United States will bar re-entry for up to ten years.[169] An undocumented immigrant in the United States is *per se* always deportable.[170] Once a citizen child's undocumented parent is deported, such parent cannot return to the United States for another 10 years if she had been in the country for more than 180 days.[171] For undocumented workers, "[w]hen the prospect of years of family separation is balanced against continued unlawful presence in the United States, many families choose the latter."[172] In most cases, lawful non-citizens can readjust status in the United States (without leaving the country) and need not be separated from their families.[173]

The prospect of family separation drastically increases when the non-citizen

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166. *See* Thronson, *supra* note 17, at 85 (stating that the first 21 years of a person's life are the most important for development).

167. See *supra* text accompanying notes 175-176.

168. Thronson, *supra* note 17, at 84 (explaining the injustice and long-term cost of punishing children by depriving them of the full benefits of citizenship because of the actions of their parents).

169. INA § 212(a)(9)(B)(i)(II) (stating that an alien who has been unlawfully present in the United States for one year or more, and who is seeking admission within 10 years of the date such alien departed the United States, is inadmissible).

170. *Id*. § 211 (listing the documentary requirements that allow immigrants to be admitted into the United States, and stating that no immigrant is given admittance unless such requirements are satisfied).

171. *Id.* § 212(a)(9)(B)(i)(II).

172. Thronson, *supra* note 17, at 74.

173. INA § 240A(b) (listing various scenarios where the Attorney General has the power to adjust the status of an inadmissible or deportable alien to an alien lawfully admitted for permanent residence).

has committed an aggravated felony.[174] As this paper has shown, if the non-citizen has committed an aggravated felony, any adjustment of status is likely to trigger removal proceedings. This means that the prospect of family separation can discourage even legal immigrants from adjusting their status for fear of deportation. Further, the normal waivers available to the non-citizen parent cease to apply when the non-citizen has committed an aggravated felony.[175] Moreover, an undocumented parent or a lawful permanent resident who committed an aggravated felony might never be allowed to reenter the United States.[176]

Limitations to a child's right to petition for her parent, coupled with a law which, in most circumstances, forces a non-citizen parent to be separated from her child for ten years unduly punishes a child for offenses committed by their parents.[177] Once a parent is deported, only two choices are available for families with a U.S. citizen child; the first one denies the citizen the right to remain in the United States and the other destroys the family's right to unity.[178] Neither of these alternatives protects a child's best interest and both are extremely traumatic.

### 3. An Impossible Choice

Apart from non-citizens who have committed aggravated felonies, courts have overlooked arguments that children would suffer in their parent's native country, unless circumstances fit the exceptional and extremely unusual hardship exception.[179] Although this exception applies to non-citizens who have not

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174. INA § 240A(a)(3).

175. For undocumented parents who have *not* been convicted of an aggravated felony, a "cancellation of removal" *and* status adjustment is available if they (1) have been physically present in the United States for a continuous period of not less than 10 years, (2) have been persons of good moral character during such period, and (3) can establish that their 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 a legal permanent resident. INA § 240A(b). For parents who are a certain kind of permanent resident, yet still face possible removal, a cancellation of such removal is available if they (1) have been lawfully admitted for permanent residence for not less than 5 years, (2) have resided in the United States continuously for 7 years after having been admitted in any status, and (3) have not been convicted of any aggravated felony. INA § 240A(a).

176. INA § 212(a)(2) (stating that an alien is inadmissible if convicted of, or admits having committed, a crime involving moral turpitude or a violation of any federal, state, or foreign law relating to controlled substances).

177. *See* Plyler v. Doe*,* 457 U.S. 202, 220 (1982) (noting that a law which denied free public education to undocumented children was "directed against children," and discriminated against them based on a legal characteristic over which they had little control).

178. *See generally* Cerrillo-Perez v. INS, 809 F.2d 1419, 1422 (9th Cir. 1987) (recognizing the difficult choice an undocumented mother and father faced in deciding whether to keep their family together when returning to Mexico or to break up their family by arranging for their citizen children to remain in the United States).

