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## How Much Do Western Democracies Value Family and Marriage? : Immigration Law's Conflicted Answers

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# HOW MUCH DO WESTERN DEMOCRACIES VALUE FAMILY AND MARRIAGE?: IMMIGRATION LAW'S CONFLICTED ANSWERS

*Nora V. Demleitner\**

The terms “family” and “marriage” are culturally based concepts, shaped through a variety of experiences, including cultural and legal. In popular discourse, “family” and “spouse” are often used as if they were self-explanatory. This is even true in human rights documents which recognize “family [as] the natural and fundamental group unit of society [which] is entitled to protection by society and the State.”<sup>1</sup> However, these documents provide no universally agreed upon definition of what constitutes a family.<sup>2</sup>

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1. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 16, ¶ 3, U.N. GAOR, 50th Sess., at 71, U.N. Doc. A/810 (1948); *see also* American Convention on Human Rights, opened for signature Nov. 22, 1969, art. 17, 1144 U.N.T.S. 123, 150 (entered into force July 18, 1978) (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.”); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 23, 999 U.N.T.S. 171, 179 (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, art. 10, § 1, 993 U.N.T.S. 4, 7 (entered into force Jan. 3, 1976) (“[The family] is the natural and fundamental unit of society. . . .”); Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, Preamble, U.N. Doc. A/44/49 (1989) (declaring the family “the fundamental group of society and the natural environment for the growth and well-being of all its members”); African Charter on Human and Peoples' Rights, adopted June 27, 1981, art. 18, 21 I.L.M. 58 (entered into force Oct. 21, 1986) (“The family shall be the natural unit and basis of society.”); European Social Charter (revised), 2 E.T.S. 163, Part I, § 16 (1996).

2. *See Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Human Rights Comm., 39th Sess., General Comment 19, Article 23, at 28, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

Law has played a crucial role in shaping, developing, and delimiting the content of these crucial concepts. Domestic law delineates clearly how to understand the term “child” for purposes of, for example, immigration law.<sup>3</sup> Such a definition may track the meaning of the term as it is commonly understood. In some cases, however, the law may have shaped the meaning of a term, such as “spouse.” Many countries have denied recognition to polygamous marriages by labeling them bigamous, and therefore illegal.<sup>4</sup> This means that under United States or French law, a second wife is not a spouse at all, while under the laws of Saudi Arabia she would be a spouse.<sup>5</sup> Here law, as shaped by custom and religion, has determined the content of the term.<sup>6</sup> The same development has occurred with regard to the term “child.” This, however, has come to be construed more broadly rather than narrowly, as children born outside of marriage are considered the children of the woman and the man who conceived them.<sup>7</sup> While in the past the child had no right to any relationship with the father and his family, she has been increasingly viewed as part of the mother’s and the father’s families, with rights to both.<sup>8</sup>

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3. See, e.g., Immigration and Nationality Act (INA) § 101(b)(1), 8 U.S.C. § 1101(b)(1) (2000).

4. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (“Polygamy has always been odious among the northern and western nations of Europe . . . . At common law, the second marriage was always void, and from the earliest history of England polygamy has been treated as an offence against society.”).

5. See, e.g., JACQUELINE BHABHA & SUE SHUTTER, *WOMEN’S MOVEMENT: WOMEN UNDER IMMIGRATION, NATIONALITY AND REFUGEE LAW* 124-26 (1994) (discussing how, while most western European countries do not recognize a second wife, polygamy is recognized in many Islamic nations).

6. Sub-groups within a society may still recognize a different, more expansive definition of the term “spouse” even if it goes against the national consensus and law. For example, some Mormons in rural Utah and adjoining states are alleged to be married through a church ceremony to more than one woman. The state legislatures and prosecutors have attempted to clamp down on such practices. See, e.g., Michael Janofsky, *Young Brides Stir New Outcry on Utah Polygamy*, N.Y. TIMES, Feb. 28, 2003, at A1.

7. The United States Supreme Court has held that the Fourteenth Amendment’s Equal Protection Clause affords children born out of wedlock the same legal protection as children whose parents were married. See *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (ruling “a state may not invidiously discriminate against illegitimate children”).

8. See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (stating that the Court has “invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents”); *Gomez v. Perez*, 409 U.S. 535 (1973); *Marckx v. Belgium*, 2 Eur. H.R. Rep. 330 (1979) (finding that Belgium’s law violated Articles 8 and 14 of the European Convention on Human Rights by distinguishing between inheritance rights of children born to unmarried mothers and those born to married mothers with regard to the mother and her family); cf. *Lalli v. Lalli*, 439 U.S. 259 (1978) (ruling that a New York statute, which permitted only those illegitimate children that had



The recent increase in migration around the world has begun to change the functioning as well as the legal definition of family dramatically.<sup>9</sup> Many families and married couples are at least temporarily separated because one or more members of the household relocate to another country.<sup>10</sup> Unless they are able to migrate together, the family member(s) left behind must often endure long waiting periods until they can rejoin their family members in the foreign country or until the migrant returns. Such separation may occur because the family does not have the funds that would allow all family members to migrate together, or because of administrative delays or immigration restrictions. In some cases, immigrants may be permanently separated if legal constraints deny their partner or relative the right to join them. This may be the case with same-sex partners or extended family members who are not eligible for family migration.

Even families who succeed in migrating as a unity, legally or without permission, or in reconstituting themselves abroad, may later be separated through state action. Family members who lack legal status or have engaged in activity that makes them deportable may be returned to their country of origin while the rest of the family may continue to remain in their domicile.<sup>11</sup>

This Article addresses how immigration laws and international prescriptions have shaped the concept of marriage and family in the

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proved paternity during the biological father's lifetime to be the lawful distributees of the estate, did not violate the Fourteenth Amendment because of the substantial state interest in preventing fraud).

9. The Geneva Conventions of 1949 and the Additional Protocols of 1977 provide the broadest definition of "family," as they deem any group that lives together and wants to live together—an objective and subjective view—a family. The Commentary to the Additional Protocols of the Geneva Conventions of 1949 narrows this interpretation, however, by stating that "the family covers persons related by blood and living together as one household." INT'L COMM. OF RED CROSS (ICRC), COMMENTARY TO THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTION OF 12 AUGUST 1949 Art. 78 (Sandoz et al. eds., 1986). Further explanations of the Convention definition focus on its subjective part and hold that unrelated persons who share in a joint household are to be considered family.

10. "[F]amilies separated by migration 'are becoming increasingly common, and will become a defining characteristic of societies in many countries in the twenty-first century.'" Kate Jastram, *Family Unity: The New Geography of Family Life* (May 1, 2003), at <http://www.migrationinformation.org/Feature/print.cfm?ID=118> (quoting U.N. Special Rapporteur on the Human Rights of Migrants, Gabriela Rodriguez Pizarro).

11. Terminology may become difficult here. The country in which the family lives may be the country of migration but it can also be the country of origin for some family members. The latter is the case if the migrant marries a national or if two migrants have children together in the country to which they migrated. While some countries categorize the latter as non-nationals, it is difficult to consider their parents' home country or countries their country of origin.

United States and other Western democracies.<sup>12</sup> Part I focuses largely on the current right of migrants, including refugees, to join other family members.<sup>13</sup> It looks at a few migrant categories as well as different family members' rights of access. Part II details the reverse: the destruction of (traditionally conceived) marriages and families through deportation. In both ways, the law contributes to the formation and constitution of family and marriage. Both parts of this Article will also discuss how migrants circumvent the law to create, or recreate, their families in the country of migration. In a more mobile world, law will fail in keeping many individuals who have a strong emotional bond from joining each other in the country the family selects as more desirable.

This Article focuses largely on the existing immigration regimes in North America and Western Europe. Even though all of these countries are industrialized democracies that have confronted increasing numbers of immigrants throughout the last two decades, the comparative approach will highlight the diversity in their legislation, often depending on existing attitudes toward both migration and families. While current family-related immigration provisions have been analyzed in light of their impact on marriage and family formation, much less work has been done on the influence deportation has had on these entities. Much of the analysis of immigration law tends to focus on how immigration rules regulate and channel immigration of individuals, rather than on the impact they have on the migration of families and couples.

## I. THE RIGHT OF MIGRANTS TO FAMILY UNION

International migrants can be grouped in a variety of different ways, with often overlapping categories. One categorization sets out the reasons why migrants leave their home countries: some are economic migrants, which may take the form of temporary or permanent migration. Others come as family migrants, which means they come to join family members already settled in a third country. A third category are refugees and asylum seekers who have to leave their home countries

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12. No single document regulates the entry of family members into a state's territory. Instead, the prevailing rules are part of multiple international documents and rights guaranteed through domestic law.

13. This Article discusses the right of family members to enter and stay permanently in the receiving country. Another important right is the right to visit family members abroad, especially for momentous occasions, such as weddings and funerals. For a discussion of the British appeals process in the denial of such family visitor visas, see VERITY GELSTHORPE ET AL., HOME OFFICE, FAMILY VISITOR APPEALS: AN EVALUATION OF THE DECISION TO APPEAL AND DISPARITIES IN SUCCESS RATES BY APPEAL TYPE (2003), at <http://www.homeoffice.gov.uk/rds/pdfs2/rdsolr2603.pdf>.



because of persecution on account of their political, religious, racial or ethnic affiliation or because they belong to a particular social group.<sup>14</sup>

Another way in which one frequently finds migrants categorized is between those who are in a country permanently and those who are there only temporarily, such as students and intra-company transfers. A third classification approach distinguishes between those who have legal status and those who do not.<sup>15</sup> Often the lines between these two groups are not as sharply drawn as one might assume but rather are ambiguous, and, depending on the country, fluid. Migrants without stay rights, however, find themselves in a legally precarious situation, endowed with the fewest legal rights<sup>16</sup> and subject to removal at any point.<sup>17</sup>

Depending on the category in which migrants find themselves, they have more or less generous family unification rights. Citizens have the most robust rights to family unification, followed by those with permanent rights to stay. States have granted certain temporary visa holders rights to family unification<sup>18</sup> but have generally not done so for the undocumented.<sup>19</sup>

The strongest right to family unification exists between spouses and between minor, unmarried, and dependent children and their parents. The rights of adult, married children to be united with their parents are much more limited as are the rights to unification with siblings or members of a more extended household, such as aunts or cousins.

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14. See Convention Relating to the Status of Refugees, July 28, 1951, art. 1A(2), 189 U.N.T.S. 137 (entered into force Apr. 22, 1954); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 6225, 606 U.N.T.S. 267, 270 (entered into force Oct. 4, 1967) (extending geographical coverage of Refugee Convention but leaving substantive definition unchanged); INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2000) (defining term “refugee,” in accord with Refugee Convention).

15. For further information on the classification of international migrants, see generally Reginald T. Appleyard, *Trends in International Migration in the 1990s and Beyond*, in *MIGRATION POLICIES IN EUROPE AND THE UNITED STATES* 33 (Giacomo Luciani ed., 1993).

16. Even undocumented migrants enjoy certain legal protections and rights. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that alien children have a right to free public education at the primary and secondary level).

17. In a few situations even undocumented migrants may be granted permission to stay. See, e.g., INA § 240A(b), 8 U.S.C. § 1229b(b) (2003) (cancellation of removal and adjustment of status for certain nonpermanent residents).

18. Often it is in a state’s interest to provide at least spouses and minor children with the right to accompany a visa holder. They provide stability and the right to bring them along makes migration more attractive.

19. See generally Amended Proposal for a Council Directive on the Right to Family Reunification, COM(2002) 225 final [hereinafter Family Reunification] (limiting family unification rights to “third-country nationals residing lawfully on the territory of the Member States”).

The unification of married couples is viewed widely as customary, though it is often subject to substantial delay.<sup>20</sup> Non-married partners have often found it more difficult, and sometimes even impossible, to move abroad with their partners. While different-sex couples have the legal option of getting married, the same does not exist in most countries for same-sex partners. It is the latter group's right to family unification that has attracted the most interest in the United States.<sup>21</sup>

### A. Couples: The Marriage Privilege

The right of married couples to live together is generally acknowledged. However, it is not always obvious in which country the two have the right to co-habit. Historically the right of women to have their husbands join them has been more limited than the husbands' right. Women are frequently assumed to relocate to their husbands' home rather than the reverse.<sup>22</sup> This presumption was part of the law in many countries, including the United States and Great Britain, where women even lost their citizenship upon marriage to a foreigner.<sup>23</sup> In Western countries such rules and formal restrictions on the migration of foreign husbands have largely been abolished, albeit recently.<sup>24</sup>

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20. See Linda Kelly, *Family Planning, American Style*, 52 ALA. L. REV. 943, 956 n.84 (2001).

21. See, e.g., Mara Schulzetenberg, *U.S. Immigration Benefits for Same Sex Couples: Green Cards for Gay Partners?*, 9 WM. & MARY J. WOMEN & L. 99, 110 (2002).

