

FAMILIES AT RISK: HOW ERRANT  
ENFORCEMENT AND RESTRICTIONIST  
INTEGRATION POLICIES THREATEN THE  
IMMIGRANT FAMILY IN THE EUROPEAN UNION  
AND THE UNITED STATES

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*[Y]ou know, being with your family, there is nothing that you can compare to anything in life. It's just that warmness of the home, time with your loved ones . . . its something that you really can't describe.<sup>1</sup>*

I. INTRODUCTION

These simple words, spoken by a Dominican man who was deported and separated from his family after living together in the United States for many years, reflect the profound role of family in society. The importance of family is recognized in many areas of United States domestic law, and has also been the cornerstone of United States immigration law. Internationally, the centrality and “value” of the family is acknowledged in various international treaties, conventions, and covenants. However, despite this reverential view of family embodied in

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1. HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY 61 (2007), available at <http://hrw.org/reports/2007/us0707/us0707webwcover.pdf>. Hector J. was deported to the Dominican Republic in 2004. He entered the United States with his mother when he was seventeen-years old. He attended New York City public schools, received an Associates degree in human resources, and worked as a community organizer for not-for-profit organizations in Brooklyn, N.Y. His deportation separated him from his oldest daughter and his mother. *Id.* at 60-61.

both domestic and international law, nations across the world are engaging in and planning immigration practices that threaten that very unit.

In both the United States and the European Union (“EU”), whether at the legislative, political, judicial, or community levels, the debate is raging on as to how to curtail undocumented or “irregular” immigration. In the United States, efforts at comprehensive immigration reform ground to a halt last year because of irreconcilable differences between those that favored an enhanced enforcement-only approach and those that favored a broad-based legalization for undocumented workers, along with a new worker visa program and enhanced enforcement.<sup>2</sup> Although there appeared to be widespread support for a new system for workers to lawfully enter the United States, there was a divide on the specifics, including whether workers should be allowed to bring their families and whether there should be a path to permanent residency or citizenship.<sup>3</sup> The proposals that sought to restrict immigration were based on increased enforcement and more punitive measures, which often focused on the family and called for an end to family-based (or “chain”) migration.<sup>4</sup>

Although President Bush had vowed to enact comprehensive immigration reform during his final term, he was unable to surmount the

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2. The Bush Administration was joined by a broad bipartisan group of senators in introducing legislation in the Senate that would have provided legalization and a road to citizenship for undocumented workers already in the country, as well as a new temporary visa program for future immigrants seeking to perform low-skilled work in the United States. However, the bill was ultimately withdrawn after extremely vocal opposition from conservatives and their constituents. See Secure Borders, Economic Opportunity and Immigration Reform Act of 2007 §§ 401-02, 601 (Draft 2007) [hereinafter Draft Secure Borders Act of 2007], available at <http://www.lulac.org/advocacy/issues/immigration/draft-051807.pdf>; Robert Pear & Carl Hulse, *Immigrant Bill Dies In Senate; Defeat for Bush*, N.Y. TIMES, June 29, 2007, at A1.

3. The bill would also have replaced the long-standing family-based immigration regime with one founded on a point system emphasizing skills and education, and would have established a federal program for integrating newcomers. Secure Borders, Economic Opportunity and Immigration Reform Act of 2007 §§ 501-02, 704-09; Michael Abramowitz, *Immigrant Legislation Splits GOP; Right Lashes Out At Bush and Senate Over Compromise*, WASH. POST, May 19, 2007, at A1; Carl Hulse & Robert Pear, *3 Months of Tense Talks Led to Immigration Deal*, N.Y. TIMES, May 19, 2007, at A11; Robert Pear & Jim Rutenberg, *Senators in Bipartisan Deal on Broad Immigration Bill*, N.Y. TIMES, May 18, 2007, at A1; Jonathan Weisman, *Deal on Immigration Reached*, WASH. POST, May 18, 2007, at A1.

4. See Press Release, Office of the Press Sec’y, The White House, Fact Sheet: Ending Chain Migration (June 1, 2007) for an explanation that the bill would have ended the process of “[c]hain” migration, shifting the focus from extended family members to the nuclear family. The bill proposed a cap on the number of visas available for parents of lawful permanent residents and the elimination of visas for siblings of United States citizens as well as adult children of citizens and lawful permanent residents. *Id.*

deep division over immigration issues.<sup>5</sup> Seemingly in an attempt to address the demands that enforcement be prioritized over legalization or new temporary worker programs, the government recently has dramatically reinvigorated its semi-dormant worksite enforcement policy.<sup>6</sup> The sharp increase in worksite raids, coupled with mandatory detention and extremely limited discretionary relief from removal, has resulted in record numbers of worksite arrests, detentions, and deportations.<sup>7</sup> It has also irreparably harmed families, as all too often children are left behind when parents are detained and deported.<sup>8</sup>

Similarly, in the EU, calls to restrict immigration are often centered on the family. France has proposed eliminating family-based immigration and many member states are considering replacing systems based on family ties with points-based systems that favor certain nationalities and skill sets.<sup>9</sup> Member States are embracing a host of integration and language prerequisites in instances of family-based immigration, as well as requiring DNA blood testing for those seeking to immigrate for purposes of family reunification.<sup>10</sup>

In both the United States and the EU, these new proposals and initiatives further weaken immigration regimes that already fail to protect families. While family-based immigration is said to be the bedrock of the United States immigration regime,<sup>11</sup> and members of

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5. See Editorial, *Make A Bad Bill Better*, N.Y. TIMES, May 29, 2007, at A18; Jonathan Weisman, *Immigration Bill Dies in Senate*, WASH. POST, June 29, 2007, at A1; see also Carl Hulse & Robert Pear, *Immigrant Bill, Lacking 15 Votes, Stalls in Senate*, N.Y. TIMES, June 8, 2007, at A1.

6. See MIGRATION POLICY INST., MIGRATION INFORMATION SOURCE, TOP TEN MIGRATION ISSUES OF 2007 3 (2007) (“In the aftermath, the message to [the] federal government has been to enforce existing laws.”).

7. *Id.* (documenting that Immigration and Customs Enforcement (“ICE”) made 4077 administrative arrests in fiscal year 2007, as compared with 1116 in fiscal year 2005).

8. See HUMAN RIGHTS WATCH, *supra* note 1, at 4.

9. For example, the United Kingdom has initiated the first stage of a new points-based immigration system. See *Immigration Points System Begins*, BBC NEWS, Feb. 29, 2008, available at [http://news.bbc.co.uk/1/hi/uk\\_news/politics/7269790.stm](http://news.bbc.co.uk/1/hi/uk_news/politics/7269790.stm).

10. See Elaine Sciolino, *Plan to Test DNA of Some Immigrants Divides France*, N.Y. TIMES, Oct. 11, 2007, at A3, noting that although eleven countries in the EU already utilize DNA testing for family reunification purposes, the proposal to require it in France stirred quite a controversy. In France, family is defined based upon acknowledgement of a child, rather than biological proof, so requiring DNA testing for immigrants would be inconsistent with the way family is defined in domestic law. *Id.*

11. Family reunification has been referred to as “[t]he dominant feature of current arrangements for permanent immigration to the United States . . . .” THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 302 (5th ed. 2003); see also STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 250 (4th ed. 2005) (“[O]ne central value that United States immigration laws have long promoted, albeit to varying degrees, is family unity.”). Family-based immigration is generally governed by 8 U.S.C. § 1153 (2007) (setting forth the preference system for family-sponsored immigration). Indeed, in 2004,

traditional nuclear families are often allowed to immigrate together,<sup>12</sup> the United States fails to allow for family reunification for persons in need of protection unless they qualify as refugees under the narrow definition of the Refugee Convention.<sup>13</sup> I have argued elsewhere that denying family reunification to those persons protected under the Torture Convention presents a “Hobson’s choice: either be protected from torture in the United States but without one’s family or return to the hands of the torturers in order to reunite with family.”<sup>14</sup> Similarly, in the EU, a grant of “complementary” protection all too often fails to allow for family reunification.<sup>15</sup>

In this Article, I examine these new immigration initiatives and proposals in both the United States and the EU, with particular attention to the impact on families, and explore whether this impact is an intentional way of limiting immigration generally. Because the EU initiatives are often justified as being in keeping with the American immigration regime, I also examine the global move toward restricting family-based immigration and argue that such restrictions undermine, rather than advance, true integration and are inconsistent with the primacy afforded the family in domestic and international laws.

In Part II, I survey the role of the family and the protection afforded for family reunification under international human rights treaties, conventions, covenants, and declarations. Part III examines the United States’ immigration regime and its treatment of the family, first in the

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65.6% of the immigrants admitted as permanent residents to the United States were admitted based on family ties. RUTH ELLEN WASEM, DOMESTIC SOCIAL POLICY DIVISION, CONGRESSIONAL RESEARCH SERVICE, U.S. IMMIGRATION POLICY ON PERMANENT ADMISSIONS 10 (2006), available at <http://fpc.state.gov/documents/organization/66512.pdf>. However, many individuals find themselves outside of the narrow definition of family utilized in the United States immigration regime. See Lori A. Nessel, *Forced to Choose: Torture, Family Reunification, and United States Immigration Policy*, 78 TEMP. L. REV. 897, 899-900 n.15, 935 (2005), stating that immigration law has also served as a filtering device to ensure that family reunification furthered the current model of family values and noting that same-sex partners and non-nuclear family members are precluded from family reunification under United States immigration law.

12. This is true even when temporary immigration status is at issue. For example, many of the temporary visa categories for entry into the United States also provide derivative status to the spouse and minor children of the primary visa holder. For just a few examples of temporary immigrant visas that also allow for the admission of the visa holder’s spouse and minor children, see 8 U.S.C. § 1101(a)(15)(F), (J), (M) (various student visas); § 1101(a)(15)(H), (L) (employment visas); § 1101(a)(15)(P) (performance visas); § 1101(a)(15)(Q) (cultural exchange visitors); and § 1101(a)(15)(R) (religious workers).

