

CHILDREN'S RIGHTS NATIONALLY AND INTERNATIONALLY DURING THE DEPORTATION OF THEIR PARENTS OR THEMSELVES

DOES THE RIGHT TO SOVEREIGNTY TRUMP THE BEST INTEREST OF THE CHILD?

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This paper advances a controversial analysis of children's rights in immigration proceedings in the United States, explaining how current US immigration laws both deny children fundamental rights set out in the US Constitution and violate the US's international human rights obligations. My analysis explores the historical progression of children's rights, both nationally and internationally, in family law, juvenile law, and immigration law. I argue that children, under both the Constitution and international human rights law, have independent rights that are not derivative of their parents, such as the right to family, the right to equal protection, the right to freedom from cruel and unusual punishment, and the right to realization of their citizenship in a meaningful manner.

My analysis of US obligations under international law will focus on the fundamental right to family, the right to be free from cruel and unusual punishment (treatment), and the international requirement of a "best interest" of the child analysis. This analysis is guided by the balancing framework recently set forth by the Inter-American Commission of Human Rights and the European Court of Human Rights, both of which outlined a variety of factors that must be analyzed during deportations impacting children, particularly US citizen children.¹ This paper will explain this balancing framework, as well as other relevant international documents.

My analysis of domestic law will focus on case law, immigration statutes, and the internal policies of administrative agencies that handle immigration, with a particular focus on how children are being treated and affected by immigration laws in the US. I will explain the US law, how it is designed, how it became so destructive, and why it violates the US's international obligations. In this section I also argue that realization of children's independent fundamental rights requires, first, that they are heard and considered in immigration proceedings that directly impact them, and second, that they are permitted to independently petition for family members. But, acknowledging that children, in addition to having rights, still require special protection, I further argue that the "best interest of the child" must be a primary consideration in all immigration proceedings that directly impact children. My analysis will conclude by discussing specific legal frameworks utilized in family law and juvenile justice settings, which would be beneficial if applied in the immigration context, as well as suggesting other considerations that should be incorporated when reframing the law.

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¹ Amrollahi v. Denmark, (No. 56811/00), Eur. Court. H.R. (Oct. 11 2002), *available at* <http://www.unhcr.org/refworld/docid/3ffae5fe4.html> (last visited May 14, 2012).

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INTRODUCTION

The migration of displaced persons is an international issue, but this issue is currently stirring intense and emotional debate throughout the United States, echoing a nationwide plea for immigration reform. After September 11, 2001, the topic of immigration became more hotly debated than ever, and this has continued to intensify as the US economy has continued to struggle.² Some US citizens advocate for harsher penalties to deter migration and others advocate for a more humane solution to the problem. But irrespective of the side on which one falls, there is one fact that is undisputed: immigration reform is a must. Unfortunately there is no reform that can provide a quick fix to the complex issues of migration that arise in the immigration context. Solving the issue of migration and displacement would require establishing world peace, creating environmental stability, and ending world hunger and poverty, which clearly requires international cooperation and is beyond the scope of the current debates which are driven by economic and border security concerns.

Yet despite the lack of a complete and easy solution, immigration and migratory issues must still be addressed and dealt with by each sovereign nation, and they must be addressed quickly because human rights abuses are flourishing. Human beings are suffering and hundreds of thousands of these human faces are those of children who have become lost in the shuffle and lost in the debate. These children are often abandoned and alone; many are refugees fleeing torture and persecution; and many others, despite having an undocumented parent, are bright and talented young people who had no say in where they were born or in where they live, yet they are being rejected and injured by the very nation that they consider home. They are afraid. But they do not fear foreign invasion, terrorism, or nuclear weapons. They fear the Armed Government agents will rip their families apart. The armed Government Agents that I will focus on are Government Agents from the United States of America, The trauma that these children endure at the hands of these government agents is not minor. Citizen Children are ripped from their families and homes; foreign born children and infants are interrogated, incarcerated, and housed in cells like criminals; and prisons are being filled with infants and children daily in the United States, a nation that internationally proclaims that the “best interest of the child” should be a primary consideration in all actions dealing with children. Yet, despite this proclamation and general agreement that children require special consideration, children with foreign born parents are being treated as an exception to the rule, irrespective of citizenship, and the Supreme Court has condoned this differential treatment of them as justified by economic and border security concerns.³ US law, both enacted and proposed, has lost sight of the “best interest of the child” when dealing with these children, thus creating a group of children on US soil for whom equality, dignity, family unity, freedom from cruel and unusual treatment, and other fundamental human rights are not recognized.

This inhumane treatment and lack of consideration for children’s interests is a violation of international humanitarian law and is in violation of the United States’ international treaty obligations.⁴ The United States has committed itself internationally, as a signatory to a number of Declarations on human rights, to honor the United States’ own obligations under them, which is

² See generally National Network for Immigrant and Refugee Rights, *Injustice For All, The Rise of the US Immigration Policing Regime* 1, 1–2 (2010) [hereinafter *Injustice For All*].

³ See *Reno v. Flores*, 507 U.S. 292, 312 (2008).

⁴ See, e.g., International Covenant on Civil and Political Rights, *opened for signature* Mar. 23, 1976, G.A. Res. 2200A, 999 U.N.T.S. 171 (signed by the United States Oct. 5 1977, ratified June 8, 1992)[hereinafter ICCPR].

of particular importance because the United States is a major power in many of the international bodies that determine what these fundamental rights are. If the United States is able to disregard the fundamental human rights they establish by making exceptions, even for reasons of national importance, then this sets an example for other States, in that a State's obligation to protect human rights is subject to any and all exceptions that the State sees fit or necessary.

But beyond international obligations, these policies are simply unacceptable because the fundamental rights of human beings cannot be subject to exceptions and the example that the United States sets is crucial to international stability in the area of human rights. For this reason the United States is bound not only legally, but also morally, to honor its commitment to the international community by truly being a State that promotes human rights for all, not only outside of, but also within its borders. This treatment of children can no longer be ignored or condoned and US citizens must speak out if our government will not desist because neutrality is no longer acceptable. The voices of concerned Americans must be loud and clear. As stated by Desmond Tutu, "If you are neutral in situations of injustice, you have chosen the side of the oppressor."⁵

I. HISTORY OF THE PROBLEM

This problem is one of international concern and although the US Government is not the only Government that commits these abuses, the fact that the abuse is widespread does not justify it legally or morally.

A. History of the Problem Internationally

Unfortunately, inhumane immigration policies, with devastating effects on children, are not unique to the United States. The forced separation of families through immigration policies is an ongoing problem occurring worldwide, and is a problem of enormous magnitude.⁶ Almost any immigration policy, enacted in any State, aimed at the removal of undocumented migrants within a State's territory, has traditionally been accepted and justified under the notion of State sovereignty, regardless of how harsh or discriminatory it is in its impact.⁷ But the fact that inhumane treatment of migrants has traditionally been universally condoned does not justify the abuse; human rights violations cannot be justified by the mere fact that the abuse is widespread.

Only recently, as the growing electronic media is increasingly publishing heart-wrenching accounts of children being forcefully separated from parents, incarcerated, and forced to leave the only life they have ever known to a State whose language and territory is foreign to them, has

⁵ Desmond Tutu, The Desmond Tutu Peace Foundation, <http://www.tutufoundation-usa.org/exhibitions.html>.

⁶ See, e.g., Inter-Am. Comm'n on Human Rights, *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System*, CIDH.ORG (Feb. 28, 2000), <http://cidh.org/annualrep/2005eng/USA.65.99eng.htm> [hereinafter *Court Report on Canada*]; *Amrollahi v. Denmark*, (No. 56811/00), Eur. Court. H.R. (Oct. 11 2002), available at <http://www.unhcr.org/refworld/docid/3ffae5fe4.html> (last visited May 14, 2012); *Grant v. United Kingdom*, 10606/07 Eur. Ct. H.R. (Jan. 8, 2009), <http://www.unhcr.org/refworld/docid/499157ca2.html>. [hereinafter *Grant*](outlining when the States interest outweighs the individual interest regardless of family ties); *Üner v. Netherlands*, 46410/99 Eur. Ct. H.R. (Oct. 18, 2006), <http://www.unhcr.org/refworld/docid/45d5b7e92.html> (last visited May 14, 2012).

⁷ See generally Ernesto Hernandez-Lopez, *International Migration and Sovereignty*, CWSL.EDU (June 5, 2008) <http://www.cwsl.edu/content/journals/Hernandez%20camera%20ready.pdf> <http://www.cwsl.edu/content/journals/Hernandez%20camera%20ready.pdf> (discussion of why Mexico does not intervene in US immigration policy).

the international community begun to acknowledge that these policies are unjust.⁸ The European Court of Human Rights (ECHR) was the first to intervene, noting that deportations can negatively impact important fundamental human rights, such as the right to family, and they held that in order for a State to adequately honor their humanitarian obligations under international law, “the best interest of a deportee’s citizen children must be duly considered in any removal proceeding.”⁹ Shortly thereafter the Inter-American Commission of Human Rights (IACHR) extended this “best interest” analysis as one that applies to all deportees and their children, defining it as a required “humanitarian defense” to deportation.¹⁰ Yet, despite this and many other similar decisions, the wrenching accounts of familial separations during deportations have continued throughout the world, and have even increased in US territory.

B. History of the Problem Domestically

The targeting of immigrant minority groups for the responsibility for societal woes has been an issue since the founding of the United States, with peaks throughout history depending on the woe. The Chinese, Japanese, and other minority groups have all had their turn as the targeted groups throughout history. On September 11, 2001, US citizenry was shocked by a terrorist attack on US soil, again piquing the most recent period of extreme anti-immigrant sentiment. And as the economy has continued to struggle, this sentiment has continued to grow. But this time the focus has taken a slightly different turn, targeting not only middle-eastern immigrants, the region from which the terrorists came, but all immigrants. This event has created an anti-immigrant sentiment that, despite being felt in a number of immigrant communities, is disproportionately impacting those of Mexican and Middle Eastern descent. New immigration policies, both enacted and proposed, are becoming increasingly harsh, targeting even the children of immigrants.

But the sentiment against Mexicans began before 9/11, with the new laws targeting Mexicans in particular arising in 1996. The 1996 laws created a wide range of latitude in the power to deport more immigrants, and 9/11 intensified the will to deport as many in that range as possible. Secure community programs and other policies that have been enacted since 9/11 have created a system that has focused on deportations, even to the extent of creating annual goals.¹¹ This has resulted in record numbers of deportations, and in turn resulted in the displacement or abandonment of hundreds of thousands of children annually.¹²

⁸ See, e.g., Kathy Kleley, *Children Caught In The Immigration Crossfire*, USA TODAY (Oct. 8, 2007), http://www.usatoday.com/news/nation/2007-10-07-Dream_N.htm; Sonia Starr and Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT’L L. 213, 236 (2003).

⁹ See, e.g., Ünner, *supra* note 6.

¹⁰ *Armendariz v. United States*, Case 12.562, Inter-Am. Comm’n H.R., Report No. 81/10. OEA/Ser.L/V/II.139, doc. 21 ¶ 64 (2010).

¹¹ See *Immigration*, OPEN CONGRESS, http://www.opencongress.org/issues/alphabetical/Ihttp://www.opencongress.org/issues/show/4514_immigration; See *Anti-Immigration Bill Making Slow Progress Across the Country*, SCOTT & ASSOCIATES, ATTORNEYS AT LAW, PLLC (Mar. 14, 2011), <http://www.scottimmigration.net/content/anti-immigration-bills-making-slow-progress-across-country>; See Josh Gerstein, *Showdown Looms on Immigration Bills Across USA*, HISPANIC NEWS (Aug. 1, 2010), http://hispanic.cc/showdown_looms_on_states_immigration_bills.htmhttp://hispanic.cc/showdown_looms_on_states_immigration_bills.htmhttp://hispanic.cc/showdown_looms_on_states_immigration_bills.htm; Injustice For All, *supra* note 2, at 1.

¹² *Id.*

These children's lives are being shattered and their pleas go unheard, despite the fact that they have done nothing wrong. Their only crime is having an undocumented parent. These children did not choose to be born, much less choose where to be born, and they have no say in where they live, but they are paying the highest price for these policies. Children are often left alone in the United States after the deportation of both their parents or they are forced to struggle in a broken home after the deportation of one parent, who is often the wage earner.¹³ Other children, who are not left behind, or who are undocumented themselves, are forced to depart the United States to a nation whose language and territory is foreign to them, leaving their friends and life as they know it behind.¹⁴

The number of children affected is astonishing. In 2010 alone, 392,862 immigrants, nearly half of whom were parents, were arrested, detained, and deported, and the numbers continue to rise.¹⁵ In 2011, the number of deportations is already nearing 400,000.¹⁶ This means that hundreds of thousands of children are being affected. For this reason, I will argue throughout this paper that, despite the complexity of the economic and border security issues surrounding immigration policy in the United States, this is primarily a humanitarian issue, and, as such, it is pertinent that any reform address the humanitarian issues that are implicated by any policy enacted.

But, in order to understand the United States' neglect of children in the immigration context, it is important to also understand the historical perceptions of children's rights under US law because these deeply ingrained views of children are likely a driving force behind children's treatment under US immigration laws. In order to change the system, one must address what drives it, and the only way to combat the perceptions that hinder positive change is to acknowledge and confront them.

II. History of Children's Rights in the US

A. History of Children's Rights under US Constitutional Law

Children's rights have always been controversial in the United States, and "deeply ingrained ideas about children's rights" have historically shaped the way children are perceived and treated under US law.¹⁷ Early law in the United States did not even recognize children as rights-holders independent of their parents, and fathers owned their children as if they held title to them.¹⁸ This conception of children as parental property is "as ancient as Judeo-Christianity."¹⁹ Despite progress in many areas of children's rights, this notion of children as property has not

¹³ Ajay Chaudry et al., *Facing Our Future: Children in the Aftermath of Immigration Enforcement*, THE URBAN INST., 27(2010), <http://www.familiesforfreedom.org><http://www.familiesforfreedom.org>http://www.urban.org/uploadedpdf/412020_FacingOurFuture_final.pdf [hereinafter *Facing Our Future*].

¹⁴ *See Id.*

¹⁵ INJUSTICE FOR ALL, *supra* note 2, at 4.

¹⁶ *Obama Administration Sets Deportation Record*, THE HUFFINGTON POST, http://www.huffingtonpost.com/2011/10/18/deportations-customs-remove-record-number_n_1018002.html [hereinafter HUFFINGTON POST].

¹⁷ David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 980-81 (2002) (citing Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents' Rights*, 5 GEO. J. ON FIGHTING POVERTY 313, 313-14 (1998)) [hereinafter *Kids Will Be Kids?*].

¹⁸ *Id.*

¹⁹ *Id.*

disappeared and it continues to influence the law today, in that even custody implies control and possession of children.²⁰

Original children's rights movements did not change this view because they were not premised on children's rights or independence; rather, they were premised on their vulnerability and their need for nurture and protection, a duty that was emerging as not only a duty of the parent, but also a duty of society.²¹ This view of children as belonging to society was the driving principle behind the emergence of the "the best interest of the child" standard, and as the movement began to expand special treatment and protection, not rights, were consistently grounded in the presumed weakness and vulnerability of children.²²

As the movement toward rights, in addition to protection, began to emerge, progress was slow. Even as the Supreme Court began to recognize certain adult rights for children it refused to extend others.²³ The Bill of Rights was first applied to children in the 1960s, when the Supreme Court, in *In re Gault*, ruled that teenagers have distinct rights under the US Constitution.²⁴ They extended to children the right to notice of charges, to counsel, to confrontation and cross-examination of witnesses, and to privilege against self-incrimination.²⁵ Prior to *In re Gault*, children had few rights that were not derivative of their parents,²⁶ but since that time a number of precedential decisions have further expanded children's rights, extending free speech and other Constitutional rights to children under the 4th, 5th, 6th, and 8th Amendments of the Constitution.²⁷ This movement toward children as individual rights holders, independent of their parents, has recently led to the majority of states appointing children independent counsel in criminal and civil cases; thus in any case, outside of immigration, resulting in any form of deprivation of liberty or change in family dynamic, such as detention or family separation, children are appointed independent counsel.²⁸ Society is beginning to recognize that children's opinions are not only valuable, but also necessary in court proceedings that determine their ultimate futures.²⁹ As of the last survey by First Star in 2009, sixty-three percent of states were mandating the appointment of an attorney for a child during separation proceedings and fifty-one percent of states mandated that the appointed attorney serve in a client-directed capacity.³⁰ Thus children in the majority of states are now parties to any case separating them from their parents, with an individual right to notice, right to counsel, and right to be heard, just as is mandated for children in criminal proceedings.³¹ A recent survey that I self-completed found that since the First Star Report even more states have mandated or are considering mandating counsel for children in family separation proceedings.

