

IN THE CHILD'S BEST INTEREST?

THE CONSEQUENCES OF LOSING A
LAWFUL IMMIGRANT PARENT TO DEPORTATION

March 2010



International Human Rights Law Clinic
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INTERNATIONAL HUMAN RIGHTS LAW CLINIC, UNIVERSITY OF CALIFORNIA, BERKELEY, SCHOOL OF LAW

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The Immigration Law Clinic (ILC) provides legal representation to indigent non-citizens in removal proceedings before U.S. Immigration Courts, the Board of Immigration Appeals, and federal courts, including the Ninth Circuit Court of Appeals. The ILC provides this necessary service to Northern California's immigrant communities, offering education and legal services to low-income immigrants facing deportation while enabling students to gain practical, real-world experience. ILC students take on all major aspects of litigation, including interviewing clients and witnesses, preparing legal briefs, drafting pleadings and motions, and arguing complex legal issues. ILC students regularly conduct naturalization workshops and organize various other community legal workshops. Recognizing the increased collaboration between criminal and immigration enforcement agencies, the ILC has been at the forefront of indigent detention and deportation defense. For more information, please visit: www.law.ucdavis.edu.

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EXECUTIVE SUMMARY

Congress is considering a comprehensive overhaul of the nation's immigration laws more than a decade after the enactment of strict immigration measures. Lawmakers should take this opportunity to reaffirm the nation's historic commitment to family unity by addressing the discrete provisions that currently undermine it. Current U.S. immigration laws mandate deportation of lawful permanent resident (LPR) parents of thousands of U.S. citizen children, without providing these parents an opportunity to challenge their forced separations. Through a multi-disciplinary analysis, this policy brief examines the experiences of U.S. citizen children impacted by the forced deportation of their LPR parents and proposes ways to reform U.S. law consistent with domestic and international standards aimed to improve the lives of children.

This report includes new, independent analysis of U.S. Department of Homeland Security (DHS) data. We estimate that more than 100,000 children have been affected by LPR parental deportation between 1997 and 2007, and that at least 88,000 of impacted children were U.S. citizens. Moreover, our analysis estimates that approximately 44,000 children were under the age of 5 when their parent was deported. In addition to these children, this analysis estimates that more than 217,000 others experienced the deportation of an immediate family member who was an LPR.

WE PROPOSE THAT THE UNITED STATES:

- » *Restore judicial discretion in all cases involving the deportation of LPRs who have U.S. citizen children in order to give parents a meaningful opportunity to present evidence of the adverse impact that their deportation will have on their U.S. citizen children.* There is a bill pending before Congress, the Child Citizen Protection Act (CCPA), that would restore discretionary authority to immigration judges to determine whether a non-citizen parent of a U.S. citizen child should be ordered removed from the United States. This bill would restore judicial decision-making power when the best interests of a U.S. citizen child hang in the balance. We recommend that Congress move to
- enact the CCPA, either alone or as part of comprehensive immigration reform legislation.
- » *Revert to the pre-1996 definition of "aggravated felony."* Before the legislative changes in 1996, the aggravated felony category was reserved for the most serious offenses. The designation of a conviction as an aggravated felony results in ineligibility for discretionary relief regardless of the equities involved. With such grave consequences for LPR parents and their U.S. citizen children, Congress should amend the current aggravated felony definition and revise it to include only serious felony offenses.
- » *Collect data on U.S. citizen children impacted by deportation of an LPR parent.* DHS should collect information on the number, age, gender, and other demographics regarding U.S. citizen children who are separated from one or both LPR parents as a result of parental deportation. DHS should also record whether the U.S. citizen child of the LPR remains in the United States or accompanies his or her deported parent. Independent research should be commissioned to study the psychological, educational, social, and economic impact of separation on U.S. citizen children.
- » *Establish guidelines for the exercise of discretion in cases involving the deportation of LPRs with U.S. citizen children.* U.S. immigration laws recognize that children constitute a vulnerable group that requires special protection. The Executive Office for Immigration Review should issue guidelines applicable in all cases in which discretion is available to assist immigration judges in considering the impact on citizen children of deporting an LPR parent. Immigration judges should also receive appropriate training from experts to adequately balance the needs of U.S. citizen children against the interests of the government in removing certain LPRs from the United States. The establishment of guidelines and access to training for judges is necessary to ensure reasoned outcomes that do not inadvertently cause disproportionate harm to U.S. citizen children.

A Family Portrait

Sann Chey* sat at a picnic table at his father's house in California's Central Valley, three of his sons at his side, and talked about the future.

"I knew what I did was wrong, and I did not want to fight the charge," Sann said. "I honestly never thought I could be deported. I had been here for so long, more than 20 years, so I thought I would go to jail and that would be it."

Sann, a father of five, came to the United States in 1981. He and his family fled Cambodia when the Khmer Rouge seized power in the mid-1970s and launched a brutal genocide that left approximately 1.5 million people dead in the country's infamous "killing fields." His family escaped to a refugee camp across the border in Thailand, and then, in 1981, the U.S. government resettled them in the United States. Sann has built a successful life in his adopted country. Sann graduated from high school, served in the U.S. Army, married, found steady work as a mechanic, and had five children, all of whom are U.S. citizens.

Today, however, his future is again in jeopardy. Sann awaits deportation to Cambodia, and his children, ranging in age from 11 to 18, risk losing their father. The government classified Sann's misdemeanor domestic violence conviction resulting from a fight with his wife as an "aggravated felony" because Sann received a 365-day sentence. A sentence of just one day less would have avoided the aggravated felony classification and given Sann the opportunity to persuade an immigration judge not to deport him because of the impact it would have on his children. However, based on that one-day difference, the law denied the immigration judge the power to fully hear Sann's case and to consider all the facts before ordering him removed.

According to Sann, his wife had a gambling addiction. Their marriage suffered, and in 2002, the police came to Sann's home to settle a dispute. Police charged Sann with domestic battery. He accepted responsibility, pleaded guilty, and served his time. After his release, a California family court awarded Sann custody of his five children because it determined he was most qualified to care for them.

For four years after his release, Sann and his children went on with their lives. But in 2006, Sann lost his green card and applied for a replacement. When a package arrived from the federal government more than a year later, Sann thought it was his replacement green card. Instead, it was a court document informing Sann that he was facing deportation to Cambodia because of his five-year-old misdemeanor conviction.

In spring 2009, U.S. Immigration and Customs Enforcement officers came to his home and arrested him. They held Sann for six months in immigration detention. The immigration judge eventually determined that under the strict definition Congress imposed in 1996, Sann's conviction constituted an aggravated felony. Under the law, the judge had no choice but to order Sann's removal.

Today, Sann is back home with his family only because the government has not yet been able to obtain travel documents from Cambodia for his return. Sann is living in immigration limbo. He could be deported at any time. When this happens, Sann fears his children will suffer most.

"What would happen to his children if both parents were gone?" said Paul, Sann's brother. "If all you have is a broken family, is that a family, or just the remnants of one?"

*The names of individuals interviewed in this policy brief have been changed to protect their privacy.

Introduction

Congress is considering a comprehensive overhaul of the nation's immigration laws more than a decade after the enactment of strict immigration measures. Lawmakers should take this opportunity to reaffirm the nation's historic commitment to family unity by addressing the discrete provisions that currently undermine it. For example, the United States currently deports lawful permanent resident (LPR)¹ parents of thousands of U.S. citizen children, without providing these parents an opportunity to challenge their forced separations. Through a multi-disciplinary analysis, this policy brief examines the experiences of U.S. citizen children impacted by the forced deportation of their LPR parents and proposes ways to reform U.S. law consistent with domestic and international standards aimed to improve the lives of children.