22. See, e.g., *Abdulaziz v. United Kingdom*, 94 Eur. Ct. H.R. (ser. A) 471 (1985); *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 (ser. A, no. 4), Inter-Am. Ct. H.R. (Jan. 19, 1984) [hereinafter *Proposed Amendments*]. For a discussion of yet earlier legislation in which women lost their citizenship upon marriage to a foreigner, see BHABHA & SHUTTER, *supra* note 5, at 17-28 (1994) (describing British laws from 1870 until 1948, when legislation depriving British women marrying a foreigner of their British citizenship was repealed). This held true also in the United States for women who married non-United States citizens between 1907 and 1922. See generally CANDICE LEWIS BREDBENNER, *A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP* (1998).

23. See, e.g., Act of Mar. 2, 1907, ch. 2534, § 3, 34 Stat. 1228

("[A]ny American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein."),

repealed by Act of Sept. 22, 1922, ch. 411, § 3, 42 Stat. 1022 ("Cable Act"); BHABHA & SHUTTER, *supra* note 5, at 17-28 (discussing British law). See also INA § 324, 8 U.S.C. § 1435 (1999) (restoring United States citizenship of women deprived of their nationality because of marriage to a foreign citizen).

24. See *Abdulaziz v. United Kingdom*, 94 Eur. Ct. H.R. 471 (ser. A) (1985); *Proposed Amendments*, *supra* note 22.



Other restrictions remain. Western countries generally deny recognition to polygamous marriages, which means only the first wife can benefit from spousal unification.<sup>25</sup> This presents particular problems for refugees and asylum seekers.<sup>26</sup> The United Nations High Commission for Refugees must attempt to resettle them in countries that recognize polygamous marriage.<sup>27</sup> In some cases, Western countries, such as the United States, have made exceptions, albeit not officially acknowledged, to the prohibition. This was the case, for example, when some Iraqi men were accepted as refugees after having collaborated with the United States government during and after the first Gulf War. In those situations it appears unconscionable to leave their multiple spouses and children from these marriages behind in countries where their lives would be threatened, or in refugee camps in third world countries.

Family unification outside the refugee context always excludes polygamous spouses.<sup>28</sup> While polygamy has become a hot political issue in France,<sup>29</sup> it has sparked almost no discussion in the United States.<sup>30</sup> Here the dispute about "spousal" migration has centered on same-sex marriages. Because of the lack of recognition of same-sex relationships under federal law,<sup>31</sup> United States immigration law does not allow same-sex partners to migrate as "spouses."<sup>32</sup>

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25. See, e.g., Prakash A. Shah, *Attitudes to Polygamy in English Law*, 52 INT'L & COMP. L.Q. 369, 389 (2003).

26. See, e.g., *Polygamy Dilemma for Immigration*, THE DOMINION (Wellington, New Zealand), Mar. 16, 2000, at 8 (describing difficulties Somali refugees with multiple spouses pose for the immigration system).

27. See *Protecting the Family: Challenges in Implementing Policy in the Resettlement Context*, Annual Tripartite Consultations on Resettlement 6 (June 2001), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/publ> [hereinafter *Protecting the Family*].

28. See, e.g., Family Reunification, *supra* note 19, art. 4(4) (prohibiting entry and residence of a further spouse and children of such spouse if the applicant already has a spouse living with him in an EU member state).

29. See, e.g., Marlise Simons, *African Women in France Battling Polygamy*, N.Y. TIMES, Jan. 26, 1996, at A1 (describing some of the fraudulent practices immigrant men use to bring in more than one spouse, often leaving wives other than the first in legal limbo). For a discussion of English law and practice, see generally Shah, *supra* note 25.

30. But see Stephanie Forbes, Comment, "Why Just Have One?": *An Evaluation of the Anti-Polygamy Laws Under the Establishment Clause*, 39 HOUS. L. REV. 1517, 1519, 1541-46 (2003) (arguing that current Establishment Clause jurisprudence would permit polygamy, which the author views as beneficial to women and children). The issue has been raised recently in connection with the discussion about same-sex marriages.

31. Cities that allow for the registration of same-sex unions call these "civil unions" or "domestic partnerships," not marriage. See James M. Donovan, Comment, *Same-Sex Union Announcements: Precis On A Not So Picayune Matter*, 49 LOY. L. REV. 171, 171-72 (2003). The state of Vermont does not style its legislation allowing for officially recognized same-sex unions as part of its marriage legislation. See VT. STAT. ANN. tit. 18, § 5131 (2000). Subsequent congressional legislation denied recognition under the Full Faith and Credit Clause to Vermont's same-sex union.

Countries that allow for the immigration of same-sex partners also permit the immigration of unmarried opposite-sex partners.<sup>33</sup> The recognition of opposite-sex relationships for immigration purposes generally has facilitated the recognition of same-sex relationships, as the only difference is in the gender of the sponsor or the beneficiary rather than the quality of the relationship. Moreover, in those countries the domestic recognition of same-sex partnerships, although they may not be endowed with the same rights as marriages, preceded immigration rights.<sup>34</sup> New Zealand and Canada, for example, both permit non-married opposite sex partners to sponsor each other.<sup>35</sup> The same holds true for a number of European Union ("EU") member states, including

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See H.R. Res. 3396, 104th Cong., 142 CONG. REC. 7270, 7271 (1996) (enacted); S. 1999, 104th Cong., 142 CONG. REC. 9072, 9073 (1996) (enacted). Absent a state constitutional amendment, the recent ruling by the Massachusetts Supreme Court will make that state the first to recognize same-sex marriage. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); see also *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004).

32. See, e.g., *Adams v. Howerton*, 673 F.2d 1036, 1039 (9th Cir. 1982) (stating that the Immigration and Nationality Act ("INA") does not provide a definition of "spouse"). In recent years legislation has been introduced to recognize same-sex relations for immigration purposes. See Permanent Partners Immigration Act, H.R. 690, 107th Cong. (2001); see also Michael A. Scaperlanda, *Kulturkampf in the Backwaters: Homosexuality and Immigration Law*, 11 WIDENER J. PUB. L. 475 (2002); Desiree Alonso, Note, *Immigration Sponsorship Rights for Gay and Lesbian Couples: Defining Partnerships*, 8 CARDOZO WOMEN'S L.J. 207, 208 (2002); Christopher A. Duenas, Note, *Coming to America: The Immigration Obstacle Facing Binational Same-Sex Couples*, 73 S. CAL. L. REV. 811, 836-40 (2000); Brian McGloin, Comment, *Diverse Families with Parallel Needs: A Proposal for Same-Sex Immigration Benefits*, 30 CAL. W. INT'L L.J. 159, 170 (1999). Limitations on the recognition of opposite-sex relationships that exist outside of marriage appear to be less problematic since these individuals would have the right and opportunity to marry, but choose not to exercise this option.

33. See, e.g., McGloin, *supra* note 32, at 170, 172 (England and Canada, respectively); Wayne van der Meide, *Who Guards the Borders of Canada's "Gay" Community: A Case Study of the Benefits of the Proposed Redefinition of "Spouse" Within the Immigration Act to Include Same-Sex Couples*, 19 WINDSOR Y.B. ACCESS JUST. 39, 40 (2001).

34. For a discussion of the different national approaches to the recognition of marriage, see Symposium, *Queer Law 2000: Current Issues in Lesbian, Gay, Bisexual, and Transgender Law*, 26 N.Y.U. REV. L. & SOC. CHANGE 137, 191-98 (2001) [hereinafter Symposium] (statement by Dr. Yuval Merin); William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 MCGEORGE L. REV. 641 (2000) (comparing Vermont, Netherlands, and Denmark).

35. Canadian law currently allows the sponsorship of same-sex couples only through humanitarian and compassionate provisions of the Immigration Act. See Immigration Act, R.S.C. 1985, c. I-227, § 114 (Can.). This, however, is a discretionary process which might be open to abuse. See LAW COMM'N OF CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS, ch. 3, pt. III (Dec. 21, 2001). The new Immigration and Refugee Protection Act, however, has changed this situation and explicitly recognizes same-sex partners as a sponsorable category of family members. See also Alonso, *supra* note 32, at 221-23.



the Netherlands and the United Kingdom.<sup>36</sup> In all of these countries same-sex relationships are legally recognized.<sup>37</sup> The EU's proposed directive on family unification continues to grant member states the right to determine whether to treat unmarried couples as if they were married.<sup>38</sup> Citizens and permanent residents who want to gain admission for their partners must be able to show that they have lived or plan to live in a joint household with the foreign partner and that a committed relationship exists.<sup>39</sup> The problems with proof are similar to those encountered in marriage-based relationships.<sup>40</sup> In both situations the immigration services will require evidence of the relationship.<sup>41</sup>

The limited recognition of same-sex partnerships for immigration purposes causes difficulties for migrants, including refugees.<sup>42</sup> For example, the United Nations High Commissioner for Refugees ("UNHCR") recognizes same-sex unions for purposes of refugee

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36. See, e.g., *The State (Netherlands) v. Reed*, [1986] E.C.R. 1283, [1987] 2 C.M.L.R. 448, 450, 467 (explaining the then existing Dutch law which granted the right of residence to foreigners in stable relationships with Dutch nationals and persons with permanent right of residence and holding that Netherlands must also extend such rights to EU nationals to prevent discrimination on grounds of nationality). For a discussion of the legal development in England, see Symposium, *supra* note 34, at 190 (statement by Lavi S. Soloway). The ability to immigrate an unmarried partner is likely closely tied to the large number of unmarried couples living together, often with their children, in these countries. The percentages are substantially higher than in the United States which appears to be more marriage focused. See Kim Kantorowicz, Comment, *Cohabitation in Minnesota: From Love to Contract—Public Policy Gone Awry*, 26 WM. MITCHELL L. REV. 213, 214 n.2 (2000); Dominick Vetri, *Almost Everything You Always Wanted to Know About Lesbians and Gay Men, Their Families, and the Law*, 26 S.U. L. REV. 1, 26 (1998).

37. For Canada's movement toward the full recognition of same-sex relationships as marriages, see Clifford Krauss, *Gay Canadians' Quest for Marriage Seems Near Victory*, N.Y. TIMES, June 15, 2003, at A3. See also generally Marianne DelPo Kulow, *Same Sex Marriage: A Scandinavian Perspective*, 24 LOY. L.A. INT'L & COMP. L. REV. 419 (2002) (discussing legal developments in Denmark, Iceland and the Netherlands, with the last recognizing same-sex marriage).

38. See Family Reunification, *supra* note 19, art. 4(3). For a critique of the draft directive on this issue, see Lina Papadopoulou, *In(di)visible Citizens(hip): Same-sex Partners in European Union Immigration Law*, 21 Y.B. EUR. L. 229, 235-39 (2003).

39. See Papadopoulou, *supra* note 38, at 234 n.35; see also Alonso, *supra* note 32, at 221-24 (discussing current laws in the United Kingdom and Finland).

40. In 1986 the United States passed legislation to prevent marriage fraud. It requires documentation of the marriage and the existence of a joint household. Moreover, the marriage must exist for two years before the sponsored foreigner may acquire permanent residence. During the initial two year period the right to stay is contingent upon the existence of the relationship. INA § 216, 8 U.S.C. § 1186a (conditional permanent resident status). See, e.g., Lolita Buckner Inniss, *Dutch Uncle Sam: Immigration Reform and Notions of Family*, 36 BRANDEIS J. FAM. L. 177, 197 (1998).

41. See Family Reunification, *supra* note 19, art. 5(2).

42. Refugees are frequently granted preferential treatment, as they had to leave their home countries involuntarily. See, e.g., THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 790 (5th ed. 2003).



resettlement.<sup>43</sup> However, because of the restrictions on such migration by many potential resettlement countries, UNHCR is limited to Canada, Australia and New Zealand, and a number of European countries for the resettlement of same-sex refugees.

Moreover, because of the prevalent limitation of spousal migration to married couples, many same-sex and unmarried opposite-sex couples cannot settle in either country of nationality unless they do so without government permission or under a non-family-related immigration rubric.<sup>44</sup> Same-sex and unmarried opposite-sex partners often enter the United States temporarily on tourist visas,<sup>45</sup> or may be able to secure temporary work permits.<sup>46</sup> If no legal route is open to them, some may choose to live in one country without documentation of the legality of their stay. This means, however, that the undocumented partner lives constantly under the threat of deportation.

While the lack of recognition of same-sex relationships for immigration benefits may be symbolic of the disadvantages homosexuals suffer, immigration procedure often harms married couples as well. In many countries, including the United States, administrative delays separate married couples at least for a number of months, and sometimes even years, even if one of the partners is a citizen of the country to which the other would like to migrate.<sup>47</sup>

For those couples where one partner has only permanent stay rights, migration of a foreign citizen spouse may be even more difficult. In the United States, for example, the country quotas for foreign nationals have caused a substantial waiting time for the spouses and minor children of so-called "green card" holders.<sup>48</sup> Such waiting periods may help explain the large number of undocumented family members in the United States.

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43. See *Protecting the Family*, *supra* note 27, at 6.

