

**BROKEN FAMILIES: A CALL FOR CONSIDERATION OF  
THE FAMILY OF ILLEGAL IMMIGRANTS IN U.S.  
IMMIGRATION ENFORCEMENT EFFORTS**

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I. INTRODUCTION

Edwin Valeriano was born in the United States.<sup>1</sup> Edwin Valeriano has lived in the United States his entire life.<sup>2</sup> Edwin Valeriano is a United States citizen.<sup>3</sup> Nevertheless, at the age of sixteen, Edwin faced the possibility of being removed from the United States to a foreign country or being separated from his sole caregiver—his father.<sup>4</sup> Edwin’s father, Ismael Valeriano, lived in the United States for the past twenty years as an undocumented immigrant from Mexico City.<sup>5</sup> Ismael is a single parent and the sole caregiver for his three boys: Edwin, age sixteen; Luis, age fifteen; and Ismael Jr., age twelve.<sup>6</sup>

Edwin Valeriano recalled being in his “seventh–period algebra class at Camel [B]ack High School when his cell phone rang” with the news that the police arrested his father.<sup>7</sup> Edwin stated, “I was shocked. I freaked out. I didn’t know what to do.”<sup>8</sup> After school, Edwin went home to tell his brothers the news.<sup>9</sup> Edwin added, “I just told them straight out. ‘Dad’s in jail. He’s not coming home’ . . . I felt like crying. But I didn’t want my brothers to get upset, so I tried to stay calm.”<sup>10</sup> The boys went to bed

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\* Capital University Law School, J.D. Candidate, May 2011. I would like to thank all the families I encountered during my work as a child welfare caseworker who inspired me to write this article. Further, I would like to thank my daughter for providing me with a daily dose of support and motivation.

<sup>1</sup>See Daniel Gonzalez, *Migrant Arrests Severing Parents from Kids*, ARIZ. REPUBLIC, July 6, 2008, at A1.

<sup>2</sup> *See id.*

<sup>3</sup> *Id.*

<sup>4</sup> *See id.*

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

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

without eating that night.<sup>11</sup> The next morning they searched for quarters in their father's dresser to pay for a bus ride to school because their dad usually drove them to school before going to his landscaping job.<sup>12</sup>

For the next eight days, the three boys lived alone.<sup>13</sup> Finally, the boys' grandmother came to care for them from Washington, but she had diabetes and the family struggled to survive.<sup>14</sup> At one point, the boys sold their two puppies to help buy food.<sup>15</sup> Community activists stepped in helping the family by providing donations to pay for rent, bills, and food.<sup>16</sup> Child Protective Services became involved and requested the court place the children in foster care, which would possibly separate the children.<sup>17</sup> Fortunately, community activists convinced the judge to allow the children to remain with their grandmother.<sup>18</sup> As of July 6, 2008, the children were awaiting their father's removal hearing; a hearing that will determine the fate of these three U.S. citizen children, Edwin, Luis, and Ismael, Jr.<sup>19</sup> However, at no point during the hearing will the court consider the children's best interests.<sup>20</sup>

With an increase in removal of illegal immigrants, the Valeriano brothers are one case among thousands where the U.S. government separated U.S. citizen children from their immigrant parents.<sup>21</sup> Removal of noncitizens separated at least 1.6 million family members, husbands, wives, sons, and daughters in the ten-year period between 1997 and 2007.<sup>22</sup> An estimated 4.9 million children living in the United States in 2009 have at least one undocumented immigrant parent.<sup>23</sup> Daily, these 4.9 million

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<sup>11</sup> *Id.*

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

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *See id.*

<sup>20</sup> *See id.*

<sup>21</sup> *See id.*; HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY 44 (2007), available at <http://www.hrw.org/en/reports/2007/07/16/forced-apart-0>.

<sup>22</sup> HUMAN RIGHTS WATCH, *supra* note 21, at 44.

<sup>23</sup> JAMES D. KREMER ET AL., URBAN INST., SEVERING A LIFELINE: THE NEGLECT OF CITIZEN CHILDREN IN AMERICA'S IMMIGRATION ENFORCEMENT POLICY 19 (Katherine (continued)

children face the possibility of family separation or family removal.<sup>24</sup> Of those 4.9 million children, about 3.1 million (sixty-four percent) are U.S. citizens.<sup>25</sup>

Immigration law as of 2011 makes the entire family of an undocumented immigrant, including families comprised of U.S. citizen children and spouses, as vulnerable to immigration enforcement as the illegal immigrant.<sup>26</sup> The government cannot deport, arrest, or detain a U.S. citizen child of an undocumented immigrant.<sup>27</sup> Nevertheless, if the government forces parents of U.S. citizen children to return to their country of origin, the child may face removal from the country with their parents or separation from their parents.<sup>28</sup> Although immigration law provides the illegal immigrant parent with limited due process during immigration enforcement efforts,<sup>29</sup> the law fails to provide the U.S. citizen child of the undocumented parent with this same limited due process during those same enforcement efforts.<sup>30</sup> For example, in removal cases, only the illegal immigrant is a party to the case.<sup>31</sup> The child is never a party to the case, even though the case ultimately decides the child's fate.<sup>32</sup>

Immigration law must change to consider these mixed-status families as a central focus rather than a mere afterthought. Immigration reform needs to provide U.S. citizen family members, especially minor children, a legally enforceable means to resist the unthinkable choice between family separation and family removal. Congress must reform present immigration law to allow U.S. citizen children of undocumented immigrants to be a

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Fennelly et al. eds., 2009), [http://www.dorsey.com/files/upload/DorseyProBono\\_SeveringLifeline\\_web.pdf](http://www.dorsey.com/files/upload/DorseyProBono_SeveringLifeline_web.pdf).

<sup>24</sup> *See id.*

<sup>25</sup> *Id.*

<sup>26</sup> RANDY CAPPS ET AL., URBAN INST., PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN 9 (2007), [http://www.urban.org/UploadedPDF/411566\\_immigration\\_raids.pdf](http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Immigration and Nationality Act (INA), 8 U.S.C. § 1229(b) (2006) (providing immigrants with a possible defense to removal).

<sup>30</sup> *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, 84 (2006) [hereinafter Thronson, *You Can't Get Here*].

<sup>31</sup> *See id.*

<sup>32</sup> *See id.* at 76.

party to their parent's removal proceeding. Such reform will restore consideration of the family to immigration removal proceedings. An immigration judge could consider the child's best interest as one of the many factors in determining whether to order removal of the undocumented immigrant—the parent of a U.S. citizen. This article sets forth not only reasons why this reform must occur but also possible ways to achieve this reform.

Part II of this article presents the historical and current treatment of families in immigration law. The section highlights the important role families have played in immigration procedures throughout history and the role families should continue to play in the creation and application of future immigration law.

Part III of the article discusses the emergence of the mixed-status family and the current dilemmas facing mixed-status families confronted with the immigration system. The immediate and long-term effect on the children, when federal officials arrest, detain, and remove undocumented parents from the United States, best emphasizes these family dilemmas.

Part IV of the article offers constitutional and international arguments for immigration reform. Ultimately, this section argues constitutional and international norms favoring consideration of the entire immigrant family, especially in relation to U.S. citizen children's best interest, should compel Congress to reform current immigration law.

Finally, Part V of the article offers possible immigration reforms. The section considers possible amendments to current immigration law to provide a more family-focused process.

## II. INFLUENCE OF FAMILY ON THE CREATION AND APPLICATION OF IMMIGRATION LAW

In a general sense, immigration law seeks to permit the most desirable people to legally inhabit a specific territory.<sup>33</sup> To obtain this goal, U.S. immigration laws, codified in the Immigration and Nationality Act (INA), divide all individuals within the United States into two classifications: citizens and noncitizens.<sup>34</sup> The INA defines an alien as “any person not a

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<sup>33</sup> Adam B. Cox, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 814 (2007).

<sup>34</sup> See Christian Joppke, *The Evolution of Alien Rights in the United States, Germany, and the European Union*, in CITIZENSHIP TODAY GLOBAL PERSPECTIVES AND PRACTICES 36, 38 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001).

citizen or national of the United States.”<sup>35</sup> It further divides noncitizens into three classifications: resident aliens, non-immigrant aliens, and illegal immigrants. Resident aliens are individuals permitted to reside in the United States as permanent residents with the expectation of obtaining citizenship status.<sup>36</sup> Non-immigrant aliens are individuals “admitted only for temporary periods,” with the expectation of returning to “their countries of origin.”<sup>37</sup> Illegal immigrants include aliens who do not fall into one of the above categories.<sup>38</sup>

For most, “[t]he idea of citizenship is . . . invoked to convey a state of democratic belonging or inclusion . . . . Citizenship as an ideal is understood to embody a commitment against subordination, but citizenship can also represent an axis of subordination itself,” especially for illegal immigrants.<sup>39</sup> For families, citizenship of each individual member is a key factor leading some families down a path to democratic belonging and other families down a path of subordination. Although the largest portion of legal immigration (eighty percent) can be linked to family relationships,<sup>40</sup> thousands of families each year are still denied or forced to wait for the entire family to obtain legal immigration status.<sup>41</sup>

During their wait for citizenship, some families face separation or removal of the entire family to foreign countries.

The casual observer—and policymaker—might readily believe that the country is neatly divided into two kinds of families: those composed of citizens who have strong claims to legal rights and social benefits, and those composed of noncitizens, whose claims to both are more contingent. American families, however, are far more

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 38–39.

<sup>37</sup> *Id.* at 39.

<sup>38</sup> *See id.*

<sup>39</sup> LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN DILEMMAS OF CONTEMPORARY MEMBERSHIP I* (2006).

<sup>40</sup> MICHAEL FIX ET AL., *URBAN INST., THE INTEGRATION OF IMMIGRANT FAMILIES IN THE UNITED STATES 7–8* (2001) [hereinafter *FIX ET AL.*], [http://www.urban.org/uploadedpdf/immig\\_integration.pdf](http://www.urban.org/uploadedpdf/immig_integration.pdf) (estimating the percentage by using 1997 and 1998 data).

<sup>41</sup> *See* DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, *ANNUAL REPORT OF IMMIGRANT VISA APPLICANTS IN THE FAMILY-SPONSORED AND EMP’T-BASED PREFERENCES REGISTERED AT THE NAT’L VISA CTR. AS OF NOVEMBER 1, 2009*, available at <http://travel.state.gov/pdf/WaitingListItem.pdf>.

complex: the number of families that contain a mix of both citizens and noncitizens is surprisingly large.<sup>42</sup>

Although immigration enforcement leads to the separation of countless families each year,<sup>43</sup> an underlying aim in immigration law is family preservation.<sup>44</sup> The overarching laws and public sentiment in the United States, as well as the historical creation and application of immigration law itself, make this aim evident.<sup>45</sup>

#### A. U.S. Societal Views on Separation of Families

Family preservation is a central theme emphasized in both U.S. law and public sentiment. Traditionally, the U.S. Supreme Court acknowledged that separation of families, through deportation for instance, “is a drastic sanction, one which can destroy lives and disrupt families.”<sup>46</sup> U.S. law continues to follow this notion in the present day. For example, in divorce cases, some states attempt to keep children with both parents.<sup>47</sup> Even in custody cases involving child abuse and neglect, courts strive for reunification with the child’s natural parents.<sup>48</sup>

Further, society criticizes both mothers and fathers for separating from their children.<sup>49</sup> Mothers who separate from their children are viewed “as misguided, selfish, [and] unnatural”<sup>50</sup> whereas fathers are often classified

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<sup>42</sup> MICHAEL E. FIX & WENDY ZIMMERMAN, URBAN INST., ALL UNDER ONE ROOF: MIXED-STATUS FAMILIES IN AN ERA OF REFORM 1 (1999), <http://www.urban.org/uploadedPDF/409100.pdf>.

