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### Family in the Balance: *Barton v. Barr* and the Systematic Violation of the Right to Family Life in U.S. Immigration Enforcement

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FAMILY IN THE BALANCE: *BARTON V. BARR* AND THE  
SYSTEMATIC VIOLATION OF THE RIGHT TO FAMILY LIFE  
IN U.S. IMMIGRATION ENFORCEMENT

DAVID BALUARTE\*

ABSTRACT

The United States systematically violates the international human right to family life in its system of removal of noncitizens. Cancellation of removal provides a means for noncitizens to challenge their removal based on family ties in the United States, but Congress has placed draconian limits on the discretion of immigration courts to cancel removal where noncitizens have committed certain crimes. The recently issued U.S. Supreme Court decision in *Barton v. Barr* illustrates the troubling trend of affording less discretion for immigration courts to balance family life in removal decisions that involve underlying criminal conduct. At issue was the “stop-time rule” for measuring the requisite seven years of continuous residence for LPR cancellation of removal. A sharply divided court read the relevant statute very differently, and a five-justice majority interpreted the stop-time rule to further limit the discretion of immigration judges to consider noncitizens’ family ties as a defense against removal. However, modern international law doctrine suggests that customary international law is the law of the United States and should be applied to resolve questions of statutory meaning under the *Charming Betsy* rule of statutory interpretation. This Article lays plain the systematic nature of the violations of the human right to family life in the U.S. system of removal and argues that the U.S. Supreme Court erred when it failed to mitigate this harm in *Barton v. Barr*.

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#### INTRODUCTION

The United States systematically violates the international human right to family life in its system of removal of noncitizens.<sup>1</sup> The Immigration and Nationality Act (INA) sets forth expansive criminal grounds for inadmissibility and deportation which are applied against noncitizens in removal proceedings.<sup>2</sup> The regime established for discretionary relief from removal, known as cancellation of removal, provides paths for both lawful permanent residents (LPRs) as well as undocumented immigrants to challenge their removal based on family ties in the United States.<sup>3</sup> However, Congress has placed draconian limits on the discretion of immigration courts to cancel removal where noncitizens have committed certain crimes.<sup>4</sup> The practice of removing noncitizens for criminal conduct without balancing the public safety imperative against the impact of that removal on children, spouses and other family members violates core human rights obligations.<sup>5</sup> However, U.S. immigration law is all but impervious to a direct challenge of this nature, in part because the century-old plenary power

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1. Wayne Smith, Hugo Armendariz, et al. v. United States, Case 12.562, Inter-Am. Comm'n. on H.R., Report No. 81/10, ¶¶ 12, 66 (2010).

2. *See, e.g.*, 8 U.S.C. §§ 1182(2), 1227(2).

3. *See* 8 U.S.C. § 1229b.

4. *See* 8 U.S.C. §§ 1229B(a)–(b).

5. *See* *Beharry v. Reno*, 183 F. Supp. 2d 584, 597–99, 601 (E.D.N.Y. 2002) (citing the Convention on the Rights of the Child and the duty to maintain family unity, accepted by every organized government except the United States). The ability of Congress to expel noncitizens stems from customary international law, thus should also be limited by the well-recognized “need to harmonize domestic and international law.” *Id.* at 599.

doctrine limits serious judicial scrutiny of all acts of Congress that set the terms for the removal of noncitizens.<sup>6</sup>

The recently issued U.S. Supreme Court decision in *Barton v. Barr* illustrates the troubling trend line towards less discretion for immigration courts to balance family life in removal decisions that involve underlying criminal conduct.<sup>7</sup> In that case, a majority of the Supreme Court Justices masked their blatant disregard for the fundamental human rights of Barton's family as a technical matter of statutory interpretation.<sup>8</sup> At issue was the "stop-time rule" for measuring the requisite seven years of continuous residence for LPR cancellation of removal.<sup>9</sup> Characteristic ambiguity in provisions of the INA led to a split among the circuits about the effect of certain crimes during that seven-year period on eligibility for LPR cancellation.<sup>10</sup> What was a clear question of statutory interpretation for the five-justice majority, was just as clearly a blatant misapplication of well-established canons for the four-justice dissent.<sup>11</sup> While the dissent did provide some description of the deep family connections that were at stake in *Barton*, an account at odds with the majority narrative that only characterized Barton in terms of the crimes he had committed, there was no suggestion that his family life should influence the interpretation of the statute at issue.<sup>12</sup> In this regard, the dissent too erred in its otherwise well-reasoned analysis of the cancellation of removal provision at issue in *Barton*.<sup>13</sup>

While rules of international law may prove ineffective in mounting a direct challenge to the grave injustices embedded in the black letter of the cancellation of removal statute, the *Charming Betsy* rule of statutory interpretation urges the consideration of such rules in resolving ambiguities in the law.<sup>14</sup> Indeed, modern international law doctrine suggests that customary international law is the law of the United States and should be applied by federal courts in certain

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6. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 305 (1984) [hereinafter Legomsky, *Principle of Plenary Congressional Power*]; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 611 (1990); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 926 (1994) [hereinafter Legomsky, *Ten More Years of Plenary Power*].

7. See *Barton v. Barr*, 140 S. Ct. 1442, 1448 (2020).

8. *Id.* at 1454.

9. *Id.* at 1447.

10. *Id.* at 1460, 1461 n.5.

11. *Id.* at 1454, 1462.

12. *Id.* at 1457 (Sotomayor, J., dissenting).

13. See *Barton*, 140 S. Ct. at 1460–61 (Sotomayor, J., dissenting).

14. See *Murray v. Schooner Charming Betsy (The Charming Betsy Case)*, 6 U.S. 64, 118 (1804).

circumstances.<sup>15</sup> Customary international law is commonly defined as law that “results from a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>16</sup> A prominent line of jurisprudence urges federal courts to interpret statutory ambiguities in a manner consistent with customary international law, and the *Charming Betsy* rule of statutory interpretation is named for the first such case.<sup>17</sup>

There is ample support in the law that a norm of customary international law has emerged to require states to perform an individualized consideration of the human right to family life in expulsion decisions.<sup>18</sup> While this rule of customary international law may not provide the basis for a direct judicial challenge to eliminate abusive provisions of the cancellation of removal statute, it certainly had a role to play in *Barton*, where an interpretation of the stop-time rule that was consistent with U.S. human rights obligations was possible under *Charming Betsy*.<sup>19</sup> In this way, the majority in *Barton* disregarded (yet another) rule of statutory interpretation in its rush to punish (yet another) noncitizen by tearing him away from his family.<sup>20</sup>

This Article will lay plain the systematic nature of the violations of the human right to family life that occur every day in the U.S. system of removal and argue that the U.S. Supreme Court erred when it failed to mitigate the harm perpetrated under this system in *Barton v. Barr*. Part I will describe the changes in law that took place in 1996 that established cancellation of removal for LPRs and non-LPRs, and eliminated other major forms of discretionary relief from removal. It will enumerate the various statutory provisions that limit eligibility to these forms of relief and specify how this statutory framework has created a system of mandatory removal for noncitizens who have committed certain criminal offenses. Part I will go on to describe the impact of this system of mandatory removal on immigrant, mixed-migrant, and U.S. citizen families in the United States in hopes of bringing the human impact of this abusive regime into sharp relief. Finally, it will describe how the plenary

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15. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3), cmt. c (AM. L. INST. 1987) (stating that “[i]nternational law . . . [is] law of the United States,” and that “[c]ourts in the United States are bound to give effect to international law”).

16. *Id.* at § 102(2).

17. See *The Charming Betsy Case*, 6 U.S. at 118; see *Paquete Habana*, 175 U.S. 677, 677 (1900) (finding that “where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations”); see also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 438 (1964).

18. See *Paquete Habana*, 175 U.S. at 677.

19. See *Barton*, 140 S. Ct. at 1447.

20. *Id.*

power doctrine facilitates this criminalization and the accompanying dehumanization of noncitizens and their families in the removal context, notwithstanding some evolving limits on that doctrine.

The second part of this Article will argue that a customary international law rule has emerged that requires the individualized consideration of family life in any expulsion decision. This part will begin with a presentation of *Wayne Smith and Hugo Armendariz v. United States*, in which the Inter-American Commission on Human Rights found that the United States systematically violated procedural protections for immigrant families in its removal regime.<sup>21</sup> It will then provide a broader analysis of this rule of law, surveying the decisions the UN Human Rights Committee and a substantial body of jurisprudence from the European Court on Human Rights. This review will examine jurisprudence in the family reunification context, as well as expulsions of noncitizens for immigration and criminal law violations. This comprehensive presentation undergirds one of this Article's principal arguments that a rule of customary international law compels states to consider the human right to family life as part of any decision to expel a noncitizen away from his or her nuclear family.

The third part of this Article will argue that the Supreme Court erred in failing to consider customary international law in interpreting the stop-time rule for LPR cancellation of removal in *Barton v. Barr*. This part will first present the circuit split resolved by the Court in *Barton* and consider the underlying decision of the Board of Immigration Appeals (B.I.A.) that the Supreme Court effectively affirmed.<sup>22</sup> It will examine the *Barton* decision in detail, considering both the rationale of the majority opinion and the contrary view advanced by the dissent. This part will then describe how the Court neglected to address the applicable rule of customary international law elaborated in the prior section and demonstrate how the correct application of the *Charming Betsy* rule of statutory interpretation in this case would have changed the outcome to protect noncitizens' human right to family life.

## I. U.S. IMMIGRATION ENFORCEMENT AND FAMILY LIFE

It is widely recognized that family reunification is one of the primary goals of U.S. immigration policy.<sup>23</sup> This is perhaps best

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21. See *Wayne Smith, Hugo Armendariz, et al. v. United States*, Case 12.562, Inter-Am. Comm'n. on H.R., Report No. 81/10, ¶¶ 12, 66 (2010).

22. See *Barton*, 140 S. Ct. at 1447–48.

23. See WILLIAM A. KANDEL, CONG. RSCH. SERV., RL43145, FAMILY-BASED IMMIGRATION POLICY 20 (2018) (citing statements to this effect by both the 1981 Select Commission

reflected in the amendments made to the INA by the 1965 Hart-Celler Act, which established the contemporary regime for family-based immigration.<sup>24</sup> Immigration to unite families has remained the most prominent feature of the U.S. immigration system since the passage of that monumental legislation, and the commitment of immigration policymakers to family reunification through immigrant admissions continued in the 1990s and 2000s.<sup>25</sup> However, this same time period was marked by a trend towards a draconian deportation regime fueled by a restrictionist discourse obsessed with immigrant criminality.<sup>26</sup> These concerns culminated in the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA) and Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, which eliminated discretionary relief from removal for noncitizens who committed certain crimes.<sup>27</sup>

The irony of a system that reunifies families in the United States in recognition of the social importance of the family, but then tears members of the family away for antisocial behavior without

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on Immigration and Refugee Policy chaired by Theodore Hesburgh (the Hesburgh Commission) and the 1995 U.S. Commission on Immigration Reform chaired by Barbara Jordan (the Jordan Commission).

24. *Id.* at 2; see also Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 661–63 (2014) (detailing the ways in which the 1965 Act incorporated the policy of family reunification); see also Catherine Lee, *Family Reunification and the Limits of Immigration Reform: Impact and Legacy of the 1965 Immigration Act*, 30 SOCIO. F. 528, 529 (2015) (challenging the characterization that family reunification policy as a uniquely modern political achievement of the civil rights era and examining immigration policy during the exclusion era and show that family reunification has been a crucial element of American immigration policy since the United States began regulating immigration).

25. See RICHARD BOSWELL, *ESSENTIALS OF IMMIGRATION LAW* 14 (3d ed. 2009); Miguel Lawson & Marianne Grin, *The Immigration Act of 1990*, *Pub. L. No. 101-649, 104 Stat. 4978*, 33 HARV. INT'L L.J. 255, 257 (1992); Shane Dizon & Nadine K. Wettstein, *Legal Immigration and Family Equity Act*, 1 *Immigr. L. Serv.* 2d (West) § 1:58 (2000); Johnny N. Williams, *Policy Change—Public Law 107-50, the Family Sponsor Immigration Act of 2002: Use of Substitute Sponsor if Visa Petitioner Has Died*, 8 *Immigr. L. Serv.* 2d (West) § 2 (2002); see also KANDEL, *supra* note 23, at 9 (discussing the Child Citizen Protection Act of 2002).

26. See BOSWELL, *supra* note 25, at 13; Carol Sanger, *Immigration Reform and Control of the Undocumented Family*, 2 *GEO. IMMIGR. L.J.* 295, 316–17, 347 (1987) (explaining how the 1986 Immigrant Reform and Control Act (IRCA) responded to concerns about unauthorized migrants living and working in the United States by criminalizing the act of assisting unauthorized immigration to the United States, as well as the employment of undocumented noncitizens); Warren R. Leiden & David L. Neal, *Highlights of the U.S. Immigration Act of 1990*, *FORDHAM INT'L L.J.* 328, 337 (1990) (describing how the 1990 Immigrant Act expanded the grounds for deportation while simultaneously limiting relief from removal).

27. See Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), *Pub. L. No. 104-208, § 304(a), 110 Stat. 3009-546, 3009-594* (1996) (codified as amended at 8 U.S.C. § 1229b); Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), *Pub. L. No. 104-32, § 442, 110 Stat. 1214, 1279* (1996) (codified as amended at 8 U.S.C. § 1228).

weighing the damage to the family unit merits attention. The following subsection will examine how the 1996 laws created a system of mandatory removal by eliminating discretionary relief from removal for noncitizens who commit “aggravated felonies.”<sup>28</sup> It will describe the evolution of that term as well as the human impact of laws that mandate the removal of all noncitizens who commit this category of offenses, notwithstanding their family ties. Cancellation of removal was installed in 1996 as the primary framework to seek discretionary relief from removal on account of family ties, and the next subsection will describe this framework and consider limitations on that relief that aggravate the situation created by mandatory removal. The last section will consider why this harsh system of removal, which destroys families that often include U.S. citizen children and other vulnerable family members, persists in a legal system that purportedly protects fundamental substantive and procedural due process rights.

#### *A. The Creation of a Mandatory Deportation Regime*

While criminal grounds for exclusion and deportation have long been a feature of U.S. immigration regulation, there was a marked increase in the breadth of these categories during the “war on drugs” in the 1980s and ‘90s.<sup>29</sup> In many ways mirroring the punitive nature of criminal justice reforms of that era, for example in the form of mandatory minimum federal sentences,<sup>30</sup> immigration consequences of criminal convictions also became increasingly harsh.<sup>31</sup> Perhaps most notable was the steady elimination of discretionary relief from deportation for noncitizens who had been convicted of crimes codified in the INA as “aggravated felonies,” and the decision in 1996 to eliminate all discretionary relief for that population.<sup>32</sup> The human impact was soon evident, with numerous accounts in the media of long-term LPRs who had committed a crime in his or her youth that suddenly required their mandatory removal.<sup>33</sup> The effects of this

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28. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 304(a), 110 Stat. 3009-546, 3009-594 (1996) (codified as amended at 8 U.S.C. § 1229b).

29. Cf. Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 967–68 (2001) (discussing the “war on drugs”).

30. See *id.* at 936–38; see also César Cuauhtémoc Garcia Hernández, *Deconstructing Crimmigration*, 51 U.C. DAV. L. REV. 197, 202 (2018).

31. Garcia Hernández, *supra* note 30.

32. *Id.*

33. See, e.g., HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY 81 (2007), <https://www.hrw.org/report/2007/07/16/forced-apart/families-separated-and-immigrants-harmed-united-states-deportation> [<https://perma.cc/RMA2-SJUV>].



regime on immigrant families soon came into focus, though over time, the U.S. system of immigration has become desensitized to its brutal consequences for family life.<sup>34</sup>

The first feature of the mandatory removal regime to emerge was a category of criminal law violations defined under immigration law as “aggravated felonies” which triggered severe immigration consequences.<sup>35</sup> The term aggravated felony was first introduced in 1988 by the Anti-Drug Abuse Act (ADAA),<sup>36</sup> which defined it as “murder, any drug trafficking crime . . . or any illicit trafficking in any firearms or destructive devices . . . or any attempt or conspiracy to commit any such act, committed within the United States.”<sup>37</sup> The 1990 Immigration Act expanded the definition of aggravated felony to include “any illicit trafficking in any controlled substance” and any crime of violence or money laundering for which the term of imprisonment imposed exceeded five years.<sup>38</sup> In 1994, Congress passed the Immigration and Nationality Technical Corrections Act (INTCA), expanding the definition of aggravated felony to include theft, document fraud, racketeering, kidnapping, smuggling, prostitution-related offenses, child pornography, national-security-related violations, and conspiracy to commit any such crimes.<sup>39</sup> Prior to the restrictive 1996 legislation referenced above, noncitizens convicted of an aggravated felony would be placed in deportation proceedings with prescribed avenues for discretionary relief in cases where equities such as family ties in the United States mitigated against their deportation.<sup>40</sup>

The serious nature of many of the crimes deemed “aggravated felonies” suggests that it is indeed reasonable for federal authorities to consider whether such conduct requires revocation of a non-citizen’s permission to remain in the United States.<sup>41</sup> Notably, it is inappropriate to view deportation as punishment for the underlying crime, inasmuch as this is the role of the criminal justice system, which has determined and applied a punishment for the crime by the time the removal proceeding is initiated.<sup>42</sup> Because deportation

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34. *Id.*

35. *Id.* at 14, 18–19.

36. Melissa Cook, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293, 299 (2003).

37. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469 (1988) (codified as amended at 8 U.S.C. 1101(a)(43)).

38. Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (1990) (codified as amended at 8 U.S.C. 1101(a)(43)).

39. Immigration and Nationality Technical Corrections Act (INTCA), Pub. L. No. 103-416, § 220, 108 Stat. 4305, 4305 (1994) (codified as amended at 8 U.S.C. 1101(a)(43)).

40. Cook, *supra* note 36, at 301–03.

41. HUMAN RIGHTS WATCH, *supra* note 33, at 14, 18–19.

42. *See Fong Yue Ting v. United States*, 149 U.S. 698, 709 (1893) (noting that

in such circumstances is not considered punishment, constitutional protections in the criminal justice context, such as prohibitions against double jeopardy or cruel and unusual punishment, are inapplicable.<sup>43</sup> In light of the fact that noncitizens convicted of crimes qualifying as “aggravated felonies” will have been subject to the full force of the criminal justice system, and recognizing the value of family unity in immigration law and policy more broadly,<sup>44</sup> it is perhaps no surprise that immigration law included discretionary relief from removal in such cases.