LPRs, also known as green card holders, have legal status to live and work in the United States. Some green card holders enter as infants or young children. More than 20,000 LPRs currently serve in the U.S. military.² While many green card holders are eligible to become U.S. citizens through naturalization, immigration experts speculate that many do not take advantage of this option because of the hefty fees required to apply or a mistaken belief that their "permanent resident" status protects them from deportation.³ In fact, LPRs make up nearly 10 percent of those who are deported from the United States.⁴ Most LPRs facing deportation on the basis of criminal convictions have already served their criminal sentences.⁵

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA)⁶ and the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA),⁷ which together introduced additional immigration restrictions on LPRs convicted of crimes. The law expanded the category of crimes designated as aggravated felonies to encompass a broad range of minor and non-violent offenses.⁸ Lawful permanent residents convicted of an aggravated felony are subject to mandatory deportation and other

severe immigration consequences.⁹ Currently, a conviction may fall into this category without being a felony and without involving any aggravated circumstances.¹⁰ Even expunging such a crime from an individual's record does not remove the immigration consequences it triggers.¹¹

Non-Violent Aggravated Felonies

Under the 1996 legislation, the following non-violent crimes may constitute aggravated felonies:

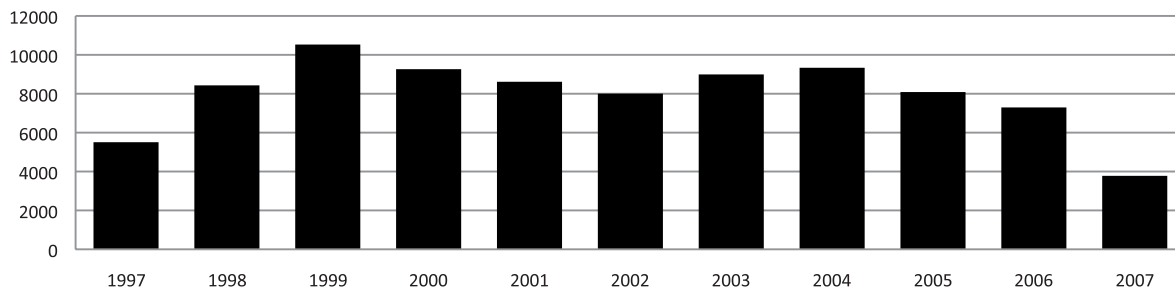
- » Non-violent theft offenses
- » Non-violent drug offenses
- » Forgery
- » Receipt of stolen property
- » Perjury
- » Fraud or deceit, where the loss to the victim exceeds \$10,000
- » Tax evasion, where the loss to the government exceeds \$10,000

Source: INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).

Until 1996, most lawful permanent residents with criminal convictions facing deportation were entitled to a hearing before an immigration judge who would balance an individual's criminal convictions against his or her positive contributions to the United States.¹² At this hearing, an immigration judge could consider the impact that deportation of an LPR parent would have on U.S. citizen children and, if warranted, could decide to allow an LPR to remain in the country. However, the 1996 immigration laws eliminated such hearings for LPRs facing deportation based on convictions classified as aggravated felonies.¹³

Despite claims by U.S. Immigration and Customs Enforcement (ICE) that it focuses on deporting the "worst of the worst" criminal offenders,¹⁴ analysis of data from the U.S. Department of Homeland Security (DHS) by the nongovernmental organization Human Rights Watch found that more than 68 percent of LPRs are deported for relatively minor, non-violent

FIGURE 1: LEGAL PERMANENT RESIDENTS (LPRs) DEPORTED BY YEAR



Source: U.S. Department of Homeland Security.

Note: Data for 1997 includes only the months of April–December and data for 2007 includes only the months of January–August.

offenses.¹⁵ Our independent analysis of data from DHS estimates that more than 100,000 children have been affected by parental deportation between 1997 and 2007, and that at least 88,000 of these children were U.S. citizens.

Against this backdrop, this policy brief draws attention to the impact of the 1996 immigration laws on U.S. citizen children of LPR parents. U.S. Customs and Border Patrol recently confirmed that on October 1, 2009, it increased efforts to identify LPRs with criminal convictions.¹⁶ It is likely that a greater number of LPRs will be detained and placed into removal proceedings.

This analysis is based on data provided by DHS as well as the 2008 American Communities Survey, a representative survey of the U.S. population administered by the U.S. Census Bureau. We have also reviewed relevant social science literature as well as international and domestic laws and standards regarding family separation. We interviewed several LPRs and their family members living in California who have been affected by deportation or potential deportation.¹⁷ We note that all children, regardless of immigration status, may be impacted by forced separations from their parents. Although U.S. citizen children are the focus of this research, this policy brief does not assert that other children are any less deserving of protection under domestic law.

Number of U.S. Citizen Children Affected By Deportation of an LPR Parent

In the ten-year period between April 1997 and August 2007, the United States deported 87,884 LPRs for criminal convictions at an average rate of approximately 8,700 per year (see *Figure 1*).¹⁸

Lawful permanent residents deported during this time period lived in the United States an average of approximately ten years, long enough to form families (see *Table 1*). The majority (53 percent) of these LPRs had at least one child living with them. In the ten-year period described above, the United States deported the lawful permanent resident mother or father of approximately 103,000 children. At least 88,000 (86 percent) of these children were U.S. citizens. Moreover, approximately 44,000 of these children were under the age of 5 when their parent was deported. In addition to these children, more than 217,000 other immediate family members—including U.S. citizen husbands, wives, brothers, and sisters—were affected by the deportation of LPRs. See the Appendix for a detailed explanation of the methodology used to estimate the length of residency and family composition of deported LPRs.

TABLE I: NUMBER OF LPRs DEPORTED AND ESTIMATED CHILDREN/FAMILY MEMBERS IMPACTED FROM 1997–2007

Total Number of LPRs Deported	87,884
Estimated percent of LPRs that had at least one child living with them	53%
Estimated Total Number of Children Under 18 Impacted by Deportation of an LPR Father or Mother	103,055
Estimated Total Number of Children Under 5 Impacted by Deportation of an LPR Father or Mother	44,422
Estimated Total Number of U.S. Born Children Under 18 Impacted by Deportation of an LPR Father or Mother	88,627
Estimated Total Number of Immediate Family Members Impacted by Deportation of an LPR in Household	217,068

Source: U.S. Department of Homeland Security. Estimates of the number of children and family members are based on a 95 percent confidence interval and were derived from the 2008 American Communities Survey. See Appendix for details.

Costs of Detention and Deportation of LPR Parents

Individuals who are detained by DHS are in custody pending resolution of their removal cases. ICE spends approximately \$2.55 billion each year on Detention and Removal Operations, the largest single portion of its annual budget.¹⁹ Of this total, approximately \$1.77 billion is spent incarcerating immigrants in local jails, while another \$221 million is spent on legal proceedings related to individual removal hearings.²⁰ Because LPRs make up an estimated 10 percent of those deported from the United States,²¹ it can be reasonably assumed that at least 10 percent of ICE’s detention and removal budget, or approximately \$255 million each year, is spent detaining and deporting lawful permanent residents, half of whom have children living with them.

By removing a lawful permanent resident parent of a U.S. citizen child, the government also creates immense secondary social and economic effects. While little data exists on the impact on U.S. citizen children of deporting LPR parents, a great deal of data exists regarding the impact of removing a parent from the home due to

incarceration. These data show that children of incarcerated parents are much more likely to experience psychological disorders and to exhibit behavioral problems.²² Children of incarcerated parents are more likely to experience trouble in school, including poor grades and behavioral problems, than children of non-incarcerated parents. One study found that 70 percent of children under age 6 with incarcerated mothers exhibited poor academic performance.²³ Removal of an LPR parent increases the likelihood of poor education outcomes for children, leading to a greater number of U.S. citizens who may be relegated to low-income employment as adults.

