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## ARTICLES

### DIVIDING LIVES: HOW DEPORTING LEGAL AND ILLEGAL IMMIGRANTS WITH UNITED STATES-BORN CHILDREN IS SEPARATING FAMILIES AND WHY UNITED STATES AND INTERNATIONAL LAWS ARE FAILING FAMILIES

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“People in California talk about the ‘illegals,’ [b]ut there was always an illegality to immigration. It was a rude act, the leaving of home.... Immigrants must always be illegal. Immigrants are always criminals. They trespass borders and horrify their grandmothers. But they are also our civilization’s prophets. They, long before the rest of us... they saw the hemisphere whole.”  
- Richard Rodriguez<sup>1</sup>

Deportation. Separation. These two words have become increasingly intertwined in the world of immigrants, both legal and illegal, in the United States throughout the past several decades. Families with mixed immigration status, where one parent or both parents are illegal immigrants but the children are lawful United States-born citizens, are now facing their worst fears as shifts in United States law have led to more family separations than ever before. These new laws have made deportation mandatory for the commission of a large array of crimes.<sup>2</sup> Additionally, they have made it more difficult for an immigrant with legal status to bring in his or her family members.<sup>3</sup> The end result of the United States

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1. PAUL SPICKARD, ALMOST ALL ALIENS: IMMIGRATION, RACE, AND COLONIALISM IN AMERICAN HISTORY AND IDENTITY 429 (2007).

2. See Aaron G. Leiderman, Note, *Preserving the Constitution’s Most Important Human Right: Judicial Review of Mixed Questions Under the REAL ID Act*, 106 COLUM. L. REV. 1367, 1369–70 (2006); see generally Jennifer M. Chacon, *Unsecured Borders: Immigration Restrictions, Crime Control, and National Security*, 39 CONN. L. REV. 1827, 1841–48 (2007).

3. See Emma O. Guzmán, Comment, *The Dynamics of the Illegal Immigration Reform and Immigrant*

government's new immigration regime is the separation of families for extended periods of time, or sometimes indefinitely.<sup>4</sup> In a country where family values are held in high esteem, these new laws run counter to the very core of protections for American families.<sup>5</sup>

This Article explores the current immigration laws causing mixed immigration status families to become separated and analyzes what the role of the United States government should be in solving this crisis. Part II discusses the current crisis occurring when families are separated due to factors such as deportation. Part III analyzes the changes brought by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")<sup>6</sup> and how these changes have negatively impacted immigrant families. Part IV examines the increasing number of deportations due to changes in the penalties for crimes committed by immigrants. Part V explores the legal protections for families available under the United States Constitution, decisions of the Supreme Court of the United States, and applicable international laws. Finally, Part VI provides an analysis of what the United States government should do to remedy this situation and provide relief to families facing separation.

#### I. DIVIDING LIVES: THE IMPACT OF SEPARATING FAMILIES

The influx of illegal immigrants into the United States in recent years has been the source of much controversy politically, socially, and economically. The Department of Homeland Security estimated that as of January 2006, nearly twelve million unauthorized immigrants were living within the borders of the United States.<sup>7</sup> Of these millions, almost 4.2 million entered the United States after the year 2000 and an estimated 6.6 million came from Mexico.<sup>8</sup> In addition, approximately "three million American-born children have at least one parent who is an illegal immigrant[, and] one in [ten] American families has mixed immigration status, meaning at least one member" of the family is an illegal immigrant.<sup>9</sup> These mixed immigration

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*Responsibility Act of 1996: The Splitting-Up of American Families*, 2 SCHOLAR 95, 95-98 (2000).

4. *See id.* at 99-103.

5. *See id.* at 100.

6. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1997).

7. MICHAEL HOEFER, NANCY RYTINA & CHRISTOPHER CAMPBELL, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2006 1, available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ill\\_pc\\_2006.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pc_2006.pdf) (last visited Feb. 9, 2009).

8. *Id.*

9. Monica Rhor, *Immigrant Raids Split Families, Leaving U.S.-Born Children Behind*, N. COUNTY TIMES (Cal.), Mar. 11, 2007, <http://www.nctimes.com/articles/2007/03/12/news/state/31107184025.txt>

status families are at the center of a contested debate, as they raise humanitarian issues when government authorities seek to split these families apart. Part of this crisis arises because “[c]hildren born in the [United States] are... American citizens and are not subject to deportation.”<sup>10</sup> Unfortunately, however, these American-born children might have one or both parents who are foreign-born illegal immigrants who can be, and often are, deported.<sup>11</sup> The regrettable side effect of this situation is that, under United States law, when one or both parents are deported it leaves “[t]oddlers stranded at day care centers or handed over to ill-equipped relatives” or even left in the care of older siblings.<sup>12</sup> In addition to deportation’s role in separating families, the new requirements established by the IIRIRA also further the separation of families with mixed immigration status.<sup>13</sup>

Although the statistics are overwhelming, the unfortunate fact remains that immigration involves human stories, not just faceless numbers. For example, the United States Immigration and Naturalization Service (“INS”) ordered Rosario Hernandez deported back to his native Mexico in 2001.<sup>14</sup> Hernandez, a thirty-nine-year-old construction worker, had immigrated to Texas when he was a teenager.<sup>15</sup> The INS called for Hernandez’s deportation because “he had been convicted three times for driving while intoxicated—twice nearly twenty years ago and once ten years later.”<sup>16</sup> He served five weekends in jail after his third conviction, but joined Alcoholics Anonymous and became sober.<sup>17</sup>

Due “to laws passed by Congress in 1996[,] the multiple convictions amounted to an ‘aggravated felony’ and made his removal mandatory, not subject to review by a judge.”<sup>18</sup> Although Hernandez’s deportation was unfortunate for him personally, it also affected his family—a wife who was a United States citizen and two children who were also United States citizens by birth.<sup>19</sup> His wife poignantly stated at the time, “What people don’t realize is that this was a surprise attack on my life, as well. We have

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(last visited Feb. 9, 2009).

