Family Separation as a Violation of International Law*

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Devastating to the individuals involved and frequently destructive in its long-term impact on cultural groups and entire societies, the involuntary separation of families is a widespread problem that deserves increased attention as an issue of international human rights. Today, the international legal system is beginning to address the concerns of the family and the need for justice within the family, and to develop norms that in many circumstances treat involuntary family separation as a violation of international law. Its approach, however, has been fragmentary and inconsistent, viewing family separation through particular lenses, such as children's rights or privacy, without establishing a coherent framework that brings these various perspectives together. In this article, we identify and compare the emerging principles of international law that relate to the issue of family separation and elaborate on them in a way that, we hope, will help to build such a framework.

Our analysis focuses on several case studies, including Australia's long history of removing Aboriginal children from their parents, recent anti-polygamy policies in France, current immigration and child welfare laws in the United States, and mass family separation in crisis situations worldwide. Each of these varied cases reflects one or more of the many facets of the problem of family separation, including the cultural significance of the family, the difficulty of defining "family," the balancing of interests and rights among different members of the family, and the balancing of these individuals' rights against the broader social, political, or economic interests of society or the state. In addition, each case tests the boundaries of possible international norms addressing this problem.

Issues involving the integrity of families are difficult for international law to resolve because they involve a variety of competing values, values that are often both passionately held and deeply contested among and within cultures. These include the rights and interests of individual family members, including the special rights of children as well as the rights of adults to form relationships,

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marry, and raise children. In this article, we address only involuntary family separation—that is, separation implemented against the expressed will of all the family members concerned. We do not address, except tangentially, separations that stem from the active, expressed choice of one or more persons—most notably from divorce—even though some of the legal principles we discuss may have implications for, or have been developed largely in the context of, such situations. Thus, by definition, all the cases of family separation we discuss interfere with individuals' autonomy, and the question is whether this interference is justified. In some cases, the "autonomy" underlying these decisions may be less than genuine; for example, women who "choose" to enter structurally oppressive family arrangements may sometimes be so constrained by cultural pressures or socioeconomic necessity as to lack a meaningful choice.[1]

Individual interests often weigh strongly in the direction of keeping families together, and they form a central motivation for norms, international or otherwise, in favor of family integrity.[2] In some cases, however, individuals' interests conflict, or a single individual may have multiple competing interests. In child welfare cases, for example, the interest of a child in being raised by her parents, and of that her parents in raising her, must be balanced against her strong interest in protection from abuse and neglect. Moreover, in addition to various competing individual interests, involuntary family separation implicates broader concerns, including core aspects of social structure, culture, and national identity. As many treaties recognize, the family is a core social institution in almost all societies, although the nature of families and their social role varies tremendously. Family separation may therefore threaten the cultural integrity of peoples. On the other hand, a nation's ability to define what constitutes a family is often a critical aspect of its collective identity, and may require the separation of some self-defined families.

Another set of values at stake, particularly important from a feminist perspective, are those involving structural equality and justice in the relations among groups within a society, including but not limited to gender equality. This perspective places emphasis on the need for justice within the family itself, which may weigh against protecting certain types of family structure and in favor of protecting others, and on solutions to the disproportionate impact of family separation policies on women and ethnic or racial minorities.

Finally, the state also has significant interests in matters involving families. As a general matter, international regulation of state behavior always implicates state sovereignty. In addition, other specific state interests, such as the regulation of immigration and the protection of children, are at stake in particular categories of family separation cases.

It should come as no surprise that international law today fails to provide any comprehensive or consistent framework for ordering and weighing these values; indeed, the total lack of consensus on many of these issues may make

1. These issues will be further discussed below, particularly in Section II.B.

2. We use "family integrity" to mean "family unity," and use the two phrases interchangeably.

such a framework impossible to achieve. Yet this difficulty should not paralyze us. International law involves, inevitably, choices and compromises that take place against a background of cultural difference. Using today's piecemeal international regulation of family matters as a starting point, we can begin to identify principles to help guide these choices in the future. This article examines the conflicts among these diverse values and interests as they play out in a number of different case studies, from which we draw some guidance for the development of international norms against involuntary family separation. Our primary focus is on the content of these norms. We leave for another day important questions regarding the best procedures and institutional arrangements for their implementation, including whether and when the use of the emerging international criminal justice system might be appropriate.

In Section I, we begin with a brief review of the current state of international law on this subject, which consists of a patchwork of treaty provisions and the glimmerings of a developing customary norm against the involuntary separation of families. The case studies in Section II illustrate the complexity of the problem and help us to flesh out the parameters of the international norms we would like to see emerge. In Section II.A, we look at the tragic history of the Stolen Generations in Australia (and analogous policies in North America)—the systematic forced removal of tens of thousands of Aboriginal children from their parents. In Section II.B, we consider the situation of polygamous immigrant families in France, a longstanding and difficult problem that has recently been turned on its head by the adoption of rigorous new anti-polygamy laws. Sections II.C and II.D, which primarily focus on very recent legal changes and court decisions in the United States, address concerns that are nonetheless significant every year in countries around the world: family separation issues in immigration policy and the protective removal of children by social service agencies. Section II.E considers mass family separation as an aspect of crisis situations, and particularly examines the obligation of states and international institutions responding to crises to work toward the reunification of families. We conclude by assessing the need for new international norms to deal with the growing problem of involuntary family separation in our fast-changing and conflict-prone contemporary world.

I.
FAMILY VALUES: CONFLICT AND COMPROMISE IN TODAY'S INTERNATIONAL LAW

This Section provides an overview of the past, existing, and newly emerging international legal norms implicating the problem of involuntary family separation and analyzes these norms in light of the value conflicts discussed in the Introduction. In Section A, we briefly review the historical evolution of these norms, addressing the question of how the family became a subject of international lawmaking in the first place. In Section B, we review existing treaty provisions that relate to family separation as well as decisions by the relevant international bodies interpreting them. In Section C, we consider what potential

general principles or customary norms we can draw from these treaty provisions and assess whether strengthening legal protections of the family is justifiable from a feminist perspective.

A. *History*

The emergence of principles of international law regarding the family is a relatively new phenomenon. In the nineteenth and early twentieth centuries, international law addressed families and family law only insofar as it established choice-of-law principles for cases in national courts involving immigrant families or families of mixed nationality.[3] The dominant principle was the notion, associated with the theorist Pasquale Mancini, that legal disputes relating to an individual's "personal status"—a concept encompassing marriage and other family relationships—should be governed by the law of that individual's domicile.[4] A number of European and Latin American multilateral conventions codified this principle and attempted to provide consistent principles for the determination of domicile; the United States and the United Kingdom did not join these conventions.[5] The possibility of reaching an international consensus on substantive provisions regarding a subject as contentious as the treatment of the family seemed remote, as even most of the choice-of-law conventions did not achieve widespread support.[6]

The middle of the twentieth century saw the development of the first treaties that set forth substantive principles regarding the state's treatment of families and, particularly, its protection of children.[7] The first treaties regarding child protection dealt with the prohibition of child labor pursuant to the creation of the International Labor Organization.[8] In 1924, the League of Nations passed a Declaration on the Rights of the Child; this was followed by a similar United Nations Declaration in 1959.[9] These were soft law instruments, not binding on states. The most significant binding international treaty to emerge from this era was the 1961 Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants.[10] The Convention still dealt largely with choice-of-law issues in guardianship cases; it was notable because it provided an exception to the prevailing domicile rule when necessary to protect children. For the first time, a treaty adopted as a central principle the protection

3. *See* Adair Dyer, *The Internationalization of Family Law*, 30 U.C. DAVIS L. REV. 625, 625-29 (1997).

4. *Id.* at 626.

5. *Id.* at 627-28. The U.S. declined to participate in part on the grounds that under its federal system choice-of-law rules for family law were left up to individual states. *Id.* at 628. The United Kingdom also refused participation because it rejected Mancini's domicile-based principle. *Id.*

6. Linda Silberman, *The Hague Child Conventions: The Internationalization of Child Law*, *in* CROSS CURRENTS: FAMILY LAW AND POLICY IN THE UNITED STATES AND ENGLAND 589, 589 (Katz et al. eds., 2000).

7. Dyer, *supra* note 3, at 629-30.

8. *Id.*

9. *Id.* at 630, 633.

10. Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, Oct. 5, 1961, 658 U.N.T.S. 143.

of the "interests of the child," a shift away from earlier conflicts rules that had been premised solely on the competing rights of parents.[11] This shift was a precursor to the 1989 Convention on the Rights of the Child, which addressed children's rights far more comprehensively but still in a manner guided by the "best interests of the child" standard.[12] It was also followed by more recent Hague Conventions setting forth standards for international cooperation on issues such as child abduction and adoption.[13]

The increasing internationalization of law affecting the family represents the confluence of two significant trends over the past century. First, the traditional view of the family as belonging to a private sphere insulated from public scrutiny and regulation, or at least as being a "local" rather than national (much less international) issue, has become increasingly untenable, if still highly influential. Feminist scholars have long critiqued this notion, both as a cultural phenomenon[14] and as a legal one.[15] For example, the placement of family issues on the "local" side of the national/local divide has long been treated by courts as a central feature of federalism in the United States. Yet Professor Judith Resnik has shown that this categorization, in addition to perpetuating inequality, has always been and is increasingly belied by many federal laws that directly or indirectly affect family affairs.[16] Feminist critiques of the public/private dichotomy, and their implications for international legal protections of the family, will be discussed later in this Section. On an international level, the dichotomy is increasingly breaking down, as "international law is gradually and reluctantly moving into unfamiliar areas" such as the regulation of family life to prevent domestic abuse.[17]

Second, the focus of international law has shifted from relations among nation-states toward the protection of individual rights.[18] The mid- to late twentieth century saw the development of a number of other major human rights treaties, both global and regional. The Universal Declaration of Human Rights

11. Dyer, *supra* note 3, at 633. The effect of this treaty was limited, however, by the fact that only eleven states (all civil law countries) ratified it. *See* Karin Wolfe, Note, *A Tale of Two States: Successes and Failures of the 1980 Hague Convention on the Civil Aspects of International Child Abductions in the United States and Germany*, 33 N.Y.U. J. INT'L L. & POL. 285, 293 & n.24 (2000). The treaty has now been superceded by a subsequent Hague Convention passed in 1996. *See* Adair Dyer, *Keynote Address: To Celebrate a Score of Years*, 33 N.Y.U. J. INT'L. L. & POL. 1, 4 n. 13 (2000); *see also infra* note 13 and accompanying text.

12. Convention on the Rights of the Child, G.A. Res. 44/25, annex, U.N. GAOR, 44th Sess., Supp. No. 49 at 167, U.N. Doc. A/44/49 (1989) [hereinafter CRC]; *see, e.g., id.* art. 3 (setting forth the "best interests of the child" standard).

13. *See* Silberman, *supra* note 6, at 589 (discussing these conventions).

14. *See, e.g.*, SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 110-133 (1989).

15. *See, e.g.*, Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001) (critiquing American law's traditional characterization of family matters as "local," and of gender violence as belonging to the category of family matters).

16. *Id.*

17. GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD 72 (1995).

18. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS, Part II (Introductory Note) (1987); Bartram S. Brown, *International Law: The Protection of Human Rights in Disintegrating States: A New Challenge*, 68 CHI.-KENT L. REV. 203, 214 (1992) (describing a "fundamental shift away from the old state-centric international law").

set the stage for the postwar expansion of human rights law.[19] The Universal Declaration is not a treaty; it was originally intended to be a hortatory set of standards, not binding law. However, many of its provisions are now accepted as customary international law.[20] Probably the most significant human rights treaty today, in terms of its scope and number of signatories, is the 1966 International Covenant on Civil and Political Rights (ICCPR), which entered into force in 1976.[21] In addition to the wide-ranging protections of the Universal Declaration and ICCPR, a number of treaties specifically address particular categories of human rights abuses—for example, sex discrimination,[22] race discrimination,[23] and genocide.[24] Finally, three regional human rights conventions for Europe, the Americas, and Africa entered into force in 1953, 1978, and 1986, respectively.[25] Each of these treaties contains specific provisions affecting families and has implications for the development of an international norm against involuntary family separation. These will be discussed further in the next Section.

B. Family Separation Under Current International Law: Treaty Provisions

In this Section, we review a variety of different treaty provisions suggesting that current international law contains norms against involuntary family separation. We divide these provisions loosely into five categories. The first four consist of protections of individual rights: the individual right to familial privacy, children's rights, parental rights, and the right to marry. The final category consists of provisions that protect the family as an institution. This protection may be framed as a right of the family or as an obligation of the state. Note that the individual rights provisions do not encompass the full range of individual family relationships one might imagine; no international treaty specifically protects the rights of siblings to stay together, for example, nor grandparents' rights. International law protects such rights to some extent through

19. Universal Declaration of Human Rights, G.A. Res. 217(A)(III), U.N. Doc. A/810 at 71 (1948) [hereinafter Universal Declaration].