²⁰ Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 737–40 (1998).

²¹ Thronson, *supra* note 17, at 983–984.

²² *Id.*

²³ See generally *McKeiver v. Pennsylvania*, 403 U.S. 528, 551 (1971); *In re Gault*, 387 U.S. 1 (1967).

²⁴ *In re Gault*, 387 U.S. 1 (1967).

²⁵ *Id.*

²⁶ *Kids Will Be Kids?*, *supra* note 17, at 985–986.

²⁷ *Id.*

²⁸ First Star, *A Child's Right To Counsel: A National Report Card on Legal Representation For Abused and Neglected Children*, available at http://www.caichildlaw.org/misc/final_rtc_2nd_edition_lr.pdf (A child advocacy agency that promotes children's rights).

²⁹ *Id.* at 6.

³⁰ *Id.* at 8.

³¹ *Id.*

Even the Federal Child Abuse Prevention and Treatment Act (CAPTA) requires that in all child abuse proceedings a guardian ad litem, who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role, and who may be an attorney or court appointed special advocate . . . shall be appointed to represent the child in such proceedings—to obtain first-hand, a clear understanding of the situation and needs of the child; and to make recommendations to the court concerning the best interests of the child.³²

Yet despite the fact that it has been over forty years since *In re Gault*, and even as the tides turn for children under family and criminal law, this emerging view of children’s rights and “best interest” analysis has not carried over and is not required when forcefully separating children from parents through immigration proceedings; even in proceedings that result in de-facto deportations of US citizen children.³³ These hearings regularly take place without granting the child any independent right to petition for family unity and do not provide the child with counsel or even the opportunity to be heard while the court makes life altering decisions that directly impact the child.³⁴

B. History of Children’s Rights under US Immigration Law

In order to understand how US immigration laws are impacting children and why these laws are in violation of the United States’ international obligations it is important to first understand the history of these laws, the policy goals behind them, and how they are applied when dealing with children. Historically, US immigration law has treated children as objects rather than actors and have generally been recognized only in dependency relationships. US citizen children have never had a right to apply for benefits for their parents and non-citizen children have never possessed any independent right to apply for benefits through them.³⁵ There are few immigration benefits for which children have a right to petition independent of their parents outside of asylum, VAWA (Violence Against Women Act), and unaccompanied minor categories.³⁶ But in these categories minors are subject to the same harsh laws and procedural complexities as adults.³⁷ They are treated as adults because there is no alternative under immigration law for independent recognition of their rights as children, thus they are placed in an adult category by necessity.³⁸

This treatment of children in the immigration context is likely influenced not only by historical views of children, but also by the fact that the majority of children encountered by the Immigration and Naturalization Service are derivatives of adults in the context of family immigration.³⁹ A “child” for immigration purposes exists only in a dependency relationship, thus

³² Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247 (42 USC. 5101 et seq; 42 USC. 5116 et seq.). 10 See LaShanda Taylor, *A Lawyer for Every Child: Client Directed Representation in Dependency Cases*, Fam. Ct. Rev., Vol. 47 No. 4, 605, 610 (2009).

³³ *Olowo v. Ashcroft*, 368 F.3d 692, 704 n.9 (7th Cir. 2004) (“Children of removable aliens do not have a right to representation in immigration proceedings unless they themselves are charged with removability”).

³⁴ *Id.*

³⁵ *Kids Will Be Kids?*, *supra* note 17, at 991–995.

³⁶ *Id.*

³⁷ *Id.* at 993–997.

³⁸ *Id.*

³⁹ US Immigration & Naturalization Serv. Statistical Yearbook of The Immigration and Naturalization Service, 1998, 29 tbl.5, 33; *Kids Will Be Kids?*, *supra* note 17, at 991–95.

it is a term limited to an “unmarried person under twenty-one.”⁴⁰ To qualify as “a child” for immigration benefits requires a particular dependent relationship with a parent, such as birth in wedlock, creation of a stepchild relationship, legitimation, or adoption.⁴¹ Immigration law never employs the term child except in relationship to a parent and, therefore, does not conceive of the child existing outside this relationship.⁴² For this reason, marriage ends childhood and adoptions must be finalized before sixteen to create a dependent child for immigration purposes.⁴³

The legitimation requirements in immigration law strongly reflect the ongoing notions of children as property, recognizing children only through parental action, because legitimation for immigration purposes may not be accomplished by a child.⁴⁴ No level of proof from a child establishing paternity can force their recognition for immigration purposes, thus children are by definition objects subject to parental control.⁴⁵ No matter how close the relationship, children have no right to force the filing of a petition on their behalf,⁴⁶ and the law permits parents to sponsor children but does not allow children to sponsor parents or siblings.

Even children granted asylum cannot apply for their parent to stay with them.⁴⁷ Yet an adult who files for asylum may include a child in their petition and the child may benefit from a grant of asylum to their parent as a derivative, but a denial to the parent will apply to the child as well.⁴⁸ This rule has led to tragic results when the child’s claims are stronger than their parents and the proceedings take place without the child’s knowledge, let alone participation.⁴⁹ But even in cases where a US child would be subject to persecution if they return with their parent, the parent’s asylum claim cannot focus on the child’s fear because asylum must be personal.⁵⁰ Courts in those cases often hold that the child can stay, thus the parent cannot use the child’s fear as a basis for their own petition.⁵¹ This circumstance may vary if a parent can meet the prerequisite for cancellation of removal, which I will discuss in later sections. In any case, it must be understood that most children, either US born or foreign born, have no realistic path to legality for themselves or their family and children continue to have very few rights under immigration law.

III. CURRENT TREATMENT OF CHILDREN UNDER US IMMIGRATION LAW

Immigration decisions transform the lives of children every day and these life-altering determinations in immigration matters are routinely reached without consideration of the viewpoints of the children who are directly involved. While the treatment of children in detention, children who are unaccompanied and abused children under US immigration law, has slightly fluctuated, one thing has remained constant; there continues to be no remedy for the majority of children, particularly those seeking family unity. US immigration law continues to

⁴⁰ Immigration and Nationality Act, 8 USC. § 1101(b)(1)(A)-(F) (2000).

⁴¹ *Id.*

⁴² *Kids Will Be Kids?*, *supra* note 17, at 991–992.

⁴³ *Id.*

⁴⁴ Matter of Goorahoo, 20 I & N. Dec. 782, 785 (BIA 1994).

⁴⁵ *Id.*; *Kids Will Be Kids?*, *supra* note 17, at 991–995.

⁴⁶ Fornalik v. Perryman, 223 F.3d 523, 527-528 (7th Cir. 2000).

⁴⁷ Immigration and Nationality Act, 8 USC. § 1158(b)(3)(2000).

⁴⁸ *See Kids Will Be Kids?*, *supra* note 17; *See also* Olowo v. Ashcroft, 368 F.3d 692 (7th Cir. 2004)

⁴⁹ *Khourassany v. INS*, 208 F.3d 1096, 1097 (9th Cir. 2000).

⁵⁰ *Olowo*, 368 F.3d 692 at 698–702

⁵¹ *Id.*

shatter the lives and ignore the pleas of hundreds of thousands of children who, despite having an undocumented parent, are often US citizens. Even the children who are not citizens were often brought to the US at such a young age that they do not understand why they are targeted, knowing only America as their home. These children are generally bright and talented children, punished only because of whose child they are; this is unacceptable. The tragic consequences of failing immigration policies can no longer be merely debated and ignored because to condone injustice is to promote it.

A. When Children Are Alone

Thousands of children arrive in the US unaccompanied by parents every year.⁵² Even more are separated from their parents after arrival.⁵³ In 1990 alone ICE arrested 8,500 juveniles, as many as 70% of them unaccompanied minors, and as many as 15% of them were under the age of fourteen,⁵⁴ but numbers are increasing dramatically, as I will discuss below in the “Extent of the Destruction” section. In any case, children arriving in the US alone consist of refugee children, children separated from parents, children of refugees sent by their parents for safety, children traveling on their own initiative, and children who are kidnapped, sold or tricked and trafficked in sexual or labor servitude.⁵⁵ Over one-half of the world’s twenty million refugees are children and two to five percent (1 million) of these children are separated from their parents.⁵⁶

Inadequate protections for these children under current immigration laws results in thousands of children struggling through the maze of immigration law without adult assistance because, as discussed above, children who are able to apply for immigration benefits independently are treated as adults, and thus are denied the right to counsel, as are adults.⁵⁷ These children are swept into a legal system that is confusing, intimidating, and overwhelming even to many adults, but these children are alone and they are often incarcerated, interrogated, and deported without any meaningful ability to defend themselves.⁵⁸ Despite some protections for unaccompanied minors, Supreme Court rulings have given ICE permission to detain these children, interrogate them, and deny them appointed counsel. The Supreme Court recently condoned ICE’s refusal to release them even to responsible adults, reiterating that the “best interest of the child” analysis does not apply in the immigration context.⁵⁹ They held that only “Minimum standards must be met, and the child’s fundamental rights must not be impaired; but the decision to go beyond those requirements . . . is a policy judgment rather than a constitutional imperative.”⁶⁰ They further noted that the detention of undocumented children is not punishment-based, but merely administrative, and if they had any doubts “as to the constitutionality of institutional custody over unaccompanied [children], they would surely be eliminated as to [children] who are

⁵² *Reno v. Flores*, 507 U.S. 292, 295 (2008).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Jacqueline Bhabha, *Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children*, 7 U.CHI. L. SCH. ROUNDTABLE 269, 272 (2000).

⁵⁶ Jacqueline Bhabha & Wendy A. Young, *Through a Child’s Eyes: Protecting the Most Vulnerable Asylum Seekers*, 75 INTERPRETER RELEASES No. 21 p. 757, 758 (June 1, 1998).

⁵⁷ *Reno*, 507 U.S. at 312.

⁵⁸ *See Id.*

⁵⁹ *Id.* at 304.

⁶⁰ *Id.* at 304–305.

aliens.”⁶¹ They justified this decision by the fact that the responsibility for regulating aliens is committed to the federal branch of government, noting that Congress can make rules for aliens that would be unacceptable if applied to citizens, irrespective of whether or not the alien is a child.⁶² Justice O’Connor concurred in this decision, while noting that “[C]hildhood is a particularly vulnerable time of life and children erroneously institutionalized during their formative years may bear the scars for the rest of their lives.”⁶³ But, the majority viewpoint was not without dissent.

Justice Stevens and Justice Blackmun dissented noting that the Court was wrong in its determination that “as long as the conditions of detention are ‘good enough’ the (INS) is perfectly justified in declining to expend administrative effort and resources to minimize such detention.”⁶⁴ They held that the INS’s decision to detain children despite the existence of responsible adults willing and able to assume custody of them is contrary to federal policy and sanctions “the wholesale detention of children who do not pose a risk of flight, and who are not a threat to either themselves or the community.”⁶⁵ They further found that periods of detention have “on occasion, approached one year.”⁶⁶

They pointed out that the Court ignored all national standards for the treatment of [even] juveniles; all of which authorized the release of a juvenile charged with any offense “to his parents, guardian, custodian, or other responsible party (including, but not limited to, the director of a shelter-care facility) . . . unless the magistrate determines, after hearing...that the detention of such juvenile is required to secure his timely appearance before the appropriate court or to insure his safety or that of others.”⁶⁷ They addressed the INS’s argument that detaining these children was necessary for the children’s own welfare and safety by stating that understanding how “the practice of commingling harmless children with adults of the opposite sex in detention centers protected by barbed-wire fences, without providing them with education, recreation, or visitation, while subjecting them to arbitrary strip searches, would be in their best interests is most difficult to comprehend.”⁶⁸ They pointed out that records indicate that this policy had ulterior motives because “when undocumented parents came to claim their children, they were immediately arrested and deportation proceedings were instituted against them.”⁶⁹ The dissent believed, as this paper argues, that the wholesale incarceration of children is not justified and that children who are alone should be provided counsel and the State, not ICE, should determine guardianship.⁷⁰

B. US Born Children and Children with Undocumented Parents Present

Yet unaccompanied minors are not the only children who find themselves in the complex maze of immigration law, alone and unheard, with very few remedies. To understand why there is no remedy for the majority of US born children one must be aware that that under current US

⁶¹ *Id.* at 305.

⁶² *Id.* at 306.

⁶³ *Reno*, 507 U.S. at 318.

⁶⁴ *Id.* at 320.

⁶⁵ *Id.* at 323.

⁶⁶ *Id.*

⁶⁷ *Id.* at 326 *citing* 18 USC. § 5034.

⁶⁸ *Id.* at 328.

⁶⁹ *Reno*, 507 U.S. at 328.

⁷⁰ *Id.* at 312.

immigration law United States citizen children still cannot, under any circumstances, petition for their parents to reside in the US with them until the children themselves are 21, irrespective of their parent's status at their birth.⁷¹ Even once a United States citizen child is 21, there are stringent income requirements, in addition to a five-to-ten-year waiting period for children whose parents have previously resided in the US without documentation before the child may even file the petition.⁷² During this waiting period the parent may not remain in or visit the US and will not be allowed to do so until the application is fully processed and approved.⁷³ Depending on the State of Origin, the petition could take another one-to-ten or more years after filing to process.⁷⁴ This being a total of 27 to 41 years before a citizen child of an undocumented parent can adjust the status of their parent in order to maintain family unity in the correct procedural way.

This demonstrates that even United States citizen children have no avenue in which to fix the predicament they are in, thus forcing these children to make a hard choice if they are even given the choice; they must choose between their birthright and their birthparents. But most US citizen children are not given the choice; they have no right to be heard; they have no right to counsel; and the determination of their fate is decided without their input.

In discussing how current immigration policies harm United States citizen children and undocumented children whose parents are in the United States this section will focus primarily on the types of deportations and removals that are the most common and the most publicized, and the policies that harm the majority children. In order to understand this discussion it is important to understand the difference between a Lawful Permanent Resident (LPR) and an undocumented alien and the different laws that impact one or both of these groups. It is also crucial to understand that children can also be deported, with or without their parent, under any of these categories.

1. The Difference Between an LPR and an Undocumented Alien

Undocumented aliens are individuals who entered the US without inspection and are not registered in US territory, whereas LPRs hold green cards and have status to live and work in the US⁷⁵ Green cards can be received by individuals either as adults or young children.⁷⁶ While many green card holders are eligible to become US citizens through naturalization, many do not

⁷¹ Bringing Parents to Live in the United States as Permanent Residents, *available at* <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=5d893e4d77d73210VgnVCM100000082ca60aRCRD&vgnnextchannel=5d893e4d77d73210VgnVCM100000082ca60aRCRD>.

⁷² Immigration Policy Center, Eliminating Birthright Citizenship Would Not Solve the Problem Of Illegal Immigration, *available at* <http://www.immigrationpolicy.org/just-facts/eliminating-birthright-citizenship-would-not-solve-problem-unauthorized-immigration>; Affidavit of Support, *available at* <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=720b0a5659083210VgnVCM100000082ca60aRCRD&vgnnextchannel=720b0a5659083210VgnVCM100000082ca60aRCRD>.