<sup>43</sup> HUMAN RIGHTS WATCH, *supra* note 21, at 44.

<sup>44</sup> See discussion *infra* Parts II.A–II.B.

<sup>45</sup> See discussion *infra* Parts II.A–II.B.

<sup>46</sup> See *Gastelum–Quinones v. Kennedy*, 374 U.S. 469, 479 (1963).

<sup>47</sup> See, e.g., TEX. FAM. CODE § 153.001 (2008) (noting the state’s public policy is “to assure that children will have frequent and continuing contact with parents” and “to encourage parents to share in the rights and duties of raising their child”).

<sup>48</sup> See, e.g., OR. REV. STAT. § 417.375 (2009) (describing the family plan that provides support to family and children for reunification).

<sup>49</sup> See Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 377 (1996) (detailing how mothers who separate from their children are criticized); see also Cynthia A. McNeely, Comment, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 FLA. ST. U. L. REV. 891, 901 (1998) (describing how women have been stereotyped into becoming mothers and placing their children above all else).

<sup>50</sup> Sanger, *supra* note 49, at 377.

as “deadbeats.”<sup>51</sup> In 2010, President Obama remarked that a parent’s absence leaves a “hole in a child’s life that no government can fill. So we can talk all we want here in Washington about issues like education and health care . . . but government can’t keep our kids from looking for trouble . . . . That’s our job as fathers, as mothers, as guardians for our children.”<sup>52</sup> Despite legal precedent and the traditional social norms against family separation, immigration law forces policy makers to weigh the need for public protection against the need for family preservation.<sup>53</sup>

### *B. Historical Treatment of Families in Immigration Law*

In addition to societal support for family preservation, the framework of immigration law is linked to family relationships.<sup>54</sup> Family relationships guided policymakers when forming immigration laws and served as one of the original reasons immigrants could receive citizenship status.<sup>55</sup>

“Historically, the United States has been a nation of immigrants.”<sup>56</sup> When the United States first became a sovereign territory,<sup>57</sup> George Washington implemented a policy welcoming the oppressed of all nations.<sup>58</sup> With the adoption of the Constitution in 1789, Congress received the power to adopt naturalization laws that could grant citizenship to immigrants.<sup>59</sup> Almost ten years later, the Alien Enemies Act and Alien Friends Act gave the President the ability to expel noncitizens deemed dangerous.<sup>60</sup> Despite the initial power granted to both Congress and the

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<sup>51</sup> See McNeely, *supra* note 49, at 892.

<sup>52</sup> Barack Obama, President of the United States, Remarks of the President at a Father’s Day Event (June 10, 2010), *available at* <http://www.whitehouse.gov/the-pressoffice/remarks-president-a-fathers-day-event>.

<sup>53</sup> Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law’s Conflicted Answers*, 32 HOFSTRA L. REV. 273, 302 (2003).

<sup>54</sup> Thronson, *You Can’t Get Here*, *supra* note 30, at 60–61.

<sup>55</sup> *Id.* at 60.

<sup>56</sup> Mark R. Amstutz, *INTERNATIONAL ETHICS: CONCEPTS, THEORIES, AND CASES IN GLOBAL POLITICS* 217 (2d ed. 2005).

<sup>57</sup> Definitive Treaty of Peace Between the United States of America and His Britannic Majesty, U.S.-Gr. Brit., art. I, Sept. 3, 1783, 8 Stat. 81.

<sup>58</sup> HENRY BISCHOFF, *IMMIGRATION ISSUES*, at xxi–xxvi (Randall Miller ed., 2002).

<sup>59</sup> U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization . . . .”); see BISCHOFF, *supra* note 58, at xxi.

<sup>60</sup> Alien Enemies Act and Alien Friends Act, ch. 66 §§ 1–3, 1 Stat. 577 (1798) (codified at 50 U.S.C. §§ 21–23 (2006)); see HUMAN RIGHTS WATCH, *supra* note 21, at 10.

President over immigration matters, they placed few restrictions on immigrants entering the United States during the first 100 years the nation existed.<sup>61</sup> Then, between 1875 and 1924, Congress created the first series of immigration reform statutes, which imposed specific grounds for excluding immigrants.<sup>62</sup> The legislation excluded prostitutes and convicts.<sup>63</sup> Later, legislation and statutes extended the category to exclude lunatics, idiots, convicts, and people likely to become public charges.<sup>64</sup>

The legislation and statutes enacted by Congress placed few major restrictions on immigration, thus, making illegal immigration nonexistent in the nineteenth and early twentieth centuries.<sup>65</sup> Even with these exclusion statutes in place, “[t]he government excluded a mere 1% of the 25 million immigrants who landed at Ellis Island before World War I.”<sup>66</sup> The government excluded most of these immigrants for health reasons.<sup>67</sup> The inscription on the Statue of Liberty highlights U.S. immigration policy prior to World War I stating, “Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore. Send these, the homeless, tempest-tossed, to me. I lift my lamp beside the golden door.”<sup>68</sup>

Despite this initial policy, in 1924 with the ending of World War I,<sup>69</sup> Congress began to toughen immigration regulations.<sup>70</sup> For the first time, Congress “imposed numerical limits on immigration[,] . . . created the U.S. Border Patrol[,] and eliminated statutes of limitations on deportation.”<sup>71</sup> Congress codified all the immigration legislation, statutes, and case law into the McCarran-Walter Immigration and Naturalization Act of 1952

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<sup>61</sup> See BISCHOFF, *supra* note 58, at xxi–xxii; HUMAN RIGHTS WATCH, *supra* note 21, at 10.

<sup>62</sup> See BISCHOFF, *supra* note 58, at xxii–xxiv; HUMAN RIGHTS WATCH, *supra* note 21, at 10.

<sup>63</sup> BISCHOFF, *supra* note 58, at xxii.

<sup>64</sup> *Id.*

<sup>65</sup> Mae M. Ngai, *How Grandma Got Legal*, L.A. TIMES, May 16, 2006, at B13.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Howard Zinn, *No Human Being Is Illegal*, THE PROGRESSIVE, July 2006, at 14, 16.

<sup>69</sup> Amstutz, *supra* note 56, at 217.

<sup>70</sup> Emma O. Guzmán, Comment, *The Dynamics of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996: The Splitting-Up of American Families*, 2 SCHOLAR 95, 109 (2000).

<sup>71</sup> Ngai, *supra* note 65.

(INA).<sup>72</sup> The INA created a quota for every country that allowed only a certain number of immigrants to enter the United States legally each year.<sup>73</sup> However, even with the increased limitations on immigration created by the INA, Congress maintained methods for reunification of families.<sup>74</sup> For example, the INA quota system established preferences for relatives of citizens.<sup>75</sup> The House Committee Report pertaining to the INA emphasized providing “for the preferential treatment of close relatives of United States citizens and alien residents consistent with the well-established policy of maintaining the family unit whenever possible.”<sup>76</sup>

Since the INA’s enactment in 1952, Congress has amended the Act several times, most significantly in 1965, 1986, 1990, and 1996.<sup>77</sup> Each amendment, other than the 1996 amendment, “strengthened the focus on family-based immigration.”<sup>78</sup> The INA promoted and continues to promote family preservation in two distinct areas: (1) by providing ways noncitizen family members can become legal residents<sup>79</sup> and (2) by providing ways noncitizen family members can challenge removal from the United States.<sup>80</sup>

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<sup>72</sup> See BISCHOFF, *supra* note 58, at xxv; Guzmán, *supra* note 70, at 109.

<sup>73</sup> BISCHOFF, *supra* note 58, at xxv.

<sup>74</sup> Guzmán, *supra* note 70, at 110–11.

<sup>75</sup> BISCHOFF, *supra* note 58, at xxv.

<sup>76</sup> H.R. REP. NO. 82-1365 (1952), reprinted in 1952 U.S.C.C.A.N. 1653, 1691.

<sup>77</sup> Guzmán, *supra* note 70, at 109; BISCHOFF, *supra* note 58, at xxv.

<sup>78</sup> Cox, *supra* note 33, at 854; see Immigration Act of 1990, Pub. L. No. 101-649, tit. III, § 301, 104 Stat. 5029 (1990) (emphasizing the section of the act that promotes family unity); BISCHOFF, *supra* note 58, at xxv (stating the 1965 Immigration Act established a preference for family reunification); Edith Z. Friedler, *From Extreme Hardship to Extreme Deference: United States Deportation of Its Own Children*, 22 HASTINGS CONST. L.Q. 491, 522 (1995) (stating the preoccupation with family unification is demonstrated by Congress’ 1990 amendment to counteract hardships created by IRCA).

<sup>79</sup> See INA, 8 U.S.C. § 1151(a)–(b) (1994 & Supp. IV 1999) (providing for family migration); *id.* § 1186a (allowing conditional permanent resident status to qualified alien spouses, sons, and daughters); Guzmán, *supra* note 70, at 112.

<sup>80</sup> See INA, 8 U.S.C. § 1251(b) (1982) (allowing for judicial recommendations against removal); *id.* § 1254(a)(1)–(2) (allowing for suspension of deportation); *id.* § 1182(c),(h) (1988 & Supp. I. 1990) (allowing for a waiver of deportation); HUMAN RIGHTS WATCH, *supra* note 21, at 13.

### 1. *Family Ties as a Route to Permanent Residency*

First, the INA created three major classifications to decide who can immigrate to the United States: family-based immigration, employment-based immigration, and diversity migration.<sup>81</sup> Noncitizens are eligible for permanent residency visas if they can prove based on sufficient evidence that they qualify for one of these classifications.<sup>82</sup> Nevertheless, the United States is limited to issuing a maximum of 480,000 visas each year.<sup>83</sup> To determine who should qualify for the limited number of visas available, Congress created a preference system for allocating permanent residency visas.<sup>84</sup> Legal immigration through the family-based classification is Congress' highest preference, providing for eighty percent of all legal immigration.<sup>85</sup> Initially, the INA established five preference levels within the family-based classification.<sup>86</sup> Congress reduced the preference levels to four following the 1990 amendments to the INA.<sup>87</sup>

The category of persons receiving the first preference for family-based visas includes "[u]nmarried sons or daughters of citizens of the United States."<sup>88</sup> Thus, children of U.S. citizens receive first preference.<sup>89</sup> The INA defines a child as "an unmarried person under twenty-one years" of age.<sup>90</sup> Although the children of U.S. citizens receive first preference, this category is still limited to only 23,400 visas per year plus any visas not used under the fourth preference.<sup>91</sup> As of November 2009, there were 245,516 people on the waitlist to obtain preference one visas.<sup>92</sup> Preference one individuals' wait period to obtain visas is about one year.<sup>93</sup>

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<sup>81</sup> See INA, 8 U.S.C. § 1153 (a)–(c) (1994 & Supp. IV 1999).