10. *Id.*

11. *See id.*

12. *Id.*

13. *See id.*

14. MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 1 (2004).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

a baby here whose whole person is forming. He changes every day, and you want both parents to be a part of that.”<sup>20</sup>

Hernandez’s story is a familiar one to many mixed immigration status families living in the United States. For Elvira Arellano, who has a United States-born eight-year-old son, the risk of deportation without her son caused her to hide in a Chicago church for a year.<sup>21</sup> Immigration and Customs Enforcement (“ICE”) officials located Arellano when she left the church and deported her to Mexico without her son, whom she left in Chicago with her pastor’s family.<sup>22</sup> News outlets nationwide are beginning to highlight similar stories of illegal immigrants seeking sanctuary in religious organizations.<sup>23</sup> Although seeking sanctuary is a temporary measure to keep families together, it is not permanent and it does not allow illegal immigrant parents to provide for their families or seek a permanent solution.

The above examples are just two stories of the millions of immigrants in the United States whose families face separation because of deportation. Before contemplating a solution to this problem, it is important to look at the legislation that has been implicated as one of the main causes of this crisis: the IIRIRA.

## II. THE IMPACT OF THE IIRIRA

Before discussing the impact of deportation on the separation of mixed immigration status families, it is important to discuss how Congress has separated families through legislation. The rise in the number of families separated due to an illegal immigrant family member is linked to the enactment of the IIRIRA.<sup>24</sup> In particular, the IIRIRA considerably affected three sections of the Immigration and Nationality Act of 1952 (“INA”):<sup>25</sup> INA section 212(a)(4),<sup>26</sup> INA section 212(a)(9),<sup>27</sup> and INA section 245(i).<sup>28</sup>

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20. *Id.*

21. *Illegal Immigrant Mother of U.S.-Born Boy Deported to Mexico*, N. COUNTY TIMES (Cal.), Aug. 21, 2007, [http://www.nctimes.com/articles/2007/08/21/news/top\\_stories/1\\_03\\_058\\_20\\_07.txt](http://www.nctimes.com/articles/2007/08/21/news/top_stories/1_03_058_20_07.txt) (last visited Feb. 9, 2009).

22. *Id.*

23. *See id.*

24. Guzmán, *supra* note 3, at 100.

25. *Id.*; *see* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

26. Guzmán, *supra* note 3, at 101; *see* INA § 212(a)(4), 8 U.S.C. § 1182(a)(4) (2006).

27. Guzmán, *supra* note 3, at 101–02; *see* INA § 212(a)(9), 8 U.S.C. § 1182(a)(9) (2006).

28. Guzmán, *supra* note 3, at 102; *see* INA § 245(i), 8 U.S.C. § 1255(i) (2006).

A. INA Section 212(a)(4)

The first of the three affected sections is INA section 212(a)(4), which relates to “a sponsor’s income affidavit which must be presented to the INS when petitioning for an alien.”<sup>29</sup> The IIRIRA amended this section in 1996, thereby increasing “the income requirement that a sponsor must meet in order to petition for someone else” from 100 percent to 125 percent of the poverty level.<sup>30</sup> As a result of this increase, very few individuals are capable of meeting the affidavit requirements, as immigrants often earn lower wages.<sup>31</sup> As a result of their inability to meet the income requirements, many immigrants are unable to sponsor family members, leading to a separation of these families.<sup>32</sup>

An immigrant applying for residency in the United States through the family-based preference must show that he or she is not a public charge.<sup>33</sup> “Since the 1880s, Congress prohibited the entry of immigrants who were ‘unable to take care of himself or herself without becoming a public charge.’”<sup>34</sup> If the INS believes that an individual is a public charge, the INS can reject his or her petition for residency.<sup>35</sup> “In order to provide a clear basis of who is, or who may become, a public charge, Congress provides factors which allow a person to show that she is not and will not become a public charge.”<sup>36</sup> “In determining whether a person is a public charge under [the] IIRIRA, several factors are taken into account,” including “age, health, family status, assets, resources, financial status, and education skills.”<sup>37</sup> If an immigrant cannot meet these requirements, however, he or she can “produce an affidavit of support from a sponsor who attests that [he or] she will provide for the applicant.”<sup>38</sup>

“Prior to the 1996 [IIRIRA reform], [a] sponsor need only show that [he or] she [could] provide for the immigrant” and prevent him or her from

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29. Guzmán, *supra* note 3, at 101.

30. *Id.* & n.21.

31. *Id.* at 101.

32. *See id.*

33. *Id.* at 125. A “public charge” is someone who becomes a burden on the United States after being admitted into the country. 8 U.S.C. § 1182 (2006).

34. Guzmán, *supra* note 3, at 126 (citing STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 316 (2d ed. 1997) (internal citations omitted)).

35. *Id.* at 125.

36. *Id.*

37. *Id.* at 126.

38. *Id.*

“becom[ing] a public charge.”<sup>39</sup> IIRIRA’s adoption, however, altered provisions regarding affidavits of support.<sup>40</sup> One of the changes is that “sponsors now have to meet 125 [percent] of the poverty level for [their] family as well as the [immigrant]’s family.”<sup>41</sup> “This affidavit is... a legally binding contract[, and] [i]t may be enforced by the [immigrant],... the federal government, or... any state.”<sup>42</sup> If the immigrant requires “any public assistance... , the sponsoring party will be held liable for any amount the [immigrant] receives[, and] [t]he sponsoring party will... have to repay that money to the state.”<sup>43</sup> “The affidavit is binding until the [immigrant] becomes a citizen (with a minimum of three to five years as a legal permanent resident) or has worked for forty qualifying quarters according to the Social Security Administration (at least ten years).”<sup>44</sup>

This reform raises a number of issues for potential immigrants, as it gravely affects families with mixed immigration status. For instance, a family might have one parent living in the United States and be unable to sponsor the other parent or children to come to the United States because the family does not meet the income requirement.<sup>45</sup> Thus, those immigrants not meeting threshold income levels cannot serve as sponsors, which results in a separation of mixed immigration status families.<sup>46</sup>

When considering these affidavits, the INS only considers the income and assets of the sponsor, not the income or assets of the immigrant.<sup>47</sup> “Although [immigrants] will likely work once authorized, their potential income is not taken into account in regard to the affidavit of support.”<sup>48</sup> This can be particularly problematic in situations where “a female permanent resident is petitioning for her [immigrant] husband” and “only her income, and not the earning potential of her husband,” is taken into account.<sup>49</sup> “Since studies have shown that females earn less than males, the likelihood that the wife alone will earn enough to meet the 125% poverty level is lower than that of males.”<sup>50</sup> Further compounding this problem is

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39. *Id.* (referencing INAsss 213A, 8 U.S.C. § 1183a (2006)).