⁷³ Carlos Batara, *The Attack on the 14th Amendment and the Myth of Anchor Babies*, (Feb. 10, 2012), *available at* <http://www.bataraimmigrationlaw.com/exposing-anchor-babies-myth.html> [hereinafter *Anchor Babies*].

⁷⁴ US Dept. of State, Visa Bulletin, *available at* http://travel.state.gov/visa/bulletin/bulletin_1360.html.

⁷⁵ *Green Card: Who is a Permanent Resident*, US CITIZENSHIP & IMMIGRATION SERV., *available at* <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=ae853ad15c673210VgnVCM100000082ca60aRCRD&vgnnextchannel=ae853ad15c673210VgnVCM100000082ca60aRCRD>.

⁷⁶ *Green Card Through Family*, US CITIZENSHIP & IMMIGRATION SERV., *available at* <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=4c2515d27cf73210VgnVCM100000082ca60aRCRD&vgnnextchannel=4c2515d27cf73210VgnVCM100000082ca60aRCRD>.

take advantage of this option, generally because of the high fees involved or because they believe that their green card is enough to protect them from deportation.⁷⁷ However, this belief is mistaken because approximately 10% of deportees are LPRs.⁷⁸

2. The Progression of Even More Destructive Laws Arising From the War on Terror

US Immigration law was not always quite as harsh as it is currently. In drafting the Immigration and Nationality Act of 1952 (INA) Congress's primary purpose was to ensure the unification of mixed families of US citizens and immigrants.⁷⁹ This priority was reiterated in 1981 by the Select Commission on Immigration and Refugee Policy, a body appointed by Congress to study immigration policies and make recommendations for legislative reform.⁸⁰ The Commission stated: "Reunification . . . serves the national interest not only through the humaneness of the policy itself, but also through the promotion of the public order and well being of the nation. Psychologically and socially, the reunion of family members with their close relatives promotes the health and welfare of the United States."⁸¹

The goal of family unity, though not at its best, was at least visible before 1996. Up until 1996, LPRs were eligible for relief from deportation under INA 212(c) as long as they had not been convicted of any aggravated felonies for which they had served sentences of five years or more⁸². Most LPRs facing deportations due to criminal convictions were entitled to a hearing in an immigration court where the individual's criminal convictions were balanced against his/her positive contributions to the United States.⁸³ Beyond LPRs, a slightly more humane balancing test was also available for undocumented families with US citizen children. In cases where the family had resided in the US for seven years and was able to show extreme hardship if returned to their State of origin, the test allowed judicial discretion to provide relief from deportations.⁸⁴

However, as the war on terror began around 1996, so did the war on immigrants. Border security became a pressing issue, and in 1996 President Clinton signed into effect two laws: the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)⁸⁵ and the Antiterrorism and Effective Death Penalty Act (AEDPA).⁸⁶ These laws were where the inhumane treatment of immigrants took flight.

⁷⁷ INTERNATIONAL HUMAN RIGHTS CLINIC, IN THE CHILDS BEST INTEREST?: THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION 3 (March 2010), *available at* http://www.law.berkeley.edu/files/IHRLC/In_the_Childs_Best_Interest.pdf (hereinafter IN THE CHILDS BEST INTEREST?).

⁷⁸ *Id.*

⁷⁹ *Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) (quoting H.R.Rep.No.85-1199, pt.2 (1957)).

⁸⁰ US SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY AND THE NATIONAL INTEREST 112-13 (1981), *available at* <http://www.eric.ed.gov/PDFS/ED211612.pdf>.

⁸¹ Colon-Navarro, Fernando, *Familia E Immigration: What Happened to Family Unity?*, 19 Fla. J. Int'l L. 491, 497 (2007) (quoting Select Commission) (hereinafter *What Happened to Family Unity*).

⁸² 8 USC. § 1182(c) (1952), *repealed by* Anterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-208, Div. C., Title III, § 304(b), 110 Stat. 3009-597 (1996) (Before 1996, lawful permanent residents were eligible for relief under INA § 212(c) as long as they had not been convicted of aggravated felonies for which they had served sentences of five years or more, but this provision was repealed by the AEDPA in 1996).

⁸³ *Id.*

⁸⁴ *Aoun v. I.N.S.*, 342 F.3d 503, 506 (6th Cir. 2003).

⁸⁵ Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified in scattered sections throughout sections 8 and 18 of the USC.) (hereinafter "Immigration Reform Act").

⁸⁶ Anti-Terrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996).

3. Why the Anti-Terrorism and Effective Death Penalty Act (AEDPA) & the Illegal Immigrant Reform and Responsibility Act Harm Children More Than Previous Laws

Under the 1996 Congress Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigrant Reform and Responsibility Act (IIRIRA) immigration laws became increasingly harsh.

i. Aggravated Felonies/Withholding of Removal For LPRs

Under these Acts, withholding of removals was made increasingly difficult, and the provisions allowing for, and in some cases requiring, the deportation of LPRs became increasingly harsh, allowing deportations of even children for minor crimes.⁸⁷ These laws expanded the categories of crimes that an LPR could be deported for by expanding the categories of crimes designated as aggravated felonies.⁸⁸ Lawful permanent residents who have been convicted of an aggravated felony are now subject to mandatory deportation, regardless of age and with little consideration of any of the circumstances surrounding the crime or the impact of their deportation on their family.⁸⁹

Also concerning is that under the new definitions of aggravated felonies, a conviction may fall into this category without involving any aggravated circumstances and without even being a felony.⁹⁰ The word “aggravated” has no legal bearing on the circumstances of the offense.⁹¹ Under the 1996 legislation, the following non-violent crimes may constitute aggravated felonies: non-violent theft offenses, non-violent drug offenses, forgery, receipt of stolen property, perjury, fraud or deceit, or tax evasion.⁹² This list is far from exhaustive. But most devastating is that many of these penalties allowing the deportation of LPRs are applied retroactively, and many of the decisions to deport these individuals have become non-reviewable, meaning that the individual or their family cannot appeal the decision to remove them in District Court.⁹³ This is causing a humanitarian crises for LPRs who are now married to US citizens and/or have US citizen children, many of whom have resided in the US their entire life never realizing that their parent/spouse was even deportable, let alone that their own State would not even listen to or consider them when shipping their loved one away.

ii. Cancellation of Removal for Non-LPRs

Under these new laws US courts can no longer consider children during any deportations unless their parent meets a number of stringent prerequisites that are unrelated to the child or

(codified in scattered sections throughout sections 8, 18, 22, 28, 40, and 42 of the USC.) (hereinafter “Anti-Terrorism Act”).

⁸⁷ Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1937-1939 (2000).

⁸⁸ *Id.*

⁸⁹ *Id.* at 1939.

⁹⁰ IN THE CHILDS BEST INTEREST?, *supra* note 77 at 4.

⁹¹ *Id.*

⁹² *Id.* at 3. (Describing Rules under INA § 101 (a)(43) and 8 USC. § 1101(a)(43)).

⁹³ *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1044 (9th Cir. 2004).

unless it is the child being formally deported.⁹⁴ Under section 240A of the Immigration and Nationality Act (INA), the Attorney General may stop the removal of and adjust the status of an alien who is deportable from the United States only if “the alien (i) has been physically present in the United States for at least 10 years prior to the application, (ii) has been a person of good moral character during that period, (iii) has not been convicted of certain enumerated criminal offenses, and (iv) establishes that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a United States citizen or lawful permanent resident.”⁹⁵

The presence and moral character requirements were already significant limitations to preventing the deportation of individuals with family who were US citizens under the previous law, but the added requirement of establishing that a parent’s removal would result in extremely unusual hardship to his children has created increasingly harsh outcomes.⁹⁶ This is because an alien must demonstrate that his or her spouse, parent, or child would suffer hardship that is substantially beyond that which would ordinarily be expected to result from the person’s departure.⁹⁷ Thus, poverty, foregone educational opportunities, separation from friends and family, inadequate health care, children not wanting to go, and lack of economic opportunities are often not enough.⁹⁸ In addition, the separation of parents and children is often not considered, as many judges view hardship by separation to be a matter of parental choice, rather than a result of the parent’s deportation.⁹⁹

In any case, a cancellation of removal is discretionary, with the outcome often depending on the reviewer; thus, there is rarely a remedy when it is not granted.¹⁰⁰ The Attorney General has delegated his authority to cancel the removal of aliens to an administrative agency comprised of immigration judges who hear these requests and the Board of Immigration Appeals (BIA), who reviews those decisions.¹⁰¹ But the decisions by the administrative agency are not reviewable by traditional courts in the majority of these types of cases,¹⁰² creating a number of other due process concerns and very inconsistent outcomes in a number of similar cases.

Most concerning is that this limited remedy is not available, under even the most compelling circumstances, if the family has not resided in the US for ten years, if the child or other parent is not a citizen, or if the judge determines that a parent lacks “good moral character;” this is an easy standard of which to fall short.¹⁰³ The limitations on utilizing this remedy create extremely harsh results for children who, despite being non-citizens, were often brought over by their parents as infants or toddlers and have spent the majority of their lives in the US, attending US schools and churches, and developing close friendships with US kids.¹⁰⁴ When these kids are suddenly deported alongside their parent, losing the only life they have known, there is no remedy for

⁹⁴ 8 U.S.C. § 1229(b)(1) (West).

⁹⁵ *Id.*

⁹⁶ *In re Gonzalez Recinas*, 23 I. & N. Dec. 467, 468 (BIA 2002).

⁹⁷ *Id.*

⁹⁸ *See, e.g., In re Monreal-Aguinaga*, 23 I. & N. Dec. 56 (BIA 2001); *see, e.g., In re Andazola-Rivas*, 23 I. & N. Dec. 319 (BIA 2002).

⁹⁹ *Matter of Ige*, 20 I. & N. Dec. 880, 885–86 (BIA 1994).

¹⁰⁰ *See, e.g., Memije v. Gonzales*, 481 F.3d 1163, 1164 (9th Cir. 2007).

¹⁰¹ 8 C.F.R. § 1003.1 (2009); 8 C.F.R. § 1003.10 (2007).

¹⁰² 8 U.S.C. § 1252 (West 2005).

¹⁰³ *See* 8 U.S.C. § 1229(b)(1) (West 2008) (Note that a non-citizen child will not be considered, regardless of how long the child has resided in the United States).

¹⁰⁴ Antonia Ginatta, *US Senate Should Pass the Dream Act*, HUMAN RIGHTS WATCH, <http://www.hrw.org/en/news/2010/11/29/us-senate-should-pass-dream-act>.

them and no consideration of their needs.¹⁰⁵ They are punished harshly for a choice they never made, and the effects on these children are not confined to parental deportations, as many of the children themselves are deported, with no consideration of the fact that their undocumented presence in the US was not by their own choice.¹⁰⁶

5. Other Policies Contributing to the Problem

The 1996 laws were only the beginning of this devastation, and, after the September 11 Terrorist Attacks, the movement to increase border security again became a hot topic and the majority of immigration and policing services were transferred over from the Immigration and Naturalization Service to the new Department of Homeland Security (DHS).¹⁰⁷ DHS is now an umbrella agency that incorporates immigration affairs with national security.¹⁰⁸ Shortly after its formation, DHS launched Operation Endgame, a “10-year strategic detention and deportation plan designed to build the capacity to remove all removable aliens,” with the current estimates at about 11.1 million undocumented aliens that reside in the US.¹⁰⁹ After Operation Endgame, DHS increased efforts to identify LPRs who have a record, and the US Customs and Border Patrol confirmed that on October 1, 2009, it also increased its efforts to identify LPRs with any criminal convictions.¹¹⁰ Secure Communities was also implemented, which is a program through which law enforcement can report anyone who comes in contact with the police who appears to be undocumented and/or a deportable LPR to Immigration and Customs Enforcement (ICE).¹¹¹ ICE now handles deportations, custody, and removal.

With these newly enacted policies mandating increased efforts to identify undocumented aliens, many who have been in the US since they were children, and mandating increased efforts to identify LPRs with any criminal history, deportations are now reaching record highs and families are being torn apart in record numbers. In the ten-year period between April 1997 and August 2007, the US deported 87,884 LPRs for criminal convictions at an average rate of approximately 8,700 per year.¹¹² These numbers have increased even further with the last two years, bringing record numbers of deportations on individuals who, as a majority, were not criminals. In fact, since 2010, the number of deportations has reached record highs, nearing 400,000 annually in 2010 and 2011.¹¹³ Despite claims by ICE that it focuses on deporting the worst criminals, analysis of data from Department of Homeland Security (DHS) by Human Rights Watch demonstrates that more than 77% of the LPRs deported for criminal offenses had only minor non-violent offenses,¹¹⁴ and many of the undocumented individuals deported had no record at all.¹¹⁵

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Injustice For All, *supra* note 2, at 1.

¹⁰⁸ *Id.* at 2.

¹⁰⁹ *Id.* at 1–2.

¹¹⁰ AILA INFONET, <http://www.aila.org/content/default.aspx?docid=31408>.

¹¹¹ *Id.*

¹¹² IN THE CHILDS BEST INTEREST?, *supra* note 90, at 4.

¹¹³ Injustice For All, *supra* note 2, at 4; *Obama Administration Sets Deportation Record*, *supra* note 16.

¹¹⁴ *Forced Apart (By the Numbers): Non-Citizens Deported Mostly For Non-Violent Offenses*, HUMAN RIGHTS WATCH, 38 (Apr. 15, 2009) available at <http://www.hrw.org/en/reports/2009/04/15/forced-apart-numbers-0> [hereinafter *Forced Apart*].

¹¹⁵ Nina Bernstein, *Target of Immigration Raid Shifted*, N.Y. TIMES, <http://www.nytimes.com/2009/02/04/us/04raids.html> (last visited Apr. 10, 2011).

But even more concerning, in the shadows of all of these documented deportations of adults, there are thousands of children who are deported alongside their parents, without a hearing, without consideration, without right to counsel, and without having made any choice. They are not counted in the statistics, despite the fact that they are impacted most severely. They are the true victims, and the United States' complete indifference to their dilemma, despite the severity of the impact on them, places the United States in violation of its international obligations, both by treaty and humanitarian law.

IV. INTERNATIONAL OBLIGATIONS IN IMMIGRATION PROCEEDINGS INVOLVING FAMILIES AND CHILDREN

Nearly every major human rights body recognizes the fundamental right to family and the need for special protection for children. This is reflected by a number of international conventions, declarations, and treaties which place consistent emphasis on the importance of family in a child's development, declaring that the family is "the natural and fundamental group unit of society and is entitled to protection by society and the State."¹¹⁶

Recently the Inter-American Commission on Human Rights (IACHR), which oversees compliance with the International Covenant on Civil and Political Rights (ICCPR), the American Declaration, the Convention on the Rights of the Child (CRC), and a number of other international human rights documents analyzed its Member States' obligations under these documents, finding that states must respect the right to family unity in cases where the deportation of a parent would arbitrarily interfere with this right.¹¹⁷ The IACHR noted that neither states' rights nor the rights of non-citizens are absolute because all states have an obligation to protect certain fundamental rights.¹¹⁸ The IACHR explained that despite a State's right to maintain public order by controlling the "entry, residence and expulsion of removable aliens," every state must still have regard for the "fundamental values of democratic societies," which are the "right to life, physical and mental integrity, family, and the rights of children to obtain special means of protection."¹¹⁹

In one particular decision, where the IACHR found that US deportation laws were in violation of its international obligations, the IACHR based their decision on the American Declaration, stating that:

Given the nature of Articles V, VI and VII of the American Declaration... where decision-making involves the potential separation of family, the resulting interference with family life may only be justified where necessary to meet a pressing need to protect public order, and where the means are proportional to that end . . . This balancing must be made on a case by case

¹¹⁶ See, e.g., International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 10, art. 24, S. Exec. Doc. D, 95-2 (1978; S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967)) [hereinafter ICESCR]; Also noted in Dorsey and Whitney LLP, *Severing a Lifeline: The Neglect of Citizen Children in America's Immigration Enforcement Policy*, 96 (Urban Institute 2009), available at http://www.dorsey.com/files/upload/DorseyProBono_SeveringLifeline_web.pdf [hereinafter *Severing a Lifeline*].