<sup>82</sup> Guzmán, *supra* note 70, at 112; see INA, 8 U.S.C. § 1153 (1994 & Supp. IV 1999).

<sup>83</sup> See INA, 8 U.S.C. § 1151(c)(1)(A)(i).

<sup>84</sup> See *id.* § 1153(a)(1)–(4) (setting forth the requirements needed for each family-based preference).

<sup>85</sup> FIX ET AL., *supra* note 40, at 7–8.

<sup>86</sup> Guzmán, *supra* note 70, at 113.

<sup>87</sup> *Id.*; INA, 8 U.S.C. § 1153.

<sup>88</sup> INA, 8 U.S.C. § 1153(a)(1).

<sup>89</sup> See *id.*

<sup>90</sup> *Id.* § 1101(b)(1).

<sup>91</sup> *Id.* § 1153(a)(1).

<sup>92</sup> ANNUAL REPORT OF IMMIGRANT VISA APPLICANTS AS OF NOVEMBER 1, 2009, *supra* note 41.

<sup>93</sup> Guzmán, *supra* note 70, at 114.

Persons receiving the second preference for family-based visas include “[s]pouses and unmarried sons and unmarried daughters of permanent resident aliens.”<sup>94</sup> Preference two is divided into two types of family relationships: (1) legal permanent residents’ spouses and children who are unmarried and under twenty-one and (2) legal permanent residents’ children who are unmarried but over twenty-one.<sup>95</sup> This preference is limited to 114,200 visas per year plus any visas not used by the first preference.<sup>96</sup> As of November 2009, there were 842,762 people on the waitlist to obtain preference two visas.<sup>97</sup> Preference two individuals’ wait period to obtain visas is about three to five years.<sup>98</sup>

Persons receiving the third preference for family-based visas include “[m]arried sons and married daughters of [U.S.] citizens.”<sup>99</sup> This preference is limited to 23,400 visas per year plus any visas not used by the first and second preferences.<sup>100</sup> As of November 2009, there were 553,280 people on the waitlist to obtain preference three visas.<sup>101</sup> Preference three individuals’ wait period to obtain visas is about three years.<sup>102</sup>

Persons receiving the fourth preference for family-based visas include “[b]rothers and sisters of [U.S.] citizens.”<sup>103</sup> This preference is limited to 65,000 visas per year and any visas not used by the first, second, and third preferences.<sup>104</sup> As of November 2009, there were 1,727,897 people on the waitlist to obtain preference four visas.<sup>105</sup> Preference four individuals’ wait period to obtain visas is about ten years.<sup>106</sup> Thus, although the INA

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<sup>94</sup> INA, 8 U.S.C. § 1153(a)(2).

<sup>95</sup> *See id.*; *see also id.* § 1101(b)(1) (defining a child to be “an unmarried person under twenty-one years” old).

<sup>96</sup> *Id.* § 1153(a)(2).

<sup>97</sup> ANNUAL REPORT OF IMMIGRANT VISA APPLICANTS AS OF NOVEMBER 1, 2009, *supra* note 41.

<sup>98</sup> Guzmán, *supra* note 70, at 114.

<sup>99</sup> INA, 8 U.S.C. § 1153(a)(3).

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

<sup>101</sup> ANNUAL REPORT OF IMMIGRANT VISA APPLICANTS AS OF NOVEMBER 1, 2009, *supra* note 41.

<sup>102</sup> Guzmán, *supra* note 70, at 114.

<sup>103</sup> INA, 8 U.S.C. § 1153(a)(4).

<sup>104</sup> *Id.*

<sup>105</sup> ANNUAL REPORT OF IMMIGRANT VISA APPLICANTS AS OF NOVEMBER 1, 2009, *supra* note 41.

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

provides routes for family members to obtain citizenship status, the number of visas available and the long wait to obtain the visas limit the possibility of obtaining such status.

2. *Family Ties as a Route to Cancel Removal*<sup>107</sup>

In addition to family-based classifications to obtain permanent residency, the INA also created several defenses a noncitizen could utilize to cancel removal from the United States.<sup>108</sup> Prior to 1988, federal officials could remove noncitizens from the United States only after having a hearing before an immigration judge.<sup>109</sup> Between 1950 and 1995, noncitizens could raise the following defenses to cancel removal:<sup>110</sup> (1) judicial recommendation against removal;<sup>111</sup> (2) suspension of deportation;<sup>112</sup> (3) waiver of deportation;<sup>113</sup> and (4) withholding.<sup>114</sup> The waiver of deportation defense enabled judges to consider the immigrant's family ties to the United States.<sup>115</sup> Under the INA § 1182(h), noncitizens who were spouses, parents, or children of U.S. citizens or legal permanent residents could request the immigration judge to waive removal upon a showing of "extreme hardship" for the U.S. citizen spouse, parent, or child.<sup>116</sup> Under the INA § 1182(c), legal permanent residents who lived in the United States for seven years could request the immigration judge to

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<sup>107</sup> Immigration law utilizes various technical names for defenses to removal. Here, the article uses the term "cancellation" to mean a decision by an immigration authority or judge to prevent the removal of a noncitizen from the United States.

<sup>108</sup> HUMAN RIGHTS WATCH, *supra* note 21, at 13.

<sup>109</sup> *Id.* at 12.

<sup>110</sup> *Id.* at 13.

<sup>111</sup> INA, 8 U.S.C. § 1251(b) (1982); HUMAN RIGHTS WATCH, *supra* note 21, at 13 (allowing a noncitizen to request the criminal court judge to issue a binding recommendation that the noncitizen's conviction of a crime of moral turpitude should not trigger removal).

<sup>112</sup> INA, 8 U.S.C. § 1254(a)(1)–(2) (allowing a non-legal permanent resident of good moral character who has lived in the United States for seven years to request that the immigration judge suspend removal based on extreme hardship to the individual).

<sup>113</sup> *Id.* § 1182(c), (h) (1988 & Supp. I 1990).

<sup>114</sup> *Id.* § 1253(h) (1994 & Supp. IV 1999) (allowing noncitizens, whose lives or freedoms would be threatened because of their race, religion, nationality, or membership in a social or political group, to request the immigration judge to suspend removal).

<sup>115</sup> *Id.* § 1182(c), (h) (1988 & Supp. I 1990).

<sup>116</sup> *Id.* § 1182(h).

waive removal after weighing several factors, including family ties in the United States and hardship to the family if removal occurred.<sup>117</sup>

From the early legislation and statutes pertaining to immigration, to the initial compilation of immigration law in the 1952 INA, and finally to the subsequent amendments to the 1952 INA, the promotion of family preservation served as an underlining policy behind each.<sup>118</sup> Family ties served as an important consideration in the application and creation of immigration law.<sup>119</sup> Therefore, the U.S. government should continue to consider family ties when creating and implementing immigration law.

### *C. Current Treatment of Families in Immigration Law*

Current immigration law still provides routes for noncitizens to obtain legal residence in the United States based on family ties; it also still provides defenses to removal for noncitizens based on those family ties.<sup>120</sup> Nevertheless, current routes—as opposed to historic routes—to citizenship and defenses to removal place more restrictions on families.<sup>121</sup> Contrary to popular belief, close family ties in the United States do not provide immigrants with readily available opportunities to obtain legal status in the United States.<sup>122</sup> Immigrant families physically present in the United States “consistently face dead ends as they seek to obtain legal status for all family members.”<sup>123</sup>

After the 1993 World Trade Center Bombing, the 1994 Popular Anti-Immigration Legislation, and the 1995 Oklahoma City Bombing, Congress significantly reformed immigration law by enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Both acts remain valid today.<sup>124</sup> Overall, these two acts increased the restrictions on undocumented immigrants, the amount of resources used to

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<sup>117</sup> *Id.* § 1182(c).

<sup>118</sup> See discussion *supra* Parts II.A–II.B.

<sup>119</sup> See discussion *supra* Part II.B.

<sup>120</sup> See INA, 8 U.S.C. §§ 1151(b)(2)(A)(i), 1152(a), 1229b(b)(1)(D) (2006).

<sup>121</sup> Compare *id.* § 1229b (2006 & Supp. I 2008), with *id.* § 1182(c) (1990) (showing that strict guidelines are now in place compared to previous plenary authority of the Attorney General).

<sup>122</sup> Thronson, *You Can't Get Here*, *supra* note 30, at 60.

<sup>123</sup> *Id.* at 61.

<sup>124</sup> HUMAN RIGHTS WATCH, *supra* note 21, at 16.

tighten the border, and the number of immigrants held in detention.<sup>125</sup> Congress rushed the passage of this drastic reform in immigration law so it could be enacted prior to the 1998 national election.<sup>126</sup> The passage of IIRIRA and the AEDPA focused on immigration enforcement with little consideration of the effect on families.<sup>127</sup>

Due to the rushed proceedings, the reformed provisions received little dialog and debate.<sup>128</sup> Representative Patsy Mink of Hawaii remarked, “I am deeply concerned that these provisions expand authorization for deportation of aliens with any association with crimes of violence or terrorism.”<sup>129</sup> Then president Bill Clinton stated, “This bill also makes a number of major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism.”<sup>130</sup> The passage and application of the two acts resulted in a disregard for the ever-present historical “family-oriented goals” of immigration law.<sup>131</sup>

1. *Effect of the Elimination of the Waiver of Deportation INA § 1182(c) on Families*

The passage of the IIRIRA replaced the waiver of deportation provision in § 1182(c) of the INA<sup>132</sup> with a much stricter cancellation of removal provision.<sup>133</sup> A family’s most realistic defense to have a family member’s removal cancelled, provided for in the INA § 1182(c), can no

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<sup>125</sup> BISCHOFF, *supra* note 58, at xxi–xxvi; *see also* DEBRA L. DELAET, U.S. IMMIGRATION POLICY IN AN AGE OF RIGHTS 127 (2000).

<sup>126</sup> HUMAN RIGHTS WATCH, *supra* note 21, at 16.

<sup>127</sup> *Immigration and Naturalization Servs. Reform: Det. Issues, Hearing Before the Subcomm. on Immigration Comm. on the Judiciary*, 106th Cong. (1998), 1998 WL 767401 (testimony of Doris Meissner, Comm’r, Immigration & Naturalization Serv., Dep’t of Justice) (reaffirming that the INS is mostly concerned with detaining illegal immigrants and enforcing border patrol); *see also* Guzmán, *supra* note 70, at 109–10.

<sup>128</sup> HUMAN RIGHTS WATCH, *supra* note 21, at 16–17.

<sup>129</sup> 142 CONG. REC. S735, E646 (daily ed. Apr. 25, 1996) (statement of Rep. Patsy T. Mink).

<sup>130</sup> Presidential Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 721 (Apr. 24, 1996).

<sup>131</sup> *See* Guzmán, *supra* note 70, at 110.

<sup>132</sup> INA, 8 U.S.C. § 1182(c) (1990); *see also* discussion *supra* Part II.B.2.

