Keeping Children with Their Parents: How U.S. Immigration Law Fails to Uphold the International Right to Family Unity

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INTRODUCTION

There is a fundamental right to family unity based in international law which the United States is currently failing to protect. Specifically, certain U.S. immigration laws cause unnecessary separation of children from parents for extended periods of time—or even indefinitely. Although U.S. immigration laws have been historically pro-family, a marked shift in the law arose near the close of the twentieth century.[1] Since the mid-1990s, immigration laws have become increasingly exclusionary, with little regard for the right to family integrity.[2] Areas of the law that particularly harm family unity include the unlawful presence bars ("ULP bars") and the expansive grounds for deportation.

As will be discussed in detail below, the ULP bars prohibit non-citizens from reentering the U.S. for at least three years if they have been unlawfully present for more than 180 days.[3] This means that many immigrants are faced with the choice of either living indefinitely in an undocumented status—and thus in constant fear of deportation—or exiting the U.S. to wait for the reentry bar to expire, often causing prolonged family separation.[4] As one example, consider

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1. Jacqueline Hagan, Brianna Castro & Nestor Rodriguez, *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799, 1801 (2010).

2. *See id.* at 1800.

3. Immigration and Nationality Act (INA) § 212(a)(9)(B)(i), 8 U.S.C. § 1182(a)(9)(B)(i).

4. *See* Kristi Lundstrom, Note, *The Unintended Effects of the Three- and Ten-*

the recent case of Raul Rodriguez, a Mexican immigrant who came to the U.S. as a minor with his mother. He graduated high school in California, got married, and began to build a life in the U.S. with his wife, Alyssa.[5] In the fall of 2021, Alyssa gave birth to their twin sons in California.[6] Raul returned to Mexico a week after their sons were born to renew his DACA status at a U.S. consulate.[7] Unfortunately, his case was denied, and he was barred from the U.S. for ten years due to past unlawful presence.[8] Alyssa now faces the choice of raising twin boys without their father or relocating to Mexico or another country to be reunited.[9] Their story—lamentably—is far from unique. The ULP bars prevent an estimated *1.2 million* spouses of U.S. citizens or lawful permanent residents ("LPR") who are otherwise eligible from acquiring permanent residency.[10]

Deportation, which has increased dramatically since the mid 1990s,[11] is another cause of great disruption of family unity. While more recent figures are difficult to obtain, an estimated *500,000* U.S.-citizen children "experienced the deportation of at least one parent from 2011 through 2013."[12] One cause of this recent increase in deportations is rooted in the vast expansion of the grounds for deportation that took place in the 1990s.[13] This note focuses specifically on the issue of the overbroad category of "aggravated felony" (the commission of which triggers automatic deportation without regard for family unity) since even many *minor* crimes fall into this classification.[14] The consequences of this broad definition are far-reaching: within the last fifteen years, approximately 300,000 immigrants were deemed "aggravated felons" and therefore ordered

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Year Unlawful Presence Bars, 76 L. & CONTEMP. PROBS. 389, 408 (2013).

5. Vicky Nguyen, *Orange County couple with newborns separated by border*, SPECTRUM NEWS 1 (Dec. 9, 2021), https://spectrumnews1.com/ca/orange-county/news/2021/12/09/orange-county-couple-with-newborns-separated-by-border.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Doris Meissner & Julia Gelatt, *Eight Key U.S. Immigration Policy Issues*, MIGRATION POL'Y INST., 20 (May 16, 2019), https://www.migrationpolicy.org/sites/default/files/publications/ImmigrationIssues2019_Final_WEB.pdf#page=20.

11. *Id.*; *U.S.-Citizen Children Impacted by Immigration Enforcement*, AM. IMMIGR. COUNCIL (June 24, 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/us_citizen_children_impacted_by_immigration_enforcement_0.pdf.

12. *Id.*

13. DAVID WEISSBRODT, LAURA DANIELSON & HOWARD S. MYERS III, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL, 1 et seq. (7th ed. 2017).

14. *See id.* at 295.

deported.[15] Consider the case of Mario, a lawful permanent resident of over twenty years, who, due to a conviction of possession of 2.5 grams of marijuana when he was 19, faces deportation.[16] Mario has three U.S.-citizen children.[17] Several other relatively minor crimes similar to that of Mario often result in the disproportionate outcome of deportation and family separation.[18] It is difficult to say exactly how many are deported for relatively minor crimes as "aggravated felons" since the Immigration and Customs Enforcement ("ICE") is not forthcoming with this data.[19] For example, in a recent yearly report, ICE only states that it conducted over 185,000 removals in fiscal year 2020, and that of that number 92 percent "had criminal convictions or pending criminal charges."[20] Nonetheless, stories such as Mario's are common, and human rights advocacy groups (among others) are calling attention to the urgent need to reform this area of the law.[21]

This note seeks to highlight how these two areas of the law contribute to the separation of children from parents, and thus the violation of international law, and propose improvements. Part I establishes the child's right to family unity under international law as well as provides an overview of the ULP bars and certain deportation laws. Part II examines and critiques several potential solutions to these problems and proposes changes to the law so that it may better protect the child's right to family unity. The note concludes that amendments to these laws are urgently required in order to safeguard the child's right to family unity and bring the United States into better compliance with international law. Although politicians are currently at a stalemate when it comes to immigration reform, the recommendations this note offers may serve as a guidepost in the future.[22]

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15. *End Extreme Punishment for "Aggravated Felonies"*, IMMIGRANT DEF. PROJECT 1–2 (rev. 2019), https://www.immigrantdefenseproject.org/wp-content/uploads/2013/04/IJN-Aggravated-Felony-Factsheet.pdf.

16. *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, HUM. RTS. WATCH (July 16, 2007), https://www.hrw.org/report/2007/07/16/forced-apart/families-separated-and-immigrants-harmed-united-states-deportation#.

17. *Id.*

18. *See id.*

19. *Id.*

20. *ERO FY 2020*, ICE, https://www.ice.gov/features/ERO-2020 (Oct. 29, 2021).

21. *See Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy, supra* note 16.

22. *See* USC STAFF, *Political Divide Remains Critically High and Immigration is Most Divisive Issue, According to New USC Polarization Index*, USC NEWS (Nov. 4, 2021), https://news.usc.edu/194189/inaugural-usc-polarization-index-reveals-political-divide-remains-critically-high-and-immigration-is-most-divisive-issue/. The

I. THE CHILD'S RIGHT TO FAMILY UNITY AND U.S. IMMIGRATION LAWS THAT VIOLATE THIS RIGHT

A. THE CHILD'S RIGHT TO FAMILY UNITY UNDER INTERNATIONAL LAW

International law protecting the right to family unity, and particularly the child's right to family unity, consists of a "patchwork" of various treaty provisions.[23] The most comprehensive international protections for children exist in the widely-ratified Convention on the Rights of the Child, which provides that States shall take great pains to protect the child's right to remain with his or her parents, unless separation is deemed in "the best interests of the child."[24] Importantly, separation under this treaty is premised upon the *best interests* of the child.[25] This Convention would provide a solid foundation for establishing that certain existing U.S. immigration laws and policies that impose separation from parents upon children in the U.S.—especially on U.S.-citizen or permanent resident children—are in violation of international law. However, the U.S. lamentably has not ratified this treaty, and therefore is not bound by its terms.[26] Nonetheless, children in the United States *still have other avenues of legal protection under international law*, which include, among others, customary international law and the International Covenant on Civil

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author recognizes that strong arguments exist in support of farther-reaching immigration law reforms, such as simply creating a clear path to citizenship for qualified immigrants (perhaps on the basis of family members, length of time spent in the U.S., etc.) who reside in the U.S. as of a certain date. However, given the longstanding congressional gridlock on the issue of widespread immigration reform, the more moderate proposals set forth in this note are likely more of a real possibility.

23. Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21, BERKELEY J. INT'L L. 213, 215 (2003). The UNHCR finds that the right to family unity applies to all people; *see* UNHCR, *Summary Conclusions on Family Unity* (Nov. 8–9, 2001), https://www.unhcr.org/protection/globalconsult/3c3d556b4/summary-conclusions-family-unity.html.

24. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, art. 9(1) ("States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.").

25. *See id.*

26. *See* Carrie F. Cordero, Heidi Li Feldman & Chimene I. Keitner, *The Law against Family Separation*, 51 COLUM. HUM. RTS. L. REV. 430, 487 (2020); *see also* Lida Minasyan, *The United States Has Not Ratified the UN Convention on the Rights of the Child*, ATLAS CORPS, (Sept. 30, 2018), https://atlascorps.org/the-united-states-has-not-ratified-the-un-convention-on-the-rights-of-the-child/ ("Huge number[s] of States have ratified the UN Convention on the Rights of the Child, however the United States have [sic] not ratified the treaty.").

and Political Rights ("ICCPR").[27]

Article 16 of the Universal Declaration of Human Rights ("UDHR") states that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State."[28] Many scholars agree that although the UDHR was not intended to be a binding treaty, most of its provisions have evolved into customary international law (and would thus be considered binding international law).[29] Therefore, one might argue that customary international law in the form of article 16 of the UDHR supports a child's right to family unity. However, it may not be necessary to answer the question of whether article 16 of the UDHR is binding upon the United States given that more expansive rights to family unity are found in the ICCPR.[30]

There can be no doubt that the ICCPR is binding upon the United States since it was ratified by the U.S. in 1992.[31] Therefore, this note focuses primarily on the ICCPR as a source of the right to family unity. In some ways article 23 of the ICCPR "codifies," article 16 of the UDHR.[32] This should come as no surprise since the ICCPR, adopted by the United Nations in 1966 and entered into force in 1976,[33] was "consciously adopted as [a] legally binding treat[y]" in follow-up to the UDHR.[34] Article 23 of the ICCPR reproduces word-for-word a portion of UDHR article 16: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."[35] Article 17 states that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, *family*, home, or correspondence . . . ."[36] Lastly, article 24 includes increased

27. *See* Cordero, Feldman & Keitner, *supra* note 26, at 487–88.

28. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR], art. 16(3).

29. *See* Starr & Brilmayer *supra* note 23, at 218; *see also* W. Michael Reisman, Comment, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 867 (1990) ("the Universal Declaration of Human Rights . . . [is] now accepted as declaratory of customary international law.").

30. *See* International Covenant on Civil and Political Rights, arts. 23 and 24, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 34 U.N.T.S. 171 [hereinafter ICCPR]; *see also* MAJA KIRILOVA ERIKSSON, *Article 16*, *in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY 243, 252 (Asbjørn Eide et al. eds., 1992) ("The entire provision [paragraph 3 of UDHR article 16] was incorporated in article 23(1) of the CCPR which was supported by the majority of the delegations.").

31. Cordero, Feldman & Keitner, *supra* note 26, at 488.

32. *See* ICCPR, *supra* note 30, art. 23; UDHR, *supra* note 28, art. 16.

33. *See* ICCPR, *supra* note 30.

34. Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 318 (1995).

35. ICCPR, *supra* note 30, art. 23; UDHR, *supra* note 28, art. 16.

36. ICCPR, *supra* note 30, art. 17 (emphasis added).

protections for the child, stating that "[e]very child shall have, without any discrimination . . . , the right to such measures of protection as are required by his status as a minor, on the part of his family, society, and the State."[37] Scholars have noted the interwoven nature of these three articles, finding that they "are frequently violated in combination in situations of family separation on deportation [or] failed attempts at family reunification . . . ."[38]

These provisions not only obligate the United States to protect family integrity, especially when children are involved, but also to refrain from any "arbitrary or unlawful interference" with the family.[39] Although the meaning of the above provisions is arguably plain, it may be helpful to review both general comments by the UN Committee on Civil and Political Rights ("CCPR"), as well as other scholarly commentary.

The CCPR has interpreted "arbitrary interference" in article 17 to include even lawful (under domestic law) interference when that is unreasonable in the "particular circumstances."[40] Scholars have noted that article 17 "may be invoked to prevent the breakup of the family by deportation."[41] Indeed, article 17 has been invoked on a number of occasions for this purpose.[42] In determining whether a given case of deportation unjustly interferes with the family, and is therefore arbitrary, the CCPR has examined whether the impact on the person is "disproportionate to the objectives of removal."[43] For example, in *Canepa v. Canada*, the deportation of Canepa was not considered arbitrary mainly because he had an extensive criminal record and had no children or spouse in Canada.[44] On other occasions, the CCPR has asked whether there was "objective justification" for family

37. *Id.* art. 24.

38. PAUL M. TAYLOR, A COMMENTARY ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 679 (2020).

39. ICCPR, *supra* note 30, art. 17; *see also* UNHCR, *Summary Conclusions on Family Unity*, para. 1 (Nov. 8–9, 2001), https://www.unhcr.org/protection/globalconsult/3c3d556b4/summary-conclusions-family-unity.html. ("A right to family unity is inherent in the universal recognition of the family as the fundamental group unit of society, which is entitled to protection and assistance. This right is entrenched in universal and regional human rights instruments and international humanitarian law, and it applies to all human beings, regardless of their status.").

40. UN Human Rights Committee (HRC), Committee on Civil and Political Rights, General Comment No. 16: *Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, para 4 (Apr. 8, 1988).

41. TAYLOR, *supra* note 38, at 459.

42. *See id.* at 466–68.

43. *Id.* at 466.

44. *See* Canepa v. Canada, CCPR/C/59/D/558/1993 (Apr. 3, 1997).

separation due to deportation, as in the case of *Madafferi v. Australia*.[45] In that case, an immigrant who came to Australia as a tourist, married an Australian, and had children with her was denied a spouse visa due to "his illegal presence . . . and alleged dishonest dealings with the immigration authorities."[46] The CCPR, also taking into account the hardship that would be imposed upon his spouse and children, determined that Australia's reasons for removal were not objectively justifiable.[47]

Beyond article 17, the official interpretation of article 23 provides that the right to found a family "implies, in principle, the possibility to procreate and live together."[48] This possibility of living together in turn implies that States must adopt measures "to ensure the unity or reunification of families."[49] In practice, the CCPR has typically found violations of article 23 in conjunction with article 17, relying heavily on the "arbitrary interference" standard from article 17.[50] Article 23 is also at times considered together with article 24—which, as noted above, provides for special protections for the child—in cases, for example, where immigration enforcement leads to a child being unjustly deprived of the "advantage . . . of living with both parents."[51]

In *Winata v. Australia*,[52] a violation of article 24 was found when Australian authorities decided to deport the undocumented parents of "a 13-year-old boy who had lived in Australia all his life and had acquired citizenship."[53] This was so because the deportation would fail "to provide [the child] with the necessary measures of protection as a minor."[54] It is important to note that the Committee was clear to express that not every deportation of the parents of a minor would result in a violation of the Covenant.[55] However, it reasoned that in these particular circumstances, especially given the length of time the parents and child had resided in Australia and the strong ties built up

45. TAYLOR, *supra* note 38, 467; Madafferi v. Australia, CCPR/C/81/D/1011/2001 (July 26, 2004).

46. *Id.*

47. Madafferi v. Australia, CCPR/C/81/D/1011/2001 (July 26, 2004).

48. UN Human Rights Committee, Committee on Civil and Political Rights, *General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, para. 5 (July 27, 1990).