¹¹⁷ See *Winata v. Australia* (No. 930/2000), 16 August 2001, U.N. Doc. No. CCPR/C/72/D/930/2000 available at <http://www.unhchr.ch/tbs/doc.nsf/0/488b0273fa4febfb1256ab7002e5395?Opendocument>.

¹¹⁸ *Armendariz v. United States*, Case 12.562, Inter-Am. Comm'n H.R., Report No. 81/10. OEA/Ser.L.V/II.139, doc. 21, ¶¶49–50 (2010).

¹¹⁹ *Id.*

basis, and that the reasons justifying interference with family life must be very serious indeed.¹²⁰

The IACHR also noted that in order for the US to meet its international obligations, the US must implement a policy that balances the necessity for removal with each individual's fundamental right to family and the best interest of their children,¹²¹ holding that failure to do so constitutes a violation of Articles V, VI, VII, XXVI and XVIII of the American Declaration.¹²² But, the US has completely ignored this decision and has made no effort to comply with the IACHR's judgment.¹²³

Yet, despite ignoring this decision, the decisions of the EU, and all other international human rights documents that embody the same principles, such as the Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, and a number of others that I will describe in detail below, the US has not removed from the Department of State's web page its official statements emphasizing the importance of international human rights, international law, and the rights of children. The Department of State's website still reports that:

The protection of fundamental human rights was a foundation stone in the establishment of the United States over 200 years ago. Since then, a central goal of US foreign policy has been the promotion of respect for human rights, as embodied in the Universal Declaration of Human Rights. The United States understands that the existence of human rights helps secure the peace, deter aggression, promote the rule of law, combat crime and corruption, strengthen democracies, and prevent humanitarian crises.¹²⁴

Because the promotion of human rights is an important national interest, the United States seeks to:

- hold governments accountable to their obligations under universal human rights norms and international human rights instruments;
- promote greater respect for human rights, including... Children's rights;
- promote the rule of law, seek accountability, and change cultures of impunity;
- assist efforts to reform and strengthen the institutional capacity of the Office of the UN High Commissioner for Human Rights and the UN Commission on Human Rights; and
- coordinate human rights activities with important allies, including the EU.¹²⁵

By ignoring international opinions, treaties, declarations, and fundamental human rights, the US has clearly demonstrated that this statement is inaccurate. A state that promotes human rights cannot do so by ignoring them, nor can the US hold other governments accountable when the US itself ignores even international body opinions finding that the state itself is violating human rights. It is unconscionable for a state to refuse to honor the same obligations or hold itself to the same standard that it requests of others.

Promoting the rule of law entails abiding by it. States cannot pick and choose what international human rights laws to promote and which to ignore because the benefits of democracy and the importance of human rights are taught by example, thus a state must honor

¹²⁰ *Id.* at ¶ 51.

¹²¹ *Id.* at ¶ 60, 64, 66.

¹²² *Id.* at ¶ 64.

¹²³ *Id.* at ¶70–73.

¹²⁴ US Dep't of State, *Human Rights*, DIPLOMACY IN ACTION, <http://www.state.gov/g/drl/hr/> (last visited May 14, 2012).

¹²⁵ *Id.*

international law internally before it can effectively promote its importance internationally. If the US itself does not abide by international law or ignores it when it is inconvenient it is hypocritical to request other states to honor it. This weakens the UN because the principles that the UN embodies stand for nothing if the human rights it promotes and treaties created through it are not honored by even its superpowers. By the United States refusing to honor its own obligations, as outlined by the IACHR and a number of other human rights documents, the United States is not promoting international law, respecting human rights, coordinating with the EU (who has also recognized the same rights outlined by the IACHR) or strengthening the UN, thus this statement is inaccurate and the United States should either adjust internal policies to honor this commitment or the statement should be removed from the Department of State's website.

But this is not the only statement that the United States has retained while maintaining a culture of impunity regarding its own violations; because in addition to retaining this statement the United States has not officially renounced any of the documents outlining the United States' commitment to honor the right to family or the rights of children.¹²⁶ In fact, the United States has remained a signatory to all of the international documents that it is currently in violation of, including the American Declaration, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (ACHR), and the Convention on the Rights of the Child (CRC), while taking actions that are not only contrary to but undermine the very principles that these treaties set out.¹²⁷ But despite remaining a signatory, acknowledging agreement with their provisions, ratifying some, and agreeing to be bound, this obligation is beyond treaties. Fundamental human rights that are acknowledged should be honored, whether the documents outlining them are self-executing or non-self executing,¹²⁸ advisory or mandatory,¹²⁹ and irrespective of the status of the person involved because human rights are the fundamental rights of every human being, which should be respected based on honor and morality, irrespective of required compliance.

In discussing how international law reached this consensus on deportations, and why the US is obligated under these documents, I will first discuss the most important provisions of some of the relevant international human rights documents, followed by a discussion of a number of international human rights cases that have interpreted some of the provisions contained therein. The relevant Human Rights documents that the US has signed or ratified, having acknowledged agreement with the principles contained therein are the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the Convention on the Rights of the Child, and the American Declaration of Human Rights.

¹²⁶ See, e.g., ICCPR, *supra* note 4.

¹²⁷ (The United States ratified the ICCPR on June 8, 1992; signed the American Convention on Human Rights on June 1, 1977; and signed the CRC on February 16, 1995, but the United States has not ratified the CRC.)

¹²⁸ Self Executing, definition *available at* <http://legal-dictionary.thefreedictionary.com/Self-Executing> (a constitutional provision is self-executing when it can be given effect without the aid of legislation, and there is nothing to indicate that legislation is intended to make it operative).

¹²⁹ *Id.* (non-self executing treaties require legislation be in place to give effect to the treaty).

A. Universal Declaration of Human Rights (UDHR)

The specific rights protected by the UDHR are: the right to “life, liberty and security of person,”¹³⁰ the right to be free from “cruel, inhuman or degrading treatment or punishment,”¹³¹ and the right to be free from “arbitrary interference” with one’s home or family.¹³² The UDHR emphasizes the importance of protecting the family unit, noting that family, as the “natural and fundamental group unit of society,” is entitled to “protection by society and the State.”¹³³ It further emphasizes the importance of special protection for children.¹³⁴

In order to promote respect for the human rights outlined in the UDHR, the UDHR requires that all human beings act towards one another “in a spirit of brotherhood,” noting that all human beings are born with “equal dignity and rights.”¹³⁵ This Declaration emphasizes the limitations of sovereignty when human rights are at stake, as it notes that States cannot condition entitlement to specific rights on “national or social origin,” “birth or other status,” or “under any other limitation of sovereignty.”¹³⁶ Thus, children of non-nationals, regardless of birth or “other status,” should be treated humanely, not because required by the US Constitution or a Treaty, but because they are human and no child’s rights under this Declaration can be ignored merely because of their own or their parents’ undocumented “status.” Entitlement to these human rights is based solely on one’s human condition.

Despite the fact the US has acknowledged that the rights contained in the UDHR are fundamental human rights, the US is completely ignoring these rights when dealing with children. Children are individuals for whom interference with their family unit by US immigration officials is arbitrary, inhumane, cruel, and for whom the current US laws provide no protection. They are regularly separated from their mothers and fathers, incarcerated, are forced into foster care, or they are sent to a State where they have never been and do not know the language, irrespective of the citizenship or fault of the child.

The handling of these children places the United States in violation of its obligations under the UDHR and although these obligations, per the United States, are not binding,¹³⁷ the daily fear and degradation that these children are facing for circumstances over which they have no control is inhumane, thus creating a mandatory duty. Laws must be enacted to protect the children of immigrants. By signing this document, the United States acknowledged that these are fundamental human rights, regardless of whether or not it is a legal obligation. Therefore, the United States cannot take actions that might undermine them. Providing these children protection is at minimum the United States’ moral obligation.

¹³⁰ Universal Declaration of Human Rights art. 3, G.A. Res. 217A, at U.N. GAOR 3d sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter UDHR].

¹³¹ *Id.* at art. 5.

¹³² *Id.* at art. 12.

¹³³ *Id.* at art. 16(3).

¹³⁴ *Id.* at art. 25(2).

¹³⁵ *Id.* at art. 1.

¹³⁶ *Id.* at art. 2.

¹³⁷ Mary Glendon, *The Rule of Law in the Universal Declaration of Human Rights*, 2 NW. U. NW. J. INT'L HUM. RTS. 2 (2004), available at <http://www.law.northwestern.edu/journals/jihr/v2/5>.

B. International Convention on Civil and Political Rights (ICCPR)

The International Convention on Civil and Political Rights, like the majority of human rights documents, provides that the family unit as “the natural and fundamental group unit of society” is “entitled to protection by society and the State.”¹³⁸ Signatories to the ICCPR are required to protect the family unit by taking appropriate measures to ensure the unity or reunification of families,¹³⁹ and by avoiding arbitrary interference with one’s family or home.¹⁴⁰ The ICCPR also requires that all signatories protect everyone from “cruel, inhumane, or degrading treatment,” particularly where their family unit is concerned.¹⁴¹ It does not allow signatories to limit these protections to citizens because they are rights belonging to everyone in a State’s territory, without distinction as to “national or social origin, property, birth or other status.”¹⁴² But, unlike the UDHR, the ICCPR does not merely set out the rights of human beings; it requires that States without appropriate legislation protecting these rights adopt the laws needed to give effect to them.¹⁴³

This Convention is also slightly different from the UDHR in its requirement that special provisions be made for the necessary protection of any children when their family unit is dissolved.¹⁴⁴ This is one area where the United States is falling extremely short. Children whose parents are deported are often left struggling economically, emotionally, and without knowledge of the whereabouts of their parent. Other children, who themselves are undocumented, are incarcerated, interrogated, and often deported without any right to appointed counsel. LPR children deported on criminal grounds, regardless of the severity of the crime, may be separated from their parents and sent back to a country alone.

Beyond immigration law, the harshness and lack of cohesion between ICE proceedings and child protection proceedings results in a brutal system that leaves many children stranded in the United States with no meaningful way to reunite or maintain contact with their parents. The current policies create unnecessary family break-ups, incarcerate innocent children, and leave the schools and churches in many communities to pick up the pieces.

This leads to yet another requirement of the ICCPR that is implicated by US immigration policy, which is “equal protection of the law,” a right which prohibits differentiations based on “national or social origin,” “birth or other status.”¹⁴⁵ The United States is in violation of this requirement, both for failing to consider children during the deportations of their parents and/or themselves, and for treating children of immigrants who are US citizens as second-class citizens. All legal procedures implicating liberty interests of non-immigrant US children and their parents are analyzed under the “best interest of the child” standard, but for children with immigrant parents, the consideration of the child’s best interest is irrelevant in immigration proceedings.¹⁴⁶

¹³⁸ ICCPR, *supra* note 4, at art. 23 (this is one of the few applicable treaties that the United States has signed and ratified, although continuing to emphasize that it is not self-executing).

¹³⁹ U.N. Human Rights Committee, *General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, ¶ 5 (July 1990) available at <http://www.unhcr.org/refworld/docid/45139bd74.html>.

¹⁴⁰ ICCPR, *supra* note 4, at art. 17(1).

¹⁴¹ *Id.* at art. 7.

¹⁴² *Id.* at art. 2(1).

¹⁴³ *Id.* at art. 2(2).

¹⁴⁴ *Id.* at art. 23(4).

¹⁴⁵ *Id.* at art. 26.

¹⁴⁶ *Severing a Lifeline*, *supra* note 116.

There is no protection at all, let alone special protection for these children. The US Supreme Court has condoned this, suggesting that these children are not entitled to even the same protection as other children who were born in the United States to US parents.¹⁴⁷ They held that “minimum standards must be met, and the child’s fundamental rights must not be impaired; but the decision to go beyond those requirements—to give one or another of the child’s additional interests priority over other concerns that compete for public funds and administrative attention—is a policy judgment rather than a constitutional imperative.”¹⁴⁸

With the “best interest of the child” being irrelevant, per the Supreme Court, US authorities have unbridled discretion, bearing constitutional authorization, to allow unnecessary foster care, homelessness, unnecessary incarcerations, to inflict trauma on innocent children, and to promote the regular break-up of family units. Since the best interest of these children is “irrelevant,” their family units are regularly severed and their fate is decided with no such consideration. This creates a double standard, with the “best interest of the child” standard being simply a consideration that is selectively applied for some children, but not for others, based solely on national origin and parentage. The differential treatment of these children is not merely a violation of equal protection; it is a discriminatory action that is mandated by the State.

C. American Convention on Human Rights “Pact of San Jose, Costa Rica” (ACHR)

The purpose of the American Convention on Human Rights was to reaffirm a system of liberty and justice based on respect for the rights of man, recognizing that “the essential rights of man are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality.”¹⁴⁹ The ACHR also defines the family as a “natural and fundamental group unit of society” that is “entitled to protection by society and the state,” noting that no one shall be the object of “arbitrary or abusive interference” with his or her “family” or his or her “home”¹⁵⁰ But, in addition to protecting the family unit, the ACHR also outlines the “rights of children” individually, stating that “every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.”¹⁵¹

This Convention does not merely outline the right to family and equal protection;¹⁵² it also prohibits the extension of punishment to any person other than the criminal.¹⁵³ If the expulsion of immigrants is justified on the basis of an illegal act, then the expulsion of their children cannot be justified by the same reasoning under this Convention. Although the incarceration of undocumented immigrants in the United States is not legally considered a punishment—it is considered an administrative formality—the incarceration and forced separation of families hardly seems a formality with no punitive function. Unfortunately, it is often politically justified by the notion that undocumented immigrants committed a crime by entering the country illegally. Even efforts to strip children of birthright citizenship are justified as necessary to prevent the parents from using their children to gain citizenship.

¹⁴⁷ *Reno v. Flores*, 507 U.S. 292, 312 (2008).

¹⁴⁸ *Id.* at 334.

¹⁴⁹ American Convention on Human Rights, “Pact of San Jose, Costa Rica,” preamble. Nov. 22, 1969, O.A.S.T.S No. 36 (signed by the United States on June. 1, 1977) (hereinafter ACHR).

¹⁵⁰ *Id.* at art. 17; art. 11(2).

¹⁵¹ *Id.* at art. 19.

¹⁵² *See Id.* at art. 11; art. 24.

¹⁵³ *Id.* at art 5(3).

However, this punitive justification raises concerns when extended to children because the children have committed no crime, but they are being punished—administratively or otherwise—for the crimes of their parents. These children are being incarcerated, banished from their homes, challenged over their citizenship, and denied family unity rights for their entire childhood. The severity of the consequences for these children is hardly a mere formality, and condoning these harms as a result of the acts of their parents is difficult to comprehend. The United States does not incarcerate children when their parents violate the penal code, and this action would be unjustified regardless of the child’s nationality. The ACHR prohibits punishing children for the intent or guilt of their parents who have illegally crossed into the United States because guilt is not inheritable.

This type of penal function, whether labeled as administrative or not, cannot be compared with parents who are incarcerated for serious crimes. This family separation only protects society from a person who sought a better life for their children, while also punishing the children. It is a far stretch to view the incarceration and/or destruction of these family units as a formality, with no legal obligations. Unlike a child whose parent is incarcerated for serious crimes that risk the safety of others, who can still visit his or her parent, and knows that his or her parent will one day return, children of illegal immigrant parents are either separated from their parents indefinitely, or forced to travel to foreign lands to see them. The administrative formality justification does not excuse the disregard of constitutional protection from unlawful imprisonment, but is rather a very creative use of language. In fact, the administrative formality justification is unrealistic considering the long-term impact it has on children of illegal immigrant parents. Thus the United States’ handling of children during the deportation of their parent and/or themselves is also a violation of its obligations under the ACHR.