<sup>133</sup> INA, 8 U.S.C. § 1229b (1994 & Supp. I 1996); *see* HUMAN RIGHTS WATCH, *supra* note 21, at 25.

longer be utilized because the provision was repealed.<sup>134</sup> An immigration judge interviewed by the Human Rights Watch said, “It is true that judges often granted [INA § 1182(c)] relief, but that was because immigration judges often saw deserving cases. Congress did not accept that fact, and so took judicial discretion away.”<sup>135</sup>

Current immigration law eliminates the opportunity for judges to balance individuals’ reasons for removal against an array of factors, including: family relationships, length of time in the United States, economic ties to the United States, likelihood of persecution, condition of health, and lack of connections to the country of origin.<sup>136</sup> A noncitizen can request cancellation of removal under the INA § 1229b(b). Yet, a judge can grant this request only if the individual: (1) lived in the United States for ten years; (2) is of good moral character; (3) has not been convicted of an immigration offense; and (4) has a U.S. citizen spouse, parent, or child who would suffer “exceptional and extremely unusual hardship.”<sup>137</sup> Current law also keeps the INA § 1182(h), which allows noncitizens who are spouses, parents, or children of U.S. citizens or legal permanent residents to request the immigration judge to waive removal upon a showing of “extreme hardship” for the U.S. citizen or legal permanent resident spouse, parent, or child.<sup>138</sup> However, these two waivers, INA § 1182(h) and INA § 1229(b), apply only to a limited number of cases.<sup>139</sup>

Even after Congress limited the circumstances when courts can consider family relationships, the INA remained silent on what should happen to U.S. citizen children of parents facing removal.<sup>140</sup> When parents of U.S. citizen children face removal, two possible outcomes arise. Either the children will suffer “de facto” deportation, being removed from the United States with their parents,<sup>141</sup> or the children will be forced to remain

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<sup>134</sup> INA, 8 U.S.C. § 1182(c) (1994 & Supp. III 1998) (repealed 1998).

<sup>135</sup> HUMAN RIGHTS WATCH, *supra* note 21, at 27.

<sup>136</sup> Compare INA, 8 U.S.C. § 1229b(b)(1) (2006), with *I id.* NA, 8 U.S.C. § 1182(c) (1988 & Supp. I 1990); HUMAN RIGHTS WATCH, *supra* note 21, at 6.

<sup>137</sup> INA, 8 U.S.C. § 1229b(b)(1) (2006).

<sup>138</sup> *Id.* § 1182(h)(1)(B) (2006 & Supp. II 2009).

<sup>139</sup> Guzmán, *supra* note 70, at 119.

<sup>140</sup> See *id.* at 117–18.

<sup>141</sup> See *Gallanos v. United States*, 785 F.2d 116, 120 (4th Cir. 1986) (stating the appellant’s claim that “de facto” deportation would occur when the immigrant’s daughter leaves the United States with her parents).

in the United States with other relatives or in state custody.<sup>142</sup> The process may also separate the children from their siblings.<sup>143</sup>

For instance, in *Salameda v. Immigration & Naturalization Service*,<sup>144</sup> the court removed a couple from the United States without consideration of the effect the removal would have on their two children.<sup>145</sup> The parents were forced to decide whether to allow their fifteen-year-old son (who lived in the United States since age two) and their seven-year-old son (who lived in the United States since birth) to remain in the United States or be removed to the Philippines with them.<sup>146</sup> The court remarked that the family would face hardship if removed to the Philippines; however, the children's prospect of removal was the parents' "fault."<sup>147</sup> Thus, the parents could not use their children to retain residence in the United States regardless of the effect on the children.<sup>148</sup>

Courts are usually not sympathetic to the families' choice reasoning, "[A] minor child who is fortuitously born here due to his parents' decision to reside in this country has not exercised a deliberate decision to make this country his home, and Congress did not give such a child the ability to confer immigration benefits on his parents."<sup>149</sup> Therefore, the IIRIRA left noncitizens with two defenses to removal based on family ties, INA § 1182(h) and INA § 1229(b).<sup>150</sup> Yet, both provide extremely limited circumstances where courts will consider the noncitizen's family relationships.<sup>151</sup> This limited ability and willingness to consider family ties leads to immigration enforcement actions determining the fate of families without ever considering the family.

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<sup>142</sup> Guzmán, *supra* note 70, at 117–18; see Kathleen A. Bailie, Note, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 *FORDHAM L. REV.* 2285, 2285–86 (1998) (describing how easily a child can be removed from a parent when the state views the child without a parent).

<sup>143</sup> Guzmán, *supra* note 70, at 118.

<sup>144</sup> 70 F.3d 447 (7th Cir. 1995).

<sup>145</sup> *Id.* at 449.

<sup>146</sup> *See id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Perdido v. Immigration & Naturalization Serv.*, 420 F.2d 1179, 1181 (5th Cir. 1969).

<sup>150</sup> INA, 8 U.S.C. §§ 1182(h), 1229b(b) (2006).

<sup>151</sup> *See id.*

## 2. *Effect of the Extreme Hardship Requirement on Families*

In addition to several other qualifications, both provisions providing for limited consideration of family ties require the noncitizen to prove a form of extreme hardship would result for the U.S. citizen spouse, parent, or child if the court ordered removal of the noncitizen.<sup>152</sup> Nevertheless, the INA does not define extreme hardship.<sup>153</sup> Courts have also refrained from providing a clear definition of the term,<sup>154</sup> leaving the decision to the discretion of the judge or board deciding the case.<sup>155</sup> Theoretically, a parent facing removal who has a U.S. citizen child could argue (1) the child will face extreme hardship from the separation caused by the parent leaving the child behind in the United States or (2) the child will face extreme hardship in the parent's home country when the child leaves with the parent. However, a motion for extreme hardship:

will require, at a minimum, an affidavit from the parent or parents stating that it is their intention that the child remain in this country, accompanied by evidence demonstrating that reasonable provisions will be made for the child's care and support. . . . [Assuming a United States citizen child would not] suffer extreme hardship if he accompanied his parent abroad . . . [any hardship] the child might face . . . if left in the United States would be the result of parental choice.<sup>156</sup>

The first argument—hardship from separation—is given little to no weight in courts.<sup>157</sup> In *Olowo v. Ashcroft*,<sup>158</sup> an undocumented Nigerian mother facing removal argued both of her U.S. citizen daughters and herself would be subject to female genital mutilation upon return to

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<sup>152</sup> *Id.*

<sup>153</sup> Jessica M. Mahr, Comment, *Protecting Our Vulnerable Citizens: Birthright Citizenship and the Call for Recognition of Constructive Deportation*, 32 S. ILL. U. L.J. 723, 733 (2008).

<sup>154</sup> *Id.*

<sup>155</sup> *Gallanos v. United States*, 785 F.2d 116, 120 (4th Cir. 1986); *Salameda v. Immigration & Naturalization Serv.*, 70 F.3d 447, 449 (7th Cir. 1995).

<sup>156</sup> *In re Ige*, 20 I. & N. Dec. 880, 885 (B.I.A. 1994).

<sup>157</sup> MiaLisa McFarland & Evon M. Spangler, *A Parent's Undocumented Immigration Status Should Not Be Considered Under the Best Interest of the Child Standard*, 35 WM. MITCHELL L. REV. 247, 261 (2008).

<sup>158</sup> 368 F.2d 692 (7th Cir. 2004).

Nigeria.<sup>159</sup> Ultimately, the Seventh Circuit Court of Appeals held the children would remain in the United States separated from their mother.<sup>160</sup> This separation did not result in “extreme hardship” that would prevent the mother’s removal.<sup>161</sup>

The second argument—hardship from removal—is also an exceptionally high standard to meet. In *Mendez v. Major*,<sup>162</sup> the court held a child’s inability to speak the language of the native land and lack of familiarity with the native culture was not enough to meet extreme hardship.<sup>163</sup> The extreme hardship standard is “so difficult to satisfy that there is only one published [Board of Immigration Appeals (BIA)] decision that grants cancellation of removal after finding that the requisite ‘exceptional and extremely unusual hardship’ existed.”<sup>164</sup> The BIA holding in *In re Recinas*<sup>165</sup> found extreme hardship existed for a mother who provided the sole means of economic support for her six children (four of whom were U.S. citizens).<sup>166</sup> The mother had no comparable means of providing for her children in Mexico nor did she have any close family members in Mexico.<sup>167</sup> The children did not speak Spanish nor had the children ever traveled to Mexico.<sup>168</sup>

Overall, the creation and current application of the IIRIRA “does not honor the concept of family values and the need to keep families together.”<sup>169</sup> Current immigration law grants families an extremely limited ability to resist the choice between separation of parent and child or removal of both parent and child.<sup>170</sup> This limited choice is inconsistent with U.S. societal values and the historical trend to preserve the family.<sup>171</sup>

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<sup>159</sup> *Id.* at 697.

<sup>160</sup> *See id.* at 701.

<sup>161</sup> *See id.*

<sup>162</sup> 226 F. Supp. 364 (E.D. Mo. 1963).

<sup>163</sup> *Id.* at 366–67.

<sup>164</sup> *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1014 (9th Cir. 2005) (Pregerson, J., dissenting) (citing *In re Recinas*, 23 I. & N. Dec. 467, 468 (B.I.A. 2002)).

<sup>165</sup> 23 I. & N. Dec. 467 (B.I.A.2002).

<sup>166</sup> *Id.* at 471.

<sup>167</sup> *Id.*

<sup>168</sup> *See id.* at 470–71.

<sup>169</sup> *Cabrera-Alvarez*, 423 F.3d at 1014 (Pregerson, J., dissenting).

<sup>170</sup> *See* discussion *supra* Part II.C.

<sup>171</sup> *See* discussion *supra* Parts II.A–II.B.

### III. DESTABILIZATION OF THE MIXED-STATUS FAMILY

In all areas, the law makes distinctions.<sup>172</sup> In both historical and current immigration law, the prominent distinction is the line between citizens and noncitizens.<sup>173</sup> Yet, the “line between ‘us’ and ‘them’ often does not match up with the ways in which families come to this country” or remain in this country.<sup>174</sup> Historically, many noncitizens did not permanently stay in the United States, and if they did remain in the United States, they achieved some form of legal immigration status.<sup>175</sup> Today, noncitizens remain permanently in the United States but never achieve legal immigration status.<sup>176</sup> Due to the increase in noncitizens physically residing in the country and the national policy of birthright citizenship, mixed-status families continue to emerge across the United States.<sup>177</sup> Preservation of the mixed-status family becomes more and more difficult due to (1) the increase in the numbers of mixed-status families in the United States<sup>178</sup> and (2) the present legal barriers on immigrant family members seeking to establish legal residence in the United States.<sup>179</sup>

#### A. Birthright Citizenship

Citizenship by birthright, *jus soli*, involves a person acquiring citizenship simply by being born within the territory of the country.<sup>180</sup> Birthright citizenship is found in the Citizenship Clause of the Fourteenth Amendment, which states, “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United

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<sup>172</sup> HIROSHI MOTOMURA, AMERICANS IN WAITING THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 4 (2006).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> Thronson, *You Can't Get Here*, *supra* note 30, at 66.

<sup>176</sup> *See id.*

<sup>177</sup> *See* McFarland & Spangler, *supra* note 157, at 254–59.