Prior to the 1996 Acts, there existed a variety of means for a noncitizen in deportation or exclusion proceedings to plead equities before a judge in hopes of keeping his or her family together, notwithstanding a criminal conviction.<sup>45</sup> These included: (1) a judicial recommendation against deportation, whereby a criminal judge could make a binding recommendation not to deport a person convicted of a crime; (2) suspension of deportation, which permitted a non-LPR who had resided in the United States for seven years to suspend deportation that would cause extreme hardship; (3) waiver of deportation under 212(h), which provided a noncitizen spouse, child, or parent of a U.S. citizen or LPR, the opportunity to ask an immigration judge to waive deportation for certain crimes upon a showing of extreme hardship; and (4) waiver of deportation under 212(c), which provided an LPR who had been lawfully present in the United States for seven years to plead equities, such as family ties, to secure a waiver of deportation from an immigration judge.<sup>46</sup> Although the 1990 Act eliminated judicial recommendations against deportation, the other forms of relief remained available—even to persons convicted of aggravated felonies, until 1996.<sup>47</sup>

First, the 1996 laws drastically expanded the number of crimes considered aggravated felonies.<sup>48</sup> AEDPA expanded the aggravated felony provision of the INA to include commercial bribery, forgery, counterfeiting, trafficking in illegal vehicles, obstruction of justice, perjury, bribing a witness, failing to appear before court on a felony charge, and forging or altering passports.<sup>49</sup> IIRAIRA added rape and

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deportation is not punishment). *But see* *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (finding a 6th Amendment right to be advised of immigration consequences of deportation because deportation has punitive aspects).

43. *See, e.g.*, *Hinds v. Lynch*, 790 F.3d 259, 264, 266 (1st Cir. 2015).

44. *See supra* note 23 and accompanying text.

45. *See* HUMAN RIGHTS WATCH, *supra* note 33, at 13.

46. *Id.*

47. *Id.* at 25.

48. Dawn Marie Johnson, *The AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. LEGIS. 477, 481–82 (2001).

49. Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-32, § 440(e), 110 Stat. 1214 (codified as amended at 8 U.S.C. § 1101(a)(43)).

sexual abuse of a minor to the aggravated felony provision of the INA,<sup>50</sup> and reduced the sentencing requirements and monetary amounts attached to the least serious classes of crimes, such that far more criminal activity was captured by these provisions.<sup>51</sup> For example, where a theft crime qualified as an aggravated felony only if it drew a sentence of five years or more before 1996, IIRAIRA reduced the qualifying sentence to one year or more.<sup>52</sup> Similarly, IIRAIRA lowered the threshold for the crime of tax evasion from \$200,000 to \$10,000 in order to qualify as an aggravated felony.<sup>53</sup>

Second, this drastic expansion of categories and classes of crimes that qualify as aggravated felonies was accompanied by an elimination of discretionary relief from deportation.<sup>54</sup> Initially, AEDPA made 212(c) relief unavailable to lawful permanent residents charged as removable for an aggravated felony.<sup>55</sup> IIRAIRA then eliminated the 212(c) waiver all together as well as suspension of deportation and made the 212(h) waiver unavailable to persons convicted of an aggravated felony.<sup>56</sup> IIRAIRA created a new defense against removal, called cancellation of removal, as a replacement.<sup>57</sup> Cancellation of removal, however, was made unavailable to noncitizens convicted of an aggravated felony.<sup>58</sup>

Ultimately, the 1996 laws had the effect of eliminating any opportunity for immigration adjudicators to halt deportations to maintain family unity in cases where noncitizens had been convicted of a drastically expanded list of aggravated felonies.<sup>59</sup> This created a mandatory removal regime that has plagued the immigrant community in the United States ever since.<sup>60</sup>

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50. Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996, Pub. L. No. 104-208, § 321(a), 110 Stat. 3009-546, 3009-627 (codified as amended at 8 U.S.C. § 1101(a)(43)).

51. § 321(a)(2), (7), 110 Stat. at 3009-627-28.

52. § 321(a)(3), 110 Stat. at 3009-627.

53. § 321(a)(7), 110 Stat. at 3009-627.

54. Paul B. Hunker, *Cancellation of Removal or Cancellation of Relief?—The 1996 IIRIRA Amendments: A Review and Critique of Section 240A(A) of the Immigration and Nationality Act*, 15 GEO. IMMIGR. L.J. 1, 30 (2000).

55. *See id.* at 3.

56. *Id.*

57. *Id.* at 2.

58. *Id.* at 3.

59. *See* Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, § 304(a), 110 Stat. 3009-546, 3009-594 (1996) (codified as amended at 8 U.S.C. § 1229b) (eliminating the availability of cancellation of removal to all noncitizens who committed an aggravated felony and leaving no room for judicial discretion); *see also* Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-32, § 440(e), 1214, 1277-78 (1996) (codified as amended at 8 U.S.C. § 1101(a)(43) (providing a new expansive list of additional felonies to be considered aggravated felonies)).

60. *See* HUMAN RIGHTS WATCH, *supra* note 33, at 5-6.

Ten years after the 1996 laws, Human Rights Watch found that approximately 670 thousand people had been removed for criminal offenses and estimated that 1.6 million spouses and children had been separated from family members as a result.<sup>61</sup> Although the data did not provide information on how many removals involved LPRs as opposed non-LPRs,<sup>62</sup> the sheer magnitude of that figure leaves little doubt that a substantial number of people were separated from their family members without access to discretionary relief based on their family relationships.<sup>63</sup> Moreover, even a single removal without access to discretionary relief based on family ties is an abuse, though that point is made most effectively with anecdotal accounts.

The Human Rights Watch report featured many individuals such as Kannareth, who immigrated to the United States from a Thai refugee camp when he was only ten years old.<sup>64</sup> Kannareth got into trouble when he was fifteen for driving without a license and then violating his probation by pickpocketing.<sup>65</sup> He then got back on track, went to college to learn a trade, began a promising career, and had a daughter with a woman he planned to marry.<sup>66</sup> He went to renew his green card after the enactment of the 1996 laws, and a criminal background check brought up his youthful indiscretions.<sup>67</sup> He was ultimately removed without any recourse to discretionary relief to keep him unified with his U.S. citizen daughter, fiancé, and aging mother.<sup>68</sup>

Such anecdotes illustrate the disproportionate nature of removal away from family members for past crimes. Moreover, a substantial body of social sciences research has followed the Human Rights Watch report to demonstrate the deeply damaging effects that such harsh deportation laws have had on families in the United States and transnationally.<sup>69</sup> This literature explores many ways in which families suffer as a result of deportation laws, including leaving spouses without necessary emotional and financial support, which can result in food insecurity and homelessness.<sup>70</sup> Studies of

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61. *Id.* at 5–6.

62. *Id.* at 6.

63. *See id.*

64. *Id.* at 51.

65. *Id.*

66. HUMAN RIGHTS WATCH, *supra* note 33, at 51.

67. *Id.*

68. *Id.* at 51–52.

69. *See infra* notes 70–73 and accompanying text.

70. *See* BLANCA RAMIREZ, LATINO PUB. POL'Y, INTERRUPTED FAMILY TIES: HOW THE DETENTION OR DEPORTATION OF A PARENT TRANSFORMS FAMILY LIFE 4–5 (2018), [https://bettercarenetwork.org/sites/default/files/Interrupted%20Family%20Ties\\_%20How%20the%20Detention%20or%20Deportation%20of%20a%20Pa.pdf](https://bettercarenetwork.org/sites/default/files/Interrupted%20Family%20Ties_%20How%20the%20Detention%20or%20Deportation%20of%20a%20Pa.pdf) [<https://perma.cc/5PP7-KS N6>]; *see also* Regina Day Langhout, Sara L. Buckingham, Ashmeet Kaur Oberoi, Noé

this nature consistently feature the particularly acute suffering experienced by U.S. citizen children who are separated from parents for extended periods, often permanently, and at times thrust into the foster care system as a result.<sup>71</sup> These children suffer severe psychological, emotional, and economic repercussions that hamper their health and well-being and alter the trajectories of their lives.<sup>72</sup> Excluding these considerations from individual removal decisions is inhumane and misguided as a matter of public policy.<sup>73</sup>

### *B. Cancellation of Removal and Its Limits*

IIRAIRA created a framework for discretionary relief from removal called cancellation of removal.<sup>74</sup> There are two sections, which set forth a framework for relief for LPRs placed in removal proceedings as well as non-LPRs, which provides an avenue for undocumented immigrants to seek discretionary relief from removal.<sup>75</sup> Each section calls for a two-step process, including an inquiry into an applicant's statutory eligibility, followed by consideration of relevant evidence in support of an eligible applicant's request for discretionary relief from removal.<sup>76</sup> The principal problems with cancellation of

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Rubén Chavez, Dana Rusch, Francesca Esposito & Yolanda Suarez-Balcazar, *Statement on the Effects of Deportation and Forced Separation on Immigrants, their Families, and Communities*, 62 AM. J. CMTY. PSYCH. 3, 4 (2018), <https://onlinelibrary.wiley.com/doi/epdf/10.1002/ajcp.12256> [<https://perma.cc/9PL8-BYZM>]; AJAY CHAUDRY, RANDY CAPPS, JUAN-MANUEL PEDROZA, ROSA MARIA CASTAÑEDA, ROBERT SANTOS & MOLLY M. SCOTT, URB. INST. FACING OUR FUTURE: CHILDREN IN THE AFTERMATH OF IMMIGRATION ENFORCEMENT, 1 (2010), <https://www.urban.org/sites/default/files/publication/28331/412020-Facing-Our-Future.PDF> [<https://perma.cc/H4W2-KQUU>].

71. See RANDY CAPPS, HEATHER KOBALL, ANDREA CAMPETELLA, KRISTA PERREIRA, SARAH HOOKER & JUAN MANUEL PEDROZA, IMPLICATIONS OF IMMIGRATION ENFORCEMENT ACTIVITIES FOR THE WELL-BEING OF CHILDREN IN IMMIGRANT FAMILIES: A REVIEW OF THE LITERATURE 5 (2015), <https://www.migrationpolicy.org/research/implications-immigration-enforcement-activities-well-being-children-immigrant-families> [<https://perma.cc/F2DX-ZJWM>]; see also Luis H. Zayas & Mollie H. Bradlee, *Exiling Children, Creating Orphans: When Immigration Policies Hurt Citizens*, 59 SOC. WORK 167, 167 (2014).

72. See Gaiane Nazarian, Separation Due to Deportation: Psychological, Emotional, and Economic Affect on Children of Deported Parents 39–42 (M.S.W. Project, California State University) (2014) (CSUSB ScholarWorks); AM. IMMIGR. COUNCIL, U.S. CITIZEN CHILDREN IMPACTED BY IMMIGRATION ENFORCEMENT 1–2 (2019), [https://www.americanimmigrationcouncil.org/sites/default/files/research/us\\_citizen\\_children\\_impacted\\_by\\_immigration\\_enforcement.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/us_citizen_children_impacted_by_immigration_enforcement.pdf) [<https://perma.cc/3HRN-XN7L>].

73. JOANNA DREBY, HOW TODAY'S IMMIGRATION ENFORCEMENT POLICIES IMPACT CHILDREN, FAMILIES, AND COMMUNITIES 30–31 (2012), <https://www.americanprogress.org/issues/immigration/reports/2012/08/20/27082/how-todays-immigration-enforcement-policies-impact-children-families-and-communities> [<https://perma.cc/S2ZP-R3YV>].

74. See 8 U.S.C. § 1229b.

75. Compare 8 U.S.C. §§ 1229b(a)–(b) (LPR cancellation), with 8 U.S.C. § 1229b(b) (non-LPR cancellation).

76. 8 U.S.C. § 1229a(c)(4).

removal arise from the broad provisions that make certain applicants ineligible, which in turn severely limit the number of cases in which immigration authorities may exercise discretion to cancel removal.<sup>77</sup>

In order to qualify for LPR cancellation of removal, a noncitizen must demonstrate seven years of lawful residence in the United States, five of which must be in LPR status.<sup>78</sup> These two status requirements are temporal in nature, and they represent the threshold for consideration of family ties and other equitable factors that may lead an immigration judge to cancel removal.<sup>79</sup> These limits are problematic inasmuch as they set an arbitrary limit that prevents an immigration judge from exercising discretion favorably if a noncitizen falls just a few days short, notwithstanding robust family ties to U.S. citizen children, spouses, and parents.<sup>80</sup> The requirement to reside continuously in the United States after being admitted in any status is further complicated by the “stop-time” rule, which stops the accrual of presence upon the issuance of a Notice to Appear in immigration court, or upon the commission of certain crimes.<sup>81</sup>

The provision that stops the accrual of lawful presence upon the commission of certain crimes was specifically addressed by the U.S. Supreme Court in its 2020 decision in *Barton v. Barr*.<sup>82</sup> This Article will examine the U.S. Supreme Court’s error in *Barton* in greater detail below, but it is sufficient at this point to highlight that the commission of certain crimes within an LPR’s first seven years in the United States will make them ineligible for cancellation of removal.<sup>83</sup> Notably, the Supreme Court determined in *Barton* that the crimes that limit relief can be relatively minor offenses that would not otherwise serve as the basis for the removal of an LPR, but may block access to this form of relief if the noncitizen is later charged as removable for other conduct.<sup>84</sup> Once again, an LPR’s ineligibility from this relief means that an immigration judge does not have the discretion to balance potentially expansive family ties against the public safety imperative of removal; rather, removal in such cases is a foregone conclusion.<sup>85</sup>

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77. See Hunker, *supra* note 54, at 2–3.

78. 8 U.S.C. §§ 1229b(a)(1)–(2).

79. See *In re Blancas-Lara*, 23 I&N Dec. 458, 459–61 (B.I.A. 2002) (stating non-immigration status counts towards seven years, otherwise it would be superfluous to the five years LPR).

80. See Cook, *supra* note 36, at 309.

81. See 8 U.S.C. § 1229b(d)(1).

82. See *Barton v. Barr*, 140 S. Ct. 1442, 1447–48 (2020).

83. *Id.* at 1446.

84. See *id.* at 1451–52.

85. See 8 U.S.C. §§ 1229b(a)(1)–(2); Cook, *supra* note 36, at 298.

This substantial limitation on relief is compounded by another provision that deems ineligible any noncitizen who has been convicted of an aggravated felony.<sup>86</sup> The expansive nature of the aggravated felony provision was covered in detail in the prior section and includes offenses that are neither aggravated nor felonious.<sup>87</sup> Cancellation of removal for LPRs therefore is limited largely by the commission or conviction of crimes, with the most severe limitations for aggravated felonies but substantial limitations also connected to a wider variety of crimes that trigger grounds of inadmissibility and deportability.<sup>88</sup> In this way, the mandatory removal regime for LPRs in the United States is quite broad.<sup>89</sup>

Cancellation of removal for non-LPRs, often utilized by undocumented immigrants as a defense against removal, is substantially more limited.<sup>90</sup> First, a non-LPR must make the threshold showings that she has been continuously physically present in the United States for ten years and has not committed a broad category of crimes.<sup>91</sup> Notably, the stop-time rule referenced above also applies to non-LPR cancellation of removal, and the same categories of crimes stop the accrual of physical presence.<sup>92</sup> Assuming the applicant for relief from removal passes these eligibility thresholds, an immigration judge will determine whether she has made sufficient showings of good moral character and that her removal would cause “exceptional and extremely unusual hardship” to a U.S. citizen or LPR spouse, child, or parent.<sup>93</sup>

The hardship standard for non-LPRs is notoriously burdensome and very few otherwise eligible applicants can make the necessary showing.<sup>94</sup> The Board of Immigration Appeals (BIA) has established that “exceptional and extremely unusual hardship” means “hardship that is substantially beyond that which would ordinarily be expected to result from the [person’s departure].”<sup>95</sup> In applying this heightened standard, the BIA has denied relief to the mother of two U.S. citizen

86. 8 U.S.C. §§ 1229b(a)(3), (b)(1)(C).

87. See *supra* notes 48–53 and accompanying text.

88. See *Barton*, 140 S. Ct. at 1448–50.

89. See 8 U.S.C. §§ 1229b(a)(1)–(2) (to be eligible for cancellation of removal, an LPR must not have been convicted of any aggravated felony); see also Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, § 440(e), 110 Stat. 1214, 1277 (codified as amended at 8 U.S.C. § 1101(a)(43)).

90. Compare 8 U.S.C. § 1229b(b)(1), with 8 U.S.C. § 1229b(a).

91. 8 U.S.C. § 1229b(b)(1)(A), (C) (excluding noncitizens who have been convicted of a crime listed in INA sections 1182(a)(2), 1227(a)(2), or 1227(a)(3)).

92. 8 U.S.C. § 1229b(d)(1).

93. 8 U.S.C. § 1229b(b)(1)(B), (D).

94. Hunker, *supra* note 54, at 44–46.

95. *In re Monreal-Aquinaga*, 23 I&N Dec. 56, 56 (B.I.A. 2001).

children because the children's father was in the United States with authorization and could care for them.<sup>96</sup> Tragically, the trauma that children suffer when their parents are torn away from them has become ordinary and expected in the U.S. system of removal.<sup>97</sup>

Although this form of relief is often considered to be available only to families in an extremely precarious situation, such as children with medical conditions who rely on the parent in removal proceedings, the BIA has insisted that the burden is not exceptional.<sup>98</sup> Indeed, in the case of an undocumented single mother of four U.S. citizen children whose entire family was in the United States in a range of immigration statuses, the BIA found that her return alone to Mexico without her family would indeed produce "exceptional and extremely unusual hardship."<sup>99</sup> Though there is clearly a way to overcome this exceedingly high hardship standard, having family in the country of nationality, some resources to make a transition, or the ability to leave the children with family in the United States, all routinely lead to the denial of this form of relief.<sup>100</sup>

Along with a variety of other limitations,<sup>101</sup> the temporal requirements, crime-based exclusions for both LPR and non-LPR cancellation of removal, and in the case of non-LPR cancellation, the impossibly high hardship standard make this relief very limited in scope. An administrative system that routinely separates families, even when they have compelling claims to stay united, appears to violate fundamental principles of due process.<sup>102</sup> However, a direct challenge to the inhumanity of this system of removal appears to be precluded by a century-old doctrine that places the authority of Congress to set the rules for immigration virtually beyond reproach.<sup>103</sup> The next section examines the difficulties inherent in a judicial challenge to Congressionally established rules for removal that fail to consider compelling family ties in the United States.

### *C. The Plenary Power Doctrine and Family Life*

A civil administrative regime that further punishes a certain category of people, in this case noncitizens, for criminal activity and

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96. See *In re Andazola-Rivas*, 23 I&N Dec. 319, 324 (B.I.A. 2002).