D. Convention on the Rights of the Child (CRC)

One of the most recognized international conventions is the Convention on the Rights of the Child. This Convention emphasizes the importance of family relationships, pointing out that that maintaining “direct contact with both parents on a regular basis” is a right that all States should respect, unless “it is contrary to the child’s best interests.”¹⁵⁴ It also emphasizes that the rights it contains are rights that must be protected for every child within a State’s jurisdiction, irrespective of the child’s or his or her parent’s or legal guardian’s “birth or other status.”¹⁵⁵ In particular it states:

The family as the fundamental group of society and the natural environment for the growth and well-being of its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community [and] [t]he child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.¹⁵⁶

The environment that children should be raised in is further described as one “of peace, dignity, tolerance, freedom [and] equality.”¹⁵⁷ As a part of providing that environment for children, the CRC emphasizes that in every action affecting children, “whether undertaken by

¹⁵⁴ Convention on the Rights of the Child art. 9(3), Nov. 20, 1989, 28 I.L.M. 1448.

¹⁵⁵ *Id.* at art. 2(1).

¹⁵⁶ *Id.* at preamble.

¹⁵⁷ *Id.*

public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”¹⁵⁸ The standard of living that the CRC states is in the best interest of children is “a standard . . . adequate for the child’s physical, mental, spiritual, moral and social development.”¹⁵⁹ In fact, the CRC explicitly noted that children have rights that must be respected, even in immigration contexts, noting that “applications by a child or his or her parents to enter or leave a State for the purpose of family reunification shall be dealt with by State Parties in a positive, humane and expeditious manner.”¹⁶⁰

The CRC not only sets out these rights directly, but also outlines and emphasizes the international consensus regarding children’s rights and a child’s interest in their family unit, noting that the need to extend particular care to children has been stated in the:

Geneva Declaration of the Rights of the Child of 1924, in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and was recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children.¹⁶¹

In fact, this Convention is so well recognized and accepted internationally that every State but the United States and Somalia has ratified it.¹⁶² And Somalia is a state where violence, abuse, exploitation, and discrimination against children occur on a wide scale.¹⁶³ Even President Obama recently stated that the mere fact that Somalia is the United States’ sole company in failing to ratify this Convention is embarrassing, stating:

It’s important that the United States return to its position as a respected global leader and promoter of Human Rights. It’s embarrassing to find ourselves in the company of Somalia, a lawless land. I will review this and other treaties and ensure that the United States resumes its global leadership in Human Rights.¹⁶⁴

But despite the continued failure of the United States to ratify this Convention, the United States has signed it, thus acknowledging agreement with the principles contained therein, which as I pointed out earlier creates a moral obligation to honor them.

¹⁵⁸ *Id.* at art. 3(1).

¹⁵⁹ *Id.* at art. 27(1).

¹⁶⁰ *Id.* at art. 10(1).

¹⁶¹ *Id.* at preamble.

¹⁶² U.N., “Convention on the Rights of the Child Status,” *Treaty Collection* (Feb. 8, 2012), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (the signatories to the CRC are listed with date of signature and ratification).

¹⁶³ See World Health Organization, *Health Systems Profile: Somalia, Executive Summary*, 5-10 (2006), <http://gis.emro.who.int/HealthSystemObservatory/PDF/Somalia/Full%20Profile.pdf> (setting out that one out of five children dies before the age of five; only one out of six children are enrolled in primary school; one out of eight women are literate; and only one out of four families have access to clean drinking water. Children in Somalia suffer from high rates of systematic abuse, this is the State the United States has kept company with, and only this State has failed to ratify the CRC.).

¹⁶⁴ Speech given at Youth Conference, video *available at* <http://www.youthdebate2008.org/debate-transcript>.

E. Vienna Convention

“Article 18 of the Convention obligates nations not to take any action that might undermine treaties to which they are signatories, even if the treaties are not ratified”; although the United States has never ratified the Vienna Convention, it has signed it.¹⁶⁵ This creates a US duty, even if it has not ratified the Rights of the Child, or other Human Rights Documents not to take any action that will undermine their effectiveness. The current actions of the United States not only undermine, but directly contradict the Treaties and Conventions that protect families and children.

F. American Declaration of the Rights and Duties of Man

The US obligations under this document are explicitly covered in the following section, titled the Inter-American Commission of Human Rights (IACHR). In a case against the United States the IACHR analyzes US deportation policies and finds that these policies are in violation of the United States’ international human rights obligations under this document, thus I will provide the analysis of US obligations under this document in that section to avoid repetition.

V. INTERNATIONAL DECISIONS FINDING HUMAN RIGHTS VIOLATIONS IN PARENTAL DEPORTATIONS

A. European Court of Human Rights

The European Court of Human Rights (ECHR), which enforces the European Convention, has repeatedly upheld the right of a State to expel immigrants convicted of crimes to maintain public order, emphasizing that the European Convention does not guarantee the right of an immigrant to live in a particular country after committing a crime.¹⁶⁶ But the ECHR has recently begun to hold that this right does have limits.¹⁶⁷ These limits have been set out in a number of cases in which the ECHR has repeatedly reiterated that a State’s decision to deport an individual is only justified if the interference with family life is not excessive compared to the public interest that is protected by their deportation.¹⁶⁸ In order for States to determine whether a deportation is justified, the Court set out a balancing test that evaluates a number of criteria to determine whether a particular deportation is excessive in its interference with family life, such as:

1. The nature and seriousness of the offense;
2. The duration of the individuals stay in the country;

¹⁶⁵ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969) (list of signatories *available at* http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en).

¹⁶⁶ *Amrollahi v. Denmark*, (No. 56811/00), Eur. Court. H.R. (Oct. 11 2002), *available at* <http://www.unhcr.org/refworld/docid/3ffae5fe4.html> (last visited May 14, 2012).

¹⁶⁷ *Üner v. Netherlands*, 46410/99 Eur. Ct. H.R. (Oct. 18, 2006), <http://www.unhcr.org/refworld/docid/45d5b7e92.html> (last visited May 14, 2012); Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 222.

¹⁶⁸ *E.g.*, *Berrehab v. Netherlands*, 138 Eur. Ct. H.R. (ser. A) (1988); *El Boujaidi v. France*, 1997-Vi Eur. Ct. H.R. 1959 (1992); *Mehemi v. France*, 1997-VI Eur. Ct. H.R. 1959 (1997).

3. The time which has elapsed since the commission of the offense and the applicants conduct during that period;
4. The nationalities of the various persons concerned;
5. The applicants family situation, including the length of the marriage and other factors that reveal a genuine family life;
6. Whether there are children, and, if so, their age;
7. The best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
8. The strength of social, cultural and family ties with the host country and with the country of destination.¹⁶⁹

In a number of cases, where the ECHR found the deportee, although convicted of a crime, posed little threat to public security and had extensive family ties to the State, the ECHR held the deportation of the individual violated the right to family unity protected by Article 8 of the European Convention.¹⁷⁰ Specifically in *Mehemi*, a case where an Algerian national faced deportation from Switzerland after being sentenced to six year in prison for the illegal importation of controlled substances, the ECHR found that the goal of family unity still outweighed the States interest in deporting him.¹⁷¹ Despite the significance of the amount of drugs involved, 142 kilograms of hash, the ECHR gave considerable weight to the fact that he had no prior convictions and his deportation would completely separated him from his wife and children because it was impossible for them to settle in any other State.¹⁷² The ECHR weighed his family connections with his danger to society and found that because his crime was a non-violent drug offense and he had a wife and 3 minor children of French Nationality in the State, his right to family life outweighed the States interest in deporting him.¹⁷³ The ECHR held that under the required balancing test his deportation would be “disproportionate to [the] aims pursued,” and thus violated article 8 of the European Convention.¹⁷⁴

But the line to how far this protection would extend was drawn in *Grant*, where a Jamaica national committed over 50 offenses while living in England, had continued to re-offend, and had never cohabitated with his citizen children, thus his deportation to Jamaica was not a violation of Article 8.¹⁷⁵ The ECHR noted that although the majority of his offenses were non-violent, they could not ignore the sheer number of offenses and the fact that with the exception of one four-year period, there was no prolonged period during which he was out of prison and did not re-offend, thus concluding that a fair balance was struck and his deportation was proportionate to the legitimate aim pursued.¹⁷⁶ But these cases were just the beginning and soon after, the Inter-American Commission followed suit. They found that all deportations could no longer be justified under the principle of State Sovereignty without balancing the harm they might cause.

¹⁶⁹ IN THE CHILDS BEST INTEREST?, *supra* note 90, at 10.

¹⁷⁰ *Boultif v. Switzerland*, 2001-IX Eur. Ct. H.R. 120 (2001).

¹⁷¹ *Mehemi v. France*, 1997-VI Eur. Ct. H.R. 1959 (1997).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Grant v. United Kingdom*, Eur. Ct. H.R. (2009), available at <http://www.unhcr.org/refworld/docid/499157ca2.html>.

¹⁷⁶ *Id.*

B. UN Human Rights Committee (UNHRC)

While analyzing the ICCPR in 2001, the UNHRC agreed with the ECHR that there are limits to States' rights to deport non-citizens when the interference with family life is excessive. The UNHRC noted that the mere fact that non-citizen parents may have a child who is a citizen does not necessarily classify the deportation as an arbitrary interference with the right to family.¹⁷⁷ However, when the child has been born and raised in the State, attended the State's schools, and developed social relationships, the State (Australia) needed to present additional factors besides merely unlawful presence to justify the deportation of the child's parents in order to avoid a characterization of arbitrariness.¹⁷⁸ The UNHRC held that deportations that would impact a child in that manner are in violation of Articles 17(1), 23, and 24(1) of the ICCPR, a treaty to which the United States is a party.¹⁷⁹

C. Inter-American Commission of Human Rights (IACHR)

The IACHR also mandates that states use a balancing test similar to the one used by the ECHR and the UNHRC when exercising the right to expel non-citizens.¹⁸⁰ The IACHR adopted this balancing test in *Stewart v. Canada*, where the deportee claimed that his deportation violated his children's rights under the Convention on the Rights of the Child (CRC).¹⁸¹ While analyzing Canada's obligations in dealing with deportees under the CRC, the IACHR held that Canada's right to expel a non-resident for a legitimate state interest must be balanced against due consideration of the deportee's family connections and the hardship the deportation may have on the family.¹⁸²

Shortly after this decision against Canada, the necessity of this balancing test was reiterated in a decision against the United States, where the test was again used by the IACHR to determine whether the deportation of the undocumented father of a US-citizen-child violated the right to family under Articles V, VI, and VII of the American Declaration on the Rights and Duties of Man because the United States is not legally bound by the CRC.¹⁸³ The IACHR held that the balancing test is not a requirement that is limited to those who have ratified the CRC, finding that the American Declaration, which the IACHR found the United States bound, also carries the same mandate.¹⁸⁴

The IACHR held that although the United States has the right to control the entry, residence, and expulsion of non-citizens,¹⁸⁵ this process must still respect the right to "life, physical and

¹⁷⁷ *Winata v. Australia* (No. 930/2000), 16 August 2001, U.N. Doc. No. CCPR/C/72/D/930/2000, ¶ 7.3. *available at* <http://www.unhchr.ch/tbs/doc.nsf/0/488b0273fa4febfbcb1256ab7002e5395?Opendocument>.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at ¶ 8 (the United States has ratified the ICCPR).

¹⁸⁰ *E.g.* Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System, Inter-Am. C.H.R., OEA/Ser.L/V/II.106, doc. 40 (2000), *available at* <http://www.cidh.org/countryrep/canada2000en/table-of-contents.htm>; U.N. C.C.P.R. Human Rights Committee, *Stewart v. Canada*, Judgment of December 1996, No. 538/1993, ¶ 12.10.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Armendariz v. United States*, Case 12.562, Inter-Am. Comm'n H.R., Report No. 81/10. OEA/Ser.L/V/II.139, doc. 21 ¶ 64 (2010).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at ¶ 49.

mental integrity, family, and the rights of children to obtain special measures of protection.”¹⁸⁶ The IACHR emphasized, like the ECHR and UNHRC, that the right to expel is not absolute and States must balance the State’s interest in removing the deportee with the impact that the removal may have on the particular family involved.¹⁸⁷ The IACHR stated that:

Given the nature of Articles V, VI, and VII of the American Declaration, where decision-making involves the potential separation of a family, the resulting interference with family life may only be justified where necessary to meet a pressing need to protect public order, and where the means are proportional to that end . . . This balancing must be on a case-by-case basis [and] the reasons justifying interference with family life must be very serious indeed.¹⁸⁸

The IACHR also laid out a list of the following factors that should be considered on a case-by-case basis to balance the deportee’s right to remain in the Host State with the State’s interest to protect its citizens, (the list is not exhaustive):¹⁸⁹

1. The age at which the non-citizen immigrated to the host state;
2. The non-citizens length of residence in the host state;
3. The non-citizens family ties in the host state;
4. The extent of hardship the non-citizens deportation poses for the family in the host state;
5. The extent of the non-citizens link to the country of origin;
6. The non-citizens ability to speak the principle language of the country of origin;
7. The nature and severity of any criminal offenses;
8. The non-citizens age at the time the offense was committed;
9. The time span of the non-citizens criminal activity;
10. Evidence of rehabilitation; and
11. Efforts to gain citizenship in the host state.¹⁹⁰

Note that this analysis must be conducted in addition to analyzing the “best interests” of the deportee’s children because the IACHR emphasized that in addition to these factors the “best interest” of minor children “must be taken into consideration” in a parent and/or child’s removal proceeding.¹⁹¹ The IACHR noted that under Article VII of the American Declaration “all children have the right to special protection care and aid,” and special protection requires that all proceedings “duly consider the best interests of the child.”¹⁹² The IACHR found that the US immigration policy violated children’s fundamental rights under articles V, VI, and VII of the American Declaration by failing to consider their right to family and the “best interests” of the affected children during removal proceedings.¹⁹³

The United States responded that a State does not interfere with children’s rights if the State does not directly target them, but the IACHR disagreed. The IACHR held that regardless of whether the United States deports the parents or whether the injuries to children are just

¹⁸⁶ *Id.* at ¶ 50.

¹⁸⁷ *Id.* at ¶ 51.

¹⁸⁸ *Id.*

¹⁸⁹ *Armendariz v. United States*, Inter-Am. Comm’n H.R., Report No. 81/10 at ¶ 54.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at ¶ 56.

¹⁹³ *Id.* at ¶ 64.

secondary consequences of that action, victims have a “right to be free from cruel, infamous, or unusual punishment” in any direct action or from a “foreseeable” consequence that flows from that action.¹⁹⁴ The United States also responded that its current immigration policies are not inhumane because the alleged victims (parents) made choices that have consequences and that requiring a balancing test will impermissibly infringe on the United States’ sovereign right to expel aliens, thus allowing criminal aliens to remain in the State simply by establishing family ties.¹⁹⁵ The IACHR responded that the argument is without merit, noting that “a balancing test is the only mechanism to reach a fair decision” that balances the competing interests of human rights versus the needs asserted by the United States to control their borders.¹⁹⁶

In the event that the IACHR had accepted the argument that the parents made a choice, thus justifying any consequences that resulted from that choice, this argument still does not justify policies harming their children who have made no choice. The majority of the children victimized by these policies made no choice. They did not choose to be born, much less where, and they surely had no choice in where they would live. But they are the individuals most severely impacted by these policies. The children are punished alongside their parents for a choice that the children never made and the US has failed to implement any reasonable form of balancing test that balances the best interest of these innocent victims with the needs of the State. In fact, the United States has completely ignored the findings and requests of the IACHR,¹⁹⁷ and US policy proposals continue to increase in harshness, both on immigrants and their children.