40. *Id.*

41. *Id.* It should be noted, however, that the sponsor does not have to earn more than 125 percent of her income alone, but can also use assets to meet the requirement. *Id.*

42. *Id.* at 127.

43. *Id.*

44. *Id.*

45. *Id.* at 128. For example, “more than half of Hispanic families earn less than [fifteen thousand dollars] a year.” *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 128–29.

the fact that although the INA does provide for waivers allowing an individual to satisfy a section he or she would not otherwise satisfy, “INA section 212(a)(4) does not allow a waiver for those who are unemployed or fail to obtain an affidavit of support.”<sup>51</sup>

Families were unable to meet the prior 100 percent poverty requirement, and the new standard of 125 percent is even harsher.<sup>52</sup> “With immigrant families earning less than an American requirement, many families will not be able to meet the requirement.”<sup>53</sup> Without the ability to meet the income requirement, an immigrant living legally in the United States is now unable to sponsor his or her family members, and as a result, the family might be separated for a lengthy period of time—or even indefinitely.

#### B. INA Section 212(a)(9)

The second section affected is section 212(a)(9) of the INA, which sets a strict punishment for immigrants who reside in the United States without proper documentation.<sup>54</sup> This section essentially creates additional bans to admission of immigrants into the United States.<sup>55</sup> To establish the length of an immigrant’s residency in the United States, the INS determines the date an immigrant entered the United States and the date an immigrant left.<sup>56</sup> Then, the INS investigates what portion of the immigrant’s residency in the United States occurred without proper documentation.<sup>57</sup> If an individual was present “in the United States [either] unlawfully, or [lacking] proper documentation, for longer than [one hundred eighty] days but less than one year[, that person] will be barred for three years from applying for permanent residency status,” even if he or she would otherwise be eligible to apply.<sup>58</sup> In addition, section 212(a)(9) imposes a ten-year bar on applications for permanent residency status from individuals unlawfully present for a year or more.<sup>59</sup>

Thus, as a result of section 212(a)(9), “[f]or the first time, a potential immigrant who accumulated designated periods of ‘unlawful presence’ is barred from admission into the United States from outside the country.”<sup>60</sup>

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51. *Id.* at 129.

52. *Id.* at 130.

53. *Id.*

54. *See id.* at 121–22.

55. *Id.* at 121.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 102, 121–22.

60. *Id.* at 101–02 (quoting 8 U.S.C. § 1182(a)(9) (2006)).

This immigration bar cannot be waived, “even if the [would-be immigrant] becomes eligible for a visa in the interim.”<sup>61</sup> “Section 212(a)(9) applies to [anyone] in the United States who is currently out of status.”<sup>62</sup> This section effectively “acts as a punishment for those who are in the [United States] illegally.”<sup>63</sup> The end result is a system in which families, where the mother, father, or children lived illegally in the United States for extended periods of time, will be separated.<sup>64</sup> “Those families have no recourse but to separate or return as a family to their native country.”<sup>65</sup>

The Ninth Circuit, in the case of *Salcido-Salcido v. INS*,<sup>66</sup> asserted the Board of Immigration Appeals (“BIA”) “abused its discretion because it failed to consider the hardship to [Tomasa Salcido-Salcido] and her [United States-born] children if they are separated because of Salcido’s deportation to Mexico.”<sup>67</sup> Salcido, a thirty-three-year-old Mexican native, appealed to the Ninth Circuit after an immigration judge denied her request for a suspension of deportation because it “would result in ‘extreme hardship’ to herself, her permanent resident husband, and her two [United States] citizen children.”<sup>68</sup> Had the Ninth Circuit not ruled in her favor, Salcido “would have been barred, for ten years, from obtaining legal permanent residen[t] [status] because she had been in the United States without the proper documentation for longer than one year.”<sup>69</sup> The Ninth Circuit stressed the importance of preventing family separation in its decision when it stated that “[t]he most important single [hardship] factor may be the separation of the [immigrant] from a family living in the United States” and reversed the immigration judge’s decision.<sup>70</sup> The court further stated, “while an [immigrant] ‘cannot gain a favored status by the birth of a citizen child,’ ‘[t]he hardship to a citizen or permanent resident child may be sufficient to warrant suspension of the parent’s deportation.’”<sup>71</sup> The court also said that “[w]hen the BIA fails to give ‘considerable, if not predominant, weight’ to

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61. *Id.* at 102.

62. *Id.* at 122.

63. *Id.* In fact, “[d]uring the enactment of [section] 212(a)(9), Congressman Lemar Smith, from Texas, stated that the United States needed to hold [immigrants] accountable for violating the immigration laws by overstaying their non-immigrant visas.” *Id.*

64. *Id.*

65. *Id.*

66. 138 F.3d 1292 (9th Cir. 1998).

67. *Id.* at 1293.

68. *Id.*

69. Guzmán, *supra* note 3, at 122–23.

70. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)).