97. See *CAPPS ET AL.*, *supra* note 71.

98. See *In re Recinas*, 23 I&N Dec. 467, 470 (B.I.A. 2002).

99. *Id.* at 473.

100. See Hunker, *supra* note 54, at 44–46; *supra* notes 95–96 and accompanying text.

101. See 8 U.S.C. § 1229b(c).

102. See, e.g., *In re Monreal-Aquinaga*, 23 I&N Dec. 56, 56 (B.I.A. 2001); see also 8 U.S.C. §§ 1229b(a)(1)–(2).

103. See *infra* Section I.C.



results in the protracted or permanent separation of nuclear families would seem ripe for a direct constitutional due process challenge.<sup>104</sup> However, the authority of the U.S. Congress to define the terms of admission and removal from the national territory has long been insulated from constitutional challenge by the plenary power doctrine, which ensures limited review by federal courts.<sup>105</sup> The foundational cases commonly accepted to have established the plenary power doctrine emerged from an era of racist immigration regulation that called for the exclusion and expulsion of Chinese nationals from the United States.<sup>106</sup> In *Chae Chan Ping*, the Supreme Court found that the power to regulate immigration was inherent to sovereignty and upheld the authority of Congress to exclude all Chinese nationals from entry.<sup>107</sup> The Supreme Court then extended this doctrine to the expulsion context in *Fong Yue Ting*, upholding the constitutionality of a requirement that Chinese nationals provide “one . . . white witness” to support their claim to U.S. residency.<sup>108</sup> The Court held that “[t]he right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, [is] an inherent and inalienable right of every sovereign and independent nation.”<sup>109</sup> This doctrine continues to have salience in modern times.<sup>110</sup>

Scholars have theorized an end to the plenary power doctrine and identified numerous cases in which the Supreme Court has conducted a review of immigration laws under some semblance of

104. See, e.g., *In re Monreal-Aquinaga*, 23 I&N Dec. at 57–58.

105. See Legomsky, *Principle of Plenary Congressional Power*, *supra* note 6, at 306; see also Motomura, *supra* note 6, at 611; Legomsky, *Ten More Years of Plenary Power*, *supra* note 6, at 926; Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 15 IMMIGR. & NAT'LITY L. REV. 21, 23 (1993); Kerry Abrams, *Family Reunification and the Security State*, 32 CONST. COMMENT. 247, 258 (2017).

106. Motomura, *supra* note 6, at 550–54.

107. *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889); see also *Nishimura Ekiu v. United States*, 142 U.S. 651, 659–60 (1892) (holding that “[i]t is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe”).

108. *Fong Yue Ting v. United States*, 149 U.S. 698, 729 (1893).

109. *Id.* at 711.

110. See, e.g., *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1963–64 (2020) (upholding precedent set in *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892)); see also Marty Lederman, *Contrary to Popular Belief, The Court Did Not Hold that the Travel Ban is Lawful—Anything But*, JUST SECURITY (July 2, 2018), <https://www.justsecurity.org/58807/contrary-popular-belief-court-hold-travel-ban-lawful-anything-but-which-ruling-justice-kennedys-deference-presidents-enforcement-ban-indefensible> [<https://perma.cc/6JAT-4HHP>] (observing that “[a] 5–4 majority of the Justices held, in effect, that even if the Proclamation is unconstitutional there’s nothing the Court can do about it”).

constitutional due process analysis, notwithstanding plenary power.<sup>111</sup> For example, in his seminal 1984 article, Stephen Legomsky predicted that an emerging trend among federal courts to perform a rational basis review of problematic immigration statutes would compel the Supreme Court “to lay the general principle to rest.”<sup>112</sup> Ten years later, recognizing that the Supreme Court had not taken this much-needed step, Legomsky identified three ways in which lower courts could “forge creative detours” around the plenary power doctrine.<sup>113</sup> Legomsky wrote that lower courts could utilize a “mild rational basis” review in considering whether deportation cases met standards for equal protection and substantive due process,<sup>114</sup> expanding exceptions for procedural due process,<sup>115</sup> or carving out new exceptions.<sup>116</sup>

Hiroshi Motomura resonated with Legomsky, arguing that the insulation of immigration laws against direct constitutional challenges under the plenary power doctrine led to the emergence of “phantom constitutional norms” to challenge the political branches’ immigration authority.<sup>117</sup> Motomura, however, expressed skepticism about this phantom constitutional decision-making because it creates two conflicting sets of norms—one for normal constitutional cases and one for immigration cases.<sup>118</sup> Motomura observed that these parallel sets of norms have created a situation in which “[g]overnment briefs in immigration cases rely heavily on directly applicable constitutional immigration law, while advocates for [noncitizens] cite the subconstitutional phantom norm decisions.”<sup>119</sup> Motomura opined that this was problematic because it leads to a situation in which the government and advocates talk past one another, and he suggested that genuine dialogue will be restored “only when courts . . . take

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111. See, e.g., *infra* notes 112–21 and accompanying text.

112. Legomsky, *Principle of Plenary Congressional Power*, *supra* note 6, at 305.

113. Legomsky, *Ten More Years of Plenary Power*, *supra* note 6, at 928–29.

114. See *id.* at 931.

115. See *id.* at 931–32 (noting that noncitizens may challenge the conditions of their confinement on due process grounds due to “gross physical abuse” on US soil or “either irrational or excessive detention can amount to punishment even without an intent to punish, and that such punishment cannot be imposed without due process”).

116. *Id.* at 933–34 (discussing using innovative ways to find First Amendment protection in deportation cases); see *Am-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060, 1075 (C.D. Cal. 1989), *rev’d on other grounds*, 970 F.2d 501 (1991) (reasoning that because the Supreme Court in *Harisiades* case had dismissed First Amendment challenges of deported aliens without mentioning the plenary power doctrine, it meant that the traditional First Amendment standards apply to deportation cases); see also *Rafeedie v. Immigr. & Naturalization Service*, 795 F. Supp. 13, 21–23 (D.D.C. 1992) (applying customary First Amendment standards to noncitizens challenging their exclusion).

117. Motomura, *supra* note 6, at 610–11.

118. *Id.* at 549.

119. *Id.* at 612.

the next step and begin to put their constitutional thinking in expressly constitutional terms.”<sup>120</sup> In the meantime, however, Motomura suggested that this “indirect expression of an alternative body of constitutional immigration law” has resulted in a weakening of plenary power and he forecasted the eventual demise of the doctrine.<sup>121</sup>

In *Trump v. Hawaii*, Motomura joined a group of family, immigration, and constitutional law scholars in an amicus brief to urge the Supreme Court to recognize a constitutional right to family life and find that President Trump’s travel ban arbitrarily interfered with that right.<sup>122</sup> Kerry Abrams, who was integral to that amicus effort, subsequently wrote an article advancing the central argument of the amicus brief that modern “courts will recognize family reunification as an interest of constitutional import, and will balance that interest against the genuine national security interests of the government.”<sup>123</sup> In developing this argument, Abrams considered the vitality of the plenary power doctrine during three distinct time periods that she describes in terms of developments in family and constitutional law.<sup>124</sup> These time periods are “the age of the unitary family,”<sup>125</sup> “the age of security,”<sup>126</sup> and “the age of balancing.”<sup>127</sup>

“[T]he age of the unitary family” coincided with the foundational period of the plenary power doctrine.<sup>128</sup> Abrams notes that the original text of the U.S. Constitution does not mention family, just as it does not enumerate a federal immigration power.<sup>129</sup> Abrams argues that the societal norms over both family and immigration that were present when the Constitution was drafted are no longer present today.<sup>130</sup> At the same time, rights that were unfathomable at the time that the Constitution was drafted have solidified in modern times.<sup>131</sup> Indeed, “[b]efore the advent of international human rights and the constitutionalization of individual rights, natural rights were part of the fabric of society and informed how courts and legislatures understood the scope of their power, but were not

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120. *Id.* at 613.

121. *Id.* at 610–11.

122. See Brief for Immigration, Family and Constitutional Law Professors as *Amici Curiae* Supporting Respondents at 20–25, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965).

123. Abrams, *supra* note 105, at 248–49.

124. See *id.* at 248.

125. *Id.* at 250.

126. *Id.* at 258.

127. *Id.* at 265.

128. *Id.* at 250, 254–55.

129. Abrams, *supra* note 105, at 250.

130. *Id.* at 251.

131. See *id.* at 249–51, 269.

cognizable rights on their own.”<sup>132</sup> Accordingly, in the age of the unitary family, there was very little tension between principles of family unity and the state’s plenary immigration power.<sup>133</sup> Abrams views the Chinese Exclusion Case and its progeny through this lens, recognizing that the establishment of a broad rule of unreviewable immigration authority had a direct impact on individual rights, in particular the right to family life.<sup>134</sup>

Abrams then described “the age of security” as marked by both the continued development and strengthening of the plenary power doctrine in the constitutional jurisprudence and the evolution of constitutional conceptions of family life.<sup>135</sup> On the one hand, the Supreme Court invoked plenary power to uphold exclusion and long-term immigration detention based on notions of national security in *Knauff v. Shaughnessy* and *Shaughnessy v. Mezei*, notwithstanding the effects of these decisions on family life.<sup>136</sup> On the other hand, the conception of the family was evolving in society and in the eyes of the Supreme Court.<sup>137</sup> Even though marriage would not be constitutionally protected until 1967, with the Court’s seminal decision striking down an anti-miscegenation law in *Loving v. Virginia*,<sup>138</sup> the Supreme Court was already thinking about protections for family life.<sup>139</sup> Justice Jackson’s dissent in *Knauff* demonstrates perfectly the tension that was beginning to develop in the constitutional jurisprudence, where he stated: “Congress will have to use more explicit language than any yet cited before I will agree that it has authorized an administrative officer to break up the family of an American citizen or force him to keep his wife by becoming an exile.”<sup>140</sup> This was a precursor to the “age of balancing.”<sup>141</sup>

Abrams referred to the modern era as “the age of balancing” because courts are recognizing family ties as constitutional liberty interests and balancing them with national security interests.<sup>142</sup> According to Abrams, “[t]his recognition is beginning to lead to a more nuanced analysis in specific cases, with an understanding that

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132. *Id.* at 258.

133. *Id.* at 252.

134. *Id.* at 258.

135. Abrams, *supra* note 105, at 258, 264–65.

136. *Id.* at 260–62 (citing *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) & *Shaughnessy v. ex rel. Mezei*, 345 U.S. 206 (1953)).

137. *Id.* at 262.

138. *See id.* (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

139. *Id.* at 260.

140. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 551–52 (1950) (Jackson, J., dissenting).

141. Abrams, *supra* note 105, at 264–65.

142. *Id.* at 265.

even a right as important as family unity can be overridden by security concerns, but that the bald claim of ‘national security’ without more does not automatically override family interests.”<sup>143</sup> Abrams highlighted important constitutional jurisprudence from *Loving v. Virginia* to *Obergefell v. Hodges*—which extended the fundamental right to marry to same-sex couples—as evidence of an evolving constitutional right to family life.<sup>144</sup> Abrams argued that constitutionalized family law protects the rights of family members vis-à-vis the rights of other family members, and that such rights “are ripe for balancing against other interests,” such as the state’s immigration power.<sup>145</sup>

Abrams’ argument, however compelling, was largely ignored by the Supreme Court in *Trump v. Hawaii*, where it upheld the President’s ban on immigration from several Muslim majority countries notwithstanding the impact on family reunification.<sup>146</sup> Regardless, while the Supreme Court did not adopt the rationale advanced by Abrams, Motomura, and other prominent scholars, in the context of immigrant admissions does not limit the extension of that rationale to the removal context.<sup>147</sup> Indeed, Abrams’ conception of a constitutionalized family law that requires balancing the right to family life against the state’s immigration authority is even more persuasive in the cases of settled migrants with deep family ties in the United States.<sup>148</sup> Moreover, Abrams’ argument that such balancing is required resonates with international human rights doctrine, and therefore connects to yet another theory of modern limitations on plenary power.<sup>149</sup>

Michael Scaperlanda has argued that the emergence of the international human rights regime has tempered the absolutist conception of sovereignty that prevailed when plenary power emerged in constitutional jurisprudence, and that doctrine does not withstand scrutiny under a modern conception of sovereignty.<sup>150</sup> Scaperlanda offers a historical account of the development of the concept of sovereignty that maps on to Abrams’ account of the constitutionalization of family law.<sup>151</sup> Taken together, these two accounts describe parallel processes by which family rights have become more

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143. *Id.*

144. *Id.* at 260, 268–69.

145. *Id.* at 269.

146. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2445 (2018) (Sotomayor, J., dissenting).

147. *Id.*

148. Abrams, *supra* note 105, at 265–66.

149. *Id.*

150. *See Scaperlanda, supra* note 105, at 88.

151. *See id.*; *see also Abrams, supra* note 105, at 266–68.

embedded while state sovereignty has weakened as a rationale for plenary power.<sup>152</sup>

Scaperlanda begins his analysis with the foundational cases that established the plenary power doctrine addressed above.<sup>153</sup> Scaperlanda argues that “[p]lenary power developed in this era of ‘absolute’ sovereignty, when no global legal infrastructure existed to harness the power of an individual nation-state within its own domain.”<sup>154</sup> As an example of the prominence of absolutism in the Supreme Court at the end of the 19th century, Scaperlanda highlights the Court’s own words in *Chae Chan Ping*, that national sovereignty is “necessarily exclusive and absolute . . . susceptible of no limitation not imposed by itself.”<sup>155</sup> This understanding of sovereignty also pervaded the Court’s decision in *Fong Yue Ting*, in which the Court emphasized that “[t]he right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps toward becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.”<sup>156</sup>

Scaperlanda goes on to observe that the age of absolutism is over and that modern international law places limits on sovereign authority, most notably in the area of human rights protection.<sup>157</sup> Indeed, in the wake of World War II and the horrors perpetrated by the Nazis in the name of national sovereignty, international human rights law developed into “a new international regime that would embed within its legal firmament concerns for the individual *vis a vis* the state.”<sup>158</sup> In Scaperlanda’s view, the emergence of human rights law was accompanied by the recession of absolute sovereignty.<sup>159</sup> He argues that “[t]he presence of binding human rights standards in the international legal order means, fundamentally, that nation-states have agreed to relinquish some measure of sovereignty over individuals within their borders.”<sup>160</sup> Moreover, he highlights that customary international law imposes limits on state sovereignty, and where human rights principles imbue that body of binding international law, sovereign states are compelled to comply.<sup>161</sup>

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152. Abrams, *supra* note 105, at 265, 268–69; Scaperlanda, *supra* note 105, at 71.

153. See Scaperlanda, *supra* note 105, at 23.

154. *Id.* at 26.

155. *Id.* (citing *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889)).

156. *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893).

157. See Scaperlanda, *supra* note 105, at 71.

158. *Id.* at 58.

159. *Id.* at 70–71.

160. *Id.* at 27.

161. *Id.* at 66.

Scaperlanda concludes that the plenary power doctrine was founded on an outdated absolutist conception of sovereignty and should be re-evaluated in light of the international human rights regime.<sup>162</sup> Scaperlanda's theory for an end to the plenary power doctrine dovetails nicely with Abrams' own theory that constitutionalized family law will require courts to balance family life against the government interests in immigration regulation.<sup>163</sup> Indeed, the prohibition against arbitrary interference with family life is one of the most important international human rights protections for non-citizens facing expulsion.<sup>164</sup> The following section presents the robust body of treaty law and international jurisprudence that establishes the human right to family life in the immigration context.

## II. THE INTERNATIONAL HUMAN RIGHT TO FAMILY LIFE

International law regarding the family is relatively new, and prior to the advent of human rights law after World War II, such rules mostly concerned the choice of law in cases before national courts involving immigrants or persons of mixed nationality.<sup>165</sup> The 1948 Universal Declaration on Human Rights (UDHR) provided the first substantive law on the protection of the family.<sup>166</sup> The UDHR established both the right to create a family and the imperative to protect the family as the "natural and fundamental group unit of society."<sup>167</sup> Moreover, it established a specific framework for the protection of this right when it provided that: "[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence" and "[e]veryone has the right to the protection of the law against such interference or attacks."<sup>168</sup> While it is true that some time passed before these rights were cemented in treaties, and then applied explicitly in the immigration context, it is now clear that the right to family life provides both a narrow basis for immigration into a country for purposes of family reunification, as well as a robust defense against expulsion.<sup>169</sup> The human right to family life, therefore,

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162. *Id.* at 84.

163. See Scaperlanda, *supra* note 105, at 84; see also Abrams, *supra* note 105, at 265–66.

164. See discussion *infra* Part II.

165. Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 216 (2003).

166. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 16 (Dec. 10, 1948).

167. *Id.*

168. *Id.* at art. 12.

169. See Vincent Chetail, *The Transnational Movement of Persons under General International Law-Mapping the Customary Law Foundations of International Migration Law*, in RESEARCH HANDBOOK ON INT'L L. & MIGRATION 1, 41–42 (Vincent Chetail & Celine Bauloz eds., 2014).

limits sovereign authority with regard to the regulation of entry and residence of migrants in certain circumstances.<sup>170</sup>

This section will first argue that the United States routinely violates the human right to family life through its mandatory deportation regime by analyzing an Inter-American Commission on Human Rights (Inter-American Commission) case. In *Wayne Smith, Hugo Armendariz, et al. v. the United States*, the Inter-American Commission considered cases of mandatory deportation through the lens of the United States' regional human rights obligations and found violations of a systematic nature.<sup>171</sup> This section goes on to present family life jurisprudence from the UN Human Rights Committee (HRC) and the European Court of Human Rights (European Court), demonstrating that major international human rights bodies have cemented a rule that requires consideration of family life in expulsion cases. Importantly, this body of jurisprudence does not establish an unqualified right to family life for noncitizens.<sup>172</sup> Indeed, international law empowers states to create rules to regulate the movement of non-citizens into their national territory and may decline to reunify family members across borders or expel noncitizens notwithstanding family ties.<sup>173</sup> However, states are required to balance the human right to family life as part of individualized expulsion decisions, and states violate their human rights obligations when they either fail to consider family life or err in properly balancing that right.<sup>174</sup>

#### A. *The U.S. Deportation Regime Violates the Right to Family Life*

The American Declaration on the Rights and Duties of Man (American Declaration) of 1948 mirrors in many important ways the UDHR, finalized later that same year.<sup>175</sup> Specifically with regard to family life, the American Declaration includes the right to establish a family in Article VI and protection against abusive attacks on family life in Article V.<sup>176</sup> In 2010, the Inter-American Commission decided *Wayne Smith* and concluded that the U.S. mandatory deportation

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170. *Id.* at 32.