44. See, e.g., Alonso, *supra* note 32, at 215-17.

45. See *id.* at 216.

46. See *id.* at 215-16.

47. See, e.g., Lenni B. Benson, *The Invisible Worker*, 27 N.C. J. INT'L L. & COM. REG. 483, 487 (2002). Since the terror attacks of September 11, 2001, immigration has become yet more cumbersome, especially for migrants from Muslim and Arab countries.

48. See INA §§ 201(c), 202(a)(2), 203(a), 8 U.S.C. §§ 1151(c), 1152(a)(2), 1153(a) (2000) (setting out numerical limitations on family migration). For the currently applicable waiting periods, see VISA SERVS., U.S. DEP'T OF STATE, IMMIGRANT NUMBERS FOR MARCH 2004, at [http://travel.state.gov/visa\\_bulletin.html](http://travel.state.gov/visa_bulletin.html) (last visited Feb. 13, 2004). Currently, the wait for foreign national spouses of permanent residents is four and a half years. See *id.* For Mexicans the wait is nine years. See *id.* Congress has provided some relief by creating a special visa category for the spouses and minor children of permanent residents. If they waited three years or longer for admission into the United States and their petitions were filed on or before December 21, 2000, they are eligible for a "V" visa. See INA § 101(a)(15)(v), 8 U.S.C. § 1101(a)(15)(V); see also Benson, *supra* note 47, at 487.

Often spouses and children migrate before their legal status is secured.<sup>49</sup> The spouses and children of undocumented workers who do not have any legal claim to family migration have also contributed substantially to the increase in the undocumented population.<sup>50</sup>

Administrative delays and quotas account for some of the temporary separation of couples and families but are not the sole reason. Many countries of immigration have set up financial requirements before spouses can follow. The sponsoring family member has to show that s/he is able to provide for the incoming migrant.<sup>51</sup> Without such documentation, entry will be denied. Other restrictions exist or are under consideration.

Family members who have infectious diseases or violent or drug-related convictions may not be able to immigrate.<sup>52</sup> Other ways to restrict family migration are through regulations upon arrival. For example, in some countries, joining family members are not granted the right to work.<sup>53</sup> While most of these restrictions are currently based on the family status and characteristics of the immigrant, such as health or criminal backgrounds, increasingly the sponsor's suitability has been questioned. In the United States this has been done primarily through financial requirements for sponsorship which were made legally enforceable through the 1996 immigration legislation.<sup>54</sup> Canada is considering legislation that would ban a potential sponsor from filing

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49. See, e.g., Benson, *supra* note 47, at 486-87.

50. See, e.g., *id.* at 485-86.

51. For the United States sponsorship requirements, see INA § 212(a)(4), 8 U.S.C. § 1182(a)(4) (exclusion as public charge); INA § 213A, 8 U.S.C. § 1183a (setting out requirements for sponsor's affidavit of support).

52. See INA § 212(a)(1)-(2), 8 U.S.C. § 1182(a)(1)-(2). For further disqualifying grounds, see generally INA § 212, 8 U.S.C. § 1182. Some of these provisions, including some of the health- and crime-related provisions allow for waivers under INA § 212(h), 8 U.S.C. § 1182(h), especially when the immigrant is an immediate relative—spouse, parent, son or daughter—of a United States citizen who would suffer extreme hardship from a denial of admission.

53. See Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, art. 2, 1968 O.J. (L 257) 13 (equalizing position of workers from EU member states and their families with that of nationals, including the right of family members to reside and work in another member state).

54. See INA § 212(a)(4)(C), 8 U.S.C. § 1182(a)(4)(C) (sponsorship requirement not applicable to spouses and children of United States citizens); INA § 213A(a)(1)(A), 8 U.S.C. § 1183a(a)(1)(A) ("sponsor agrees to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line during the period in which the affidavit is enforceable").



immigration papers for any family member for five years after he has been convicted of a crime.<sup>55</sup>

The proposed EU directive on family unification would allow member states to set the minimum age for family unification for married couples up to age twenty-one.<sup>56</sup> This would be permitted even if domestic laws set the marriage age at eighteen or below. The EU has stated two grounds on which it justifies this provision. It should increase integration and prevent forced marriages.<sup>57</sup> The latter rationale appears to be designed to protect foreign women against cultural practices perceived as prevalent in their home countries.<sup>58</sup>

Such restrictions indicate that states consider immigration benefits, even for spouses, not a right but rather a benefit that can be granted and restricted at their discretion.<sup>59</sup> This implies that even if there were a universal right to be reunited with one's family, the state has the power to restrict it administratively, possibly even to the point where it becomes meaningless. Also, the existing restrictions indicate that the character of the sponsoring individual and her economic situation become of paramount importance. Sponsorship may prove especially burdensome for women since in all immigration countries women continue to be paid less than men and tend to be disproportionately represented in part-time and lower paying jobs.<sup>60</sup>

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55. See Immigration and Refugee Protection Act, R.S.C., ch. 27, § 36 (2001) (Can.); see also Tom Godfrey, *Feds on Ban Wagon; Criminals Can No Longer Sponsor New Immigrants*, TORONTO SUN, Nov. 4, 2002, at 5.

56. See Family Reunification, *supra* note 19, art. 4(4).

57. See *id.* at Commentary on the articles, Article 4.

58. Interestingly enough, the member states do not view this provision as a potential safeguard against the potentially abusive situation in which so-called mail-order brides may find themselves. For a discussion of mail-order brides, see Nora V. Demleitner, *In Good Times and Bad: The Obligation to Protect "Mail-Order Brides,"* in 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 613 (Kelly D. Askin & Dorean M. Koenig eds., 2000); Eddy Meng, Note, *Mail-Order Brides: Gilded Prostitution and the Legal Response*, 28 U. MICH. J.L. REFORM 197 (1994).

59. However, such an expansive view of state's rights may be incorrect. International law and treaties provide some protection for family migration, see Gallya Lahav, *National, Regional, and International Constraints to Family Reunification: A European Response*, at <http://migration.uni-konstanz.de/german/veranstaltungen/workshop/lahav.html> (last visited Jan. 1, 2004), for a discussion on international instruments of migration policy, though it is unclear how far such protection goes.

60. In the United States citizens are exempt from the sponsorship requirements for spouses and children. However, the obligations do apply to all Permanent Resident Aliens ("PRA") and citizens sponsoring adult married children and parents. See INA § 212(a)(4)(C), 8 U.S.C. § 1182(a)(4)(C) (2000).

On pay inequity, see, for example, B. Tobias Isbell, Note, *Gender Inequality and Wage Differentials Between the Sexes: Is It Inevitable or Is There an Answer?*, 50 WASH. U. J. URB. & CONTEMP. L. 369 (1996); Equal Rights Advocates, *Pay Inequity*, at <http://www.equalrights.org/facts/paystats.htm> (last visited Jan. 2, 2004). For a discussion of gender discrimination in



Current terrorism concerns may also lead to restrictions on family and spousal unification. Not only have waiting times been prolonged, but family members and spouses may be denied entry because of suspected terrorist connections.<sup>61</sup> While this provision is more likely to affect the entry of non-citizen husbands, some European countries apparently consider restricting the rights of male residents in sponsoring foreign wives.<sup>62</sup> These countries appear to deem the migration of spouses from immigrants' home countries to be contributing to the lack of integration which may increase the attraction of radical groups and causes.<sup>63</sup>

England has proposed one such restriction on spousal migration.<sup>64</sup> Its goal seems to be to promote (immigrant) marriages in the country of migration.<sup>65</sup> While many men and women return to their or their parents' countries of origin to find a spouse, the number of men doing so appears to be larger.<sup>66</sup> By preventing the migration of foreign women as spouses, the British government proceeds on the assumption that women can help men with their integration into the host society. A non-native woman would therefore impair the man's ability to settle and assimilate.

As the English proposal indicates, the unification of couples and families is often assumed to have a salutary effect on the migrant. Families assist in integration and help stabilize the migrant. Therefore, they contribute to the reduction of crime, tend to increase the economic productivity of the migrant and assure that less of the money earned by

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immigration law, see, for example, BHABHA & SHUTTER, *supra* note 5; BREDBENNER, *supra* note 22.

61. See INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B) (exclusion on security and related grounds); see also Markus Rau, *Country Report: Germany 49*, in *TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY?* (Walter et al., eds. forthcoming 2003), available at <http://edoc.mpil.de/conference-on-terrorism/country/germany.pdf>.

62. See, e.g., *Mix and Match*, *ECONOMIST*, June 14, 2003, at 7 (discussing restrictions on the entry of foreign spouses in Denmark).

63. The term "immigrant" is used loosely here and includes also the children of immigrants. It is often the second generation—often citizens of their parents' country of immigration—who return to their parents' country of origin to find a wife or husband.

64. See Anthony Browne, *Age Bar to Curb Forced Marriages*, *THE TIMES* (London), May 14, 2003, at 2.

65. Concerns about high numbers of immigration do not appear to have motivated this legislation. In the United States, however, proposals to restrict immigration, including in some cases spousal migration, have traditionally been tied to concerns about migration control. See generally Federation for American Immigration Reform, *Why America Needs an Immigration Time-Out*, at <http://www.fairus.org/news/NewsPrint.cfm?ID=1168&c=12> (last visited Feb. 20, 2004). In the wake of the terrorist attacks of September 11, 2001, they have increasingly been explained in terms of domestic security. See, e.g., *id.*

66. See Browne, *supra* note 64, at 2.

the migrant is remitted to his or her home country.<sup>67</sup> For these reasons, permitting family migration is not a mere exercise of state generosity but rather a crucial aspect of integrating and stabilizing migrant populations.<sup>68</sup> Such a positive perspective on family migration could lead to a further dismantling of barriers to family unification, including on unmarried same-sex or opposite-sex couples.

However, concerns about negative foreign influences, especially through the relationship many consider the most intimate, may lead to restrictions on spousal migration. Combined with the attitudes of immigration restrictionists, such views may override what appeared to have become an incipient international norm to increased spousal unification, at least for citizens, permanent residents, and refugees, and at least with regard to legally married opposite-sex spouses.

Spouses are not the only close relatives with access to migration rights. Minor children are considered equally, if not more, preferred for immigration purposes.

### B. *The Parent-Child Relationship*

Despite the emphasis on the parent-child relationship, the term “child” does not enjoy a uniform interpretation. Some countries consider “children” for immigration benefits to be all those under eighteen; others extend immigration benefits to children under twenty-one, as long as they remain unmarried and dependent on their parents.<sup>69</sup> However,

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67. Male migrants are frequently considered likely consumers of paid sex, and have been tied to the exploitation of the victims of human trafficking. For those reasons men who migrate alone also often suffer from and transmit sexually transmitted diseases, including the AIDS virus. See, e.g., INT’L ORG. FOR MIGRATION, *MOBILE POPULATIONS AND HIV/AIDS IN THE SOUTHERN AFRICAN REGION* (2003).

68. In many cases, spousal migration may be less beneficial. Domestic violence is a recurrent problem in many marriages, including those where one or both partners are migrants. National laws make increasing allowance for such situations. See, e.g., Leslye E. Orloff & Janice v. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM U.J. GENDER SOC. POL’Y & L. 95 (2001) (recounting legislative developments in the United States); Migration und Bevölkerung, *Deutschland: Aufenthaltsrecht nachgezogener Ehepartner geändert* (Apr. 2000), at [http://www2.hu-berlin.de/population/miginfo/migration\\_und\\_bevoelkerung/artikel/000303.htm](http://www2.hu-berlin.de/population/miginfo/migration_und_bevoelkerung/artikel/000303.htm).

69. For a definition of the term “child” under United States immigration law, see INA § 101(b)(1), (c)(1), 8 U.S.C. § 1101(b)(1), (c)(1). Canadian law allows the immigration of unmarried sons or daughters under the age of nineteen. Immigration and Refugee Protection Regulations, 136 CAN. GAZETTE II, June 14, 2002, at 1, 20 (2002) (Can.) (definition of “dependent child”), available at <http://canadagazette.gc.ca/partII/tempPdf/g2-136x9.pdf>. For a discussion of the dependency requirement, see David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 991-92 (2002).



various concerns about family immigration have caused some European countries to re-consider such expansive coverage. Some proposals would have restricted family migration to children younger than eight or ten years old.<sup>70</sup> The justification for such blueprints appears to be that older children have difficulty assimilating because of language deficits and differences in educational systems. A potential consequence of such restrictive immigration policies is that young siblings are separated as families are only allowed to immigrate some but not all of their children. Little allowance is made for the emotional impact the family and family unity have on the child and vice versa; the emphasis tends to be on the relationship between the child and society—not unlike claims about the spousal role in a husband’s integration and assimilation. The proposed EU directive on family unification, which, if adopted, must be implemented within two years after passage, allows EU member states to restrict immigration benefits generally to minor children who have not yet reached the age of maturity otherwise applicable under national law.<sup>71</sup> However, if national legislation, at the time the directive is implemented, already restricts migration to those fifteen and younger, the member state may retain this lower age cut-off. Germany insisted on a provision that allows member states to ascertain whether a minor child who is older than twelve fulfills relevant integration criteria prior to granting entry.<sup>72</sup> This means, for example, that children who do not speak the language of the country of immigration may be denied the right to reside there. The EU directive continues to permit divergent rules for family unification but mandates that countries permit children to be unified with their parents at least as long as they are younger than twelve.<sup>73</sup> Member states can be substantially more generous than the EU floor, however.