71. *Id.* (quoting *Ramirez-Durazo v. INS*, 794 F.2d 491, 498 (9th Cir. 1986); *Cerrillo-Perez v. INS*, 908 F.2d 1419, 1422 (9th Cir. 1987)).



the hardship that will result from family separation, it has abused its discretion.<sup>72</sup> This case is just one example among numerous cases where immigrants would ordinarily qualify for visas, but section 212(a)(9) imposes a bar because of the immigrants' illegal presence in the United States.<sup>73</sup>

The section 212(a)(9) ban ultimately serves to separate families and keep them separated for an extended period of time.<sup>74</sup> Prior to the IIRIRA's 1996 adoption, "undocumented persons who had been [residing] in the United States could leave the country and petition for residency without any additional wait."<sup>75</sup> With the adoption of section 212(a)(9), an immigrant is required to return to his or her home country and wait for the specified number of years—three or ten—before he or she can petition for a visa.<sup>76</sup> Due to the immigration backlog, he or she might have to wait between thirteen and twenty years or more, which means families are separated for extended periods of time.<sup>77</sup>

### C. INA Section 245(i)

The third IIRIRA reform that gravely affects immigrants with mixed immigration status families is the repeal of section 245(i), "which allowed qualification under 245 of those who would be barred due to their illegal entry."<sup>78</sup> "Section 245 was originally enacted in 1952... to facilitate [individuals' attempts to] obtain[] visas... and to circumvent the requirement that [immigrants] return to their native country before gaining admission to the United States as a legal permanent resident."<sup>79</sup> Essentially, under section 245, an illegal undocumented immigrant living in the United States could remain in the country while he or she obtained a visa.<sup>80</sup> While these individuals had to pay a fine of one thousand dollars and obtain adjustment of status, they did not have to leave the United States and return to their home countries to become legal citizens.<sup>81</sup> As part of the IIRIRA changes in 1996, this section was repealed and became effective on January

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72. *Id.* (quoting *Gutierrez-Centeno v. INS*, 99 F.3d 1529, 1533 (9th Cir. 1996)).

73. Guzmán, *supra* note 3, at 123.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 123–24.

79. *Id.* at 124.

80. *Id.*

81. *Id.*

14, 1998.<sup>82</sup>

As a consequence of the repeal, several problems arose for immigrants. “Many families [were] separated because they could not afford to pay the [one thousand dollar] penalty.”<sup>83</sup> “In different communities, composed of families with undocumented immigrants, applying for an adjustment of status for more than one person was impossible because of the expensive penalty[;] [t]herefore, these families would be required to separate because the adjustment could not be obtained.”<sup>84</sup> Section 245(i) does provide that a family can save money to pay the fine for family members; however, this essentially forces families “to prioritize which family member would receive the adjustment” at the expense of other family members.<sup>85</sup> Still, “[w]ithout this opportunity for immigrant families to remain together, they would simply have to separate, leave their children behind in the United States[,] and return to their home country.”<sup>86</sup>

### III. DEPORTATION

In addition to the changes brought about by the IIRIRA in terms of gaining residency status and sponsorship, there have also been changes in deportation laws. According to a report by the United States Department of Homeland Security, there were 1,206,457 deportable immigrants located within the United States in 2006.<sup>87</sup> According to ICE, over a twelve-month period ending on September 30, 2007, 164,000 criminals were involved in deportation proceedings—a stark increase from the 64,000 placed in deportation proceedings in 2006.<sup>88</sup> It is estimated that this number will rise to 200,000 throughout 2008.<sup>89</sup> This increase in deportation proceedings, and deportations generally, is the result of changes in the law relating to criminal conduct and immigration status for both legal and illegal immigrants.<sup>90</sup>

In 1996, Congress enacted two pieces of legislation changing the

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82. *Id.*

83. *Id.* at 124–25.

84. *Id.* at 125.

85. *Id.*

86. *Id.*

87. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SECURITY, 2006 YEARBOOK OF IMMIGRATION STATISTICS 91 (2007), available at [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/OIS\\_2006\\_Yearbook.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/OIS_2006_Yearbook.pdf).

88. Ernesto Londoño, *U.S. Steps Up Deportation of Immigrant Criminals*, WASH. POST, Feb. 27, 2008, at A1.

89. *Id.*

90. *Id.*

consequences of criminal convictions not only for illegal immigrants, but also for lawful permanent residents: the Antiterrorism and Effective Death Penalty Act (“AEDPA”)<sup>91</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”).<sup>92</sup> “Although lawful permanent residents had long been subject to deportation for criminal convictions, the 1996 laws make such deportation mandatory in large classes of cases.”<sup>93</sup> These new laws also require “that permanent residents convicted of [certain] crimes [be] automatically placed in detention [upon] completion of [their] criminal sentence[s].”<sup>94</sup> “The[se] new immigration laws increase the likelihood that a permanent resident will face mandatory deportation for any criminal conviction.”<sup>95</sup> “In addition, changes in criminal justice policies, Immigration and Naturalization Service (“INS”) enforcement policies, and the new mandatory detention system render the new laws far more unforgiving in practice than is apparent from their texts.”<sup>96</sup> “As a result, the new deportation [system] greatly increases the [possibility] that a [criminal] conviction... will result not only in criminal punishment, but also in exile and family separation.”<sup>97</sup> Essentially, “Congress has mandated the deportation of persons whose family members may all reside in this country, who may have grown up here, who may be needed for the emotional and financial support of minor children or elderly parents, or who may present other compelling equities that counsel against deportation.”<sup>98</sup>

Prior to the changes brought about in 1996, “the deportation laws relating to... permanent residents convicted of crimes operated as a two-step process.”<sup>99</sup> “The first step was to determine whether a person was deportable. The second step was to determine whether the person should be deported, based on all the facts and circumstances of the case.”<sup>100</sup> This second step allowed for the consideration of factors such as rehabilitation, how deportation would affect the family, and whether there were strong ties

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91. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1997) (codified in scattered sections of 8, 10, 22, 28, 40 & 42 U.S.C.).

92. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1997) (codified in scattered sections of 8 & 18 U.S.C.); see Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1936 (2000).

93. *Id.*

94. *Id.*

95. *Id.* at 1937.

96. *Id.*

97. *Id.*

98. *Id.* at 1938.