171. See *Smith v. United States*, Inter-Am. Comm'n. H.R., Report No. 81/10-Case 12.562, ¶¶ 55–60 (2010).

172. See Helen Lambert, *Family Unity in Migration Law: The Evolution of a More Unified Approach in Europe*, in RESEARCH HANDBOOK ON INT'L L. AND MIGRATION 194, 196 (Vincent Chetail & Celine Bauloz eds., 2014).

173. *Id.*

174. See *id.* at 199–200.

175. Compare Organization of American States, American Declaration of the Rights and Duties of Man, O.A.S. G.A. Res. XXX, O.A.S. Doc. OEA/Ser.L.V/II.82 (1948), with G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

176. American Declaration of the Rights and Duties of Man, *supra* note 175, at arts. V–VI.



regime violates these rights as well as related substantive and procedural protections.<sup>177</sup> This case focused on two noncitizens who became mandatorily deportable after the 1996 amendments to the INA eliminated 212(c) relief for LPRs who had been convicted of an aggravated felony.<sup>178</sup> The Commission's decision in *Wayne Smith* is significant because it clearly establishes that the U.S. practice of removing noncitizens for criminal convictions without any consideration of their family ties violates its human rights obligations.<sup>179</sup>

Wayne Smith had been an LPR in the United States for twenty-five years when he was deported.<sup>180</sup> In 1967, when he was ten years old, Mr. Smith arrived in the United States from Trinidad as a dependent of a diplomatic visa holder.<sup>181</sup> While his parents separated in the United States, he lived with his mother and became an LPR in 1974.<sup>182</sup> Unfortunately, Mr. Smith "fell in with the wrong crowd and began using drugs."<sup>183</sup> In February 1990, he was convicted of possession and attempted distribution of cocaine.<sup>184</sup> After pleading guilty, Mr. Smith spent three years in prison.<sup>185</sup>

While serving his time at the Lorton Reformatory, Mr. Smith attended Narcotics Anonymous, participated in classes at the University of the District of Columbia, and coordinated the Christian services at the prison's chapel.<sup>186</sup> Mr. Smith ultimately was paroled for his behavior and rehabilitation.<sup>187</sup>

After his release from prison, Mr. Smith remained an active volunteer with the prison ministry while continuing his studies at the University of the District of Columbia with a scholarship from Action to Rehabilitate Community Housing.<sup>188</sup> He acted as a drug counselor and volunteered with other organizations like the Community for Creative Non-Violence, a charity that provides services for the homeless.<sup>189</sup> He never failed his bimonthly drug screening

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177. *Wayne Smith, Hugo Armendariz, et al. v. United States*, Case 12.562, Inter-Am. Comm'n H.R., Report No. 81/10, ¶ 60 (2010).

178. *Id.* ¶¶ 12–21.

179. *Id.* ¶ 38.

180. Brief for Petitioners at 3, *Wayne Smith, Hugo Armendariz, et al. v. United States*, Case 12.561, Inter-Am. Comm'n H.R., Report No. 81/10 (2010) [hereinafter *Wayne Smith Brief*], [https://www.bc.edu/content/dam/files/centers/humanrights/pdf/Smith-Armendariz\\_Merits\\_Brief\\_FINAL1.pdf](https://www.bc.edu/content/dam/files/centers/humanrights/pdf/Smith-Armendariz_Merits_Brief_FINAL1.pdf) [<https://perma.cc/7HMH-76SH>].

181. *Id.* at 19.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Wayne Smith Brief*, *supra* note 180, at 19.

187. *Id.*

188. *Id.* at 19–20.

189. *Id.* at 20.

and stayed in touch with his parole officer.<sup>190</sup> Mr. Smith and his wife, Ann Smith, established “H&S New Construction Cleaning”; employed around fifteen people, many of whom were recovering from an addiction; bought a family home; and paid taxes.<sup>191</sup>

Deportation proceedings were initiated against Mr. Smith in 1996, and he was ultimately found to be mandatorily deportable for his drug conviction, which meant he had no opportunity to plead the equities outlined above as a defense against deportation.<sup>192</sup> Mr. Smith unlawfully reentered the United States in 1999, after he received news that his family was struggling and desperately needed his support, but he was arrested and once again summarily removed when his prior removal order was reinstated in 2001.<sup>193</sup> This led Mr. Smith to file a petition before the Inter-American Commission on Human Rights in 2002.<sup>194</sup>

The Inter-American Commission is a regional human rights body of the Organization of American States (OAS) with a mandate to promote and protect human rights in OAS Member States.<sup>195</sup> Notably, the Inter-American Commission has authority to consider individual petitions against all OAS Member States for violations of the rights enshrined in the American Declaration.<sup>196</sup> Accordingly, the Commission is the only international human rights body that hears individual cases of human rights abuse against the United States.<sup>197</sup> Cases proceed before the Commission through an admissibility stage, when the Commission makes a determination about certain threshold jurisdictional requirements, and then a merits stage.<sup>198</sup> The merits stage culminates with a decision whether the state in question violated its regional human rights obligations under the American Declaration or the American Convention on Human Rights and various other regional human rights treaties if the state in question has ratified those instruments.<sup>199</sup> Cases against the United States proceed only under the rights enshrined in the American Declaration because it has not ratified any of the regional human rights treaties.<sup>200</sup>

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190. *Id.*

191. *Id.*

192. Wayne Smith, Hugo Armendariz, et al. v. United States, Case 12.562, Inter-Am. Comm'n H.R., Report No. 81/10, ¶ 15 (2010).

193. *Id.* ¶ 16.

194. *Id.* ¶ 1.

195. See Caroline Bettinger-López, *The Inter-American Human Rights System: A Primer*, 42 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 581, 582–83 (2009).

196. *Id.* at 583.

197. *Id.*

198. *Id.* at 586.

199. *Id.* at 582–83, 586.

200. *Id.* at 583.

The Inter-American Commission declared Mr. Smith's case admissible with respect to, among other things, the rights to protection against abusive attacks on family life (Article V), to establish a family life (Article VI), to protection for mothers and children (Article VII), to a fair trial (Article XVIII), and to due process of law (Article XXVI), and the Commission consolidated the case with a similar case filed on behalf of Hugo Armendariz.<sup>201</sup> This was appropriate, inasmuch as the case of Mr. Armendariz had many key similarities to Mr. Smith's case.<sup>202</sup>

Mr. Armendariz was born in Mexico in 1970, came to the United States when he was just two years old, and became an LPR six years later.<sup>203</sup> Mr. Armendariz lived in the United States his entire life and never spent a significant amount of time in Mexico, or learned to read and write in Spanish.<sup>204</sup> He married a U.S. citizen, had one U.S. citizen daughter from a prior relationship for whom he paid child support, and a U.S. citizen stepdaughter with his wife.<sup>205</sup> In 1995, Mr. Armendariz was convicted of possession of cocaine for sale and related charges, and while he was serving his time in 1996, immigration authorities began to pursue his deportation.<sup>206</sup> By the time his case was heard, the immigration judge concluded that IIRAIRA had made Mr. Armendariz mandatorily deportable.<sup>207</sup> The judge therefore declined to consider arguments under 212(c) based on Mr. Armendariz' 1994 marriage to a U.S. citizen, his relationships with his stepdaughter and biological daughter, his U.S. citizen mother, LPR father, and U.S. citizen brother and sisters.<sup>208</sup>

In its 2010 decision on the merits, the Inter-American Commission found that the United States had violated both substantive and procedural human rights protections when it expelled Mr. Smith and Mr. Armendariz without individualized consideration of their family life.<sup>209</sup> First, the Commission addressed the substantive provisions, including "protection of the law against abusive attacks upon . . . family life" (Article V), "the right to establish a family" (Article VI), and the "special protection" that should be afforded to children (Article VII).<sup>210</sup> The Inter-American Commission first answered the

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201. *Wayne Smith, Hugo Armendariz, et al. v. United States*, Case 12.562, Inter-Am. Comm'n H.R., Report No. 81/10, ¶¶ 1–2 (2010).

202. *Id.* ¶¶ 22–23.

203. *Id.* ¶ 19.

204. *Id.*

205. *Id.* ¶¶ 19, 21.

206. *Id.* ¶ 20.

207. *Wayne Smith*, Inter-Am. Comm'n H.R., Report No. 81/10, at ¶ 20.

208. *Id.* ¶ 22.

209. *Id.* ¶¶ 60, 65.

210. *Id.* ¶¶ 47–60.

question of whether immigration enforcement fell within the ambit of the “abusive attacks” on family life contemplated by the American Declaration, and found that it did.<sup>211</sup>

The Commission recognized, on the one hand, the authority of a state to “maintain public order through the control of entry, residence and expulsion of removable [noncitizens],” and on the other that “immigration policy must guarantee to all . . . due process . . . [and] the right to . . . family, and the right to children to obtain special means of protection.”<sup>212</sup> The Commission observed in this regard that “in this area neither the scope of action of the State nor the rights of a noncitizen are absolute,” and “that there must be a balancing test” that weighs state interests against the right to family life.<sup>213</sup> In this regard, the Commission emphasized that interference with family life must be necessary to “meet a pressing need to protect public order,” and that the means must be proportional to the end.<sup>214</sup> Notably, the Commission relied on the jurisprudence of the HRC and the European Court on the right to family life, and recognized the importance of harmonizing the protection of noncitizens’ right to family life across regional and international human rights instruments.<sup>215</sup> Finally, the Commission emphasized that “special protection” for children requires a procedural opportunity in any expulsion proceeding to consider the best interests of children who would be separated from parents subject to removal.<sup>216</sup>

In applying these human rights principles to the U.S. system of mandatory deportation, the Commission found that the absence of any opportunity to present evidence of the impact of their removal on their family life and children’s rights violated these substantive protections.<sup>217</sup> The Commission rejected the United States’ position that requiring such a balancing test would impermissibly infringe on the country’s sovereign rights or “permit criminal aliens to remain in the country with impunity simply by establishing family ties.”<sup>218</sup> The Commission emphasized that neither state authority nor immigrants’ rights are unqualified in this arena, and that “a

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211. *Id.* ¶¶ 47–48.

212. *Id.* ¶¶ 49–50 (quoting American Declaration on the Rights and Duties of Man, art. XXVIII (1948) and IACHR, *Report on the Situation of Human Rights of Asylum seekers within the Canadian Refugee Determination System* (2000)).

213. *Wayne Smith*, Inter-Am. Comm’n H.R., Report No. 81/10, at ¶ 51.

214. *Id.* (quoting IACHR, *Report on the Situation of Human Rights of Asylum seekers within the Canadian Refugee Determination System*, ¶ 166 (2000)).

215. *Id.* ¶¶ 51–54.

216. *Id.* ¶¶ 56–57.

217. *Id.* ¶¶ 58–60.

218. *Id.* ¶ 58.

balancing test is the only mechanism to reach a fair decision between the competing individual human rights and the needs asserted by the State.”<sup>219</sup>

Next, the Inter-American Commission examined the case in light of the United States’ human rights obligations to ensure judicial protection (Article XVIII) and due process (XXVI).<sup>220</sup> The Commission’s decision to consider this case through the lens of procedural protections was novel, inasmuch as the HRC and European Court have only ever considered this issue in expulsion proceedings under the substantive right to family life.<sup>221</sup> The Inter-American Commission specifically found that this was an “independent violation” of Mr. Smith’s and Mr. Armendariz’ rights due to the absence of any procedural mechanism for them to present arguments against their removal related to their right to family life.<sup>222</sup>

The Commission’s decision specified that the violations of the right to family life, special protections for children, and procedural guarantees arose from the absence of any balancing test under the law.<sup>223</sup> It ordered the United States to amend its laws to ensure that resident noncitizens’ right to family life are guaranteed in removal proceedings and provide individualized consideration of the equities in each case.<sup>224</sup> This means that every expulsion case in the United States that denies a noncitizen the opportunity to provide evidence of family life as a defense against expulsion constitutes a human rights violation. Accordingly, any case of mandatory deportation, or any situation in which the immigration judge is prevented from considering evidence of family life due to the conviction of certain crimes, results in a violation of human rights. The following section will demonstrate how this Inter-American rule resonates with identical rules from the European and UN human rights systems.

### *B. Balancing Family Life Against Sovereign Immigration Authority*

The right to family life envisioned by the Universal Declaration was also reiterated in the International Covenant on Civil and Political Rights (ICCPR).<sup>225</sup> The Covenant incorporates almost verbatim

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219. *Wayne Smith*, Inter-Am. Comm’n H.R., Report No. 81/10, at ¶ 58.

220. *Id.* ¶ 61.

221. *Id.* ¶¶ 61–65.

222. *Id.* ¶¶ 64–65.

223. *Id.* ¶ 66.

224. *Id.* ¶ 67.4.

225. Compare International Covenant on Civil and Political Rights arts. 17, 23, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], with G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 16 (Dec. 10, 1948).

the Universal Declaration when it provides that “the family is the natural and fundamental group unit of society . . . entitled to protection by society and the State.”<sup>226</sup> The Human Rights Committee (HRC) has interpreted this right to include “the adoption of appropriate measures . . . to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.”<sup>227</sup> Article 17 of the ICCPR protects against “arbitrary or unlawful interference with . . . privacy, family, home or correspondence,” and the HRC has also extended this protection to the immigration context.<sup>228</sup> Specifically, the HRC has suggested that “in certain circumstances, an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when . . . respect for family life arise.”<sup>229</sup> The question, then, is what are the “certain circumstances” contemplated by the ICCPR that might compel States to permit entry or residence of migrants in a manner protective of the right to family life.<sup>230</sup>

The European Court asks a similar question in evaluating whether actions by the Council of Europe Member States violate the right to family life envisioned in Article 8 of the European Convention on Human Rights (ECHR).<sup>231</sup> Like the Universal Declaration, the American Declaration, and the ICCPR, the ECHR’s Article 8 ensures that “[e]veryone has the right to respect for his private and family life” and protects that family life from “interference by a public authority” in certain circumstances.<sup>232</sup> The ECHR articulates the parameters for such interference in the text of the treaty, where it provides that it must be “in accordance with the law and . . . 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.”<sup>233</sup>

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226. ICCPR, *supra* note 225, at art. 23.

227. H.R. Comm., Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, at 29–30 (July 29, 1994).

228. *Id.* at 20.

229. *Id.* at 19 (stating that “[t]he Covenant does not recognize the right of aliens to enter or reside in the territory of a State party . . . [h]owever, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of . . . respect for family life arise.”).

230. *Id.*

231. EUR. CT. H.R., GUIDE ON ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE, HOME AND CORRESPONDENCE 82 (2020) [hereinafter GUIDE ON ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS], [https://www.echr.coe.int/Documents/Guide\\_Art\\_8\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf) [<https://perma.cc/92UQ-LHBV>].

232. European Convention on Human Rights art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

233. ICCPR, *supra* note 225, at art. 8.

The European Court will often conduct a two-prong review of an alleged Article 8 violation, following the structure of the article itself.<sup>234</sup> First, the Court will consider the case under Article 8.1, and decide whether there was government interference with family life.<sup>235</sup> This includes an inquiry into the specific family ties at issue, and it is well-established that the Court only considers the nuclear family to receive the protection of family life.<sup>236</sup> The Court tends to move through this first prong of analysis fairly quickly, and then moves to the Article 8.2 question whether the interference was “necessary in a democratic society,” and therefore permitted by the ECHR.<sup>237</sup> This inquiry parallels the HRC inquiry into the “certain circumstances” in which the ICCPR may compel a state to reunify noncitizens or stay an expulsion to maintain family unity.<sup>238</sup> The following subsections consider both European Court and HRC jurisprudence on the right to family life in three scenarios, including transnational family reunification, expulsion for immigration law violations, and expulsion for criminal law violations.

### 1. *Immigrant Admissions and Family Life*

Studies have shown that almost one third of the global population of migrants initially transited international borders to reunify with family members.<sup>239</sup> Among the industrialized nations of the Organisation for Economic Co-operation and Development (OECD),<sup>240</sup> family reunification and formation together with accompanying family members account for 38% of permanent migration, and this rate has been increasing since 2015.<sup>241</sup> Beyond this unmistakable trend in how and why global migration occurs, scholars have recognized that such migrants enjoy relevant international law protections for the family.<sup>242</sup>

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234. GUIDE ON ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 231, at 6.

235. *Id.*

236. *Id.* (noting how the protection of “private life” under the same article protects the unity of extended family and non-traditional families). *See id.* at 26–27 (stating that the scope of “private life” protections include protections for relationships between adults and children with no biological ties, protections for medically assisted procreation, protections for adopted families even outside standard procedure, and protections for embryos).

237. *Id.* at 12.

238. *See* H.R. Comm. *supra* note 227, at 11, 29–30.

239. Chetail, *supra* note 169, at 41.

240. *Member Countries*, ORG. OF ECON. CO-OPERATION & DEV., <http://www.oecd.org/about/membersandpartners> [https://perma.cc/X6LH-3J4B].

241. ORG. OF ECON. CO-OPERATION & DEV., INTERNATIONAL MIGRATION OUTLOOK 2018: RECENT DEVELOPMENTS IN INTERNATIONAL MIGRATION MOVEMENTS AND POLICIES 21 (2018), [https://read.oecd-ilibrary.org/social-issues-migration-health/international-migration-outlook-2018\\_migr\\_outlook-2018-en#page20](https://read.oecd-ilibrary.org/social-issues-migration-health/international-migration-outlook-2018_migr_outlook-2018-en#page20) [https://perma.cc/EQ75-D74P].

242. Chetail, *supra* note 169, at 41 (citing J. Vedsted-Hansen, *Migration and the Right*

The European Court is the only human rights body to seriously consider the contours of the human right to transnational family reunification in a trilogy of cases, including *Sen v. the Netherlands*,<sup>243</sup> *Gül v. Switzerland*,<sup>244</sup> and *Ahmut v. the Netherlands*.<sup>245</sup> *Sen v. the Netherlands* concerned two Turkish nationals who held residence permits in the Netherlands and who wanted to reunify with their daughter.<sup>246</sup> Zeki Sen immigrated to the Netherlands in 1977, and married his wife Güllden Sen in Turkey in 1980, who subsequently succeeded in immigrating to the Netherlands with her husband in 1986.<sup>247</sup> The Sens had one child, Sinem, in Turkey in 1983, and Güllden left Sinem in her aunt's custody at the age of three when Güllden moved to the Netherlands to join her husband.<sup>248</sup> In the Netherlands, the Sens proceeded to have two more children, born in 1990 and 1994 respectively.<sup>249</sup> The Sens' petition to gain residence for Sinem was denied, with the Netherlands concluding that the family bond between the parents and the child had been broken when they left her in her aunt's custody.<sup>250</sup> The matter was then presented to the European Court as a violation of the family's rights under Article 8 of the ECHR.<sup>251</sup>

The European Court proceeded through the two-part analysis, finding first that there was a family life between the Sens and their daughter in Turkey, and that refusal by the Netherlands to issue her a residence permit constituted "interference" for purposes of the Convention.<sup>252</sup> The Court's inquiry into whether the interference was justified by some conventional reason was characteristically fact-based,<sup>253</sup> and looked both at the circumstances of the family separation as well as the possible repercussions for reunifying the

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to *Family and Private Life, in Mondialisation, migration et droits de l'homme* 722 (Vincent Chetail, ed., 2007)).