In a number of cases the European Court of Human Rights (“ECHR”) has addressed the affirmative right to family unification under Article 8 of the European Convention on Human Rights, which

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70. See, e.g., Migration und Bevölkerung, *Deutschland: Positionspapier der CSU zur Ausländerpolitik* (Feb. 1998), available at [http://www2.hu-berlin.de/population/miginfo/migration\\_und\\_bevoelkerung/artikel/980202.htm](http://www2.hu-berlin.de/population/miginfo/migration_und_bevoelkerung/artikel/980202.htm) (describing the position paper of one of Germany’s largest parties which advocated limiting family unification to children younger than age ten).

71. See Family Reunification, *supra* note 19, art. 4(1)(b), (c).

72. See *id.* art. 4(1)(c); EU: *Einigung über Familienzusammenführung*, MIGRATION UND BEVÖLKERUNG, Mar. 2003, at 3, at [http://www.migration-info.de/migration\\_und\\_bevoelkerung/archiv/ausgaben/ausgabe0303.pdf](http://www.migration-info.de/migration_und_bevoelkerung/archiv/ausgaben/ausgabe0303.pdf).

73. See EU: *Einigung über Familienzusammenführung*, *supra* note 72.



guarantees “respect for [one’s] private and family life.”<sup>74</sup> In its decisions, the ECHR balances the right to family life against a state’s interest in regulating and controlling immigration.<sup>75</sup> Even in cases involving unification with young children, the latter interest dominated if the parents did not have permanent stay rights in the country of immigration. In *Gül v. Switzerland*, for example, the court denied a Turkish couple who had a humanitarian permit to live in Switzerland the right to be reunited with their then four-year-old son whom they had left behind in Turkey.<sup>76</sup> Because Switzerland had not granted the couple a settlement permit and the family’s situation was not caused by Swiss authorities, the ECHR found the state had no positive obligation to allow for family unification.<sup>77</sup> Despite a strong dissent, the court continued with this line of reasoning in *Ahmut v. Netherlands*.<sup>78</sup> The court there held that the applicant’s ten-year-old child had sufficient connections to Morocco to remain there, and that nothing prevented his father from joining him there.<sup>79</sup> In his dissenting opinion, Judge Martens criticized the majority for its decision, and indicated that it may show “an increasing preparedness to condone harsh decisions, in the field of immigration.”<sup>80</sup> There seems to be a growing tendency in the court’s jurisprudence to value a state’s right to “protect” its existing population and the existing population’s increasing dissatisfaction with immigration, over an individual’s right to be united with her family, including minor children.

Nevertheless, minor children are still being treated relatively generously, at least at an early age. Adult children, however, are often excluded from immigration benefits,<sup>81</sup> or at least are subjected to long waiting periods before being admitted.<sup>82</sup>

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74. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8(1), 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter European Convention].

The European Commission on Human Rights and the Court have been criticized for not including same-sex relationships in their definition of “family.” See, e.g., Symposium, *supra* note 34, at 183 (discussion by Prof. Kristen Walker).

75. See European Convention, *supra* note 74, art. 8.

76. See 22 Eur. H.R. Rep. 93 (1996).

77. See *id.* at 114-15.

78. 24 Eur. H.R. Rep. 62 (1996).

79. See *id.* at 79.

80. *Id.* at 81 (Martens, J., dissenting).

81. The new EU directive, for example, provides that member states may provide only adult, unmarried children of non-EU citizens with permanent stay rights the opportunity to immigrate if they “are objectively unable to provide for their own needs on account of their state of health.” See Family Reunification, *supra* note 19, art. 4(2)(b).

82. See VISA SERVS., *supra* note 48.

Minor children can only rarely immigrate their parents.<sup>83</sup> The new United States visas for the victims of human trafficking are an exception as they allow trafficking victims under the age of twenty-one to immigrate their parents, either because they were the victims of severe human trafficking and assisted the government in the investigation of the offense and the prosecution of the offenders or because they were under the age of eighteen when trafficked.<sup>84</sup> A similar provision allows immigration of the parents of minor children who fell prey to certain violent crime.<sup>85</sup> The newly authorized T-visa adds unmarried siblings under the age of twenty-one to the list of family members who may immigrate, therefore enabling more parents of trafficking victims to take advantage of this immigration opportunity.<sup>86</sup> However, many parents with adult unmarried children or married minors might decline this opportunity because it would force them to leave these children behind.<sup>87</sup>

Some countries permit adult children to immigrate their parents. United States law, for example, grants United States citizens the opportunity to immigrate their parents—under many of the same conditions as spouses and minor children, including the requirement that they show funds sufficient to support their parents.<sup>88</sup> The proposed EU family migration directive allows, but does not mandate, member states, to permit the immigration of the parents or parents-in-law of non-EU foreigners with permanent stay rights if they have sufficient funds to finance their parents' stay and if the parents have no "proper family support" in their home country.<sup>89</sup> The latter may be a difficult requirement to meet, especially if it is defined broadly to include financial and emotional support and if extended family members count.

As ungenerous as some of the provisions for closest family members may appear, even fewer rights are granted to other relatives.

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83. The rationale for this rule, at least in countries that ascribe citizenship on the basis of *ius soli*, is that individuals may enter without documentation or overstay a permitted stay with the goal of having children who, upon birth, are automatically citizens and can sponsor their parents for immigration.

84. See INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T) (2001) ("T" visas).

85. See INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) ("U" visas).

86. See 8 U.S.C. § 1101(a)(15)(T); see also *President Signs Trafficking Victims Protection Reauthorization Measure*, 81 INTERPRETER RELEASES 42, 43 (2004).

87. Maria Jose Fletcher, Florida Immigrant Advocacy Center, Presentation, Course on International and Comparative Women's Human Rights, LL.M. Program in Intercultural Human Rights, St. Thomas University School of Law, Miami, Fla. (Jan. 23, 2004).

88. See INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (definition of "immediate relative"); INA § 213A, 8 U.S.C. § 1183a (requirements for sponsor's affidavit of support).

89. See Family Reunification, *supra* note 19, art. 4(2)(a), 7.



### C. *The Nuclear Family: A Western Construct?*

In recent decades Western democracies have conceived of “family” as a nuclear family, consisting of mother, father and one or more (biological or adopted) minor children.<sup>90</sup> This construct is viewed as the dominant model; if not numerically, then aspirationally. Nevertheless, even in Western countries, many households do not fit this mold. Single-person and two-person households have come to play an ever more important role,<sup>91</sup> as have other models—grandparent-grandchild households, for example<sup>92</sup>—in which others, relatives and non-relatives, live in the household, either in addition to or instead of the expected nuclear family members.<sup>93</sup>

Despite its diminished reality, immigration law is based on the assumptions of the dominant model. For example, it views adult, married children as no longer part of the family but instead as having their own, separate family.<sup>94</sup> This is especially the case when their parents are no longer alive. Therefore, only a few countries of immigration grant immigration benefits to siblings.<sup>95</sup> Grandparents,

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90. Under United States immigration law, children born outside of marriage and their father can bestow immigration benefits upon each other only under limited circumstances. *See, e.g.*, *Nguyen v. INS*, 533 U.S. 53 (2001); *Miller v. Albright*, 523 U.S. 420 (1998). Mothers, however, are considered primarily affiliated with their children and therefore are automatically eligible to sponsor and to receive benefits through their children. *See Nguyen*, 533 U.S. at 60. In these cases, immigration law shows the inherent assumptions that continue to be made about family relationships.

For purposes of refugee resettlements, UNHCR defines the nuclear family “as the husband and wife, their minor or dependent children, unmarried children and minor siblings.” *Protecting the Family*, *supra* note 27, at 6 (emphasis in original).

91. In the United States, about one quarter of all children, for example, live with only one parent. *See* TERRY A. LUGAILA, U.S. DEP’T OF COMMERCE, NO. P20-514, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1998 (UPDATE) (Current Population Reports, 1998), available at <http://www.census.gov/prod/99pubs/p20-514.pdf>. For a discussion of the fiction of the nuclear family, see, for example, Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984); Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387 (1993).

92. *See, e.g.*, Karen Schwartz, *Raising Children Can Be Tough the 2nd Time Around*, CHI. TRIB., Oct. 23, 2002, at N1; Meg Milne, *Older Generation Benefit from Childminding: Grandparent Power*, SUNDAY EXPRESS (United Kingdom), Nov. 24, 2002, at 28.

93. *See, e.g.*, JASON FIELDS, U.S. DEP’T OF COMMERCE, NO. P20-547, CHILDREN’S LIVING ARRANGEMENTS AND CHARACTERISTICS: MARCH 2002 (Current Population Reports, June 2003), available at <http://www.census.gov/prod/2003pubs/p20-547.pdf>.

94. *See, e.g.*, INA § 203(a)(3), 8 U.S.C. § 1153(a)(3) (2000) (only married sons and married daughters of U.S. citizens have right to family unification, but are subject to strict numerical limits).

95. *See, e.g.*, INA § 203(a)(4), 8 U.S.C. § 1153(a)(4). While the United States allows for sibling migration, because of the limited number allocated to this immigration category, currently



aunts and uncles, cousins, nieces and nephews, are generally without any immigration rights, independent of their emotional and financial relationship to the potential sponsor.<sup>96</sup> Largely for ease of classification and to limit immigration benefits, the state has restricted immigration rights to certain categories of individuals, usually without regard to their actual relationship, other than financial dependency in certain cases, with the immigrant.

However, in recent years low birth rates have driven some countries to reverse long-standing policies. Spain, for example, recently permitted foreigners with any Spanish relatives to apply for residence permits.<sup>97</sup> Current Canadian law allows the immigration of even far removed relatives if the immigrant otherwise does not have any close family members in Canada.<sup>98</sup> Increased generosity in family migration has traditionally been limited, however, to relations based on blood, through marriage or adoption.

Recent Canadian proposals abandon this scheme, and their adoption would bring about a stunning reversal in the traditional immigration regime with its focus on blood or marriage-based relationships.<sup>99</sup> No longer would relatives be the only potential beneficiaries; immigrants would be allowed to sponsor (one) close friend.<sup>100</sup> The sole requirement would be that the sponsored individual be "known and [be] emotionally important to" the sponsor.<sup>101</sup> A more restricted proposal demands that the persons had "a close personal relationship characterized by emotional or economic interdependence for at least one year."<sup>102</sup> Such a definition would limit sponsorship to interdependent relationships and preserve greater immigration control. The latter has become a dominant concern. However, because of the financial requirements of sponsorship,

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the backlog is about twelve years. See VISA SERVS., *supra* note 48. Because of country quotas, the waiting periods for Filipinos is about twenty-two years. See *id.*

96. Canada allows the immigration of grandparents as well as of siblings, nieces and nephews, and grandchildren, as long they are unmarried orphans under the age of nineteen. Immigration Regulations, SOR/78-172, § 2(1) (1978).

97. See Isambard Wilkinson, *Door Opens for Million Immigrants to Spain*, DAILY TELEGRAPH (United Kingdom), Jan. 20, 2003, at 13 (stating that a work visa is no longer required for such immigration).

98. Immigration Regulations, *supra* note 96, § 2(1).

99. See LAW COMM'N OF CAN., *supra* note 35, ch. 3, pt. I.

100. See *id.* ch. 3, pt. III, Recommendation 9; see also CANADA, DEP'T OF CITIZENSHIP & IMMIGRATION, IMMIGRATION LEGISLATIVE REVIEW ADVISORY GROUP, NOT JUST NUMBERS: A CANADIAN FRAMEWORK FOR FUTURE IMMIGRATION 47 (1997) [hereinafter IMMIGRATION LEGISLATIVE ADVISORY GROUP].

101. IMMIGRATION LEGISLATIVE ADVISORY GROUP, *supra* note 100, at 48.

102. See LAW COMM'N OF CAN., *supra* note 35, ch. 3, part III.

it is unlikely that immigrants would attempt to sponsor random strangers, especially if there were also an additional numerical limit on such sponsorships. This proposal, if enacted, would remove the assumption that it is only relatives with whom we are so close that they deserve sponsorship, and presumably recognize that for many individuals it is non-relatives who would provide the greatest benefit in settling abroad.<sup>103</sup>

Extending the concept of familial relationships might reinvigorate concepts of family in countries of immigration that would have otherwise become extinct. This could, however, lead to divergent developments of family models in sending and receiving countries as in the developing world the nuclear family increasingly displaces the extended family.<sup>104</sup> On the other hand, an expansion of the notion of blood- or marriage-based sponsorship might enable individuals to free themselves of the pressures of family members to immigrate them, and therefore create more similar familial models in both sets of countries.