99. *Id.*

100. *Id.*

to the person's country of origin.<sup>101</sup> The 1996 deportation laws have essentially eliminated the second step and allow for an individual to be deported based on step one alone.<sup>102</sup> "As a result, it is now much more likely that a lawful permanent resident with only one conviction will be subject to deportation and that anyone subject to deportation will be barred from relief."<sup>103</sup>

The first relevant change that increases the likelihood of deportation is connected to "aggravated felonies."<sup>104</sup>

As the term is defined, a crime need not be either aggravated or a felony. For example, a conviction for simple battery or for shoplifting with a one-year suspended sentence—either of which would be a misdemeanor or a violation in most states—can be deemed an aggravated felony.<sup>105</sup>

"Under the [new] 1996 laws, a sentence of [only] one year is [now] sufficient to receive... aggravated felony status."<sup>106</sup> "Many of the crimes added to the aggravated felony definition fit within the broad immigration law category of 'crimes involving moral turpitude.'"<sup>107</sup> "For example, any crime with an element of fraud [now] falls into [the aggravated felony] category."<sup>108</sup> Additionally, under the pre-1996 laws, "a person convicted of shoplifting and given a suspended sentence was not [subject to] deporta[tion] unless he or she had two convictions...."<sup>109</sup> "Under the new laws, [however], the conviction results in mandatory deportation."<sup>110</sup> "For crimes that had previously been considered aggravated felonies, the new laws bar relief regardless of the length of the prison sentence or whether the person received any prison sentence at all."<sup>111</sup> The impact of this change is drastic, as a person convicted of the lowest level of controlled substance possession, which may not carry a prison sentence, now faces mandatory deportation.<sup>112</sup>

The second relevant change pertains to crimes committed within the first five to seven years of residence in the United States.<sup>113</sup> "During an

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101. *Id.* at 1938–39.

102. *Id.* at 1939.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 1940.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 1941.

immigrant's first seven years of residence, any crime that makes the person deportable stops the clock for counting continuous residence and therefore bars the person from relief from deportation, even if the conviction is a crime that would not otherwise bar relief."<sup>114</sup> Therefore, a crime such as simple possession of drugs would lead to mandatory deportation. Additionally, "during an immigrant's first five years of legal residence, any crime involving moral turpitude that *could* be punished by a sentence of one year is grounds for mandatory deportation, even if the person is sentenced to only probation or a fine."<sup>115</sup> These "provisions can be devastating for immigrant families because almost any infraction that occurs during the period of adjustment to life in the United States makes a legal permanent resident subject to mandatory deportation."<sup>116</sup>

These provisions can be especially distressing for those immigrating to the United States as a family unit and who might have a teenage child who gets convicted of shoplifting or another minor crime.<sup>117</sup> This teenage child would face an order to return to the country the family just emigrated from because of the mandatory deportation laws.<sup>118</sup> Even if this teenage child is not recognized by the INS after his or her conviction, "he or she will live under the threat of deportation for the rest of his or her life[] [b]ecause there is no statute of limitation on deportation proceedings...."<sup>119</sup> "[I]t will not matter when the INS chooses to enforce the law or how [long] that person has [lived] in the United States since [the commission of] the crime" because the only relevant factor considered by the INS is whether that person committed a crime within the first five or seven years of residence.<sup>120</sup>

The third relevant change relates to the definitions of the terms "conviction" and "sentence."<sup>121</sup> According to the BIA, "conviction... includes dispositions that are not treated as convictions by state law, such as expunged convictions."<sup>122</sup> "[T]he laws [also] provide that any reference to a term of imprisonment shall include any period of time that the sentence is suspended."<sup>123</sup> As a result, a suspended one-year sentence is treated as a one-year term of incarceration, despite its equivalence to one year of

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114. *Id.*

115. *Id.*

116. *Id.* at 1942.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

probation.<sup>124</sup>

These new mandatory deportation laws have a profound effect on the families of both legal and illegal immigrants. “Families are in crisis from the moment that the INS places a family member in detention. The family may now be without a breadwinner; the family members left behind may face eviction due to their inability to make mortgage or rent payments.”<sup>125</sup> The family may face indefinite separation upon finalization of the deportation process.<sup>126</sup> “As a legal matter, family members who are United States citizens may not be able, under the laws of their loved one’s former country, to immigrate to that country.”<sup>127</sup>

It might also “be impractical [or] difficult for the rest of the family to leave the United States[, as some of the] family members might have jobs, go to school, or have other strong ties to [the United States].”<sup>128</sup> “They [might also] have dependant elderly relatives... [or] have built a business in the United States....”<sup>129</sup> “Even if they are able to leave and immigrate to the native country of the deported family member, they would in effect experience deportation as well—they would be removed from the country that they consider their home and sent to another country to which they may have only attenuated connections or no connections at all.”<sup>130</sup>

“Deportation that results in the separation of parents from their minor children [who] are United States citizens... raises” an even more complicated issue.<sup>131</sup> “Our legal system generally observes the principle that children should be brought up by their parents, and it separates parents from their children only in cases of abuse or neglect.”<sup>132</sup> With mandatory deportation, however, “children may face permanent separation from parents who have fully served a criminal sentence, often on the basis of conduct that the criminal justice system treated as not warranting serious punishment.”<sup>133</sup>

These changes in the law effectuated an increase in the separation of immigrant families.<sup>134</sup> Separating families, however, runs counter to the

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124. *Id.*

125. *Id.* at 1951.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 1951–52.

131. *Id.* at 1953.

132. *Id.*

133. *Id.*

134. *Id.* at 1954.

fundamental American principle that families are an important and vital aspect of society.

#### IV. LEGAL PROTECTIONS FOR FAMILIES

Legal protections for families exist both in United States law and also in international law doctrines applicable in the United States. This section explores the protections under United States law, as well as international law, and seeks to provide an understanding of how these laws should counter the penalties created by the new immigration laws.

##### A. Protections for Families Under United States Law

The United States Constitution contains certain protections for families. The Supreme Court of the United States in *Meyer v. Nebraska*,<sup>135</sup> when interpreting the Fourteenth Amendment, held that the term “liberty,”

[w]ithout doubt... denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy these privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>136</sup>

The Court further stated, “[t]he established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.”<sup>137</sup> In addition, “[d]etermination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.”<sup>138</sup>

*Meyer* is one of the earlier cases in which the Supreme Court emphasized that the Constitution provides protections for families. Specifically, the Fourteenth Amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

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135. 262 U.S. 390 (1923).

136. *Id.* at 399 (internal citations omitted).