20. *See* W. Michael Reisman, *Comment: Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 867 (1990).

21. International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

22. Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 20378 (1981) [hereinafter CEDAW].

23. International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter CERD].

24. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 1021 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

25. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov 4, 1950, 213 U.N.T.S. 222 (entered into force 3 Dec. 1953) [hereinafter European Convention]; American Convention on Human Rights, Nov. 22, 1969 1144 U.N.T.S. 123 (entered into force Jul. 18, 1978) [hereinafter American Convention]; African (Banjul) Charter on Human and Peoples' Rights, Jun. 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) [hereinafter African Charter].

general provisions protecting privacy and family life; some court decisions on this point are discussed below.[26]

This section is not a comprehensive review of existing treaty provisions that have implications for the legality of particular instances of family separation. A number of additional provisions affect the application of this norm to specific circumstances—for example, where family separation is used as a tool of genocide, it may violate the Genocide Convention, while policies that restrict family members' rights to travel in order to visit one another may violate provisions protecting the freedom of movement. The African Commission on Human and Peoples' Rights has held that family separation under certain circumstances violates provisions against inhuman and degrading treatment.[27] A range of specific provisions will be discussed in Section II in the context of particular case studies. Also, in addition to international provisions *against* family separation, some treaty provisions may weigh in *favor* of family separation in particular circumstances. For example, provisions obligating the state to act to prevent child abuse, which are discussed to a limited extent in Subsection 2 below, sometimes necessitate a child's removal from her parents, while provisions in favor of gender equality may arguably weigh in favor of the anti-polygamy policies discussed in Section II.B. Both of these other categories of treaty provisions will be considered in the context of the case studies in Section II. This Section, however, simply reviews the possible treaty-based arguments in favor of a norm against involuntary family separation, considering them against the background of the value conflicts discussed in the Introduction and using them to provide a broader context for the subsequent discussion of the case studies.

1. The Right to Privacy and Family Life

The right to family integrity is an aspect of the right to privacy, which is protected by a number of international conventions. Article 12 of the Universal Declaration of Human Rights states: "No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honour or reputation. Everyone has the right to the protection of the law against such interference or attacks."[28] Very similar language is found in Article 17 of the ICCPR,[29] Article 11 of the American Convention,[30] Article 16

26. *See also* VAN BUEREN, *supra* note 17, at 83 (discussing siblings' rights). Note that Article 5 of the CRC imposes a general obligation on sates to respect, "where applicable," the rights of the extended family. *See infra* note 48.

27. Modise v. Botswana, African Comm'n Hum. & Peoples' Rights, Comm. No. 97/93 (1997).

28. Universal Declaration, *supra* note 19, art. 12.

29. ICCPR, *supra* note 21, art. 17.

30. American Convention, *supra* note 25, art. 11. The American Convention's structure is somewhat different. Headed "Right to Privacy," Article 11 reads: "1. Everyone has the right to have his honor respected and his dignity recognized. 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. 3. Everyone has the right to the protection of the law against such interference or attacks." *Id.*

of the Convention on the Rights of the Child,[31] and Article 10 of the African Charter on the Rights and Welfare of the Child.[32] In each of these treaties, arbitrariness is the touchstone for what counts as unlawful interference with the family. Article 8 of the European Convention provides similar protection, although, instead of using the term "arbitrary," it spells out the conditions under which the state may interfere with family life:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. 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.[33]

Among the various international human rights institutions, the European system has produced the most developed family privacy doctrine; we will take a closer look at it here. Notwithstanding the potentially broad scope of the exceptions in section 2, the European Court of Human Rights (ECHR) has interpreted Article 8 to provide fairly robust privacy protection generally, and specifically to protect family integrity against state interference. The right to cohabitate with one's family has been held to be a central aspect of "family life" under Article 8 (as well as a core element of the Article 12 right to "found a family").[34] The Court has held that Article 8 places restrictions and obligations on states in areas including child custody decisions,[35] protective removal of children,[36] immigration policy,[37] and illegitimacy laws.[38] Many of these decisions will be discussed in subsequent sections of this article; we set forth some of the basic principles here.

In *Marckx v. Belgium*, which held that Article 8 forbids states from legally discriminating against illegitimate children, the ECHR set forth the principle that Article 8 does not simply impose negative restrictions on the state's authority to interfere with family life. Rather, "there may be positive obligations inherent in an effective 'respect' for family life. . . . [The State] must act in a manner calculated to allow those concerned to lead a normal family life."[39] This obligation encompasses the creation of domestic "legal safeguards that

31. CRC, *supra* note 12, art. 16 (granting these privacy rights specifically to children).

32. African Charter on the Rights and Welfare of the Child, July, 1990 OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999) [hereinafter African Children's Charter] (protecting the privacy of the child). Note that the African Charter on Human and Peoples' Rights, in contrast, does not contain privacy protections. *See* African Charter, *supra* note 25.

33. European Convention, *supra* note 25, art. 8.

34. Abdulaziz v. United Kingdom, App. Nos. 9214/80, 9473/81, 9474/81, 7 H.R. Rep. 471, ¶ 62 (1985).

35. *E.g.*, Hoffman v. Austria, App. No. 12875/87, 17 Eur. H.R. Rep. 293 (1993); Salgueiro da Silva Mouta v. Portugal, App. No. 33290/96, 31 Eur. H.R. Rep. 1055 (1999).

36. *E.g.*, Olsson v. Sweden, App. No. 10465/83, 11 Eur. H.R. Rep. 259 (1987); *see also* notes 369-380 and accompanying text.

37. *E.g.*, *Abdulaziz*, 7 Eur. H.R. Rep. 471; Ciliz v. Netherlands, 2000-VIII Eur. Ct. H.R. 267.

38. *E.g.*, Marckx v. Belgium, App. No. 6833/74, 2 Eur. H.R. Rep. 330 (1979); Johnston v. Ireland, App. No. 9697/82, 9 Eur. H.R. Rep. 203, ¶¶ 70-75 (1986).

39. *Marckx*, 2 Eur. H.R. Rep. 330 ¶ 31.

render possible, as from the moment of birth, the child's integration in his family."[40] The principle that the state may be required to affirmatively promote family life is repeated, if not extensively developed, in a number of other cases.[41] However, the Court has held that these positive obligations are particularly culturally contingent and that states are entitled to considerable discretion in carrying them out.[42]

The ECHR has often added strength to Article 8's protections by reading them in conjunction with the Article 14 prohibition on discrimination. For example, in *Mouta v. Portugal*, the Court read Articles 8 together with 14 to prevent states from discriminating in child custody decisions against homosexual parents.[43] In *Abdulaziz v. United Kingdom*, it found that an immigration policy that allowed admission to the spouses of male but not female legal residents discriminated on the basis of sex, violating Article 14 in conjunction with Article 8.[44] Similarly, in *Markcx* the Court cited the non-discrimination imperative embodied by Article 14 when it held that "Article 8 makes no distinction between the 'legitimate' and the 'illegitimate' family."[45] In this regard, it also noted that Council of Europe resolutions had established that families headed by single mothers are entitled to be treated as no less of a "family" than traditional two-parent families.[46] In rejecting the Belgian government's defense that its illegitimacy policy was necessary to protect "morals and public order," the Court agreed that "support and encouragement of the traditional family is in itself legitimate or even praiseworthy," but held that measures toward this end must not prejudice the rights of other families.[47] The Court also held that Article 8 protects not only the rights of immediate family members, but also those of grandparents and other extended family members.[48]

Yet the ECHR's cases also reflect ambivalence about the power of international law to restrict states' ability to control the legal and practical definition of a family. For example, in *Rees v. United Kingdom*, the Court held that the Article 8 privacy right did not encompass a right of a post-operative transsexual to have his new sex identity legally recognized so that he could marry a woman. It reasoned that "the notion of 'respect' is not clear-cut. . . . [H]aving regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to

40. *Id.*

41. *E.g.*, *Abdulaziz*, 7 Eur. H.R. Rep. 471 ¶ 67; *Ciliz*, 2000-VIII Eur. Ct. H.R. 267 ¶¶ 61-62.

42. *See* Rees v. United Kingdom, 9 Eur. H.R. Rep. 56 ¶¶ 35-37 (1986) (noting that the scope of the positive obligations entailed by Article 8 is indeterminate, will vary from state to state based on cultural practices, and will depend on a "fair balance" between community and individual interests).

43. 31 Eur. H.R. Rep. 1055 ¶ 36.

44. 7 Eur. H.R. Rep. 471 ¶ 83.

45. 2 Eur. H.R. Rep. 330 ¶ 31.

46. *Id.*

47. *Id.* ¶ 40.

48. *Id.* ¶ 45. Note that the extended family is also protected under the Convention on the Rights of the Child, the drafting history of which reflects particular concern for the accommodation of cultural difference. *See* SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 335 (1999); *see also supra* note 26.

case."[49] Thus, although acknowledging that a number of European states did afford transsexuals the legal right at issue, the Court refused to require the U.K. to follow this example, instead allowing it to resolve such critical issues of identity on its own.[50] The Court has also emphasized the evolution of social and cultural norms, as reflected by state practice across Europe; sometimes, as in the illegitimacy cases, this has served to justify the recognition of a new Article 8 right.[51] In other cases, like *Rees*, the Court has left open the possibility of further evolution that might change the law in the future, but has found that thus far the necessary state practice element for the establishment of a particular norm is lacking.[52]

2. *The Rights of the Child and the "Best Interests" Test*

The second category of relevant treaty provisions are those that protect the rights of children to remain with their families. As described above, a series of international treaties and declarations, culminating in the 1989 Convention on the Rights of the Child, has established the "best interests of the child" as the general standard states must employ to shape their policies and practices affecting children.[53] A number of specific provisions of the Convention reflect a presumption that family unity will best serve these interests. First, the Preamble to the Convention describes the family as the "natural environment for the growth and well-being of all its members and particularly children," and further states that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding."[54] More specifically, Article 7(1) of the Convention grants each child "as far as possible, the right to know and be cared for by his or her parents,"[55] while Article 8(1) grants the "right of the child to preserve his or her identity, including . . . family relations . . . without unlawful interference."[56] Article 9(1) specifically bans the separation of children from their parents except under specific circumstances:

> State 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. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.[57]

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49. *Rees*, 9 Eur. H.R. Rep. 56 ¶ 37.

50. *Id.* ¶¶ 37, 42.

51. *See Marckx*, 2 Eur. H.R. Rep. 330 ¶ 41.

52. *Rees*, 9 Eur. H.R. Rep. 56 ¶¶ 37, 47.

53. This standard, and particularly its application to the protective removal of children by social welfare services, will be discussed extensively in Section II.D below.

54. CRC, *supra* note 12, Preamble ¶ 6.

55. *Id.* art. 7(1).

56. *Id.* art. 8(1).

57. *Id.* art. 9(1).

Note that while Article 9(1) allows states to remove children from their families in order to protect them from abuse or neglect, it imposes a procedural requirement of judicial review—a protection lacking in many states, as discussed below in Section II.D. Although the Convention does not make clear whether this judicial review must take place *before* the child is removed, Article 9(1) is commonly interpreted as imposing such a requirement.[58] Article 9(2) further specifies that "all interested parties" shall have a right to participate in proceedings pursuant to Article 9(1). This procedural right "has been compared with Article 14(1) of the ICCPR," a provision generally outlining due process protections for any individual whose legally protected rights are at stake.[59]

Article 24(1) of the ICCPR grants children the right to special protection by the state. The U.N. Human Rights Committee has held that this right affirmatively obligates the state to intervene in situations where a child faces abuse or neglect.[60] A similar requirement of special protection for children is provided by Article 16 of the Additional Protocol to the American Convention on Economic, Social, and Cultural Rights.[61]

The Convention on the Rights of the Child also imposes obligations on states in situations where families have already been separated. First, where children are separated from one or both parents (for example, due to child custody decisions as described in Article 9(1)), the state must respect a child's right to "maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."[62] Furthermore, if parents are separated from their children due to "any action initiated by a State Party, such as . . . detention, imprisonment, exile, deportation, or death," the state must furnish the parents or children with any available information regarding their family members' whereabouts.[63] Finally, where national borders separate children from their parents, states must allow sufficient freedom of movement to enable the families to see one another regularly.[64] They also must handle applications by children or parents "to enter or leave a State Party for the purpose of family reunification" in a "positive, humane, and expeditious manner."[65] One scholar has noted that this constitutes an "innovative obligation"

58. States that allow only ex post facto review by their courts have submitted reservations to this portion of the Convention. *See* DETRICK, *supra* note 48, at 171-72.