It is also likely that many U.S. citizen children separated from an LPR parent will suffer economic strain, requiring additional public assistance for the families left behind. A recent study by the Urban Institute on the consequences of arrest, detention, and deportation of immigrant parents on children in the United States found that parental arrest results in severe economic hardship for families because they lose a breadwinner.²⁴ The study found that most households experienced lower incomes, housing instability, and food insufficiency.²⁵ Households surveyed in all six cities in the study reported

a significant average drop in income after a parent's arrest.²⁶

The Urban Institute found that the vast majority of affected families received some sort of assistance from family and friends, yet informal support was not sustainable for families facing long deportation proceedings.²⁷ More than half the families studied relied on private or public financial support to sustain the household including food, rent, and utility assistance.²⁸ Public benefits for U.S. citizen children affected included cash welfare, Supplemental Nutrition Assistance Program (formerly known as the Food Stamp Program), the Supplemental Nutrition Program for Women, Infants and Children, and free and reduced-price school meals.²⁹

Legal Protection for the Most Vulnerable Members of Society

International human rights law and domestic family law recognize children as among the most vulnerable members of society. Nearly every major human rights treaty recognizes the need for special protection of children.³⁰ In the United States, immigration is governed primarily by federal law. Nevertheless, a human rights framework provides a useful lens for analyzing the impact of deporting lawful permanent resident parents and supplies an important source of norms that may guide domestic lawmakers in their efforts to reform the U.S. immigration system.

International human rights treaties recognize the family as the natural and fundamental unit of society.³¹ The International Covenant on Civil and Political Rights (ICCPR) provides that the family is "entitled to protection by society and the State."³² The right to a family also requires that states take appropriate measures "to ensure the unity or reunification of families."³³ As such, states cannot arbitrarily or unlawfully interfere with this essential social unit. The United Nations Human Rights Committee, which oversees state compliance with the ICCPR, has found that states must respect the right to family

unity in cases where the deportation of a parent would arbitrarily interfere with this right.³⁴ The Convention on the Rights of the Child also enshrines the principle that in all legal actions, "the best interests of the child shall be a primary consideration."³⁵

U.S. federal law and the laws of many states also protect family integrity. Laws in all fifty states require the use of the best interests of the child standard in decisions "regarding a child's custody, placement or critical life issues."³⁶ Federal laws such as the Family Medical Leave Act also protect the rights of individuals to take leave from their jobs to care for a family member.³⁷ Certain states, such as California, have also passed similar family leave laws that allow parents to take unpaid leave to attend their child's school activities.³⁸

Application of the Principle of Family Unity to Deportation of LPR Parents

In drafting the Immigration and Nationality Act of 1952 (INA), Congress's primary purpose was to ensure the unification of mixed families of U.S. citizens and immigrants.³⁹ This priority was reiterated in 1981, by the Select Commission on Immigration and Refugee Policy, a body appointed by Congress to study immigration policies and recommend legislative reform, which stated:

[R]eunification . . . serves the national interest not only through the humaneness of the policy itself, but also through the promotion of the public order and well being of the nation. Psychologically and socially, the reunion of family members with their close relatives promotes the health and welfare of the United States.⁴⁰

Courts also have recognized the importance of the INA's emphasis on family unity. In the 1977 case *Fiallo v. Bell*, the U.S. Supreme Court recognized that the legislative history of the INA "establishes that congressional concern was directed at 'the problem of keeping families of United States citizens and immigrants united.'"⁴¹

Numerous appellate courts have affirmed this interpretation of the INA as consistent with its goal of preventing the “continued separation of families.”⁴²

However, current immigration laws undermine these foundational principles. In more than half the cases documented in the Urban Institute study, children remained in the United States after the deportation of a parent.⁴³ Sann’s story exemplifies how immigration laws interfere with family unity. When Sann was detained, his sister, a high school teacher, took care of Sann’s daughter, and his younger brothers took care of Sann’s four sons. The children continue to live in separate homes.

“Nothing was the same when he was gone—Sann was the glue that held this family together,” said his brother, Paul. Sann’s sister said she fears what will happen to her brother if he returns to Cambodia. She believes that his absence will tear all of them apart.

Sann was ordered removed without the opportunity for a hearing to consider the effects his deportation would have on his five U.S. citizen children, ranging in age from 11 to 18. Had such a hearing been available, the immigration judge could have considered the impact of Sann’s deportation on his dependent U.S. citizen children, consistent with the INA’s commitment to family unity.

IMPACT ON HEALTH

Removing a lawful permanent resident parent from the home also negatively impacts the physical and mental health of U.S. citizen children. The right to health is widely recognized by numerous human rights treaties.⁴⁴ The scope of this right has been held to include the “enjoyment of the highest attainable standard of physical and mental health.”⁴⁵ The first post-World War II treaty to establish the right to health, the 1946 Constitution of the World Health Organization, describes “health” as “a state of complete physical, mental, and social well-being and not merely the absence of infirmity.”⁴⁶

Impacts of Forced Separation

Emilio Martinez has been a green card holder since he came to the United States from Mexico as a toddler. His problems started when he was 18 years old. Police picked him up with some friends and charged him with illegal possession of a firearm. Emilio pleaded guilty, and a judge sentenced him to six months in jail. As a condition of his probation, the judge ordered Emilio to stay away from gang members.

For three years, life continued as normal. Emilio bought a house, married Cathy, a U.S. citizen, and started his career as a welder. But in 2008, Emilio got a call at work from his sister saying that her husband had been arrested. She asked Emilio to stop by her house to check on her children. When Emilio went to his sister’s house, the police accused him of “associating with a gang member”—simply by visiting his brother-in-law’s house—and they arrested him for violating his parole. Emilio was jailed for thirty days. Just before he was scheduled for release, officials told him he had an “Immigration and Customs Enforcement hold.” As a result, he was transferred to another jail where he has been held in the custody of the U.S. Department of Homeland Security for nearly a year and a half.

During this time Cathy and their children have been separated from Emilio. “I have had to be a dad and a mom—I just barely get by,” Cathy said. She was unsure how to explain their father’s absence to their children. “I didn’t want to tell the kids at first, because I thought he would be home soon,” she said. “But after a while, it had been so long that I had to tell them something.” When she did tell her 5-year-old son, she explained: “[He] told me I should go to the jail for a couple of days to trade positions, so he could see his dad.”

In recent years, Congress has passed a number of laws aimed at promoting the welfare of children on issues relating to health, education, and protection from crime.⁴⁷ For example, the No Child Left Behind Act requires schools to track the academic performance of limited-English speaking children and other groups that include children of immigrants.⁴⁸ Policies requiring the deportation of LPR parents of U.S. citizen children directly contradict the purposes of these laws and place the welfare of these children at risk.

Available data on children whose parents are absent as a result of incarceration suggest that these children may suffer a number of health problems. Studies of this population show that children who witness a parent's arrest often suffer psychological harm, including persistent nightmares and flashbacks.⁴⁹ Additionally, studies have shown that incarceration of parents results in the introduction of new caregivers in a child's life, which significantly increases the likelihood a child will be victimized.⁵⁰

Limited research has been conducted that documents adverse health impacts on children living in the United States when a parent is deported. Anthropologists Marcelo and Carola Suárez-Orozco recently completed a study that examined 385 early adolescents in the United States from China, Central America, the Dominican Republic, Haiti, and Mexico, 85 percent of whom experienced separation from one or both parents for extended periods because of immigration, divorce, or death.⁵¹ Marcelo and Carola Suárez-Orozco found that children from separated families were more likely to show signs of depression than children who had not been separated.⁵² Their data also indicated that separations from loved ones, particularly parents, led to feelings of loss and sadness in both adults and children.⁵³

The Urban Institute study also found significant behavioral changes among most children who had experienced immigrant parental separation.⁵⁴ A majority of the children displayed changes in such basic areas as sleeping,

eating, and controlling their emotions.⁵⁵ More than half cried more frequently and were more afraid, and more than a third were more anxious, clingy, withdrawn, angry, or aggressive following their parent's arrest.⁵⁶ Although the severity of these psychological impacts tended to decrease in the long term, at least 40 percent of children exhibited signs of these behavioral changes after nine months.⁵⁷

Christine Sun, a Chinese immigrant who lives in the San Francisco Bay Area, arrived in the United States in 1996, to begin her new life with her husband, a U.S. citizen. However, the marriage was unsuccessful and the couple divorced in 1998. In 2007, as Christine returned from a trip to China to visit relatives, immigration officials asked about her criminal history. She admitted that she had two prior shoplifting offenses. As a result, the officials seized her green card and told her that she would be placed in deportation proceedings.