243. *Sen v. the Netherlands*, 36 Eur. Ct. H.R. 7 (2001).

244. *Gül v. Switzerland*, App. Np. 23218/94, 1996-I Eur. Comm'n H.R. Dec. & Rep. 159 (1994).

245. *Ahmut v. the Netherlands*, App. No. 21702/93, 1996-VI Eur. Comm'n H.R. 579 (1996).

246. *See Sen v. the Netherlands*, 12 Hum. Rts. Case Dig. 963, 963 (2001). This discussion relies on the facts of the case presented in this case digest because the judgement of the Court is only in French.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 964.

252. *See* Ryan T. Mrazik & Andrew I. Schoenholtz, *Protecting and Promoting the Human Right to Respect for Family Life: Treaty-Based Reform and Domestic Advocacy*, 24 GEO. IMMIGR. L.J. 651, 657 (2010).

253. *See id.*



family in Turkey.<sup>254</sup> Specifically, the Court noted that the Sens had voluntarily left Sinem in Turkey, and that she had developed strong cultural ties with her country of nationality.<sup>255</sup> However, the Court noted that the possibility of family reunification in Turkey was made difficult because of the Sens' deep ties in the Netherlands, which included two children born and raised there.<sup>256</sup> The Court concluded that the hardship of moving the entire family unit to Turkey posed too much of a burden, particularly for the children born in the Netherlands, and that the most appropriate way to protect the right to family life was for Sinem to migrate to the Netherlands.<sup>257</sup>

The European Court's decision in *Sen v. the Netherlands* confirms that there are circumstances in which the human right to family life will require a state to admit an immigrant to its territory over the state's objection.<sup>258</sup> The circumstances in *Sen*, however, suggest that the right to family life in the family reunification context is limited, and this is confirmed by two other cases in which the European Court found no violation of family life in the reunification context.<sup>259</sup> Specifically, the European Court decided *Gül v. Switzerland* and *Ahmut v. the Netherlands* in 1996 and upheld the authority of Switzerland and the Netherlands, respectively, to deny residency permits to children who wanted to reunite with their parents.<sup>260</sup>

In *Gül v. Switzerland*, two Turkish nationals who had established residency in Switzerland petitioned for their son to join them and were denied.<sup>261</sup> In this case, Mr. Gül left his wife and two children to seek asylum in Switzerland and was able to obtain residency notwithstanding the denial of his asylum claim.<sup>262</sup> Mrs. Gül had joined him a few years later on a humanitarian permit to secure medical services, and they next applied for a residency permit for one of their sons.<sup>263</sup> The European Court found in this case that "there were no obstacles to the development of a family life in Turkey," and that the circumstances did not require reunification against the will of the state.<sup>264</sup> Similarly, in *Ahmut v. the Netherlands*, a Moroccan man, Ahmut, sought permission for his son, Souffiane, to enter the

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254. *See id.* at 662.

255. *Sen v. the Netherlands*, 12 Hum. Rts. Case Dig. 963, 964 (2001).

256. *Id.* at 964–65.

257. *See id.* at 965.

258. *Id.*

259. Mrazik & Schoenholtz, *supra* note 252, at 662–63.

260. *Id.*

261. *See id.* at 661.

262. *Id.*

263. *Id.*

264. *Id.*

Netherlands after his ex-wife passed away in Morocco and left his five children in the care of her mother.<sup>265</sup> Ahmut attained citizenship in Morocco in 1990, the same year that Souffiane came to live with him in the Netherlands, but was subsequently denied a residency permit.<sup>266</sup> Ultimately, the European Court found no violation of family life because there was no significant impediment to the enjoyment of family life in Morocco.<sup>267</sup>

Comparing *Sen* with *Gül* and *Ahmut*, it is evident that the Court's conclusion about the appropriate locus of family life is a significant factor in cases about family reunification.<sup>268</sup> Indeed, in *Sen*, the Court considered that both parents had established residency in the Netherlands and two of their children had been born and educated there, supporting a conclusion that the Netherlands was the locus of family life.<sup>269</sup> While Sinem was born and raised in Turkey, making that an appropriate locus for her life, the Court believed that it would be too onerous for the parents and two siblings to join her there, making the Netherlands the appropriate locus of their family life.<sup>270</sup> In contrast, the parents in *Gül* were not permanent residents in Switzerland and they possessed cultural and linguistic connections to Turkey, leading the Court to conclude in that case that nothing prevented them from developing their family life in Turkey.<sup>271</sup> Similarly, in *Ahmut*, the child lived in Morocco and had family there, whereas his father was alone in the Netherlands and still had substantial connections to Morocco, including citizenship, making Morocco the most appropriate locus for family life.<sup>272</sup> Accordingly, a reasoned consideration of the proper locus of family life is central to a determination about whether an immigration admissions decision violated that right under Article 8.<sup>273</sup>

The Court's concern for the best interest of the child in these cases is manifest. This includes both an interest in being close to parents and other family members, as well as an interest in living in the context where the child is "at home" culturally and linguistically.<sup>274</sup> In both *Gül* and *Ahmut*, the Court emphasized that the children had lived in their respective countries of nationality their

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265. Mrazik & Schoenholtz, *supra* note 252, at 661.

266. *Id.* at 661–62.

267. *Id.* at 662.

268. *See id.* at 661–62 (discussing the Court's analysis in each of the cases).

269. *See Sen v. the Netherlands*, 12 Hum. Rts. Case Dig. 963, 965 (2001).

270. Mrazik & Schoenholtz, *supra* note 252, at 662–63.

271. *Id.* at 661.

272. *See id.* at 661–62.

273. *Id.*

274. *Id.* at 653, 666.

whole lives and had been acculturated there.<sup>275</sup> In *Sen*, the Court made a similar finding about Sinem's cultural and linguistic comfort, but also considered the best interest of Sinem's two siblings born in the Netherlands.<sup>276</sup> This, perhaps more than any other factor, appears to account for the different outcomes in these cases.

Specifically with regard to the best interest of the child, the main UN instrument in this regard is the Convention on the Rights of the Child (CRC), and that treaty requires that "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification" are dealt with in a "positive, humane and expeditious manner."<sup>277</sup> This guarantee is both substantive and procedural in nature, and it suggests favorable treatment of such requests.<sup>278</sup> Moreover, the near universal ratification of this instrument suggests that such principles may be on their way to attaining the status of customary international law.<sup>279</sup> Notably, some scholars have gone so far as to argue that a customary international law norm already exists to facilitate the reunification of a minor child with her parents lawfully residing in the country of immigration.<sup>280</sup> While controversial in the family reunification context, it is much more difficult to dispute the evolution of a customary international law norm that requires the consideration of family life in expulsion cases that would permanently remove one member of a nuclear family.<sup>281</sup> The subsections that follow consider the right to family life in cases of expulsion for civil immigration law violations as well as criminal law violations.

## 2. *Unauthorized Immigration and Family Life*

The HRC has resolved a number of individual cases involving the right to family life as a defense against expulsion, and in so doing, it has articulated a very progressive framework for protection of unauthorized migrants.<sup>282</sup> For example, the HRC has found that an undocumented immigrant who has established substantial family

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275. *Id.* at 667.

276. See Mrazik & Schoenholtz, *supra* note 252, at 667.

277. G. A. Res. 44/25, art. 10(1) (Nov. 20, 1989).

278. Chetail, *supra* note 169, at 45.

279. *Id.* at 46.

280. See *id.* at 44.

281. *Id.*

282. See, e.g., Hum. Rts. Comm., 98th Sess., ¶¶ 11.1(a)–(b), 14.3–17. U.N. Doc. CCPR/C/98/D/1246/2004 (Mar. 25, 2010); Rep. of the Hum. Rts. Comm., ¶¶ 8.1–8.3, U.N. Doc. A/64/40 (Vol. II) (2009); Hum. Rts. Comm., 81st Sess., ¶¶ 9.7–10, U.N. Doc. CCPR/C/81/D/1011/2001 (2004) [hereinafter *Madafferi v. Australia*].

ties should not be deported unless the state has a significant interest beyond immigration regulation.<sup>283</sup> In another case involving an undocumented immigrant with family ties, the HRC found that the fact that the individual had withheld information about prior criminal conduct in his country of nationality during the initial immigration process did not justify expulsion.<sup>284</sup> A close examination of these cases provides meaningful insight into the scope of the family life defense against expulsion.

In *Winata v. Australia*, Hendrik Winata and So Lan Li, a couple who had overstayed their visas and remained in Australia without authorization, contested the denial of their visa applications as a violation of their right to family life.<sup>285</sup> Hendrik had lived in Australia since 1985, and So Lan since 1987.<sup>286</sup> Both had overstayed their visas, and the couple had an Australian citizen son who was born during their unauthorized stay.<sup>287</sup> The HRC indicated that no Covenant violation necessarily occurs from denying visas to immigrants who overstay their visas and remain without authorization, even if the couple has a child with citizenship in the country in question.<sup>288</sup> However, where the couple has lived with their child in the country for a substantial period of time, in this case thirteen years, the HRC found “it is incumbent on the State party to demonstrate additional factors justifying the removal of both parents that go beyond a simple enforcement of its immigration law in order to avoid a characterization of arbitrariness.”<sup>289</sup> The HRC concluded that removal in this case would violate the right to family life.<sup>290</sup> The HRC recommended that Australia re-examine the visa applications “with due consideration given to the protection required by [the couple’s child’s] status as a minor.”<sup>291</sup> The HRC further found that Australia was under an obligation to ensure that similar violations did not occur in the future.<sup>292</sup>

The HRC further expanded the protection of family life in *Madafferi v. Australia*, where it found Australia’s decision to deport Francesco Madafferi away from his Australian wife and four children

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283. See, e.g., Hum. Rts. Comm., 72nd Sess., ¶¶ 7.1–7.3, U.N. Doc. CCPR/C/72/D/930/2000 (Aug. 16, 2001) [hereinafter *Winata v. Australia*].

284. *Madafferi v. Australia*, Hum. Rts. Comm., 98th Sess. at ¶ 9.8.

285. *Winata v. Australia*, Hum. Rts. Comm., 72nd Sess., at ¶¶ 2.1, 2.6.

286. *Id.* ¶ 2.1.

287. *Id.* ¶¶ 2.1–2.2.

288. *Id.* ¶ 7.3.

289. *Id.*

290. *Id.*

291. *Winata v. Australia*, Hum. Rts. Comm., 72nd Sess., at ¶ 9.

292. *Id.*

violated his right to family life.<sup>293</sup> Francesco had entered Australia on a tourist visa in 1989, but let his visa expire as he made plans to marry Anna Maria Madafferi, an Australian national.<sup>294</sup> Francesco believed he derived legal residency automatically due to his marriage, and remained without authorization for fourteen years, during which time he had four Australian children with Anna Maria.<sup>295</sup> In 1996, Francesco came to the attention of immigration authorities, which denied his application for a spousal visa due to his revelation that he had a criminal record in his native Italy.<sup>296</sup> Appeals over the next six years resulted in a final expulsion order, and Francesco presented his case to the HRC alleging a violation of his right to family life.<sup>297</sup>

In reviewing the case, the HRC invoked the familiar refrain that Australia's legitimate desire to deport noncitizens who violate immigration laws should be balanced against the harm a deportation will have on the family of the person deported.<sup>298</sup> First, the HRC considered that Francesco's criminal conduct in Italy had occurred twenty years prior, that the convictions had been extinguished, and there were no outstanding warrants.<sup>299</sup> Next, the HRC considered that it would be exceedingly burdensome for Anna Maria and their four children to move to Italy, particularly considering the age of the children.<sup>300</sup> Ultimately, the HRC concluded that the removal of Francesco would violate the ICCPR protection from arbitrary interference with the family, in conjunction with special protections for children and the family unit.<sup>301</sup>

Like the HRC, the European Court has developed a rich body of jurisprudence on the right to family life as a defense against expulsion by unauthorized migrants,<sup>302</sup> but for purposes of this discussion it is important to note that the European Court understands family life to be limited to the nuclear family.<sup>303</sup> Specifically, the

293. *Madafferi v. Australia*, Hum. Rts. Comm., 72nd Sess., at ¶ 9.8.

294. *Id.* ¶¶ 2.1–2.2.

295. *Id.* ¶ 2.2.

296. *Id.* ¶¶ 2.3–2.4.

297. *Id.* ¶¶ 2.5–3.1.

298. *See id.* ¶ 9.8.

299. *Madafferi v. Australia*, Hum. Rts. Comm., 72nd Sess., at ¶ 9.8.

300. *Id.*

301. *Id.* (finding a violation of Article 17.1 “in conjunction with article 23, of the Covenant in respect of all of the authors, and additionally, a violation of article 24, paragraph 1, in relation to the four minor children due to a failure to provide them with the necessary measures of protection as minors”).

302. *See* GUIDE ON ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 231, at 82.

303. *Id.* at 63.

Court has found that family life exists between spouses, and that children born of spouses are automatically part of that family life.<sup>304</sup> While adult children are not generally considered to have a family life with their parents and siblings,<sup>305</sup> the Court has accepted that young adults may still have a family life with their parents and other close family members if they have not yet established their own families.<sup>306</sup> Notably, the European Court will consider interference in the relationship between non-nuclear family members under Article 8 as a violation of private life.<sup>307</sup> Because of this fairly precise delineation between relationships as family life and those protected as private life, it is important to examine how the European Court understands the limits of the nuclear family.

In *Berrehab v. the Netherlands*, the European Court demonstrated a flexible approach to family life, even within the more conservative confines of the nuclear family.<sup>308</sup> In that case, Abdellah Berrehab, a Moroccan national, had initially established residency in the Netherlands through his marriage to Sonja Koster, a Dutch citizen.<sup>309</sup> However, the couple divorced a couple years later just as their daughter was born, and the Netherlands rejected Abdellah's request to renew his visa, notwithstanding the birth of his daughter.<sup>310</sup> Abdellah maintained visitation while he fought his deportation, but was ultimately deported and unable to continue a regular visitation schedule as a result.<sup>311</sup> Abdellah was then able to secure a one-month permit to visit his daughter, and after he returned, he and Sonja remarried, which then served as the basis for a residency permit.<sup>312</sup> Abdellah filed a case before the European Court arguing that his deportation had been in violation of his right to family life, and the Court found that family life did exist with his daughter notwithstanding his divorce from his wife and non-custodial relationship with his daughter.<sup>313</sup> The Court went on to find that his deportation violated his right to family life.<sup>314</sup>

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304. See *Berrehab v. the Netherlands*, 138 Eur. Ct. H.R. (ser. A) at 14 (1989); see also *Abdulaziz v. United Kingdom*, 94 Eur. Ct. H.R. (ser. A) at 32 (1985).

305. See GUIDE ON ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 231, at 83 (citing *Kwakyie-Nti and Dufie v. the Netherlands*, App. No. 31519/96 Eur. Comm'n H.R. Dec. & Rep. (2000)).

306. *Maslov v. Austria*, 2008-III Eur. Ct. H.R. 301, 321.

307. *Slivenko v. Latvia*, 2003-X Eur. Ct. H.R. 229, 232.

308. *Berrehab v. the Netherlands*, 138 Eur. Ct. H.R. (ser. A) at ¶ 21 (1989).

309. *Id.* ¶¶ 7–8.

310. *Id.* ¶¶ 9–10.

311. *Id.* ¶¶ 9, 12.

312. *Id.* ¶ 13.

313. *Id.* ¶¶ 17, 21.

314. *Berrehab*, 138 Eur. Ct. H.R. (ser. A) at ¶ 29.

In *Jeunesse v. the Netherlands*, Meriam Jeunesse challenged her order of deportation arising from her visa overstay because it violated her right to family life.<sup>315</sup> Meriam was born and raised in Suriname, and had Dutch nationality until Suriname's independence in 1975.<sup>316</sup> She began a relationship with a man from Suriname (Mr. W) in the early 1990s, and when he moved to the Netherlands and acquired Dutch nationality, she made repeated attempts to join him.<sup>317</sup> She finally succeeded in 1997 when she received a visitor visa for forty-five days, after which time she remained in the Netherlands and never returned to Suriname.<sup>318</sup> Meriam married Mr. W in 1999, and they subsequently had three children in 2000, 2005, and 2010, while she continued to work to regularize her immigration status.<sup>319</sup> Meriam filed her case with the European Court after years of litigation to defend her right to family life in the Netherlands.<sup>320</sup>

The European Court recognized the complexity of a case where the family life asserted in defense against expulsion was developed during a noncitizen's unauthorized stay in the country of immigration.<sup>321</sup> The Court noted that a State is under no obligation to permit a noncitizen to remain in country awaiting the decision on a residence permit, but if the State does permit physical presence, it must recognize that social and family connections may follow.<sup>322</sup> The Court emphasized, however, that a state is under no obligation to recognize a family unity claim in such circumstances.<sup>323</sup> The Court distinguished this type of case from that of a "settled migrant," like those in which residents are deemed deportable because of criminal conduct, and where the Court must ensure that "fair balance has been struck between the grounds underlying the authorities' decision to withdraw the right of residence and the Article 8 rights of the individual concerned."<sup>324</sup> The Court approaches such cases in a manner similar to reunification cases where it considers whether

315. *Jeunesse v. the Netherlands*, 60 Eur. Ct. H.R., at ¶¶ 13, 76–77 (2015).

316. *Id.* ¶ 9.

317. *Id.* ¶¶ 9–10, 12.

318. *Id.* ¶ 13.

319. *Id.* ¶¶ 16, 18, 41.

320. *See id.* ¶¶ 1, 100.

321. *See Jeunesse*, 60 Eur. Ct. H.R., at ¶¶ 100–03.

322. *Id.* ¶ 103 (citing *Chandra v. the Netherlands*, App. No. 53102/99 (May 13, 2003); *Benamar v. the Netherlands*, App. No. 43786/04 (Apr. 5, 2005); *Priya v. Denmark*, App. No. 13594/03 (July 6, 2006); *Rodrigues da Silva v. the Netherlands*, 2006-I Eur. Ct. H.R. (2006); *Omoregie v. Norway*, App. No. 265/07, § 64 (July 31, 2008); and *B.V. v. Sweden*, App. No. 57442/11 (Nov. 13, 2012)).