59. *Id.* at 174.

60. *Id.* at 173 (citing the Committee's General Comments).

61. *Id.*

62. CRC, *supra* note 12, art. 9(4).

63. *Id.* art. 9(3).

64. *Id.* art. 10(2).

65. *Id.* art. 10(1). Article 10 stops short of requiring that states permit immigration for the purpose of family reunification, however. Furthermore, it may not even require that states admit alien parents or children for visits. Although Article 10(2) grants children whose parents reside in different countries the right to maintain "personal relations and direct contacts with both parents," it goes on to state: "Towards that end . . . States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country." This last clause does not give children or parents the right to enter any foreign country—which raises the question of how a parent and child of different nationalities could visit one another if neither of the states in question was willing to admit the one who was an alien.

under international law, arguably giving rise to a right to enter a foreign country (subject to exclusion based on certain specific justifications), a right that other international conventions have not afforded.[66] Ordinarily, states have not had to justify the exclusion of aliens under international law. Subject to certain limitations such as non-discrimination, control of immigration has always been viewed as a sovereign right. This principle and its limits are discussed further in Sections II.B and C.

Another treaty that extensively details the human rights of children is the 1990 African Charter on the Rights and Welfare of the Child, which entered into force in 1999.[67] Like the Convention on the Rights of the Child, this Charter employs the "best interests of the child" standard.[68] Subject only to this standard, it prohibits the separation of children from their parents. Article 19 states:

> 1. Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child.
>
> 2. Every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis. . . .

Furthermore, the Charter requires that states share information and otherwise facilitate reunification where families have been separated.[69] It also imposes detailed requirements for care of children and family reunification efforts in the event of armed conflict and refugee situations, and limits the conditions under which mothers (but not fathers) may be separated from their children due to imprisonment.[70] These reunification provisions, which have precursors in the Geneva Conventions,[71] demonstrate how the specific rights of the child protected by these treaties build on other, more generally applicable human rights. For example, one scholar has noted that the "right of the child to reunification

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In fact, Article 10(2) may not provide any significant protection beyond that already provided by other principles of international law. The rights to leave any country and to enter one's own are basic human rights that are not contingent on the need for family unification. *See, e.g.*, Universal Declaration, *supra* note 19, art. 13(2). But the protections of freedom of movement were controversial at the time of drafting, however elementary they seem now, because the Convention was drafted during the Cold War, when many Soviet bloc countries did not permit their citizens to leave freely. *See* DETRICK, *supra* note 48, at 185-86. In addition, it is possible that the general "right" set forth in the first sentence of CRC Article 10(2) reaches beyond the specific obligations imposed by the remaining sentences, which may not alone be enough to realize that right.

66. DETRICK, *supra* note 48, at 189. *But see id.* at 190 (noting that the *travaux preparatoires* of the CRC stated that Article 10 did not interfere with "the general right of States to establish and regulate their respective immigration laws in accordance with their international obligations," although these international obligations might, in a circular fashion, include the specific requirements of Article 10 itself).

67. African Children's Charter, *supra* note 32.

68. *Id.* art. 4(1).

69. *Id.* art. 19(3).

70. *Id.* arts. 22, 23, 30.

71. *See* DETRICK, *supra* note 48, at 179.

with his or her family has developed from two fundamental rights: the right to respect for family life and the right to freedom of movement."[72]

The principle of the "best interests of the child," which originally derived from U.S. family law, is today a ubiquitous feature of international treaties and the reasoning of international institutions. In addition to its prominence in the specific treaties addressing the rights of children, the "best interests" principle has been the basis for decisions and comments of the U.N. Human Rights Committee interpreting provisions of the ICCPR and its optional protocols,[73] as well as for decisions by the ECHR.[74] Yet despite the consensus this standard enjoys, its meaning is highly contested, and it has been criticized for vagueness. "Best interests" may be given "very diverse interpretations" depending on the cultural context.[75] The evolution and application of the best interests of the child standard will be discussed further in the case studies, particularly Section II.D, which focuses on the protective removal of children from their parents.

3. Parental Rights

In addition to protecting the rights of children to be with their parents, international law also protects the rights of parents to be with and care for their children. Parental rights are, in fact, extensively recognized by the Convention on the Rights of the Child, and may modify the "best interests" standard. Article 3 states:

> 1. In all actions concerning children . . . the best interests of the child shall be a primary consideration.
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents. . . .[76]

The wording of Article 3 suggests that protection of parental rights may permit some departures from the strict application of the best interests standard. The best interests of the child are only required to be *a* primary consideration, not necessarily the dispositive consideration, and Article 3(2) seems to suggest that parental rights need to be balanced against any contrary interests of the child. Indeed, the drafting history of the Convention shows that the choice of language was quite deliberate; an earlier proposal to define the child's best interests as

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72. VAN BUEREN, *supra* note 17, at 105; *cf. supra* note 65.

73. *See* General Comment No. 17(35), *Report of the Human Rights Committee*, U.N. GAOR, 44th Sess., Supp. No. 40, Annex VI, ¶ 6, U.N. Doc. A/44/40 (1989); General Comment No. 19(39), *Report of the Human Rights Committee*, U.N. GAOR, 45th Sess., Supp. No. 40, at 175 U.N. Doc. A/CONF. 157/24 (Part I) (1993); Hendriks v. Netherlands, App. No. 8427/78, 5 Eur. Comm'n H.R. Dec. & Recs. (1982); Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, 8 INT'L J.L. & FAM. 1, 4 (1994) (collecting these cases).

74. *See infra* notes 369-380 and accompanying text.

75. Alston, *supra* note 73, at 4-5; *see also id.* at 10-11 (criticizing the drafters for giving too little attention to the meaning of "best interests"); *id.* at 18 (noting that "best interests" is a particularly indeterminate standard even when compared to other international human rights norms); *cf.* Abdullah An-Na'im, *Cultural Transformation and Normative Consensus on the Best Interest of the Child*, 8 INT'L J.L. & FAM. 62, 63 (1994) (noting that the CRC in general may represent "much apparent consensus on very little substance").

76. CRC, *supra* note 12, art. 3.

"the paramount consideration" was rejected.[77] This suggests that international law recognizes a strong parental right to family unity that must be considered, even where a child's interests lean toward removal from his or her parents.

In Article 18, which obligates the state to provide parents with appropriate assistance in child care, the Convention states, "Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."[78] This provision not only recognizes parental rights to care for children, but also sets forth the presumption that the exercise of those rights will be in the best interests of children. Furthermore, the Convention recognizes specific rights of parents in a number of other provisions: the right to guide children in the exercise of their own rights, the right to state-provided information and reunification efforts in the event of separation, and the right to travel across national borders to visit children.

Several other treaties recognize the right of parents to care for their children. The Universal Declaration, the ICCPR, and the European and American Conventions all recognize the right of all persons to "found" or "raise a family."[79] The African Charter on the Rights and Welfare of the Child both recognizes parents' "primary responsibility . . . [for] the upbringing and development [of] the child" and imposes upon them individual duties regarding the exercise of that responsibility.[80] In addition, carving out an exception to children's privacy rights, it states that "parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children."[81] The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) mandates that states accord parental rights equally to men and women, although not necessarily mandating that such rights exist in the first place.[82] In addition, the ICCPR recognizes parents' right to control their children's religious and moral education—a right that could not be exercised in the event of family separation.[83]

4. The Right to Marry

The fourth type of international law provision affecting family unity is the protection of the right to marry. This right was set forth in Article 16(1) of the Universal Declaration, which states: "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage

77. *See* Alston, *supra* note 73, at 10, 12. In many domestic legal systems, the best interest of the child is treated as paramount, in contrast to the international standard. *See* Stephen Parker, *The Best Interests of the Child: Principles and Problems*, 8 INT'L J.L. & FAM. 26, 27 (1994).

78. CRC, *supra* note 12, art. 18(1).

79. Universal Declaration, *supra* note 19, art. 16(1); ICCPR, *supra* note 21, art. 23(2); European Convention, *supra* note 25, art. 12; American Convention, *supra* note 25, art. 17(2).

80. African Children's Charter, *supra* note 32, art. 20.

81. *Id.* art. 10.

82. CEDAW, *supra* note 22, art. 16.1(d).

83. ICCPR, *supra* note 21, art. 18(4).

and at its dissolution." The ICCPR and the American and European Conventions all protect the "right of men and women of marriageable age to marry."[84] Like the Universal Declaration, the American Convention also specifies that states may not limit the right to marry on discriminatory grounds.[85] CEDAW requires that marriage rights (including the rights to freely consent to and to terminate marriages) be available equally to men and to women.[86]

The ECHR has adopted a fairly narrow interpretation of the right to marry in the European Convention. For example, the Court has held that Article 12 does not provide a right to same-sex marriage, an issue discussed further in Section II.B.[87] Subsequently, although the Court held that three-year restrictions on remarriage violate Article 12, it suggested unwillingness to judge domestic marriage law by international standards. The Court stated that the fact that "a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect offends the Convention, particularly in a field—matrimony—which is so closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit."[88] Thus, even strong evidence of predominant state practice supporting the existence of an international norm will not, in the realm of marriage, necessarily provide a basis for rejecting the particular policy choices of states.

The Court has also held that Article 12 only protects the initial act of marriage, but does not implicate individuals' rights thereafter.[89] Thus, the Convention does not protect the right to divorce,[90] although it may protect the right to physical separation and does protect the right of persons to remarry once they are legally divorced.[91] Similarly, one might infer from this narrow construction that Article 12 does not prevent states from forcing already-married couples to separate, and that such a restriction, if found in the Convention at all, must be grounded in Article 8's protection of family life or some other provision.

Interestingly, the ECHR has specifically distinguished Article 12 in this regard from Article 16 of the Universal Declaration, on which it was based; the drafters of the European Convention dropped the Declaration's language extending equal rights to men and women "during marriage and at its dissolution."[92] Although the Declaration's language may appear only to ban sex discrimination in marriage rights, the ECHR's citation to it in a case unrelated to sex discrimination suggests that the Court may have read the Declaration to provide all people with a right to maintain or dissolve a marriage. Thus, to the

84. *Id.* art. 23(2); *see also* European Convention, *supra* note 25, art. 12 (using similar but not identical language); American Convention, *supra* note 25, art. 17(2).

85. American Convention, *supra* note 25, art. 17(2) (stating that states may impose conditions on marriages "insofar as such conditions do not affect the principle of nondiscrimination established in this convention").

86. CEDAW, *supra* note 22, art. 16(1).

87. *See Rees*, 9 Eur. H.R. Rep. 56 ¶ 50.

88. F. v. Switzerland, App. No. 11329/85, 10 Eur. H.R. Rep. 411 ¶ 33 (1987).

89. *E.g.*, Johnston v. Ireland, 9 Eur. H.R. Rep. 203 ¶ 52 (1986).

90. *Id.* ¶ 54.

91. *F. v. Switzerland*, 10 Eur. H.R. Rep. 411.

92. *Johnston*, 9 Eur. H.R. Rep. 203 ¶ 52.

extent that the Declaration is binding as customary international law, it may offer protection beyond that provided by the European Convention.

The Human Rights Committee has held that the right to "marry and found a family," which is protected by Article 23(2) of the ICCPR, encompasses the right to procreate and to live together with one's family.[93] This holding implies that the right to marry and found a family under the ICCPR extends beyond the initial act of marriage and procreation—the state cannot force already-married couples to separate from one another or from their children. Furthermore, the right to marry may impose affirmative obligations on the state to take necessary measures to ensure family reunification when, for whatever reason, families are separated between or within states.[94]

5. *The "Fundamental Group Unit": The Rights of the Family*

The final category of relevant treaty provisions consists of those that seek to protect the family unit, as opposed to the rights of individuals to remain with their families. These provisions focus on the family as an institution and its relationship to society as a whole. The prototype is Article 16(3) of the Universal Declaration, which states: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."[95] Article 23(1) of the ICCPR and Article 17(1) of the American Convention contain the same language, and the Preamble to the Convention on the Rights of the Child similarly describes the family as the "fundamental group of society."[96] Article 18 of the African Charter goes into further detail regarding the family's cultural role and the state's obligations:

> 1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and morals.
> 2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.[97]

The Charter, which is the only major human rights treaty to assign individuals a set of duties toward society, goes on to require individuals to respect their parents, "preserve the harmonious development of the family," and work for its "cohesion and respect."[98] In addition, a number of treaty provisions and soft law instruments require the state to provide affirmative protection to the family.[99] As international family law scholar Geraldine Van Bueren has noted, fi-

93. *See* DETRICK, *supra* note 48, at 187.