A small step was made in June 2011 when President Obama proposed that bureaucrats might exercise discretion and show leniency to some immigrants in deportation proceedings by weighing certain factors, such as:

1. The length of time the person has lived in the United States;
2. Whether the person was brought as a child;
3. Whether the person is pursuing an education;
4. Whether the person has a criminal record;
5. Whether the person or immediate relative served in the US military;
6. Whether the person has a spouse, child or parent who is a US citizen or permanent resident; and
7. Other circumstances.¹⁹⁸

These proposed factors were remarkably similar to the required factors set out by the Inter-American Commission, showing that Obama has at least paid attention to international opinion, but the factors have been hotly contested and are not statutory. This policy proposal was released in an in-house memorandum, known as the “Morton Memo.”¹⁹⁹ It was released June 17, from ICE Director John Morton to all field office directors, field agents, and chief counsel. But this memo has done little to help, as it has not been honored by ICE agents, and likely will not help until the factors become law.²⁰⁰

¹⁹⁴ *Id.* at ¶ 48.

¹⁹⁵ *Armendariz v. United States*, Inter-Am. Comm’n H.R., Report No. 81/10 at ¶ 58.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at ¶ 72.

¹⁹⁸ Ruben Navarrette Jr., *Obama's confused policy on deportations*, CNN (Oct. 7, 2011), <http://www.cnn.com/2011/10/07/opinion/navarrette-deportations-memo/index.html> (last visited May 15, 2012).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

VI. THE LIMITATIONS OF STATE SOVEREIGNTY

State sovereignty is not a license to ignore human rights. The US Government has built a “brutal system of immigration control and policing that criminalizes immigration status, normalizes the forcible separation of families,” and justifies these inhumane policies under the notion of sovereignty.²⁰¹ But inhumane policies are not a right of sovereignty and using sovereignty to justify the abuse of human rights is now being criticized in a variety of situations regarding migrants.²⁰² In addition to the limitations set by the IACHR, UNCHR, and the ECHR, the Inter- American Court of Human Rights has also restricted this justification when applied to human rights violations against migrants in employment.²⁰³

In an advisory opinion dealing with the abuse of migrant workers in the United States the Inter-American Court explained that although every State is entitled to enforce its immigration policies, human rights take precedence over these policies.²⁰⁴ The Inter-American Court held that regardless of whether or not a State is a signatory to any specific treaty every State still has a duty to honor the human rights of migrants.²⁰⁵ These opinions reflect an international consensus that State sovereignty is not a license for an unlimited reign of terror in dealing with migrants and human rights must still be recognized and honored for all human beings regardless of status.

VII. BALANCING THE IMPACT OF THESE POLICIES ON CHILDREN

In order to demonstrate how the failure of the United States to apply the balancing test mandated by the IACHR is impacting children, and to show exactly why the United States is in violation of its international human rights obligation to protect the right to family and to protect against cruel, inhumane, and degrading treatment, I will now outline the general impact that the United States’ failure to apply this balancing test is having on children and why these policies are cruel and inhumane. I will further demonstrate the magnitude of the problem and the long-term impact that it will have on the United States in order to aid in a determination of what is really achieved by these policies.

Every year, thousands of children, many of whom are US citizens, are victimized by failing US immigration policies, with shattered lives, forced family separations, children whose hopes and dreams are trampled and destroyed, and an overwhelmed foster care system being what the US has to show for it. Children are victimized in a variety of ways, including the loss of one or both parents, being left in the United States alone, ongoing fear of deportation, incarceration of themselves and their family and/or actual expulsion to a foreign land. Every day choices must be made by parents to either to take their children with them to a State where the child will suffer in poverty, forego educational opportunities available in the United States, and possibly place the child in danger, or to leave them behind feeling abandoned and alone. But even this hard choice is not available for many families if the children are also undocumented and are caught and detained, or if the parents’ detention in a deportation facility forces the children into foster care,

²⁰¹ Injustice for All, *supra* note 2, at 1.

²⁰² *E.g.*, Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 60, 166, 172, 173 #4 (Sept. 17, 2003) (opinion requested by Mexico, with briefs and oral arguments by other States to determine the protection to which undocumented migrants are entitled, with organizations and States specifically discussing the United States and Mexico conflict).

²⁰³ *Id.*

²⁰⁴ *Id.* at ¶ 172.

²⁰⁵ *Id.* at ¶ 173 no. 4.

where there is often no realistic means for many parents to regain custody and reunite with their children due to the disconnect between the child welfare and immigration systems.

But the victimization of children is not limited to only those children who are undocumented, deported, or have lost a family member, because as published deportations continue to rise even children who have not lost a parent are living in fear. This fear is not limited to undocumented children. Even US citizen children of immigrants are living in fear of what the future holds for them. They are growing up in an environment where their very presence in their own country is criticized; their parents are blamed for their existence; and they wake up daily not knowing what family member may be gone when they arrive home from school. This harm is no longer even a secondary effect of immigration policies targeting their parents, because recently proposed policies have begun targeting the children directly, in efforts to punish their parents supposed intent to immigrate through them.²⁰⁶ These children are being caught and now even targeted in the crossfire of the battle between the State and their parents, and despite being US citizens they are not being heard or even considered when their lives are turned upside down.

These direct attacks on children demonstrates that America's historic values and international commitment to protect children; ensure fair treatment and equal liberty and justice for all; and protect all individuals from cruel and unusual treatment has apparently been lost behind societies concerns of economic and border security. The human rights abuses that these policies are creating for even American children is now becoming a tragedy of epic proportions and there are no adequate statistics that can calculate the damage they have done and continue to inflict; unfortunately only history will one day account for it.

A. Extent of the Familial Destruction in Numbers

As the number of ICE raids continue to increase the impact on children and their families continues to intensify, with the last two years being record years for deportations and familial destruction.²⁰⁷ In 2010, the US government deported approximately 392, 862 immigrant workers, students, and youth, many of whom have been long time residents of the US.²⁰⁸ The number of deportations in 2011 was again nearly 400,000.²⁰⁹ But beyond those numbers are the other numbers that are not accounted for, such as the numbers of abandoned children, incarcerated children, families separated, lives destroyed, and children left hopeless.²¹⁰ There are children who live in fear they will arrive home to find their parents gone and those who actually do. These are the tragic numbers of the greatest magnitude that are untold by the majority of Government statistics.

The psychological and economic devastation to children and their families that is resulting from US immigration policies is a problem of increasing magnitude and its impact will continue to increase in severity if it continues to be ignored. Currently they are approximately 11.9 million undocumented immigrants in the United States.²¹¹ Approximately 6.6 million of these

²⁰⁶ *Anchor Babies*, *supra* note 73.

²⁰⁷ Navarrette, *supra* note 198.

²⁰⁸ *Injustice For All*, *supra* note 2, at 4.

²⁰⁹ HUFFINGTON POST, *supra* note 16.

²¹⁰ *Injustice For All*, *supra* note 2, at 4.

²¹¹ *Immigration and Child Welfare Fact Sheet*, Casey Program; Capps, R., Fix, M.Ost, J., & Passel, J.S. (2004). *The Health and Well Being of Young Children of Immigrants*. Washington DC: Urban Institute [hereinafter *Child Welfare Fact Sheet*].

individuals reside in families of mixed citizenship status,²¹² meaning that either one parent, the children, or one parent and the children are US citizens or LPR's. In some of the families citizenship is even inconsistent amongst siblings, with some of the children being US citizens, while others are undocumented.²¹³ This means that there are more than 5 million children with an undocumented parent that are currently living in the US and while approximately 1.5 million of these children are undocumented, the other 3 million plus children are US citizens.²¹⁴ In any case, almost all children under the age of 6 that are living in immigrant families in the United States are US citizens and most of these children live in mixed citizenship status families.²¹⁵

Although many US citizens and politicians see these numbers as demonstrative of the need for increased enforcement, they also demonstrate the risk of it. Every day that this problem is ignored 1,100 families are torn apart and all too often it is the wage earner that is removed, forcing the family not only into emotional, but also into economic crisis.²¹⁶ But beyond the undocumented individuals deported, the current statistics regarding the family dynamic in many of these households reflects that the dramatic increase in deportations is not only affecting undocumented migrant families, but is also having a detrimental impact on an astonishing number of US citizens, both parent and child.²¹⁷

Trying to deport our way out of this problem is not only creating a humanitarian crisis internationally; it is creating an internal crisis, and continued enforcement in this manner will create a national catastrophe. This problem is not one that more deportations can solve because it is not only impacting undocumented immigrants who can one day be removed from the United States, it is impacting families of all types, many of which contain US citizens, both parent and child. A report issued by the Berkeley Human Rights Clinic estimated that 103,000 children were affected by the deportations of their LPR parents alone in 1997 through 2000, and that at least 88,000 of the impacted children were US citizens.²¹⁸ They further estimated that "approximately 44,000 of these children were under the age of 5 when their parent was deported."²¹⁹ An Urban Institute study found that 87,884 of the LPRs deported during the period of April 1997 and August 2007 had resided in the US an average of 10 years and 53% of these LPRs had at least one child living with them.²²⁰

But the continuous growth in deportations and all of the unaccounted for children has now made even those numbers insufficient to describe the tragedies that these laws are creating daily in the lives of children residing within the borders of the US because the numbers are only increasing. There was a ten-fold increase in immigrants arrested at their workplaces between 2002 and 2007,²²¹ and even higher numbers in 2010 and 2011.²²² Although family unity is an aspect of the problem, the issues these policies create are far deeper than family unity. The

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Severing a Lifeline*, *supra* note 146, at 1.

²¹⁵ Child Welfare Fact Sheet, *supra* note 211.

²¹⁶ Midwest Coalition for Human Rights, *Faith and Community Leaders Take Action to Stop the Separation of Families*, available at <http://www.midwesthumanrights.org/faith-and-community-leaders-take-action-stop-separation-families>.

²¹⁷ *Id.*

²¹⁸ IN THE CHILDS BEST INTEREST?, *supra* note 90, at 4.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Urban Institute, (2008) Unauthorized Immigrants. Policy Nutshells, No. 5, <http://www.urban.org/decisionpoints08/archive/05immigrants.cfm> (last visited May 15, 2012).

²²² See HUFFINGTON POST, *supra* note 16.

negative impact is not only creating an individual crisis for the family, it is also creating an internal crisis, both economic and psychological on the US citizens left behind, which is negatively impacting society as a whole. It is impacting child welfare, churches, schools, children's mental health, welfare agencies, family values, and the economic, medical, and psychological well being of many Americans.

B. Child Welfare Implications

Immigration laws do not intersect with child welfare laws to protect children when their parents are being deported, and some child welfare procedures may even cause the deportation. The lack of coherent policies not only burdens the child welfare system by causing unnecessary family separations, but the policy collisions between the two systems often makes these separations permanent. There are a multitude of different issues that arise, but I will outline the ones that appear with the most frequency and are the most damaging.

First, one of the issues frequently arising is timeline conflicts. Under the Adoption and Safe Families Act (AFSA) child welfare agencies are under intense pressure and strict guidelines to establish permanent placement for any child placed in their care, and AFSA does not explicitly provide any exceptions for immigration cases.²²³ Under AFSA, a termination of parental rights petition must be filed if a child has “been in care for 15 of the previous 22 months,” with only a few limited exceptions (none of which are related to immigration issues).²²⁴ States that do not honor these timelines will become ineligible for federal matches to funding, which puts states in a difficult position when dealing with children whose parents are in immigration proceedings²²⁵ because ICE does not operate on the same timelines. “Deportation cases often can and do last longer than the AFSA 15 month timeline.”²²⁶ But even in deportations that proceed quicker, a parent is not permitted to return to the United States to pick up their child, or to work on a case-plan. Meeting the timelines cannot be accomplished without a workable parenting plan.

This makes reunifying these families very difficult for child welfare agencies because, in many of these cases, creating a workable parenting plan before the parent is deported is difficult. On many occasions, a parent may be in custody for extended periods or deported before Child Welfare is even able to locate them or before the parent is able to locate their child. Until locating the parent, Child Welfare has a child who is often classified as abandoned, which further speeds up the timelines.²²⁷ Even parents who are located may be unable to meet case plan requirements, such as participating in parenting classes or having regular visits with the child while they are in custody, when they have been transferred out of state, or when they have been

²²³ Wendy Cervantes and Yali Lincroft, *The Impact of Immigration Enforcement on Child Welfare, in* CAUGHT BETWEEN SYSTEMS: THE INTERSECTION OF IMMIGRATION AND CHILD WELFARE POLICIES, First Focus 5 (May 21, 2010) <http://www.firstfocus.net/library/reports/caught-between-systems-the-intersection-of-immigration-and-child-welfare-policies> (last visited May 15, 2012).

²²⁴ *Id.*

²²⁵ See Idaho Child Protection Manual, Judicial Benchbook 170–75 (2011) available at <http://idahodocs.cdmhost.com/cdm/singleitem/collection/p15100coll7/id/239450/rec/7>.

²²⁶ CERVANTES, *supra* note 223, at 6.

²²⁷ See Idaho Child Protection Manual, *supra* note 225, at I-20, VI-12, VI-13, VII-13, X-12, X-18; see also Cervantes, *supra* note 223 at 6.

deported.²²⁸ Even when parents are temporarily released on bond, case plans are still often unworkable due to the parent's inability to get a driver's license or a job in the United States.²²⁹

In addition, detained parents may be unable to participate in court proceedings related to the care and custody of their child making it difficult to intervene as the timeline deadlines approach.²³⁰ One of the only exceptions to the timeline deadlines for the filing of termination petitions is an extension that is available in some cases where a child is in the care of relatives. However, family placement is difficult to achieve for these children.²³¹ These procedural barriers often result in children being unnecessarily separated from their parents with no realistic avenue to regain family unity.

Second, immigrant children and children from immigrant households are less likely to be living in relative foster care because of the procedural barriers to undocumented immigrants being foster parents. Immigrant children and children from immigrant households are more likely to be living in group homes and institutions than other children.²³² They are also "more likely to have a case goal of independent living or long-term foster care."²³³ Unlike family-unity goals that guide most child welfare cases, many of these children have no one left in the United States, and if they do, the placement is often unachievable under the current regulations.²³⁴

Third, cross-reporting has also created issues. Child Welfare agencies often cross-report to law enforcement when there is a joint investigation of child abuse or when there is a need for a criminal background check prior to a placement with an adult relative.²³⁵ While Child Welfare may be trying to investigate the circumstances of a case or find a family placement for a child, law enforcement may be utilizing the police department's 287(g) agreement to turn the family over to ICE.²³⁶ First Focus identified a case in which a mother was turned over to ICE after a CPS investigation was commenced. When the social worker called the grandparents to take the child after the mother's arrest, the grandparents were also arrested by ICE during a visit at the Child Welfare Agency.²³⁷ Cases like this do not help protect these children because they create a genuine fear of Child Welfare and hamper the trust of the agency that is needed to protect children.²³⁸ This fear and distrust not only hampers the ability to place children with relatives but also increases the risk that child abuse will not be reported.²³⁹

Fourth, another issue that child welfare agencies face is the failure of immigration enforcement agencies to consider the "best interest of the child." This creates difficulty for child welfare because unlike immigration courts, child welfare must consider the "best interest of the child."²⁴⁰ Sending a child back to extreme conditions in their parents' home country, although not unusual in immigration court, can be at odds with child welfare policies. Dealing with parents who are incarcerated, difficult to find, or those who are sent to a foreign country without any chance to make contact with Child Protection creates extremely difficult situations for Child

²²⁸ Idaho Child Protection Manual, *supra* note 225, at I-20, VI-12, VI-13, VII-13, X-12, X-18.

²²⁹ CERVANTES, *supra* note 223, at 6.

²³⁰ *Id.*

²³¹ *Id.*

²³² Child Welfare Fact Sheet, *supra* note 211.