179. *See* INA § 240A(b)(1)(D) (stating that if the removal of an otherwise inadmissible or deportable alien would result in "exceptional and extremely unusual hardship" to the alien's child, then such removal may be cancelled); *In re Monreal,* 23 I. & N. Dec. at 56 (discussing the exceptional and extremely unusual hardship standard established in section 240A(b) of the INA in order to determine whether a deportable father was entitled to have his deportation cancelled); *see also Memije*,481 F.3d at 1163 (declining to review an Immigration Judge's determination that

committed an aggravated felony, the same issues of family separation and devaluation of citizen children's rights occur. At the risk of family separation, many non-citizens are forced to go back to their native land, which they left in order to lead a better life.[180] Non-citizens often leave their native land because of the lack of economic opportunities, or unstable political or social conditions. Even for citizen children who have been raised in the United States their entire lives, the fact that they are unable to speak their parent's language, the lack of education, and the cultural shock that would ensue has not necessarily been deemed to amount to an exceptional and extremely unusual hardship.[181]

Children can, of course, remain in the United States because this is their right as an American citizens.[182] Although an infant child cannot decide for herself, non-citizen parents could make the choice that it would be in her best interest to remain in the United States in the care of foster parents.[183] Before the heightened standard of "exceptional and extreme hardship," the Board of Immigration Appeals (BIA) stated that the critical issue was the type of hardship that would result if the child accompanied the parent abroad.[184] On the other hand, "the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation."[185] In the case of a non-citizen convicted of an aggravated felony, who once deported might never be allowed to return to the United States, this hardly seems like a choice.

The issue of family, and relationships between family members, used to be one of paramount importance in deportation proceedings.[186] Today, the issue is far less important. The "exceptional and extreme hardship" standard is extremely hard to satisfy and is unavailable for non-citizens who have committed an aggravated

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petitioners failed to prove their children would be subject to exceptional and extremely unusual hardship if petitioner's removal from the United States was not cancelled).

180. *See Cerrillo*, 809 F.2d at 1423 (identifying various reasons why immigrants come to the United States, including instances where parents flee their homeland to escape persecution).

181. *See In re Monreal*, 23 I. & N. Dec. at 70-73 (ruling that two citizen children would not be subjected to exceptional and extremely unusual hardship if their father was removed from the United States, even though their grandparents and extended family lived in the United States, they were substantially educated in the United States, and they were socialized in the United States).

182. Acosta v. Gaffney, 558 F.2d 1153, 1157 (3d Cir. 1977) ("It is the fundamental right of an American citizen to reside wherever he wishes, whether in the United States or abroad, and to engage in the consequent travel.").

183. *Id.* at 1158.

184. *See In Re* Ige, 20 I. & N. Dec. 880, 885 (BIA 1994) (requiring the respondent to show that either he or his children would suffer extreme hardship upon going to Nigeria).

185. *Id*. (stating that the hardship claimed by the parents in this case was created by the parents themselves).

186. *See* Cerrilo-Perez v. INS, 809 F.2d 1419, 1423-26 (highlighting an undocumented mother and father's difficult choice, either being separated from their children who would remain in the United States or moving their whole family to Mexico.); *see also* Bastidas v. INS, 609 F.2d 101, 105 (3d. Cir. 1979) ( "[T]he separation of family members from one another [is] a serious matter requiring close and careful scrutiny."); Ravancho v. INS, 658 F.2d 169, 175 (3d. Cir. 1981) (noting that psychological trauma of U.S. citizen children may be an element in determining hardship).

felony. Many parents placed in deportation proceedings find themselves forced to make the painful and difficult decision of whether to raise their child themselves, or give their child the opportunities life in the United States affords. The law as it stands right now denies any agency to citizen children whose parents are put in deportation proceedings. In doing so, our government disregards the best interest of such children and denies them their birthright.[187] The current immigration system is harmful to the needs of immigrant children, citizen children, and immigrant families.[188]