13. Nessel, *supra* note 11, at 899.

14. *Id.*

15. Complementary protection refers to international protection granted by states for reasons that fall outside of the mandate of the Refugee Convention. See JANE MCADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW 1-2 & n.2 (2007).

context of enforcement policy and then in providing protection to those fleeing harm or natural disaster. By examining the enforcement efforts from a human rights perspective, I argue that the increased enforcement efforts violate the international human right to family unity. Currently, the United States' approach to enforcing its immigration laws seems to outweigh a family's right to be together. However, by framing the issue as one involving the core human right of family unity and questioning the appropriateness of the government's infringement of this basic right, the public dialogue can be shifted from a focus on "illegal aliens as lawbreakers" to the appropriateness and morality of interfering with a family's right to live together. This same application of human rights norms is utilized to examine the immigration regime's failure to allow those in need of protection to reunify with family members. Part IV provides a comparative analysis of family reunification trends in the EU, including the increasing reliance on DNA testing and language and integration exams. I argue that such measures violate the right to family unity and actually hinder, rather than further, integration efforts.

## II. A HUMAN RIGHTS-BASED APPROACH TO IMMIGRATION LAW AND ITS IMPACT ON THE FAMILY

The United States ratifies few international human rights treaties and conventions and generally refuses to accept international norms as appropriate interpretive tools for analyzing domestic laws, even those like immigration laws that often arise from international human rights treaties.<sup>16</sup> Even with regard to international instruments that the United States has ratified, such as the International Covenant on Civil and Political Rights ("ICCPR"),<sup>17</sup> the United States takes the position that such international treaties are not self-executing and that it is therefore not bound by them unless it enacts implementing legislation.<sup>18</sup>

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16. See generally Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 CHI. J. INT'L L. 347 (2000) (discussing the fact that the United States rarely ratifies human rights treaties, and even if one is ratified, it typically has little effect).

17. The United States ratified the ICCPR on June 8, 1992. United Nations High Comm'r for Human Rights, International Covenant on Civil and Political Rights New York, 16 December 1966, available at <http://www2.ohchr.org/english/bodies/ratification/4.htm>. However, the Senate ratification included a declaration that the Covenant was not self-executing. 138 CONG. REC. S4781, S4783 (1992) (statement of Sen. Moynihan).

18. The United States takes this position with regard to all human rights instruments that it signs. See, e.g., Roth, *supra* note 16, at 347 (asserting that "on the few occasions when the US government has ratified a human rights treaty, it has done so in a way designed to preclude the treaty from having any domestic effect.").

However, “[c]ommentators have widely criticized this narrow interpretation of the [United States’] responsibilities under international human rights law.”<sup>19</sup> Despite the judiciary’s discomfort with utilizing international norms to interpret domestic laws, such an approach is particularly appropriate in immigration matters. International human rights instruments place great weight on the role of the family as the fundamental unit of society.

As set forth in the Universal Declaration of Human Rights,<sup>20</sup> and reiterated in the 1969 American Convention on Human Rights<sup>21</sup> and the International Convention on Civil and Political Rights,<sup>22</sup> “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>23</sup> The 1981 African Charter on Human and Peoples’ Rights also guarantees the family’s protection by the state.<sup>24</sup> The International Covenant on Economic, Social and Cultural Rights requires states to provide the “widest possible protection and assistance” to the family as the “natural and fundamental group unit of society.”<sup>25</sup>

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19. Nessel, *supra* note 11, at 921-22 (citing DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 466 n.11 (3d ed. 1999) (discussing applicable scholarship and treatises and finding that “[t]he question of whether the United States is bound by the treaty is distinct from that of whether the treaty is self-executing or requires implementation to create specific remedies in domestic fora.”)); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 201 (2d ed. 1996) (“A tendency in the Executive branch and in the courts to interpret treaties and treaty provisions as non-self-executing runs counter to the language, and spirit, and history of Article VI of the Constitution.”); Kristen B. Rosati, *The United Nations Convention Against Torture: A Self-Executing Treaty That Prevents the Removal of Persons Ineligible for Asylum and Withholding of Removal*, 26 DENV. J. INT’L L. & POL’Y 533, 575-76 (1998) (arguing that Article 3 of the Torture Convention is self-executing and that “the U.S. must comply with it.”).

20. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/RES/217 (Dec. 10, 1948).

21. American Convention on Human Rights: “Pact of San José, Costa Rica” art. 17, ¶ 1, Nov. 22, 1969, T.S. No. 17955, 1144 U.N.T.S. 123. (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.”).

22. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368. The Convention states: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” *Id.* at art. 23, ¶ 1. The Convention also states: “The right of men and women of marriageable age to marry and to found a family shall be recognized.” *Id.* at art. 23, ¶ 2.

23. Universal Declaration of Human Rights, *supra* note 20, at art. 16, ¶ 3.

24. African Charter on Human and Peoples’ Rights, June 27, 1981, T.S. No. 26363, 1988 U.N.T.S. 245. The Charter states that “[t]he family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.” *Id.* at art. 18, ¶ 1. The Charter also states that “[t]he State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.” *Id.* at art. 18, ¶ 2.

25. International Covenant on Economic, Social and Cultural Rights art. 10, ¶ 1, Dec. 19, 1966, 993 U.N.T.S. 3 (“The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society . . .”).

Although the state may owe a high duty of protection to the family as a matter of international human rights law, the concept of family reunification also embodies additional dimensions, including whether an immigrant's crossing of transnational borders to join a family member in the host state, or allowing an immigrant to remain in the host state's territory so as not to sever an existing family unit, should be permitted. Thus, an analysis under international human rights law would require the balancing of the right to family life with the countervailing state right to determine who can enter or remain in its territory.

A number of Conventions explicitly recognize this tension. For example, Article 8(1) of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms specifies that "[e]veryone has the right to respect for his private and family life, his home and his correspondence."<sup>26</sup> However, the Convention also allows for broad curtailment of those rights by the state.<sup>27</sup>

While it has been argued that family reunification is best understood as a *humanitarian principle* and not as a *human right*, there is near universal agreement that there is a right to family reunification under international law.<sup>28</sup> For example, in the context of migrant laborers, a number of international instruments clearly set forth a *right* to family reunification. The International Labor Organization, for one, has articulated the right of lawfully admitted migrant and permanent workers

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26. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, ¶ 1, Nov. 4, 1950, 213 U.N.T.S. 222 (as amended by Protocol No. 11 Nov. 1, 1998), available at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>; see also *id.* at art. 12 ("Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.").

27. See *id.* at art. 8, ¶ 2 ("There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.").

28. Kate Jastram, *Family Unity*, in *MIGRATION AND INTERNATIONAL LEGAL NORMS* 185, 186 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003); Kate Jastram & Kathleen Newland, *Family Unity and Refugee Protection*, in *REFUGEE PROTECTION IN INTERNATIONAL LAW* 555, 576 (Erika Feller et al. eds., 2003). But see Arturo John, *Family Reunification for Migrants and Refugees: A Forgotten Human Right?* 2-3 & n.14 (Feb. 2005) (unpublished manuscript, on file with the Hofstra Law Review), available at [http://www.fd.uc.pt/hrc/working\\_papers/arturojohn.pdf](http://www.fd.uc.pt/hrc/working_papers/arturojohn.pdf) (characterizing jurisprudence of the European Court of Human Rights on the compatibility of Article 8 of the 1950 European Convention on Human Rights with states' rights to control immigration as "timid" when contrasted with its "bold stance" interpreting the compatibility of Article 8 with non-refoulement and claiming that "family reunification appears to be relegated to a lower tier of international and regional texts.").

to family reunification.<sup>29</sup> In addition, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families goes further, providing that states “shall take appropriate measures to ensure the protection of the unity of the families of migrant workers.”<sup>30</sup>

In the context of refugees or children, the right to family reunification is particularly clear. For example, the African Charter on the Rights and Welfare of the Child<sup>31</sup> states that “[t]he family shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for its establishment and development.”<sup>32</sup> Article XXIII of that Charter directs that signatory states “undertake to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist . . . a child and to trace the parents or other close relatives of an unaccompanied refugee child in order to obtain information necessary for reunification with the family.”<sup>33</sup>

The 1989 Convention on the Rights of the Child (“CRC”) comes closest to expressly recognizing a fundamental right to family reunification.<sup>34</sup> Article 9(1) mandates that “States Parties shall ensure that a child shall not be separated from his or her parents against their will . . . .”<sup>35</sup> Pursuant to Article 10(1), “applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.”<sup>36</sup> However, certain countries, mindful of the

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29. *See, e.g.*, Convention (No. 97) Concerning Migration for Employment art. 8, July 1, 1949, 1952 U.N.T.S. 72 (stating that family members “shall not be returned to their territory of origin or the territory from which they emigrated because the migrant is unable to follow his occupation by reason of illness contracted or injury sustained subsequent to entry . . . .”); Convention (No. 143) Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers art. 13, June 26, 1975, 1978 U.N.T.S. 324 (“A Member may take all necessary measures which fall within its competence and collaborate with other Members to facilitate the reunification of the families of all migrant workers legally residing in its territory.”).

30. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 44, Dec. 18, 1990, 2220 U.N.T.S. 93, *available at* <http://www2.ohchr.org/english/bodies/cmw/cmw.htm>.

31. African Charter on the Rights and Welfare of the Child of 11 July 1990, *reprinted in* 2 COLLECTION OF INTERNATIONAL INSTRUMENTS AND OTHER LEGAL TEXTS CONCERNING REFUGEES AND DISPLACED PERSONS 65 (Jean-Pierre Colombey ed., 1995).

32. *Id.* at 72.

33. *Id.* at 74.

34. *See generally* Convention on the Rights of the Child art. 9-10, Nov. 20, 1989, 1577 U.N.T.S. 3 (declaring that children have a right to remain or be reunified with their families).

35. *Id.* at art. 9, ¶ 1.

36. *Id.* at art. 10, ¶ 1. Article 22, ¶ 2, further provides:



immigration implications of this right to family reunification, ratified the CRC with declarations or reservations expressly stating that the Convention would not affect the nation's domestic immigration policy.<sup>37</sup>

Families have had mixed results when utilizing international human rights instruments to argue for family reunification or family unity in the immigration context. For example, in deciding claims brought pursuant to Article 8 of the European Convention on Human Rights' guarantee of family life, the European Court of Human Rights has been more receptive to family unity-based challenges to deportation when the family is already living in the host country, than to family reunification-based claims that require transnational border crossing in order for the family to be united.<sup>38</sup> However, in claims in which an immigrant seeks to enter the host country in order to reunite with existing family residing there, the European Court of Human Rights utilizes a balancing test to weigh the right to family life against the state's interest in controlling immigration. While the state's interest all too often prevails, the court has been most willing to find a superseding right to family life in situations in which the family cannot be reunited in another country or the immigrants facing family separation have long-standing ties to the host country.<sup>39</sup>

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States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family.