Christine's deportation proceedings affected her daughter, Jamie, an 11-year-old U.S. citizen. "I got depressed," said Jamie. Jamie explained that every time her mother left the apartment, even to take out the trash, Jamie "felt cold, nervous, and would start crying" because it gave her a sense of what it would be like to live without her mother.

Similarly, Juan, the 12-year-old U.S. citizen child of an LPR from Mexico, had a hard time sleeping and playing when his father was detained by immigration officers. His older sister said she feared she would never see her father again.

Although the Suárez-Orozco study noted the resilience of children, it also stressed the importance of considering how the child understands the separation.⁵⁸ If a child is well prepared for the separation and the time apart is framed as temporary and necessary, the separation will be more psychologically manageable than if the child feels that he or she has been abandoned by the parent.⁵⁹ Because the context and circumstances of separations due to detention and deportation are likely neither prepared

for in advance nor framed as temporary, these separations likely will be psychologically difficult.

In fact, uncertainty is a hallmark of detention and deportation of LPR parents. There is no predetermined, fixed period of detention, and it is not clear until a final decision has been rendered in each case whether the parent will be released or deported.⁶⁰

IMPACT ON EDUCATION AND SOCIAL DEVELOPMENT

Parents contribute to their children's academic success by reading to them, helping with homework, taking their children to and from school, and providing a stable home environment where children learn and grow. However, each year, the education of thousands of U.S. citizen children is affected by the detention and deportation of a parent who is a lawful permanent resident.

The right to education is firmly established in international human rights law,⁶¹ which defines education as encompassing the broad range of activities that contribute to the development of children.⁶² For example, the Committee on the Rights of the Child, the body that enforces the international Convention on the Rights of the Child, notes that education includes activities "beyond formal schooling" which "enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society."⁶³

The U.S. Supreme Court has recognized the importance of education, noting the "lasting impact of its deprivation on the life of the child."⁶⁴ Access to education is also protected under U.S. federal and state law. The stated goal of the No Child Left Behind Act is to improve access to a quality education for all children.⁶⁵ In addition, certain states such as California have declared education to be a fundamental right.⁶⁶

The Urban Institute study also documented the effects that parental detention and deportation can have on a child's education.⁶⁷ A significant number of children in the study experienced disruptions in their schooling: many missed school following their parent's arrest, some

struggled to maintain good grades, and others considered dropping out of school.⁶⁸ Following the arrest of a parent, academic performance suffered and grades dropped for about one in five students.⁶⁹

The families interviewed for this policy brief demonstrate how detention can hinder the education of U.S. citizen children. When Sann was detained, his children's performance in school plummeted. Sann's youngest son, Vithu, 13, went from being an A student to flunking 7th grade English.

Christine Sun's daughter Jamie, is an honor student in the Gifted and Talented Education program (GATE). While her mother's case was pending, Jamie said it took her longer to finish her homework because she was distracted by thoughts of her mother's possible deportation. Her mother's deportation proceedings also affected Jamie's social life. She found herself getting angry more often. She said she became upset that her normal homework took longer than usual and was quicker to become angry at her fellow classmates.

Another U.S. citizen, Daniel, is a 14-year-old who had to change schools when his LPR mother, a Mexican national, was detained for a year. Daniel—also a student in the GATE program—saw his grades drop. "I didn't concentrate as much because I was in a place that I didn't recognize," he explained. Daniel said that he used to be more playful and socially engaged before he had to transfer schools. He said he has become withdrawn in his new learning environment and does not like talking to his peers.

U.S. Deportation Law and Policy Should Be Informed by European Court of Human Rights Jurisprudence

The European human rights regime provides one model for addressing potential family separation in deportation hearings involving a lawful permanent resident parent of a U.S. citizen child. Many European nations have immigration systems that, like the United States, confront the problem

of deporting long-term legal residents who commit crimes, but who have citizen children and extensive ties to the country. European countries have incorporated a judicial balancing test that considers the nation's interest in public safety in light of the right to the family and the best interests of the child.

The European Court of Human Rights (European Court), the judicial body that enforces the European Convention on Human Rights (European Convention),⁷⁰ has repeatedly upheld the right of a state to expel immigrants convicted of crimes to maintain public order.⁷¹ Further, the court has emphasized that the European Convention does not guarantee the right of an immigrant to live in a particular country, especially after committing a crime.⁷² However, the European Court has held that a state's decision to deport an individual is justified only if the interference with family life is not excessive compared to the public interest that is protected.⁷³ In cases in which an individual convicted of a crime poses little threat to public security and has extensive family ties to the country, the European Court has held that deportation may violate the

right to family unity protected by Article 8 of the European Convention.⁷⁴

The European Court has often found that the right to family unity outweighs the state's interest in deporting an immigrant convicted of a crime. In the case of *Mehemi v. France*, the European Court considered the case of an Algerian national sentenced to six years imprisonment for illegal importation of a controlled substance.⁷⁵ The European Court weighed Mehemi's family connections, including his wife and three minor children of French nationality, and found that his right to family life outweighed the state's interest in deporting him. Because his crime was a non-violent drug offense, the court found his deportation was disproportionate to the public interest aims pursued, and thus violated Article 8.⁷⁶

The Inter-American Commission has followed a similar balancing test to determine whether the deportation of a parent violates the right to family under the American Convention on Human Rights⁷⁷ and the American Declaration of the Rights and Duties of Man.⁷⁸ The Commission's report on Canada's immigration system concedes

European Court Model

The European Court for Human Rights criteria for evaluating whether a particular deportation violates the right to family unity include:

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

Sources: *Mehemi v. France*, 1997-VI Eur. Ct. H.R. 1959; *Boultif v. Switzerland*, 2001-IX Eur. Ct. H.R. 120.

that while states have the right and duty to maintain public order through expulsion of immigrants, they must balance this right with the potential harm to the rights of the individuals in a specific case.⁷⁹ The Commission also accepted the European Court's determination that a balancing test should be applied on a case-by-case basis and that states must have a compelling justification for interference with the right to family.⁸⁰

Similar to U.S. immigration law prior to 1996, the current European model provides a feasible alternative to mandatory detention and deportation. This model could be adapted to restore the authority of U.S. immigration judges to conduct a practical balancing test that considers the rights of the LPR parent, the U.S. citizen child, and the state. Because of the particular vulnerabilities of children, U.S. immigration judges need flexibility in applying a multi-factored analysis to ensure that the needs of all parties are given proper consideration. Such an approach would bring current immigration laws in line with the basic American values of public safety and family unity, as well as with international human rights standards.

Conclusions and Recommendations

Reform of the nation's immigration system is urgently needed. Thousands of U.S. citizen children have been adversely impacted by the expansion of the "aggravated felony" definition. Reforming the nation's immigration laws to take into consideration the best interests of U.S. citizen children will reduce unnecessary costs to our social welfare system. Such modifications also will bring the United States in line with international law and the practice of many European countries. By strengthening legal protections for these children, Congress can reaffirm its historic commitment to the principle of family unity.