### *D. Current Legislation Affecting U.S. Citizen Children of Immigrant Parents*

Initiatives by Congress since passing the IIRIRA and the AEDPA demonstrate that members of Congress did not anticipate that these laws would have such overreaching effects. Since 1996, there have been four major proposals by Congress to amend these two laws.[189] In 2006, Representative Jose E. Serrano (D-NY) submitted a bill that would allow judges to consider the best interests of U.S. children whose parents are in deportation proceedings.[190] The non-profit organization Families for Freedom described the Child Citizen Protection Act as a limited bill which would restore justice to the immigration system and repeal the harshest provisions of the 1996 laws.[191] On February 6, 2009, the bill was referred to the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law; to date the bill has 24 sponsors.[192] The bill would amend § 240(c)(4) of the INA and give an immigration judge the ability to exercise discretion during a non-citizen deportation "if the judge determines that such removal, deportation, or exclusion is clearly against the best interests of the child . . . ."[193]

Another bill with the best interest of the child in mind is the Humane

187. *See Cerrillo-Perez*, 809 F.2d at 1419 (emphasizing the importance of considering the citizen child's hardship that could result if her undocumented parents were deported); Memije v. Gonzalez, 481 F.3d 1163, 1165 (9th Cir. 2007) (Pregerson, J. dissenting) ("By denying undocumented parents cancellation of removal, our government effectively deports their United States citizen children and denies those children their birthrights.").

188. *See* David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 1014 (stating that the limited conception of a "child" in immigration law influences the treatment of children in all immigrations matters and limits their status as persons with individual rights).

189. FORCED APART, *supra* note 9, at 34. ("Although several bills have been introduced over the ensuing decade, only one . . . made it out of congressional committee in the US House of Representatives and was introduced in the US Senate—only to die there without being referred to a Senate committee.").

190. Child Citizen Protection Act, H.R. 182, 111th Cong. (2009).

191. *American Kids, Immigrant Families,* FAMILIES FOR FREEDOM, Dec. 17, 2009, http://www.familiesforfreedom.org/httpdocs/americankids.html.

192. CCPA, *supra* note 200.

193. *Id*. at 1. The bill allows for two important exceptions to judge's discretion. First, the provision would not apply for an alien described in section 212(a)(3) or 237(a)(4). *Id.* Second, it would not apply to an alien who has engaged in certain conduct described in the Trafficking Victims Protection Act of 2000. *Id.*

Enforcement and Legal Protections for Separated Children Act ("HELP") introduced by Representative Lynn Woolsey (D-CA) on July 31, 2009.[194] On September 14, 2009, the bill was referred to the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law.[195] This bill looks to humanize the too-often-traumatizing experience which children and families go through in ICE raids and their aftermath. According to its supporters, HELP would "provide critical, nationwide protocols to help keep children with their parents or caregivers and out of the foster care system while their parent's or caregiver's case is pending by ensuring that vulnerable populations apprehended during immigration enforcement activities are identified and treated with dignity."[196] Moreover, the HELP Act proposes an alternative to detention for detained individuals.

In part, this bill is most likely a response to ICE work-place raids like those that took place across the country in 2006, 2007, and 2008. ICE defended its actions and stated that it took extraordinary measures to ensure that the children of workers' that were caught up in these raids would not be separated from their parents.[197] Unfortunately, the aftermath of the raids showed that many children had no idea where their parents ended up, and community leaders were unable to obtain clear information from ICE about the whereabouts of detainees.[198] When ICE procedures did not fill the gap, community groups and churches were left to care for many U.S. children.[199] Another important consideration that HELP would address is limiting the severe trauma children experience after armed agents enter their homes by having proper mechanisms and procedures in place.[200]

Although both of these bills are a step in the right direction in terms of providing comprehensive immigration reform, legislation should look towards international norms and procedures to incorporate concepts of family unity and children's best interest. Serrano's bill adequately addresses the needs of U.S. citizen children. However, the language still gives judges the discretion to base their decision on a child's best interest or another necessary provision. It should be a requirement that the best interests of children be taken into account any time there is a strain on family unity. The HELP act would cover both ICE and deputized police agents cooperating with ICE. It would be unreasonable to assume that simply by doing away with the AEDPA and the IIRIRA, issues of family separation in immigrant communities would cease. The HELP Act recognizes that

194. Humane Enforcement and Legal Protections for Separated Children Act of 2009, H.R. 3531, 111th Cong. (2009).

195. *Id*.