*Id.* at art. 22, ¶ 2. However, even this "right" to family reunification is diminished by reference to leaving one's own country but not remaining in a foreign country. *Id.* at art. 10, ¶ 2 ("States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country.").

37. See, for example, Germany stating:

Nothing in the Convention may be interpreted as implying that unlawful entry by an alien into the territory of the Federal Republic of Germany or his unlawful stay there is permitted; nor may any provision be interpreted to mean that it restricts the right of the Federal Republic of Germany to pass laws or regulations concerning the entry of aliens and the conditions of their stay or to make a distinction between nationals and aliens.

Rainer Frank, *Introduction to CHILDREN ON THE MOVE: HOW TO IMPLEMENT THEIR RIGHT TO FAMILY LIFE* 14-15 (Jaap Doek et al. eds., 1996). The United Kingdom made a reservation with respect to nationality and immigration upon ratification of the CRC in 1991. Margaret McCallin, *Refugee Children: The Need for an Integrated Approach Towards Their International Protection*, in *CHILDREN ON THE MOVE*, *supra*, at 110.

38. Jastram, *supra* note 28, at 194. For a discussion of international jurisprudence in family unity and family reunification cases, see generally Nessel, *supra* note 11, at 909-14.

39. See Nessel, *supra* note 11, at 911 (citing Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law's Conflicted Answers*, 32 *HOFSTRA L. REV.* 273, 288 (2003)).

For example, in *Tuquabo-Tekle v. The Netherlands*,<sup>40</sup> the court found a violation of Article 8 of the European Convention on Human Rights where the court refused to allow the applicant to reside in the Netherlands with her mother, step-father, and siblings. In balancing the state's interest in maintaining a restrictionist immigration policy against the family's interest in living together, the court relied on the international protection that the Netherlands had afforded to both the mother and step-father, as well as the young age of the daughter at the time the application was initially filed, to find that the family should most appropriately be reunited in the Netherlands, rather than their native Ethiopia.<sup>41</sup> Similarly in a recent case that tested the outer limits of a state's permissible actions in the name of immigration enforcement,<sup>42</sup> the court found a positive obligation on the State to facilitate the family reunification of a foreign unaccompanied minor child with her refugee mother.<sup>43</sup>

The Human Rights Committee also has a growing body of jurisprudence interpreting the right to family reunification in the deportation context pursuant to Article 17 of the International Covenant on Civil and Political Rights' prohibition on arbitrary or unlawful interference in family life.<sup>44</sup> The Human Rights Committee is guided by an assessment as to whether the impact of deportation on the remaining family members would outweigh the state's objective in removing the individual, considering such factors as "length of stay in the host country, age, . . . the family's financial and emotional interdependence,

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40. App. No. 60665/00, slip op. at 13 (Eur. Ct. H.R. Dec. 1, 2005), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search "Application Number" for 60665/00).

41. *Id.*

42. See *Mubilanzila Mayeka v. Belgium*, App. No. 13178/03, slip op. (Eur. Ct. H.R. Oct. 12, 2006), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search "Application Number" for 13178/03).

43. *Id.* at 21-22. In this case, the Court examined the interplay between Article 3's prohibition on torture or inhumane or degrading treatment or punishment, Article 8's prohibition on interference with family life, and the CRC. The Court held that Belgium's actions in detaining a five-year-old unaccompanied minor for almost two months in an adult detention facility amounted to inhumane and degrading treatment or punishment of the child, and the anxiety caused to the mother similarly violated Article 3's prohibition on inhumane or degrading treatment or torture. *Id.* at 16-19. The subsequent deportation of the young child to the Congo without making any arrangements for family to meet her also was held to violate Article 3. *Id.* at 21-22. In terms of Article 8, the Court held that, since the child was an unaccompanied foreign minor, Belgium was under a duty to facilitate family reunification. Its failure to do so violated the right to family reunification of both mother and child. *Id.* at 27.

44. See *Jastram*, *supra* note 28, at 191; *Canepa v. Canada*, U.N. H.R. Comm'n, U.N. Doc. CCPR/C/59/D/558/1993, ¶ 11.4 (1997).

and . . . the state's interests in promoting public safety and in enforcing immigration laws."<sup>45</sup>

While international law balances the family's right to unity against the state's right to control its borders, the state's right to control its border is not absolute and has often been overemphasized.<sup>46</sup> In fact, the state's right to sovereignty is qualified by its countervailing humanitarian duties. As immigration scholar James A. R. Nafziger has cautioned, "[i]t is essential that migration issues be unshackled from the dubious proposition that a state may exclude all aliens. Instead, there is a firm basis for articulating a qualified duty of states to admit aliens."<sup>47</sup> As explored below, this "qualified duty" should almost certainly apply to those immigrants seeking to remain united, or to reunite, with their families.

### III. THE UNITED STATES ENHANCED WORKSITE ENFORCEMENT MEASURES AND DENIAL OF DERIVATIVE STATUS TO NON-CONVENTION REFUGEES SEVERS FAMILIES AND UNDERMINES CORE HUMAN RIGHTS

#### A. *Increased Interior Enforcement Efforts Unfairly Divide Immigrant Families and Undermine Family Unity*

Despite the central role that the family plays in United States immigration law, and the protection afforded the family under international human rights law, when deportation is at issue, individuals are increasingly being targeted for removal with little attention paid to the impact on the remaining family members.<sup>48</sup> As one scholar aptly

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45. Jastram, *supra* note 28, at 191-92.

46. See e.g., James A. R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804, 845 (1983). Nafziger argues that Emer de Vattel's seminal book on international law (*Le Droit des Gens*, 1758) has often been erroneously relied upon to justify a notion of an absolute sovereign right to exclude. In actuality, "Vattel . . . took sovereign duties as well as rights seriously. Even if the sovereign theoretically has the right, or 'inherent power' in modern terminology, to exclude aliens absolutely, he cannot do so in some instances because of his qualified duty to admit some foreigners." *Id.* at 814. As Nafziger explains, "[i]nterpretations of Vattel's commentary on foreign migration have, however, consistently ignored both the subtleties on the duty side and his qualifications of the sovereign 'right' to exclude foreigners." *Id.*

47. *Id.* at 845.

48. It is true that family ties can still serve as a basis to waive certain inadmissibility or deportability grounds. See, e.g., 8 U.S.C. § 1182(a)(3)(D)(i)-(iv) (2007) (waiving communist or totalitarian party membership inadmissibility grounds in certain circumstances); § 1182(a)(6)(E)(i) (waiving smuggling grounds in certain instances); § 1182(d)(11) (waiver for family unity); § 1182(d)(12) (waiving document fraud inadmissibility grounds); § 1182(g) (providing a waiver for certain health-related inadmissibility grounds); 8 U.S.C. § 1227(a)(1)(E)(ii)-(iii) (2007) (waiving alien smuggling deportability grounds); Immigration and Nationality Act of 1952, Pub. L. No. 414,

notes, “[t]he application of immigration law routinely conflicts with private decisions about family composition and integrity, and in turn family decisions regarding where to live routinely result in the circumvention of immigration provisions.”<sup>49</sup>

The increased emphasis on worksite raids within the United States severs mixed-status immigrant families as undocumented parents are deported and citizen children may be left behind.<sup>50</sup> There are currently estimated to be over eleven million undocumented persons living in the United States.<sup>51</sup> Notwithstanding the actual presence and contributions of this large population in everyday life—they perform the most

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§ 212(c), 66 Stat. 163, 187 (1952) (amended 1990) (providing for a discretionary waiver of deportation for long-time lawful permanent residents with strong family ties). The importance of family ties when an individual is facing deportation has greatly diminished. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8, 18 U.S.C.). In a new piece of legislation, Congress has taken its willingness to treat the family as one unit for immigration purposes a step further, seeking to target entire families for deportation. As part of the recently enacted Real ID Act, Congress amended the immigration law to expand the category of those that may be removed based on terrorist activities to include persons whom a consular official or the Attorney General has reason to believe are engaged in terrorist activities, representatives or members of foreign terrorist organizations, and representatives of groups who publicly endorse terrorist activities. Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302, 306-07 (2005) (to be codified in scattered sections of 8, 49 U.S.C.). This amendment also renders removable the spouse and children of someone subject to removal under these terms. *See REAL ID Now the Law*, INTERPRETER RELEASES, May 16, 2005, at 813, 814 (noting how Section 105 of the Real ID Act amended INA § 237(a)(4)(B)). These amendments took effect on May 11, 2005, and apply retroactively. *Id.*; Real ID Act § 103(d) (“The amendments made by this section shall take effect on the date of the enactment of this division, and these amendments, and section 212(a)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)), as amended by this section, shall apply to . . . removal proceedings instituted before, on, or after the date of the enactment of this division[.]”).

49. 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, 59 (2006).

50. *See, e.g.*, Sherryl Zounes, Current Developments, *Children Without Parents: An Unintended Consequence of ICE's Worksite Enforcement Operations*, 21 GEO. IMMIGR. L.J. 511 (2007) (noting that the government's dramatically increased worksite enforcement efforts, coupled with increased rates of detention and deportation, has had the “unintended consequence” of separating children from their parents). As Ms. Zounes recounts, the highly publicized raids in New Bedford, MA, resulted in the detention of 361 employees, the majority of whom were women. As a result of the raid, children were stranded in day care centers, schools, or left for prolonged periods with friends or relatives. This situation was further exacerbated when 200 of these primarily female workers were sent to detention centers in Texas and New Mexico, necessitating child care arrangements for 35 children. Although more than 90 of the 361 undocumented workers were ultimately released on humanitarian grounds because they were the sole caregivers for their children, dozens of children were stranded without parents as a result of confusion and mistakes. *Id.* at 511-12.

51. RANDY CAPPS ET AL., NATIONAL COUNCIL OF LA RAZA, PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN 9 (2007).

dangerous work for the lowest pay,<sup>52</sup> their children attend public schools, they pay into a tax system that they cannot benefit from—they have no legal status and are vulnerable to exploitation, arrest, and deportation at any moment.<sup>53</sup> Although there has been much discussion and debate over various proposed legalization laws in the past few years, there have been no legislative reforms enacted to allow this vulnerable population to come forward and legalize their status.<sup>54</sup> While various attempts at reform legislation have failed, the enforcement agency of the Department of Homeland Security (Immigration and Customs Enforcement or “ICE”) has dramatically increased its interior enforcement and deportation efforts, with a disproportionate impact on family members.<sup>55</sup>

Many immigrant families are comprised of members with a number of different immigration statuses. Pursuant to the United States Constitution, any child born on American soil is automatically a United States citizen.<sup>56</sup> Thus, the children of immigrants, or some of them, may be citizens of the United States, while one or both parents may be undocumented or holding temporary visas.