49. *Id.*

50. *See* TAYLOR, *supra* note 38, at 637–38.

51. *Id.* at 639.

52. Winata and Li v. Australia, CCPR/C/72/D/930/2000, 26 July 2001.

53. TAYLOR, *supra* note 38, at 680.

54. Winata and Li v. Australia, para. 7.3, CCPR/C/72/D/930/2000, 26 July 2001.

55. *Id.*

over that period, removal would violate the Covenant.[56] The Committee noted that Australia needed "additional factors justifying the removal of both parents that go *beyond a simple enforcement of its immigration law* in order to avoid the characterisation of arbitrariness."[57]

Therefore, in light of the CCPR's interpretation of these articles, unlawful "arbitrary interference" with the family occurs when family separation results from deportation that is not proportionate to the reasons for removal and is not objectively justifiable. The problem, as discussed below, is that current U.S. immigration laws frequently fail these standards, often leaving even U.S.-citizen or LPR children without one or both parents.[58]

B. CURRENT U.S. IMMIGRATION LAWS AND POLICIES THAT VIOLATE THE CHILD'S RIGHT TO FAMILY UNITY

1. Brief Historical Context of U.S. Immigration Law

The history of U.S. immigration law is a complex topic, well beyond the scope of this article.[59] However, a brief overview of some key immigration acts from 1952 onward is helpful in understanding the origins of the present hostility toward family unity, which is embedded in current law. This note will give particular attention to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"),[60] as many consider that it radically changed "the United States' previously profamily immigration policy."[61]

In 1952, previous "piecemeal" immigration laws were consolidated into the Immigration and Nationality Act of 1952 ("INA"), which, now with several amendments, provides the basis for current immigration law.[62] The INA was criticized for its original

56. *Id.*

57. *Id.* (emphasis added).

58. *See* AM. IMMIGR. COUNCIL, *supra* note 11, at 1 (explaining that from 2011 to 2013, over 500,000 U.S.-citizen children have experienced deportation of one or both parents).

59. For a succinct overview of the history of U.S. immigration law, *see* WEISSBRODT ET AL., *supra* note 13, at 1 et seq.

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

61. Lundstrom, *supra* note 4, at 395; *see also* Hagan et al. *supra* note 1, at 1800 (explaining that IIRIRA, along with the Antiterrorism and Effective Death Penalty Act ("AEDPA") and the USA PATRIOT Act, brought "devastation . . . to immigrant families.").

62. WEISSBRODT ET AL., *supra* note 13, at 14.

national origin quota system, which was "a blatant form of racial and ethnic discrimination."[63] Yet, even though discrimination existed in this form, it is important to note that immediate relatives of U.S. citizens were exempt from the quota system, thus demonstrating an original commitment to family unity in the INA.[64] In 1965, amendments to the INA abolished the discriminatory quota, marking "the beginning of a more inclusionary era in U.S. immigration policy."[65] These amendments gave preference to family members of citizens and LPRs and also to refugees.[66] Several scholars agree that these amendments were rooted in principles of family unity, which was fundamental to U.S. immigration law until the mid-1990s.[67]

A drastic shift came in 1996 with the passage of IIRIRA and the Antiterrorism and Effective Death Penalty Act ("AEDPA"),[68] which some consider to be part of a response to "anti-immigration sentiment in the 1990s."[69] These Acts increased enforcement of immigration laws and expanded the grounds of inadmissibility and removal. In a nutshell, IIRIRA "increased removals by expanding the categories of noncitizens subject to deportation, by restricting the ability of migrants to appeal deportation, and by increasing the offenses for which noncitizens could be deported."[70] Two IIRIRA changes in particular have wreaked havoc on family unity in the years since the Act: the creation of the ULP bars and the significant expansion of the grounds of deportation—particularly through a broadening of a particular category of crimes—"aggravated felonies"—that result in automatic deportation.[71] Each of these changes will be discussed

63. *Id.* at 15 (the discrimination consisted of a quota based on national origin, especially limiting immigration from the Eastern Hemisphere).

64. *Id.*

65. Hagan et al., *supra* note 1, at 1803.

66. *Id.*

67. *See, e.g., id.*; *see also* Margot Mendelson, *The Legal Production of Identities: A Narrative Analysis of Conversations with Battered Undocumented Women*, 19 BERKELEY WOMEN'S L.J. 138, 141 (2004) ("[The] era of liberalization of U.S. immigration policy was epitomized by the 1965 amendments to the Immigration and Nationality Act, which introduced family reunification as a central principle in immigration law.").

68. Pub. L. No. 104-32, 110 Stat. 1214 (1996).

69. WEISSBRODT ET AL., *supra* note 13, at 37.

70. Hagan et al., *supra* note 1, at 1804; *see also* Fernando Colon-Navarro, *Familia e Inmigración: What Happened to Family Unity?*, 19 FLA. J. INT'L L. 491, 494 (2007) (claiming that one of IIRIRA's "main goals was to detain and remove immigrants with criminal convictions" and that [l]ittle or no reference was made to the goal of family reunification.").

71. *Id.* at 1804; *see* Cain W. Oulahan, Comment, *The American Dream Deferred: Family Separation and Immigrant Visa Adjudications at U.S. Consulates Abroad*, 94 MARQ. L. REV. 1351, 1357 (2011) ("In addition to the unlawful presence bars, [IIRIRA] contained a number of additional restrictive and punitive immigration measures. For

below, along with their severe consequences on the child's right to family unity.

2. The Three- and Ten-Year Unlawful Presence Bars

The ULP bars, now codified in section 212 of the INA, were created through IIRIRA.[72] The rule provides that a non-citizen is barred from reentry into the U.S for three years if the individual has been unlawfully present in the U.S. for more than 180 days but less than a year.[73] Should a non-citizen accrue more than one year of unlawful presence, that individual is barred for ten years.[74] In this context, "unlawful presence" simply means being "present in the United States without being admitted or paroled" or being present "after the expiration of the period of stay authorized . . . ."[75] A given period of unlawful presence must be accumulated in one stay in the U.S. in order to trigger either of the bars.[76]

Since their creation, the ULP bars have been the root of many harmful effects both on immigrants and on society in general, which have been well documented by scholars.[77] Chief among these negative consequences is the extreme difficulty in gaining LPR status now imposed on immigrants who are subject to the bars (including those with close family ties in the U.S.). Undocumented immigrants who have entered the country illegally are not permitted to adjust their status to that of LPR without leaving the United States—even if they have immediate relatives who are U.S. citizens or LPRs.[78] The only other avenue for obtaining LPR status is through application for an immigrant visa at a consulate outside of the U.S. However, if an immigrant leaves the U.S. after having accrued sufficient unlawful

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example, IIRAIRA [sic] made it more difficult to seek asylum in the U.S., granted the government wider latitude to detain and deport immigrants, and imposed additional burdensome requirements for adjustment of status to permanent resident. These drastic new laws were largely at odds with existing immigration policy, which favored family unity.").