<sup>178</sup> *See* LOW INCOME WORKING FAMILIES PROJECT, URBAN INST., CHILDREN OF IMMIGRANTS: NATIONAL AND STATE CHARACTERISTICS 2, 6 (2009), available at [http://www.urban.org/UploadedPDF/411939\\_childrenofimmigrants.pdf](http://www.urban.org/UploadedPDF/411939_childrenofimmigrants.pdf) (recognizing that eighty-six percent of children with immigrant parents are U.S. citizens and the number of children in the United States with at least one immigrant parent doubled from eight million in 1990 to sixteen million in 2006).

<sup>179</sup> *See* discussion *supra* Part II.

<sup>180</sup> Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws*, in CITIZENSHIP TODAY GLOBAL PERSPECTIVES AND PRACTICES 17, 17 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001).

States and of the State wherein they reside.”<sup>181</sup> Courts interpreted the Citizenship Clause “to confer citizenship on the child born within the United States regardless of the parents’ citizenship status or the legality of the parent’s presence in the country.”<sup>182</sup>

Recently, scholars have debated the applicability of birthright citizenship conferred upon children of undocumented immigrants.<sup>183</sup> Some argue the United States must recognize birthright citizenship in such situations to correspond with immigration policies and prevent harm to the children.<sup>184</sup> Others argue the United States should not recognize birthright citizenship in such situations to prevent loopholes in immigration law and the use of children as “anchor babies.”<sup>185</sup> Two recent bills were presented to Congress that would prevent birthright citizenship in such situations: the Birthright Citizenship Act of 2007 and the End Birth Citizenship to Illegal Aliens Act of 2006.<sup>186</sup> Neither bill passed.<sup>187</sup>

The Supreme Court remains silent on the issue, never directly answering whether the laws of the United States confer citizenship to children of illegal immigrants.<sup>188</sup> However, in *United States v. Wong Kim Ark*,<sup>189</sup> the Court held children born to permanent residents who were legally in the country at the time of the child’s birth are United States citizens.<sup>190</sup> Despite the Court’s silence on the exact issue and the recent

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<sup>181</sup> U.S. CONST. amend. XIV, § 1.

<sup>182</sup> Mahr, *supra* note 153, at 726 (citing *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898)).

<sup>183</sup> See James C. Ho, *Defining “American” Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 2D 367, 367 (2006); Adam C. Abrahms, Note, *Closing the Immigration Loophole: The 14th Amendment’s Jurisdiction Requirement*, 12 GEO. IMMIGR. L.J. 469, 469 (1998); Katherine Pettit, Comment, *Addressing the Call for the Elimination of Birthright Citizenship in the United States: Constitutional and Pragmatic Reasons to Keep Birthright Citizenship Intact*, 15 TUL. J. INT’L & COMP. L. 265, 266 (2006).

<sup>184</sup> Natalie Smith, *Developments in the Legislative Branch*, 20 GEO. IMMIGR. L.J. 325, 327 (2006); see Pettit, *supra* note 183, at 268.

<sup>185</sup> Ho, *supra* note 183, at 367–68; Smith, *supra* note 184, at 327; Abrahms, *supra* note 183, at 472.

<sup>186</sup> Birthright Citizenship Act of 2007, H.R. 1940, 110th Cong. § 2 (2007); End Birth Citizenship to Illegal Aliens Act of 2006, H.R. 6294, 109th Cong. § 2 (2006).

<sup>187</sup> See Birthright Citizenship Act of 2007, H.R. 1940, 110th Cong. § 2 (2007); End Birth Citizenship to Illegal Aliens Act of 2006, H.R. 6294, 109th Cong. § 2 (2006).

<sup>188</sup> Mahr, *supra* note 153, at 724–25.

<sup>189</sup> 169 U.S. 649 (1898).

<sup>190</sup> *Id.* at 651.

debate for change, birthright citizenship is a “long-standing principle” and is the law of the United States.<sup>191</sup> Thus, the U.S. government recognizes children born to immigrants in the United States as citizens.<sup>192</sup>

### *B. Prevalence of the Mixed-Status Family*

The principle of birthright citizenship gives rise to a variety of mixed-status families.<sup>193</sup> Mixed-status families are defined as families where at least one parent is a noncitizen and at least one child is a citizen.<sup>194</sup> Eighty-five percent of immigrant families with children are mixed-status families.<sup>195</sup> One in ten U.S. citizen children lives in a mixed-status family.<sup>196</sup> Noncitizens head seventy-five percent of the mixed-status households with a U.S. citizen child.<sup>197</sup> Thus, immigrant families in the United States are not an isolated population but rather “are profoundly woven into the national fabric through close family ties with citizens and legal permanent residents.”<sup>198</sup> Due to the massive integration of immigrants into American society, “[i]t is simply not possible to take any action that will affect immigrants without also intimately affecting a much broader swathe of U.S. society, including many U.S. citizens and certainly including many children.”<sup>199</sup>

### *C. Immigration Enforcement*

The Department of Homeland Security (DHS) is charged with overseeing all immigration enforcement actions—arrests, detentions, returns, and removal of foreign nationals.<sup>200</sup> DHS is comprised of two major units: Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE).<sup>201</sup> CBP enforces immigration laws at ports of entry, and ICE enforces immigration laws within the interior of the

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<sup>191</sup> McFarland & Spangler, *supra* note 157, at 258.

<sup>192</sup> *Id.*

<sup>193</sup> Thronson, *You Can't Get Here*, *supra* note 30, at 65.

<sup>194</sup> FIX ET AL., *supra* note 40, at 15.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 15–16.

<sup>198</sup> Thronson, *You Can't Get Here*, *supra* note 30, at 61.

<sup>199</sup> *Id.* at 61, 65–66.

<sup>200</sup> OFF. OF IMMIGR. STATS., DEP'T OF HOMELAND SEC., ANN. REP., IMMIGR. ENFORCEMENT ACTIONS: 2008, at 1 (2009).

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

United States.<sup>202</sup> DHS arrests more than 1.6 million immigrants each year.<sup>203</sup> In 2008, ICE alone detained a record 378,582 aliens, representing a twenty-two percent increase from 2007.<sup>204</sup> Each DHS arrest, detention, or removal of an undocumented immigrant affects many American citizens.<sup>205</sup> The rest of society may eventually be able to replace these undocumented immigrants, but their families cannot.<sup>206</sup>

### *1. Immediate Effect of Worksite Raids on Families*

One type of immigration enforcement method affecting families all over the country, and not just on the border, is worksite enforcement.<sup>207</sup> Unlike other forms of immigration enforcement, worksite enforcement generally causes arrests of immigrants with no prior criminal history or immigration-related offenses.<sup>208</sup> Worksite arrests of immigrants have increased over the years from 500 arrests of immigrants at workplaces in 2002 to 3600 arrests of immigrants in workplaces in 2006.<sup>209</sup> On average, worksite arrests affect one child for every two workers arrested.<sup>210</sup>

The Urban Institute and the National Council of La Raza (NCLR) conducted a study on three communities who experienced workplace raids in 2006 and 2007: Greely, Colorado; Grand Island, Nebraska; and New Bedford, Massachusetts.<sup>211</sup> All three sites underwent similar experiences.<sup>212</sup>

ICE agents arrived at the plants early in the morning with a large number of vehicles—including several buses—to move arrested immigrants from the plants to processing facilities. . . . [P]lant management shut down the assembly lines and instructed workers to assemble in central locations, where ICE agents separated them into groups by citizenship and legal status and requested to see their documentation. There were conflicting reports about the

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<sup>202</sup> *Id.*

<sup>203</sup> CAPPS ET AL., *supra* note 26, at 10.

<sup>204</sup> OFF. OF IMMIGR. STATS., *supra* note 200, at 3.

<sup>205</sup> See Thronson, *You Can't Get Here*, *supra* note 30, at 65–66.

<sup>206</sup> *Id.*

<sup>207</sup> CAPPS ET AL., *supra* note 26, at 9.

<sup>208</sup> *Id.* at 9–10.

<sup>209</sup> *Id.* at 1.

<sup>210</sup> *Id.* at 15.

<sup>211</sup> *Id.* at 2.

<sup>212</sup> *Id.* at 22–23.

degree to which ICE agents were armed and had their guns drawn during the raids. There were also conflicting reports about the number of agents who spoke Spanish and were able to communicate effectively with the arrested workers. . . . [A]rrestees were held for several hours at the plants before boarding buses for other locations where they were to be held for processing, and during this time had no access to legal counsel or communication with their family members about their circumstances.<sup>213</sup>

Federal officials often shipped those arrested to distant locations for detention, including Iowa and Texas.<sup>214</sup> The shock and isolation caused many of those arrested to sign papers “agreeing to be deported without appeal” and without ever speaking to a lawyer or an official from their consulate.<sup>215</sup> The 912 arrests made during the 3 raids directly affected 506 children.<sup>216</sup> These three raids resulted in no children becoming homeless or being taken into state custody, which had occurred in prior raids.<sup>217</sup> However, “many children faced traumatic experiences” because of the raids.<sup>218</sup>

Some children “were left for varying periods of time without adult supervision.”<sup>219</sup> Some young children spent at least one night without their parents.<sup>220</sup> Caregivers hospitalized one seven-month-old baby, who was accustomed to his mother’s milk, because the child refused cow milk and became dehydrated.<sup>221</sup> Another infant spent seventeen days without his mother’s breast milk.<sup>222</sup> The mother reported that ICE never asked whether she had children.<sup>223</sup> Even after explaining to them that she had an infant at home, ICE declined to release her.<sup>224</sup> Although some families

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<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 24, 26.

<sup>215</sup> *Id.* at 24.

<sup>216</sup> *See id.* at 15.

<sup>217</sup> *Id.* at 35–36.

<sup>218</sup> *Id.* at 37.

<sup>219</sup> *Aguilar v. U.S. Immigration & Customs Enforcement Div. of the Dep’t of Homeland Sec.*, 510 F.3d 1, 6 (1st Cir. 2007).

<sup>220</sup> *CAPPS ET AL.*, *supra* note 26, at 35.

<sup>221</sup> *Id.* at 37.

<sup>222</sup> *Id.* at 36.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

were eventually reunited following the raids, others faced permanent separation as parents were removed to foreign lands.<sup>225</sup>

## 2. Immediate Effect of Removal on Families

Removal is defined as “[t]he compulsory and confirmed movement of an inadmissible or deportable alien out of the United States based on an order of removal. An alien who is removed has administrative or criminal consequences placed on subsequent reentry, owing to the fact of the removal.”<sup>226</sup> An inadmissible alien includes any “alien seeking admission into the United States who is ineligible to be admitted according to the provisions of the Immigration and Nationality Act.”<sup>227</sup> A deportable alien includes any alien “admitted into the United States but who is subject to removal pursuant to provisions of the Immigration and Nationality Act.”<sup>228</sup>

“The United States conducted 2,199,138 alien removals between 1998 and 2007.”<sup>229</sup> These removals involved a recorded 180,466 alien parents of U.S. citizen children.<sup>230</sup> However, collecting data on children of immigrants removed from the United States is not mandatory, so the data is not comprehensive.<sup>231</sup> The number of removals by DHS increased twelve percent from a total of 319,382 in 2007 to 358,886 in 2008.<sup>232</sup> Criminals accounted for only twenty-seven percent of removals in 2008.<sup>233</sup>

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<sup>225</sup> *Id.* at 43.