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52. See Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 347 (2001).

53. *Id.*

54. See Kevin R. Johnson, *Protecting National Security through More Liberal Admission of Immigrants*, 2007 U. CHI. LEGAL F. 157, 173-75, summarizing the failed attempts at comprehensive immigration reform and noting that the only immigration legislation that was ultimately passed in 2006 was a law authorizing the extension of the fence at the Mexican-American border, notwithstanding the lack of evidence that the fence, or other enforcement-only efforts, will impact the number of undocumented immigrants in the United States. See also, *supra* notes 2-4 and accompanying text.

55. See CAPPs ET AL., *supra* note 51, at 1; Johnson, *supra* note 54, at 173-75. On May 12, 2008, approximately 900 ICE agents raided the nation’s largest kosher slaughterhouse and meatpacking plant, located in Postville, Iowa (hereinafter referred to as “the Postville Meatpacking Raids”). See Erik Camayd-Freixas, *Interpreting after the Largest ICE Raid in US History: A Personal Account*, at 1 available at <http://graphics8.nytimes.com/images/2008/07/14/opinion/14ed-camayd.pdf> (last visited Sept. 9, 2008). Government officials have touted the massive raid as “the largest single-site operation of its kind in American history.” *Id.* However, the raid has been widely criticized for its impact on families and the community. See, e.g., Spencer S. Hsu, *Immigrant Raid Jars a Small Town*, WASH. POST, May 18, 2008, at A1; Editorial, *The Shame of Postville, Iowa*, N.Y. TIMES, July 13, 2008, at 11; Julia Preston, *Iowa Rally Protests Raid and Conditions at Plant*, N.Y. TIMES, July 28, 2008 at A11. Nearly 400 immigrants were arrested at the slaughterhouse and transported to a 60 acre cattle fairground. Camayd-Freixas, *supra*, at 1. The immigrants were charged with federal crimes including aggravated identity theft, possession or use of false identity documents for purposes of employment, and unlawfully using social security numbers. *Id.* at 10. In exchange for waiving their rights to any appeals, many immigrants entered into plea agreements mandating 5 months of imprisonment followed by deportation. *Id.* at 5.

56. U.S. CONST. amend. XIV, § 1.

Approximately five million United States citizen children have at least one undocumented parent.<sup>57</sup> Over the past five years, ICE has arrested, detained, and deported immigrant workers at an unprecedented level. Whereas in 2002, only 500 undocumented immigrants were arrested in workplace raids, in 2006, there were 3600 immigrants arrested at work.<sup>58</sup> When immigrant workers are suddenly arrested and detained, their children may be left with neighbors, babysitters, or relatives for prolonged periods of time.<sup>59</sup> On average, the number of children impacted by workplace raids is about half of the number of adults arrested.<sup>60</sup> In other words, “for every two immigrants apprehended, one child was left behind.”<sup>61</sup>

In the Postville Meatpacking Raid, nearly 400 immigrants were arrested, detained, coerced into pleading guilty to criminal acts, and sentenced to five months imprisonment followed by deportation.<sup>62</sup> Such massive immigration raids devastate entire communities. For example, in the Postville Meatpacking Raid, one-third of Postville, Iowa’s population disappeared as a result of the immigration raid.<sup>63</sup> In addition to the workers that were arrested, the chilling effect of the raid resulted in many more immigrants fleeing the area.<sup>64</sup> Terrified immigrant families sought refuge in a Catholic Church and the public schools lost so many immigrant children that one principal traveled through town on a school bus, gathering seventy students after convincing scared parents that it was safe for their children to return.<sup>65</sup>

Further compounding the situation for immigrant workers is that the increasing militarization of the border impedes visits between family members on both sides of the border. As Professor Jennifer Chacón has remarked, “family intimacy has become a privilege that migrants must

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57. CAPPS ET AL., *supra* note 51, at 1.

58. *Id.*; see also Johnson, *supra* note 54, at 165 (describing the Bush Administration’s highly publicized campaign of increased worksite raids at the end of 2006).

59. See Raquel E. Aldana, *Introduction: The Subordination and Anti-Subordination Story of the U.S. Immigrant Experience in the 21st Century*, 7 NEV. L.J. 713, 733-34 (2007) (noting that children are abandoned at schools and day care centers when their parents are arrested and awaiting deportation in detention after immigration raids).

60. CAPPS ET AL., *supra* note 51, at 2.

61. *Id.* at ii. In order to keep up with the growing number of worksite arrests, ICE has also dramatically increased its detention capacities. In 2006, there were nearly 20,000 immigrants in detention on any given day, a 10 percent increase from the prior year. *Id.* at 11. The number of deportations is also increasing substantially each year. In 2006, ICE formally deported over 185,000 immigrants from the United States. *Id.* at 11-12.

62. Camayd-Freixas, *supra* note 55, at 1, 5.

63. *Id.* at 3.

64. *Id.*

65. *Id.*

be willing to trade in exchange for the benefits of working in the United States.”<sup>66</sup> Given the importance of family unity in immigration law, one must question why immigration enforcement is carried out without regard for family ties, such that increased enforcement efforts sever families and harm both United States citizens and lawful permanent resident children.<sup>67</sup>

Targeting undocumented workers without regard for their children (who are most often United States citizens) unjustly undermines the principles of family unity that are said to lie at the heart of the United States immigration regime.<sup>68</sup> Although there is often little sympathy shown for undocumented workers, both the judicial and legislative branches have shown greater concern for children, regardless of their immigration status. For example, the United States Supreme Court has carved out greater rights for immigrant children, outside of the context of regulating the borders. In *Plyler v. Doe*,<sup>69</sup> the Supreme Court guaranteed all children, including those who are undocumented, the right to a free public education.<sup>70</sup> Although the Court found that the undocumented parents may have violated United States immigration laws, it was unwilling to punish innocent children by denying them an education.<sup>71</sup> The Court also expressed concern at the alternative—creating an illiterate underclass in the United States.<sup>72</sup>

Congress, too, has at times shown a willingness to treat undocumented children as “children first” and aliens second.<sup>73</sup> For

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66. Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of Loving*, 2007 WISC. L. REV. 345, 370.

67. For a discussion of the impact of immigration enforcement efforts on mixed status families, see Monique Lee Hawthorne, Comment, *Family Unity in Immigration Law: Broadening the Scope of “Family,”* 11 LEWIS & CLARK L. REV. 809, 820-22 (2007).

68. While the Department of Homeland Security (“DHS”) asserts that it is working closely with the Department of Social Services (“DSS”) to ensure that children are not left unattended as a result of worksite enforcement actions, this does not appear to be the case. For example, with regards to a raid in New Bedford, MA, DHS Assistant Secretary Julie Meyers assured the Governor that immigration agents “worked closely with DSS both before the operation commenced and at every stage of the operation, to be sure that no child would be without a sole caregiver.” Zounes, *supra* note 50, at 513. However, according to the DSS Commissioner, although ICE told DSS about the raid, the social workers were denied access while the raid was occurring due to it being a “law enforcement issue.” *Id.*

69. 457 U.S. 202 (1982).

70. *Id.* at 230.

71. *Id.* at 219-20.

72. *Id.* at 222.

73. Christopher Nugent & Steven Schulman, *A New Era in the Legal Treatment of Alien Children: The Homeland Security and Child Status Protection Acts*, INTERPRETER RELEASES, Feb. 19, 2003, at 233, 234.

example, the Child Status Protection Act of 2002<sup>74</sup> amended the immigration law to protect children who, due to administrative delays, were at risk of turning twenty-one years of age and losing immigration status, including derivative asylum status.<sup>75</sup> Unfortunately, the courts have been much less willing to prioritize family ties over enforcement when faced with claims that deporting parents of United States citizen children results in the “de facto” deportation of the children as well.<sup>76</sup>

Commentators and scholars have widely criticized the United States policy of disregarding the impact on children when parents are deported, and have made strong arguments in favor of a prohibition on the “de-facto” deportation of United States citizen children.<sup>77</sup> However, the courts have routinely rejected constitutional challenges to such alleged “de facto” deportations of American children. For example, in *Acosta v. Gaffney*, the parents of an American infant argued that their deportation would result in the de facto deportation of their five-month-old United States citizen daughter, thereby depriving her of her constitutional right to reside in the United States<sup>78</sup> In rejecting this argument, the court held that the infant could not make any conscious decisions at this point and that her right as a citizen to reside in the United States would still be available to her when she turns twenty-one years of age and can return.<sup>79</sup> The court also reiterated that the parents could choose to leave the infant in foster care in the United States rather than live in family unity in another country.<sup>80</sup>

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74. Child Status Protection Act of 2002, Pub. L. No. 107-208, 116 Stat. 927 (codified as amended in scattered sections of 8 U.S.C.A. § 1101).

75. *Id.* at 928-29.

76. See, e.g., Bill Piatt, *Born As Second-Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35, 36, 40-41 (1988) (pointing out the inconsistency in judicial rulings that demonstrate a willingness to intervene to ensure that administrative officials to do not make the economic or educational status of children within the U.S. harsher as a result of their parents' undocumented status, while refusing to intervene to assure that children's economic or educational rights are not undermined as a result of their de facto deportation based on their parents' undocumented status); Sonia Starr & Lea Brilmayer, *Family Separation as a Violation Of International Law*, 21 BERKELEY J. INT'L L. 213, 260 (2003).

77. Starr & Brilmayer, *supra* note 72, at 259-60.

78. 558 F.2d 1153, 1155 (3d Cir. 1977).

79. *Id.* at 1158.