94. Human Rights Committee, General Comment 19, 39th Sess. at 29, U.N. Doc. HRI/GEN/1, (1990).

95. Universal Declaration, *supra* note 19, art. 16(3).

96. ICCPR, *supra* note 21, art 23(1); American Convention, *supra* note 25, art. 17(1); CRC, *supra* note 12, preamble.

97. African Charter, *supra* note 25, art. 18(1)(2).

98. *Id.* art. 29. *See also* African Children's Charter, *supra* note 32, art. 18 (stating that the family, as the "natural unit and basis of society . . . shall enjoy the protection and support of the State).

99. *See* VAN BUEREN, *supra* note 17, at 77 (citing provisions of the CRC, the International Covenant on Economic, Social, and Cultural Rights, and the Declaration on Social Progress and Development, as well as statements of the Committee of Independent Experts, which was established pursuant to the European Social Charter).

nancial or other assistance from the state may be "the most effective measure to ensure the unity of the family as the basic unit in society."[100]

Provisions such as these point to an "essential dichotomy surrounding the family," which international law constructs both as a collection of individuals with competing interests and as a group that is protected as such.[101] The language in many of these treaty provisions emphasizing the family's place in society suggests that the provisions protect the family not as a holder of a group right but rather as a cultural institution. Such a reading is also supported by the fact that no procedural mechanisms exist to enforce protection of the "rights" of the family unit under the European and American conventions, nor under the ICCPR.[102] In practice, then, these provisions protect broader societal interests rather than the interests of the family per se; they are a means of cultural preservation. Not surprisingly, then, interpretations of these provisions have afforded a wide degree of cultural latitude. The Human Rights Committee has interpreted Article 17 of the ICCPR to mean that a society's obligation to protect the family "may vary from country to country and depend on different social, economic, political or cultural conditions and traditions."[103] Indeed, the Committee has also held that the very definition of the family may vary considerably from society to society.[104] As a general rule, "both international and regional human rights law are slowly coming to terms with the different cultural approaches to the concept of family."[105]

C. *Customary Norms Against Family Separation*

All of these categories of provisions, and their application by the relevant treaty bodies, demonstrate that international law now recognizes a number of principles that, at least under certain circumstances, protect the integrity of families. We argue that the various conventions may also be giving rise to a nascent broader norm of customary international law. Customary international law, which binds all states,[106] derives from two elements: state practice and *opinio juris*. The former refers to what states do and the latter to why they do it, that is, to a prevailing belief that certain behavior is either required or prohibited by international law.[107] Professor Anthea Roberts has described a recent shift in the weight of these elements in the process of forming customary law. Traditionally, the state practice element was paramount, while the *opinio juris* element posed the subsidiary question of why certain state practices existed. The

100. *Id.*

101. *Id.* at 68.

102. *Id.* at 78 (noting that the "entitlement of the family to protection by society and the state is formulated as a group right, but the basic procedural hurdles only allow for individual claims").

103. *See id.* (quoting the HRC's decision in *Cziffra and Nineteen Mauritius Women*).

104. *See id.* (noting that the HRC "accepts that there is not a singly universally binding definition of family" and interprets Article 17 to encompass all those groups that would comprise the family "in the society of the State Party concerned").

105. *Id.* at 71.

106. *See* Alston, *supra* note 73, at 17.

107. *See* Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 757-58 (2001).

"modern" view, however, has placed primary weight on the *opinio juris* element, which may be inferred from court decisions, declarations of international forums, and the content of treaties that have been ratified by a large number of states.[108] The modern approach allows norms to evolve more quickly, because international legal opinion changes more easily than does state practice.[109] Without taking up the question of the comparative legitimacy of these approaches, we will by necessity analyze the existence of customary norms largely from the modern perspective; we simply lack sufficiently comprehensive information as to the practice of large numbers of states. In any case, our main objective is to explore the directions in which we think customary and treaty-based international law *ought* to evolve, rather than simply describing its current content.

It is probably too early to argue that a general norm against family separation has achieved the status of customary international law—at least, to the extent that that norm would extend beyond the specific aspects and circumstances discussed here. Given the widespread occurrence of family separation, the state practice element is probably lacking. Furthermore, few sources of international opinion have addressed this problem in any kind of comprehensive manner. We believe, however, that such a norm is beginning to evolve in fragmentary ways. Sufficient consensus exists against particular types of family separation, or in favor of some of the specific principles discussed above that weigh against family separation, to constitute customary international law.[110] Moreover, we believe that customary norms will continue to evolve as international and domestic institutions apply the relevant treaty provisions and engage in dialogue regarding their meanings and implications.[111] The piecemeal treaty provisions discussed in this Section may increasingly come to be seen to embody an underlying general norm. For example, as Professor Sharon Detrick has stated, Articles 9(1) and 10(1) of the Convention on the Rights of the Child "embody the principle of family unity, as they share the aim of protecting children against separation from their parents."[112] More to the point, these norms *should* continue to evolve. The case studies discussed in this article give just a few examples of the magnitude of the problem of family separation and the variety of its forms, which suggest that the issue cannot be addressed adequately by narrowly tailored treaty provi-

108. *Id.* at 758-59. Professor Roberts also describes a sharp schism among international legal scholars regarding the acceptability of these two approaches and provides a theory that aims to reconcile the two.

109. *Id.*

110. *See, e.g.*, April Adell, Note, *Fear of Persecution for Opposition to Violations of the International Human Right to Found a Family as a Legal Entitlement to Asylum for Chinese Refugees*, 24 HOFSTRA L. REV. 789, 795-96 (1996) (arguing that the right to found a family has achieved the status of customary international law).

111. *See, e.g.*, An-Na'im, *supra* note 75, at 64 (noting that continued international dialogue will produce increasing consensus on the "meaning and implications" of the best interests principle). The best interests principle itself probably enjoys the status of customary international law already. *See* discussion, *infra* notes 311-320 and accompanying text, of the *Beharry v. Reno* case in the United States, which held the provisions of the CRC binding on the non-signatory United States as customary international law.

112. DETRICK, *supra* note 48, at 191.

sions. The remainder of this article is devoted to the exploration of the possible contours of new international norms against involuntary family separation.

First, however, we anticipate one significant objection, grounded in feminist theory and experience, to the recognition of international norms against family separation. Many critics have argued that notions such as family rights and family privacy simply insulate from scrutiny, and thereby ensure the continuation of, violence and oppression within families. Professor Fernando Teson provides one version of this argument:

> [I now turn to] one of modern feminism's most persuasive points: the modern state affords excessive protection to the family. Family "autonomy," as the legal basis of the private social domain, has legitimized the domination of women and children by men. . . . The law should punish the victimization of women, and culprits should not be allowed to hide behind the "family unit," a politically defined space where men may unjustly dominate and sometimes even victimize women and children. . . . [G]roup autonomy (state sovereignty, family autonomy) is an illiberal notion. Kantian liberalism insists that our moral principles derive from individual dignity and autonomy. Every person holds individual rights which are not forfeited by membership in the group. . . . Just as the principle of state sovereignty must be set aside to protect citizens whose rights are violated by their government, so the principle of family autonomy must be set aside to protect the rights of members of the family.[113]

Professor Teson's argument is a liberal version of the critique, extensively developed by feminist scholars over several decades, of the relegation of women to the private sphere. Some feminists go further, arguing that the public/private dichotomy itself institutionalizes oppression and violence.[114] Many contemporary international legal scholars argue that international law should increasingly focus on affairs of the family—not in order to increase the legal protection offered to the family as a unit, but rather in order to protect the individual rights of family members and/or to break down social structures of subordination.[115] As it stands now, international law places excessive weight on state sovereignty and imposes insufficient duties on states to protect human rights within the family. The result, in Professor Teson's words, is that "there are two layers of legal immunity enjoyed by men who oppress women: domestic law, which treats the family as the man's castle, and international law, which likewise leaves the state (with its many men's castles) largely shielded from external scrutiny."[116]

Those obligations that international law does place on states with respect to their treatment of families may simply perpetuate oppression. As feminist scholars Hilary Charlesworth, Christine Chinkin, and Shelley Wright have argued, treaty provisions protecting the "natural and fundamental group unit of society . . . ignore that to many women, the family is a unit for abuse and

113. Fernando R. Teson, *Feminism and International Law: A Reply*, 33 VA. J. INT'L L. 647, 657-58 (1993).

114. *E.g.*, Hilary Charlesworth, Christine Chinkin, & Shelley Wright, *Feminist Approaches to International Law*, 85 A.J.I.L. 613, 636-37 (1991).

115. *See, e.g.*, Teson, *supra* note 113 (making the individual rights-based argument); *see generally* Charlesworth et al., *supra* note 114 (critiquing both the traditional model of international law and the rights-based alternative of liberal feminism for perpetuating structures of oppression).

116. Teson, *supra* note 113, at 658.

violence; hence, protection of the family also preserves the power structure within the family, which can lead to subjugation and dominance by men over women and children."[117] Furthermore, some contend that treaty provisions that link privacy rights to the protection of the family (such as Article 8 of the European Convention) reinforce the role of the public/private dichotomy in international law.[118]

We do not know what any of these scholars would have to say specifically about international norms dealing with involuntary family separation. However, we imagine that some might argue that *any* legal norm, international or otherwise, that seeks to protect the family *qua* family risks strengthening the public/private divide and setting up further barriers to legal remedies for intra-family oppression. This is especially true when such norms depend on the right to privacy or the value of the "family unit," whether conceived as a matter of "group autonomy" or as a social institution.

We are sympathetic to these criticisms, and we wish at this point to make clear what we are *not* arguing when we argue for international norms against family separation. First, we are only addressing involuntary family separation—that is, separation enforced against the expressed wishes of all family members. We do not argue in favor of an international norm that would prevent individuals from leaving oppressive family structures voluntarily; indeed, we believe international law should protect their right to do so.[119] Second, we are not by any means arguing that family unity is a value that should trump all others, or that it should in general take precedence over individual rights or social equality concerns. Indeed, a central aspect of our argument is that family separation issues involve deep and difficult conflicts between competing values and interests, including the strong interests of individual family members. Depending on the situation, the balance of these values will sometimes weigh in favor of family separation, and sometimes against. As noted previously, we think that international law does to some extent, and should to a greater extent, place emphasis on issues of justice within the family.

Third, we would like to examine more closely what we mean, and what international law means, by the value of the family as an entity. The various competing interests of individuals, as reflected in the first five categories of treaty provisions discussed above, are relatively easy to understand and compare. Though the content and weight given to individual rights may be contested, it is at least possible to talk meaningfully about their universal

117. Charlesworth et al., *supra* note 114, at 636; *see also* VAN BUEREN, *supra* note 17, at 67 (noting that the "potential of international law" to protect children effectively has been limited by its embrace of the traditional public/private dichotomy).

118. VAN BUEREN, *supra* note 17, at 72.

119. As noted in the Introduction, we understand that a focus on family members' expressed wishes is not sufficient in all cases to protect against oppression within the family; victims of abuse or women facing strong cultural pressures may fear expressing a wish to leave their families, while younger abused children may be literally unable to express themselves.

application.[120] The provisions that protect the family unit are more difficult to conceptualize. In what sense does the family as a unit or an institution have value beyond the interests of its members? Treaty language describing the family as a "natural" and "fundamental" unit brings to mind long-entrenched notions that the traditional form of the family, with a man at its head, is fixed by human biology and central to human society. But the case studies we discuss in the next Section will demonstrate that far from being universal, what counts as a "family" is radically culturally contingent, as is the social role that the institution of family plays. When we discuss the value of family unity as something separate from the interests of the individual members of families, we are not employing some abstract notion of "group autonomy," nor relying on the suspect notion that human society has a "natural" unit or a "natural" order. Neither do we give any weight to tradition- or natural law-based notions that family affairs are in some way inherently private. Rather, we understand the value of the family unit to be a social construction that can only be meaningfully understood when set in a particular cultural context. Furthermore, we understand cultures themselves to be fluid, not static—both evolving over time and subject to conflict within.[121]

Notwithstanding these disclaimers, it would be overly simplistic to conclude that, because legal protections of the family have frequently perpetuated oppression, international (or domestic) law should not seek to protect the family at all. That the family's role as an institution is socially constructed does not strip it of its significance; people live their lives in cultural context, not in abstract universals. The family does unarguably play an important role in preserving cultures, and even though some cultural norms (for example, patriarchy) are unjust and require transformation, we think cultural integrity is a valid concern for international law. Indeed, we doubt many would disagree on this point; even in the West, most feminists today at least temper the more rigorous universalist principles advanced in decades past with respect for cultural difference. Furthermore, as many of the treaty provisions above suggest, and as the case studies below will demonstrate, the individual interests of women and children, as well as a systemic concern with the eradication of gender-based and other forms of inequality, often weigh strongly in *favor* of a norm against family separation. As international law on this issue evolves, our challenge will be to identify the circumstances in which, on balance, the competing values at stake compel the application of such a norm. We attempt, with the following case studies, to shed some light on that challenge.