72. INA § 212(a)(9)(B)(i), 8 U.S.C. § 1182(a)(9)(B)(i).

73. INA § 212(a)(9)(B)(i)(I), 8 U.S.C. § 1182(a)(9)(B)(i)(I).

74. INA § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II).

75. INA § 212(a)(9)(B)(ii), 8 U.S.C. § 1182(a)(9)(B)(ii).

76. Lundstrom, *supra* note 4, at 391.

77. *See generally id.* (discussing several negative consequences of the ULP bars; for example, greater incentive for undocumented immigrants to continue staying in the United States illegally, negative community perceptions, and adverse economic effects).

78. *See id.* at 408 ("However, because they cannot adjust their status from within the country or leave without triggering the bars, they are left without a process by which they can benefit from their preferred status.").

presence, one of the ULP bars is triggered, thereby barring that individual from reentry for three or ten years.[79] This means that one who enters the U.S. illegally and is subject to the ULP bars effectively has no way of gaining legal status without leaving the country and being barred for three or ten years.

The immigrant is thus often faced with the difficult choice of either remaining with family in the U.S. in undocumented status or leaving and enduring a long period of separation outside of the U.S. before applying for a visa.[80] However, for one who chooses to remain in the U.S. without status, fear of deportation is ever-looming. An immigrant who is unlawfully present in the U.S. is removable under current law.[81] If such an immigrant is discovered, and ICE decides to initiate removal proceedings, ICE would first issue a Notice to Appear.[82] If the immigrant ignores the notice, he or she would likely be ordered to be removed without a hearing.[83] Otherwise, the immigrant would next attend a removal hearing, after which the immigration judge would order the immigrant's removal, terminate the proceedings, or grant discretionary relief.[84] However, discretionary relief, such as cancellation of removal, is often difficult to obtain, as will be discussed below.[85]

The ULP bars constitute a significant change in the law, given that prior to 1996, non-citizens who were present in the U.S. unlawfully for extended periods of time could simply leave before removal proceedings were brought and seek reentry through application for a visa.[86] In this way, if an immigrant had a citizen spouse or child in the U.S., he or she could, if otherwise eligible, leave the U.S. and apply for a family-based immigrant visa, and then return with legal status.[87] This system therefore provided a clear path to LPR status for those with U.S.-citizen or LPR spouses or children, and incentivized immigrants to obtain LPR status.[88] However, now the ULP bars provide the opposite incentive in many cases—that is to say, an immigrant faced with choosing between three or ten years of family separation and remaining illegally in the U.S. to stay with family would

79. *Id.* at 392.
80. *See id.* at 408.
81. *See* WEISSBRODT ET AL., *supra* note 13, at 290.
82. *Id.* at 330–31.
83. *Id.*
84. *Id.* at 343.
85. *See* discussion *infra* Section II.B.1.a, and accompanying notes.
86. WEISSBRODT ET AL., *supra* note 13, at 281.
87. Lundstrom, *supra* note 4, at 397.
88. *Id.*

likely choose the latter option.[89] Waivers to the ULP bars do exist, but eligibility requirements are very stringent, effectively making such waivers extremely narrow in application, as will be discussed below.[90]

The Department of Homeland Security estimates that as of 2018, there were approximately 11.4 million unauthorized immigrants living in the U.S––the amount has almost doubled since 1996.[91] Also, the Pew Research Center reports that in 1995, only 33 percent of illegal adult immigrants had been living in the U.S. for more than ten years and that this figure grew to 66 percent by 2017.[92] This data seems to confirm that the 1996 laws incentivize immigrants to remain in the U.S. for longer periods of time, even in their unauthorized status. As discussed, the ULP bars have in this way caused numerous unauthorized immigrants with relatives or spouses who are U.S. Citizens or LPRs to remain unlawfully despite being otherwise eligible to apply for permanent residency.[93] As noted above, approximately 1.2 million spouses of U.S. citizens or LPRs currently cannot obtain permanent residency due to the ULP bars.[94]

3. U.S. Deportation Law

The general grounds for deportation are found in section 237 of the INA, which include the following broad categories: non-citizens who (1) were inadmissible at the time of entry or who have violated their status, (2) have committed certain crimes, (3) have not registered or have falsified documents, (4) have become a security threat, (5) have become a public charge, or (6) have voted

89. *Id.*

90. *See infra* notes 111–13 and accompanying text.

91. DHS, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2015–January 2018*, https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Pop_Estimate/UnauthImmigrant/unauthorized_immigrant_population_estimates_2015_-_2018.pdf (last visited Jan. 27, 2022); DHS, *Illegal Alien Resident Population*, https://www.dhs.gov/sites/default/files/publications/Unauthorized%20Immigrant%20Population%20Estimates%20in%20the%20US%201996.pdf (last visited Mar. 3, 2023).

92. Mark Hugo Lopez, Jeffrey S. Passel, & D'Vera Cohn, *Key Facts About the Changing U.S. Unauthorized Immigrant Population*, PEW RSCH. CTR. (Apr. 13, 2021), https://www.pewresearch.org/fact-tank/2021/04/13/key-facts-about-the-changing-u-s-unauthorized-immigrant-population/.

93. *Explainer: The Need to Reform or End the 3- and 10-Year Bars*, NAT'L IMMIGR. F. (Nov. 5, 2021), https://immigrationforum.org/article/explainer-the-need-to-reform-or-end-the-3-and-10-year-bars (showing that those who have unlawfully remained in the U.S. for extended periods are barred from reentering).

94. Meissner & Gelatt, *supra* note 10.

unlawfully.[95]

The first category applies to those who, among other things, enter the U.S. illegally, violate a visa condition (such as engagement in unauthorized work), or overstay the period authorized.[96] The second category—criminal offenses—became much broader in 1996, especially through the significant expansion of the definition of "aggravated felony."[97] This is of particular significance because an immigrant convicted of an aggravated felony—even an LPR—is subject to "mandatory detention and deportation."[98] Prior to 1996, aggravated felonies under the INA included only more serious crimes such as murder or drug trafficking.[99] Now the term "aggravated felony" includes a long list of crimes, the commission of any one of which results in deportation.[100] To put it concisely, IIRIRA's new definition of aggravated felony covers all crimes that "required a prison sentence of a year or more."[101] This effectively means that even certain crimes that are categorized as misdemeanors under state law can, and often do, fall into the INA's aggravated felony classification.[102] Some examples of crimes that have been deemed "aggravated felonies" (in certain circumstances) under the INA include: "[m]isdemeanor theft of items of minimal value, such as a $10 video game, $15 worth of baby clothes, or tire rims from an automobile"; "[w]riting a bad check for $1500 worth of construction supplies"; "[p]ulling the hair of another during a fight over a boyfriend."[103]

The 1996 laws also severely limited judicial review for certain classes of deportees.[104] For example, immigration judges used to have discretion to cancel deportation of an immigrant if "exceptional" hardship to the family would result. Now the standard is much

95. INA § 237, 8 U.S.C. § 1227; *see also* WEISSBRODT ET AL., *supra* note 13, at 287.

96. *See* INA § 237(a)(1), 8 U.S.C. § 1227(a)(1); INA § 212(a)(6), 8 U.S.C. § 1182(a)(6).

97. Hagan et al., *supra* note1, at 1804.

98. Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 23 IN DEF. OF THE ALIEN 1, 4 (2000).

99. WEISSBRODT ET AL., *supra* note 13, at 295.

100. *See* INA § 101(a)(43), 8 U.S.C. § 1101(a)(43); *see* also WEISSBRODT ET AL., *supra* note 13, at 295 (stating that "aggravated felony" now includes "rape, sexual abuse of a minor, money laundering, crimes of violence for which the term of imprisonment is at least one year, theft, burglary, kidnapping, child pornography, RICO offenses, running a prostitution business . . . , fraud offenses where the loss exceeds $10,000, forgery, obstruction of justice, and other crimes.").