80. *Id.* For similar decisions rejecting claims of de facto deportation of United States citizen children, see *Mamane v. I.N.S.*, 566 F.2d 1103, 1106 (9th Cir. 1977); *Martinez v. Bell*, 468 F. Supp. 719, 727 (S.D.N.Y. 1979). In *Application of Amoury*, 307 F. Supp. 213, 216 (S.D.N.Y. 1969), the court expressed no discomfort with punishing children for the status of their parents. According to the court,

It is all too true that oft-times individuals, entirely innocent of wrongful conduct, suffer equally with those who commit the wrongful act which brings penalties in its wake. But this does not mean that a constitutional violation has



However, human rights-based arguments for family reunification have been successful in other nations and may prove to be more fertile ground on which to base challenges to immigration enforcement decisions that unfairly penalize American children.<sup>81</sup> Although, as discussed earlier, the United States has not ratified most international human rights instruments, the applicable conventions nevertheless provide a framework for analyzing the impact that increased worksite enforcement efforts have on the family.<sup>82</sup>

For example, as discussed earlier, the European Court on Human Rights utilizes a balancing test to weigh the family's right to unity against the state's countervailing right to enforce its immigration laws.<sup>83</sup> The above-cited statistics on mixed-status families and the impact of worksite raids and deportation on the family suggest that many families could show long-standing ties to the United States that could outweigh the government's interest in deportation.

The value of an international human rights-based approach to family unity issues and the treatment of undocumented workers is evidenced by recent litigation before the Inter-American Court on Human Rights. Undocumented immigrants and their family members are increasingly seeking rulings from the Inter-American Court in cases involving United States immigration policy. For example, after the United States Supreme Court ruled that undocumented workers were not entitled to a backpay remedy when their guaranteed labor rights were violated,<sup>84</sup> an advisory opinion was sought from the Inter-American Court on Human Rights. Rather than focusing solely on the illegality of the workers' immigration status, the court stated that, "the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of his human rights, including those of a labor-related nature."<sup>85</sup>

As noted by Professor Beth Lyon, "[i]n recent decades, the international human rights standard-setting community has singled out the rights of migrant workers for expansion, clarification, and enhanced

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been visited upon the innocent person. It is not required that the procedural due process due an accused must also be accorded to those who may be affected by the final result of proceedings against the accused.

*Id.*

81. See Nessel, *supra* note 11, at 908.

82. See *supra* notes 16-47 and accompanying text.

83. See *supra* notes 38-43 and accompanying text.

84. *Hoffman Plastic Compound, Inc. v. NLRB*, 535 U.S. 137, 140 (2002).

85. *Juridical Condition & Rights of the Undocumented Migrants*, Advisory Opinion, OC-18/03, Inter-Am. Ct. H.R. doc. X, ¶ 8 (2003).

monitoring.”<sup>86</sup> At the same time, however, very few nations ratify the applicable human rights instruments that would grant rights to this population. For example, very few countries have ratified the International Convention on the Protection of the Rights of All Migrant Workers and their Families, which would afford protection for family unity of migrant workers.<sup>87</sup>

Similarly, non-governmental organizations and advocates concerned with the impact of deportation on the family have sought the intervention of the Inter-American Commission on Human Rights. In a recent case challenging the mandatory deportation of non-citizens with criminal convictions, Human Rights Watch argued that mandatory deportation without any consideration of the impact on children violates numerous human rights instruments including the American Declaration of Human Rights, the International Covenant on Civil, Political and Religious Rights, and the Convention on the Rights of the Child.<sup>88</sup>

While international conventions guaranteeing the right to family unity may not offer practical protection to families facing separation as a result of increased worksite enforcement actions, they offer an alternate view of undocumented workers and their families—“the workers’ status as lawbreakers is of less significance than their situation of deprivation, vulnerability, and likelihood of experiencing classic forms of racial, national, and gender discrimination.”<sup>89</sup> As a starting point, Congressional legislation is needed to restore discretionary relief that takes into account an immigrant’s family ties to the United States.<sup>90</sup> A

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86. Beth Lyon, *New International Human Rights Standards on Unauthorized Immigrant Worker Rights: Seizing an Opportunity to Pull Governments Out of the Shadows* 554 (Villanova Law Sch. Pub. L. & Legal Theory Working Paper Series, Working Paper No. 2006-06, 2006), available at <http://ssrn.com/abstract=897752>.

87. Although the Convention needed only twenty ratifications to enter into force, that took thirteen years. As of November 2004, the Convention has received only twenty-seven ratifications, primarily from sending, rather than receiving, nations. *Id.* at 559.

88. See Written Comments of Amicus Curiae, Human Rights Watch, *Smith v. U.S.*, Case no. 12.561, Inter-Am. C.H.R. (2007).

89. Lyon, *supra* note 82, at 567.

90. Prior to 1996, a discretionary provision allowed an immigration judge to balance the equities before ordering deportation when a lawful permanent resident was facing deportation. See Immigration and Naturalization Act § 244(a)(1), Pub. L. No. 414, 66 Stat. 163, 214 (1952). For undocumented persons that were facing deportation, there was discretionary relief available if the person had been living in the United States for seven years, was of good moral character, and if her deportation would cause extreme hardship. *Id.* Congress narrowed this discretionary relief in 1996 such that it is now solely available to persons who have been living in the United States for at least ten years prior to the initiation of removal proceedings and only if the removal would cause exceptional and extremely unusual hardship to a United States citizen or lawful permanent resident spouse or child. Compare 8 U.S.C. § 1229b(b) (2007), with § 244(a)(1).

recent bill proposed in the House of Representatives would allow immigration judges to exercise just that discretion, for example, to determine whether deportation is appropriate when there is a United States citizen child involved.<sup>91</sup>

### *B. Lack of Family Reunification Provisions in Law*

Another way in which United States immigration laws divide, rather than reunify, families is by failing to allow for derivative status to broad categories of persons that are granted protection from civil wars, natural disasters, or torture. Parents that flee danger in their home country or that are in the United States at a time when disaster strikes back home can seek protection in the United States.<sup>92</sup> If the person does not fear persecution or torture but rather needs protection due to a civil war or natural disaster that has occurred while she or he was already in the United States, she or he can seek temporary protected status.<sup>93</sup> If the person can prove that their fear of persecution is related to their race, religion, nationality, political opinion, or membership in a particular social group, she or he can seek asylum protection pursuant to the 1967 United Nations Protocol on Refugees, as implemented domestically through the 1980 United States Refugee Act.<sup>94</sup> If the person fears torture if returned to her homeland, she can seek protection under the United Nations Convention on Torture, as implemented domestically in the United States through the Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”).<sup>95</sup>

While there are three forms of protection from danger in one’s home country, only those individuals granted asylum protection have the right to seek family reunification in the United States with a spouse or

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91. See H.R. 213, 110th Cong. (introduced Jan. 4, 2007).

92. 8 U.S.C. § 1254a(b)(1) (2007).

93. Pursuant to 8 U.S.C. § 1254(a), the Attorney General may designate nations for “temporary protected status” for a period of six to eighteen months when necessary to prevent such nationals already in the United States from being returned to the danger associated with armed conflict or natural disasters. *Id.* § 1254a(b).

94. Refugee Act of 1980 § 201, Pub. L. No. 96-212, 94 Stat. 102, 102 (codified as amended in scattered sections of 8 U.S.C.) (amending sections of the Immigration and Nationality Act § 1196, Pub. L. No. 109-162, 119 Stat. 3130 (2005), and implementing Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol], available at [http://www.unhcr.ch/html/menu3/b/o\\_p\\_ref.htm](http://www.unhcr.ch/html/menu3/b/o_p_ref.htm)). The 1967 Protocol amended the Convention Relating to the Status of Refugees, April 22, 1954, 189 U.N.T.S. 150 [hereinafter Refugee Convention], available at <http://www2.ohchr.org/english/law/pdf/refugees.pdf>.

95. Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (1998). This was followed by Immigration and Naturalization Service regulations in 1999. See 64 Fed. Reg. 8488 (Feb. 19, 1999); 65 Fed. Reg. 76135 (Dec. 6, 2000); 8 C.F.R. §§ 208.16-208.18 (2008).

under-age children residing in the home country. Those that fear torture or cannot return due to war or natural disaster cannot bring their children to safety in the United States and are “forced to choose” between their own safety and the chance to reunite with their immediate family.<sup>96</sup> Implicit in the right to family reunification for all refugees (those recognized under the Refugee Convention and those granted complementary protection under the Torture Convention or state humanitarian instruments) are both the child’s right to live with her parents and the refugee’s right to live with her family in a safe country. By definition, the refugee does not have the option of reunifying with family members in the home country due to fear of persecution or torture. However, families should not have to decide between living in family unity and being free from harm. Both the right to live in family unity and the right to be free from harm are protected as core fundamental human rights. As set forth above, the family is to be protected as the “natural and fundamental group unit of society.”<sup>97</sup> The Refugee Convention and the United Nations Convention against Torture are aimed at protecting vulnerable refugees that need surrogate protection because their own nations have failed to protect them.<sup>98</sup> As a matter of basic morality and dignity, persons should not need to choose between two fundamental human rights. As discussed below, this seemingly immoral choice also leads children to make dangerous journeys alone in search of parents who are in the United States.

This failure to afford family reunification rights to those in need of protection under international human rights-based complimentary protection regimes<sup>99</sup> or domestic remedies, such as temporary protected status, undermines principles of family reunification that are valued in both domestic and international law. Because the status is motivated by a need for surrogate state protection, regardless of the source of the protection, the rights which attach to the status (such as family reunification rights) should be identical.<sup>100</sup> Indeed, the concept of complementary protection was originally intended as a way to protect those who were in need of international protection but did not necessarily meet the narrow contours of the Refugee Convention

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96. See Nessel, *supra* note 11, at 899.

97. See Universal Declaration of Human Rights, *supra* note 20, at art. 16, ¶ 3; see also International Covenant on Economic, Social and Cultural Rights, *supra* note 25 and accompanying text.

98. See sources cited *supra* note 94.

99. See MCADAM, *supra* note 15, at 199.

100. See *id.* at 198-99.

definition.<sup>101</sup> The hope was that states would not limit protection to traditional Convention Refugees but would broaden their protection mandate to include those fleeing other situations such as natural disasters or armed conflicts. Unfortunately, the reverse has occurred as nations, including the United States, use temporary or complementary protection to supplant more robust asylum protections.<sup>102</sup>

This failure to consider the family as an integral unit when making immigration decisions also inevitably leads to an influx of unaccompanied minors attempting perilous journeys to reunite with their parent(s), both in the United States and in other nations. In both the United States and the EU southern border states, there has been a dramatic increase in unaccompanied minors traveling much further distances to cross borders. In 2004, ICE estimated that over 122,000 unaccompanied minors crossed unlawfully into the United States.<sup>103</sup> In 2004, all but 20,000 of these minors were from Mexico whereas today 80 to 90% of these minors make journeys from further south including Honduras, Guatemala, and El Salvador.<sup>104</sup> Similarly, in southern border-states of the EU, African parents are resorting to sending their children on the dangerous sea journey to Spain in hopes that it will be harder to deport the children. Until 2005, more than 90% of the unaccompanied migrant children entering Spain originated from Morocco (particularly Southern Morocco).<sup>105</sup> Starting in January 2006, the number of Sub-Saharan African children, mainly from Mali and Senegal, increased significantly.<sup>106</sup>

Rather than denying families the right to live together, thereby further endangering the families as children are forced to make surreptitious journeys to the protective state, all persons in need of international protection should be afforded the right to live with their immediate family members. Such a change in policy would be in

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101. See *id.* at 23, explaining that, although the term “complementary protection” was not actually coined until the 1990s, the notion could be traced back to the League of Nations’ earliest attempts to regulate refugees under international law. In its original form, the word “complementary” referred only to the source of the protection, with the content of the protection being identical. *Id.* at 23-24, 28.