The UNHCR has long advocated that refugee families be reunited based on principles of dependency rather than the predetermined concept of the (nuclear) family.<sup>105</sup> Because refugees often depend on extended family members, either for cultural reasons or because of the refugee experience, UNHCR has asked that “economic and emotional relationships between refugee family members be given equal weight and importance in the criteria for reunification as relationships based on blood lineage or legally sanctioned unions.”<sup>106</sup> This approach allows for a culturally sensitive approach as well as needed flexibility in the family unification of refugees, a particularly victimized and protected group.<sup>107</sup> Many immigration countries have used the concept of dependency, however, to limit immigration only to close relatives who are financially dependent on the sponsor.<sup>108</sup> Therefore, they moved away from the UNHCR approach by focusing again on blood or legal relationships and

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103. Such non-relatives may be the women who raised the children who sponsor them, neighbors abroad, business partners or best friends. In countries that do not allow for same- or opposite-sex partners to sponsor each other, a best friend provision may provide individuals with a less disputed opportunity to sponsor their partner.

104. See Jastram, *supra* note 10.

105. See *Protecting the Family*, *supra* note 27, at 1-2.

106. *Id.* at 2.

107. See *id.* at 5-6.

108. Some countries, such as Italy and Luxembourg, for example, will allow the migration of elderly parents of a refugee only if the financial dependency of the parents on the refugee is established. See EUR. COUNCIL ON REFUGEES & EXILES, SURVEY OF PROVISIONS FOR REFUGEE FAMILY REUNION IN THE EUROPEAN UNION 58, 64 (1999), available at [http://www.ecre.org/policy/research\\_papers.shtml](http://www.ecre.org/policy/research_papers.shtml).



by restricting dependency solely to finances. Presumably some of these restrictions arise from immigration control concerns and fears that refugees would abuse a less restrictive regime.

#### D. *The Future of Family-based Migration*

Despite some expansions in the area of family unification, at a time when Western countries are increasingly concerned about immigration,<sup>109</sup> a countervailing trend has been towards restricting family unification. While there seems to be a growing recognition that at least spouses and young, minor children have (some) right to reside with their families, the question remains which country should provide individuals with the space to reunite their family.

Periodically, anti-immigration forces attempt to limit family migration to the United States by eliminating the right of United States citizens to sponsor their parents and siblings.<sup>110</sup> In Western Europe, substantial restrictions on the right of non-EU citizens to reunite their families have occurred because countries have limited the migration of minor children and parents.<sup>111</sup> Other, less direct restrictions are also possible through increases in the required financial resources of the sponsor or through stricter bureaucratic hurdles, such as language requirements for the beneficiary.<sup>112</sup> The trend in some countries seems to

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109. Such concern emanates from a variety of sources, including overpopulation and environmental degradation; economic worries, especially in times of high unemployment; the destruction of culture through the admission of immigrants who cannot or do not want to assimilate; the retention of the primary language through the influx of one large group of immigrants with a different primary language; the destruction of the welfare system because immigrants disproportionately rely on it; and fears that foreign terrorists may be able to enter and remain in the country as migrants. See, e.g., Libby Brooks, *Asylum: A Special Investigation: 5 Tough Questions About Asylum*, GUARDIAN (London), May 1, 2003, at 2 (discussing asylum seekers in Great Britain); Peter Finn, *A Turn From Tolerance*, WASH. POST, Mar. 29, 2002, at A1 (discussing immigration integration difficulties in Denmark).

110. While this is a right of United States citizens, it is one that largely benefits naturalized citizens, i.e., ex-immigrants. In fact, immigration offices tout the right to immigrate one's family members, including parents, as a primary benefit of naturalization. See BUREAU OF CITIZENSHIP AND IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., IMMIGRATION THROUGH A FAMILY MEMBER, at <http://uscis.gov/graphics/services/residency/family.htm> (last modified Oct. 30, 2003) (indicating that United States citizens can sponsor parents, spouses, children of any age or marital status, and siblings, whereas residents of the United States can only petition for their spouses and unmarried children).

111. See, e.g., Family Reunification, *supra* note 19; EUobserver.com, *New Rules for Third-Country Family Reunification*, at <http://www.euobserver.com/index.phtml?print=true&sid=9&aid=9520> (visited last June 19, 2003).

112. United States law distinguishes so-called "after-acquired" families from preexisting families. The latter, formed before the principal immigrant's admission to the United States, can come in immediately with the immigrant or follow him shortly while the latter, formed once the

be toward more restrictions, largely because of general fears about increased migration, though countervailing developments do occur, as the Canadian model shows. The reason for these are three-fold.

First, international human rights law increasingly recognizes the right to family unification and to special protections for married couples and families.<sup>113</sup> Based on these rights, it has become impossible for countries to systematically deny permanently settled migrants the right to family unification, at least with regard to their spouses and children. Even in areas of the law, such as refugee protections, where applicable treaties do not explicitly mandate the right to family unification, it has become generally recognized.<sup>114</sup> Since by definition refugees and asylum seekers cannot return to their countries of origin, the receiving country must provide for family unification.<sup>115</sup> Some countries have interpreted this right to evaporate, however, when the threat of persecution dissipates. Japan has declared that starting April 1, 2004, it will no longer allow Vietnamese refugees to bring family members into the country since it determined that there is no on-going danger of persecution in Vietnam.<sup>116</sup> Legal obstacles are not the only hurdle for refugees in reuniting their family. Often the length of recognition proceedings delays family unification.<sup>117</sup>

Second, countries find it to their advantage to admit close family members of migrants. Often they are able to facilitate the integration process and to enable the migrant to establish him- or herself more quickly. Family members are also crucial for the healing of refugees or asylum seekers who are accepted because they were persecuted in their home countries.<sup>118</sup> The presence of family members also reduces

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principal immigrant is admitted to the United States, often have a long waiting period, at least unless the immigrant naturalizes.

113. See, e.g., Universal Declaration of Human Rights, *supra* note 1, art. 16; International Covenant on Civil and Political Rights, *supra* note 1, art. 23; International Covenant on Economic, Social and Cultural Rights, *supra* note 1, art. 10(1); African Charter on Human and Peoples' Rights, *supra* note 1, art. 18.

114. See *Protecting the Family*, *supra* note 27, at 3.

115. See Jastram, *supra* note 10.

116. See *Japan To End Policy On Allowing Refugee Families From Vietnam, Cambodia, Laos*, KYODO NEWS SERV., Mar. 14, 2003.

117. See Jastram, *supra* note 10. Refugee admission into the United States has become particularly slow since the attacks of September 11, 2001. Despite a refugee admission quota of 70,000, in 2002 the United States admitted 27,110 refugees. For 2003 the number was only slightly higher: 28,422. See Hannah Betesh, *Increased Security Scrutiny Keeps Refugee Families Apart*, NETWORK NEWS (Nat'l Network for Immigrant & Refugee Rights, Oakland, Cal.), Fall-Winter 2003, at 12; see also Rachel L. Swarns, *U.S. Security Backlog Strands Many Refugees in Camps Abroad*, N.Y. TIMES, June 4, 2003, at A10.

118. See *Protecting the Family*, *supra* note 27, at 2, 12.



remittances abroad—a useful benefit for the receiving countries since the immigrants will spend the money on consumption or investment in their new home country.<sup>119</sup> When countries of immigration compete for particularly desirable immigrants, the generosity of their family migration benefits might play a role in the immigrants' settlement decision.<sup>120</sup>

Third, once migrants manage to secure their situation, they will attempt to unite their families, legally or illegally. Generous and speedy family unification can help prevent, or at least decrease, large-scale undocumented migration.<sup>121</sup> As the data on convicted and deported offenders who attempt to return to the United States indicate, however, even substantial prison sentences will not deter those with close families from attempting to come back to the United States.<sup>122</sup>

For all of these reasons, some family migration is always in the interest of the countries of immigration. However, some countries attempt to limit such immigration to those they consider beneficial family members, such as the educated and those with language ability, or attempt to keep out those who appear unable to provide for themselves by setting up sponsorship requirements.<sup>123</sup>

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119. See, e.g., Kerala Monitor, *Encourage Expats to Bring Their Families—GCC Study* (June 2, 2003), at <http://www.keralamonitor.com/expatsgulf.html>. For an account of how remittances have changed life in the sending countries and of how family life and the role of women is impacted by migration, see, for example, Amy Waldman, *Gulf Bounty Is Drying Up in Southern India*, N.Y. TIMES, Feb. 24, 2003, at A3.

120. See, e.g., Migration und Bevölkerung, *Deutschland: 10.000 weitere "Green Cards"* (Jan. 2002), available at [http://www2.hu-berlin.de/population/miginfo/migration\\_und\\_bevoelkerung/artikel//020105.htm](http://www2.hu-berlin.de/population/miginfo/migration_und_bevoelkerung/artikel//020105.htm) (discussing benefits attached to so-called "Green Card," a temporary work visa for foreign computer specialists).

121. The nature and quantity of the immigration problem will also depend on other factors, such as the country's geographic location, ease of undocumented entry, and enforcement efforts within the country.

122. See 8 U.S.C. § 1326 (2000) (detailing maximum penalties for reentry after removal for a criminal conviction); see also Linda Drazga Maxfield & Keri Burchfield, *Immigration Offenses Involving Unlawful Entry: Is Federal Practice Comparable Across Districts?*, 14 FED. SENTENCING REP. 260, 262 (2001); Linda Drazga Maxfield, *Fiscal Year 2000 Update on Unlawful Entry Offenses*, 14 FED. SENTENCING REP. 267, 267 (2001). While not all of those returning do so for family reasons, many do, especially if their families are unable or unwilling to relocate to their former home country and if the deported individual was the family's primary breadwinner. See, e.g., Edward Hegstrom, *Details of Deadly Journey Emerge: Illegal Immigrant Died Trying to Return to Family*, HOUSTON CHRON., May 23, 2003, at A33.

123. For a discussion of the class and race discrimination inherent in the current United States immigration regime, see, for example, Kevin R. Johnson, *Race and the Immigration Laws: The Need for Critical Inquiry*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 187 (Francisco Valdes et al. eds., 2002); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Janice D.

In receiving certain family members but not others, the immigration law of the countries of destination shapes the composition of the family, usually in accordance with the prevailing conception of family life in the receiving country. Because the nuclear family is the dominant model in Western countries, it should not be surprising that spouses and minor children have preferential immigration rights. Hurdles with regard to their admission can be ascribed to immigration control concerns, and especially attempts to keep undesirable immigrants out or encourage their immigrant family members to return home.

Immigration law constructs families not only through laws that permit entry and stay. It also does so through laws that prevent or prohibit families from continuing their residence in a foreign country. Moreover, the role family considerations play in deportations sheds some light on the relative importance the receiving country puts on family and marriage, as opposed to other values.

## II. DEPORTATION: THE POWER TO DESTROY MARRIAGES AND FAMILIES

While exile—the right to remove citizens from the state’s territory—has largely been prohibited in Western countries,<sup>124</sup> all countries retain the right to remove non-citizens from their territory through deportations. Most removals take place because non-citizens do not have the requisite documents, such as visas or permanent residency papers, to stay and/or work in a foreign country.<sup>125</sup> Such removals may occur even if the individual has close family members who are nationals

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Villiers, *Closed Borders, Closed Ports: The Plight of Haitians Seeking Political Asylum in the United States*, 60 BROOK. L. REV. 841 (1994).

124. See, e.g., Universal Declaration of Human Rights, *supra* note 1, art. 9; Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 16, 1963, art. 3, Eur. T.S. No. 46 (entered into force May 2, 1968) (article 3 provides that “[n]o one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national”); American Convention on Human Rights, *supra* note 1, art. 22(5), at 151 (entered into force July 18, 1978) (article 22(5) provides that “no one can be expelled from the territory of the state of which he is a national”). Despite some disputes over the extent of the human rights prohibition on banishment, there seems no doubt that individuals convicted of crime cannot be exiled from their home country as punishment. For a discussion of banishment within a nation state, see Jason S. Alloy, Note, “158-County Banishment” in Georgia: Constitutional Implications Under the State Constitution and the Federal Right to Travel, 36 GA. L. REV. 1083, 1086 (2002) and Alafair S. Burke, *Unpacking New Policing*, 78 WASH. L. REV. 985 (2003).

125. See OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., 2002 YEARBOOK OF IMMIGRATION STATISTICS 213 (2003), available at <http://uscis.gov/graphics/shared/aboutus/statistics/Yearbook2002.pdf>.



or permanent residents of the country of immigration.<sup>126</sup> This may be the case when the undocumented immigrant has failed to wait outside the receiving country during the requisite waiting period.