101. Hagan et al., *supra* note 1, at 1804.

102. WEISSBRODT ET AL., *supra* note 13, at 295.

103. *End Extreme Punishment for "Aggravated Felonies", supra* note 15.

104. Hagan et al., *supra* note 1, at 1804.

higher.[105] Whereas prior to 1996 an immigration judge would consider whether one who is eligible for deportation *should* be deported based on all the particulars of the given case, such as family ties, now this is no longer the case.[106] It is much more likely now that "anyone subject to deportation will be barred from relief."[107] This "one-size-fits-all" approach is deeply troubling when family unity is at stake because consideration of hardship to the family resulting from deportation is now extremely limited.[108]

Since the enactment of IIRIRA in 1996, the number of deportations drastically increased from approximately 50,000 in 1995 to an average of nearly 400,000 annually between 2008 and 2012.[109] More recent figures show that from 2016 to 2020, an average of approximately 225,000 immigrants were deported annually.[110] Removal rates are high in part because the grounds for deportation are numerous, ranging from serious crimes to minor procedural violations.[111] As immigrants are deported, families are often torn apart and separated for prolonged periods of time, or even indefinitely.[112] Studies show that over sixteen million people in the United States live with at least one undocumented family member—frequently a parent.[113] As of 2018, over six million U.S.-citizen children (under eighteen years old) lived with at least one undocumented parent.[114] As noted above, approximately *500,000 U.S.-*

105. *Id.*

106. Morawetz, *supra* note 98, at 4.

107. *Id.*

108. David Baluarte, *Family in the Balance: Barton v. Barr and the Systematic Violation of the Right to Family Life in U.S. Immigration Enforcement*, 27 WM. & MARY J. RACE, GENDER & SOC. JUST. 33, 46 (2020); *see also* Morawetz, *supra* note 98, at 3 ("The 1996 laws, together with most proposals for their reform, have assumed that Congress should develop a one-size-fits-all test that will determine which permanent residents with convictions should be deported. Whether through the label of certain classes of crimes or through the length of the person's sentence, Congress has mandated the deportation of persons whose family members may all reside in this country, who may have grown up here, who may be needed for the emotional and financial support of minor children or elderly parents, or who may present other compelling equities that counsel against deportation.").

109. Hagan, Castro & Rodriguez, *supra* note 1, at 1801; *Latest Data: Immigration and Customs Enforcement Removals*, TRAC IMMIGRATION, https://trac.syr.edu/phptools/immigration/remove/ (last visited Jan. 8, 2022).

110. *Latest Data: Immigration and Customs Enforcement Removals*, TRAC IMMIGRATION, https://trac.syr.edu/phptools/immigration/remove/ (last visited Jan. 8, 2022).

111. *See* INA § 237, 8 U.S.C. § 1227.

112. Hagan, Castro & Rodriguez, *supra* note 1, at 1818–19.

113. AMERICAN IMMIGRATION COUNCIL, *supra* note 11.

114. *Id.*

citizen children "experienced the deportation of at least one parent from 2011 through 2013."[115]

II. SPECIFIC U.S. IMMIGRATION LAWS THAT VIOLATE THE CHILD'S RIGHT TO FAMILY UNITY

Although several U.S. immigration laws likely violate a child's right to family unity under international law, this note focuses on two areas in particular: the three- and ten-year ULP bars and certain U.S. deportation laws. Current laws in each of these areas violate international law and cause devastating harm to family unity, especially for young immigrants in the U.S. This part will examine the deficiencies in several previous solutions to the issue of family separation due to the ULP bars and deportation laws and then propose different ideas for solving these issues.

A. THE THREE- AND TEN-YEAR UNLAWFUL PRESENCE BARS

The harmful effects of the ULP bars are numerous and far-reaching,[116] but perhaps the most troubling consequence is prolonged family separation, which directly contravenes a child's right to family unity under international law. Undocumented parents who are subject to ULP bars are typically faced with choosing between remaining in the U.S. illegally or risking separation from children and other family members for years.[117] Forcing immigrants to make such a choice only incentivizes those with families in the U.S. to remain illegally, contrary to Congress's intent in IIRIRA, which was likely just the opposite.[118] Each path gives rise to a multitude of problems for immigrants. Should an immigrant choose to stay in the U.S. illegally in order to remain with family, that person is effectively relegated to "an underclass of immigrants who cannot assimilate into their communities and the United States generally, or who choose not to try, for fear of attracting unwanted government attention."[119] Also, if discovered, deportation would likely result.[120] On the other hand, however, should an immigrant parent choose to depart and wait at least three or ten years to return to the U.S. legally, the result, from the

115. *Id.*
116. *See generally* Lundstrom, *supra* note 4.
117. *Id.* at 408.
118. *See id.* at 396.
119. *Id.*
120. *See id.*

child's perspective, is likely a long period without one or both parents.

1. Previous Possible Solutions

a. ULP bar waiver solutions are inadequate

Congress attempted to embed in the INA a partial solution to the dilemma described above in the form of a waiver of the ULP bars.[121] If the ULP bar would result in "extreme hardship" for a U.S. citizen or permanent resident who is the *spouse* or *parent* of the immigrant, this discretionary waiver may be available.[122] However, there are at least three issues with this waiver. First, hardship to a U.S. citizen or permanent resident *child* is not considered,[123] but rather only hardship to a qualifying spouse or parent. Second, the "extreme hardship" standard is very difficult to meet.[124] Lastly, the immigrant is required to leave the United States and apply through a consulate abroad.[125] Should the application be denied, the immigrant is left outside the U.S.—likely separated from their family. Unsurprisingly, this risk is unappealing to many, especially given the high bar to prove extreme hardship; therefore, the waiver is not a viable option for most immigrants.[126]

To remedy this problem, the Obama administration implemented a provisional unlawful presence waiver in 2013 that allows immigrants to apply for the waiver described above without leaving the U.S.[127] Unfortunately, the provisional waiver has also proven to be disappointing for several reasons.[128] First, similar to the traditional waiver, "the provisional waiver does not account for extreme hardship to children."[129] Second, the extreme hardship standard is still very difficult to meet.[130] Lastly, even if the provisional waiver is approved, the immigrant is still required to leave and then reenter the

121. *See* INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v).

122. *Id.*

123. Lundstrom, *supra* note 4, at 391.

124. *See* Oulahan, *supra* note 71, at 1364.

125. Natalie Tepeli, *Keeping Families Together: The Façade of the I-601A Provisional Unlawful Presence Waiver*, 19 PUB. INT. L. REP. 43, 45 (2013).

126. Lundstrom, *supra* note 4, at 408–09.

127. Tepeli, *supra* note 125, at 45–46.

128. *Id.* at 46.

129. Lundstrom, *supra* note 4, at 410; *see also* Maria E. Enchautegui & Cecilia Menjívar, *Paradoxes of Family Immigration Policy: Separation, Reorganization, and Reunification of Families under Current Immigration Laws*, 37 LAW & POL'Y 32, 42 (2015) ("There are no waivers for hardship to children even if they are US born.").