102. For a historical examination of the temporary protection regime, see Joan Fitzpatrick, *Flight From Asylum: Trends Toward Temporary “Refuge” and Local Responses to Forced Migrations*, 35 VA. J. INT’L L. 13, 40-44 (1994).

103. Camille T. Taiara, *The Littlest Deportees*, NEW AM. MEDIA, Mar. 8, 2007, available at <http://news.ncmonline.com> (search “The Littlest Deportees”).

104. *Id.*

105. HUMAN RIGHTS WATCH, UNWELCOME RESPONSIBILITIES: SPAIN’S FAILURE TO PROTECT THE RIGHTS OF UNACCOMPANIED MIGRANT CHILDREN IN THE CANARY ISLANDS 20 (2007).

106. *Id.*

keeping with the primacy of the family unit in domestic and international law and would further a holistic view of international human rights and protection, rather than perpetuating a protection hierarchy that unifies or divides families based solely on the underlying legal basis for granting protection.<sup>107</sup>

#### IV. A LOOK AT THE EXPERIENCES OF OTHER NATIONS AND THE EU HARMONIZATION PROCESS

The United States is not alone in failing to provide for family reunification rights for those granted subsidiary or complementary protection. While the number of nations that afford family reunification rights to Refugee Convention refugees suggests that an international norm favoring family reunification under the Refugee Convention is emerging, the variance with regard to non-Convention refugees suggests that family reunification is too often viewed as a discretionary benefit rather than a fundamental human right.

Indeed, an increasing number of nations are now relying on complementary protection regimes as a tool to re-direct refugees into more temporary forms of protection with lesser family reunification rights.<sup>108</sup> This is done under the cover of facilitating repatriation in the future. Refugee and protection issues are increasingly being viewed through an enforcement lens, with a greater emphasis on protecting nations from mass influxes of refugees than with determining the true protection needs of the individual. Thus, it is the circumstances of arriving as part of a mass influx, rather than the underlying cause of flight, that all too often determines whether asylum or temporary refuge will be afforded.<sup>109</sup>

A number of countries do allow for family reunification for those granted complementary protection.<sup>110</sup> For example, “Denmark, Finland, and Sweden offer ‘non-Convention refugees’ the same family

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107. Scholars have advanced similar arguments in this regard. *See e.g.*, Jane McAdam, Paper Presentation at “Moving On: Forced Migration and Human Rights” Conference, NSW Parliament House, Humane Rights: The Refugee Convention as a Blueprint for Complementary Protection Status 4-5 (Nov. 22, 2005).

108. Ninette Kelley, of the UNHCR, notes that “[s]ome States use complementary forms of protection for persons who would qualify in other States as Convention refugees, leading to the criticism that resort to the former is used to avoid or forestall the engagement of Convention obligations towards refugees.” *See* Ninette Kelley, *International Refugee Protection Challenges and Opportunities*, 19 INT’L J. REFUGEE L. 401, 428 (2007).

109. Fitzpatrick, *supra* note 98, at 16.

110. Jastram, *supra* note 28, at 190.

reunification rights as Convention refugees.”<sup>111</sup> Other countries impose additional burdens on non-Convention refugees’ ability to reunite with family members.<sup>112</sup> Still others, like the United States, deny non-Convention refugees any ability to reunite with families.<sup>113</sup>

The harmonization process underway in the EU perhaps best reveals the controversy surrounding family reunification rights for non-Convention refugees. While “[t]he Committee of Ministers of the Council of Europe specifically recommend[ed] that family reunion provisions relating to refugees should apply” in all complementary protection situations,<sup>114</sup> the EU Council Directive on Family Reunification failed to require member states to afford such rights to those with complimentary or subsidiary protection.<sup>115</sup> As noted by María Teresa Gil-Bazo, the Directive’s separation of Geneva Convention refugees and those in need of international protection for other reasons reflects a missed opportunity to combine all those in need of international protection into one status.<sup>116</sup> According to Gil-Bazo, “the Directive could have reflected the evolution of international law by

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111. See Nessel, *supra* note 11, at 916.

112. See Kelley, *supra* note 104, at 427 (noting that “[o]ften, however, such protection is time limited, and [complementary protection] does not provide as full a panoply of integration rights or security as is accorded to recognized refugees”); see also John, *supra* note 28, at 39 (citing several international sources, including: France, Loi Chevènement art. 16; Netherlands Aliens Law art. 9; U.K. (ELR)).

113. John, *supra* note 28, at 39 (citing several international sources, including, Austria, 1997 Asylum Law art. 15; Germany, Aliens Law § 53; Spain, Asylum Law § 17(3)). One commentator notes that:

[I]n most European States, persons not recognised as refugees but nevertheless in need of protection, such as asylum seekers, humanitarian or de facto refugees and to some extent displaced persons, are denied the right to family reunion. This is in spite of the fact that family reunion is considered a basic human right, and that States are bound to comply in good faith with Convention law, including the judgments of the Court.

Hélène Lambert, *The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion*, 11 INT’L J. REFUGEE L. 427, 431 (1999).

114. Jastram & Newland, *supra* note 28, at 587 (citing Council of Eur., Comm. of Ministers, Recommendation Rec (2001) 18 of the Committee of Ministers to Member States on Subsidiary Protection, 774th mtg., ¶ 6 (Nov. 27, 2001), available at [http://www.refugeelawreader.org/538/Recommendation\\_R\\_2001\\_18\\_to\\_Member\\_Sates\\_on\\_Subsiadiary\\_Protection.pdf](http://www.refugeelawreader.org/538/Recommendation_R_2001_18_to_Member_Sates_on_Subsiadiary_Protection.pdf)).

115. Council Directive (EC) 2003/86 of 22 September 2003 on the Right to Family Reunification, art. 3(2)(c), 2003 O.J. (L 251/12) (2003) [hereinafter EU Council Directive]. The proposed EU directive on family unification would also allow member states to restrict family unification rights for spouses unless both spouses are at least twenty-one years of age, even in cases in which domestic laws allow for marriage at eighteen years of age. *Id.* at art. 4(5).

116. María Teresa Gil-Bazo, *The Protection of Refugees Under the Common European Asylum System. The Establishment of a European Jurisdiction for Asylum Purposes and Compliance with International Refugee and Human Rights Law*, 36 CUADERNOS EUROPEOS DE DEUSTO 153, 159 (2007) (Spain).

joining in one instrument the various legal grounds under which individuals are protected under international law and creating one status of the 'refugee' broadly considered under [European Council] law."<sup>117</sup> Similarly, the European Council on Refugees and Exiles has criticized linking family reunification solely to the Refugee Convention rather than including all those in need of international protection.<sup>118</sup>

In nations with growing numbers of immigrants, there is also a concern with the immigrant groups' willingness or ability to assimilate within the dominant culture and language of the host country. Historically, it was assumed that there was an implicit agreement to assimilate in exchange for the opportunity to immigrate, with backlashes against those groups that were perceived as unwilling to assimilate.<sup>119</sup> However, as discussed below, nations are now requiring particular immigrants to enter into explicit contractual assimilation agreements with the country of immigration as a prerequisite to admission. Other nations are requiring integration exams or imposing language requirements on immigrants as prerequisites to admission.

Few would take issue with the goal of encouraging the integration of new immigrants into society.<sup>120</sup> However, there are many questions as

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117. *Id.* at 159-60.

118. Eur. Council on Refugees and Exiles, POSITION ON REFUGEE FAMILY REUNIFICATION ¶ 1-10 (July 2000), available at <http://www.ecre.org/files/family.pdf>. Following the disturbing United States and global trend of criminalizing immigration, the European Parliament recently passed a Directive on the Return of Illegal Immigrants ("Returns Directive"), authorizing detention for six to eighteen months prior to deportation, followed by a five year bar on re-entry. See Press Release, European Parliament, Parliament adopts directive on return of illegal immigrants (June 18, 2006), available at [http://www.europarl.europa.eu/news/expert/infopress\\_page/018-31787-168-06-25-902-20080616IPR31785-16-06-2008-2008-true/default\\_en.htm](http://www.europarl.europa.eu/news/expert/infopress_page/018-31787-168-06-25-902-20080616IPR31785-16-06-2008-2008-true/default_en.htm). Commentators fear that the Returns Directive will result in the violation of basic human rights, including the right to family unity. See, e.g., Press Release, Eur. Council on Refugees and Exiles, Returns Directive: EU Fails to Uphold Human Rights (June 18, 2008), available at <http://www.ecre.org/files/ECRE%20press%20release%20Returns%20Dir.pdf>; Press Release, Eur. Council on Refugees and Exiles, "Returns Directive": European Parliament and Member States Risk Compromising Respect for Migrants' Rights (May 20, 2008), available at <http://www.ecre.org/files/ECRE%20AI%20Joint%20PR%20Returns%20Directive.pdf>.