323. *Jeunesse*, 60 Eur. Ct. H.R., at ¶ 103.

324. *Id.* ¶ 104.

the state has a “positive obligation” to grant residency, as compared to a negative obligation not to rescind permission to reside.<sup>325</sup>

While the Court recognized that the distinction between a state’s positive and negative obligations in immigration cases that implicate the right to family life is difficult to define with precision, it set forth the following considerations for such cases:

[1] the extent to which family life would effectively be ruptured, [2] the extent of the ties in the Contracting State, [3] whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned and [4] whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion.<sup>326</sup>

Moreover, the Court acknowledged the unique circumstances in which family ties are formed during the pendency of a noncitizen’s request to reside and provided that States may consider that such ties were formed when the possibility to remain was uncertain or precarious.<sup>327</sup> Where this is the case, the Court asserts that “it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8.”<sup>328</sup> At the same time, the Court recognized the established principle under international law that all decisions that involve children must adequately account for their best interest.<sup>329</sup>

In Meriam Jeunesse’s case, the European Court found such “exceptional circumstances.”<sup>330</sup> The Court first emphasized that all members of Meriam’s family were nationals of the Netherlands with a right to enjoy their family life in the country of their nationality, and that she held Dutch nationality as a child that she lost automatically when Suriname became independent.<sup>331</sup> Then the Court considered that she had lived in the Netherlands for sixteen years with no criminal incidents, and that Dutch authorities tolerated her presence for this entire time while it completed consideration of her residency request.<sup>332</sup> Whereas the Court acknowledged that nothing prevented Meriam’s husband and three children from accompanying

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325. *See id.* ¶ 105 (citing *Ahmut v. the Netherlands*, 1996-VI Eur. Ct. H.R. at § 63 (1996)).

326. *Id.* ¶ 107.

327. *Id.* ¶ 108.

328. *Id.*

329. *See Jeunesse*, 60 Eur. Ct. H.R., at ¶ 109.

330. *Id.* ¶ 122.

331. *Id.* ¶ 115.

332. *Id.* ¶ 116.



her to Suriname, it found that they would “experience a degree of hardship if they were forced to do so.”<sup>333</sup> Finally, the Court considered the impact of the decision to deport Meriam on her children to be an important feature of the case, and the Court recognized that she was the primary caretaker for the children and that rupturing that relationship would be disruptive.<sup>334</sup> Ultimately, the Court found this to be an exceptional case, that the Netherlands did not adequately balance the necessary considerations, and that it violated its Article 8 obligations as a result.<sup>335</sup>

There are a number of important themes that emerge from this review of the HRC and European Court jurisprudence. First, there are different conceptions of family that are relevant to “family life” under the relevant human rights instruments.<sup>336</sup> However, there is consensus that the nuclear family, including a spouse and children, is always proper when considering state interference with family life.<sup>337</sup> Second, the standard used by the European Court in assessing the family life claims of noncitizens who form families during a period of unauthorized presence seems more onerous than that applied by the HRC.<sup>338</sup> Nevertheless, there is a clear consensus that family life must always be considered as part of an individualized decision whether to let an unauthorized immigrant remain, even if only exceptional cases may merit protection in Europe.<sup>339</sup> Finally, at least in the European jurisprudence, there appears to be a meaningful distinction between the situations of unauthorized immigrants and lawful residents who engage in conduct that makes them deportable.<sup>340</sup> For that reason, the next section reviews the body of jurisprudence that, like the *Wayne Smith* case discussed in the previous section, concerns the state’s obligation to consider the family life of noncitizens who violate criminal laws.

### 3. Criminal Law Violations and Family Life

The HRC specifically addressed the State’s interest in the expulsion of noncitizens who commit crimes in *Dauphin v. Canada*.<sup>341</sup> In that case, John Michaël Dauphin was a Haitian national who had

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333. *Id.* ¶ 117.

334. *Id.* ¶ 118.

335. *See Jeunesse*, 60 Eur. Ct. H.R., at ¶¶ 122–23.

336. *Id.* ¶ 106.

337. *Id.* ¶ 115.

338. *See id.* ¶¶ 101–03.

339. *Id.* ¶ 107.

340. *Id.* ¶ 104.

341. *Dauphin v. Canada*, Comm. No. 1792/2008, U.N. Doc. A/64/40, ¶¶ 2.1–2.4 (2009).

resided in Canada since the age of two, and believed himself to be a Canadian citizen until he was convicted of robbery with violence at the age of eighteen and sentenced to thirty-three months in prison.<sup>342</sup> Canadian authorities found John Michaël deportable for his crime, and disregarded his argument that he had no family in Haiti, as his parents, brothers, and sisters had all acquired Canadian citizenship.<sup>343</sup> In considering whether the deportation of John Michaël would violate his right to family life under the ICCPR, the HRC made important findings both with regard to the interference and proportionality prongs of the family life analysis.<sup>344</sup>

First, the HRC found that John Michaël's parents and siblings were his family for purposes of Article 17 protection, and considered his young age and that he had no family in Haiti in concluding that his deportation would constitute interference with his family life.<sup>345</sup> Second, as the HRC acknowledged the legitimate aim of deportation as a public safety measure, it found that Canada must consider that John Michaël committed his single criminal offense when he was only eighteen.<sup>346</sup> Ultimately, the HRC found that John Michaël would suffer "drastic effects" if deported from Canada, where he had his whole family, to Haiti, where he had no one, and concluded that his removal would be disproportionate to the legitimate aims of the Canadian state and, therefore, in violation of his family life under the ICCPR.<sup>347</sup>

Whereas the HRC clearly recognizes the authority of the state to promote public safety through the expulsion of persons convicted of crimes, it is clear these government interests cannot be advanced without regard to family life.<sup>348</sup> Indeed, the HRC requires that the State consider the length of time that an immigrant has resided in the country of immigration, the extent of family ties in the country of immigration, as well as the country of nationality.<sup>349</sup> These considerations must be weighed against the government's interests in promoting public safety, and deportation may be considered disproportionate in a wide variety of circumstances where substantial family ties would be compromised.<sup>350</sup>

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342. *Id.* ¶¶ 2.1, 8.2.

343. *Id.* ¶ 2.2.

344. *Id.* ¶ 8.4.

345. *Id.* ¶ 8.3 (relying on HRC General Comments 16 and 19, recalling "the concept of the family is to be interpreted broadly").

346. *Id.* ¶ 8.4.

347. *Dauphin*, U.N. Doc. A/64/40, at ¶ 8.4 (finding that his deportation would violate both Articles 17 and 23, paragraph 1 of the ICCPR).

348. *Id.* ¶ 8.3.

349. *Id.*

350. *See Jeunesse v. the Netherlands*, 60 Eur. Ct. H.R. at ¶ 104 (2015).

The European Court has also developed a body of jurisprudence addressing balancing the right to family life against the authority of the state to expel noncitizens convicted of crimes.<sup>351</sup> Notably, as a number of European States have passed legislation that prohibits the expulsion of long-term immigrants who were born in the state or arrived at a young age, the European Court has not found an absolute defense against removal for such persons under the ECHR.<sup>352</sup> Rather, the European Court has recognized the right of a State party to the ECHR to expel resident immigrants for criminal activity, but insists that such expulsions must be proportionate in light of the likely effects of such interference with the deportee's family life.<sup>353</sup> Whereas the Court has adopted the notion of balancing set forth by the HRC, it has been more specific about the appropriate framework for analysis.<sup>354</sup>

European Court cases fall into two broad categories, including young offenders whose main familial connection is to parents and siblings, and offenders who have a spouse and children.<sup>355</sup> The Court has referred to younger offenders who do not have a spouse and children as "second generation" noncitizens, and generally the Court considers their cases under the "private life" provision of Article 8.<sup>356</sup> In such cases, the Court has indicated that it will consider:

[1] the nature and gravity of the offences committed by the applicant; [2] the length of his stay in the host country; [3] the period which elapsed between the commission of the offences and the impugned measure and the applicant's conduct during that period; [and] [4] the solidity of social, cultural and family ties with the host country and with the country of destination.<sup>357</sup>

In *Moustaquim v. Belgium*, the Court applied this analysis and found a violation of Article 8 where the young offender had as many as twenty-two convictions for theft crimes.<sup>358</sup> Notably, the Court has also upheld deportations where the crimes of "second generation" immigrants are especially severe "such as rape or armed robbery, for which unconditional prison terms of five or more years had been imposed."<sup>359</sup> Regardless of the severity of the crime, the European

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351. *Id.*

352. *See U'ner v. the Netherlands*, App. No. 46410/99 ¶ 57 (Oct. 18, 2006).

353. *Id.* ¶¶ 57–59.

354. *Id.* ¶¶ 58–59.

355. *Maslov v. Austria* (First Section), App. No. 1638/03, ¶ 36 (Mar. 22, 2007).

356. *Id.*

357. *Id.*

358. *Moustaquim v. Belgium* (A/193) App. No. 12313/86, ¶ 15 (Feb. 18, 1991).

359. *Maslov v. Austria*, App. No. 1638/03, ¶ 40 (June 23, 2008) (citing *Bouchelkia v. France*, App. No. 1638/03, ¶ 65 (Jan. 29, 1997) and *Boujlifa v. France*, App. No. 25404.94

Court consistently requires a balancing of the noncitizen's family ties against the state interests in expulsion.<sup>360</sup>

In those cases involving noncitizens who have established their family life in the country of immigration, with a spouse and children, the Court considers:

[1] the nature and seriousness of the offence committed by the applicant; [2] the length of the applicant's stay in the country from which he or she is to be expelled; [3] the time elapsed since the offence was committed and the applicant's conduct during that period; [4] the nationalities of the various persons concerned; [5] the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life; [6] whether the spouse knew about the offense at the time when he or she entered into a family relationship; [7] whether there are children of the marriage, and if so, their age; [8] the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled; and [9] the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled.<sup>361</sup>

Cases in which the Court has applied these considerations are illustrative.

In *Kolonja v. Greece*, Greece moved to expel an Albanian national of Greek origin who had lived in Greece for several years before being sentenced to seven years in prison for a drug conviction.<sup>362</sup> Stefan Kolonja was married to a Greek national and had two Greek children, but was nonetheless ordered to be deported to Albania and permanently banned from reentering Greece.<sup>363</sup> Following his deportation, he returned to Greece illegally, and was again deported, at which point he brought his case to the European Court.<sup>364</sup> On balancing Mr. Kolonja's family life against the State's interest in maintaining public safety, the European Court found that both the decision and the permanent ban on reentry violated his right to family life.<sup>365</sup> In this regard, the jurisprudence of the European Court coincides

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(Oct. 21, 1997)).

360. *Jeunesse v. the Netherlands*, 60 Eur. Ct. H.R. at ¶ 121 (2015).

361. *Üner v. the Netherlands*, App. No. 46410/99, ¶¶ 57–58 (Oct. 18, 2006).

362. *Kolonja v. Greece*, App. No. 49441/12, 1 (May 19, 2016), <http://hudoc.echr.coe.int/leng?i=001-162856> [<https://perma.cc/8CH4-JP98>].

363. *Id.*

364. *See id.*

365. Press Release, Eur. Ct. of H.R., Press Release: Judgments and Decisions of 19 May 2016 (2016).

with that of the HRC and the Inter-American Commission in expulsion cases.

Central to all HRC, European Court, and Inter-American cases involving the noncitizens' right to family life is the imperative that states balance the individual right to maintain important family ties against the legitimate interest of the state to enforce its immigration laws.<sup>366</sup> Indeed, even in the most egregious cases of persistent unlawful presence,<sup>367</sup> return in violation of an immigration ban,<sup>368</sup> or the commission of serious crimes,<sup>369</sup> this robust body of international human rights jurisprudence requires states to balance the noncitizens' right to family life. The final section of this Article will argue that this norm has been cemented as customary international law, which the United States is required to apply, and that the U.S. Supreme Court erred when it failed to do so in its recent decision in *Barton v. Barr*.

### III. *BARTON V. BARR* CONTRAVENES CUSTOMARY INTERNATIONAL LAW

In May 2020, the U.S. Supreme Court issued its decision in *Barton v. Barr*, which resolved a circuit split on the proper application of the “stop-time” rule for cancellation of removal.<sup>370</sup> That rule establishes that the accrual of seven years of continuous residence (LPR cancellation) or ten years of continuous physical presence (non-LPR cancellation) will terminate with either the initiation of removal proceedings or the commission of an enumerated criminal offense.<sup>371</sup> The issue in *Barton* concerned the proper interpretation of the second provision, which terminates the requisite continuous period for cancellation of removal:

when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.<sup>372</sup>

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366. H.R. Comm., Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, U.N. Doc. No. HRI/GEN/1/Rev.1, at 19 (July 29, 1994).

367. *Jeunesse v. the Netherlands*, 60 Eur. Ct. H.R. at ¶ 86.

368. *Kolonja v. Greece*, App. No. 49441/12, 1 (May 19, 2016), <http://hudoc.echr.coe.int/eng?i=001-162856> [<https://perma.cc/8CH4-JP98>].

369. *Maslov v. Austria*, App. No. 1638/03, ¶ 40 (Jun. 23, 2008) (citing *Bouchelkia v. France*, App. No. 1638/03, ¶ 65 (Jan. 29, 1997); *Boujlifa v. France*, App. No. 25404.94 (Oct. 21, 1997)).

370. *Barton v. Barr*, 140 S. Ct. 1442, 1448, 1454 (2020).

371. 8 U.S.C. § 1229b(d)(1).

372. *Id.*

The Supreme Court in *Barton* considered whether the stop-time rule is triggered in an LPR cancellation case with the commission of an offense enumerated in 1182(a)(2).<sup>373</sup> The answer to this question may appear simple at first blush, and indeed the majority opinion in *Barton* suggested that it was,<sup>374</sup> but the issue is quite complex. The complexity relates to a key distinction in immigration law between noncitizens seeking “admission” to the United States and noncitizens deemed “deportable” after admission. This distinction is clear in the INA, and the U.S. Code enumerates grounds of inadmissibility in section 1182 and grounds of deportability in section 1227.<sup>375</sup> Because the stop-time rule applies to both non-LPR cancellation and LPR cancellation, a court could read the statute to stop the accrual of continuous physical presence when a noncitizen commits an offense enumerated in 1182(a)(2) *and* is either found inadmissible under 1182 or deportable under 1227 as a result.<sup>376</sup> The Supreme Court in *Barton* took a different tack, siding with the BIA and a majority of circuits that have held that continuous residence for LPRs is terminated upon the commission of a crime enumerated in 1182(a)(2), regardless of whether the crime results in a finding of inadmissibility or deportability.<sup>377</sup>

The following section will describe the evolution of this dispute about the proper interpretation of the statute, including the 2006 BIA decision to first address this issue, the Circuit split that emerged, and the majority and dissenting rationales of the Supreme Court in *Barton*. In so doing, the section will reference various rules of statutory interpretation used to justify each court’s resolution of this issue and identify how different approaches led to different outcomes. The final section of this Article will identify one rule of statutory interpretation that was omitted by every court to consider this issue, including the Supreme Court; namely, the *Charming Betsy* rule.<sup>378</sup> According to the *Charming Betsy* rule of statutory interpretation, a court should resolve ambiguities in a statute in a manner consistent with applicable rules of customary international law.<sup>379</sup> Inasmuch as there was one interpretation of this ambiguous statutory provision

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373. *Barton*, 140 S. Ct. at 1442, 1449–50 (2020) (finding that “the date of *commission* of the offense is the key date for purposes of calculating whether the noncitizen committed a § 1182(a)(2) offense during the initial seven years of residence”).

374. *Id.* at 1450.

375. *Id.* at 1446.

376. *Id.* at 1457 (Sotomayor, J., dissenting).

377. *Id.* at 1454.

378. *Murray v. Schooner Charming Betsy (The Charming Betsy Case)*, 6 U.S. 71, 118 (1804).

379. *Id.*

that would have permitted Barton to seek discretionary relief from removal based on his family life, and another that foreclosed that possibility, the Court should have chosen the former.

*A. Dispute over the Proper Interpretation of the Statute*

In *Matter of Jurado Delgado*, the BIA first addressed the question later posed to the Supreme Court in *Barton*.<sup>380</sup> In that case, Jimmy Roberto Jurado Delgado had been admitted to the United States as an LPR in 1985, and was convicted in 1997 of “two crimes involving moral turpitude” that led to the initiation of removal proceedings.<sup>381</sup> Mr. Jurado Delgado had previously been convicted of retail theft in 1991 and unsworn falsification to authorities in 1992, but was never charged for those crimes in immigration proceedings.<sup>382</sup> The Immigration Judge did not apply the stop-time rule based on these earlier convictions because they were not included as charges of removability and granted the application for cancellation of the removal.<sup>383</sup> The DHS appealed, arguing that any crimes that were contemplated in 1182(a)(2)(A)(I) and committed in the seven-year period for LPR cancellation should trigger the stop-time rule, and the BIA agreed.<sup>384</sup>

The BIA focused on the novelty of the stop-time rule statutory formulation that the offense 1182(a)(2) “renders the [noncitizen] inadmissible,” and used the canon of statutory interpretation that requires the consideration of statutory terms in the context of the statute.<sup>385</sup> Specifically, the BIA noted that in other sections of the INA, Congress used the formulation “is inadmissible” to describe limitations on relief from removal.<sup>386</sup> It concluded that to “be rendered inadmissible” must have a different meaning than to “be inadmissible,” and decided that it meant the noncitizen could potentially be inadmissible if so charged.<sup>387</sup> Accordingly, because Mr. Jurado Delgado could potentially be charged with inadmissibility, his commission of the 1182(a)(2) offenses rendered him inadmissible and precluded him from pursuing cancellation of removal.<sup>388</sup> The BIA therefore held that a cancellation applicant need not “have been *charged* with . . . an offense as a ground of inadmissibility or removability in order for

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380. See *In re Jurado-Delgado*, 24 I. & N. Dec. 29, 29–30 (B.I.A. 2006).

381. *Id.*

382. *Id.* at 29.

383. *Id.* at 30.

384. *Id.*

385. *Id.* at 31.

386. *In re Jurado-Delgado*, 24 I. & N. Dec. 29, 31 (B.I.A. 2006).