130. Lundstrom, *supra* note 4, at 410.

U.S.,[131] which may also result in family separation--albeit likely not as protracted as otherwise. The fears and uncertainties that can accompany even a brief departure from the U.S. may also deter eligible immigrants from completing the provisional waiver process.[132]

Since both the traditional and provisional ULP waivers are fraught with issues, especially since children are not qualifying relatives for purposes of either waiver, these solutions are ineffective. In short, the waivers are narrow in application, difficult to obtain, and do not properly protect the right of children to family unity. Therefore, the waiver "solution" is inadequate.

b. Other proposals also fall short

In light of the negative consequences of the ULP bars, some have proposed amending the INA to completely eliminate them.[133] This way, otherwise eligible undocumented immigrants could simply return to their home country, apply for LPR status, and then return to the U.S. legally.[134] One scholar contends that this is not a shortcut, since the immigrant would still need to qualify and apply for permanent residency.[135] Others argue that the ULP bars should be eliminated because they are "disproportionate to the seriousness of the immigration violation," there is no evidence that the bars have any significant deterrence effect, and they "tear families apart."[136] Some argue that eliminating the ULP bars, yet still requiring immigrants to return to their country to apply for a visa, would especially benefit families while ensuring "a reasonable measure of accountability" for those who enter the U.S. illegally.[137]

Although eliminating the ULP bars would be a welcome step, given the current extreme polarization on the topic of immigration in the U.S., it is unlikely to be a realistic solution at present.[138] Also, maintaining the requirement to process one's visa abroad still

131. *Id.*; Tepeli, *supra* note 125, at 46.

132. Tepeli, *supra* note 125, at 46.

133. Lundstrom, *supra* note 4, at 412 (arguing that eliminating the ULP bars could "decrease[] the harmful economic and familial consequences for both immigrants and American citizens.").

134. *Id.* at 409.

135. *Id.*

136. Oulahan, *supra* note 71, at 1356.

137. *Id.* at 1357.

138. *See, e.g.*, *Political divide remains critically high and immigration is most divisive issue, according to new USC polarization index*, USC NEWS (Nov. 4, 2021), https://news.usc.edu/194189/inaugural-usc-polarization-index-reveals-political-divide-remains-critically-high-and-immigration-is-most-divisive-issue/.

imposes harsh consequences on undocumented immigrants with close family in the U.S.[139] Some negative consequences could include travel expenses, inability to continue providing for the family, and the fear and uncertainty inherent in the consular visa application process. However, the harshest consequence for those with family members in the U.S. is often lengthy separation, since even in "normal" times, consular processing can be a long road.[140] Although precise figures are difficult to obtain, it seems that the Covid-19 pandemic has caused significant delays in consular processing, thereby lengthening an already protracted process.[141] The negative impact on children, and the entire family, during such a period of separation from one or both parents is severe.[142] For this reason, it seems that eliminating the ULP bars while still requiring immigrants to process visas abroad is not the ideal solution.

Another scholar proposed amending the INA to exempt immediate relatives of U.S. citizens from the ULP bars and allow them to adjust to LPR status without leaving the U.S.[143] The rationale behind this proposal is that it would "promote family unity while discouraging illegal immigration and fraudulent activity."[144]

This proposal seems to strike a good balance between deterring illegal entry to the U.S. and protecting family unity. However, there is much room for improvement. Under the INA, the term "immediate relative" only includes "children, spouses, and parents" of U.S. *citizens*.[145] Notably, therefore, this proposal would do nothing to further protect family unity where the immigrant's immediate family members are only LPRs. There does not seem to be any reason to exclude LPRs as qualifying immediate relatives in this proposal, as even the ULP waiver considers hardship to LPR spouses and parents.[146] It seems, therefore, that if family unity is the goal, ULP bar exemptions must include relatives of U.S. citizens and LPRs alike.

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139. *See* Colon-Navarro, *supra* note 70, at 505.

140. *Id.* at 505–06.

141. *See, e.g.*, Suzanne Monyak, *Limited operations at US consulates keep visa holders on edge*, ROLL CALL (Dec. 22, 2021, 7:00 AM), https://www.rollcall.com/2021/12/22/limited-operations-at-us-consulates-keep-visa-holders-on-edge/.

142. For a detailed exploration of the negative consequences on children due to immigrant family separation, *see generally* Joanna Dreby, *The Burden of Deportation on Children in Mexican Immigrant Families*, 74 J. MARRIAGE & FAM. 829 (2012).

143. Colon-Navarro, *supra* note 70, at 492.

144. *Id.*

145. INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i).

146. *See* INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v).

2. Recommendations

Given the shortcomings noted in the above solutions and proposals, a better solution is required. This note proposes two options to better protect the child's right to family unity: (1) exempt immediate relatives of U.S. citizens *and* LPRs from the ULP bars and allow them to adjust their status without leaving the U.S., or (2) amend the provisional ULP bar waiver to account for hardship to U.S.-citizen or LPR children of the immigrant and lower the "extreme hardship" bar significantly. The first solution is preferred since it would better protect a child's right to family unity. However, the author also offers the second solution as it may be a more realistic change in policy.

a. Option one: exempt immediate relatives of U.S. citizens and LPRs from the ULP bars

Under the INA, an immigrant who overstays his or her visa or otherwise fails "to maintain continuously a lawful status" is ineligible for adjustment of status *unless* the immigrant is an immediate relative of a U.S. citizen.[147] However, if one enters illegally, there is no such exception.[148] The fact that there is an exception for immediate relatives who have overstayed their visas demonstrates congressional intent to protect family unity in this context. Since those who overstay their visa and those who enter illegally are both committing similarly illegal acts, no preferential treatment should be shown to one group over the other. Therefore, immediate relatives of U.S. citizens who would otherwise be subject to the ULP bars should be exempt from the bars and allowed to adjust their status within the U.S.

There is also good reason to include immediate relatives of LPRs in this exemption. After the extensive application process and rigorous background checks necessary to gain LPR status, the LPR properly holds a right to live in the United States similar to that of a U.S. citizen and is also protected under the law.[149] Although some would argue that there is no constitutional right to live with one's family in the United States, others such as Justice Breyer disagree.[150]

147. INA § 245(c), 8 U.S.C. § 1255(c).

148. *See id.*; *see also* Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2356 (2019).

149. *Rights and Responsibilities of a Green Card Holder (Permanent Resident)*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/green-card/after-we-grant-your-green-card/rights-and-responsibilities-of-a-green-card-holder-permanent-resident (last updated July 7, 2015).

150. *See* Kerry v. Din, 576 U.S. 86, 108 (2015) (Breyer, J., dissenting) ("[T]his

Regardless of whether such a right exists under U.S. law, it has been established above that this right does exist under the ICCPR, to which the U.S. is bound.[151] Therefore, those who have the legal right to remain in the United States permanently—U.S. citizens and LPRs—should be permitted to live with immediate family members who are immigrants and would otherwise be eligible to immigrate but for the ULP bars.

Congress has also shown clear intent to protect the family unity of LPRs in other areas of immigration law, and therefore, if an exemption from the ULP bar is made for immediate relatives of U.S. citizens, it should also be extended to those of LPRs. For example, an entire category of family-based immigration visas exists under the INA for spouses and children of LPRs.[152] Also, the ULP bar waiver is made available to spouses and children of both U.S. citizens and LPRs alike.[153] This demonstrates the general goal of Congress to keep immediate family members of both U.S. citizens and LPRs together.

Furthermore, the population of LPRs is so numerous that they should not be overlooked. Recent estimates from the Department of Homeland Security suggest that approximately 13.6 million LPRs were living in the United States as of 2019.[154] Therefore, the harm caused when close family members of LPRs are separated due to the ULP bars is far-reaching.

Lastly, should this exemption be granted, immediate relatives of U.S. citizens and LPRs who are otherwise eligible for adjustment of status should be permitted to complete the process from within the United States. This would further promote family integrity, as consular processing times can be very lengthy,[155] and would remove the economic and emotional hardships of family separation during such a period. It would be a fair solution since such an option already exists for immediate relatives of U.S. citizens who enter legally yet overstay their visas.[156]

Court has long recognized . . . the right of spouses to live together and raise a family.").