119. See KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 47 (2007).

120. Although, it must be noted that "integration" can have very different meanings. Integration generally refers to the incorporation of immigrants into the structures of the host country on all levels. Walter Kälin, *Human Rights and The Integration Of Migrants*, in MIGRATION AND INTERNATIONAL LEGAL NORMS, *supra* note 28, at 271, 272-73. However, the relationship between social integration and cultural assimilation is much more complicated. It is unclear to what extent social integration is possible without cultural assimilation or to what extent cultural assimilation facilitates social integration. *Id.* at 272. Kitty Calavita also points out that by the 1980s and 1990s, "integration had replaced assimilation as the buzzword in academic treatises and policy circles, a substitution that may have responded rhetorically to the myriad 'discontents' associated with the



to whether the new integration measures will further, or actually impede, such a goal. Historically, the main models for integration have ranged from assimilation to multiculturalism.<sup>121</sup> The United States, as exemplified by the “melting pot” theory, has relied on new groups of immigrants “melting” into society and society evolving over time to reflect its various “ingredients.”<sup>122</sup> In contrast, Canada has employed multiculturalism with different ethnic groups co-existing.<sup>123</sup> In the European Union, immigration is a relatively new phenomenon in many formerly emigration states.<sup>124</sup> The dramatic increase in immigration into the European Union has spurred a multitude of new integration measures.<sup>125</sup> While encouraging or assisting newcomers to learn the predominant language and/or culture of their new home country may be advisable, these initiatives all too often seek to single-out immigrant groups that are deemed less likely to assimilate and exclude their initial entrance into the country. This is done through language and cultural

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former system, but not its inherent ambiguities.” Calavita, *IMMIGRANTS AT THE MARGINS: LAW, RACE, AND EXCLUSION IN SOUTHERN EUROPE* 76 (2005).

121. For a more in-depth discussion of various integration models, see Lauren Gilbert, *National Identity and Immigration Policy in the U.S. and the European Union*, 14 *COLUM. J. EUR. L.* 99 (2007). Professor Gilbert argues that there is currently a convergence of integration models between the U.S. and the EU. *Id.* at 100-07.

122. However, it is important to acknowledge the United States’ dark history as it has also “attempted to coerce immigrants and people of color to assimilate into the mainstream and adopt ‘American’ ways.” JOHNSON, *supra* note 115, at 47.

123. Section 27 of the Canadian Charter on Rights and Freedoms (1982) requires that Canadian laws be interpreted through an understanding of multiculturalism. CONSTITUTION ACT, 1982 pt. 1, § 27 (Can.). Canada first made multiculturalism an official policy in 1971. *Multiculturalism—Canadian Multiculturalism: An Inclusive Citizenship*, available at [http://www.canadianheritage.gc.ca/progs/multi/inclusive\\_e.cfm](http://www.canadianheritage.gc.ca/progs/multi/inclusive_e.cfm) (last visited June 15, 2008).

124. In fact, Europe now matches North America in its significance as a region of immigration. Net immigration in Europe in 2001 was 3.0 per 1,000 inhabitants, compared to 3.1 in the United States. Margaret Kengerlinsky, *Shifting Borders: Immigration, Refugee and Asylum Matters & Public Policy: Immigration and Asylum Policies in the European Union and the European Convention on Human Rights: Questioning the Legality of Restrictions*, 12 *GEO. PUB. POL’Y REV.* 101, 104 (2006/2007). Europe’s immigrant population is now comprised of 56.1 million people, compared to 40.8 million in North America. *Id.* Spain and Italy are two examples of current European Union immigration destination countries that have historically been countries of labor emigration, “sending millions of working men, women, and children to virtually every corner of the globe beginning in the late 1800’s.” CALAVITA, *supra* note 120, at 4.

125. See, e.g., Jonathan Faull, E.U. Justice Freedom & Sec. Dir. Gen., *Immigration and Identity: Do Current Patterns of Immigration Challenge Existing Notions of National Identity?*, Conference on Immigration, Integration and Identity: Managing Diverse Societies in Europe and the USA (May 15, 2006), available at [http://www.eurunion.org/eu/index.php?option=com\\_content&task=view&id=2401](http://www.eurunion.org/eu/index.php?option=com_content&task=view&id=2401) (noting that “in Europe immigration has been seen as utilitarian and designed to be temporary, not as permanent and as a crucial element in nation-building”). Faull also notes that “a number of EU Member States are now re-evaluating the role of citizenship as a means of promoting integration.” *Id.*

exams that must be passed *prior to* entering the host country.<sup>126</sup> For those that are allowed to enter, there are contractual obligations to assimilate and punitive measures for those who do not comply.<sup>127</sup> Some countries have also imposed bans on cultural or religious practices that are deemed to undermine integration.<sup>128</sup> Finally, alongside these new measures, family reunification, which is perhaps the most essential key to integration, is being curtailed to make way for highly skilled immigrants and those deemed most likely to integrate.

After a storm of controversy surrounding France's attempt to enact a bill that would have mandated DNA testing for all immigrants seeking family reunification, France passed an amended, but strict, immigration bill requiring language and cultural knowledge tests as well as optional maternal/child DNA testing for immigrants seeking family reunification.<sup>129</sup> Pursuant to French immigration law, prospective immigrants must now pass a test for language skills and French values.<sup>130</sup> Prior to the overhaul of the French immigration regime, family reunification was the driving force behind immigration policy and accounted for nearly 65% of all immigration to France.<sup>131</sup>

Under the new French immigration law, immigrants must sign a welcome and integration contract and take French language and civics

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126. See, e.g., *infra* notes 136-37 and accompanying text.

127. See, e.g., *infra* notes 132-35 and accompanying text.

128. See, e.g., Human Rights Watch, France: Headscarf Ban Violates Religious Freedom (Feb. 26, 2004), available at <http://www.hrw.org/english/docs/2004/02/26/france7666.htm> (critiquing a proposed French law banning Islamic headscarves and other visible religious symbols in state schools). In France, a Moroccan woman and mother of four French national children, married to a French citizen of Moroccan descent, was denied citizenship based on "insufficient assimilation" into France. See Conseil d'État [CE] [highest administrative court] May 26, 2008, available at [http://www.conseil-etat.fr/ce/jurispd/index\\_ac\\_ld0820.shtml#](http://www.conseil-etat.fr/ce/jurispd/index_ac_ld0820.shtml#) (last visited Sept. 17, 2008). The decision to deny citizenship was recently upheld by France's highest administrative court. *Id.* The Court relied on the woman's religious practices, including her wearing of niqab (an Islamic veil that covered her from head to toe with only her eyes exposed), to find that her "radical" practice of Islam was incompatible with French values like gender equality. See Katrin Bennhold, *A Veil Closes France's Door to Citizenship*, N.Y. TIMES, July 19, 2008, at A1.

129. Deirdre Jurand, *France Passes Bill Allowing DNA Tests for Immigrants*, JURIST, Oct. 23, 2007, available at <http://jurist.law.pitt.edu/paperchase/2007/10/france-passes-bill-allowing-dna-tests.php>. Many countries, including Finland, Italy, New Zealand, and the Netherlands (as well as the United States and Canada) already require DNA testing for at least certain immigration applications. See Cindy L. Baldassi, *DNA, Discrimination and the Definition of "Family Class"*: M.A.O. v. Canada (Minister of Citizenship and Immigration), 21 J.L. & SOC. POL'Y 5, 15 (2007).

130. MIGRATION POLICY INST., *supra* note 6, at 8. Importantly however, under the French model, prospective immigrants that are judged to lack competency in French language skills are required to take 400 hours of subsidized French language instruction in France. See *id.*

131. Kara Murphy, Migration Policy Inst., *France's New Law: Control Immigration Flows, Court the Highly Skilled*, BACKGROUNDERS, Nov. 2006, available at [http://www.migrationpolicy.org/pubs/Backgrounder2\\_France.php](http://www.migrationpolicy.org/pubs/Backgrounder2_France.php).

courses.<sup>132</sup> In order to obtain permanent residency status, they must prove that they are “well-integrated” into French society.<sup>133</sup> The French restrictions on family reunification are said to further three goals: ensuring that immigrants respect French values, promoting integration of immigrants, and undermining forced marriages and polygamy in France.<sup>134</sup> Clearly, the changes in the law will result in a greater number of family separations and families waiting longer periods to be reunited. For example, whereas before, an immigrant had to wait twelve months before filing for family reunification, the required period is now increased to eighteen months.<sup>135</sup>

In March 2006, the Netherlands introduced an integration exam requiring that an immigrant must pass a test in the Dutch language and have knowledge of Dutch society as a prerequisite for entry on a family reunification visa.<sup>136</sup> In contrast to policies (like those in the United States) that require a certain degree of knowledge of language and civics after a person has resided for a number of years within the United States and seeks to naturalize, the Dutch test is given to prospective immigrants that have yet to enter the Netherlands. The language exercises include repeating sentences, indicating opposites, and answering short questions. In telling recognition of the gulf that the prospective immigrants are being required to bridge while still most often in their home countries, the Dutch government provides a censored version of the controversial video *Coming to the Netherlands*, which tries to prepare potential migrants for things they will see in the Netherlands, including nudity and homosexuality.

In April 2007, a similar test was introduced in Denmark. In March 2007 the German and British governments announced their intent to institute a language test abroad. France has also expressed a commitment to follow suit.<sup>137</sup>

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132. *See id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *See* Chavi Keeney Nana, *With Strict Policies in Place, Dutch Discourse on Integration Becomes More Inclusive*, MIGRATION INFORMATION SOURCE, Apr. 19, 2007, available at <http://www.migrationinformation.org/USfocus/display.cfm?id=596>.

137. *Controversial French Immigration Bill Heads to Parliament*, CBS NEWS, Sept. 18, 2007; Eric Leise, *Germany Strives to Integrate Immigrants with New Policies*, MIGRATION INFORMATION SOURCE, July 9, 2007, available at <http://www.migrationinformation.org/USfocus/display.cfm?id=610>; *New UK Citizenship Testing Starts*, BBC NEWS, Nov. 1, 2005, available at [http://news.bbc.co.uk/1/hi/uk\\_politics/4391710.stm](http://news.bbc.co.uk/1/hi/uk_politics/4391710.stm); Migration, Denmark—Legislationline.org, *Denmark Introduces New Language Tests for Foreigners*, Dec. 13, 2005, available at

Although these integration exams are purportedly aimed at preventing forced marriage or fostering integration, it is also quite clear that such measures will undermine the ability of a great number of immigrants to reunite with their family members. In fact, the Dutch Minister of Alien Affairs and Integration noted that she expected a 20% reduction of family migration to result as a “side effect” of the new exams.<sup>138</sup> Commentators have also expressed concern with the discriminatory impact of these exams, recalling the use of similar language tests in South Africa and Australia during periods of extreme racism.<sup>139</sup> As is also clear in the context of the English-only movement in the United States, language is often used as a proxy for nationality or race.<sup>140</sup>

In Spain, in the period leading up to the March 2008 elections, the conservative Partido Popular’s (“PP”) campaign platform focused on immigration with new proposals to restrict immigration and prioritize those immigrants seen as being most likely to integrate.<sup>141</sup> The PP also proposed an explicit contract to be entered into between intending immigrants and Spain requiring assimilation and the acquisition of language skills. Such calls to prioritize immigrants that will be able to integrate most easily into Spanish society are being set forth hand-in-hand with proposals to ban Islamic women from wearing a veil in public institutions, in the name of fighting discrimination.<sup>142</sup> In France, the government banned the wearing of the Muslim headdress in public school in 2004.<sup>143</sup>

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<http://www.legislationline.org> (select “Denmark” from Country menu, then select “Migration” from Topic menu).