In other situations individuals may be legally and permanently settled in a foreign country but become deportable because they engage in an undesirable activity, such as criminal conduct.<sup>127</sup> In the United States, the 1996 immigration legislation<sup>128</sup> dramatically increased the number of offenses that make an individual removable and restricted the waiver provision that had previously allowed many convicted offenders to remain in the United States because of the length of their previous stay and close family relations.<sup>129</sup> In addition, the Immigration and Naturalization Service (“INS”) construed the provision to apply retroactively,<sup>130</sup> and began deportation proceedings against long-term permanent residents whose offenses were many years, and in some cases decades, in the past.<sup>131</sup> It was not until 2001 that the Supreme Court held the retroactive application of this provision unconstitutional.<sup>132</sup> However, the broad scope of deportable offenses and the lack of extenuating circumstances for so-called “aggravated felonies” make deportation for a criminal offense increasingly likely.<sup>133</sup>

Most importantly, in the vast majority of cases in which the permanent resident has a criminal conviction, her deportation will occur

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126. See, e.g., Emma O. Guzman, Comment, *The Dynamics of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996: The Splitting-Up of American Families*, 2 SCHOLAR 95 (2000) (discussing how deportation leads to the destruction of mixed families).

127. See INA § 237(a), 8 U.S.C. § 1227(a) (2000) (listing activities and behaviors under United States law that trigger deportability). Since September 2001, a number of countries have also made it easier to deport individuals based on suspicion of terrorism. See Rau, *supra* note 61, at 49-51 (discussing new German law regulating expulsion of suspected terrorists).

128. See Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in sections of 8 U.S.C.).

129. See Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1950-54 (2000).

130. The INS is now part of the Department of Homeland Security. Since the demise of INS in March 2003, deportations have rested with the Bureau of Customs and Border Protection, an arm of the new Department. For a description of the immigration agencies, see <http://uscis.gov>.

131. See, e.g., *id.* at 136-37; Anthony Lewis, *Abroad at Home; Punishing the Past*, N.Y. TIMES, Mar. 30, 1998, at A17; Anthony Lewis, *Abroad at Home; When It Is Unjust*, N.Y. TIMES, Dec. 26, 1997, at A39.

132. See *INS v. St. Cyr*, 533 U.S. 289, 315-26 (2001).

133. In the 1996 legislation, Congress also set up a more rigid administrative regime to identify non-citizen offenders upon their incarceration and to hold deportation hearings while they are still imprisoned so that they can be speedily removed directly from prison. See IIRAIRA § 303 (codified as 8 U.S.C. § 1226); INA § 238, 8 U.S.C. § 1228 (describing expedited removal procedure). Moreover, the Supreme Court has upheld no-bail detention prior to removal. See *Demore v. Kim*, 123 S. Ct. 1708, 1712 (2003).

independent of her family circumstances.<sup>134</sup> She may be married to a citizen, have citizen children or other close citizen relatives. The only situation in which deportation of a Permanent Resident Alien (“PRA”) offender may be stopped is when her conviction has not been for an aggravated felony.<sup>135</sup>

For non-PRAs cancellation of removal is yet more unlikely as it requires a showing that the citizen or PRA spouse, parent or child would suffer “exceptional and extremely unusual hardship” from her deportation.<sup>136</sup> However, a prerequisite is that the alien be a person of good moral character<sup>137</sup>—a requirement impossible to fulfill after a criminal conviction. Moreover, the hardship requirement is very difficult to meet, as its language and subsequent decisions indicate.<sup>138</sup>

Because of the gendered nature of crime and criminal enforcement, the number of removable men is substantially higher than that of women.<sup>139</sup> Because of the high threshold set by the hardship provision, men whose only close citizen relative is a spouse are usually unable to fulfill the requirement, as spouses are generally expected to move with their partner who is being removed. Therefore, the deportation provision implicitly reinforces the assumption that wives move with their husbands.

United States courts have held the mere existence of minor citizen children irrelevant to the deportation decision.<sup>140</sup> Only in situations where the lives of the children would be endangered in the parent’s home country, might the parent’s deportation be halted.<sup>141</sup>

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134. See Morawetz, *supra* note 129.

135. See INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3).

136. INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D).

137. See INA § 240A(b)(1)(B), 8 U.S.C. § 1229b(b)(1)(B).

138. See INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D). See, e.g., *Iturribarria v. INS*, 321 F.3d 889, 902 (9th Cir. 2003) (refusing to hold that the upheaval and adjustment difficulties children experience when accompanying a deported parent are sufficient to constitute exceptional and extremely unusual hardship); *In re Monreal*, 23 I. & N. Dec. 56 (B.I.A. 2001) (finding no exceptional and extremely unusual hardship where deportee’s children would be forced to follow father and deportee’s parents would be left behind).

139. See, e.g., TRACY L. SNELL, U.S. DEP’T OF JUSTICE, SURVEY OF STATE PRISON INMATES, 1991: WOMEN IN PRISON 2 (1994), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/wopris.pdf>.

140. See, e.g., *Iturribarria*, 321 F.3d at 902 (holding that petitioner failed to show extreme hardship to his United States citizen children); *In re Monreal*, 23 I. & N. Dec. 56 (BIA 2001); see also *United States v. Hernandez*, 325 F.3d 811, 816 (7th Cir. 2003) (denying downward departure to avoid deportation in light of minor children).

141. See *Nwaokolo v. INS*, 314 F.3d 303, 308-10 (7th Cir. 2002) (granting a stay of petitioner’s removal upon a showing that petitioner’s daughter might be subject to female genital mutilation in petitioner’s native Nigeria). But see *Bueno v. INS*, 578 F. Supp. 22, 25 (N.D. Ill. 1983) (finding no extreme hardship to child with serious gastric illness despite the fact that she would



Upon deportation, an alien who attempts to reenter the United States after being convicted of a felony can be imprisoned for up to ten years unless the Attorney General has consented to re-admission.<sup>142</sup> Aggravated felons could be imprisoned for up to twenty years for re-entry, again subject to a waiver by the Attorney General.<sup>143</sup> Therefore, should a deported offender return to the United States, he is threatened with substantial punishment.

Under United States law, the groups most privileged on the immigration entry side—spouses and minor children—are not generally determinative when removal is at issue.<sup>144</sup> It is assumed that the family could be reunited in another country, if necessary.<sup>145</sup> On a more cynical note, one might conclude that the state would like to see a family desert a criminal offender, and assists the family by removing the individual virtually permanently to another country.<sup>146</sup>

The state's interest in public protection appears to trump all other considerations, including unity of a United States citizen or permanent resident family.<sup>147</sup> This development parallels that in other areas of the law where convicted citizen offenders are subject to a host of collateral

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have to accompany her deported mother back to Mexico where treatment for the illness was unavailable in the region in which they would be living).

142. For penalty provisions following unlawful entry after deportation, see INA § 276(b), 8 U.S.C. § 1326(b) (2000).

143. See *id.*; U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2002).

144. See *Liu v. INS*, 13 F.3d 1175, 1177 (8th Cir. 1994); *Al-Khayyal v. INS*, 818 F.2d 827, 830 (11th Cir. 1987); see also *Morawetz*, *supra* note 129, at 1950-54.

145. See *Patel v. INS*, 638 F.2d 1199, 1206 (9th Cir. 1980); *In re Monreal*, 23 I. & N. Dec. 56 (B.I.A. 2001).

146. Domestic violence offenses, for example, carry a mandatory deportation sanction, under the assumption that it benefits the spouse (and children) if the offender is removed. See INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i). However, research has indicated that spouses are less likely to report family violence if deportation is a possible consequence. See, e.g., Nina W. Tarr, *Promoting Justice Through Interdisciplinary Teaching, Practice, and Scholarship Civil Orders for Protection: Freedom or Entrapment?*, 11 WASH. U. J.L. & POL'Y 157 (2003); Tammy Fonce-Olivas, *Abuse Cases Decline*, EL PASO TIMES, Aug. 18, 2003, at 1A. While battered spouses demand protection, for financial and other reasons, they do not usually consider permanent removal in their interest. See, e.g., Deanna Kwong, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections under VAWA I & II*, 17 BERKELEY WOMEN'S L.J. 137, 143 (2002); Bernice Yeung, *The Land of Blood & Money*, SF WEEKLY (California), May 3, 2000, available at <http://www.sfweekly.com/issues/2000-05-03/feature.html/1/index.html>.

147. Many families are mixed families for purposes of immigration law, i.e., different family members have different immigration and citizenship status. For example, children born on United States territory automatically become citizens while one of their parents may be a United States citizen and one a permanent resident; alternatively, one child may be a United States citizen while another is undocumented as the permanent resident mother is still waiting to immigrate her minor, non-citizen child. See generally Michael E. Fix & Wendy Zimmerman, *All Under One Roof: Mixed-Status Families in an Era of Reform* (Oct. 6, 1999), at <http://www.urban.org/urlprint.cfm?ID=6599>.

sanctions, many of which are designed to keep individuals from reuniting with their families.<sup>148</sup> In some cases it even becomes impossible for them to live with their family, usually under the guise of public safety.<sup>149</sup> The implicit assumption made is that the family will sever its ties with the offender because of the offender's criminal conviction—and the state lends a helping hand.

In reality, however, the deportation of a parent often leaves the spouse and children with two equally difficult choices: They can either remain in the country of residence—often their country of citizenship or origin—from which their spouse or parent is being deported; or they can follow him to his country of origin. The decision will depend on the specific family situation: was the deported family member the primary breadwinner?; how long ago did she migrate to the United States?; how old are the children, and what language(s) do they speak?; of what opportunities will the children be deprived if they are being removed from the United States?; what would be the situation of the couple in the deported spouse's home country? Of particular concern to elderly couples is likely to be a provision of the Social Security Act that mandates that not only the person deported but also his non-citizen spouse, should she follow him, will lose any Social Security benefits derived through the deportee. Effectively, this forces many elderly couples to decide between their spouse and their means of survival.<sup>150</sup> Since deportations of settled families were relatively rare prior to the 1996 immigration legislation,<sup>151</sup> little in-depth research exists as to how families have made such arrangements. Some news reporting focused on these cases upon the initial enforcement of the 1996 legislation. The topic garnered more attention in the wake of the recent deportations of

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148. See, e.g., Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 24 (Marc Maurer & Meda Chesney-Lind eds., 2002); Nora V. Demleitner, "Collateral Damage": No Re-Entry for Drug Offenders, 47 *VILL. L. REV.* 1027, 1044 (2002); SUSAN M. KUZMA, *UPDATE OF FEDERAL SECTION OF CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY* 9 (2000).

149. See, e.g., 42 U.S.C. § 1437f(d)(1)(B)(iii) (banning drug offenders from federally subsidized or funded housing); see also Demleitner, *supra* note 148, at 1036, 1043-44.

150. See Stephen H. Legomsky, *Suspending the Social Security Benefits of Deported Aliens: The Insult and the Injury*, 13 *SUFFOLK U. L. REV.* 1235, 1236-37 (1979).

151. This holds true for deportations based on criminal convictions as well as deportations based on lack of immigration status. See IMMIGRATION AND NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 2001 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 247, 249 (2003).



migrants from Arab and/or Muslim countries, most of whom are being deported because of immigration violations.<sup>152</sup>

The legislative and judicial disregard of most family situations may appear astounding at first glance, especially in light of other rhetoric focused on the protection of children and families. However, this approach in the cases of convicted non-citizens tracks to a large extent the sentencing of citizens in the federal system.<sup>153</sup> The United States Sentencing Guidelines, for example, mandate that family circumstances are “not ordinarily relevant.”<sup>154</sup> While this language is restrictive, federal judges are able to consider family circumstances at least in unusual situations, akin to the “exceptional and extremely unusual hardship” language.<sup>155</sup> A recent congressional amendment to the Guidelines goes yet a step further, however, by denying federal judges the opportunity to consider family circumstances in the sentencing of all sex offenders.<sup>156</sup> The impact of a sentence on family members is not deemed relevant because Congress views the offender’s actions as so heinous that any sentence should be determined based on his actions alone, without regard to the impact on third parties.<sup>157</sup> The underlying assumption is

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152. See, e.g., Caryle Murphy & Nurith C. Aizenman, *Foreign Students Navigate Labyrinth of New Laws; Slip-Ups Overlooked Before 9/11 Now Grounds for Deportation*, WASH. POST, June 9, 2003, at B1; Rachel L. Swarns, *Thousands of Arabs and Muslims Could be Deported, Officials Say*, N.Y. TIMES, June 7, 2003, at A1; see also *War on Terrorism: Immigration Enforcement Since September 11, 2001: Hearing Before the Subcomm. on Immigration, Border Sec. and Claims of the House Comm. on the Judiciary*, 108th Cong. 30 (May 8, 2003) (prepared statement of Laura W. Murphy and Timothy H. Edgar, ACLU), available at <http://www.house.gov/judiciary/murphy050803.htm>.

153. The federal system is the appropriate comparator as Congress has the legislative authority over both immigration law and the federal criminal system, including sentencing. See, e.g., Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

154. U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (2002). A recent judicial survey indicated that federal district and appellate judges would prefer more flexibility in sentencing, which could allow them to consider family circumstances. See LINDA DRAZGA MAXFIELD, U.S. SENTENCING COMM’N, FINAL REPORT: SURVEY OF ARTICLE III JUDGES ON THE FEDERAL SENTENCING GUIDELINES B-5, D-5 (2003), available at <http://www.ussc.gov/judsurv/jsfull.pdf>.