<sup>226</sup> OFF. OF IMMIGR. STATS., *supra* note 200, at 2.

<sup>227</sup> *Id.*; *see also id.* § 1182 (2006) (“Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States.”). Aliens are deemed inadmissible in § 1182 for several reasons, including health, criminal convictions, security matters, and being a public charge. INA, 8 U.S.C. § 1182.

<sup>228</sup> OFF. OF IMMIGR. STATS., *supra* note 200, at 2; *see also* INA, 8 U.S.C. § 1227(a) (“Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens.”). Some of the classes of aliens deemed deportable include aliens inadmissible at the time of entry or adjustment of their status, aliens with certain criminal offenses, aliens who failed to register or falsified documents, aliens that posed a security risk, and aliens deemed public charges. INA, 8 U.S.C. § 1227.

<sup>229</sup> OFF. OF INSPECTOR GEN., DEP’T OF HOMELAND SEC., REMOVALS INVOLVING ILLEGAL ALIEN PARENTS OF UNITED STATES CITIZEN CHILDREN 1 (2009), *available at* [http://www.dhs.gov/xoig/assets/mgmtrpts/OIG\\_09-15\\_Jan09.pdf](http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-15_Jan09.pdf).

<sup>230</sup> *Id.* at 5.

<sup>231</sup> *Id.* at 6.

<sup>232</sup> OFF. OF IMMIGR. STATS., *supra* note 200, at 3.

<sup>233</sup> *Id.* at 4.

“The most common categories of crime committed by aliens removed in 2008 included illegal drug activity [thirty-five percent], immigration violations [eighteen percent], and assault [eighteen percent].”<sup>234</sup>

Noncitizens are always vulnerable to removal.<sup>235</sup> “Few forms of human misery are equal to being refugees who by definition face a challenge to life or liberty that threatens their very survival. . . . [The United States has] the duty to avoid depriving persons, including foreigners, of life and liberty.”<sup>236</sup> Yet, between 1997 and 2007, Human Rights Watch estimates removal of noncitizens separated “at least 1.6 million family members . . . husbands, wives, sons, and daughters.”<sup>237</sup> Immigration officials removed at least 180,466 immigrant parents from the United States according to the Department of Homeland Security.<sup>238</sup> Sixty-three percent of these parents were removed for (1) being present without authorization (68,179), (2) being previously removed and ineligible for reentry (25,604), or (3) attempting to enter without proper documentation or through fraud or misrepresentation (20,340).<sup>239</sup> Immigration officials removed less than one percent of these parents on national security grounds (13).<sup>240</sup> Every time officials remove a parent from the United States, the family must make the personal choice between separation and removal of the entire family. Nevertheless, sometimes no personal choice exists because

[s]pouses and children are often either US citizens or lawful permanent residents, and cannot relocate to the deportee’s country of origin . . . . [P]arents of school age children emphasize that the United States is the only home their children have ever known, that their children often do not speak any language other than English, and that their children are being educated in US schools as reasons for

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<sup>234</sup> *Id.*

<sup>235</sup> See HUMAN RIGHTS WATCH, *supra* note 21, at 4.

<sup>236</sup> Andrew E. Schacknove, *American Duties to Refugees Their Scope and Limits*, in OPEN BORDERS? CLOSED SOCIETIES? THE ETHICAL AND POLITICAL ISSUES 131, 131, 137 (Mark Gibney ed., 1988).

<sup>237</sup> HUMAN RIGHTS WATCH, *supra* note 21, at 44.

<sup>238</sup> OFF. OF INSPECTOR GEN., *supra* note 229, at 8–9.

<sup>239</sup> See *id.* at 9.

<sup>240</sup> *Id.*

not being able to join their deported spouse permanently.<sup>241</sup>

### 3. *Lasting Impact of Raids and Removal on Children*

America as a whole feels the affect of each removal as “US citizen and lawful permanent resident children and spouses are forced to confront life without their fathers, mothers, children, husbands, or wives.”<sup>242</sup> Removal involves removing both parents and breadwinners from families.<sup>243</sup> When immigration officials remove a breadwinner from a family, the family’s income is substantially lowered, and the family’s material hardship substantially increases.<sup>244</sup> Some families facing the loss of a breadwinner after a worksite raid had their utilities and phone service cut off, while others were forced to move due to their inability to pay housing costs.<sup>245</sup> Furthermore, studies link children’s “health, cognitive development, and educational achievement” to family income.<sup>246</sup> Thus, removal, which often lowers a family’s income, will also result in lowering children’s cognitive development and educational achievement.<sup>247</sup>

Additionally, when immigration officials remove a parent from a family, the family suffers from a “more unstable home environment.”<sup>248</sup> Removal destroys “one of the main strengths in immigrant families—the presence of two parents.”<sup>249</sup> Child psychology experts note, “[c]hildren can experience stress, depression and anxiety disorders . . . [and] children who witness their parents being taken into custody lose trust in their parents’ ability to keep them safe and begin to see danger everywhere.”<sup>250</sup>

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<sup>241</sup> HUMAN RIGHTS WATCH, *supra* note 21, at 22. For a more detailed discussion on de facto deportation and removal of the entire family, see David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1193–97 (2005); Mahr, *supra* note 153, at 729–35.

<sup>242</sup> HUMAN RIGHTS WATCH, *supra* note 21, at 4.

<sup>243</sup> See CAPPES ET AL., *supra* note 26, at 41.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 47.

<sup>246</sup> *Id.* at 41.

<sup>247</sup> *See id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> Tyche Hendricks, *The Human Face of Immigration Raids in Bay Area: Arrests of Parents Can Deeply Traumatize Children Caught in the Fray, Experts Argue*, THE SAN FRANCISCO CHRONICLE, Apr. 27, 2007, at A12 (restating comments by Dr. Alicia  
(continued)

For example, Gerardo Anthony Mosquera Jr.'s parents described him as "a good boy in a tough neighborhood. . . . He took his studies seriously, enjoyed sports, stayed away from drugs and worked after school to help support his struggling family, which included three younger siblings and an infant son."<sup>251</sup> The seventeen-year-old junior at Bell Gardens High School committed suicide not long after officials removed his father from the United States.<sup>252</sup> Family remarked how "Gerardo had been despondent since his father, Gerardo Antonio Mosquera Sr., a legal resident of the United States for 29 years was deported . . . because of a 1989 conviction for selling a \$10 bag of marijuana."<sup>253</sup> Gerardo's mother, Maria Sanchez Mosquera, remarked, "He became a different person. I think he believed my husband walked out on us. . . . That damn little bag of marijuana. It turned everything around. It cost my husband his papers. It cost my son his life."<sup>254</sup>

#### IV. BEYOND POLICY: REASONS FOR IMMIGRATION REFORM

##### A. *International Call for Family Preservation*<sup>255</sup>

Neither parents' rights nor children's rights should be diminished simply because immigration law is involved.<sup>256</sup> International norms emphasize this notion by "treat[ing] 'persons' rather than 'citizens' as the

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Lieberman, director of the Child Trauma Research Project at UCSF, and Dr. Amana Ayoub, a psychologist at the Center for Survivors of Torture).

<sup>251</sup> Patrick J. McDonnell, *Deportation Shatters Family*, L.A. TIMES, Mar. 14, 1998, at B1.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

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

<sup>255</sup> See Jacqueline Bhabha, "More Than Their Share of Sorrows": *International Migration Law and the Rights of Children*, 22 ST. LOUIS U. PUB. L. REV. 253 (2003); Shayana Kadidal, "Federalizing" *Immigration Law: International Law as a Limitation on Congress's Power to Legislate the Field of Immigration*, 77 FORDHAM L. REV. 501 (2008); Sara A. Rodriguez, *Exile and the Not-So-Lawful Permanent Resident: Does International Law Require a Humanitarian Waiver of Deportation for the Non-Citizen Convicted of Certain Crimes?*, 20 GEO. IMMIGR. L.J. 483 (2006), for a more detailed discussion on international law's mandate for consideration of the family in immigration law.

<sup>256</sup> David B. Thronson, *Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families*, 43 WAKE FOREST L. REV. 391, 413 (2008).

‘holders’ of the most basic rights [] against governments.”<sup>257</sup> Under the Constitution, the United States possesses the power to enter treaties.<sup>258</sup> All treaties made by the United States are the “supreme law of the land.”<sup>259</sup> Although treaties only have the force of law if ratified, many courts use “non-ratified treaties as aids” in interpreting the meaning of statutes.<sup>260</sup> Further, as first announced by Chief Justice Marshall in *Talbot v. Seemen*,<sup>261</sup> “[T]he laws of the United States ought not . . . be construed as to infract the common principles and usages of nations, or the general doctrines of national law.”<sup>262</sup> International law continues to be enforced in U.S. courts and is used to help interpret national law, including the INA.<sup>263</sup>

Many international policies and laws recognize (1) the fundamental substantive right to family integrity and association and (2) the procedural right against arbitrary interference with the right to family integrity and association.<sup>264</sup> For example, the Universal Declaration of Human Rights (UDHR)<sup>265</sup> announced, “[F]amily is the natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>266</sup> Although not a treaty, “the Declaration has become the accepted general articulation of recognized rights” of all people throughout the world.<sup>267</sup>

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<sup>257</sup> Vicki C. Jackson, *Citizenship and Federalism*, in *CITIZENSHIP TODAY GLOBAL PERSPECTIVES AND PRACTICES* 17, 144–45 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001).

<sup>258</sup> U.S. CONST. art. II, § 2 (stating the President shall have the power, to make treaties).

<sup>259</sup> U.S. CONST. art. VI.

<sup>260</sup> *Beharry v. Reno*, 183 F. Supp. 2d 584, 593 (E.D.N.Y. 2002); see *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) (citing the American Convention on Human Rights and the Universal Declaration of Human Rights as support for customary principle prohibiting prolonged arbitrary detention); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987) (recognizing the Universal Declaration, American Convention, and the Civil and Political Covenant as evidence of a customary norm against summary execution).

<sup>261</sup> 5 U.S. 1 (1801).

<sup>262</sup> *Id.* at 43.

<sup>263</sup> See, e.g., *Immigration & Naturalization Serv., v. Cardoza-Fonseca*, 480 U.S. 421, 436–41 (1987) (using international law as a guide to the construction of the Refugee Act of 1980 and the INA).

<sup>264</sup> Kadidal, *supra* note 255, at 515–16.

<sup>265</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

<sup>266</sup> *Id.* at art. 16(3).

<sup>267</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701, reporters’ note 6 (1986).