387. *Id.*

388. *Id.* at 35.

the provision to stop the . . . accrual of continuous residence.”<sup>389</sup> Notably, this interpretation of the statute would trigger the stop-time rule “when the alien has committed an offense referred to in section [1182(a)(2) of this title],” and rendered the next two clauses of the statutory provision superfluous.<sup>390</sup>

The first U.S. Court of Appeals to address this issue in a published decision was the Fifth Circuit in *Calix v. Lynch*.<sup>391</sup> In that case, Rony Alexander Paz Calix had been admitted to the United States in December 1997 as an LPR and was convicted for cocaine possession in 2007 and charged as removable based on that conviction.<sup>392</sup> Mr. Paz Calix had also been convicted of possession of marijuana in 2001, but was never charged in immigration proceedings as a result of that conviction.<sup>393</sup> An Immigration Judge applied the stop-time rule to preclude an application for cancellation of removal, and the BIA upheld that decision on appeal.<sup>394</sup> Mr. Paz Calix challenged the denial in a petition for review to the Fifth Circuit, which analyzed the statutory language under the *Chevron* framework.<sup>395</sup> The court proceeded to “avail [itself] of the traditional means of statutory interpretation, which include the text itself, its history, and its purpose”<sup>396</sup> to determine if the statute is ambiguous under *Chevron* step one.

Mr. Paz Calix argued that the statute unambiguously established his eligibility for cancellation of removal pursuant to the canon of statutory interpretation against surplusage, which requires “that a statute must, if possible, be construed in such fashion that every word has some operative effect.”<sup>397</sup> He argued that the statute required both the commission of the 1182(a)(2) offense, and that the noncitizen be “rendered” inadmissible under 1182(a)(2).<sup>398</sup> He further argued that to apply the stop-time rule based on the commission of the offense alone would give no operative effect to the second provision requiring that the noncitizen be “rendered” inadmissible.<sup>399</sup> He urged the court to conclude that 1182(a)(2) would halt continuous presence or residence only for noncitizens seeking

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389. *Id.* at 31.

390. *See* 8 U.S.C. § 1229b(d)(1).

391. *Calix v. Lynch*, 784 F.3d 1000, 1006–07 (5th Cir. 2015).

392. *Id.* at 1002.

393. *Id.*

394. *Id.* at 1011.

395. *Id.* at 1005 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837, 842 (1984)).

396. *Id.* (quoting *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 739 (5th Cir. 2005)).

397. *Calix*, 784 F.3d at 1006 (quoting *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 36 (1992)).

398. *Id.* at 1006.

399. *Id.*



admission and urged the court to find that the statute unambiguously carried this meaning.<sup>400</sup> The Fifth Circuit, however, was unconvinced and declared the statute ambiguous, passing then to *Chevron* step two.<sup>401</sup>

Notably, the Fifth Circuit found that *Jurado Delgado* did not govern, as the BIA in that case answered the “narrow question” of whether a noncitizen “could be charged with removal on one ground and be ineligible for cancellation of removal because of another ground.”<sup>402</sup> The Fifth Circuit framed the issue before it in broader terms, and proceeded to interrogate the operation of the stop-time rule.<sup>403</sup> Unbound by the agency interpretation that “render inadmissible” meant that the individual could possibly be charged as inadmissible, the Fifth Circuit concluded that the term “renders” required that the noncitizen be convicted of the 1182(a)(2) offense after commission.<sup>404</sup> The Fifth Circuit found that Mr. Paz Calix’s conviction for the marijuana offense “rendered” him inadmissible resulting in the application of the stop-time rule at the time of commission in 2001, therefore making him ineligible for cancellation of removal.<sup>405</sup>

In *Nguyen v. Sessions*, the Ninth Circuit found a fundamental flaw in the Fifth Circuit’s reasoning and arrived at a different conclusion.<sup>406</sup> In that case, Vu Minh Nguyen entered the United States as an LPR in 2000 and was placed in removal proceedings fifteen years later based on three misdemeanor convictions.<sup>407</sup> During removal proceedings, Mr. Nguyen admitted to using cocaine in 2005, which is a drug offense enumerated in 1182(a)(2).<sup>408</sup> Accordingly, the Immigration Judge found that the stop-time rule was triggered in 2005 and pretermitted his application for cancellation of removal, a decision that was ultimately affirmed by the BIA.<sup>409</sup> In reviewing the agency determination, the Ninth Circuit emphasized the distinction between inadmissibility and deportability under immigration law,<sup>410</sup> and ultimately concluded that “[u]nder the plain language of

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400. *Id.*

401. *Id.* at 1007.

402. *Id.* at 1009.

403. *See Calix*, 784 F.3d at 1011.

404. *Id.* at 1009, 1012.

405. *Id.* at 1011–12.

406. *Nguyen v. Sessions*, 901 F.3d 1093, 1099 (9th Cir. 2018) (finding that the Fifth Circuit “dodged the surplusage problem by noting that different statutory sections of the INA can be ‘difficult to harmonize’ . . . this is an impermissible reason to read superfluousness into a statute when applying the traditional rules of statutory construction leads to a perfectly reasonable reading”).

407. *Id.* at 1095.

408. *Id.*

409. *Id.*

410. *Id.* at 1097.

the stop-time rule and the INA, a lawful permanent resident cannot be ‘rendered inadmissible’ unless he is seeking admission.”<sup>411</sup> The government advanced three arguments based in the statute, and the Ninth Circuit rejected each in turn.<sup>412</sup>

First the government argued that Mr. Nguyen was “rendered inadmissible” upon commission of a crime enumerated in 1182(a)(2).<sup>413</sup> The Ninth Circuit noted that this reading would make the second part of the provision—that the commission of the 1182(a)(2) offense “renders the alien inadmissible . . . or removable”—completely unnecessary.<sup>414</sup> It is worth noting that this is a version of the surplusage argument that the Fifth Circuit did not find persuasive in *Calix v. Lynch*.<sup>415</sup> The government next argued that the text of 1182(a)(2) declared that “any alien” who commits a crime enumerated in that section “is inadmissible,” such that the commission of such an offense would render the noncitizen inadmissible by operation of the statute.<sup>416</sup> The Ninth Circuit also rejected this argument, pointing to the header in § 1182 that describes “[c]lasses of aliens ineligible for visas or admission,” and emphasizing once again that LPRs have already been admitted and are only deemed inadmissible in specific circumstances.<sup>417</sup>

Finally, the government argued that the Ninth Circuit owed deference to the BIA’s interpretation in *Jurado Delgado* under *Chevron*.<sup>418</sup> However, the Ninth Circuit agreed with the Fifth Circuit that the holding in *Jurado Delgado* was narrow and did not directly address the question before the court.<sup>419</sup> Notably, the Ninth Circuit pointed to intervening BIA precedent that suggested alternative interpretations of the stop-time rule.<sup>420</sup> Moreover, the Ninth Circuit found the Fifth Circuit’s rationale otherwise unpersuasive because it had failed to adequately address the surplusage problem that had been raised consistently ever since *Jurado Delgado*.<sup>421</sup> Indeed, the

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411. *Id.* at 1100.

412. *Nguyen*, 901 F.3d at 1097–99.

413. *Id.* at 1097.

414. *Id.*

415. *Calix v. Lynch*, 784 F.3d 1000, 1006 (5th Cir. 2015).

416. *Nguyen*, 901 F.3d at 1098.

417. *Id.* (quoting 8 U.S.C. § 1182(a)).

418. *Id.* (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

419. *Id.* at 1098–99.

420. *Id.* at 1099 (citing *In re Campos-Torres*, 22 I&N Dec. 1289, 1294–95 (B.I.A. 2000) (“[R]ejecting a reading of the stop-time rule that would make ‘referred to in section [1182(a)(2)]’ meaningless.”); *In re Garcia*, 25 I&N Dec. 332, 335–36 (B.I.A. 2010) (“[H]olding that an offense is not ‘referred to in section [1182(a)(2)]’ for the stop-time rule’s purposes where it qualifies for the petty theft exception, which only applies to inadmissibility grounds.”)).

421. *Id.* at 1099.

Ninth Circuit was not willing to accept an interpretation of the statute that rendered the second two operative clauses without any legal effect.<sup>422</sup> The contrary interpretations of the Fifth and Ninth Circuits created a split on this important question.

*B. The Supreme Court Resolves the Circuit Split*

*Barton v. Barr* originated in the Eleventh Circuit, which noted the circuit split in its opinion and explicitly disagreed with the Ninth Circuit.<sup>423</sup> Andre Martello Barton, a Jamaican national, was initially admitted to the United States in May 1989, and adjusted status to LPR three years later.<sup>424</sup> In January 1996, Barton was charged with three counts of aggravated assault, one count of first-degree criminal damage to property, and one count of possession of a firearm during the commission of a felony.<sup>425</sup> In July 1996, he was convicted on all charges.<sup>426</sup> A decade later, Barton was convicted of controlled substances crimes in 2007 and 2008, and ultimately placed in removal proceedings.<sup>427</sup> While DHS initially charged Barton as removable for his 1996, 2007, and 2008 crimes, Barton challenged the 1996 crimes as a basis for removal, and the government ultimately relented.<sup>428</sup> However, when Barton filed an application for cancellation of removal, the government once again raised the 1996 crimes which it could not use as a basis for charges of removability, but which would serve as the basis for inadmissibility under § 1182(a)(2), triggering the stop-time rule.<sup>429</sup> The Immigration Judge agreed, pretermittting the cancellation application, and the BIA affirmed, relying on *Matter of Jurado Delgado*.<sup>430</sup>

The Eleventh Circuit began its analysis with *Chevron*, and first examined the ambiguity of the statute.<sup>431</sup> The court used the dictionary to examine the plain meaning of the relevant statutory terms “renders” and “inadmissible,” and concluded that there was nothing in these terms that required that a noncitizen actually be seeking admission in order to be rendered inadmissible.<sup>432</sup> Barton raised the

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422. See *Nguyen v. Sessions*, 901 F.3d 1093, 1099 (9th Cir. 2018).

423. *Barton v. Att’y Gen.*, 904 F.3d 1294, 1295 (11th Cir. 2018), *cert. granted sub nom. Barton v. Barr*, 140 S. Ct. 1442 (2020).

424. *Id.* at 1296.

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.* at 1297.

429. *Barton*, 904 F.3d at 1297.

430. *Id.*

431. *Id.* at 1297–98 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

432. *Id.* at 1298–99.

surplusage argument that had prevailed at the Ninth Circuit, and while the Eleventh Circuit found it “a little hard to follow,” the argument was quite straight forward.<sup>433</sup> Specifically, Barton argued that if Congress had intended the mere commission of an 1182(a)(2) offense to trigger the stop-time rule, then the statute only needed to include the first clause.<sup>434</sup> The Eleventh Circuit ultimately rejected the surplusage argument for two reasons.<sup>435</sup> First, the court found it unnecessary to follow the rule against surplusage where the purported surplus language would render an otherwise unambiguous statute ambiguous.<sup>436</sup> Second, and more in line with the Fifth Circuit, the Eleventh Circuit found that commission of a 1182(a)(2) crime fulfilled the first part of the statute, and conviction, admission, or admission of acts that constitute the essential elements of the crime then “rendered” a noncitizen inadmissible.<sup>437</sup> Accordingly, the Eleventh Circuit found the rule against surplusage inapplicable.<sup>438</sup> The Supreme Court granted certiorari in *Barton v. Barr* to resolve the split among the Circuits.<sup>439</sup>

In *Barton v. Barr*, the majority opinion of the Supreme Court, authored by Justice Kavanaugh, held that cancellation of removal is precluded when a noncitizen commits an offense referred to in 1182(a)(2) within the initial seven years.<sup>440</sup> The Court upheld the reasoning of the Eleventh Circuit (and the Fifth), in finding that it is the subsequent conviction that “renders” the noncitizen inadmissible and therefore disqualifies the noncitizen for cancellation of removal.<sup>441</sup> The Supreme Court further found that “[a]s a matter of statutory text and structure, that analysis is straightforward,” and noted that since *Jurado Delgado*, the BIA had interpreted the statute in that manner.<sup>442</sup> Notably, the majority did not deem it necessary to apply the two-step *Chevron* analysis, notwithstanding the fact that (unlike the Eleventh and Fifth Circuit) it did view this question as identical to that addressed by the BIA in *Jurado Delgado*.<sup>443</sup> The

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433. *Id.* at 1300.

434. *Id.* at 1300–01.

435. *Barton*, 904 F.3d at 1301.

436. *Id.*

437. *Id.*

438. *Id.* at 1301–02.

439. *Barton v. Barr*, 140 S. Ct. 1442, 1445 (2020).

440. *Id.* at 1449–50 (finding that “the date of *commission* of the offense is the key date for purposes of calculating whether the noncitizen committed a § 1182(a)(2) offense during the initial seven years of residence”).

441. *Id.* at 1450 (citing *Barton v. United States Att’y Gen.*, 904 F.3d 1294, 1301 (11th Cir. 2018) (incorporating the Eleventh Circuit’s rationale that “while only commission is required at step one, conviction (or admission) is required at step two”)).

442. *Id.* at 1450 (citing *Jurado-Delgado*, 24 I. & N. Dec., at 31).

443. *Id.* Presumably, the majority’s view that the “analysis is straightforward” meant

majority defended its interpretation of the statute against the three main arguments advanced by Barton.<sup>444</sup>

First, the Court addressed Barton's argument that the overall structure of the statute supports an interpretation that the 1182(a)(2) offense must be the basis for removal in order to stop time for cancellation of removal.<sup>445</sup> The Court disagreed and found Barton's purported difficulty in explaining why Congress would not have included additional statutory language to identify offenses "referred to in section 1182(a)(2) or section 1227(a)(2)" to be the "Achilles' heel" of this argument.<sup>446</sup> Barton urged the Court to recognize that inadmissibility and deportability are distinct statutory concepts with different bases in the statute, and that Congress would have understood this fundamental feature of immigration law.<sup>447</sup> Indeed, it is easy to understand why a statutory provision that applies to non-LPRs, many of whom have not been admitted to the United States, and LPRs who have all been lawfully admitted would be structured this way. Indeed, a relatively easy way to understand the statute is that it identifies a certain set of conduct, in this case 1182(a)(2) offenses, that will render all noncitizens *seeking admission* ineligible for relief, but only preclude noncitizens from relief *after admission* if the 1182(a)(2) offense is serious enough to render the noncitizen deportable under 1227(a)(2) or 1227(a)(4).<sup>448</sup> The majority decided that a better way to make sense of the statute was to declare it a "recidivist statute," analogizing a humanitarian provision of immigration law to a criminal law sentencing enhancement without citation or support in legislative history or the statute itself.<sup>449</sup>

The dissent, authored by Justice Sotomayor, correctly pointed out that the majority "conflat[ed]" the terms "inadmissible" and

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that it did not consider the statute ambiguous, and it would have resolved the case at *Chevron* step one in the same manner as the Eleventh Circuit. *Id.* This is worth noting, however, because the Ninth Circuit found that the statute was not ambiguous under *Chevron* but decided the statutory question differently. *See Barton*, 140 S. Ct. at 1446–48. The Fifth Circuit for its part found the question was ambiguous, but applied its own reasoning under *Chevron* step two after finding that the BIA's holding in *Jurado-Delgado* was narrow and did not resolve the question of the proper interpretation of the statute. *See id.* at 1446–47.

444. *Id.* at 1451, 1453–54.

445. *Id.* at 1451.

446. *Id.* at 1452.

447. *Id.* at 1451.

448. *See* 8 U.S.C. § 1227(a)(2)–(a)(4).

449. *Barton*, 140 S. Ct. at 1445–46 (explaining that "[i]f a lawful permanent resident has ever been convicted of an aggravated felony, or has committed an offense listed in § 1182(a)(2) during the initial seven years of residence, that criminal record will preclude cancellation of removal. In that way, the statute operates like traditional criminal recidivist laws, which ordinarily authorize or impose greater sanctions on offenders who have committed prior crimes").

“deportable,” leading to the “paradox[ical]” conclusion that one can be already admitted to the country yet also “inadmissible.”<sup>450</sup> The dissent proceeded to break down the stop-time rule, noting the specific references to inadmissibility and deportability,<sup>451</sup> and that these are terms of art that must be considered in the context of the statute.<sup>452</sup> The opinion emphasized that the two-track system of exclusion and deportation had long existed in immigration law and continued under the statute which clearly differentiated between two categories of noncitizens.<sup>453</sup> The distinction between these two tracks is reflected throughout immigration law, for example noncitizens may show inadmissibility by admitting to a crime, while deportability requires convictions for most criminal grounds.<sup>454</sup> The two tracks are also reflected in the cancellation of removal statute, which requires LPRs merely show relief is deserved as a matter of discretion and non-LPRs must meet a heightened standard of exceptional and extremely unusual hardship to an LPR or U.S. citizen family member.<sup>455</sup> Indeed, this distinction is fundamental to immigration law and it is appropriate to read this distinction into the stop-time rule which intended different standards for non-LPRs and LPRs.<sup>456</sup>

Second, the majority addressed Barton’s argument—that the statute’s requirement that the 1182(a)(2) offense must “render” the noncitizen inadmissible could only be fulfilled when the noncitizen is actually charged with inadmissibility.<sup>457</sup> Notably, these are rare circumstances, but they clearly exist in the law.<sup>458</sup> The majority, however, ignored this feature of immigration law and instead focused on the fact that 1182(a)(2) declares that a noncitizen who commits an enumerated offense “is inadmissible.”<sup>459</sup> Here, the Supreme Court ignored that the title of 1182 references noncitizens seeking admission, which Barton and other similarly situated LPRs are not.<sup>460</sup>

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450. *Id.* at 1455 (Sotomayor, J., dissenting).

451. *Id.*

452. *Id.*

453. *Id.*

454. *Id.* at 1456 (Sotomayor, J., dissenting).

455. *See Barton*, 140 S. Ct. at 1456 (Sotomayor, J., dissenting).

456. *Id.*

457. *Id.* at 1453–54.

458. The six scenarios in which an LPR is deemed an applicant for admission are codified at 8 U.S.C. § 1101(a)(13)(C)(i)–(vi). *See, e.g., Heredia v. Sessions*, 865 F.3d 60, 60–63 (2d Cir. 2017) (holding that an LPR returning from a trip to the Dominican Republic after having committed an 1182(a)(2) offense was appropriately deemed an applicant for admission under the INA); *see also In re Collado-Munoz*, 21 I. & N. Dec. 1061, 1062–66 (B.I.A. 1998) (holding that IIRIRA overruled the equitable doctrine (“*Fleuti* doctrine”) that had allowed LPRs to take innocent, casual, and brief trips abroad without applying for admission upon their return).

459. *Barton*, 140 S. Ct. at 1452.

460. *See id.* at 1455 (Sotomayor, J., dissenting).