²³³ *Id.*

²³⁴ *Id.* at 4–8

²³⁵ THE INTERSECTION OF IMMIGRATION AND CHILD WELFARE POLICIES, *supra* note 223, at 6–7.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ CERVANTES, *supra* note 223, at 5–6.

Welfare workers in determining what is in the child's "best interest."²⁴¹ If the reunification does not take place before the parent is deported, then it is difficult to serve the child's best interest. Child Protection cannot just place young children on airplanes alone to send them to foreign countries without following strict and time consuming procedures.²⁴² Even if a parent in ICE custody is found before being deported, it is difficult to justify placing the child in a family detention center as being in the child's "best interest."

Fifth, when ICE raids are performed Child Welfare is often uninformed, thus unprepared to deal with the magnitude of children who find themselves alone.²⁴³ Although some recent policies have begun requiring that ICE screen for child protection issues during raids of more than 25 people,²⁴⁴ this is not always carried out, and it does not help in raids detaining less than 25 people. Those raids still leave a number of unidentified children without parents and Child Protection workers scrambling to find emergency placements as children are discovered.²⁴⁵ But even when ICE does screen it does not always help because many parents, fearing for their children's safety, are afraid to tell these armed agents where their children are.²⁴⁶ For those reasons ICE raids across the United States have resulted in thousands of abandoned US citizen and undocumented children annually, leaving schools, churches, and Child Welfare Agencies to pick up the pieces. These children are often referred to Child Protection through schools or other social service agencies when they are discovered parentless and alone, further burdening this already overwhelmed system.²⁴⁷

But beyond the magnitude of children these policies impose on Child Welfare and the number of unnecessary family separations they cause, these are the most difficult and most costly cases for Child Welfare Agencies to deal with.²⁴⁸ The problems caused by these policy collisions are not minor either for Child Welfare or society. A preliminary analysis by the National Survey of Child and Adolescent Well-Being (NSCAW) found that "9.6% of all children involved with the [C]hild [W]elfare [S]ystem are children of immigrant parents and 2.3% of all children within the [C]hild [W]elfare [S]ystem are immigrants themselves."²⁴⁹ Further studies have shown that immigration cases are considered some of the most time consuming and challenging cases for child welfare agencies because many social workers have little to no knowledge of immigration issues or procedures and the Child Welfare Systems are not equipped to address them.²⁵⁰

Child Welfare Agencies cannot effectively meet the needs of these children without the cooperation of ICE, which is difficult for them to obtain. However, in order to adequately protect these children the Immigration and Child Protection Regulations must take into account the unique situation of immigrant families. If not, then the unnecessary separation of families will further burden our overwhelmed Child Welfare System.

²⁴¹ *Id.*

²⁴² *See Id.*

²⁴³ *Id.* at 2–4.

²⁴⁴ *Id.* at 3.

²⁴⁵ CERVANTES, *supra* note 223, at 3.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Child Welfare Fact Sheet, *supra* note 211.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

C. The Economic, Psychological, and Educational Impacts

Separation from parents, friends, and the life that the children are accustomed to is devastating to them, whether the separation is caused by the deportation of a parent, the children themselves, or parental incarceration. In basic terms, the separation of families has a massive affect on not only the future prosperity of the child but it also affects their immediate wellbeing psychologically and economically.²⁵¹ In balancing the States interest versus the impact of these deportations on children it is important to understand how significantly children are impacted when one or both parents are deported.

I found no current studies that assess the impact of these immigration policies on children who have been deported with their parents or on those children whose parents have chosen to take them. Some documentaries have demonstrated depression and other anger issues in those children, but due to a lack of access to the whereabouts of those children once they are deported there is little information to assess their outcomes. However, there are a number of studies on the impact of parental incarceration or deportation on children who are left behind, as well as studies on the fear that children experience knowing that one day they could lose their parent and they will either be left alone or will have to leave to a foreign land. For these reasons, the children who stay in the United States are the children who are encompassed in the majority of statistics, although the effects are likely the same if not worse on the children that are deported.

Children often stay either because of the policy failures between Immigration and Child Welfare or because of their parents fear that their child will suffer or be in danger if they return to their country of origin.²⁵² An Urban Institute Study reported that when a parent is deported over half the children affected remain in the United States.²⁵³ For this reason the impact of this problem is being felt in the United States in Child Services, Welfare Services, schools, health care, and mental health agencies.²⁵⁴ The magnitude of the impact of these policies across the Social Service Systems clearly demonstrates that the United States' stated goals are not being achieved. The United States claims that undocumented immigrants are burdening the economy, and must be removed to relieve this burden.²⁵⁵ Yet the way that the United States is dealing with undocumented immigrants, particularly those in mixed status families, is only compounding the economic damage that the US claims justifies the deportations in the first place. In fact, deportations of the husbands, wives, and parents of US citizens, who are often the sole breadwinner for the household, frequently forces the remaining family members to utilize a Welfare System that they had never before accessed, and the individuals who are being psychologically damaged, traumatized, and forced onto welfare are not deportable.

1. Economic Strain

The type of economic strain that these families experience is detrimental to these children both short-term and long-term. Studies on even average households experiencing family breakups demonstrate that seventy-five percent of all children in the United States who receive

²⁵¹ Patrick Fagan, *How Broken Families Rob Children of Their Chances for Future Prosperity* HERITAGE FOUND.: BACKGROUNER, June 11, 1999 [hereinafter *Broken Families*].

²⁵² *Facing Our Future*, *supra* note 13, at 24.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ COLORADO ALLIANCE FOR IMMIGRATION REFORM, <http://www.cairco.org/econ/econ.html>.

welfare benefits do so because of a parental breakup.²⁵⁶ This risk of economic crisis during family separation increases even more for low-income families.²⁵⁷ Studies on immigrant families from which one or both parents have been deported show that these families are even more likely to suffer from economic strain than average households, requiring additional public assistance.²⁵⁸ This increase in poverty is concerning in that poverty is one of the most important predictors of negative child outcomes, and decreased productivity, which affects everyone.²⁵⁹ For example, the income reduction when one parent is deported is substantial, yet little attention is being paid to the disintegration of these families and how it affects internal poverty rates and the economy. “When America’s economic productivity fell by 2.1 percent from 1981 to 1982, it was called the recession. And when the economy contracted by 30.5 percent . . . it was the great depression.”²⁶⁰

Family separation creates a reduction of family income ranging from 28% to 42% and can range to 100% in a family where the sole breadwinner is deported.²⁶¹ This explains precisely why welfare applications increase and communities struggle when families are torn apart. A study by the Urban Institute found that parental arrest and deportation of immigrant parents resulted in severe economic hardship on families because they often lose the breadwinner, which is not unexpected in that deportations are often conducted through worksite raids and police encounters, thus targeting the individual producing the income for the household.²⁶²

Due to this sudden loss of income most of these households experience financial instability; causing housing instability and food insufficiency, with the Urban Institute reporting that one in four households did not have any wage earners after the arrest.²⁶³ Due to the loss of the family’s wage earner about two-thirds of the families interviewed stated they were struggling to pay their monthly bills as a result of the parental detention or deportation.²⁶⁴ One in four of the surveyed families moved in with friends and family to reduce their housing costs, and of the eight families that owned their homes prior to the detention of one spouse, four lost them as a result.²⁶⁵ The vast majority of individuals in the Urban Institute Study received some type of assistance from family and friends, but this did not last when the family encountered long deportation proceedings or when the other parent was forced to leave permanently.²⁶⁶

When the deportation proceedings were lengthy or the other parent was forced to leave permanently more than half of the families eventually needed private or public financial support to sustain the household, including food, rent and/or utility assistance.²⁶⁷ Public Benefits for US citizen children and spouses affected included cash assistance, food stamps, WIC (Supplemental Nutrition program), and free and reduced-price school meals.²⁶⁸ But financial struggles are not an anomaly in broken families because 74 percent of all US families in the lowest income brackets are headed by single parents.²⁶⁹ And these statistics do not even assess the economic

²⁵⁶ *Broken Families*, *supra* note 251, at 2–3.

²⁵⁷ *Id.* at 4.

²⁵⁸ *Facing Our Future*, *supra* note 13.

²⁵⁹ Child Welfare Fact Sheet, *supra* note 211.

²⁶⁰ *See Broken Families*, *supra* note 251, at 4.

²⁶¹ *See Id.*; *Facing Our Future*, *supra* note 13, at 27.

²⁶² *Facing Our Future*, *supra* note 13 at 27.

²⁶³ *Id.*

²⁶⁴ *Id.* at xiii

²⁶⁵ *Id.* at ix.

²⁶⁶ *Id.* at 35.

²⁶⁷ *Facing Our Future*, *supra* note 13 at 36.

²⁶⁸ *Id.* at 24.

²⁶⁹ *Broken Families*, *supra* note 251, at 15.

impact on the Foster Care System when both parents are deported, as I pointed out in the section on Child Welfare.

These policies do not punish only the immigrants and their children; they impact the economy, they strain the welfare system, and they negatively impact the wellbeing of the US citizens left behind, both immediately and long-term, as will be further outlined.

2. Psychological Impact on Physical and Mental Health

But beyond the economic impact on the family, losing a parent to deportation also negatively impacts children's physical and mental health, creating not only long-term health risks and emotional damage to the child, but implicating yet another economic issue surrounding health care. In the ICESR, the Right to Health includes the "enjoyment of the highest attainable standard of physical and mental health."²⁷⁰ The Constitution to the World Health Organization also describes health as "a state of complete physical, mental and social well-being and not merely the absence of infirmity."²⁷¹

The impact of parental deportation is devastating to both the physical and mental health of these children. This is demonstrated in areas such as sleeping, eating, behavioral outbursts, and controlling their emotions.²⁷² More than half of these children cry frequently and are more afraid, and more than a third are more anxious, clingy, withdrawn, angry, or aggressive following their parents' arrest.²⁷³ At least 40% of these children continue exhibiting these behavioral changes after nine months.²⁷⁴ But the negative impact increases even more during long-term separations, and the children who experienced long-term separation are the most prone to severe withdrawal and aggression, with the majority of them demonstrating five or more of these changes.²⁷⁵ Other studies of children who have experienced parental arrests show that children who actually witness the arrest of their parent suffer increased psychological harm, including persistent nightmares and flashbacks.²⁷⁶

Beyond the studies, children describe the feelings of hopelessness that they experience in their letters to judges pleading for the release of their parents. These letters demonstrate worry, inability to concentrate, depression, and feelings of helplessness and hopelessness:

- "Instead of paying attention in class [I think about the effects of moving to Mexico and how to avoid them]."
- "[J]ust the thought of living in Mexico is unbearable to me."
- "I promise that if you take this stress away . . . I will become a doctor."
- "I don't know anything or anyone."
- "Next year I will be taking Honors and Above Placement (AP) classes. All my efforts to get into these classes will have been for nothing if my parents are deported because we will have to go with them."
- "I do not want to go there and have to live there."
- "How would I survive, I don't even know the language."

²⁷⁰ International Covenant on Economic, Social, and Cultural Rights, art. XII, Dec. 16, 1966, 993 U.N.T.S. 3.

²⁷¹ Constitution of the World Health Organization, preamble, July 22, 1946.

²⁷² *Facing Our Future*, *supra* note 13, at ix.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* at ix, 53; IN THE CHILD'S BEST INTEREST?, *supra* note 77 at 8.

²⁷⁶ DENISE JOHNSTON, JAILED MOTHERS (Pacific Oaks Center for Children of Incarcerated Parents 1991).

- “[F]ood is different back there.”²⁷⁷

This is a problem that must be addressed because the trauma to children when a parent is deported is not short-term. Psychological studies show that “[children of broken families] are almost twice as likely to exhibit antisocial behavior as adults; 25 percent to 50 percent more likely to manifest such behavior problems as anxiety, depression, hyperactivity, or dependence; two to three times more likely to need psychiatric care; and much more likely to commit suicide as teenagers.”²⁷⁸ These are the statistics of broken families in general, but for the children whose parents are deported, the family is broken up by force or with little warning. This significantly reduces the likelihood of seeing the deported parent again, and causes children to fear for the parent’s safety, all of which must be considered in calculating the long-term effects. I must, again, note that if the end goal in removing undocumented aliens is to increase the stability and well being of the United States, the means are clearly not achieving the end. In fact, they are doing exactly the opposite.

3. Educational Impact

The impact of our current deportation policies is not short-term. The trauma that these policies inflict on children also impacts their future productivity and potential; children who have experienced the deportation of a parent are more likely to experience trouble educationally, such as poor grades and behavioral problems in school.²⁷⁹ One study found that 70% of children under the age of six with incarcerated mothers exhibited poor academic performance.²⁸⁰ But even when a child’s parent is not incarcerated, children in broken families are twice as likely to drop out of high school: they miss more days of school, have lower educational aspirations, and receive lower grades.²⁸¹ The Urban Institute found that about one in five students experienced a drop in grades after ICE arrested their parent, generally resulting from the child’s difficulty focusing.²⁸² A significant number of children in the Urban Institute Study also experienced disruptions in their schooling: many missed school following their parent’s arrest, and others considered dropping out of school.²⁸³ Even more concerning, the effects on children’s education are not short-term. Statistically, the removal of a parent increases the overall likelihood of poor education outcomes for children long-term, leading to a greater number of US citizens who may be relegated to low-income employment as adults.²⁸⁴ This long-term outcome is detrimental to the economy of the United States and future productivity because these children are the future. Therefore, I reiterate that if the United States’ end goal in removing undocumented aliens is to increase the stability and well being of the nation, the means we are using are not achieving the ends.

²⁷⁷ *E.g.*, *Memije*, 481 F.3d at 1166–68.

²⁷⁸ *Broken Families*, *supra* note 251, at 13.

²⁷⁹ *Id.*

²⁸⁰ ANN M. STANTON, *WHEN MOTHERS GO TO JAIL* (Lexington Books 1980).

²⁸¹ *Broken Families*, *supra* note 251, at 13.

²⁸² *Facing Our Future*, *supra* note 13, at 51.

²⁸³ *Id.* at 49–50.

²⁸⁴ *IN THE CHILDS BEST INTEREST?*, *supra* note 77, at 5.

D. Effect on Family Values

The impact of family breakups on children is frequently manifested in their own family values as adults. A study conducted on US children in broken families demonstrated that children raised in their original family with two parents are more likely to marry as adults, divorce less, cohabit less often, and have a decreased risk of future poverty.²⁸⁵ Notably, children who have two parent families are also at a decreased risk of teen pregnancy, which is also a significant indicator of lower productivity as an adult.²⁸⁶ In Comparison, this study noted that the children who are the most likely to attain a good income as adults are children who have both parents, finish school, get a job, and marry before having children of their own.²⁸⁷

For a nation that struggles to reduce teen pregnancy, emphasizes the institution of marriage, and promotes family values, a policy choice that forcefully breaks up families is extremely counterproductive. The broken family is a problem that the United States has identified as a societal issue and one that society strives to fix, yet we are only enacting policies aimed at fixing those families broken up by choice, and we are ignoring those families that are broken up by force. Society is unwisely ignoring the easiest demise of the family institution to fix; the one that is preventable. These families do not need to be broken apart. In order to strengthen the institution of family and decrease the number of broken families in the United States we need to start with the policies that cause the break up. This may seem insignificant, but by strengthening the family unit we strengthen the economy, and the overall welfare of society.