The International Covenant on Civil and Political Rights (ICCPR),<sup>268</sup> a treaty ratified by the United States,<sup>269</sup> reaffirms the statements of UDHR and expands the notion by stating that all men and women have the right “to found a family,” which includes the right to live together.<sup>270</sup> Also, the American Convention on Human Rights signed by the United States in 1977<sup>271</sup> further directs that “[n]o one may be the object of arbitrary or abusive interference with his private life, his family, [or] his home. . . . Everyone has the right to the protection of the law against such interference or attacks.”<sup>272</sup>

### 1. *Substantive Right to Family Integrity*

These international laws and policies recognize the right to family integrity and association as a fundamental substantive right—a right that protects private family decisions, including the decision of where to live and who to live with.<sup>273</sup> Immigration law, by nature, is at tension with the fundamental right to family association because immigration law ultimately determines where someone can and cannot live legally.<sup>274</sup> Thus, many courts, including courts in the United States, struggle with how to uphold the right of family association during immigration enforcement.<sup>275</sup>

The European Court of Human Rights (ECHR) provides the most “developed body of international” law confronting the struggle between upholding the right to family integrity while still enforcing immigration laws.<sup>276</sup> The U.S. federal courts often rely on ECHR’s application on international law as authority “indicative of the customs and usages of civilized nations.”<sup>277</sup> Therefore, the United States should consider the ECHR’s approach to handling the struggle.

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<sup>268</sup> International Covenant on Civil and Political Rights (ICCPR), Sept. 8, 1992, 999 U.N.T.S. 171.

<sup>269</sup> 138 CONG. REC. 8070 (1992).

<sup>270</sup> ICCPR, *supra* note 268, at art. 23(1).

<sup>271</sup> American Convention on Human Rights: “Pact of San Jose, Costa Rica,” Nov. 22, 1969, 1144 U.N.T.S. 144, *available at* <http://www.oas.org/juridico/english/treaties/b-32.html>.

<sup>272</sup> *Id.* at art. 11.

<sup>273</sup> Universal Declaration of Human Rights, *supra* note 265, at art. 16(3); ICCPR *supra* note 268, at art. 23(1)–(2).

<sup>274</sup> See Thronson, *You Can’t Get Here*, *supra* note 30, at 59.

<sup>275</sup> See Kadidal, *supra* note 255, at 515, 519.

<sup>276</sup> *Id.* at 519.

<sup>277</sup> *Id.*; *Fernandez v. Wilkinson*, 505 F. Supp. 787, 797 (D. Kan. 1980).

The ECHR decides immigration removal cases by utilizing a “proportionality principle.”<sup>278</sup> In removal cases, ECHR courts acknowledge immigrants’ rights to family integrity by considering in each case whether interference with a particular family’s life would be “disproportionate” to the public interest being protected.<sup>279</sup> The ECHR recognizes that family separation is so burdensome on individuals that “the state may justify it only with the strongest of countervailing interests.”<sup>280</sup>

In *Moustaquim v. Belium*,<sup>281</sup> a European court found that removal of a Moroccan national boy at age twenty-one, who was guilty of several petty criminal charges, would be disproportionate when weighed against his strong family ties.<sup>282</sup> The boy lived in Belgium since age two with his parents and seven siblings.<sup>283</sup> He had no links to Morocco and was educated entirely in the French language.<sup>284</sup> In addition to the ECHR standard, the Human Rights Watch examined the immigration policies and laws of sixty-one countries.<sup>285</sup> Fifty-two of the sixty-one countries examined require a weighing of family ties prior to removal of an immigrant from their country.<sup>286</sup> Yet, the United States requires no weighing of family ties in removal proceedings.<sup>287</sup>

## 2. *Procedural Right Against Arbitrary Interference with Family Integrity*

The right against arbitrary interference with family integrity and association is also a procedural right recognized by international law.<sup>288</sup> Although the United States has not weighed in on application of the international substantive right to family integrity and association in regards to removal of noncitizens, the United States courts have addressed the

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<sup>278</sup> Kadidal, *supra* note 255, at 515, 519.

<sup>279</sup> *Id.* at 519.

<sup>280</sup> *Id.* at 515.

<sup>281</sup> 193 Eur. Ct. H.R. (ser. A) (1991), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionId=42282660&skin=hudoc-en>.

<sup>282</sup> *Id.* at 8, 20.

<sup>283</sup> *Id.* at 8, 19.

<sup>284</sup> *Id.* at 19.

<sup>285</sup> HUMAN RIGHTS WATCH, *supra* note 21, at 49–50.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> American Convention on Human Rights, *supra* note 271, at art. 17.

procedural right.<sup>289</sup> In a series of appeals coming out of the United States Second Circuit Court of Appeals, immigrants challenged States' arbitrary interference with their right to family integrity and association.<sup>290</sup> These immigrants with U.S. citizen children and spouses faced removal from the United States without a hearing that allowed for consideration of the burden on the immigrants' families.<sup>291</sup>

In *Beharry v. Reno*,<sup>292</sup> the court held the removal of a long-term alien "without allowing him to present the reasons he should not be deported violates the ICCPR's guarantee against arbitrary interference with one's family, and the provision that the alien shall be allowed to submit the reasons against his expulsion."<sup>293</sup> However, in 2005 the Second Circuit rejected the argument that international law warranted relief from removal proceedings when removal would burden a family's unity.<sup>294</sup> No other U.S. court has followed the district court analysis in *Beharry*.<sup>295</sup> Thus, the Supreme Court and other circuits currently remain silent on whether removal proceedings not allowing for consideration of the family violate an immigrant's procedural right against arbitrary interference with family integrity.<sup>296</sup>

### 3. *The Child's Right to Consideration of the Child's Best Interests*

Despite the lack of consideration for family integrity in removal proceedings in the United States and the Second Circuit's rejection of removal as an arbitrary interference with family integrity, the Convention

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<sup>289</sup> See generally *Guaylupo-Moya v. Gonzales*, 423 F.3d 121 (2d Cir. 2005) (disregarding family's substantive rights in deportation proceeding); *Oliva v. U.S. Dep't of Justice*, 433 F.3d 229 (2d Cir. 2005) (disregarding family's substantive rights in deportation proceeding); *Beharry v. Reno*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002), *rev'd on other procedural grounds*, *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003) (reversing on procedural grounds and disregarding the family's substantive rights during a deportation hearing).

<sup>290</sup> See *Guaylupo-Moya*, 423 F.3d at 124; *Oliva*, 433 F.3d at 30; *Beharry*, 183 F. Supp. 2d at 592.

<sup>291</sup> See *Guaylupo-Moya*, 423 F.3d at 125, 127; *Oliva*, 433 F.3d at 230–31; *Beharry*, 183 F. Supp. 2d at 592.

<sup>292</sup> 183 F. Supp. 2d 584 (E.D.N.Y. 2002), *rev'd on other procedural grounds*, *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003).

<sup>293</sup> *Id.* at 604.

<sup>294</sup> *Guaylupo-Moya*, 423 F.3d at 136; *Oliva*, 433 F.3d at 235.

<sup>295</sup> HUMAN RIGHTS WATCH, *supra* note 21, at 65.

<sup>296</sup> See *id.*

on the Rights of the Child (CRC)<sup>297</sup> calls for protection of families beyond the family's right to integrity.<sup>298</sup> The CRC provides, "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."<sup>299</sup> The CRC also requires countries to "ensure that a child [will] not be separated from his or her parents against [the parent's] will [unless] separation is necessary for the best interests of the child."<sup>300</sup>

The CRC was signed but not ratified by the United States because of disagreements over specific issues relating to abortion and juvenile justice but not because of disagreement over the treaty's central provisions.<sup>301</sup> "[E]very other nation except Somalia . . . has ratified the CRC."<sup>302</sup> Thus, "the CRC should be read as customary international law."<sup>303</sup> The CRC requires the government to view the child as a party to removal cases involving immigrant parents rather than simply a "stand-alone dispute" between the immigrant parent and the government.<sup>304</sup> Following the CRC, the INA must be read as a violation of "the principles of customary international law . . . [because] the best interests of the child . . . [are not] considered where possible."<sup>305</sup>

#### *B. Constitutional Call for Family Preservation*

Similar to international norms, national norms also treat a "person," as opposed to a "citizen," as entitled to certain fundamental protections.<sup>306</sup> The Declaration of Independence directs the federal government to recognize "that all men . . . are endowed by their Creator with certain unalienable Rights,"<sup>307</sup> and the Constitution acknowledges that "[n]o person shall . . . be deprived of life, liberty, or property, without due

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<sup>297</sup> Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (ratified Sept. 2, 1990).

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* at art. 3(1).

<sup>300</sup> *Id.* at art. 9(1).

<sup>301</sup> Kadidal, *supra* note 255, at 522.

<sup>302</sup> *Beharry v. Reno*, 183 F. Supp. 2d 584, 596 (E.D.N.Y. 2002).

<sup>303</sup> *Id.* at 601.

<sup>304</sup> Kadidal, *supra* note 255, at 523.

<sup>305</sup> *Beharry*, 183 F. Supp. 2d at 604.

<sup>306</sup> See discussion *supra* Parts IV.A–IV.B.

<sup>307</sup> THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

process of law.”<sup>308</sup> Thus, these protections apply “to all persons within the United States, including aliens, whether their presence [here] is lawful, unlawful, temporary, or permanent.”<sup>309</sup> The Supreme Court holds certain fundamental rights and liberty interests require “heightened protection against government interference,”<sup>310</sup> regardless of an individual’s immigration status.<sup>311</sup>

The Supreme Court explicitly recognized the right to family integrity and association as a fundamental right. In *Troxel v. Granville*,<sup>312</sup> the Supreme Court noted “the interest of parents in the care, custody, and control of their children” is a fundamental right requiring heightened protection.<sup>313</sup> In *Moore v. City of East Cleveland*,<sup>314</sup> the Court held the “right to live together as a family” is an important fundamental right deserving constitutional protection.<sup>315</sup> The Supreme Court reasoned, “[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”<sup>316</sup>

Stemming from this fundamental right to family integrity and association, parents with custodial rights are granted the “affirmative right to determine the country, city, and precise location where their child will live.”<sup>317</sup> For the best interests of individual family members, some families will make the choice to live together whereas other families will make the difficult choice to live apart. Nevertheless, the Court recognizes this is a private choice protected by the Constitution.<sup>318</sup> The government’s interference with this private choice must be justified by something more than a legitimate purpose.<sup>319</sup>

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<sup>308</sup> U.S. CONST. amend. V (emphasis added).

<sup>309</sup> *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001).

<sup>310</sup> *Rico v. Rodriguez*, 120 P.3d 812, 818 (Nev. 2005) (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion)).

<sup>311</sup> *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

<sup>312</sup> 530 U.S. 57 (2000) (plurality opinion).

<sup>313</sup> *Id.* at 65; *Rico*, 120 P.3d at 818 (quoting *Troxel*, 530 U.S. at 65).

<sup>314</sup> 431 U.S. 494 (1977) (plurality opinion).

<sup>315</sup> *Id.* at 500, 503 n.12.

<sup>316</sup> *Id.* at 503–04.

<sup>317</sup> *Gonzalez v. Gutierrez*, 311 F.3d 942, 949 (9th Cir. 2002) (emphasis omitted).