196. *Protecting Children and Families: A Letter of Support,* FRIENDS COMMITTEE ON NATIONAL LEGISLATION, Apr. 22, 2010, http://www.fcnl.org/issues/immigration/protecting_children_and_families_a_letter_of_support/index.html.

197. DORSEY & WHITNEY LLP, *supra* note 29, at 41.

198. *Id*. at 42-43.

199. *Id.* at 43-44.

200. *See infra* text accompanying notes 160-169.

trauma and fear will result from enforcement immigration activities and provides a net for families and children who don't know where to turn when deportation or detentions occur.[201]

Although both of these bills provide safeguards for citizen children, they don't adequately address issues of citizen children's devaluation in the immigration law beyond enforcement responses. The best protection for citizen children's rights whose parents are non-citizens is a pathway to lawful status for the parents based on family, community ties, residence in the United States, employment, and good moral character.[202] So long as there are barriers for children to petition their undocumented parents, and so long as the government continues to expand § 287(g) programs and continues to deport non-citizens for non-violent offenses, citizen children will continue to suffer simply because their parents are non-citizens. Now is the time to propose comprehensive reform that protects children, families, and communities and moves away from enforcement-only immigration initiatives.

## IV. FAMILY UNITY IN INTERNATIONAL LAW

When a mixed family is forced to make a choice which leads to involuntary family separation, there is a violation of international law. International law concepts are useful in striking a fairer balance between the national concern for deterring crime committed within our borders and a commitment to family unity.[203] As this comment has demonstrated, severe consequences in immigration law can lead to the separation of U.S. born children from their parents who have committed aggravated felonies.[204] The procedures resulting in deportation are subject to abuse by enforcement officials and many of these non-citizens are deported for relatively non-violent crimes. Security concerns are essential in crafting fairer immigration laws and having a citizen child should not be a carte blanche for a stay of deportation when the non-citizen commits an egregious crime.[205] This comment encourages legislators to strike a better balance between

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201. *See Protecting Children and Families: A Letter of Support, supra* note 206 ("[T]he HELP Seperated Children Act limits enforcement activities in safe zones and the involvement of children in enforcement activities, and would help family members locate those who are detained.").

202. *See* Comprehensive Immigration Reform for America's Security and Prosperity Act of 2009, H.R. 4321, 111th Cong. (2009) (including Representative Serrano's Child Citizen Protection Act in its text)*; see generally* Randal C. Archibold, *New Immigration Bill is Introduced in House*, N.Y. TIMES, Dec. 15, 2009, http://www.nytimes.com/2009/12/16/us/politics/16immig.html?_r=1&pagewanted=print (discussing the Republican and Democratic responses to the bill).

203. *See* Armendariz v. United States, Case 526-03, Inter-Am. C.H.R., Report No. 57/06, OEA/Ser.L/V/II.127 Doc. 4 rev. 1 (2007), *available at* http://www.cidh.org/annualrep/2006eng/usa526.03eng.htm (admitting a petition that claimed the United States violated the petitioner's right to life, liberty, personal security, and family life when he was deported from the United States, allegedly without a fair opportunity to establish that his familial circumstances outweighed the state's interest in deporting him).

204. *See* discussion *supra* Part III.

205. *See supra* text accompanying notes 174-78.

family unity and national security concerns by drawing concepts from both international law and domestic law. The current system, which leads to mandatory deportation, does not strike this balance.