120. This is not to say that concepts such as "rights" or even "interests" are inherently universal or given, rather than constructed and contingent. *See, e.g.*, Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 303 (1988) (noting that the "best interests of the child is a highly contingent social construction" that depends as much on "political and social judgments about what kind of society we prefer" as on "neutral or scientific data about what is 'best' for children"). Bartlett's point is clearly supported by the example of the "child welfare" policies of the Australian government discussed in Section II.A, as well as by the difficulties in applying the best interests test discussed in Section II.D.

121. *See* An-Na'im, *supra* note 75, at 67 (criticizing the search for single "authentic" representations of cultures).

II.
CASE STUDIES

If international law does, in fact, contain a norm against the involuntary separation of families, what is the scope and content of that norm? In this Section, we use a number of case studies to flesh out the nature of and exceptions to international protections of family integrity, and to consider how recognition of those protections would influence several areas of national law and policy. In Section A, we examine how states use family separation to attack the cultural integrity of minority groups, focusing particularly on the history of Australia's removal of Aboriginal children from their parents. In Section B, we analyze France's recently implemented policy of forcibly separating polygamous immigrant families, and evaluate the need to balance the integrity of families with the goal of gender equality. In Section C, we assess states' responsibilities to accommodate family unification in their immigration policies, specifically focusing on the removal policies of the United States. In Section D, we consider international law's implications for domestic family law, in particular for the protective removal of children by child welfare services in the United States. Finally, in Section E, we consider instances of mass family separation as a corollary of crisis situations.

A. Stolen Generations: Family Separation as Cultural Genocide

The forced separation of families is always painful to the individuals it directly affects, but it is especially dangerous when targeted at discrete racial, ethnic, or cultural minorities. In such situations, family separation may, by design or effect, attack the cultural integrity and possibly the survival of the entire group, either by directly interfering with reproductive autonomy or by preventing younger members from learning the group's traditions and history. The sad story of Australia's Stolen Generations,[122] along with similar policies of removal of indigenous children in other countries, is a notable example. During the twentieth century, the Australian government systematically and forcibly removed tens of thousands of Aboriginal children from their parents and gave them to white adoptive parents.[123] In addition to these forced adoptions, the government also removed many children from their families at a slightly older age and forced them to attend white-run boarding schools. Although the removals ended in the 1960s, their effects on Aboriginal life in Australia are still plain today. Many, perhaps most, of these now-grown children still have no idea who their birth parents or siblings were. Moreover, they have been completely dis-

122. This term was coined by Peter Read in 1982 and is now in common parlance. Jennifer Clarke, Cubillo v. Commonwealth, 25 MELB. U. L. REV. 218, 219 n.1 (2001) (citing PETER READ, THE STOLEN GENERATIONS: THE REMOVAL OF ABORIGINAL CHILDREN IN NEW SOUTH WALES 1883 TO 1969 (1982)). According to Prof. Robert Van Krieken, the term is "meant to refer to something broader" than the physical removal of children; it "aims to capture the 'theft' of part-Aboriginal children from their culture, their history, and their community." Robert Van Krieken, *Is Assimilation Justiciable?* Lorna Cubillo & Peter Gunner v. Commonwealth, 23 SYDNEY L. REV. 239, 240 (2001).

123. *See, e.g.*, READ, *supra* note 122.

connected from the communities in which they were born, undermining their sense of cultural identity.[124] As this discussion will show, these policies violate a number of international and Australian legal principles—yet none of these principles has been enforced successfully either in Australian courts or by any international institution that has considered the Stolen Generations travesty. The development of a new international norm against involuntary family separation might thus provide a viable remedy in a situation where other approaches have failed.

1. History of the Stolen Generations

The removal policy in Australia had its roots in practices of the British colonial era,[125] but removals began on a large scale around 1910 and accelerated with the passage of the Aboriginals Ordinance of 1918 in the Northern Territory (where most Aboriginal Australians live). The Ordinance gave "exceptionally wide powers"[126] to the Director of Native Welfare, who was authorized "at any time to undertake the care, custody, or control of any aboriginal or half-caste, if, in his opinion it [was] necessary or desirable in the interests of the aboriginal or half-caste for him to do so."[127] Furthermore, he was authorized to order Aboriginals or so-called "half-castes" to be removed for any reason or to be detained in any "reserve or aboriginal institution," the latter a term that could apply to schools, homes, missions, orphanages, or reformatories.[128] In 1947, the ordinance was amended to make the Director the "legal guardian of every aboriginal and every half-caste child, notwithstanding that the child has a parent or other relative living."[129] The fact that the legal authorization for the removal policy was ostensibly the "interests" of the children demonstrates the malleability of "interests" language, especially when applied to children who are too young to express their interests themselves.

Australia's child removal policy affected virtually all Aboriginal families. A recent investigation by the Australian Human Rights and Equal Opportunity Commission found that nationally,

> between one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970 . . . In that time not one Indigenous family has escaped the effects of forcible removal . . . Most families have been affected, in one or more generations, by the forcible removal of one or more children.[130]

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124. Philip Lynch, *Keeping them Home: The Best Interests of Indigenous Children and Communities in Canada and Australia*, 23 SYDNEY L. REV. 501, 511-12 (2001).

125. *See generally* READ, *supra* note 122.

126. Cubillo v. Commonwealth, 174 A.L.R. 97, 154 (Austl. F.C. 2000).

127. Aboriginals Ordinance, 1918 (Aust.); *see* Clarke, *supra* note 122, at 234. The position of the Director of Native Welfare was originally referred to as Chief Protector of Aboriginals. *Id.* at 231. "Half-caste" referred to a multiracial person with any amount of Aboriginal ancestry. *Id.* at 232. In 1953, the Ordinance was amended to remove most "half-castes" from its scope. *Id.* at 237.

128. Clarke, *supra* note 122, at 234-35.

129. *Id.* at 232 (quoting the amendment).

130. Human Rights and Equal Opportunity Commission, Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their

Notwithstanding these terrible statistics, the Australian case, while particularly egregious, is not unique in kind. As one Australian commentator noted, "First Nations and Aboriginal communities in North America and Australia have been deprived of their children from the time of the European invasion."[131] Both the United States and Canada implemented policies that forcibly placed indigenous children in boarding schools as a means of cultural assimilation. In Canada, this policy remained in effect until the 1970s, and even more recently, some First Nations children have been removed and given to white adoptive families.[132] In 1998, the Canadian government established a CAD$350 million fund to award reparations to children who were sent to the boarding schools.[133] Even today, child welfare services in Canada, the United States, and Australia remove indigenous children from their parents and place them in state or foster care at dramatically higher rates than the rates at which non-indigenous children are removed.[134]

The negative effects of these removal policies on indigenous children's development and psychological well-being are well documented and continue into adulthood.[135] But the damage extends far beyond the individual children:

> The removal of First Nations and Aboriginal children from their homes has a devastating impact upon those who remain. The family unit, so often the primary vehicle for the transmission of identity, meaning, love, and ultimately, meaningful life, is destroyed. . . . With children gone, the shared goal of raising children disintegrates. Parents give up: "If you lose your children you are dead." As the family disintegrates, so too the community. . . . The net effect, felt both by those who are removed and those who remain, is a sense of instability, loss, confusion, and abandonment. "Because the family is the most fundamental economic, education, health-care unit in society and the centre of an individual's emotional life, assaults on Indian families help cause the conditions that characterise those cultures of poverty where large numbers of people feel hopeless, powerless, and unworthy."[136]

The history of the Stolen Generations thus demonstrates how involuntary family separation can operate as an assault on the individual, the family, and the community as a whole.[137]

Families (1997) [hereinafter Commission Report], *cited in* George Williams, *Race and the Australian Constitution: From Federation to Reconciliation*, 28 OSGOODE HALL L.J. 643, 660 (2000).

131. Lynch, *supra* note 124, at 501-02 (citing a Canadian report documenting 200 years of efforts by missionaries, teachers, and governments to assimilate indigenous children into white society).

132. *Id.* at 502 (citing 1983 report by Manitoba County Services).

133. Ben Saul, *The International Crime of Genocide in Australian Law*, 22 SYDNEY L. REV. 527, 574 (2000).

134. Lynch, *supra* note 124, at 503-04 (citing factors of ten or more in removal rate differences).

135. *See id.* at 504 (citing evidence that Stolen Generation children were, as adults, twice as likely to be arrested or do drugs than were Aboriginal children who were not removed); *id.* at 511-12 (citing severe psychological and emotional damage); *cf. id.* at 511 (quoting a native Canadian activist saying the culture in boarding schools ingrained in Indians "a legacy of violence").

136. *Id.* at 518-19 (quoting comments of Russell Barsh and W. Byler on the destruction of American Indian families).

137. *See* discussion *infra* note 170 and accompanying text.

2. *Applicability of the International Prohibition of Genocide*

The Australian child removal policy has often been described as cultural genocide.[138] Indeed, the Human Rights and Equal Opportunity Commission report stated unambiguously, without the "cultural" modifier: "[The removals] were an act of genocide, aimed at wiping out Indigenous families, communities and cultures, vital to the precious and inalienable heritage of Australia."[139] The removal policy clearly demonstrates certain core elements of the crime of genocide. The Genocide Convention defines genocide as

> any of the following acts *committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such*:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.[140]

Australia's child removal policy evidently fits into category (e); the question, however, is whether it meets the requirements of the intent element emphasized above. The policy was expressly intended to bring about the total assimilation of Aboriginal children into white society. Although never officially admitted by the Australian government, which has described the removals as a child welfare policy, the end goal may well have been to eliminate Aboriginal society as a distinct cultural group—at least "in part," which is all the Convention requires.[141] The fact that not every Aboriginal child was removed does not disprove the intent element, as the strategy may have been to erode Aboriginal culture gradually over the course of generations.

Yet despite arguably possessing the characteristics of the crime of genocide, the history of the Stolen Generations and its treatment by Australian courts demonstrate the inadequacy of the international prohibition of genocide as a mechanism for addressing family separation, even when it is targeted at distinct minorities. Although Australia has ratified the Genocide Convention, it has never passed implementing legislation. Courts have held that the crime of genocide is not incorporated into Australia's common law,[142] and they have rejected the argument that the Stolen Generations policy was a violation of an implicit

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138. *See, e.g.*, Lynch, *supra* note 124, at 520.

139. Commission Report, *supra* note 130.

140. Genocide Convention, *supra* note 24, art. 2 (emphasis added). Note that while clause (e) is relevant in the Australian case, clause (d) of this definition may also be applicable to some forms of family separation. The systematic separation of men from women, which necessarily separates families, may be a measure intended to interfere with the group's ability to reproduce.

141. As one member of the National Commission established to investigate the removal practice stated, "'the attempt to "solve the Aboriginal problem" by the taking away of children and merging them into white society fell within [the modern definition of genocide].'" Timothy L.H. McCormack, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681, 725 n. 230 (1997) (quoting statement by J.H. Wootten).

142. *See* Saul, *supra* note 133, at 533 (describing the holding in *Nulyarimma v. Thompson*, 165 A.L.R. 621 (1999)).

constitutional right to freedom from genocide.[143] Some commentators have argued that Australia's failure to enforce its international law obligations stems from its refusal to admit that "genocide," a term very much associated with Nazi Germany, could ever take place in a "civilized" country like Australia.[144] Indeed, Australian officials proudly tout the country's human rights record.[145]

Critics have argued that the refusal to expressly criminalize genocide reflects an unwillingness to confront the implications of the child removal policy—demonstrating an unspoken recognition that the policy at least raises the issue of genocide. Australian officials claim that existing laws, such as those against murder, proscribe sufficiently the underlying acts that constitute genocide.[146] Yet no official has ever been convicted of a crime for implementing the child removal policy.[147] Moreover, Aboriginal plaintiffs challenging the policy through civil claims have thus far been unsuccessful, although few cases have yet been heard and thousands more are pending.[148] Taken together, this case law demonstrates the inadequacy of reliance on either existing domestic laws or the international prohibition on genocide.