151. *See supra* notes 22–25 and accompanying text.

152. *See* INA § 203(a)(2), 8 U.S.C. § 1153(a)(2).

153. *See* INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v).

154. Bryan Baker, *Estimates of the Lawful Permanent Resident Population in the United States and the Subpopulation Eligible to Naturalize: 2015-2019*, DEP'T HOMELAND SEC. (Sept. 2019), https://www.dhs.gov/sites/default/files/publications/lpr_population_estimates_january_2015_-_2019.pdf.

155. Colon-Navarro, *supra* note 70, at 505.

156. *See* INA § 245(c), 8 U.S.C. § 1255(c).

b. Option two: amend the provisional ULP bar waiver

Should there be insufficient support for the above proposal, an alternate solution would be to amend the provisional ULP bar waiver to include consideration of the hardships of U.S. citizens and LPR *children*, and also lower the hardship threshold. Immigration attorneys question how such a waiver can "maintain family unity" when it does not even consider the hardships of U.S. citizen children.[157] To illustrate the great deficiencies in this policy, consider the following fictional scenario: a single Mexican woman enters the United States illegally and lives there for several years. Although unmarried, she eventually has a son, and the father is no longer present. The child, born in the U.S., is automatically a U.S. citizen.[158] The woman likely lives in fear that her status will be discovered and that she will be deported.[159] Her only immediate family in the United States is her son, but she cannot successfully apply for a provisional waiver since she cannot demonstrate "extreme hardship" to a U.S. citizen spouse or parent.[160] Her only options are likely to remain in her undocumented state, and continue to live in fear, or move back to Mexico with her son, and thereby deprive her son of his right to live in the United States.

This dilemma would likely be resolved if hardship to the child could be considered for purposes of the provisional waiver. However, the "extreme hardship" standard would still pose a problem in many cases, since it is a very high bar.[161] This standard should be lowered, therefore, especially where hardship to a child is considered. There should be a presumption that if an immediate family member of a U.S. citizen or LPR leaves the United States, extreme hardship to immediate family members left behind will result. This presumption should be especially strong where children or single parents would be left behind, as extreme hardship seems much more likely than not to occur in such cases.[162]

In sum, exempting immediate relatives of U.S. citizens and LPRs from the ULP bars and allowing them to adjust to LPR status within the United States would provide a legal avenue for such family

157. Tepeli, *supra* note 125, at 46.

158. *See* INA § 301(a), 8 U.S.C. § 1401(a).

159. *See, e.g.*, Lundstrom, *supra* note 4, at 396.

160. *See Provisional Unlawful Presence Waivers*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/family/family-of-us-citizens/provisional-unlawful-presence-waivers (last updated Jan. 5, 2018).

161. *See* Baluarte, *supra* note 108, at 46.

162. *See* Dreby, *supra* note 142, at 841–43.

members to become permanent residents while maintaining family unity. Such immigrant family members would no longer be required to live in fear or shame, or, worse, be separated from family members for years. Furthermore, allowing them to adjust their status within the United States would allow for a more stable transition to LPR status, with no family disruption, and also provide more equal treatment to those who enter the United States legally and overstay their visa (yet have an immediate relative who is a U.S. citizen).[163]

Amending the provisional bar waiver to consider hardship to children would at least better align U.S. immigration law with international human rights law. This change, along with a significant lowering of the "extreme hardship" threshold, would better protect children from the devastating effects of separation from a parent.

B. DEPORTATION LAWS

Given the severe consequences of family separation due to the deportation of children, such separation must only occur in the direst of circumstances, such as when a parent is abusive, dangerous, or criminal. Under international law, the government must have serious reasons to separate a child from a parent,[164] and many of the grounds for deportation fall far short of justifying such severe family disruption. Therefore, the grounds for deportation should be narrowed and be especially rare in cases where removal will cause family separation. In particular, the expansive list of crimes constituting aggravated felonies (which therefore trigger automatic deportation) must be shortened so that only serious crimes result in removal. This section addresses why cancellation of removal is inadequate to fix this issue, discusses various other solutions, and finally offers a proposed amendment to the INA to fix this problem.

1. Previous Possible Solutions

a. Cancellation of removal is very difficult to obtain

As mentioned above, the INA offers a potential solution to certain LPRs and non-LPRs who face deportation: cancellation of removal.[165] Although the eligibility requirements for LPRs are arguably

163. *See* INA § 245(c), 8 U.S.C. § 1255(c).
164. *See* ICCPR, *supra* note 30, at art. 23.
165. *See* INA § 240A, 8 U.S.C. § 1229b.

reasonable, those for non-LPRs are extremely stringent.[166] The non-LPR immigrant is required to have been physically present in the United States for at least ten years before seeking cancellation of removal, be "a person of good moral character" during that time, not be convicted of certain crimes, and show that removal would cause "exceptional and extremely unusual hardship to the alien's spouse, parent, or child who is a citizen of the United States or an alien lawfully admitted for permanent residence."[167]

These requirements severely limit eligibility for non-LPR immigrants. The showing of ten years of continuous physical presence alone is a high bar, but perhaps the most difficult requirement is the hardship standard, which is "notoriously burdensome."[168] Few applicants can meet this high bar, which the Board of Immigration Appeals has ambiguously defined as "hardship that is substantially beyond that which would ordinarily be expected to result from the alien's deportation."[169] Being a parent of a U.S.-citizen child is not enough to meet this burden, and therefore some have noted that parents being "torn away" from children is now "ordinary and expected in the U.S. system of removal."[170] Even if cancellation of removal were granted to a non-LPR—which would result in permanent residency[171]—the immigrant would still be subject to years of fear of deportation and be forced to live in a "shadow culture" to avoid detection.[172] In short, although cancellation of removal is helpful in some cases, its application is narrow, and it does not adequately protect family unity.[173]

b. A few scholarly proposals and why they fall short

One scholar argues that when the government considers the removal of a noncitizen, it must balance "the public safety imperative against the impact of that removal on children, spouses, and other family members."[174] More concretely, this scholar maintains that

166. *See* INA §§ 240A(a)–(b), 8 U.S.C. §§ 1229b(a)–(b).

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

168. Baluarte, *supra* note 108108, at 46.

169. *In re* Monreal-Aquinaga, 23 I. & N. Dec. 56, 56 (B.I.A. 2001); Baluarte, *supra* note 108, at 46.

170. Baluarte, *supra* note 108, at 47.

171. *See* INA § 240A(b), 8 U.S.C. § 1229b(b).

172. Lundstrom, *supra* note 4, at 396.

173. *See* Baluarte, *supra* note 108, at 47 (discussing how the requirements for cancellation of removal make its application "very limited in scope").