International law is derived from a combination of treaties, declarations, conventions and customary law. "[I]mmigration law deals with the movement of [non-citizens] across borders and [because it] is partially derived from international law, it makes sense to apply [international norms] here."[206] Through various treaties and customary international law, the international community has sought to protect family integrity issues which encompass privacy and the child's best interest, among others.[207]

This section explores some of the treaties, declarations, and international bodies which have dealt with the issues of family unity and crimes committed by non-citizens within their borders. A comparison between two similarly situated non-citizens highlights the difference in international law and finds that the multi-factored approach employed by the European Human Rights Court (EHCR) leads to better protection of non-citizen's rights.[208]

### *A. Source of Law Protecting Involuntary Family Separation*

The International Covenant on Civil and Political Rights (ICCPR),[209] the European Convention on Human Rights (European Convention)[210] and the American Declaration of the Rights and Duties of Man (American Convention)[211] all recognize that family unity must be evaluated in deportation proceedings. Moreover, "best interests of the child," which recognizes that one of a child's rights is the right to remain with her family, is the general standard that states must employ when they shape policies and practices that will affect children.[212] Although a child's best interest are crucial in determining custody in virtually all American states, immigration law disregards a child's best interest.

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206. Ramji-Nogales, *supra* note 20, at 293.

207. *See* Starr & Brilmayer, *supra* note 18, at 216-18 (discussing the history of involuntary family separation and the emergence of treaties that began to recognize issues of privacy, children's rights, etc).

208. *See infra* text accompanying notes 231-258.

209. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

210. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter European Convention].

211. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention].

212. *See* Child Welfare Info. Gateway, *Determining the Best Interests of the Child: Summary of State Laws,* CHILDRENWELFARE.GOV, http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm (noting that "[a]ll States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands have statutes requiring that the child's best interests be considered whenever specified types of decisions are made regarding a child's custody, placement, or other critical life issues").

The United States is of course not subject to the European Convention; however it has ratified the ICCPR and is a signatory of the American Convention.[213] In addition, it is well-established that U.S. courts may not ignore treaty obligations, but must instead construe domestic law so that it does not directly contradict international law.[214] What is more, the concept of a child's best interests is deeply rooted in American domestic law and, therefore, expanding the concept to immigration law would respect both international norms as well as domestic laws.[215]

The American Convention protects the right to establish a family, children's rights to special protection, and inviolability of the home.[216] The American Declaration constitutes a source of international obligation for Member States of the Organization of American States (OAS).[217] The United States ratified the OAS Charter and has been a member since 1889.[218] The Inter-American Commission on Human Rights (IACHR) is entrusted with furthering human rights set forth in the American Convention.[219] The Commission is not an international court; however, the recommendations, which come from an authorized body of international experts, should be persuasive in drafting new legislation in the United States to protect immigrant families.[220]

The language of the ICCRP protects the rights of children and family unity. Article 23 recognizes that the family is "the natural and fundamental group unit of society" entitled to protection by society and the State.[221] Moreover, much like other international treaties, the ICCPR protects an individual's privacy, family, and home from government interference.[222] The ICCRP requires a state to allow a non-citizen put in deportation proceedings the right to challenge his deportation

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213. The United States ratified the ICCPR June 8, 1992. ICCPR, *supra* note 219. The United States is a member of the Organization of American States (OAS) since 1889. The American Convention is not a treaty, but the United States ratified the OAS Charter and is subject to its provisions. American Convention, *supra* note 221. *See also* Donald T. Fox, *Inter-American Commission on Human Rights Finds United States in Violation*, 82 AM. J. INT'L. L. 601, 602 (1988) (noting that the United States Government was found in violation of two provisions of the American Convention).

214. Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."); The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law.").

215. *See generally* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms,* 113 HARV. L. REV. 1936, 1950-51 (2000) (noting that generally U.S. immigration law, like family law, attempts to keep families together).

216. American Convention, *supra* note 221, arts. 17, 19, & 11.

217. Fox, *supra* note 223, at 602-03.

218. ORG. OF AM. STATES: MEMBER STATE: UNITED STATES OF AM., http://www.oas.org/en/ member_states/member_state.asp?sType=USA (last visited Feb. 16, 2011).

219. *What is the IACHR?*, INTER-AM. COMMISSION ON HUM. RTS., http://www.cidh.org/what.htm (last visited Feb. 26, 2011).