In the future, Australian courts may recognize a crime of genocide pursuant to recent legislation passed to implement Australia's obligations under the Rome Statute of the International Criminal Court.[149] The Rome Statute lacks retroactive effect, however. Moreover, precedent shows that Australian courts would not consider the child removal policy to amount to genocide even if a legal prohibition existed. The first case brought to Australian courts by members of the Stolen Generations was *Kruger v. Commonwealth* in 1997. In a declaratory judgment action, plaintiffs alleged that the removal policy exceeded the government's constitutional powers, violated the freedom of religion, and breached implied constitutional provisions protecting equality and freedom of movement and preventing genocide.[150] In *Kruger,* the Australian High Court reserved consideration of the question (later resolved in the negative by the Full Federal Court) of whether the crime of genocide was prohibited by Australian law.[151] Instead, the Court held that the child removal policy did not amount to genocide. In the Court's view, the necessary element of intent to harm or destroy the Ab-

143. Kruger v. Commonwealth, 190 C.L.R. 1 (1997).

144. *See* Saul, *supra* note 133, at 540-41 (citing statements by Australian politicians); *see also* McCormack, *supra* note 141, at 725 (noting that "[i]n Australia, the prevailing view is that, as the [child removal policy] did not involve extermination camps and gas-ovens, [it] could not have constituted genocide").

145. Williams, *supra* note 130, at 644-45 (citing, inter alia, statement of Prime Minister John Howard).

146. Saul, *supra* note 133, at 541 (citing Australian submissions to U.N. Human Rights Committee).

147. *See generally id.* Forcible transfer of children is not a crime under the Australian Criminal Code. *Id.* at 543.

148. *Id.* at 570-71; *see Cubillo,* 174 A.L.R. at 97.

149. Saul, *supra* note 133, at 541.

150. Clarke, *supra* note 122, at 219 n.3.

151. 190 C.L.R. 1 (1997); *see* Saul, *supra* note 133, at 533-34.

original population was absent; rather, the policy's intent was to promote child welfare.[152]

In *Cubillo v. Commonwealth*, the first civil damages suit concerning the Stolen Generations, an Australian federal court similarly referred to the removals as an Aboriginal "protection" and "welfare" policy that, though "badly misguided," was "well-meaning."[153] *Cubillo*, which was later affirmed on appeal,[154] was a tort suit for wrongful imprisonment, negligence, and breach of statutory and fiduciary duty. Without foreclosing the possibility that these legal theories might succeed in future challenges to the child removals, the *Cubillo* court held that the evidentiary record in this case lacked sufficient information about whether the plaintiff was in the care of a parent before she was taken. The court also held that it was inappropriate to rule on the overall validity of the child removal policy in a tort suit by an individual plaintiff, and accordingly excluded parliamentary apologies and other evidence of the policy's wrongfulness.[155] This analysis demonstrates the weakness of domestic litigation by individuals (at least pursuant to ordinary domestic law) as a strategy for addressing policies of widespread and systematic family separation. In contrast to this piecemeal domestic law approach, an international law approach would allow judgment on the lawfulness of a state policy taken as a whole.

But the Stolen Generations case likewise demonstrates the pitfalls of reliance on the international prohibition against genocide as a strategy against family separation policies that target particular ethnic groups. Part of the problem lies in the language of the Genocide Convention itself. When the Convention was drafted, it included an express prohibition on cultural genocide.[156] However, this language was removed from the final version.[157] Many delegates felt that the equation of destruction of cultures with the actual mass murder of peoples would trivialize the crime and inhibit the effective formation of international norms against atrocities like those in Nazi Germany.[158] Furthermore, at that time a number of countries, including the United States, had explicit policies of assimilating immigrant and indigenous groups, and thus opposed using the Convention to protect cultural difference.[159] Despite this resistance, the Convention goes beyond mass murder by reaching removals of children and policies designed to interfere with reproduction.[160] Scholars have suggested

152. *See* Saul, *supra* note 133, at 533-34.

153. *Cubillo*, 174 A.L.R. 97 (2000); *see* Clarke, *supra* note 122, at 222; Van Krieken, *supra* note 122, at 258-59. Similarly, Canadian courts have relied on the principle of the "best interests" of the child to support Canada's child removal policies. *See* Alston, *supra* note 73, at 20-21.

154. Cubillo v. Commonwealth, 183 A.L.R. 249 (2001).

155. Clarke, *supra* note 122, at 250.

156. Saul, *supra* note 133, at 555.

157. *Id.*

158. *See* Matthew Lippman, *Art and Ideology in the Third Reich: The Protection of Cultural Property and the Humanitarian Law of War*, 17 DICK. J. INT'L L. 1, 62 (1998).

159. Saul, *supra* note 133, at 555.

160. Genocide Convention, *supra* note 24, art. 2(c)-(e).

that the inclusion of these provisions enabled the Convention to reach certain forms of cultural genocide without expressly using that phrase.[161]

Yet the Convention's intent requirement may frustrate this indirect approach to cultural genocide. For a policy to constitute genocide, it must be intended to destroy a group, in whole or in part—language that arguably may not encompass the simple destruction of the group's cultural integrity. Moreover, the intent requirement has proven to be a significant obstacle to indigenous groups in pursuing claims of genocide in general.[162] The requirement of "special intent" is more stringent than the intent elements of ordinary crimes, requiring evidence of a clear purpose on the part of the perpetrator, rather than mere knowledge of the likely consequences.[163]

Furthermore, as a practical matter, although the Convention has been important in solidifying an international consensus against genocide, it has virtually never been enforced on an international level. In fact, although it entered into force in 1951, and although there have been several widely recognized cases of genocide since then,[164] the world's first conviction for the international crime of genocide did not take place until 1999, in a decision by the International Criminal Tribunal for Rwanda.[165]

3. *Other Applicable Provisions of International Law*

In addition to the international prohibition of genocide, Australia's child removal policy contravened a number of other principles of international law, some long since established and some emerging today. For example, when targeted against indigenous or other racial or ethnic groups, family separation policies violate international customary and conventional law against race discrimination.[166] But absent some particular elaboration of why and under what circumstances family separation policies violate them, general provisions of international law against racism, like the prohibition of genocide, may not set a clear enough norm to deter countries from adopting policies like Australia's.

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161. *See* Rhona K. M. Smith, *The International Impact of Creative Problem-Solving: Resolving the Plight of Indigenous Peoples*, 34 CAL. W. L. REV. 411, 414 (1998).

162. McCormack, *supra* note 141, at 723; Saul, *supra* note 133, at 566.

163. Saul, *supra* note 133, at 566.

164. The post-World War II atrocities most broadly agreed to constitute genocide are those in Cambodia and Rwanda. *See, e.g.*, Ivan Eland, *Middle East: What Should the United States Do About Saddam Hussein?*, 50 EMORY L.J. 833, 836 (2001). Events in Bosnia are also often referred to as genocide. *See, e.g.*, Kofi Annan, *Opening Remarks: Advocating for an International Criminal Court*, 21 FORDHAM INT'L L.J. 363, 364-65 (1997); Ronald C. Slye, *International Law, Human Rights Beneficiaries, and South Africa: Some Thoughts on the Utility of International Human Rights Law*, 2 CHI. J. INT'L L. 59, 59 (2001). Some commentators have used the term "genocide" to describe events in Biafra, Bangladesh, Somalia, and East Timor as well. *See, e.g.*, Evo Popoff, Note, *Inconsistency and Impunity in International Human Rights Law: Can the International Criminal Court Solve the Problems Raised by the Rwanda and Augusto Pinochet Cases*, 33 GEO. WASH. INT'L L. REV. 363, 368 (2001); Mary Margaret Penrose, *Impunity—Inertia, Inaction, and Invalidity: A Literature Review*, 17 B.U. INT'L L. J. 269, 282 (1999).

165. Saul, *supra* note 133, at 527.

166. *See, e.g.*, ICCPR, *supra* note 21, art. 2(1); CERD, *supra* note 22, art. 2.

Australia has never admitted that its child removal policy was racist; it characterizes the policy as a well-intentioned mistake.

Were it enacted today, Australia's policy would violate the requirements of Article 20(3) of the Convention on the Rights of the Child, which requires that when the state separates a child from its parents, even in the child's best interests, it be sensitive to the cultural heritage of the child in selecting alternative care arrangements.[167] Furthermore, policies such as Australia's are inconsistent with the principles embodied in certain international declarations promoting protection of the specific rights of indigenous peoples. For example, the U.N. Draft Declaration on the Rights of Indigenous Peoples explicitly addresses the issue in Article 6, which states in relevant part:

> Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext.[168]

In addition, other provisions of the Draft Declaration are certainly implicated by Australia's policy, including Article 7, which prevents cultural genocide, including population transfer or forced assimilation, and Article 15, protecting the right of indigenous children to "education in their own culture and language." But although the language of the Draft Declaration is encouragingly strong, it is not a treaty and does not bind any country. In general, international protection of indigenous rights is inchoate. Other than the African Charter, which alone among the major human rights conventions protects the rights of peoples, no treaty currently in force in any significant number of nations expressly protects these rights.[169] Thus, an approach to the child removal issue premised on international legal protections of indigenous peoples would currently be ineffective.

167. *See generally* VAN BUEREN, *supra* note 17, at 102 (discussing this requirement).

168. Res. 1994/45, Subcommission on Prevention of Discrimination and Protection of Minorities, 46th Sess. U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994). *See also* Vienna Declaration and Programme of Action, World Conf. on Human Rights, art. 20, U.N. Doc. A/CONF.157/23 (1993) (providing vague protection for the "human rights and fundamental freedoms of indigenous people," as well as their "distinct identities, culture, and social organization"); Proposed American Declaration on the Rights of Indigenous Peoples, Inter-American Commission on Human Rights, 1333rd Sess., 95th Reg. Sess., art. 5 (1997) (prohibiting "enforced assimilation" and the "destruction of a culture," and protecting the right to develop a cultural identity), *available at* http://www.cidh.oas.org/indigenous.htm (last visited Oct. 20, 2002); *id.* art. 7 (protecting the right to cultural integrity); *id.* art. 11 (protecting indigenous families and requiring that courts separating families consider "the views of the peoples, including individual, family, and community views"). Like the UN Draft Declaration, neither the Vienna Declaration nor the Proposed American Declaration are binding treaties.

169. *See, e.g.*, Carlos M. Ayala Corao, *Situation of the Human Rights of Indigenous Persons and Peoples in the Americas*, OAS Doc. OEA/Ser.L/V/II.108 Doc. 62 (2000) (critiquing inadequacy of current treaty law), *available at* http://www.cidh.oas.org/indigenas/intro.htm (last visited Oct. 20, 2002).

4. *Implications of the Australian Child Removal Policy for International Norms Against Family Separation*

Therefore, despite the apparent inconsistency of Australia's child removal policy with international norms against race discrimination, discrimination against indigenous persons, and possibly genocide, no effective international or domestic law remedy has been provided to the victims thus far. The main problem lies in convincing people generally, and courts specifically, that the policy was motivated by malice or animus against the group. The history of the Stolen Generations thus provides a case study supporting the necessity of international legal norms specifically prohibiting involuntary separation of families, without a requirement of group-based animus. Of course, where courts consider the validity of specific removals of children—for example, those intended to protect the welfare of victims of abuse or neglect—they should take into account the existence of group-based animus or stereotypes. Reviewing courts should vigilantly guard against child removals that are premised on discriminatory assumptions about different groups' caretaking abilities. We will discuss these issues further in Section II.D.

There are several different ways to classify the wrong inherent in the Australian child removal policy: as a crime against the individual child, as a crime against the family, or as a crime against a cultural and racial group. These interpretations are not mutually exclusive; we believe that all are accurate. An international norm against family separation would primarily address the first two categories of harm, protecting the rights of individuals to remain with their families as well as the rights of families themselves. Certainly, in the case of the Stolen Generations, conceiving of the harm done in these ways alone would miss an important facet of the story; a crucial part of the tragedy and the evil of the child removals was its lasting impact on Aboriginal communities and culture.[170] Yet the private suffering experienced by the children and the families they left behind should not be downplayed. A norm against involuntary family separation might help to prevent or remedy such harms without the necessity of proving discriminatory intent. Furthermore, a robust, fully developed norm against family separation ought to take broader group injuries into account. Accordingly, family separation policies that target discrete minorities should be understood as a particularly egregious violation of international law, perhaps rising to the level of a crime against humanity. The inclusion of a prohibition on child transferal in the Genocide Convention demonstrates that the international community has already come to understand some discriminatory family separation policies as falling within the ambit of international criminal law.