155. See, e.g., *United States v. Pena-Tejeda*, 1999 U.S. Dist. LEXIS 20061, at \*3-5 (S.D.N.Y. June 21, 1999). Recent congressional legislation, however, has aimed at limiting such judicial departures. See *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003*, Pub. L. No. 108-21, 117 Stat. 650 (2003) (encompassing Feeney Amendment). In its initial draft the Amendment would have outlawed family-based departures in all types of cases. For the history of the Feeney Amendment, see Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENTENCING. REP. 310, 310-13 (2003).

156. See PROTECT Act § 401(b)(4).

157. But see Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383 (2002) (arguing for greater consideration of third-party interests in sentencing).

that any penalty serves the offender right since he had it in his power not to commit the criminal act.<sup>158</sup>

The deportation of criminal offenders despite their close family ties in the United States pits two sets of values against each other: public protection and the integrity and protection of the family.<sup>159</sup> The latter disappears from public discourse when non-citizen offenders are at issue. They are generally discussed as if they had no ties in the community—in fact, it is the community that appears to demand their removal to guarantee public safety. In light of the benefits Americans believe citizenship and residency in the United States hold, many view the removal of non-citizens for criminal offenses a cleansing of society of those considered undesirables.

The categorical approach adopted by the United States in the wake of the 1996 immigration legislation is unique if compared to the laws in other Western democracies. Canadian courts, for example, have held family considerations highly relevant in deportation cases.<sup>160</sup> Citizen children create strong humanitarian and compassionate considerations counseling against deportation,<sup>161</sup> as do other close family ties. This means it is the family connection rather than the crime that provides an important starting point for the analysis. The same holds true in many European countries. National courts and the ECHR have rejected attempts to deport non-nationals based on criminal convictions if the

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158. For a discussion of the impact of imprisonment on the children of offenders, see John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, in 26 CRIME AND JUSTICE: PRISONS 121 (Michael Tonry & Joan Petersilia eds., 1999) and Brown, *supra* note 157, at 1395-96.

159. United States courts have generally rejected the argument that removal of a parent would amount to the “*de facto* deportation” of citizen children.

[C]ourts have reasoned (a) that a citizen child cannot make a real choice about where to live and thus is dependent on the decision of his or her parents; (b) that the child’s removal from the country is not inevitable because the parents might choose to leave the child with foster parents in the United States; and (c) that in any event the citizen child will be free to return to the United States upon attaining majority.

STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 628 (3d ed. 2002); *see also* Newton v. INS, 736 F.2d 336, 342-43 (6th Cir. 1984); Acosta v. Gaffney, 558 F.2d 1153, 1157-58 (3d Cir. 1977).

160. *See, e.g.*, Wu v. Canada, [2001] F.C. 1274 (Can.) (stating that immigration officers must balance Canada’s interest with family interests and the circumstances of all the family members); *see also* Tavita v. Minister of Immigration [1994] 2 N.Z.L.R. 257 (C.A.).

161. *See, e.g.*, Baker v. Canada, [1999] S.C.R. 817 (directing immigration officers to consider the best interests of the appellant’s four Canadian-born children when making a determination on whether to deport appellant); *see also* Legault v. Canada, [2002] 4 F.C. 358 (C.A.). *But see* Parsons v. Canada, [2003] F.C. 913 (Fed. Ct.). For an in-depth analysis of *Baker* and its aftermath, *see* generally Sharryn Aiken & Sheena Scott, Baker v. Canada (Minister of Citizenship and Immigration) and the Rights of Children, 15 J.L. & SOC. POL’Y 211 (2000).



center of their life, including their families, is in the country of immigration.<sup>162</sup> The ECHR addressed the deportation of non-citizens with close family members in the deporting state in a number of cases where it has explicitly balanced the right to family life against the state's interest in protection.<sup>163</sup>

One of the most highly publicized cases in Germany involving the deportation of a minor occurred in 1998 when Germany removed a fourteen-year-old Turkish boy who had grown up in Germany to Turkey.<sup>164</sup> The boy had been born in Germany and did not speak much Turkish. Prior to his fourteenth birthday—the age of criminal liability is fourteen—he had committed a substantial number of property and violent offenses.<sup>165</sup> After he turned fourteen, the city of Munich and the Bavarian government moved to have Mehmet, as the boy became known, and his parents deported.<sup>166</sup> The action against the parents was dropped quickly, but Mehmet was convicted of an assault committed after he turned fourteen, and subsequently removed to Turkey.<sup>167</sup> Court actions continued, and ultimately the highest Bavarian administrative court ruled against the German government, ordering it to revoke the deportation order and to grant Mehmet permanent stay rights.<sup>168</sup> The highest German administrative court affirmed the decision holding that minors could only be removed after a series of criminal acts or upon a particularly serious offense—all of which must be committed after the offender turns fourteen.<sup>169</sup> The court did not find it necessary to analyze

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162. See, e.g., *Moustaquim v. Belgium*, App. No. 12313/86, 13 Eur. H.R. Rep. 802, 815 (1991) (finding violation of right to respect for family life when deportation order was given without considering that all of the deportee's close relatives live in Belgium, one of the deportee's older children had acquired citizenship, and that the three youngest children had been born in Belgium).

163. See, e.g., *Beldjoudi v. France*, App. No. 12083/86, 14 Eur. H.R. Rep. 801, 822 (1992) (stating that the role of the European Commission of Human Rights is to balance the aim of protection and the right to respect for family life). *But see supra* text accompanying note 74.

164. See, e.g., Hans-Peter Kastenhuber, *Aufenthaltsrecht umfasst drei Stufen*, NÜRNBERGER NACHRICHTEN, Oct. 21, 1998 (because of German immigration law at the time, Mehmet did not have a permanent right to stay in Germany though both of his parents had such a right). Under current German law, Mehmet would be born a German citizen. Staatsangehörigkeitsrecht, v. 22.7.1913 (RGBl. I S. 583, BGBl. III S. 102-1) (last amended by Staatsangehörigkeitsrechtsreform, v. 23.7.1999 (BGBl. I S. 1618)), available at <http://www.auswaertiges-amt.de/www/en/willkommen/staatsangehoerigkeitsrecht>.

165. See Uwe Diederichsen, *Kommentar: Das Mehmet-Menetekel*, 47 N.J.W. 3471 (1998).

166. See *id.*

167. See *id.*

168. See Silvester Stahl, *Deutschland: Bundesverwaltungsgericht bestätigt "Mehmet"-Urteil*, MIGRATION UND BEVÖLKERUNG, Sept. 2002, at 2, available at [www.migration-info.de/migration\\_und\\_bevoelkerung/archiv/ausgaben/ausgabe0207.pdf](http://www.migration-info.de/migration_und_bevoelkerung/archiv/ausgaben/ausgabe0207.pdf).

169. See *id.*

the constitutionally guaranteed protection of family life.<sup>170</sup> Even after this decision, however, Germany retains the right to deport minors as long as they fulfill the requisite criminality threshold.<sup>171</sup>

Other countries have gone farther in protecting permanent residents against expulsion even after commission of a criminal offense. Unless the offenses committed were against the state or terrorism-related, the new French immigration law makes it virtually impossible to remove “those who entered France before age 13; the spouses of French citizens or legal residents; the parents of children who are French citizens; those who have resided legally in France for at least 20 years.”<sup>172</sup>

In addition to national courts,<sup>173</sup> the ECHR has heard numerous deportation cases involving challenges under Article 8 of the European Convention on Human Rights which guarantees “the right to respect for [one’s] private and family life.”<sup>174</sup> In its jurisprudence, the court has generally focused on whether, based on the facts in each case, the state has “struck a fair balance”<sup>175</sup> between the right to family life on the one hand and the state’s legitimate interest in the prevention of disorder or crime and the guarantee of public safety on the other.<sup>176</sup> To ascertain the value of the family life at issue, it has looked toward the length and quality of the family relationships as well as the number and location of relatives.<sup>177</sup> For example, even the conviction of a serious violent crime did not counsel in favor of deportation in the case of a deaf-mute whose

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170. *See id.*

171. *See id.* It is assumed that annually a few hundred young non-citizens who were born in Germany are being deported for criminal offenses. Deportations of juveniles for criminal offenses are extremely rare in the United States, presumably because prison sentences are longer, with offenders turning eighteen by the time they are deported. Crimes adjudicated as juvenile offenses will not render the offender deportable. *See* Robert E. Shepherd, Jr., *Collateral Consequences of Juvenile Proceedings: Part II*, 15 CRIM. JUST. 41, 41 (Fall 2000).

172. *See* Carl R. Baldwin, *France’s Immigration Reform Limits The “Double Penalty” of Deportation After Time Served*, at <http://www.ilw.com> (last visited last Jan. 4, 2004).

173. *See, e.g.,* *Samaroo v. Sec’y of State for the Home Dep’t*, No. C/2001/0030 & 00525, 2001 WL 753400, ¶¶ 27-29 (C.A. July 17, 2001) (engaging in proportionality analysis, the English Court of Appeal weighs seriousness of the criminal offense against right to family unity).

174. European Convention, *supra* note 74, art. 8; *see also* MARK W. JANIS ET AL., *EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS* 226-27 (2d ed. 2000) (describing the role the European Court of Human Rights has had in interpreting the right to privacy under Article 8).

175. *See, e.g.,* *Dalia v. France*, 62 Eur. Ct. H.R. 76, 91 (1998).

176. *See* European Convention, *supra* note 74, art. 8(2) (stating interference with family life permitted if it “is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”).

177. *See* JANIS ET AL., *supra* note 174, at 258-59.



family members were French citizens and lacked close ties to Algeria, his country of nationality.<sup>178</sup>

The court has opted against an extensive definition of the right to family life if the family could be easily reconstituted in another country because the individual should not be allowed to choose his preferred country of residence.<sup>179</sup> In making such determinations, the court tends to consider the practical feasibility of family reunions and the burden deportation would have on the family relationship,<sup>180</sup> as well as the ties the potential deportee has to his or her country of citizenship.<sup>181</sup> Relevant are the potential deportee's language skills, length of stay, age at arrival in the country of residency, and the number of close relatives in the country of origin.<sup>182</sup> Such factors can trump even in situations where the potential deportee has committed serious offenses, including violent and drug crimes.<sup>183</sup> Under the court's jurisprudence, no per se deportable offenses exist, and any deportation must be tested against the right to family life.<sup>184</sup>

Critics of the court's jurisprudence abound as it appears unprincipled and made on an ad hoc basis.<sup>185</sup> A number of judges have criticized the apparent unpredictability of the court's judgments which makes it difficult for national authorities to foresee the legality of their actions.<sup>186</sup> Despite these problems and the fear that the court has moved toward a more restrictive stance, the ECHR protects families and marriages to a much greater extent than United States courts do. It considers the impact of deportation on the potential deportee's family life and does so in a pragmatic way.<sup>187</sup> This is a far cry from the current

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178. See *Nasri v. France*, App. No. 19465/92, 21 Eur. H.R. Rep. 458, 474-77 (1995).

179. See, e.g., *Abdulaziz v. United Kingdom*, 94 Eur. Ct. H.R. (ser. A) 471, ¶ 68 (1985).

180. See, e.g., *Berrehab v. Netherlands*, App. No. 10730/84, 11 Eur. H.R. Rep. 322, 329-31 (1988) (noting that the deportation of a father to his home country would make it difficult for him to see his young child and thereby constitute a violation under Article 8).

181. See, e.g., *Beldjoudi v. France*, App. No. 12083/86, 14 Eur. H.R. Rep. 801, 823 (1992) (noting that the deportee did not speak the language of his country of origin and had no familial or other ties to his country, and therefore could be deported only under exceptional circumstances); *Moustaquim v. Belgium*, App. No. 12313/86, 13 Eur. H.R. Rep. 802, 815 (1991) (stating that at the time the deportation order was served, the deportee had returned to visit his native Morocco twice in twenty years).

182. See JANIS ET AL., *supra* note 174, at 259-60.

183. See, e.g., *Moustaquim*, 13 E.H.R.R. 802; *Beldjoudi v. France*, 14 E.H.R.R. 801.

184. See JANIS ET AL., *supra* note 174, at 260.

185. See *id.* at 260-61.

186. See, e.g., *Boughanemi v. France*, App. No. 22070/93, 22 Eur. H.R. Rep. 228, 249-50 (1996) (Martens, J., dissenting).