137. *Id.* at 399–400.

138. *Id.* at 400 (internal citations omitted).

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>139</sup>

Subsequent Court cases have upheld and expanded the interpretation of the Fourteenth Amendment utilized in *Meyer*. For example, in *Santosky v. Kramer*,<sup>140</sup> the Court stated that “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child” is protected by the Fourteenth Amendment.<sup>141</sup>

Additionally, in *Quilloin v. Walcott*,<sup>142</sup> the Court asserted, “[w]e have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.”<sup>143</sup> The Court further stated “[i]t is cardinal with us that the custody, care[,] and nurture of the child first reside in the parents, whose primary function and freedom include preparation for obligations the [S]tate can neither supply nor hinder.”<sup>144</sup> In terms of the Fourteenth Amendment specifically, the Court further stated, “it is now firmly established that ‘freedom of personal choice in matters of... family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.’”<sup>145</sup> The Court also declared that:

We have little doubt that the Due Process Clause would be offended “[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.”<sup>146</sup>

Finally, in *Wisconsin v. Yoder*,<sup>147</sup> the Supreme Court stated, “[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”<sup>148</sup>

It is clear the Court has determined that the Fourteenth Amendment

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139. U.S. CONST. amend. XIV, § 1.

140. 455 U.S. 745 (1982).

141. *Id.* at 753.

142. 434 U.S. 246 (1978).

143. *Id.* at 255.

144. *Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

145. *Id.* (quoting *Cleveland Bd. Of Educ. V. LaFleur*, 414 U.S. 632, 639–40 (1974)).

146. *Id.* (quoting *Smith v. Org. of Foster Families*, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring)).

147. 406 U.S. 205 (1972).

148. *Id.* at 232.



provides protection for families within the protections for liberty. It is also apparent the Court has determined that the family unit is an integral and important part of American culture and tradition and, as such, should be greatly protected.

In addition to the Fourteenth Amendment, the Fifth Amendment provides that “[n]o person shall be... deprived of life, liberty, or property, without due process of law...”<sup>149</sup> The Supreme Court in *Plyer v. Doe*,<sup>150</sup> stated that regardless of “his status under the immigration laws, an [immigrant] is surely a ‘person’ in any ordinary sense of that term. [Immigrants], even [immigrants] whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”<sup>151</sup> It has further been argued that “[b]ecause the right to parent has long been recognized as a fundamental right protected by the Due Process Clause, it is a right that is extended to everyone, including both legal and illegal immigrants, provided they are physically present in the country.”<sup>152</sup>

In *Mathews v. Diaz*,<sup>153</sup> the United States Supreme Court, citing *Wong Yang Sung v. McGrath*,<sup>154</sup> stated, “[t]here are literally millions of [immigrants] within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law.”<sup>155</sup> The Court further stated that “[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.”<sup>156</sup> It is clear from these cases that the Supreme Court intends for both the Fifth and Fourteenth Amendments’ due process clauses to apply to illegal immigrants.

The new immigration laws run counter to the protections for families found both in the United States Constitution, as well as case law. In addition to the national protections for families, there are several relevant international doctrines that also protect families.

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149. U.S. CONST. amend. V.

150. 457 U.S. 202 (1982).

151. *Id.* at 202 (internal citations omitted).

152. S. Adam Ferguson, Note, *Not Without My Daughter: Deportation and the Termination of Parental Rights*, 22 GEO. IMMIGR. L.J. 85, 92 (2007).

153. 426 U.S. 67 (1976).

154. 339 U.S. 33 (1950).

155. *Mathews*, 426 U.S. at 77 (citing *Wong Yang Sung*, 339 U.S. at 48–51).

156. *Id.* (internal citations omitted).

## B. Protections for Families Under International Law

There are several relevant international doctrines that provide protections for families in terms of protecting the family unit as well as protecting the right to have a domicile or residence.

### 1. International Covenant on Civil and Political Rights

The first relevant international doctrine is the International Covenant on Civil and Political Rights (“ICCPR”),<sup>157</sup> which was “adopted and opened for signature, ratification[,] and accession” by the General Assembly on December 16, 1966 and entered into force on March 23, 1976.<sup>158</sup> The United States signed the ICCPR on October 5, 1977 and ratified it on June 8, 1992.<sup>159</sup>

The first pertinent provision of the ICCPR is section one of Article Twelve, which provides that “[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”<sup>160</sup> Section two of Article Twelve further provides that “[e]veryone shall be free to leave any country, including his own.”<sup>161</sup> Article Thirteen, in conjunction with Article Twelve, states:

Any alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.<sup>162</sup>

Finally, section one of Article Twenty-three asserts that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>163</sup> This Article should be given a broad interpretation in order to protect family unity. Where family unity and limitations on immigration, which are implicit in Articles Twelve and

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157. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 52, U.N. GAOR, Supp. (No. 16), U.N. Doc. A/6316, 999 U.N.T.S. 171 (Mar. 23, 1976), available at [http://www.unchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unchr.ch/html/menu3/b/a_ccpr.htm).

158. *Id.*

159. UNITED NATIONS, TREATY COLLECTION ch. 4, § 4 (2008), <http://treaties.un.org/doc/Publication/MTDSG/VolumeI/ChapterIV/IV-4.en.pdf>.

160. International Covenant on Civil and Political Rights, *supra* note 157, at art. 12, § 1.

161. *Id.* at art. 12, § 2.

162. *Id.* at art. 13.

163. *Id.* at art. 23, § 1.

Thirteen, conflict, the ICCPR should be interpreted to uphold family unity. This expansive interpretation of Article Twenty-three would provide for family protection over immigration control, which would serve the goal of family rights under the ICCPR.