138. HUMAN RIGHTS WATCH, THE NETHERLANDS: DISCRIMINATION IN THE NAME OF INTEGRATION 19 (May 2008), [www.hrw.org/english/docs/2008/05/15/nether18796.htm](http://www.hrw.org/english/docs/2008/05/15/nether18796.htm).

139. See e.g., Emily C. Peyser, Comment, “Pacific Solution”? *The Sinking Right to Seek Asylum in Australia*, 11 PAC. RIM L. & POL’Y J. 431, 436 (2002) (in order to ensure that Europeans were favored as immigrants, Australia utilized a controversial dictation test until 1958 and maintained its “White Australia” immigration policy until 1973).

140. See Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 336 (1992).

141. See e.g., Carlos E. Cué, *El PP seleccionará a los inmigrantes en función de su nivel de adaptación* [*The PP Will Select Immigrants Based on Their Level of Adaptation*], EL PAIS.COM, Feb. 9, 2008, at p.1 (Spain) (reporting that the PP has proposed a new point-based immigration system that affords greatest weight to those of particular countries of origin that are Spanish-speaking).

142. *Id.* at 1, 18 (describing a PP proposal to prohibit the use of the Islamic veil in schools).

143. See Kimberly Hamilton et al., *The Challenge of French Diversity*, MIGRATION INFORMATION SOURCE, Nov. 2004, available at <http://www.migrationinformation.org/USfocus/display.cfm?id=266>.

The proliferation of new assimilation, integration, and language exams raises various questions. First, are such requirements permissible or do they unfairly discriminate against certain classes of immigrants? Second, assuming such requirements are legal, are they likely to further true integration or hinder it? Lastly, why are so many of these requirements particularly targeting the intending beneficiaries of family reunification petitions?

Although various international human rights declarations recognize linguistic rights as human rights, “[v]irtually all . . . treaties, conventions and declarations dealing with linguistic rights specifically deny any rights for the languages of immigrants.”<sup>144</sup> Heinz Kloss, a German linguist, sets forth the four arguments that are most frequently relied upon as justification for denying linguistic rights:

[T]he tacit compact theory (immigrants make an unspoken agreement to adapt); the take-and-give theory (the receiving state’s economic benefits require the cost of assimilation); the anti-ghettoization theory (isolation creates enclaves devoid of the host state’s culture and that of immigrants’ countries of origin); and the national unity theory (immigrants who maintain language are disruptive forces destabilizing the host state).<sup>145</sup>

Although there is no enforceable linguistic human right for immigrants, the new EU initiatives are troubling policies on legal grounds. For example, the EU Directive on the Right to Family Reunification requires that, when making a determination on a family reunification petition, the “best interests of the minor children” be taken into account,<sup>146</sup> as well as the “nature and solidity of the person’s family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin . . . .”<sup>147</sup> Therefore, any across-the-board requirement that the beneficiaries of a family reunification petition remain in the home country until the integration and language exams are passed is inconsistent with the Directive’s mandate to make individual

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144. Paul Conor Hale, Comment, *Official, National, Common or Unifying: Do Words Giving Legal Status To Language Diminish Linguistic Human Rights?*, 36 GA. J. INT’L & COMP. L. 221, 251 (2007) (quoting Douglas A. Kibbee, *Language Rights and Immigrant Languages* 5, available at <http://www.utexas.edu/cola/insts/france-ut/archives/Fall2003/ConfLangImmigration/kibbee.pdf> (last visited June 15, 2008)).

145. *Id.*

146. EU Council Directive, *supra* note 115, at art. 5, § 5.

147. *Id.* at art. 17.

determinations as to the best interest of the child and particular circumstances of each case.

Article 7(2) of the EU Council Directive on the Right to Family Reunification only permits “integration measures” before entry, not “integration conditions.”<sup>148</sup> During the negotiations on the first two directives on legal migration an explicit difference was made between integration measures and integration conditions. When Austria, Germany, and the Netherlands in March 2003 proposed to replace the term “integration measures” with “integration conditions,” the other Member States explicitly rejected that proposal.<sup>149</sup>

In addition to the EU Council Directive, national constitutions, and domestic legislation, the Member States are also bound by numerous international human rights treaties and conventions including: the European Community Treaty (“EC Treaty”), the European Convention on Human Rights (“ECHR”), the Convention on the Rights of the Child, the ICCPR, and the EU Charter on Fundamental Rights. All of these documents provide a basis for challenging the integration and language requirements. For example, the Dutch legislation and proposed German legislation provide for exemptions from the integration/language exams for nationals of certain countries. Given that the purported goal of the exams is to ensure better integration into the destination country, one can argue that exempting certain nationalities, but not others, bears no relationship to the aim of the measure and therefore constitutes unlawful discrimination on the basis of nationality as prohibited by Article 12 of the EC Treaty, Article 14 of the ECHR, and Article 26 of the ICCPR.<sup>150</sup>

The requirement to pass the integration/language tests before entering the country may also result in prolonged family separation in violation of Article 8 of the ECHR (assuming there is no other country where the family could reasonably be expected to live together, or that the spouse in the EU could not reasonably be expected to give up his/her life in the EU).

In contrast, advocates in the United States are limited in their ability to use international covenants, treaties, or conventions. The only potentially applicable binding international treaties or conventions in the

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148. *Id.* at art. 7, § 2; *cf.* Proposal for a Council Directive Concerning the Status of Third Country Nationals Who Are Long Term Residents (EC) No. 7393/1/03 REV1, pg. 5 (Mar. 14, 2003) [hereinafter Proposal for a Council Directive].

149. *See* Proposal for a Council Directive, *supra* note 148, at 5.

150. *See* International Covenant on Civil and Political Rights, *supra* note 22, at art. 26; Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 26, at art. 14; Consolidated Version of the Treaty Establishing the European Community art. 12, Dec. 24, 2002, 2002 O.J. (C 325) 43.

United States are the Refugee or Torture Conventions. Although the United States Constitution and domestic laws can be utilized to challenge unjust immigration laws or policies, the United States Supreme Court has shown great deference to Congress when immigration regulation is at issue.<sup>151</sup>

Turning to the second question as to whether forced integration measures, whether in the form of language or integration exams prior to admission or contractual agreements to integrate with sanctions for noncompliance, actually further integration, the answers are mixed. While language and assimilation requirements are based on the belief that they further integration, social science research actually suggests that “permitting identification with socially salient categories like race and gender is more likely to translate into reduced prejudice than attempting to eliminate or eclipse entirely those categories.”<sup>152</sup> Moreover, Walter Kälin reminds us that, “a high degree of assimilation does not always guarantee successful integration as exclusion and racism may occur between groups with similar backgrounds.”<sup>153</sup> Conversely, certain ethnic groups have resisted assimilation but have been quite successful at integrating themselves into the structures of the host society.<sup>154</sup> Therefore, it can be argued that actions such as France’s prohibition of the Muslim head covering in the name of integration may actually hinder it.

Because family-based immigration is one of the primary forms of immigration, integration and language requirements tend to focus on those seeking family reunification. In addition, nations are moving away from family reunification models in favor of point-based systems that emphasize desirable skills and language abilities.<sup>155</sup>

The reality is that because today’s global migrants “come from countries of vast social, cultural, and often racial ‘distances’ from the countries they seek to enter. . . . [T]he ‘visibility’ and ‘otherness’ of newcomers [has increased], which in turn fuel the discomfort of host

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151. See Lori A. Nessel & Anjum Gupta, *Abuse of (Plenary) Power? Judicial Deference and the Post-9/11 War on Immigrants*, in *AWAKENING FROM THE DREAM: CIVIL RIGHTS UNDER SIEGE AND THE NEW STRUGGLE FOR EQUAL JUSTICE* 229, 230-31 (Denise C. Morgan et al. eds., 2006).

152. Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 385-86 (2008) (noting the potential implications of this new research in the debate over the cultural consequences of immigration).

153. Kälin, *supra* note 120, at 273.

154. *Id.* (citing examples of “East Asian immigrant communities in the United States, Indians in East Africa, and Lebanese traders in Western Africa[]”).

155. See *e.g.*, MIGRATION POLICY INST., *supra* note 6, at 8; Murphy, *supra* note 131.

populations.”<sup>156</sup> Because nations often do not view family reunification as a fundamental human right, but rather as a humanitarian principle, family unity is being eroded as nations turn their attention to recruiting particular skilled migrants that are deemed likely to integrate well into the host country. And, as discussed previously, family unity is also being undervalued as nations focus on increased enforcement and deportation of long-time residents.

## V. CONCLUSION

The combination of undervaluing family unity, the misguided emphasis on increased worksite enforcement, and using language and culture-based restrictions to curtail immigration have resulted in unjust immigration regimes. For these reasons, arguments based on international human rights norms, justice, and morality become particularly important. It is essential to look beyond the individual immigrant targeted by any immigration policy or law and understand the connection between the immigrant and his/her family on a deeper level than the common rhetoric of “chain migration.” Greater attention must be paid to the morality and long-term implications of dividing families. As the Swiss novelist and playwright Max Frisch once noted in the context of Germany’s experience with guest workers: “We asked for workers but people came.”<sup>157</sup> If legislation or policies are focused on the immigrant as an individual without an understanding of the context of family ties that has (and I believe should) guide immigration policy, we will continue dividing families and endangering children. As the United States Conference on Catholic Bishops has acknowledged: “[m]ore powerful economic nations, which have the ability to protect and feed their residents, have a stronger obligation to accommodate migration flows.”<sup>158</sup> Both the United States and the European Union must work to ensure that immigration laws do not undermine family unity.

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156. Demetrios G. Papademetriou, *The Age of Mobility: How to Get More Out of Migration in the 21st Century*, MIGRATION POLICY INST., Mar. 2007, at 1.

157. *Id.* at 8.

158. U.S. Conference of Catholic Bishops, *A Pastoral Letter Concerning Migration from the Catholic Bishops of Mexico and the United States* ¶36 (2003), available at <http://www.usccb.org/mrs/stranger.shtml>.