174. *Id.* at 34.

courts must interpret ambiguous immigration statutes "in a manner consistent with international legal obligations," according to the *Charming Betsy* doctrine.[175] In *Barton v. Barr*,[176] the Court failed to follow the *Charming Betsy* doctrine.[177] Instead, in the scholar's view, it interpreted an ambiguous statutory provision in such a way that foreclosed cancellation of removal while an alternate valid interpretation existed that would have protected the international right to family unity.[178] If courts were to follow the *Charming Betsy* doctrine, they would be freer to find ways to protect the right to family unity in the context of deportation.[179]

Another scholar urges courts to recognize that "the deportation of a parent or spouse of an American Citizen impact[s] the fundamental rights of the citizen family member," and therefore should apply the standard of strict scrutiny in such cases.[180] The strict scrutiny standard requires the government to show that the burden imposed on the individual is "precisely tailored to serve a compelling government interest."[181] This would likely result in family separation only "when absolutely necessary."[182]

While the author agrees that courts should follow the *Charming Betsy* doctrine and also apply strict scrutiny in cases where an immediate relative of a U.S. citizen is facing deportation, these solutions fall short of what is necessary to properly protect a child's right to family unity. Following the *Charming Betsy* doctrine would do little to lessen the severity of the stringent cancellation of removal requirements, and therefore this form of relief would still only be available in very limited circumstances.[183] Immigrants who fail to meet the requirements would still be separated from their families, and even if they went undetected, they would likely live in constant fear of deportation. The "strict scrutiny solution" would similarly only help a limited group of immigrants, as it would only apply in a courtroom and does not consider family members of LPRs.

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175. *Id.* at 92.

176. *See generally* Barton v. Barr, 140 S. Ct. 1442 (2020).

177. Baluarte, *supra* note 108, at 92.

178. *Id.* at 92–93.

179. *Id.*

180. Beth Caldwell, *Deported by Marriage: Americans Forced to Choose between Love and Country*, 82 BROOK. L. REV. 1, 47–48 (2016).

181. Fisher v. Univ. of Tex., 570 U.S. 297, 308 (2013) (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978)).

182. Caldwell, *supra* note 180, at 47.

183. *See* Baluarte, *supra* note 108, at 47.

2. Recommendation: narrow the meaning of "aggravated felony"

The above solutions to the issue of family separation due to deportation are helpful, but not sufficient. To truly protect the child's right to family unity, amendments to the INA that severely limit the removability of immediate relatives of U.S. citizens and LPRs are required. A good starting point would be to narrow the meaning of "aggravated felony" to correspond only to serious crimes. This would protect immigrants—and more specifically, those with immediate family members in the U.S.—from deportation for nonviolent or otherwise minor crimes.

Although arguments can be made to narrow the list of other crimes that constitute grounds for removability, this note focuses on the issue of aggravated felonies since they clearly trigger deportation automatically.[184] Beyond the fact that minor offenses are simply not interchangeable with aggravated felonies,[185] congressional intent and public policy also demonstrate that the term "aggravated felony" has far too broad a meaning under the INA.

An aggravated felony need not be "aggravated" or even a "felony" to be considered such under the INA.[186] In fact, the term even includes "many nonviolent and seemingly minor offenses,"[187] even though one convicted of an aggravated felony is subject to "the harshest deportation consequences."[188] Scholars and judges alike have been perplexed by the apparent elevation of minor crimes to the status of "aggravated felony" in the immigration context.[189] This goes against a long common law tradition of a clear distinction between minor crimes such as misdemeanors, and more serious crimes classified as felonies,[190] which are usually "punishable by imprisonment for more than one year or by death."[191] The addition of "aggravated" implies an even greater degree of severity in the crime, which typically would

184. *See* Morawetz, *supra* note 98, at 4.

185. *See* Dawn Marie Johnson, *AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. Legis. 477, 478 (2001).

186. *Aggravated Felonies: An Overview*, AM. IMMIGR. COUNCIL (Mar. 16, 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/aggravated_felonies_an_overview_0.pdf.

187. *Id.*; *see also* Morawetz, *supra* note 98, at 5 (discussing the wide expansion of the term "aggravated felony" under IIRIRA to include, at times, misdemeanors such as shoplifting and other minor offenses).

188. Carachuri-Rosendo v. Holder, 560 U.S. 563, 566 (2010).

189. *See* Johnson, *supra* note 185, at 477–78.

190. *Id.* at 478.

191. *Felony*, BLACK'S LAW DICTIONARY (11th ed. 2019).

include violence or the "presence of a deadly weapon."[192] It is clear that these terms are not interchangeable, and therefore should not be treated as such in the immigration context.

There is also strong evidence that Congress originally intended the term "aggravated felony" to apply only to the most serious of offenses.[193] The term, first used by Congress in the Anti-Drug Abuse Act of 1988, was originally defined to include only murder, drug trafficking, and trafficking in firearms or other destructive devices, carrying a penalty of deportation if convicted.[194] The congressional record further supports the notion that this term was meant to apply only to very serious crimes.[195] One senator explained that the goal of these provisions was to impose harsher sanctions on a "particularly dangerous class" of criminals.[196] Now, however, the term has been watered down to include a vast array of crimes that never should have fallen into this category, despite evidence that "Congress meant to include only offenses involving manifestly serious misconduct."[197]

Public policy would also favor a narrowing of the meaning of "aggravated felony." Even aside from family separation, deportation often has devastating consequences on the immigrant, including "financial, psychological, and emotional hardships."[198] However, this penalty becomes even more catastrophic where family separation is implicated,[199] and therefore it should not be imposed lightly—yet this is precisely what occurs when minor crimes result in deportation.

In light of these considerations, Congress should narrow the crimes that trigger deportation, beginning first with the notorious "aggravated felony" classification. The law should return to limiting offenses that fall into this category to serious crimes that involve threats to public safety and security, violent or exploitative offenses, and other such crimes. If one commits a violent or other serious crime, public policy and international law would likely favor deportation despite family separation, since in many cases it would protect the children and family left behind. But where crimes are less severe, the immigrant will already face the penalty for his or her crime in the U.S.

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192. *Aggravated*, BLACK'S LAW DICTIONARY (11th ed. 2019).

193. *See* Brief of National Immigration Project of The National Lawyers Guild as Amicus Curiae in Support of Respondent at 3–7, Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007) (No. 05-1629) [hereinafter Amicus Brief].

194. Anti-Drug Abuse Act of 1998, Pub. L. No. 100-690, §§ 7342, 7344, 102 Stat. 4181, 4469–71; *see also* Amicus Brief, *supra* note 193, at 4.

195. *See* Amicus Brief, *supra* note 193, at 4.

196. 134 Cong. Rec. 32417, 32649; *see also* Amicus Brief, *supra* note 193, at 4.

197. Amicus Brief, *supra* note 193, at 7; *see also* Baluarte, *supra* note 108, at 42.

198. Caldwell, *supra* note 180, at 2.

199. *Id.* at 2–3.

criminal justice system.[200] Any further reason for deporting that person would likely be outweighed by the harm caused to that person's children and family. In this way, the law would better protect a child's right to family unity.

CONCLUSION

That even one child in the U.S. has been unjustly separated from a parent due to current anti-family immigration laws is deplorable. The fact that *hundreds of thousands of children* have been subjected to this devastating punishment is both inhumane and illegal under international law. The solution to this problem is clear: U.S. immigration law must be amended to better protect the child's right to family unity. Two areas that have a destructive effect on family unity are the ULP bars and expansive deportation laws. Amending the law to exempt immediate relatives of U.S. citizens and LPRs from the ULP bars and allowing them to adjust their status without leaving the country would likely vastly improve family unity and incentivize immigrants to obtain legal status. Narrowing the grounds for deportation so that the meaning of "aggravated felony" under the INA only includes serious crimes—as it was originally meant to be—would ensure that children do not suffer the removal of a parent simply due to petty and nonviolent crimes. These amendments would allow numerous children across the country to enjoy their fundamental right to family unity and would render U.S. immigration law more compliant with international law.

200. *See* Baluarte, *supra* note 108, at 40 (explaining that the criminal justice system adjudicates and imposes punishments for a crime prior to removal proceedings and that deportation is not a punishment for the crime).