## 2. The Universal Declaration of Human Rights

The second relevant international doctrine is the Universal Declaration of Human Rights (“UDHR”),<sup>164</sup> which was adopted and proclaimed by the General Assembly of the United Nations on December 10, 1948 and articulated the “importance of rights which were placed at risk during the decade of the 1940s: the rights to life, liberty, and security of person; freedoms of expression, peaceful assembly, association, religious belief, and movement; and protections from slavery, arbitrary arrest, imprisonment without fair trial, and invasion of property.”<sup>165</sup> The UDHR also includes provisions protecting social, economic, and cultural rights.<sup>166</sup> The force of the UDHR is limited, however, due to “broad exclusions and the omission of monitoring and enforcement provisions.”<sup>167</sup> Despite its shortcomings, the UDHR is effective in laying out essential rights that human beings worldwide should be guaranteed, including relevant provisions regarding protections for family, residence, and asylum. In addition, the UDHR, including its provisions protecting families, has been declared “customary international law.”<sup>168</sup>

First, Article Two sets forth the broad applicability of the UDHR by stating, “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth[,] or other status.”<sup>169</sup> Article Two also asserts that “no distinction shall be made on the basis of the political, jurisdictional[,] or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing[,] or under any other

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164. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), available at <http://www.un.org/Overview/rights.html>.

165. DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS: LAW POLICY & PROCESS 9 (3d ed. 2001).

166. *Id.*

167. *Id.*

168. Ronald C. Slye, *Community Institution Building: A Response to the Limits of Litigation in Addressing the Problem of Homelessness*, 36 VILL. L. REV. 1035, 1043 (1991); Leonard Storchey, *The Right to Family Reunification in the Immigration Law of the Commonwealth Caribbean and the United States: A Comparative Study*, 7 TOURO INT'L L. REV. 177, 178 (1997).

169. Universal Declaration of Human Rights, *supra* note 164, at art. 2.

limitation of sovereignty.”<sup>170</sup>

Section one of Article Thirteen provides that “[e]veryone has the right to freedom of movement and residence within the borders of each state.”<sup>171</sup> Section two of Article Thirteen further provides that “[e]veryone has the right to leave any country, including his own, and to return to his country.”<sup>172</sup> In a similar vein, section one of Article Fourteen asserts, “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.”<sup>173</sup> Section two of Article Fourteen further states that “[t]his right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.”<sup>174</sup>

Section one of Article Sixteen provides, “[m]en and women of full age, without any limitation due to race, nationality[,] or religion, have the right to marry and to found family. They are entitled to equal rights as to marriage, during marriage[,] and at its dissolution.”<sup>175</sup> Furthermore, section three of Article Sixteen establishes that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>176</sup>

The provisions of the UDHR have been declared customary international law. As such, the provisions of the UDHR setting forth protections for family rights should be upheld and enforced to their fullest extent. In the United States, the new immigration laws are running counter to the familial rights provided for—and protected by—the UDHR.

### 3. International Covenant on Economic, Social, and Cultural Rights

The third relevant international law doctrine is the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”),<sup>177</sup> which was adopted and “opened for signature, ratification[,] and accession” by the General Assembly on December 16, 1966.<sup>178</sup> Although the ICESCR was adopted in 1966, the United States did not sign it until October 5, 1977 and

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170. *Id.*

171. *Id.* at art. 13, § 1.

172. *Id.* at art. 13, § 2.

173. *Id.* at art. 14, § 1.

174. *Id.* at art. 14, § 2.

175. *Id.* at art. 16, § 1.

176. *Id.* at art. 16, § 3.

177. International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), at 49, U.N. Doc. A/6316, 993 U.N.T.S. 3 (Jan. 3, 1976), available at [http://www.unhcr.ch/html/menu3/b/a\\_cesr.htm](http://www.unhcr.ch/html/menu3/b/a_cesr.htm).

178. *Id.*

has yet to ratify it.<sup>179</sup> The United States, as it holds itself out to be a world leader, should ratify this doctrine and further the development of human rights worldwide.

Although the effect of the ICESCR is limited in the United States because it has not been ratified, the ICESCR is still important for its relevant provisions related to the issue of immigration and family separation. The most relevant provision is section one of Article Ten, which asserts that “[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.”<sup>180</sup>

These international provisions place a strong value on the family unit, calling it the “fundamental group unit of society.”<sup>181</sup> Despite these international protections, the separation of families in the United States due to deportation and strict immigration laws is an ongoing crisis that needs resolution. As the next section will address, the United States should take into account family separation when conducting deportation proceedings to provide a balance between immigration laws and family rights, as well as to furnish an outlet for illegal immigrants to become legal citizens without harsh penalties.

#### V. THE GREAT BALANCING ACT: REGULATING IMMIGRATION WHILE PROTECTING FAMILIES

The separation of mixed immigration status families has become a crisis in the United States in recent years. United States Supreme Court decisions and the United States Constitution provide a great deal of protection to the family unit.<sup>182</sup> International laws also emphasize the importance of families.<sup>183</sup> Despite the protections for families, changes in immigration laws, criminal laws, and deportation laws affect not only illegal immigrants, but those with legal status as well. Although there is no easy solution to this crisis, there are actions the United States can take to alleviate the problems faced by mixed immigration status families.

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179. Office of the United Nations High Commissioner for Human Rights <http://www2.ohchr.org/english/bodies/ratification/3.html> (last visited Mar. 14, 2009).

180. International Covenant on Economic, Social, and Cultural Rights, *supra* note 177, at art. 10, § 1.

181. *Id.*

182. See U.S. CONST. amends. V & XIV; *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

183. See International Covenant on Civil and Political Rights, *supra* note 157.

A primary issue in this crisis is balancing a nation's right to control immigration with the protections that should be afforded families, and individuals in general, to seek a domicile or residence. "Although States have a legitimate power to control immigration and define their citizens and residents, they must also observe their international commitments through positive efforts aimed at keeping migrant families together."<sup>184</sup> This need to balance the interests of the State with the rights of the people has been a struggle since the founding of the United States.

Arguably, the need for more stringent immigration regulation is justified, especially when taking into account the need to ensure national security by preventing potential terrorists from entering the United States. In light of this changing political situation, the tightening of immigration laws seems justified. The issue of a fair and efficient system of review arises, however, when these immigration laws are utilized in situations where there clearly is no threat to national security and the outcome is the unfair separation of families.