220. Fox, *supra* note 223, at 602-03.

221. ICCPR, *supra* note 219, art. 23.

222. *Id.* art. 17.

absent compelling reasons of national security.[223] It states that the non-citizen is allowed to "submit . . . reasons against his expulsion and to have his case reviewed by. . . the competent authority or a person or persons especially designated by the competent authority."[224]

The European Court of Human Rights (ECHR) enforces the European Convention.[225] Article 8 of the European Convention protects the right to family unity and limits governmental interference in the family.[226] The European Convention states that everyone has a right to family life and privacy and that interference by a public authority must be "in accordance with the law. . . necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of rights and freedoms of others."[227] It requires that all members consider concepts of family unity when deciding to deport a non-citizen.[228]

### *B. Application of International Law: Comparison Between the ECHR and the IACHR*

Inherent in international law is the right of nations to exclude certain undesirables from their borders and to shape their immigration policy.[229] Both the European nations and the United States recognize a nation's right to exclude "undesirables" from their borders. However, the European nations have managed to craft a multi-factored rule that provides better protection for family unity. Under the ECHR, non-citizen parents who have committed non-violent crimes and have had a significant presence in the country are not subject to mandatory deportation.[230] A similar approach in the United States is appropriate as it would not require that every non-citizen with a U.S citizen child would be granted a stay of deportation.

A comparison between cases will help illustrate the stark differences between

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223. *Id.* art. 13.

224. *Id*.

225. European Convention, *supra* note 220, art. 19; *see also Summary of the Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL OF EUROPE, http://conventions.coe.int/ Treaty/en/Summaries/Html/005.htm ("To ensure the observance of the engagements undertaken by the Parties, the European Court of Human Rights in Strasbourg has been set up. It deals with individual and inter-State petitions.") (last visited Feb. 27, 2010).

226. European Convention, *supra* note 220, art. 8.

227. *Id.*

228. *See id.* (stating that there shall be no interference with a person's right to their family life except in accordance with the law).

229. *See* FORCED APART, *supra* note 9, at 8 (encouraging Congress and the President to reform U.S. immigration law and policy).

230. *See* Boultif v. Switzerland, App No. 54273/00, 33 Eur. H.R. Rep. 50 ¶ 48 (2001) (indicating that the ECHR considers, among other factors, the "seriousness of the offence committed by the [non-citizen]" and the "duration of the [non-citizen's] stay in the country from which he is going to be expelled").

the two systems when deciding to deport a non-citizen who has committed a serious crime. Hugo Armendariz was three years old when his family emigrated from Mexico to the United States and became a lawful permanent resident at age nine.[231] When he was twenty-six years old he was sentenced to five years, eight months imprisonment for possession of cocaine with intent to distribute.[232] The INS proceedings commenced immediately upon his release and two years later, Armendariz was given a deportation hearing in front of an immigration judge.[233] Armendariz sought a discretionary waiver of inadmissibility under then-existing INA § 212(c).[234]

In contrast stands the case of Abdelouahab Boutlif, who was born in Algeria, immigrated to Switzerland in 1992, and married a Swiss citizen in 1993.[235] In 1994, Boutlif was sentenced to two-years imprisonment following his conviction for armed robbery and damage to property.[236] The Swiss authorities subsequently refused to renew his residence permit.[237] Ultimately, Boutlif was separated from his wife and forced to move to Italy.[238] Boutlif then challenged his deportation under Article 8 of the European Convention, which protects family life and places restrictions on the interference by public authorities.[239]

In *Boutlif*, the ECHR first found that the interference was "in accordance with the law" because the Swiss government envisioned the expulsion of non-citizens "if the person concerned has been convicted of a criminal offence."[240] Second, the court found that the Swiss Federal Court "considered that the applicant's residence permit was not to be renewed in view of the serious offence which he had committed and in the interests of public order and security."[241] Therefore, the interference pursued a legitimate end.[242] Finally, the court assessed whether the interference was "necessary in a democratic society."[243] In its evaluation, the court stressed the importance of proportionality in the crime committed to the severity of

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231. Armendariz-Montoya v. Shonchik, 291 F.3d 1116, 1118 (9th Cir. 2002), *cert. denied*, 539 U.S. 902 (2003).

232. *Id*.

233. *Id.*

234. *Id.*

235. *Boultif*, 33 Eur. H.R. Rep. ¶¶ 6-7.