WE RECOMMEND THE FOLLOWING MEASURES:

- » ***Congress should restore judicial discretion in all cases involving the deportation of LPRs who have U.S. citizen children in order to give parents a meaningful opportunity to present evidence of the adverse impact that their deportation will have on their U.S. citizen children.*** Restoring discretion will give immigration judges an opportunity to make informed decisions based on all relevant facts, including the health, well being, and educational needs of U.S. citizen children. Currently there is a bill pending in Congress that would provide this needed reform. The Child Citizen Protection Act (CCPA)⁸¹ was introduced by Congressman Jose Serrano (D-NY) on January 6, 2009, in the 111th Congress as H.R. 182.⁸² This bill would provide discretionary authority to immigration judges to determine whether a non-citizen parent of a U.S. citizen child should be ordered removed, deported, or excluded from the United States. This bill would return the decision-making power to judges when the best interests of a U.S. citizen child hang in the balance. This bill would not interfere with the power of immigration judges to order LPRs removed. If enacted, this bill will restore discretion in cases in which relief is foreclosed by a statutory bar.⁸³ We recommend that Congress move to enact the CCPA, either alone or as part of comprehensive immigration reform legislation.
- » ***Congress should revert to the pre-1996 definition of aggravated felony.*** Before the legislative changes in 1996, the aggravated felony designation was reserved for the most serious offenses. At that time many convictions that fell into this category required sentences of five years or more.⁸⁴ Today, a sentence of just one year qualifies many offenses under the aggravated felony designation.⁸⁵ The designation of a conviction as an aggravated felony results in ineligibility for discretionary relief, regardless of the equities involved. With such grave consequences for LPR parents and their U.S. citizen children, the aggravated

felony definition should be revised to limit this category to only serious felony convictions. On February 8, 2010, the American Bar Association voted to urge Congress to change current immigration laws, in part by changing the current definition of aggravated felony. The ABA recommends limiting this category to felony convictions in which a sentence of more than one year has been imposed, and excluding suspended sentences.⁸⁶

» *The U.S. government should collect data on U.S. citizen children impacted by deportation of an LPR parent.* Currently, we know very little about the numbers of U.S. citizen children affected by deportation of an LPR parent. Such information is critical to gain a fuller understanding of the real impact of deportation laws on the nation's youngest citizens. U.S. Department of Homeland Security should collect information on the number, age, gender and other demographics regarding U.S. citizen children who are separated from one or both LPR parents as a result of parental deportation. The agency should also record whether the U.S. citizen child remains in the United States or accompanies his or her deported parent. The social impacts of deportation of an LPR parent should also be investigated. Independent research should be commissioned to study the psychological, educational, social, and economic impacts on U.S. citizen children of LPR parental deportation.

» *The Executive Office for Immigration Review should establish guidelines for the exercise of discretion in cases involving the deportation of LPRs with U.S. citizen children.* U.S. immigration laws recognize that children constitute a vulnerable group that requires special protection.⁸⁷ In 2007, the Chief Immigration Judge issued guidelines for adjudicating cases in which the respondent is an unaccompanied minor who is not a U.S. citizen.⁸⁸ These guidelines applied the principle of the best interests of the child to modify the court procedures and environment to account for the special needs of unaccompanied minors

in these circumstances.⁸⁹ The Executive Office for Immigration Review should issue similar guidelines to assist immigration judges in considering the impact on citizen children of deporting an LPR parent.

In some situations, deportation of an LPR parent will result in dependent U.S. citizen children being left without any family caretakers in the United States. In other situations, U.S. citizen children will accompany their parents to foreign countries. Immigration judges should receive appropriate training. A greater understanding of the needs of children, how children process information and events, and the effect of removing an LPR parent from the home of a U.S. citizen child will better prepare immigration judges to adequately balance the needs of citizen children against the interest of the government in removing certain LPRs from the United States. The establishment of guidelines and access to training for judges is necessary to ensure well reasoned outcomes that do not inadvertently cause disproportionate harm to U.S. citizen children.

APPENDIX

DATA SOURCES AND METHODOLOGY

The U.S. Department of Homeland Security (DHS) provided data to the nongovernmental organization Human Rights Watch, which published an analysis in their April 2009 report *Forced Apart (By the Numbers): Non-citizens Deported Mostly for Nonviolent Crimes*.⁹⁰ Human Rights Watch made available a subset of the data covering lawful permanent residents (LPRs) to the authors of this report for our independent analysis.

The estimates of the number of family members affected by the deportations of LPRs were generated in a two-step process. First, using the DHS data, we identified the 18 countries of deportation that accounted for 90 percent of the 87,844 LPRs who were deported between 1997 and 2007. These countries are Mexico, the Dominican Republic, Jamaica, El Salvador, Colombia, Philippines, Haiti, Guatemala, Trinidad and Tobago, Guyana, Honduras, Canada, United Kingdom, Portugal, Ecuador, Peru, and South Korea. Second, we made use of the 2008 American Communities Survey, a representative survey of the U.S. population administered by the U.S. Census Bureau, to generate estimates of noncitizen family sizes.⁹¹ We analyzed noncitizen survey respondents who met two requirements: they were age 30 and their country of birth was one of 18 countries listed above. A 1996 Bureau of Justice Statistics publication “Noncitizens in the Federal Criminal Justice System, 1984-94” found that the median age of noncitizens prosecuted in federal courts was 30, thus we used that age for our analysis. The estimates are based on the following assumptions (after accounting for age and country-of-birth as described here): (1) The population statistics generated from the 2008 American Communities Survey adequately describes the non-citizen population for years 1997-2007; (2) the characteristics of the LPR population are similar to those of non-citizens in general (the American Communities Survey does not distinguish between different types of non-citizens); and (3) deported LPRs have similar characteristics to the general population of non-citizens.

This analytical population of noncitizens reported an average of 10.6 years living in the United States. We calculated average family size, average number of own children, and average number of children under age 5 living in the household as well as 95th confidence intervals for each mean using the ACS household weight. The rounded means were 3.7, 1.3 and .53, respectively. Finally, we calculated estimates of the number of family members (total, children, and children under age 5) affected by total LPR deportations between 1997 and 2007 by multiplying the upper and lower limits of each unrounded mean’s estimate by 87,844 (see table below). For the purpose of estimating the number of family members affected by a deportation, 1 was subtracted from the mean of 3.72885 to account for the respondent. Finally, an Urban Institute study found that 86 percent of all children of immigrants are U.S. citizens.⁹² To estimate the number of children under 18 impacted by a parent deportation who were U.S. citizens, we multiplied 103,055 by .86.

TABLE A.1: ESTIMATES OF CHILDREN AND FAMILY MEMBERS OF LPRs DEPORTED BETWEEN 1997–2007

	Estimate	Estimated Range
Total Number of Children Under 18 Impacted by Deportation of an LPR Father or Mother	103,055	98,143 to 107,968
Total Number of Children Under 5 Impacted by Deportation of an LPR Father or Mother	44,422	41,801 to 47,044
Total Number of Immediate Family Members Impacted by Deportation of LPR in Household	217,068	209,590 to 224,547

Note: Estimates are based on 95 percent confidence interval.

Notes

1 Also commonly referred to as “green card holders,” the term “lawful permanent resident,” or LPR, refers to individuals who enjoy the legal status to reside permanently in the United States as an immigrant in accordance with the immigration laws. Immigration and Nationality Act [hereinafter INA] § 101(a)(20), 8 U.S.C. § 1101 (2000) (all INA citations in this report are to the official print version of the U.S. Code (2000) unless otherwise noted). Individuals may obtain this status a number of ways including through family members or employment. See generally INA § 203, 8 U.S.C. § 1153.

2 JEANNE BATALOVA, MIGRATION POLICY INSTITUTE, *IMMIGRANTS IN THE US ARMED FORCES* (May 2008), available at <http://www.migrationinformation.org/USFocus/display.cfm?ID=683#1> (accessed Feb. 24, 2010).

3 See Ly Diem, *Deported! Surprising Details On Who Can Get the Boot*, IN'L EXAMINER, vol. 34, No. 24, Jan. 10, 2008, available at <http://www.detentionwatchnetwork.org/node/518> (accessed Feb. 21, 2010).