In terms of identifying the exact contours of an international legal norm against family separation, the Stolen Generations example is perhaps not very useful, precisely because the violation of international law is so clear. A number

170. *Cf.* Lynch, *supra* note 124, at 520-21 (critiquing family courts' overly individualistic focus on the best interests of indigenous children, arguing that for indigenous persons, individual, family, and community needs cannot meaningfully be separated).

of different and important values recognized by international law are at play: the integrity of families, the elimination of racial discrimination, the protection of indigenous cultures, and the welfare of children. What makes this case easy is that all of those values point in the same direction: toward the illegality of Australia's conduct. Although Australia ostensibly justified the removals based on child welfare, the actual harms suffered by the children it affected are well documented.[171] Furthermore, to the extent that child welfare concerns were premised on the idea that Aboriginals were unfit or otherwise inferior parents—or that children were inherently better off if raised in white Australian culture—they reflect racial stereotypes that cannot count as legitimate interests for the purposes of international law.[172] In short, there is no compelling justification for the involuntary separation of Aboriginal families, and a number of strong international law arguments against it. Thus, Australia's child removal policy is a core example of state behavior prohibited by the international legal norm against family separation.

B. *What Constitutes a Family? The Case of Polygamous Immigrants in France*

If international law recognizes, or should recognize, norms against family separation, how do we define the "family" that these norms protect? Understandings of what groups of people constitute legitimate families vary tremendously cross-culturally and are often highly contested within cultures. The institution of polygamous marriage represents one particularly deep intercultural divide. In this section, we consider the case of polygamous immigrant families in France, who have recently been subjected to a sudden change in legal regime that has forced many of them to choose between permanently separating and being deported. We argue that the draconian retroactive aspects of France's policy should be understood to violate international law; however, we believe that some anti-polygamy measures are not only allowed but encouraged or even required by international law. The separation of polygamous families poses a difficult case for international law because it requires the balancing of strong, conflicting internationally recognized values and interests—in particular, weighing families' rights not to be forcibly separated against women's rights to gender equality and freedom from coercive family environments.

171. *See supra* notes 135-136 and accompanying text.

172. *See* Robert Manne, *The Child's Interests Must Come First*, SYDNEY MORNING HERALD, Aug. 14, 2000, at 14 (arguing that the *Cubillo* decision was "blind to the racist assumptions that conditioned what, for 40 years, the administrators regarded as being, self-evidently, in the best interests of the child"); *cf.* Lynch, *supra* note 124, at 520-24 (critiquing "best interests of the child" standard as employed by contemporary family courts in Australia and Canada for being insensitive to cultural difference). *But see* Van Krieken, *supra* note 122, at 258 (criticizing Manne's argument and arguing that the *Cubillo* court recognized the prejudices of administrators, but could not deem their actions unauthorized by law because the prejudices were in fact embodied in the law of the time).

1. The Status of Polygamy in the Contemporary World

Polygamy, the marriage of one man to more than one woman,[173] has for centuries been nearly unknown in the West.[174] It is forbidden by mainstream Christian and Jewish religious doctrine,[175] and no Western country today legally sanctions the performance of polygamous marriages.[176] When practiced by particular groups within Western countries—most notably by the Mormons in the United States during the nineteenth century, and to a much smaller extent today—mainstream society has condemned polygamy as immoral, sexist, and destructive to children, and has pressured these groups to change their practices.[177] In most Western countries, to the extent that polygamy survives today, it is seen at best as a distasteful oddity.[178]

Yet in much of the world, polygamy is very much alive. Islamic law authorizes each man to have as many as four wives, and the law in many Muslim countries incorporates this rule.[179] Polygamy is also a long-standing tradition in many African cultures and remains prevalent today, especially in West Africa.[180] A 1998 study found that over fifty percent of women in Senegal, Burkina Faso, Togo, and Benin were in polygamous marriages, with just slightly smaller percentages in a number of other countries.[181] Polygamy is legal in a significant majority of non-industrialized countries.[182] Even nations that have constitutional provisions against sex discrimination often specifically exempt marriage laws.[183]

However, polygamy is culturally contested even within societies where it is legal and common. Over the past two decades, women's rights advocates within many Third World countries have begun to scrutinize polygamy's effect on gender hierarchy, within the family and in society at large. Today, many African women's groups and activists are working actively to end this tradition.[184] Nat-

173. Polyandry, the marriage of one woman to more than one man, is extremely rare almost everywhere. *See* Reuel S. Amdur, *Here Come the Brides*, OTTAWA CITIZEN, Jul. 20, 2002, at B7.

174. David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 61 (1997).

175. *See* WIKIPEDIA, *available at* http://www.wikipedia.org/wiki/polygamy (last visited Oct. 22, 2002).

176. *See* Lydia Esteve Gonzalez & Richard Mac Bride, *Fortress Europe: Fear of Immigration? Present and Future of Immigration Law and Policy in Spain*, 6 U.C. DAVIS J. INT'L L. & POL'Y 153, 178 (2000) (stating that polygamy is banned in every European Union country).

177. *See* Chambers, *supra* note 174, at 63-67; *see also* Reynolds v. United States, 98 U.S. 145, 164 (1878) (affirming conviction of a Mormon for bigamy and noting that polygamy "has always been odious among the northern and western nations of Europe").

178. *See* Chambers, *supra* note 174, at 73.

179. Adrien Katherine Wing, *Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-first Century*, 11 J. CONTEMP. LEGAL ISSUES 811, 812 (2001).

180. Benedicte Manier, *Polygamy in Africa resisting pressure of change: Report*, AGENCE FRANCE PRESSE, Apr. 16, 1998, *available at* 1998 WL 2262382.

181. *Id.*

182. Chambers, *supra* note 174, at 61.

183. Wing, *supra* note 179, at 844.

184. Lara Santoro, *First Wives Club Unites in Africa*, CHRISTIAN SCI. MONITOR, Jan. 23, 1998, at 1; Howard W. French, *For Women in Ivory Coast, New Fight for Equality*, N.Y. TIMES, Apr. 6, 1996, at A41.

urally, polygamy is not the only feature of life in many of these societies that relegates women to a position of inferiority; where women are culturally devalued, monogamous marriage can also be a subordinating institution.[185]

2. *Polygamy Among Immigrant Families in France*

The situation of polygamous families living in France highlights both inter- and intra-cultural conflicts over what forms of "family" society and the law should recognize. While France, Europe's most multiethnic society, is home to millions of recently arrived immigrants from former French colonies in Africa, it is also a particularly jealous guardian of its own traditional culture, to which immigrants have faced increasing pressure to assimilate.[186] The arrival of polygamous immigrant families has thus created a serious cultural clash. Polygamous marriages may not lawfully be performed in France, but for several decades, driven by its postwar need for immigrant labor,[187] France legally recognized foreign polygamous marriages so long as they were valid in the country in which they were performed. This policy enabled male immigrants to bring multiple wives into the country on long-term spousal visas.[188] A substantial number of immigrants, mostly from West Africa, took advantage of this policy. As a result, France had 200,000 people living in polygamous families by the 1990s.[189] These families were primarily concentrated in enclaves in the poorer Paris suburbs, where today they make up the majority of some communities.[190]

In the 1980s and early 1990s, African women's advocacy groups in France began to criticize the living situations of the wives of polygamous men. The issues paralleled those raised by some women living in Africa:[191] many first

185. *Cf.* Chambers, *supra* note 174, at 65-66 (noting that late nineteenth-century American women were not, on average, more liberated than women in polygamous Mormon families).

186. *See* Jeremy Jennings, *Citizenship, Republicanism and Multiculturalism in Contemporary France*, 30 BRIT. J. POLIT. SCI. 575, 575 (2000) (stating that "despite an astonishing level of cultural and ethnic diversity, France has seen itself as and has sought to become a monocultural society"); *id.* at 576-79 (arguing that "French universalism" is inconsistent with particularistic claims for minority rights). *See also* Bertrand Bissuel, *Divorcer ou Vivre Sans Papiers: Le Dilemme des Femmes de Polygames*, LE MONDE, Feb. 10, 2002, *available at* http://www.lemonde.fr/article/0,5987,3226--262133-,00.html (noting that the desire to force immigrants to assimilate to mainstream culture was a major factor behind the adoption of anti-polygamy laws).

187. Jon Henley, *"I Can't Say to a Wife of 20 Years She Has to Go": Polygamy Used to Be Tolerated in France—But Not Any More*, GUARDIAN, May 9, 2001, at 16 (also citing a 1980 government directive stating that polygamy among immigrants was not "contrary to the public order").

188. *See* Adrian Pennink, *Thousands of Families in Despair as France Enforces Ban on Polygamy*, INDEPENDENT, Apr. 1, 2001, at 22.

189. Marlise Simons, *African Women in France Battling Polygamy*, N.Y. TIMES, Jan. 26, 1996, at A1 (200,000 people in the Paris area alone); Wilma Randle, *So Far From Home*, ESSENCE, Sept. 1998, at 76 (200,000 in France); *see also* Pennink, *supra* note 188 (140,000 in France, as of 2001). It is unclear whether Pennink's lower estimate reflects the effects of the anti-polygamy policy or is simply based on different data; in any event, accurate estimates of numbers are impossible "because foreign wives are often in the country clandestinely and immigrants keep other wives back in Africa." Simons, *supra*; *see also* Judy Scales-Trent, *African Women in France: Immigration, Family, and Work*, 24 BROOKLYN J. INT'L L. 705, 720 (1999).

190. Simons, *supra* note 189.

191. *See id.* (citing Madine Diallo's statement that "it is a myth that African women like polygamy," whether in Africa or in France).

wives were shocked and hurt by their husbands' decisions to take additional spouses,[192] rivalry among the women was common,[193] and some women were coerced into marriage at a young age by their families. In addition, living in France brought new challenges for these families. In Africa, each wife generally had her own house or hut for herself and her children; not so in France, where housing was very expensive.[194] As a result, large families, sometimes over twenty people, were crammed into tiny apartments where privacy was nonexistent.[195] Tensions often grew among the spouses and children, sometimes to the point of violence,[196] and some wives wanted out of their marriages or even attempted suicide.[197] In addition, mainstream French society's repugnance for polygamy made newly arrived women and their children feel unwelcome in their new communities. Children often feared mockery by their classmates, and delinquency rates were high.[198] Second and third wives with proper residence and working papers sometimes had trouble accessing the government's health care and social security benefits.[199] As a result of these pressures, some African women's groups began to lobby the government to discourage polygamy through changes in its immigration policies.[200]

Concurrent with these developments was a rise in French anti-immigrant sentiment. Statements and policies of mainstream political leaders reflected this trend. Jacques Chirac, now the French president, gave a speech while mayor of Paris in which, talking about African immigrants, he declared: "If you add the noise they make and the smell, well, the French worker goes mad. And if it were you, you would go mad too."[201] In this political context, polygamy was a lightning rod for anti-immigrant attitudes. Politicians characterized polygamous families as burdens on the welfare state: Chirac derided families "with a father, three or four wives, twenty kids, who receive 50,000 francs in welfare payments, without working, naturally."[202] Furthermore, polygamy was seen as an obstacle to immigrants' assimilation into mainstream French culture, and anti-immigrant groups thus portrayed it as a threat to the stability of French society itself.[203]

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192. Randle, *supra* note 189.

193. Simons, *supra* note 189.

194. Henley, *supra* note 187; Randle, *supra* note 189.

195. Ruth Nabakwe, *African Polygamous Life in a Western Context*, AFRICA NEWS, Dec. 4, 2000, *available at* LEXIS, News Library, Africa News File.

196. Simons, *supra* note 189.

197. Bissuel, *supra* note 186 (citing Isabelle Gillette-Faye of the Group for the Abolition of Sexual Mutilation, who also stated that physical violence between co-wives caused some women severe physical injury).

198. Nabakwe, *supra* note 195.

199. Angeline Oyog, *France: African Women Seek to Break Out of Chains of Polygamy*, INTER PRESS SERVICE, Mar. 4, 1992, *available at* LEXIS, News Library, Inter Press Service File.

200. *Id.*; Bissuel, *supra* note 186.