Again, an LPR may be in a situation where she is seeking admission, which would make 1182 clearly applicable, but the majority declined to address this inconvenient reality of the INA.<sup>461</sup> Instead, it analogized circumstances in which non-LPRs need to demonstrate admissibility after an initial admission, such as when they apply for LPR status,<sup>462</sup> and ignored those limited situations in which LPRs are actually subject to grounds of inadmissibility under the law.<sup>463</sup>

Finally, the Court addressed Barton's argument that the Eleventh Circuit's interpretation would render the language: "or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title" without effect, thereby violating the rule against surplusage.<sup>464</sup> The Court insisted that "[s]ometimes the better overall reading of the statute contains some redundancy,"<sup>465</sup> and declared that to read the statute without redundancy would require the Court to rewrite the statute.<sup>466</sup> This claim, however, has no basis in the statute. Indeed, the stop-time rule applies to both non-LPR and LPR cancellation, meaning that the provision applies to some non-citizens who are seeking admission, and some noncitizens who are charged as deportable.<sup>467</sup> The first clause draws into the purview of the stop-time rule any noncitizen who has "committed 'an offense referred to in section 1182(a)(2),' " which applies to all non-LPRs and LPRs.<sup>468</sup> The second clause "that renders the alien inadmissible to the United States under section 1182(a)(2)" applies on its terms to all non-LPRs and LPRs who are seeking admission, recognizing implicitly that LPRs seek admission only in limited circumstances.<sup>469</sup> The third clause uses the word "or" to suggest an alternative, and then limits cancellation of removal for noncitizens who are "removable from the United States under section 1227(a)(2) or 1227(a)(4)," which refer to non-LPRs and LPR who have been admitted, are not seeking readmission, and are properly charged as deportable under the referenced sections.<sup>470</sup> Indeed, there is a way to read the statute and give it its plain meaning—no "rewriting" required—but to do so would have led the majority to a different conclusion which it was evidently unwilling to draw.

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461. *See* 8 U.S.C. § 1182(a)(2).

462. *Barton*, 140 S. Ct. at 1452.

463. *See* 8 U.S.C. § 1182(a)(2).

464. *Barton*, 140 S. Ct. at 1453.

465. *Id.* (quoting *Rimini Street, Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019)).

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.*

470. *Barton*, 140 S. Ct. at 1453.

The dissent was correct when it stated that: “[h]ad Congress intended for commission of a crime in § 1182(a)(2) alone to trigger the stop-time rule, it would have said so.”<sup>471</sup> The rule against surplusage was raised before every court to consider this question, but only the Ninth Circuit and the dissent in *Barr* felt compelled to give every clause of the stop-time rule meaning.<sup>472</sup> Importantly, there is another rule of statutory interpretation that would have aided these courts in arriving at the correct interpretation of the stop-time rule. That is the *Charming Betsy* rule of statutory interpretation, which compels a court to read a statute in a manner consistent with customary international law where possible.<sup>473</sup> The application of the *Charming Betsy* rule would have led the Supreme Court to permit Barton and similarly situated noncitizens to present evidence of their family life as part of their request for cancellation of removal.

### C. *The Charming Betsy Rule of Statutory Interpretation*

This final section argues that customary international law requires the individualized consideration of family life in decisions to expel migrants, and that rule should have influenced the outcome in *Barton* under the *Charming Betsy* rule of statutory interpretation. Indeed, the robust body of international human rights jurisprudence presented above demonstrates the emergence of a norm that meets the legal definition of customary international law.<sup>474</sup> That norm, properly conceived, requires states to balance family life in decisions to expel individuals for immigration or criminal law violations.<sup>475</sup> While the influence of international law in judicial decision-making in the United States is at times controversial, customary international law has an established pedigree in U.S. jurisprudence.<sup>476</sup> An internationalist conception of the *Charming Betsy* rule of statutory interpretation is one established entry point through which rules of customary international law may influence

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471. *Id.* at 1460 (Sotomayor, J., dissenting).

472. *See id.* at 1455 (Sotomayor, J., dissenting).

473. *See* Murray v. Schooner Charming Betsy (*The Charming Betsy Case*), 6 U.S. 64, 118 (1804).

474. *See* North Sea Continental Shelf (Ger. V. Den./Neth.), Judgement, 1969 I.C.J. 4, 53 (Feb. 20); RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 102 (AM. L. INST. 1987).

475. *See supra* Section II.B.

476. *See* The Paquete Habana, 175 U.S. 677, 677 (1900); *see also* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1104 (1990); Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1824 (1998); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 82 (2004).



the scope and meaning of federal statutes.<sup>477</sup> Considering that what was at stake in *Barton* was access to one of the limited means by which immigration courts can consider a noncitizen's family life in the United States as a defense against removal, the Court should have interpreted the statute in Barton's favor.

Customary international law is one of the primary sources of international law and is created when general patterns of state practice or behavior emerge out of a sense of legal obligation.<sup>478</sup> By definition, customary international law is a fluid body of law that is formed when practices become sufficiently widespread, as evidenced by diplomatic or other governmental acts, public measures, or policy statements.<sup>479</sup> While a practice must be "general and consistent" to form the basis of customary international law, it need not be universally followed, but there should be ample evidence of wide acceptance among states.<sup>480</sup> Notably, such a practice must not only be widespread to solidify as a norm of customary international law, but states must follow the practice out of a sense of legal obligation, commonly referred to as *opinio juris*.<sup>481</sup> Just as it may be difficult to identify the precise point when a practice becomes sufficiently widespread, it can also be challenging to determine when states follow a practice out of a sense of legal obligation.<sup>482</sup> While public statements are helpful in this regard, they are not necessary, and *opinio juris* can also be inferred from acts or omissions.<sup>483</sup>

The best evidence that a norm of customary international law has emerged to require the consideration of family life in individualized expulsion decisions are the many treaty provisions cited above and the authoritative interpretations that support this conclusion.<sup>484</sup> The European Court of Human Rights issues binding decisions with regard to human rights obligations against all forty-seven Member States of the Council of Europe that have ratified the European Convention.<sup>485</sup> Similarly, the Inter-American Commission has jurisdiction

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477. Steinhardt, *supra* note 476, at 1112 ("[I]nternational law may penetrate domestic law through the presumption that Congress intends to conform its statutes to international standards.")

478. See *North Sea Continental Shelf* (Ger. V. Den./Neth.), Judgment, 1969 I.C.J. 4, 53 (Feb. 20); RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 102 cmt. B (AM. L. INST. 1987).

479. RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 102 cmt. B (AM. L. INST. 1987).

480. *Id.*

481. *Id.* at cmt. C.

482. *Id.*

483. See *id.*

484. See *supra* Part II.

485. DAVID BALUARTE & CHRISTIAN DE VOS, FROM JUDGMENT TO JUSTICE: IMPLEMENTING INTERNATIONAL AND REGIONAL HUMAN RIGHTS DECISIONS 15, 17 (2010).

over all thirty-five Member States of the Organization of American States, and issues authoritative interpretations of Inter-American human rights instruments in its reports and decisions.<sup>486</sup> The Human Rights Committee similarly issues authoritative interpretations of the ICCPR, which currently has 173 states party to the convention who are obliged to abide by the decisions of the HRC.<sup>487</sup> The body of family life jurisprudence of these three human rights institutions spans years and covers a wide range of scenarios in which states have used their authority to expel noncitizens in violation of their human rights obligations.<sup>488</sup> The review of relevant jurisprudence looks at the expulsion of noncitizens who have no immigration status as well as those who have immigration status but who are nevertheless ordered expelled due to criminal law violations.<sup>489</sup> Notably, while there are differences of opinion about when family life will compel a state to allow noncitizens who have otherwise run afoul of immigration laws, there is consensus that some opportunity must exist to advance the family life of a nuclear family as a defense against expulsion.<sup>490</sup>

The practice of considering family life as part of expulsion decisions, whether the state's ultimate decision is to expel or not, is both "general and consistent," such that it meets the first prong of the test to establish customary international law.<sup>491</sup> Evidently, the practice is not universally followed, but through the decisions of international human rights bodies that operate in the majority of countries in the world states have recognized that noncitizens' family life grounded in their territory must be considered.<sup>492</sup> This recognition meets the second requirement for the establishment of customary international law that states perform the act out of a sense of legal obligation.<sup>493</sup> Through their adhesion to the various human rights regimes that have evolved in the image of the Universal Declaration of Human Rights, states have come to recognize both that the family is a fundamental building block of society and that family unity is a basic human right.<sup>494</sup> In order to respect this right envisioned by numerous human rights treaties, states have created

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486. *Id.* at 63–64.

487. UN Status of Ratification Interactive Dashboard, *available at* <https://indicators.ohchr.org> [<https://perma.cc/N28C-6UC9>].

488. *See supra* Part II.

489. *Id.*

490. *Id.*

491. RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 102 (AM. L. INST. 1987).

492. UN Status of Ratification Interactive Dashboard, *supra* note 487.

493. RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 102 cmt. E (AM. L. INST. 1987).

494. Abrams, *supra* note 105, at 630.

mechanisms to consider family life as a reflection of their understanding that they must balance this right against the states own interests in maintaining orderly migration, public safety, and the security of the national territory.<sup>495</sup> The right of family members to be together, free from arbitrary state interference, need not be inconsistent with the state interests; indeed, the law only requires that states balance these interests and give them due consideration.<sup>496</sup>

To date, only a handful of U.S. courts have addressed this issue, but these decisions support the conclusion that a norm of customary international law has evolved along these lines.<sup>497</sup> In *INS v. St. Cyr*, the Supreme Court limited the retroactive effect of IIRAIRA's elimination of 212(c) relief and the application of mandatory deportation to persons who had committed offenses deemed aggravated felonies, but made no reference to international law.<sup>498</sup> Prior to that decision, Eddy Maria challenged the retroactive application of AEDPA's reclassification of his second degree attempted theft conviction as an aggravated felony and IIRAIRA's subsequent elimination of 212(c) relief.<sup>499</sup> The District Court in *Maria v. McElroy* emphasized that "[a]n act of Congress should be construed in accordance with international law where it is possible to do so without distorting the statute," and found that "retroactive deprivation of Mr. Maria's statutory right to humanitarian relief from deportation would arguably be contrary to both the [ICCPR] and customary international human rights law."<sup>500</sup> After review of major sources of international law, the court concluded that "[t]he rights to be free from arbitrary interference with family life and from arbitrary expulsion are human rights that are part of customary international law that must be followed by the United States."<sup>501</sup> The court held that Mr. Maria must have access to 212(c) relief so that he could advance family life as a defense against removal.<sup>502</sup>

After the U.S. Supreme Court limited the retroactivity of IIRAIRA's elimination of 212(c) in *St. Cyr*, the same District Court

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495. *Id.* at 655, 673–74.

496. *Maria v. McElroy*, 68 F. Supp. 2d 206, 233 (E.D.N.Y. 1999).

497. Abrams, *supra* note 105, at 247–48.

498. See *INS v. St. Cyr*, 533 U.S. 289, 321 (2001).

499. *Maria*, 68 F. Supp. 2d at 231 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 n.20 (2d Cir. 1980) (quoting *Murray v. Schooner Charming Betsy (The Charming Betsy Case)*, 6 U.S. 64, 67 (1804)); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 114 (Am. L. Inst. 1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."), *abrogated by Restrepo v. McElroy*, 369 F.3d 627, 640 (2d Cir. 2004).

500. *Id.*

501. *Id.* at 233.

502. *Id.* at 234.

that decided *Maria* extended its international law rationale to permit a noncitizen to seek discretionary relief from removal, notwithstanding apparent ineligibility.<sup>503</sup> In *Beharry v. Reno*, Don Beharry was convicted of robbery months after the passage of the 1996 acts and deemed deportable for an aggravated felony.<sup>504</sup> Mr. Beharry argued that he should have access to discretionary relief because he had committed his crime before the passage of the 1996 acts and therefore acted in reliance on the laws in place at that time.<sup>505</sup> The District Court ruled “in light of *St. Cyr*, international law and other considerations [such as public policy], . . . the operative time from which to define retroactivity under the [INA] is the moment the crime was committed.”<sup>506</sup> While the court found that 212(c) was unavailable to Mr. Beharry because it had been eliminated entirely in 1996, it noted that 212(h) waiver still existed under the law.<sup>507</sup> The court recognized that the 1996 legislation made the 212(h) waiver unavailable to LPRs who had been convicted of an aggravated felony, but that to preclude Mr. Beharry’s access to that discretionary relief would violate U.S. international obligations relating to family life and special protections for children.<sup>508</sup> The court found that the *Charming Betsy* rule requires that courts construe statutes in compliance with international law, and that 212(h) is “the most narrowly targeted way to bring the INA into compliance with international law requirements.”<sup>509</sup> The court therefore held that 212(h) was available to Mr. Beharry because his crime predated the 1996 amendments that made 212(h) unavailable to him because of his aggravated felony.<sup>510</sup>

While the District Court’s international law analysis in *Maria* and *Beharry* was never sustained on review, the Second Circuit never specifically undermined the finding that family life protection had attained the status of customary international law.<sup>511</sup> Moreover, the *Charming Betsy* rule of statutory interpretation that the District Court advanced in those cases is based on a centuries-old line of

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503. *Beharry v. Reno*, 183 F. Supp. 2d 584, 604–05 (E.D.N.Y. 2002), *rev’d sub nom.* *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003).

504. *Id.* at 603.

505. *Id.*

506. *Id.* at 605.

507. *Id.* at 592 (recalling that 212(h) “allows waiver of deportation under special circumstances for aliens whose deportation would result in substantial hardship to a citizen spouse or children”).

508. *Id.* at 604–05.

509. *Beharry*, 183 F. Supp. 2d at 604.

510. *Id.*

511. *See Beharry v. Ashcroft*, 329 F.3d 51, 63 (2d Cir. 2003) (holding that Mr. Beharry had not administratively exhausted his 212(h) argument).

jurisprudence and should appropriately factor into judicial interpretations of statutory provisions implicated in mandatory deportation.<sup>512</sup> Ralph Steinhardt has argued that “[a]s the international legal system addresses more substantive aspects of economic and political life . . . the *Charming Betsy* principle should take on a heightened practical and theoretical significance.”<sup>513</sup> David Cole and Harold Koh have resonated with this view, arguing that federal courts should interpret statutes in a manner consistent with international law in accordance with the *Charming Betsy* doctrine.<sup>514</sup> Of course, contrary views abound,<sup>515</sup> and those who argue that this invocation of *Charming Betsy* is misguided have accurately observed the disinclination of many courts to apply this “internationalist” view of the doctrine in a consistent manner to advance international human rights norms.<sup>516</sup> Unfortunately, these contrary views anticipated the outcome in *Barton v. Barr*, at least with regard to the role of *Charming Betsy* and customary international law in the consideration of the Court.

One might assume from the reasoning of the majority opinion in *Barton v. Barr* that an invocation of the customary international law norm that requires consideration of family life in expulsion decisions would have fallen on deaf ears. Nevertheless, the absence of this discussion from the litigation entirely is perhaps a more troubling commentary on the role of international law in contemporary judicial decision-making. The dissent in *Barton* argued persuasively that a faithful reading of the stop-time rule under the rule against surplusage favored giving Mr. Barton the opportunity to

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512. See *Murray v. Schooner Charming Betsy (The Charming Betsy Case)*, 6 U.S. 64, 115 (1804); see also *The Paquete Habana*, 175 U.S. at 677; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (Am. L. Inst. 1987).

513. Steinhardt, *supra* note 476, at 1197.

514. David Cole, *The Idea of Humanity: Human Rights and Immigrants' Rights*, 37 COLUM. HUM. RTS. L. REV. 627, 646 (2006) (arguing that “absent a clear conflict, courts should interpret federal statutes to conform to international law obligations”); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 44 (2004) (invoking the *Charming Betsy* decision in support of the contention that the early Supreme Court “promoted the implicit or explicit internalization of international law into U.S. domestic law through statutory construction”).

515. See, e.g., Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 492 (1998).

516. Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 690 (2000) (citing a line of cases which ultimately did not follow customary international law in resolving challenges to mandatory immigrant detention: *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1451 (9th Cir. 1995); *Gisbert v. United States Attorney Gen.*, 988 F.2d 1437, 1448 (5th Cir. 1993); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir. 1986)). *But see* *Fernandez v. Wilkinson*, 505 F. Supp. 787, 799–800 (D. Kan. 1980), *aff’d*, 654 F.2d 1382 (10th Cir. 1981)).

seek discretionary relief from removal.<sup>517</sup> Absent from that opinion is any mention that a rule of customary international law that requires the consideration of family life as part of the decision to remove Mr. Barton, and no party to the litigation invoked *Charming Betsy* to urge the Court's consideration of this rule. Nevertheless, this doctrine supports the dissent's view that the statute should have been interpreted to give every clause of the stop-time rule effect, inasmuch as that interpretation of the statute would have been consistent with the customary international law obligation to provide Mr. Barton the opportunity to invoke family life as a defense against removal.<sup>518</sup> Ultimately, the Supreme Court should have recognized this fundamental human rights protection and interpreted the statute to give it effect.

#### CONCLUSION

The United States systematically violates the human right to family life of noncitizens in removal proceedings inasmuch as it denies broadly defined categories of persons the opportunity to seek discretionary relief from removal to keep their families unified in the United States. The elimination of various forms of discretionary relief from removal in 1996 and the replacement of those forms of relief with cancellation of removal, with its many limitations and bars to relief, brought the United States out of compliance with its international obligations. This situation has persisted for nearly twenty-five years, and the brutality and irreparable harm that has been wrought on the lives of millions of noncitizens and their U.S. citizen family members is unquantifiable.

The existence of this draconian system and its abusive rules does not relieve courts of the responsibility to comply with international obligations when the law permits. Indeed, while mandatory removal of some noncitizens may be inevitable under the existing removal regime, some statutory provisions are open to interpretation, and interpretations that comply with human rights obligations are often possible. The *Charming Betsy* doctrine has long existed as a mandate for courts to interpret statutes in a manner consistent with international legal obligations, and that is precisely what courts must do when a removal statute is open to interpretation. Where it is possible for courts to read such a statute in a manner that would permit a noncitizen to seek discretionary relief and present a defense

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517. *See* Barton v. Barr, 140 S. Ct 1442, 1461 (2020) (Sotomayor, J., dissenting).

518. *Id.*

against removal based on the human right to family life, courts must interpret the law to permit that option.

In *Barton v. Barr*, the U.S. Supreme Court failed in this regard. The Court had a duty under the law to interpret the stop-time rule in a manner that would have provided Mr. Barton with the opportunity to seek discretionary relief from removal based on his and his family's human right to family life. In failing to do so, the Court further expanded the reach of the mandatory removal regime and callously cemented an interpretation of the law that will tear many more families apart without a real opportunity to seek justice in court. Congress must now act to bring the removal system back into compliance with human rights obligations to protect family life.