4 See HUMAN RIGHTS WATCH, *FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES*, April 15, 2009 [hereinafter “FORCED APART (BY THE NUMBERS)”], available at <http://www.hrw.org/en/reports/2009/04/15/forced-apart-numbers-0> (accessed Feb. 21, 2010).

5 The U.S. Supreme Court has found that deportation does not legally constitute punishment. *Fong Yue Ting v. United States*, 149 US 698, 728 (1893). However, the practical effect of deportation based on criminal convictions is that immigrants are punished once by the criminal justice system, and then again by the immigration system. Lea McDermid, *Deportation is Different: Noncitizens and Ineffective Assistance of Counsel*, 89 CAL. L. REV. 741, 763 (2001) (“The technical distinction between collateral and direct consequences does nothing to ameliorate the suffering of those who are subject to the double punishment of a prison sentence plus removal.”); *FORCED APART (BY THE NUMBERS)*, *supra* note 4, at 5 (stating that non-citizens convicted of crimes are “subject to deportation after they have finished serving their criminal sentences.”).

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

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

8 When the category was first established in 1988, the term “aggravated felony” applied to serious crimes such as murder, drug trafficking crimes, and certain illicit trafficking offenses. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181 (1988). INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), states that any alien who is convicted of an aggravated felony at any time after

admission is deportable; INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) states that individuals convicted of any aggravated felony are not eligible for cancellation of removal. Additionally, Congress has taken further action to restrict the ability of federal judges to review immigration court decisions. See REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005) (barring federal courts from reviewing discretionary denials of relief).

9 In this policy brief, we use the term “mandatory deportation” to refer to deportation without a discretionary hearing to consider circumstances specific to the individual case. Individuals convicted of aggravated felonies are subject to mandatory detention, ineligible for asylum, permanently barred from entering the United States, and are subject to a sentence of up to twenty years if they re-enter the country without permission from the Secretary of Homeland Security. INA § 236(c), 8 U.S.C. 1226(c); INA § 208(b)(2)(B)(i), 8 U.S.C. 1158 (b)(2)(B)(i); § 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii); § 276(b)(2), 8 U.S.C. § 1326(b)(2).

10 Many state law misdemeanor crimes which are punishable by sentences of one year are included in the aggravated felony category in federal immigration law. These crimes include non-violent offenses because the word “aggravated” has no legal bearing on the circumstances of the offense.

11 The INA definition of a conviction for immigration purposes does not exclude a conviction that was expunged or eliminated on the basis of rehabilitative relief. See 8 U.S.C. § 1101(a)(48).

12 Before 1996, lawful permanent residents were eligible for relief from deportation under INA § 212(c) as long as they had not been convicted of aggravated felonies for which they had served sentences of five years or more. 8 U.S.C. § 1182(c) (1952), repealed by Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-208, Div. C., Title III, § 304(b), 110 Stat. 3009-597 (1996).

13 INA 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), states that any alien who is convicted of an aggravated felony at any time after admission is deportable; INA 240A(a)(3), 8 U.S.C. § 1229b(a)(3), states that individuals convicted of any aggravated felony are not eligible for cancellation of removal. Additionally, Congress has taken further action to restrict the ability of federal judges to review immigration court decisions. The 2005 REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231 (2005), bars federal courts from reviewing discretionary denials of relief, including discretionary relief still available to lawful permanent residents, such as cancellation of removal, voluntary departure, and adjustment of status. INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) (removing jurisdiction to review “any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245,” or “any other decision or action...”).

14 U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE), *FISCAL YEAR 2008 ANNUAL REPORT, PROTECTING*

NATIONAL SECURITY AND UPHOLDING PUBLIC SAFETY 3, available at http://www.ice.gov/pi/reports/annual_report/2008/ar_2008_page1.htm (accessed Jan. 6, 2010).

15 The most common criminal offenses are driving under the influence of liquor, simple assault, and drug possession. See FORCED APART (BY THE NUMBERS), *supra* note 4, at 39.

16 American Immigration Lawyers Association, AILA InfoNet, Doc. No. 09100122, available at <http://www.aila.org/content/default.aspx?docid=9826> (accessed Feb. 25, 2010).

17 The names of those interviewed for this policy brief have been changed to protect their privacy.

18 This was based on the average across years 1998-2006; data for years 1997 and 2007 are not for those full years.

19 U.S. DEPT. OF HOMELAND SECURITY, OFFICE OF PUBLIC AFFAIRS, FACT SHEET: ICE FISCAL YEAR 2010 ENACTED BUDGET 2, Nov. 5, 2009, available at <http://www.ice.gov/pi/news/factsheets/index.htm> (accessed Feb. 21, 2010).

20 *Id.* at 1-2.

21 FORCED APART (BY THE NUMBERS), *supra* note 4, at 24.

22 Based on a qualitative study of 30 children who had witnessed the arrest of their mothers, Jose-Kampfner posited that the high levels of anxiety and depression found among participants were associated with the experience of maternal incarceration and with trauma related to the arrest event itself. C.J. Jose-Kampfner, *Post-Traumatic Stress Reactions in Children of Imprisoned Mothers*, in CHILDREN OF INCARCERATED PARENTS (K. Gabel & D. Johnston eds., 1995). In her sample of 56 mothers incarcerated at women's prisons in Kentucky and Washington State and their children, Baunach found that 70 percent of the children exhibited symptoms of social and psychological disorders, such as aggression, hostility, and withdrawal. PHYLLIS JO BAUNACH, *MOTHERS IN PRISON* (Transaction Books 1985).

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

24 AJAY CHAUDRY ET AL., *URBAN INST., FACING OUR FUTURE: CHILDREN IN THE AFTERMATH OF IMMIGRATION ENFORCEMENT 27* (2010) [hereinafter *URBAN INST.*]. The study included 190 children in 85 families living in six U.S. cities. For more information on the effect of deportation on families in the United States, see the work of Families for Freedom, a New York-based multi-ethnic defense network run by and for families confronting deportation, <http://www.familiesforfreedom.org>.

25 *URBAN INST.*, *supra* note 24, at ix. Because of these financial difficulties, one in four families moved in with friends and family to reduce their housing costs, and of the eight families that owned their homes prior to the detention of their parent, four lost their homes as a result.

26 *URBAN INST.*, *supra* note 24, at xiii (stating that one in four of the households did not have any wage earners after the arrest, and about two-thirds of the families interviewed stated that they had trouble paying their monthly bills as a result of the parental detention).

27 *URBAN INST.*, *supra* note 24, at 35.

28 *URBAN INST.*, *supra* note 24, at 36 (stating that while only one in ten of the families interviewed reported receiving Temporary Assistance for Needy Families benefits before the arrest, about one in seven received benefits following the arrest).

29 *URBAN INST.*, *supra* note 24.

30 See, e.g., International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 10, art. 24, S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967) [hereinafter ICESCR]: (every child has “the right to such measures of protection as are required by his status as a minor”). See also, UN Human Rights Committee, General Comment 17, ¶ 2 (stating that the ICCPR requires that states adopt “special measures to protect children” to ensure that they enjoy all of the rights provided in the Covenant). See also, Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (1989) [hereinafter CRC].

31 See, e.g., ICESCR, *supra* note 30, art. 10(1) (stating “[T]he widest possible protection and assistance should be accorded to the family.”).

32 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 177, 179, arts. 17, 23 [hereinafter ICCPR].