236. *Id.* ¶¶ 9-11.

237. *Id.* ¶ 14.

238. *Id.* ¶ 20.

239. *Id.* ¶ 31 (quoting Article 8 of the European Convention). Article 8 protects a person's right to respect for his family life:

Everyone has the right to respect for his . . . family life . . . . There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

European Convention, *supra* note 220, art. 8.

240. *Boultif*, 33 Eur. H.R. Rep. 50 ¶ 42.

241. *Id.* ¶ 44.

242. *Id.* ¶ 45.

243. *Id.* ¶¶ 46-56.

the punishment.[244] The court endorsed a test to be used in future expulsion cases which would:

> consider the nature and seriousness of the offence committed . . . ; the length of the applicant's stay in the country from which he is going to be expelled; the time elapsed since the offence was committed as well as the applicant's conduct in that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; and other factors expressing the effectiveness of a couple's family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage, and if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse is likely to encounter in the country of origin.[245]

Applying these factors to the *Boutlif* case, the court found that because it was virtually impossible for his family to live together outside of Switzerland, the offence presented a limited risk to public order, and the interference with his rights under Article 8 was disproportionate to these factors, he could not be expelled from Switzerland.[246]

Under U.S. law, Armendariz was unable to request a § 212(c) hearing because he had been convicted after the passing of the AEDPA and the IIRIRA.[247] As an aggravated felon, his family ties in the United States, his fourteen year old citizen daughter, his length of residence, and his lack of ties in Mexico played no role in his deportation hearing.[248] Armendariz ultimately appealed this decision to the IACHR.[249]

At the IACHR, Armendariz argued that the United States was responsible for violations of the right to life, liberty, and security of his person, as well as his right to protection against abusive attack on his family, his right to establish a family, the right of protection for mothers and children, and his right to inviolability of the home.[250] The United States argued that the American Declaration was merely a

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244. The Court reviewed the refusal to renew Boultif's residence permit by balancing his rights against Switzerland's governmental interests:

[T]he Court's task consists in ascertaining whether the refusal to renew the applicant's residence permit in the circumstances struck a fair balance between the relevant interests, namely the applicant's right to respect for his family life, on the one hand, and the prevention of disorder and crime, on the other.

*Id.* ¶ 47.

245. *Id.* ¶ 48.

246. *Boultif*, 33 Eur. H.R. Rep. at ¶¶ 55-56.

247. Armendariz-Montoya v. Shonchik, 291 F.3d 1116, 1118 (9th Cir. 2002). (noting that the Immigration Judge after having determine that Section 440(d) of the AEDPA categorically negated section 212 (c) relief for aliens deportable for having committed an aggravated felony decided that the section applied).

248. *Id.* at 1118.

249. Hugo Armendariz v. United States, Case 526-03, Report No. 57/06, Inter-Am. Ct. H.R., Report No. 57/06, OEA/Ser.L/V/II.127 doc. 4 rev. 1 (2007).

250. *Id.* ¶ 2.

recommendation which did not create legally-binding obligations, and, even if it could be subject to violations, Armendariz had not stated facts which would constitute a violation.[251]

On the issue of family unity and mandatory deportation under the IIRIRA, the court found that Article V (right to protection against abusive attacks on family life) was violated. The United States, after arguing that it was not bound by the Declaration's provisions, claimed that the rights to exclude from its territory non-citizens was a legitimate means of exercising its sovereign right and not a violation of the principles of international law.[252] However, on the issue of family unity, the United States claimed that "such violations cannot be said to provide a non-national with a liberty interest that outweighs a state's legitimate responsibility to provide for the welfare and security of its citizens."[253] Apparently, the welfare of Armendariz's citizen daughter or his elderly citizen mother were not legitimate considerations.[254] Because of the serious offenses that had been committed by Armendariz, removal was justified on those grounds notwithstanding his family situations.[255]

The IAHCR found that despite the United State's objections, the American Declaration created legally binding obligations for OAS member states. Moreover, the court noted that the petition stated facts which, if proven, would tend to establish violations of rights which are guaranteed under the Declaration.[256] The court also found that other international bodies recognized that family associations outweighed the state's interest in deporting a non-citizen and that these could "provide constructive insights" into international application of rights which are common to regional and international human rights systems.[257]