<sup>318</sup> *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>319</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion); *see also Plyler v. Doe*, 457 U.S. 202, 202 (1982) (asserting that the state interest in saving money and  
(continued)

However, immigration law acts as an exception to the fundamental right of family association as a private choice that usually requires heightened protection.<sup>320</sup> Immigration law often causes the forcible separation of a noncitizen immigrant from his citizen child or spouse.<sup>321</sup> Immigration law often takes the family's private choice away absent a compelling or important interest.<sup>322</sup> One may argue that ultimately the family, rather than the courts, will decide whether the parent is separated from the family by being removed from the country or whether the entire family will be removed from the country to prevent separation. Thus, heightened scrutiny need not apply. Nevertheless, immigration law forces this private choice upon the family due to the government's decision to remove the parent—a decision that rarely allows consideration of the family affected.<sup>323</sup> Such government interference of the fundamental right to family association must be subjected to a heightened scrutiny, especially when countless U.S. citizens are directly affected.<sup>324</sup>

The United States currently declines to accept the approach adopted by many other countries that mandates the consideration of the family in immigration removal proceedings to comply with the fundamental right to family association.<sup>325</sup> Various reasons are presented as to why immigration law can act as an exception to the constitutionally protected right to family association. Most fear consideration of the family would lead to an open door policy for individuals seeking citizenship.<sup>326</sup> Individuals could come into the country, give birth, and petition for citizenship, thus, creating a “loophole” in the immigration system.<sup>327</sup>

Nevertheless, courts could consider deliberate fraud (the possibility of an immigrant producing a child merely to obtain citizenship) during the

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detering illegal immigrants was *not important enough* to justify withholding a vital public function—education—from innocent children who could not be held responsible for the law breaking of their parents).

<sup>320</sup> See Thronson, *You Can't Get Here*, *supra* note 30, at 59.

<sup>321</sup> See *id.* at 59, 80.

<sup>322</sup> See *id.* at 59.

<sup>323</sup> See INA, 8 U.S.C. § 1182(h) (1990 & Supp. II 1991); *id.* § 1229(b) (2008 & Supp. I 2009).

<sup>324</sup> See *Troxel*, 530 U.S. at 60; *Moore v. City of E. Cleveland*, 431 U.S. 494, 504–05 (1977) (plurality opinion); *Stanley v. Illinois*, 405 U.S. 645, 646 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); see also *MOTOMURA*, *supra* note 172, at 158–59.

<sup>325</sup> See discussion *supra* Part IV.A.

<sup>326</sup> *Acosta v. Gaffney*, 558 F.2d 1153, 1157–58 (3d Cir. 1977).

<sup>327</sup> *Id.* at 1158.

immigration removal proceeding.<sup>328</sup> Furthermore, denying children and families consideration during immigration enforcement efforts seems a minor deterrent for preventing such a loophole.<sup>329</sup> First, parents decide “to have children for numerous reasons other than gaining favor in the immigration system.”<sup>330</sup> Second, the increased barriers placed on immigrant families in the 1996 legislation to obtaining citizenship through family relationships<sup>331</sup> resulted in only the increase and not decrease in the immigrant population.<sup>332</sup> Third, a more narrowly tailored means to achieve this purpose would be to eliminate birthright citizenship.<sup>333</sup> Therefore, fear of an open door policy for citizenship would fail the heightened scrutiny required for such governmental interference in the family’s fundamental right to remain together.<sup>334</sup>

Despite the current debates calling for recognition of the rights of immigrants and their U.S. citizen children, the 1996 immigration reform codified the government’s ability to interfere in legal and illegal immigrants’ family decisions, without ever considering how the family is affected.<sup>335</sup> This reform will continue to threaten the rights of immigrants and their families until the courts rule the act unconstitutional or repeal the act.<sup>336</sup> It is “[h]abit, rather than analysis [that] makes it seem acceptable and natural to distinguish between . . . alien and citizen . . . [and] that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the

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<sup>328</sup> See generally Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1683 (2007) (“Immigration Marriage Fraud Amendments of 1986 . . . subject couples married for less than twenty-four months to a more searching scrutiny than other couples experience.”).

<sup>329</sup> Thronson, *You Can’t Get Here*, *supra* note 30, at 84.

<sup>330</sup> *Id.*

<sup>331</sup> See *supra* text accompanying notes 124–27.

<sup>332</sup> Thronson, *You Can’t Get Here*, *supra* note 30, at 84.

<sup>333</sup> Alison M. Osterberg, Note & Comment, *Removing the Dead Hand on the Future: Recognizing Citizen Children’s Rights Against Parental Deportation*, 13 LEWIS & CLARK L. REV. 751, 780 (2009) (noting that “the law must be narrowly tailored to achieve the compelling government interests of deterring unlawful immigration and maintaining the integrity of the immigration scheme”).

<sup>334</sup> See *Troxel v. Granville*, 530 U.S. 57, 60 (2000) (plurality opinion); *Moore v. City of E. Cleveland*, 431 U.S. 494, 504–05 (1977) (plurality opinion); *Stanley v. Illinois*, 405 U.S. 645, 646 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); see also MOTOMURA, *supra* note 172, at 158–59.

<sup>335</sup> See Joppke, *supra* note 34, at 43–44.

<sup>336</sup> See *id.*

classification is being made.”<sup>337</sup> Discrimination is never a legitimate purpose to deny individuals their fundamental right to family association.<sup>338</sup>

#### V. POSSIBILITIES FOR IMMIGRATION REFORM

Current immigration law disregards the long held historical policy of preserving families.<sup>339</sup> Current immigration law destabilizes mixed-status families.<sup>340</sup> Current immigration law violates global international norms.<sup>341</sup> Current immigration law acts as an exception to the fundamental constitutional principal of protection of family integrity.<sup>342</sup> Therefore, Congress must reform current immigration law to provide protection to U.S. citizens and their families. Congressman John Conyers remarked immigration law must “restore fairness to the immigration process. . . . No one here is looking to give immigrants a free ride, just a fair chance.”<sup>343</sup> Instead of taking a “one size fits all” approach to removal proceedings, U.S. immigration law needs to provide more room for consideration of families affected by immigration enforcement.<sup>344</sup>

Human Rights Watch proposed several amendments to the INA to:

- (1) restore hearings to weigh an immigrant’s connections to the US, especially their family relationships, in deciding whether someone should be deported;
- (2) ensure that refugees who would likely face persecution upon return are allowed to remain in the US as long as they have not committed a particularly serious crime and do not pose a danger to the community of the United States; and
- (3) amend definitions in the current law to ensure that immigrants are not deported for minor (especially non-violent) offenses or for offenses that were not grounds for deportation at the time they were committed.<sup>345</sup>

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<sup>337</sup> *Mathews v. Lucas*, 427 U.S. 495, 520–21 (1976) (Stevens, J., dissenting).

<sup>338</sup> *Id.* at 520 n.3.

<sup>339</sup> See discussion *supra* Part II.

<sup>340</sup> See discussion *supra* Part III.

<sup>341</sup> See discussion *supra* Part IV.A.

<sup>342</sup> See discussion *supra* Part IV.B.

<sup>343</sup> HUMAN RIGHTS WATCH, *supra* note 21, at 36.

<sup>344</sup> See *id.* at 46.

<sup>345</sup> *Id.* at 82.

Also, between 1999 and 2007, several U.S. legislators proposed bills to fix some of the problems caused for noncitizens with close family ties.<sup>346</sup> Unfortunately, none on these bills were passed into law.<sup>347</sup>

Currently, the United States denies immigrants' families and children consideration in immigration removal proceedings.<sup>348</sup> This article suggests a moderate reform in immigration law to restore consideration of the family in removal proceedings, which Congress eliminated by the 1996 reform. This moderate reform would allow U.S. citizen children of undocumented immigrants to be parties to the undocumented parent's immigration case. As a party to the case, the immigration judge must consider the child's best interests. Section 1229b(b) of the INA as codified in the United States Code (U.S.C.) could be amended by adding at the end:

(7) Special Rule for U.S. Citizen Children

Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if

(A) the alien is the parent of a child who is a citizen of the United States and

(B) removal is clearly against the best interests of the child.

The section could also include certain criminal offenses that would automatically eliminate the child's best interest from consideration in order to maintain public safety. For guidance in determining the child's best interest, immigration judges could look to state statutes and state case law determining the child's best interest in domestic matters.

Besides simply considering the family during removal proceedings, the United States immigration law could also consider the mixed-status family during visa distribution. Congress could limit the possibility of immigration enforcement efforts causing families to choose between

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<sup>346</sup> H.R. 5035, 109th Cong. (2006); H.R. 213, 110th Cong. (2007); H.R. 4966, 106th Cong. (2000); S. 3120, 106th Cong. (2000); S. 173, 106th Cong. (1999); S. 871, 106th Cong. (1999).

<sup>347</sup> See H.R. 5035, 109th Cong. (2006); H.R. 213, 110th Cong. (2007); H.R. 4966, 106th Cong. (2000); S. 3120, 106th Cong. (2000); S. 173, 106th Cong. (1999); S. 871, 106th Cong. (1999).

<sup>348</sup> HUMAN RIGHTS WATCH, *supra* note 21, at 5.

family separation and family removal by providing a more direct route for parents with U.S. citizen children to obtain legal status. Section 1153(a)(4) of the INA as codified in the U.S.C. could be amended by replacing the brothers and sisters family preference with:

(4) Parents of citizen children

Qualified immigrants who are the parents of citizens of the United States, if such citizens are at least 3 years of age and not over 21 years of age, shall be allocated visas in a number not to exceed 65,000, plus any visas not required for the classes specified in paragraphs (1) through (3).

Society generally promotes keeping parents and children together.<sup>349</sup> Thus, immigration law should provide consideration for the parent-child relationship during the visa distribution process. The combination of these two amendments would limit the number of families forced to decide between separation and removal by (1) providing families a route to acquire the same citizenship status and (2) providing families a defense to the removal proceedings.

## VI. CONCLUSION

The government does not need to grant immigrants with strong family ties automatic citizenship status. Nevertheless, the United States must consider these family ties, especially in immigration removal proceedings. The historical policies behind immigration law call for greater consideration of family ties.<sup>350</sup> The destabilization of mixed-status families in the United States calls for greater consideration of family ties.<sup>351</sup> International norms on the treatment of families call for greater consideration of family ties.<sup>352</sup> Individuals' fundamental rights to family integrity and association call for greater consideration of family ties.<sup>353</sup>

Immigration law should not force families—comprised of U.S. citizen husbands, wives, sons, and daughters—to decide between separation and removal of the entire family to a foreign location. As Congressman Jose Serrano remarked, “I have trouble believing that any American would

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<sup>349</sup> *Id.* at 57–58.

<sup>350</sup> See discussion *supra* Part II.

<sup>351</sup> See discussion *supra* Part III.

<sup>352</sup> See discussion *supra* Part IV.A.

<sup>353</sup> See discussion *supra* Part IV.B.

support their government breaking up families, or orphaning children.”<sup>354</sup> However, immigration removal proceedings separated an estimated 1.6 million family members between 1997 and 2007.<sup>355</sup> The United States needs immigration reform and must require consideration of the family during immigration removal proceedings. Even for those who read the Constitution and international norms to not require consideration of family ties in immigration removal proceedings,<sup>356</sup> the question remains whether Congress *should* provide different procedures based on policy. The answer must be yes.

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<sup>354</sup> *100,000 Plus Citizen Children Find Parents Deported*, US FED. NEWS, Apr. 13, 2009.

<sup>355</sup> HUMAN RIGHTS WATCH, *supra* note 21, at 6.

<sup>356</sup> *See id.* at 46.