187. See, e.g., H el ene Lambert, *The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion*, 11 INT'L J. REFUGEE L. 429,

United States law, which allows deportation waivers only under limited circumstances, and then only in cases where the lives of United States citizens are extraordinarily impacted by the removal. Based on the immigration statute, United States courts have developed a much more individualistic jurisprudence which discounts the third party impact of deportation. Except in unusual circumstances, they fail to consider the practical impact of deportation on other family members, especially minor children.<sup>188</sup> Often parents face the stark choice of leaving their children with relatives or friends in the United States or removing them from the only country they have known and moving them to an unknown society where they often have substantially less opportunity than in the United States. Unless there would be exceptional hardship to United States citizen children, courts do not factor the impact of the deportation (or of the potential move) on children into their decisions. However, it is likely that the deportation of a parent has a substantial detrimental impact on any child, akin to the incarceration of a parent.

Moreover, the law does not allow for consideration of the effect of the deportation on the individual to be deported.<sup>189</sup> All in all, United States law weighs the protection of the public substantially more heavily than the ECHR. In this respect, United States immigration law continues the incapacitative approach of recidivist statutes and drug and violent crime legislation which have led to long-term sentences based on public protection grounds.<sup>190</sup>

The approach of United States law may not be surprising despite frequent assertions regarding the importance and value of family and children. In contrast to many European constitutions and the European Convention on Human Rights, the United States Constitution lacks a provision that explicitly recognizes the right to a family life. Under United States law, there are spuriously few opportunities for the government to affirmatively recognize families or special relationships

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429 (1999) (“[W]here the person in need of protection has not committed a serious offence, the balance of interest would most likely weigh in his or her favour.”).

188. See Thronson, *supra* note 69, at 996.

189. Prior to the 1996 changes in immigration law, courts could consider the hardship deportation would impose on the potential deportee.

190. See, e.g., *Ewing v. California*, 538 U.S. 11 (2003) (upholding California’s three-strikes law for a minor theft against an Eighth Amendment challenge); see also Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (granting federal funding for state prisons tied to truth-in-sentencing provisions which mandated that violent and sex offenders serve at least eighty-five percent of their sentences); Kevin R. Reitz, *Federal Influence in State Cases: Sentencing, Prosecution, and Procedure: The Federal Role in Sentencing Law and Policy*, 543 ANNALS 116, 117-18 (1996).



between family members.<sup>191</sup> If it is done, then it frequently is done so in a hierarchical manner, in which the state positions itself as the protector of one family member against another. The starkest example is the prosecution of drug-addicted women for delivering drugs to their children during birth.<sup>192</sup> While the Supreme Court ultimately held the collection of the evidence unconstitutional because it amounted to a warrantless, non-consensual search, it did not challenge the underlying assumptions of stark individuality or find that the state has some responsibility for providing positive conditions for childbirth.<sup>193</sup> Instead the state here used the criminal justice system to sever a relationship commonly recognized as the most important in early life. This differs from the European approach where the special relationship between women and the fetus/child during and immediately after pregnancy has been recognized.<sup>194</sup> The member states of the EU, for example, offer a panoply of protective legislation to safeguard the mother-child relationship.<sup>195</sup> The difference between positive and negative protection for the family could not be more pronounced.

So far, the United States has failed to sign the United Nations Convention on the Rights of the Child. This Convention may provide an added constraint on states to remove immigration violators, as well as non-citizen criminal offenders, if the person to be removed has a child permanently settled in the country of immigration.<sup>196</sup> According to

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191. Usually state protection of families extends to negative rights, such as the right not to be discriminated against because of one's family status, for example, illegitimacy. See JANIS ET AL., *supra* note 174, at 234. If recognition of a special relationship does occur, it is often in contrast to a relationship of which the legislature disapproves. See, e.g., Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

192. See, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67, 70-73 (2001); *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992); see also Tamar Lewin, *Mother Cleared of Passing Drug to Babies*, N.Y. TIMES, July 24, 1992, at B7.

193. See *Ferguson*, 532 U.S. at 76-86.

194. See, e.g., *Hofmann v. Barmer Ersatzkasse*, 1984 E.C.R. 3047.

195. Such protective legislation has been criticized as contributing to gender inequality. See, e.g., Dorothea Alewell & Kerstin Pull, *An International Comparison and Assessment of Maternity Leave Legislation*, 22 COMP. LAB. L. & POL'Y J. 297 (2001); Fiona Beveridge & Sue Nott, *Women, Wealth and the Single Market*, 8 INT'L LEGAL PERSP. 1 (1996); Petra Foubert, *Does EC Pregnancy and Maternity Legislation Create Equal Opportunities for Women in the EC Labor Market? The European Court of Justice's Interpretation of the EC Pregnancy Directive in Boyle and Lewen*, 8 MICH. J. GENDER & L. 219 (2002).

196. Convention on the Rights of the Child, *supra* note 1, Preamble. One hundred-ninety states have ratified the Convention. As of 2003, Somalia and the United States are the only remaining signatories, and Somalia has indicated its interest in ratifying the convention. See OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES, at <http://www.unhcr.ch/pdf/report.pdf> (last updated Nov. 2, 2003).

Article 9, states “shall ensure that a child shall not be separated from his or her parents against their will, except when . . . such separation is necessary for the best interests of the child.”<sup>197</sup> Under this provision the interests of the child constitute a substantial counterbalance to the state’s interest in removing an offender. Article 9 implies also a right for the child to be with both parents rather than with only one parent. Therefore, a child with two custodial parents where one parent is about to be deported can still rely on this Article as s/he has the right to live with both parents. However, neither this nor any other convention guarantees a comparable right to spouses or other close relatives.<sup>198</sup>

While generosity in admitting non-citizen family members is important in constituting families, the right to continue such family life in a settled place is crucial in guaranteeing family stability and coherence. Often it is argued that because the requirements for United States citizenship are much less onerous than those in European countries,<sup>199</sup> there is more justification to remove those who do not naturalize and commit offenses. However, naturalization may (not) occur for a panoply of reasons—economic, financial, political, cultural, emotional, intellectual—so that the security of one’s family should not be tied too closely to this decision. A criminal conviction should not render especially long-term resident non-citizens automatically deportable and then make them ineligible to return for a decade or two. Such a sanction seems unduly harsh, especially in its impact on family members. In this respect deportation operates like other collateral sanctions following criminal convictions, as all of them fail to consider adequately their impact on family members, ascribing the family’s misfortune solely to the individual’s actions.

Since 1996 the number of deportations from the United States has risen dramatically.<sup>200</sup> Most of the deported are individuals who have entered the United States without documentation, usually after having

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197. Convention on the Rights of the Child, *supra* note 1, art. 9(1).

198. *Cf.* Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/RES/34/46 (1979).

199. *See generally, e.g.,* ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY (1992). Despite recent changes in Germany’s immigration law, it is still considered more difficult to acquire citizenship there than in the United States. *See* Devora Rogers, *Germans Consider U.S. Experience In Immigration Debate*, Deutsche Welle, at [http://www.dw-world.de/english/0,,1430\\_A\\_1050110\\_1\\_A,00.html](http://www.dw-world.de/english/0,,1430_A_1050110_1_A,00.html) (Dec. 5, 2003).

200. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., 2002 YEARBOOK OF IMMIGRATION STATISTICS 176 (2003), available at <http://uscis.gov/graphics/shared/aboutus/statistics/yearbook2002.pdf>.



crossed a border without the requisite entry documents.<sup>201</sup> The number of deportations of criminal offenders has also increased substantially.<sup>202</sup> While many of them attempt to make a life in their countries of citizenship,<sup>203</sup> others have attempted to return to the United States. Re-entry of a convicted and deported felon, however, carries a substantial prison term.<sup>204</sup> Prior to a change to the United States Sentencing Guidelines effective November 1, 2001,<sup>205</sup> all reentry offenses carried a sixteen-level penalty enhancement. Since the change, the adjustment has been more graduated, depending largely on the underlying felony conviction.<sup>206</sup> Even though this modification may have changed the views of many district court judges, in a judicial survey conducted early in 2002, more than half of the judges who responded expressed the view that the imposed sentences for unlawful entry offenses were greater than appropriate.<sup>207</sup> Further, the judges appeared equally split as to whether these sentences provide adequate deterrence.<sup>208</sup> A similar dichotomy existed with regard to whether such sanctions adequately protect the public.<sup>209</sup> While some of these responses may be connected to the offender's underlying crimes, others are presumably tied to the offender's motivation for reentering. However, judges cannot and do not usually consider the offender's family circumstances in such cases.<sup>210</sup> Therefore, a number of offenders whose return was motivated by family

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201. See *id.* A much smaller number of such removals are for individuals who entered legally but then overstayed their visas. See *id.* at 214.

202. See *id.* at 177.

203. See, e.g., Flynn McRoberts et al., *Torn from Families and Jobs, Deportees Face Bleak Future*, CHI. TRIB., Nov. 17, 2003, News, at 1; Deborah Sontag, *In a Homeland Far From Home*, N.Y. TIMES, Nov. 16, 2003, § 6, at 48. Some of these attempts do not involve legal activity. Central American and Caribbean countries have complained about the influx of convicted offenders, especially gang members in their early to mid-twenties. Many of them have re-established the gang culture abroad and become involved in the drug trade. See MARGARET H. TAYLOR & T. ALEXANDER ALEINIKOFF, *DEPORTATION OF CRIMINAL ALIENS: A GEOPOLITICAL PERSPECTIVE* (1998), at [http://www.thedialogue.org/publications/taylor\\_criminal.htm](http://www.thedialogue.org/publications/taylor_criminal.htm); Randall Richard, Associated Press, *500,000 Deportees from U.S. Wreaking Havoc*, ARIZ. REPUBLIC, Oct. 26, 2003; see also Anna Gorman, *Mexico Seeks Warning on Deportations*, L.A. TIMES, Oct. 8, 2003, at B6.

204. See 8 U.S.C. 1326 (2000); U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1) (2002).

205. See U.S. SENTENCING GUIDELINES MANUAL § 2L1.2. All immigration offenses are federal crimes. Therefore, the Federal Sentencing Guidelines cover the sentencing of all immigration offenders. See, e.g., Maxfield & Burchfield, *supra* note 118; Maxfield, *supra* note 118.

206. See U.S. SENTENCING GUIDELINES MANUAL § 2L1.2.

207. See MAXFIELD, *supra* note 154, ch. 2.

208. See *id.*

209. See *id.*

210. The Sentencing Guidelines caution that “[f]amily ties . . . are not ordinarily relevant” in sentencing an offender. U.S. SENTENCING GUIDELINES MANUAL § 5H1.6; see also *supra* note 155 and accompanying text.

concerns, including providing for their families and being a present parent, child or spouse, will serve long sentences.<sup>211</sup>

The reentry bar combined with the substantial penalties for such entry make such informal family unification risky. That individuals still attempt to cross international borders under such circumstances reflects their need to be with their families in familiar surroundings and the impossibility of uprooting a family after many years in the United States.

### III. CONCLUSION

Despite giving lip service to the importance of marriage and family to an individual's life, countries do not recognize the right to cohabit with spouses and minor children as absolute. Speedy permission for entry and residence may clash with a host of other goals of immigration law, many of which seem to be irreconcilable with the right to family migration for migrants. Even though obstacles to family unification are often justified to prevent so-called "chain" migration,<sup>212</sup> it is unlikely that such hurdles deter migration as planned. More probably, they lead to substantial dislocations, ranging from large remittances to undocumented migration of close family members. The large population of undocumented individuals in the United States—many of them waiting for their papers based on close relationships to permanent residents—bears proof of this phenomenon.

The term "family" should be construed broadly to allow for different family formations that recognize the essential human need for close relationships. While a few Western democracies consider a broader construction of the term, many still restrict family migration to the nuclear family. With a rising need for high skills immigration and concomitant stable immigrant families, changes may, however, occur. Initially a more favorable regime may benefit particularly better educated and wealthier immigrants whose family is viewed as an asset, either on its own or if weighed against the immigrant's skills. The value family adds exists, however, for all immigrants, and may even be more

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211. Anecdotal evidence indicates that many re-entrants do so to reunite with family members. See, e.g., Edward Hegstrom, *Illegal Immigrant Died Trying to Return to Family*, HOUSTON CHRON., May 22, 2003, at A33 (having been deported for three DWI convictions, an illegal Mexican immigrant died from heat exhaustion in reentry attempt; his return was motivated by a desire to be with his children).

212. See FED'N FOR AM. IMMIGRATION REFORM, SHACKLED BY CHAIN MIGRATION (Oct. 2002), at <http://www.fairus.org/ImmigrationIssueCenters/ImmigrationIssueCenters.cfm?ID=1170&C=12> (arguing for restrictions on family migration to prevent so-called "chain" migration based solely on family status of immigrant).



important for those who are unable to travel frequently to visit close family.

As the state should assist in family formation by decreasing entry restrictions and administrative hurdles, it should increase its recognition of the value of family in making deportation decisions. The destruction of families after many years of settled residence in a foreign country undermines one of the most powerful pillars of society. More empirical research is needed on this matter, but the intentional destruction of family units is unlikely to lead to any beneficial results. Families should not be forced to choose between one of their members and their country of permanent residence. Instead the state should be responsible for the rehabilitation and re-integration of such family members, as it is for those of citizens.

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