Lawmakers in the United States should use both international law concepts and domestic law to protect the rights of U.S. citizen children where family separation is imposed against their will. Other developed nations have instituted removal proceedings that balance family unity against the severity of the crime and their right to exclude certain "undesirable" immigrants for national concerns.[258]

Some might argue that society has a lesser commitment to protect such immigrants. But society owes an ethical obligation to protect the rights of even those who have committed "aggravated felonies."[259] Moreover, the ineffectiveness of the laws targeting the most egregious criminals, the violations of international

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251. *Id.* ¶ 3.

252. *Id.* ¶ 22.

253. *Id.* ¶ 24.

254. *See Hugo Armendariz*, Case 526-03 ¶ 10 (noting that "Armendariz's mother is a U.S. citizen [and that he] has a U.S. citizen daughter who is 14 years old").

255. *Id.* ¶ 3.

256. *Id.* ¶ 43.

257. *Id.* ¶ 43.

258. *See supra* text accompanying notes 236-52.

259. Beharry v. Reno, 183 F.Supp.2d, 584, 602 (E.D.N.Y. 2002) (citing Alexander Tsesis, *Toward a Just Immigration Policy: Putting Ethics into Immigration Law*, 45 Wayne L. Rev. 105, 168 (1999)).

law, and the disregard for a child's best interest require that Congress re-evaluate the draconian laws affecting mixed families.

## V. CONCLUSION

Congress must reconsider amending the 1996 laws so that they affect a limited number of immigrants and put an end to the violation of the rights of citizen children. For almost fifteen years, these laws have had serious consequences for mixed families. The aggravated felony laws and the repealing of waivers have destroyed family unity in the immigration context. As a society, we must also be wary of the enforcement-only responses that are springing up in immigrant communities. Programs like 287(g) are poorly managed, susceptible to abuses at the hands of local enforcement, lead to trauma in citizen children, and exacerbate fear in immigrant communities. Although the bills introduced by Representative Serrano and Woolsely are necessary, they are not enough to provide for family unity in the immigration context because they continue to work within the enforcement model immigration reform.

As this paper has highlighted, children's rights are violated when they suffer emotional trauma as a result of deportation regardless of the mechanism by which they undergo forced separation from their parents. Citizen children are unable to petition on behalf of their parents, their interests are not considered when a parent is being deported, and they undergo separation from their parents or relocation to a land that they have never known. Because of the ways that the current immigration system separates families, a simple granting of discretion to a judge, by itself, will not remedy the problem. This paper has highlighted that devaluations of the rights of children do not only occur when that immigrant parent is deported. A disregard for citizen children's rights begins when they are unable to petition for their undocumented parent. It is exacerbated when their parent is detained and subsequently incarcerated. It continues at the immigration court when the rights of children and family cannot be considered by the immigration judge. The deportation of a citizen's parent devalues what it means for these children to be American citizens.

The current immigration system forces families to be apart, imposes severe punishment for minor offenses, and violates international human rights law. Other nations have managed to strike a more fair balance between a right to family unity and a nation's right to keep certain undesirables away. There is no reason why the United States, with its rich history of immigration and its initial commitment to both international norms and family-based immigration, should not be able to do the same. Although this paper advocates for lawmakers and policy makers in the United States to consider international norms in drafting new legislation, it also argues that the solution to the immigration problem in the United States must be uniquely American. This requires the same level of commitment to children's best interests in immigration law that already exists in domestic law. In the case of deportation of a non-citizen parent, a child's best interest should not be left to a judge's discretion, but should be a fundamental consideration. American families

are changing in unique ways that other societies might not be, and legislation must reflect these changes.

The recent change in administration means that our political reality has changed. If tough on crime actually translated into targeting serious non-citizen criminals instead of unfairness and devastation at the expense of families, then perhaps this model could be sustained. "Tough on crime" may be part of our reality, but our laws must be reevaluated to address this concern without being tough on families.