As discussed in Section III, there was a two-step process for deportation proceedings. First the court would consider whether an individual was deportable, and then it would consider whether there were any mitigating factors, such as family hardship due to separation.<sup>185</sup> With the changes in the law brought about by the IIRIRA and also changes in the classification of aggravated felonies, this two-step analysis became a bright-line test of deportability alone.<sup>186</sup> Because the legislation is unlikely to undergo reform due to the unpopularity of protecting illegal immigrants, courts should return to a two-step analysis considering factors such as rehabilitation and family hardship before deciding to deport an individual.

Under the Fifth and Fourteenth Amendments, it is clear that citizens of the United States are afforded due process.<sup>187</sup> Further, the United States Supreme Court has held that due process rights are afforded to both legal and illegal immigrants.<sup>188</sup> As a result, illegal immigrants should be entitled to the same due process rights and equal protection of the laws as citizens, including the right to have a family and remain a family.<sup>189</sup> Before making a final ruling on deportation, judges should consider the family rights found

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184. Giovanna I. Wolf, *Preserving Family Unity: The Rights of Children to Maintain the Companionship of Their Parents and Remain in Their Country of Birth*, 4 IND. J. GLOBAL LEG. STUD. 207, 208 (1996).

185. Morawetz, *supra* note 92, at 1938.

186. *Id.* at 1939.

187. U.S. CONST. amends. V & XIV.

188. *Plyer v. Doe*, 457 U.S. 202, 210 (1982); Ferguson, *supra* note 152, at 92.

189. *See Plyer*, 457 U.S. at 210.

under the term “liberty” in the Fifth and Fourteenth Amendments.<sup>190</sup> Liberty, as defined by the Supreme Court, includes the right to have a family.<sup>191</sup> Illegal immigrants should be considered “people” under the Fifth and Fourteenth Amendments. The courts should consider the constitutional issue of separation of families with illegal immigrant family members.<sup>192</sup> The role of the judiciary is to check the legislature and, by taking into account mitigating factors, the courts can balance the harsh immigration laws with the right of families to remain together.<sup>193</sup>

In addition to balancing the rights of families with the regulation of immigration, one must also take into account the freedom of movement set forth in international doctrines. Under these provisions, there is an inherent right to have a residence or domicile and also to freely move to and from one’s own country.<sup>194</sup> Although the European Union’s laws are outside the scope of this Article, it is interesting to note that a citizen of one EU country can freely move and work in another EU country.<sup>195</sup> Arguably, EU laws are much more in line with the ideas expressed in the international doctrines.

Under the international doctrines, it is arguable that the United States does have a fairly open immigration policy for immigrants who do not enter illegally. The problem actually lies in the treatment of illegal immigrants.<sup>196</sup> New laws punish illegal immigrants by making them leave the United States and reside in their home countries for years before they can even begin the immigration process, which runs counter to international doctrines.<sup>197</sup> The new laws discourage immigrants from coming forward because of the penalties that they will face if they choose to do so.<sup>198</sup> The United States should adopt a system allowing illegal immigrants who come forward and want to become legal immigrants to do so without having to leave the country.

Additionally, the new laws fail to take into account the fact that many illegal immigrants enter the country not for the purpose of trying to deceive the United States government, but instead because they feel they have no

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190. *Id.* at 210–12.

191. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

192. *Ferguson*, *supra* note 152, at 92.

193. *Id.*

194. Universal Declaration of Human Rights, *supra* note 164.

195. SCAD Plus, Right of Union Citizens and Their Family Members to Move and Reside Freely, <http://europa.eu/scadplus/leg/en/lvb/133152.htm> (last visited Mar. 14, 2009).

196. *See Guzmán*, *supra* note 3, at 100.

197. *See id.* at 123.

198. *See id.* at 102–03.

other choice.<sup>199</sup> The United States holds itself out to be a world leader. As such, it is revered by a great number of countries and is seen as a land of hope and opportunity. As stated on the Statue of Liberty, “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-tost to me, I lift my lamp beside the golden door!”<sup>200</sup> The United States should formulate a policy that would allow illegal immigrants who come forward and wish to become legal residents or citizens to do so without the penalties imposed by the new immigration laws.<sup>201</sup>

Arguing for mitigating factors will potentially be more successful than arguing for a repeal of the IIRIRA or the changes in the criminal laws regarding aggravated felonies. The political heat generated around the issue of immigration would most likely prevent politicians or lawmakers from risking the societal backlash if they advocate the repeal of the new immigration laws. In terms of family separation, President Barack Obama has stated he “believe[s] we must fix the dysfunctional immigration bureaucracy and increase the number of legal immigrants to keep families together and meet the demand for jobs that employers cannot fulfill.”<sup>202</sup> It will be interesting to see whether the crisis of family separation due to mixed immigration status is truly addressed during President Obama’s tenure.

The best chance for providing a fair outcome to families dealing with separation resulting from mixed immigration status is to provide the courts with the chance to consider mitigating factors in making deportation decisions and remove the penalties for illegal immigrants who come forward and wish to be legal citizens. Both United States and international laws provide strong protections for the family unit and, under both of these bodies of law, families in the United States, even those with mixed immigration status, should be protected.

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199. *See id.* at 98.

200. Ellis Island Foundation, Statue of Liberty, [http://www.statueofliberty.org/default\\_sol.htm](http://www.statueofliberty.org/default_sol.htm) (last visited Mar. 14, 2009).

201. It is important to briefly consider the argument that if the United States provided more protections to keep mixed immigrant status families intact, then there would be an increase in the number of illegal immigrants entering the United States with the sole purpose of starting a family so they could remain here. One solution to this situation might be a system of fines to punish these individuals and discourage others from doing the same.

202. Barack Obama and Joe Biden, Immigration, <http://www.barackobama.com/issues/immigration/> (last visited Mar. 14, 2009).



## VII. CONCLUSION

The separation of mixed immigration status families in the United States is a crisis that needs to be addressed. Both United States and international laws provide protections for families, and the new immigration laws run counter to the notion of protecting the family unit. The United States needs to address this immigration crisis and work to find a solution to prevent the hardship caused by family separation, as failing to do so denies both citizens and illegal immigrants their fundamental rights to have, and to remain, a family.