33 Human Rights Committee, General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses, ¶ 5 (27/07/90).

34 See, e.g., *Winata v Australia* (No. 930/2000), 16 August 2001, U.N. Doc. No. CCPR/C/72/D/930/2000 (referring to case of a stateless married couple from Indonesia, where the Human Rights Committee found that deporting the parents would violate articles 17, 23, and 24 of the ICCPR). The Committee noted that the fact that non-citizen parents may have a child who is a citizen does not necessarily classify the deportation as an arbitrary interference with the right to a family. On the one hand, this statement highlights that under the ICCPR, non-citizens do not have an absolute right to remain in the host country. On the other hand, it illuminates the need for states to evaluate possible unlawful interferences with the right to family. In this instance, because the child had been born and raised in Australia, “attending Australian schools as an ordinary child would and developing the social relationships inherent in that,” the Committee ruled that Australia had to present additional factors to justify the deportation of his parents “in order to avoid a characterization of arbitrariness.”

- 35** CRC, *supra* note 30, at 46, art. 3.
- 36** U.S. DEPT. OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, DETERMINING THE BEST INTERESTS OF THE CHILD: SUMMARY OF STATE LAWS, April 2008, available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interestall.pdf (accessed Feb. 21, 2010).
- 37** Family and Medical Leave Act, Pub. L. 103-3, 107 Stat. 6, 29 U.S.C. § 2601 (1993).
- 38** See, e.g., Cal. Lab. Code § 230.8 (prohibiting employers who employ 25 or more employees from discriminating against employees for taking off up to 40 hours each year to participate in school or child care activities for his or her child).
- 39** This key purpose is mentioned in the legislative history of the Act and in subsequent litigation. See also Solis-Espinoza v. Gonzales, 401 F.3d 1090, 1094 (9th Cir. 2005) (quoting H.R. Rep. No. 85-1199, pt. 2 (1957), reprinted in 1957 U.S.C.C.A.N. 2016, 2020); see also Colon-Navarro, Fernando, *What Happened to Family Unity?*, 19 FLA. J. INT'L L. 491, 492 (2007).
- 40** Colon-Navarro, *supra* note 39, at 497 (quoting U.S. Select Commission on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest 112-13 (1981)). Until the 1996 changes, family reunification had been at the foundation of U.S. immigration policy. In 1965, Congress passed the Immigration Reform Act of 1965, which changed “the primary focus of the criteria for admission from nationality to family reunification.” *Id.* at 496 (quoting National Research Council, Statistics on U.S. Immigration: An Assessment of Data Needs for Future Research (1996)).
- 41** Fiallo v. Bell, 430 U.S. 787, 795 (1977) (quoting H.R. Rep. No. 85-1199, at 7 (1957)). Specifically, in *Lau v. Kiley*, the Second Circuit upheld the importance of family reunification in visa preference laws when it stated that the “foremost policy underlying the granting of preference visas under our immigration laws [is] that of the reunification of families.” *Lau v. Kiley*, 563 F.2d 543, 547 (2d Cir. 1977).
- 42** Kaliski v. Dist. Dir. of INS, 620 F.2d 214, 217 (9th Cir. 1980). In a later case, Solis-Espinoza v. Gonzales, 401 F.3d 1090, 1094 (9th Cir. 2005), the Ninth Circuit reaffirmed that the primary purpose of the INA is to “keep families together” and that public policy “supports recognition and maintenance of a family unit.”
- 43** URBAN INST., *supra* note 24, at 24, 70.
- 44** The right to health has been formally recognized by six international human rights treaties. See, International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, S. Exec. Doc. C, 95-2 (1978); S. Treaty Doc. 95-18; 660 U.N.T.S. 195, 212, 220, art. 5(e)(iv); Convention on the Elimination of all Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 18-9, arts. 11(1)(f), 12 and 14(2)(b) (1980) [hereinafter CEDAW]; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, New York, Dec. 18, 1990, entered into force July 1, 2003, 2220 U.N.T.S. 93, 105, 108, 109, arts. 28, 43(e), and 45(c) (1991) [hereinafter Migrant Workers Convention]; International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (Dec. 13, 2006), 46 I.L.M. 443, art. 25; CRC, *supra* note 30, at 52, art. 24; ICESCR, *supra* note 30, at 10, art. 12.
- 45** ICESCR, *supra* note 30, at 10, art. 12(1).
- 46** Constitution of the World Health Organization, preamble, July 22, 1946.
- 47** See, e.g., The No Child Left Behind Act of 2001, 20 U.S.C. 6301 (2002) [hereinafter No Child Left Behind Act]; State Child Health Insurance Program Reauthorization Act of 2009, 42 U.S.C. § 1320, 1396-97 2009.
- 48** RANDY CAPPAS ET AL, URBAN INST., THE NEW DEMOGRAPHY OF AMERICA'S SCHOOLS: IMMIGRATION & THE NO CHILD LEFT BEHIND ACT 1 (2005), available at <http://www.urban.org/publications/311230.html> (accessed Feb. 21, 2010).
- 49** D. JOHNSTON, JAILED MOTHERS (Pacific Oaks Center for Children of Incarcerated Parents 1991).
- 50** See R. WHELAN, BROKEN HOMES AND BATTERED CHILDREN: A STUDY OF THE RELATIONSHIPS BETWEEN CHILD ABUSE AND FAMILY TYPE (London, Family Education Trust 1993) (finding that the presence of other adults other than blood relatives in a child's home increases the chances of victimization).
- 51** Marcelo and Carola Suárez-Orozco, *Making Up for Lost Time: The Experience of Separation and Reunification among Immigrant Families*, in THE NEW IMMIGRATION: AN INTERDISCIPLINARY READER 179, 185 (Marcelo and Carola Suárez-Orozco ed., 2005) [hereinafter Suárez-Orozco].
- 52** Suárez-Orozco, *supra* note 51, at 179.
- 53** Suárez-Orozco, *supra* note 51, at 191.
- 54** URBAN INST., *supra* note 24, at 53.
- 55** URBAN INST., *supra* note 24, at ix.
- 56** URBAN INST., *supra* note 24, at ix (stating that a majority of children experienced four or more of these behavior changes) and at 53 (stating that children who experienced long-term separation from their parents were most prone to withdrawal and aggression).
- 57** URBAN INST., *supra* note 24, at 53.
- 58** Suárez-Orozco, *supra* note 51, at 193.
- 59** Suárez-Orozco, *supra* note 51, at 193.
- 60** Additionally, in a policy report that focused on family separation due to migration of parents to the United States,

University of Maryland professors found that parents and psychologists in their study believed that family separation has negative psychological effects for both parents and children during their separation and after reunification. T.H. GIDLING & SARA POGGIO, *FAMILY SEPARATION AND THE EDUCATIONAL SUCCESS OF IMMIGRANT CHILDREN 2* (2009) available at http://globalchild.rutgers.edu/pdf/Family_Separation-Policy_Brief.pdf (accessed Feb. 21, 2010). The mothers in their focus group were intensely aware of the emotional burden of separation their children experienced. *Id.* Many mothers were very concerned that their children would become involved in gangs as a “refuge from emotional problems.” *Id.*

61 See, e.g., ICESCR, *supra* note 30, at 8, art. 13(1) (mandating that the “States Parties to the present Covenant recognize the right of everyone to education”). See also CRC, *supra* note 30, at 53, art. 28.

62 The right to education extends beyond basic skills instruction. See, e.g., CRC, *supra* note 30, at 54, art. 29(1)(a) (stating that education should be directed to “development of the child’s personality, talents and mental and physical abilities to their fullest potential”). The Committee on the Rights of the Child has also recognized that developing social relationships is a key part of education. The Committee has interpreted the right to education to encompass the purpose of “ensuring that essential life skills are learnt by every child and that no child leaves school without being equipped to face the challenges that he or she can expect to be confronted with in life.” Committee on the Rights of the Child, General Comment 1: Aims of Education, Article 29 (1), ¶ 9 (4/17/01) [hereinafter CRC General Comment 1]. The committee went on to define “basic skills” as “not only literacy and numeracy but also life skills such as the ability to make well-balanced decisions; to resolve conflicts in a non-violent manner; and to develop a healthy lifestyle, good social relationships and responsibility, critical thinking, creative talents, and other abilities which give children the tools needed to pursue their options in life.” *Id.*

63 CRC General Comment 1, *supra* note 62, at ¶ 2.

64 Plyer v. Doe, 457 U.S. 202, 221 (1982).

65 See, No Child Left Behind Act, *supra* note 47.

66 Serrano v. Priest, 487 P.2d 1241 (1971).

67 URBAN INST., *supra* note 24, at 53.

68 URBAN INST., *supra* note 24, at 49-50.

69 URBAN INST., *supra* note 24, at 51 (stating that among the number of children who showed signs of behavioral changes at school, most had trouble focusing).