By breaking up families, regardless of the justification, we devalue the very institution that we claim to promote, and we damage the children who are the future of our country. What is happening to hundreds of thousands of children is not a small issue. Rather, the sheer magnitude of children affected is very significant and when analyzing the future impact of the damage being done it is very concerning. Not only do children from broken families generally earn less, pose a higher risk of psychiatric issues, and experience lower levels of educational achievement, the damage does not end with the immediate victims of the broken family; it is an expanding cycle, which will be passed on for generations.²⁸⁸ It is important to remember that what America creates today will impact it tomorrow. Family stability is undeniably linked to economic prosperity, physical wellbeing, and educational outcomes. Destroying families, in the magnitude that our current immigration policies are, weakens the structural underpinnings of society as a whole

VIII. IS THERE ANY CONSTITUTIONAL PROTECTION?

There is currently no meaningful protection on US soil for these children or their families, irrespective of the citizenship of the child. Even the Constitution has been dormant in relation to their predicament and the US courts have made this dormancy clear by their uniform rejection of all Constitutional claims brought by even US born children who are injured. US courts have

²⁸⁵ *Broken Families*, *supra* note 251, at 9, 13.

²⁸⁶ *Id.* at 4.

²⁸⁷ *Id.* at 11.

²⁸⁸ *Id.* at 1.

consistently held that even US citizen children have no Constitutional rights that can defeat the removal of their parent.²⁸⁹

In *Cervantes*, the Tenth Circuit held that the deportation of a child's parents causes only an incidental impact on the child, and despite the fact that this incidental impact was a serious one, "Congress clearly has the power to prescribe the conditions under which aliens may enter and remain in the United States [and] even though their enforcement may impose hardship upon the aliens' children," this does not raise Constitutional issues.²⁹⁰ This holding was reiterated in *Emisco-Cardozo*, where the Second Circuit held that although they were not prepared to say a child could never intervene when their parents are deported, intervention was not justified if a child would only make the same hardship arguments that their parents had already made.²⁹¹ These same holdings have been reiterated in case after case, irrespective of the Constitutional claim made.

In *Reno* the Supreme Court took the lack of Constitutional rights even a step further for undocumented children, holding that undocumented children can be incarcerated, without regard to less restrictive placements, as long as minimal standards are met and the child's fundamental rights are not impaired.²⁹² But they never clarified what fundamental rights undocumented children may have.²⁹³ In contrast, the Court eliminated any conditions of deportation as implicating fundamental rights, as discussed above in the section on "When Children Are Alone."²⁹⁴ In addition, the Court found that even if this treatment were not permitted when dealing with US children, undocumented children are not entitled to the same rights.²⁹⁵ The Court asserted that certain human rights can be contingent on citizenship and status, even when dealing with children.²⁹⁶ Further, the Court in *Reno* held that the decision to do more than a bare minimum to safeguard undocumented children during deportation is a policy judgment rather than a Constitutional imperative and noted that the detention of undocumented children, without the right to counsel, is not unlawful under the Constitution because it is a mere administrative decision.²⁹⁷ Even more notably, the Court held that any type of "best interest" analysis is not mandatory in immigration proceedings.²⁹⁸

Despite previous holdings, there are still principles that remain in Supreme Court precedent that should protect the children of undocumented parents during deportation proceedings. The Constitution still requires equal protection and freedom from cruel and unusual punishment, even for children. These precedents lead to the conclusion that children should have the same protection against deportation, whether constructive or actual, as their parents and should be able to be heard.

Despite the contrary nature of the opinion in *Reno*, the Supreme Court declined to overturn its holding in *Plyer*, where the Court held that everyone within the jurisdiction of a State is

²⁸⁹ David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 Nev. L.J. 1165, 1196 (2006) (example cases are also included in footnote 152 of the *Choiceless Choices*) [hereinafter *Choiceless Choices*]

²⁹⁰ *Cervantes v. Immigration & Naturalization Serv.*, Dept. of Justice, 510 F.2d 89, 91-92 (10th Cir. 1975).

²⁹¹ *Emciso-Cardozo v. Immigration & Naturalization Serv.*, 504 F.2d 1252, 1254 (2d Cir. 1974).

²⁹² *Reno*, 507 U.S. 292 at 304-305.

²⁹³ *See. Id.*

²⁹⁴ *See Id.*

²⁹⁵ *Id.* at 304-306.

²⁹⁶ *Id.*

²⁹⁷ *Reno*, 507 U.S. 292 at 304-306.

²⁹⁸ *Id.* at 304.

entitled to equal protection.²⁹⁹ In *Plyler* the Supreme Court held that, when dealing with children, a State may not accomplish what would otherwise be prohibited by the Equal Protection Clause, merely by defining a disfavored group as non-resident.³⁰⁰ *Plyler* involved an attempt by Texas to exclude undocumented children from public education. Although the Supreme Court noted that there was no fundamental right to public education, it held that undocumented children could not be singled out in a manner that would affect their overall wellbeing, regardless of status, because they were not to blame for their unlawful presence.³⁰¹ The Court noted that persuasive arguments may support less protection of those whose presence in the United States is the product of their own conduct, but found that the arguments do not apply with the same force when placing a disability on the children of those individuals who cannot control the conduct of their parents.³⁰²

Although the Court applied only a rational basis test they found that the benefit to Texas did not outweigh the harm to these children, stating that when determining the rationality of a statute that impacts undocumented children the “costs to the Nation” and to the “innocent children may properly be considered.”³⁰³ The Court expressly noted that undocumented children are not “accountable for their disabling status” and expressed concern about treating these children in a manner that would impact their social, economic, intellectual, and psychological well being.³⁰⁴ The Court warned against the attempt to control adults by acting against their children stating, “legislation directing the onus of a parents’ misconduct against his children does not comport with fundamental conceptions of justice.”³⁰⁵

The Court discounted arguments that undocumented children could be singled out because they could be later deported, thus any injury to them would not affect the United States long-term. Rather, the Court found that “this subclass is largely composed of persons with a permanent attachment to the Nation and that they are unlikely to be displaced from our territory.”³⁰⁶ The Court quoted a statement by the Attorney General, where he noted, “[W]e should recognize reality and devote our enforcement resources to deterring future illegal arrivals.”³⁰⁷ Most importantly, the Court found that “We cannot ignore the significant social costs borne by our nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”³⁰⁸ Although the Court applied only a rational basis test, they revealed that public policies and legislation that severely and negatively impacts the overall well being of innocent children might fail this test.

Unfortunately, *Plyler* has not been expanded beyond its facts, and the Court has declined to extend its principles to preventing the deportation of children, let alone their parents. In fact, in *Reno*, incarcerating and deporting the same innocent children, without education, without counsel, and under questionable conditions was condoned.³⁰⁹

Unfortunately *Reno* is remarkably similar to another case, *Korematsu*, a landmark case that is still a historical embarrassment, continuing to scar those whose abuse it condoned. In *Korematsu*,

²⁹⁹ *Plyler v. Doe*, 457 U.S. 202, 226 (1982).

³⁰⁰ *Id.*

³⁰¹ *Id.* at 230.

³⁰² *Id.* at 220.

³⁰³ *Id.* at 223–24.

³⁰⁴ *Plyler v. Doe*, 457 U.S. at 230.

³⁰⁵ *Id.* at 220.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 221.

³⁰⁹ *See Reno*, 507 U.S. 292.

the Supreme Court expressly permitted the continuation of Japanese internment camps during WWII.³¹⁰ The Court, while allowing the wholesale incarceration of Japanese citizens, did note that the “compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic government institutions.”³¹¹ But Justice Jackson disagreed that even situations of emergency direst and peril could justify this type of behavior, noting that “if any fundamental assumption underlies our system, it is that guilt is personal and is not inheritable.”³¹² He expressed particular concern with the fact that even children were being expelled from their homes and placed in these camps.

Just as Justice Jackson dissented in *Korematsu*, and Justices Stevens and Blackmun dissented in *Reno*, other dissents regarding the current mistreatment of children are arising amongst Circuit Justices, who point out that these policies are inhumane.³¹³ Justice Pregerson, of the Ninth Circuit, noted that:

The decision in this case, if carried out, will inflict egregious harm on four children born in the United States. Our government’s refusal to grant the children’s undocumented parents’ cancellation of removal tramples on the children’s substantive due process rights—rights our government routinely ignores. By denying undocumented parents cancellation of removal, our government effectively deports their United States citizen children and denies those children their birthrights. The government’s conduct violates due process by forcing the children to accept de facto expulsion from their native land or give up their constitutionally protected right to remain with their parents [and] I pray that soon the good men and women in our Congress will ameliorate that plight of families . . . and give us humane laws that will not cause the disintegration of such families.³¹⁴

In that case, the deportation affected four children who had never been outside of the United States, but were denied relief from the parents’ deportation, despite having nowhere to go in Mexico, the children’s inability to speak Spanish, and despite both of the children’s grandparents residing lawfully in the United States.³¹⁵

But majority opinions have contradicted Judge Pregerson’s view by holding that a child is not denied their right of citizenship, because they can come back when they are 18.³¹⁶ This reasoning completely ignores the same foregone education, right to equal treatment, and inability to punish children for their parent’s acts that was found to be unconstitutional in *Plyler*.³¹⁷ In *Plyler*, when the US Supreme Court held that undocumented children could not be denied an education in the United States they noted that these children should not be punished for the choices of their parents.³¹⁸ Yet the Court has remained silent when the immigration system punishes them on a daily basis and by the thousands, creating the same damage to the children that *Plyler* found unconstitutional.

³¹⁰ *Korematsu v. United States*, 323 U.S. 214 (1944)(holding that Japanese internment camps were constitutional).

³¹¹ *Id.* at 220.

³¹² *Id.* at 243 (Justice Jackson’s dissenting opinion).

³¹³ *Memije*, 481 F.3d at 1164.

³¹⁴ *Id.* at 1164, 1165.

³¹⁵ *Id.*

³¹⁶ *Plyler*, 457 U.S. at 226.

³¹⁷ *Id.*

³¹⁸ *Id.* at 228.

I reiterate that State sovereignty does not allow a State to ignore and trample human rights, and our Constitution protects “the people,” a category in which immigrants surely fall. It does not; in any section of it limit that word to only certain people, of certain ages, from certain countries.

IX. IS THERE ANY BENEFIT OR STATE INTEREST?

There are many legitimate reasons to enact harsh policies in order to stop illegal immigration. These reasons are related to population control concerns and fairness to those waiting lawfully to enter the United States. There are also economic arguments against illegal immigration, but there are many contradicting views related to the economic impact. The view that I advocate is the one set out by Supreme Court in *Plyler*, where the Court noted that there was no evidence produced in that case that “illegal entrants impose any significant burdens on the state’s economy,” emphasizing that “available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state.”³¹⁹

In addition, I advocate that the limited resources of the United States be utilized to prevent future unlawful arrivals, improve the efficiency of our current immigration system, and to deport those who do represent a serious threat to the well being of the Nation. The individuals that fit into this category are not immigrant children or their families. The damage to these children and the long-term impact on society of the trauma that we are inflicting on them, even if it is not unconstitutional, is not wise policy. It is a moral concern, an economic concern, and a national well-being concern. Further if it is a decision for the legislature alone then the legislature should seriously consider the long-term impact of these policies because these children are not going away and we cannot deport ourselves out of this issue. Whatever solution we utilize must be humane because our actions today will impact us tomorrow.

A. Current US Policies Fail the Balancing Test

The harm to these children cannot possibly be justified under the balancing test. These children are being injured psychologically, economically, physically, and educationally for a choice that they never made. They did not chose to be born, much less did they chose where they would be born, and they surely had no choice in where they would live. However, they are the most severely impacted victims and the impact is lifelong. In addition these laws are not achieving their stated policy goals of decreasing illegal immigration, and securing our borders; but they are overwhelming the Welfare and Childcare Systems. They will impact the economic prosperity and family values of our nation for generations to come, deteriorating the overall stability of our nation, as noted above.

Many organizations believe that implementing a balancing test will help to alleviate the detrimental effects that our current immigration policies are having on children. But the outcome of the balancing test cannot be determined because the United States refuses to apply one. US officials have failed to implement any reasonable form of balancing test that balances the best interest of the child, let alone the interests of the deportee with the interests of the State.

³¹⁹ *Id.*

X. POLICY RECOMMENDATIONS

Legislation and state policies that provide children with state funded, child directed legal, during any hearing that affects the child's liberty interests, such as detention or family separation proceedings, is a good example of the rights that children should be entitled to during immigration proceedings. First Star's discussion on the ABA model code of children's representation provides a useful framework. Children should be viewed as persons in hearings that affect them and US children should be provided the same rights as adults in these proceedings. These rights include the right to be heard, and the right to petition for immediate family members, such as their parents and siblings. Children should not be detained under any circumstances without the right to appointed counsel and children who arrive in the United States alone or through no fault of their own should be protected in the same manner as any other child requiring state child protective services.

It is no longer plausible to ignore children's voices and child centered perspectives that recognize children as individual persons. Adoption of a bill of rights for children has been suggested, with proponents arguing that the principle expressed in the Declaration of Independence is that we are all human beings, thus should not be treated as things. The proposed bill of rights for children, among others, included the legal right to parental love and affection, discipline and guidance, support and education, to be regarded as a person, fair treatment by authority figures, to be heard and listened to, and recognition that "best interest" is always a paramount factor.³²⁰ Additional Recommendations are as follows:

1. Restore judicial discretion in all cases in order to give parents and children a meaningful opportunity to present evidence of the adverse impact that their deportation will have on their children.
2. Consider the "best interests" of the child in all deportation proceedings.
3. Revert to the pre-1996 definition of "aggravated felony." Congress should amend the current aggravated felony definition and revise it to include only serious felony cases.
4. The Executive Office for Immigration Review should issue guidelines applicable in all cases in which discretion is available to assist immigration judges in balancing the necessity for deportations with the impact it will have on the deportee and their family.
5. Immigration judges should receive appropriate training from experts to adequately balance the needs of US citizen children against the interests of government in removing their parents from the United States.
6. Reform the nation's immigration system by adopting the current European model of applying a balancing test that considers the rights of the parent, child, and the State. There must be a multi-factored analysis to consider the needs of all parties in order to ensure that children are protected.
7. End the jailing of individuals except in situations where there is a high risk of public safety.
8. Address the root causes of displacement and migration by promoting and implementing fair trade and sustainable community development policies.

³²⁰Foster, A Bill of Rights for Children, 6 Fam LQ 343 (1972); See also Witkin, Justin, *A time for Change: Reevaluating the Constitutional Status of Minors*, 47 FLA. L. REV. 113, 113-46 (1995); Bruce C. Hafen & Jonathen O. Hafen, *Abandoning Children to Their Autonomy: The United Nation Convention on the rights of the Child*, 37 HARVARD INT'L L.J. 449 (1996).

9. Ratify and implement the UN Rights of the Child and honor our current treaty obligations.

XI. CONCLUSION

Children in the United States today live in fear, they are routinely separated from family members, are denied their birthright, are targeted by inhumane immigrations policies and are expelled without any consideration of their best interest. Unfortunately, the fear these children face is not unprecedented, because there are many US minority groups, who at one time or another have found themselves as the targets of US policy.³²¹ The use of sovereignty as a justification for the violation of human rights has been evident throughout US history, dating back to the trail of tears, forced assimilation of native children, and slavery and continuing on to policies targeting the Chinese laborers when the Railroad neared completion and the mass roundups of Japanese Americans for placement in internment camps during WWII.

This tragic history reflects how the United States reacts inhumanely when fear sets in and how the United States, a nation priding itself on family values, strong children, and protecting its citizens, has far too many of its citizens who remember when it was their day as the feared and targeted. Yet, once again, with a new mission of border and economic security, America has lost sight of the terror it is creating, within its own nation, on its own citizens, and on children who have no say in who they are or where they live. Children in the United States today live in fear and terror, and their terror is created and condoned by the United States.

But it is not too late to stop; the United States can honor the judgment of the Inter-American Court, find a humane solution to console national concerns, and prevent yet another tragedy in US history. Congress must focus on a comprehensive overhaul of the nation's immigration system and reaffirm the nation's historic commitment to family unity by addressing the provisions that are undermining it in our current laws. It is simply bad policy to sacrifice children's futures on the altar of immigration control.

³²¹ See generally Sonia Starr and Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 236 (2000).