70 Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 222 [hereinafter European Convention].

71 See *Uner v. Netherlands*, 2006-XII, Eur. Ct. H.R. ____, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Uner%20>

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Uner%20> Netherlands&sessionId=47796967&skin=hudoc-en.

72 European Convention, *supra* note 70, art. 8. Article 8 of the European Convention on Human Rights provides: “Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

73 *Berrehab v. the Netherlands*, 138 Eur. Ct. H.R. (ser. A) (1988); see also *Beldjoudi v. France*, 234 Eur. Ct. H.R. (1992), *Mehemi v. France*, 1997-VI Eur. Ct. H.R. 1959; and *El Boujaïdi v. France*, 1997-VI Eur. Ct. H.R. 1980.

74 *Boultif v. Switzerland*, 2001-IX Eur. Ct. H.R. 120.

75 *Mehemi v. France*, 1997-VI Eur. Ct. H.R. 1959.

76 Despite the fact that the amount of drugs in question was substantial, 142 kilograms of hashish, the European Court of Human Rights gave considerable weight to the fact that Mehemi had no prior convictions and that his deportation had completely separated him from his wife and children because it was impossible for them to resettle together in Algeria or any other country. *Id.* The court also noted that Mehemi “was completely integrated into French society and had no link whatsoever with Algeria other than his nationality.” *Id.* See also *Amrollahi v. Denmark*, (No. 56811/00) Eur. Ct. H.R. (July 11, 2002) available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Amrollahi%20%20v.%20%20Denmark&sessionId=47796967&skin=hudoc-en> (holding that the deportation of an Iranian national from Denmark for a serious drug offense violated Article 8 under the *Boultif* test because Amrollahi was married to a Danish national, had two Danish citizen children, and it was impossible for them to relocate to Iran). It is important to note that the European Court often does not find an Article 8 violation. In *Grant v. United Kingdom*, the court held that because Grant, a national of Jamaica living in England, had committed over fifty offenses, had continued to re-offend, and never cohabited with his citizen children, his deportation to Jamaica was not a violation of Article 8. *Grant v. United Kingdom*, (No. 10606/07), Eur. Court. H.R. (Jan. 8, 2009) available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Grant%20%20v.%20%20United%20%20Kingdom&sessionId=47796967&skin=hudoc-en>. Although the European Court acknowledged that the majority of his offenses were non-violent, it could not ignore the “sheer number of offences” he committed and the fact that with the exception of one four-year period, there was no prolonged period during which he was out of prison and did not re-offend. *Id.* The court recognized that his deportation would affect his youngest

daughter, but maintained that it would not affect her in the same manner it would have if they had been living together as a family. *Id.* Thus, the court held that a fair balance was struck and that Grant's deportation was proportionate to the legitimate aim pursued. *Id.*

77 American Convention on Human Rights, Nov. 21, 1969, O.A.S. T.S. No. 36; 1144 U.N.T.S. 143, 150, art. 17(1) (stating "The family is the natural and fundamental group unit of society and is entitled to protection by society and the state"), Art. 19 stating: "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state") (1969).

78 American Declaration of the Rights and Duties of Man, Res. XXX, Final Act of the Ninth International Conference of American States (Pan American Union), Bogota, Colombia, Mar. 30-May 2, 1948, at 38; *reprinted in* Handbook of Existing Rules Pertaining to Human Rights, OEA/Ser.L/V/II.23 Doc. 21 Rev. 6, at 5 (1979); 1 Annals of the O.A.S. 130 (1949); Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003); and 43 Am. J. Int'l L. Supp. 133 (1949). Art. V (stating "Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.") Art. VI (stating "Every person has the right to establish a family, the basic element of society, and to receive protection therefor:").

79 Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System, Inter-Am. C.H.R., OEA/Ser.L/V/II.106, doc. 40 (2000) [hereinafter Report on Canadian Refugee System]. The Commission found that in instances in which immigration proceedings may potentially separate families, the resulting interference with family life may only be justified where necessary to meet a pressing need to protect public order, and where the means are proportional to that end.

80 Report on Canadian Refugee System, *supra* note 79.

81 The changes proposed by the Child Citizen Protection Act also appear in the Comprehensive Immigration Reform for America's Security and Prosperity Act, H.R. 4321, introduced by Congressman Luis V. Gutierrez (D-IL) in December 2009. Under Section 315, the bill restores discretionary authority to decline to order "removed, deported, or excluded from the United States" the parent of a child who is a U.S. citizen. H.R. 4321, 111th Cong. § 315 (1st Sess. 2009).

82 H.R. 182, 111th Cong. (1st Sess. 2009).

83 In addition to the aggravated felony bar to discretionary relief, the "stop-time" or "clock stop" rule found in immigration law bars discretionary relief to individuals who have been convicted of certain crimes based on how soon after their admission the convictions took place. 8 U.S.C. § 1229b(a)(2), 8 U.S.C. § 1229b(d)(1). Even minor, non-violent, and non-aggravated felony offenses can bar

eligibility for a discretionary waiver. *Id.* The American Bar Association adopted Resolution 114A on February 8, 2010, urging Congress to amend the Immigration and Nationality Act to restore an immigration judge's authority to consider a discretionary application "to deserving lawful permanent residents barred from cancellation by the offense 'clock-stop' provision." ABA Comm'n on Immigration, Recommendation 114A Adopted by the House of Delegates (Feb. 8, 2010), available at http://www.abanet.org/leadership/2010/midyear/docs/daily_journal.pdf. [hereinafter Resolution 114A].

84 See Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 321(a), 110 Stat. 3009-546 (1996), reducing the sentence required for defining less serious crimes as aggravated felonies. See also *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 (2003).

85 See, e.g., 8 U.S.C. § 1101(a)(43)(F), (G), (R), (S).

86 Resolution 114A, *supra* note 83.

87 See, e.g., INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D), which requires that undocumented immigrants seeking cancelation of removal establish "that removal would result in exceptional and extremely unusual hardship to the alien's spouse parent, or child," or INA § 240A(b)(2)(A), 8 U.S.C. § 1229b(b)(2), which provides special rules for battered spouses and children.

88 DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OFFICE OF THE CHIEF IMMIGRATION JUDGE OPERATING POLICIES AND PROCEDURES MEMORANDUM 07-01: GUIDELINES FOR IMMIGRATION COURT CASES INVOLVING UNACCOMPANIED ALIEN CHILDREN (2007) [hereinafter Guidelines].

89 The Chief Immigration Judge suggested that while "the concept of 'best interests of the child'" does not provide relief that is not sanctioned by law, it is nevertheless a factor that relates to the immigration judge's discretion in taking steps to ensure that a 'child-appropriate' hearing environment is established" Guidelines, *supra* note 88, at 4.

90 FORCED APART (BY THE NUMBERS), *supra* note 4.

91 Steven Ruggles, Matthew Sobek, Trent Alexander, Catherine A. Fitch, Ronald Goeken, Patricia Kelly Hall, Miriam King, and Chad Ronnander. Integrated Public Use Microdata Series: Version 4.0 [Machine-readable database]. Minneapolis, MN: Minnesota Population Center [producer and distributor], 2008.

92 URBAN INST., CHILDREN OF IMMIGRANTS: A STATISTICAL SNAPSHOT (2009), available at <http://www.urban.org/publications/901294.html> (accessed Feb. 24, 2010).

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