201. Pennink, *supra* note 188.

202. Bissuel, *supra* note 186 (translated from French).

203. Henley, *supra* note 187 (noting that polygamy was perceived as "one of many foreign customs that were a threat to French society"); Emmanuelle Andrez & Alexis Spire, *Droits des étrangers et statut personnel*, PLEIN DROIT No. 51, Nov. 2001 (stating that in the early 1990s, polygamy was stigmatized as a sign of failed integration, and experts were solicited to support the view that eradicating it was essential to the goal of assimilation), *available at* http://www.gisti. org/doc/

3. *The Loi Pasqua*

In 1993, the government responded to these various pressures by passing new immigration legislation known as *le loi Pasqua*, after then-Interior Minister Charles Pasqua. Among other changes, the new law substantially changed French policy regarding polygamy. First, it changed the immigration policy so that only one spouse of each new French immigrant would be issued a spousal visa and working papers and be eligible for the *allocation familiale* (the family allowance, a welfare benefit); the other spouses and their children were excluded.[204] Second, these changes were applied retroactively to families that had already immigrated.[205] Under the new policy, polygamous men and all their wives would lose their working and residence papers and *allocation familiale*, and be subject to deportation, unless they legally divorced and physically separated the household so that each wife was living separately. This policy was mitigated somewhat by a longstanding law that immigrants whose children are French citizens cannot be deported, but even these parents could lose their working papers and welfare eligibility.[206] In addition, a circular issued in 2000 formalized the practice of not applying the retroactive provisions of the laws to the first wife of a polygamous husband, but only to his subsequent wives.[207]

For the first five or six years after the law's passage, it was not enforced against families already in France.[208] In the past several years, however, enforcement has begun in earnest, and the effects of the new policy are now becoming evident.[209] For a few women, the policy has provided the excuse they needed to leave their living arrangements;[210] for most, it appears to be a disaster. Facing harsh penalties, these families face several unattractive options: ac-

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plein-droit/51/statut.html (last visited Oct. 22, 2002); *see also* Jennings, *supra* note 186, at 589 (citing Christian Jelen's polemic against multiculturalism, which associated polygamy with practices such as cannibalism and cutting off the hands of thieves).

204. The *loi Pasqua* was passed as an amendment to the immigration ordinance of November 2, 1945. Article 30 reads: "Lorsqu'un étranger polygame réside sur le territoire français avec un premier conjoint, le bénéfice du regroupement familial ne peut être accordé à un autre conjoint. Sauf si cet autre conjoint est décédé ou déchu de ses droits parentaux, ses enfants ne bénéficient pas non plus du regroupement familial." *See Étapes d'une répression*, PLEIN DROIT, No. 51, Nov. 2001, *available at* http://www.gisti.org/doc/plein-droit/51/etapes.html (last visited Oct. 22, 2002).

205. Article 15bis states, "La carte de résident ne peut être délivrée à un ressortissant étranger qui vit en état de polygamie ni aux conjoints d'un tel ressortissant. Une carte de résident délivrée en méconnaissance de ces dispositions doit être retirée." *Id.*

206. *See Polygamie: mieux vaut tard . . .*, PLEIN DROIT No. 46, Sept. 2000 (quoting *Polygamie: ne pas se tromper de combat!*, PLEIN DROIT No. 36, Dec. 1997) (arguing that French children are not spared from the policy's effects when their parents are prevented from working and cut off from welfare benefits) *available at* http://www.gisti.org/doc/plein-droit/46/polygamie.html (last visited Oct. 22, 2002); *see also* Bissuel, *supra* note 186; Jean-Pierre Alaux, *À la rue sous prétexte de polygamie*, PLEIN DROIT No. 51, Nov. 2001, *available at* http://www.gisti.org/doc/plein-droit/51/polygamie.html (last visited Oct. 22, 2002).

207. *Étapes d'une répression, supra* note 204. Occasionally first wives have had their papers revoked anyway. *See* Charlotte Rotman, *Un An Pour Paraître Monogame*, LIBÉRATION, July 7, 2000.

208. Henley, *supra* note 187.

209. *Id.*

210. *See also* Nabakwe, *supra* note 195 (stating that some members of polygamous families, including men, have supported the policy).

cept deportation, try to live in France as *sans-papiers* (illegal immigrants or those lacking work permits), or divorce and split up the family.[211] The last option is obviously unappealing for those who are satisfied with their existing living situations, but even for those who are not, divorce poses major problems. Many women are opposed to divorce on principle,[212] and furthermore, relocation can cause major upheaval in the lives of the women and their children. Beyond that, relocation is often a practical impossibility, as families simply cannot afford to pay for multiple homes.[213] In cases where the husband elects to divorce all but his first wife to maintain his own immigration status, the other wives (and frequently their children) often find themselves thrown out on the street with nowhere to go.[214] Today, many such women are living as squatters in abandoned buildings around Paris.[215] Others have been sent back to Africa.[216] According to Jean-Pierre Alaux of the immigrants' rights group GISTI, "eight years after the institutionalization of [anti-polygamy laws] . . . it is women who are paying the price."[217]

Furthermore, the French authorities have often been quite strict in their application of the law. A physical separation of households is required, not just legal divorce. Immigration authorities have refused to certify families as complying with the new conditions when they have simply rented additional apartments in the same building.[218] Enforcement is often carried out by the police, who have reportedly harassed and interrogated immigrant women about their private lives, demanding evidence that they have completed their "decohabitation."[219]

Today, some of the same African women's advocates who pushed for a crackdown on polygamy decry the *loi Pasqua* as being unduly draconian and as inflicting serious harm on the very group of people it was intended to help. Some commentators have noted that the law, though ostensibly designed as a response to feminist concerns, was in fact meant to appeal to French xenophobia and the backlash against the welfare state.[220] In other words, conservative politicians co-opted the gender equality issue and twisted it to serve their own agenda. According to activist Lydie Dooh Bunya, "[t]he French authorities have

211. Bissuel, *supra* note 186.

212. *African Women Caught Between Difficult Choices in France*, PANAFRICAN NEWS AGENCY DAILY NEWSWIRE, Feb. 13, 2002, available at LEXIS, News Library, PANA File.

213. Rotman, *supra* note 207.

214. Alaux, *supra* note 206.

215. Bissuel, *supra* note 186. Housing discrimination may make relocation even more difficult. *See* Pennink, *supra* note 188 (describing the plight of one woman who, with her eight children, was forced to squat after being "turned back from dozens of better apartments because the residents just do not want her to live there").

216. Rotman, *supra* note 207.

217. Alaux, *supra* note 206 (translated from French). GISTI stands for *Groupe d'information et de soutien des immigrés* [Group for the Information and Support of Immigrants].

218. *See* Pennink, *supra* note 201.

219. Bissuel, *supra* note 186.

220. *Id.*

just found a pretext to render life much more difficult for all Africans in France and to force us to leave."[221]

Under pressure from immigrants' rights groups, the government has recently passed several measures intended to soften the blow of the *loi Pasqua*. However, these measures will not eliminate the damage. For example, in 1998 the government re-enacted the basic provisions of the *loi Pasqua* in the *loi Chevènement*, but created exceptions under which certain limited categories of people could receive one-year visas.[222] In April 2000, the Ministry of the Interior issued a circular allowing these temporary visas to be issued more broadly to polygamous spouses,[223] but these measures were only intended to buy time for the families to make new housing arrangements. The circular made visa renewal dependant on ending cohabitation.[224] Furthermore, the government delayed circulation of the order to local officials, a delay that immigrants' rights advocate Claudette Bodin alleges was due to election-year anti-immigrant politics.[225] In 2000, a government circular authorized the re-issuance of work permits for non-deportable parents of French children.[226] Following the lead of non-governmental organizations, the government issued another circular in 2001 ordering local officials to help displaced wives gain access to emergency shelter.[227] Advocates have criticized this policy as a grossly inadequate solution to a problem of the government's own making.[228]

Prior to the passage of the *loi Pasqua*, the French courts had traditionally recognized the right of polygamous immigrant families to enter France and reside together.[229] However, in 1997, the Conseil d'État upheld the authority of the administration to refuse to renew resident visas on the basis of the new laws.[230] In addition, the Ministry of the Interior's April 2000 circular supporting the enforcement of the laws cited the "consistent" holdings of the Conseil d'État that polygamous families were not covered by Article 8 of the European

221. Angeline Oyog, *France: Clamping Down on Polygamy to Chase Out Foreigners*, INTER PRESS SERVICE, Jun. 17, 1993, *available at* 1993 WL 2540140. Dooh Bunya also explained that the French did not take the problem of polygamy seriously until they came to see it as a burden on the welfare system. *Id.*

222. *See Étapes d'une Répression*, *supra* note 204.

223. Ministère de l'Interieur, Circulaire du 25 avril 2000, *available at* http://www.gisti.org/doc/textes/2000/circulaire-polygames.html (last visited Oct. 22, 2002); *see also* Bissuel, *supra* note 186.

224. Ministère de l'Intérieur, *supra* note 223; *see also* Bissuel, *supra* note 186; Alaux, *supra* 206.

225. Henley, *supra* note 187. The circular was eventually made public in June 2000. Rotman, *supra* note 207.

226. *See Polygamie: mieux vaut tard . . .* ,PLEIN DROIT No. 46, Sept. 2000 (discussing both policy changes) *available at* http://www.gisti.org/doc/plein-droit/46/polygamie.html (last visited Oct. 22, 2002).

227. Meanwhile, non-governmental organizations have also started to make efforts to help displaced wives of polygamists find housing; however, such initiatives are too few and far-between to make a substantial dent in the problem. *See* Bissuel, *supra* note 186.

228. *See* Alaux, *supra* note 206.

229. *See* Andrez & Spire, *supra* note 203 (citing the *Montcho* decision of the Conseil d'État in 1980).

230. *See Étapes d'une répression*, *supra* note 204 (discussing this decision).

Convention on Human Rights, which protects the privacy of family life.[231] The circular also cited a 1993 advisory opinion of the Conseil Constitutionnel, which had confirmed that the law only protected "the conditions of a normal family life," with "normal" conditions defined as those that are dominant in France—that is, not polygamy.[232] The Ministry circular concluded: "In fact, the prohibition of polygamy is founded on a necessary respect for republican values, for women's rights, and for the integration of children [into French society]."[233]

4. *Value Conflicts and Balancing of Interests in the Regulation of Polygamy*

As these decisions suggest, the legal status of polygamy and the immigration of polygamous families both pose difficult problems for the articulation of international legal norms against involuntary family separation. As a general rule, polygamy is a serious obstacle to gender equality, both in the societies that practice it traditionally and when transplanted into new contexts through immigration.[234] There may be an emerging international legal norm against polygamy, with roots that extend back several decades. Early articulations of the international right to religious freedom made clear that this right did not encompass polygamy; that is, that there was no affirmative right *to* polygamy.[235] Polygamy was identified as a threat to women's internationally-protected legal rights in a seminal 1976 article on sex discrimination by Professor Myres McDougal.[236] In the United States, an organized movement of Mormon women has emerged opposing the continued practice of polygamy in some enclaves, despite its ban by the Utah state constitution and the laws of all fifty states.[237] Where states allow polygamy but not polyandry (as per Islamic law), they violate the basic principle against sex discrimination contained in Article 16(1) of CEDAW.[238] That Article further declares that there must be equality in the marital relationship.[239] In addition, polygamy may be harmful to children, especially when, as in France, it results in extremely crowded living conditions, potentially violating the "best interests" standards of the Convention on the Rights

231. Ministère de l'Intérieur, *supra* note 223 (citing specifically the decision in *Préfet du Calvados*, Oct. 2, 1996).

232. *Id.* (citing Conseil Constitutionnel Decision No. 93-325 DC, Aug. 13, 1993) (translated from French).

233. *Id.*

234. *But see* Elizabeth Joseph, *My Husband's Nine Wives*, N.Y. TIMES, May 23, 1991, at A31 (arguing, based on her own experience in a polygamous household in Utah, that polygamy is good for women, helping them to balance a career with family).

235. *See* Carol Weisbrod, *Universals and Particulars: A Comment on Women's Human Rights and Religious Marriage Contracts*, 9 S. CAL. REV. L. & WOMEN'S STUD. 77, 80 (1999).

236. Myres McDougal et al., *Human Rights for Women and World Public Order: The Outlawing of Sex-Based Discrimination*, 69 AM. J. INT'L L. 497, 506 (1975); *see also* Weisbrod, *supra* note 235, at 80-81.

237. *See generally* http://www.polygamy.org (last visited May 2, 2003); http://www.polygamyinfo.com/frontdoor.htm (last visited Oct. 22, 2002).

238. *See* Urfan Khaliq, *Beyond the Veil?: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah*, 2 BUFF. J. INT'L L. 1, 30 (1995).

239. *See also* Khaliq, *supra* note 238, at 31.

of the Child. Finally, even if none of these harms are inherent in the concept of polygamy, the practice in much of the world has been compared to slavery.[240] Women and quite young girls are often forced into polygamous marriages, sometimes after having been sold at auctions.[241]

Thus, there are strong interests, cognizable at international law, that weigh against a norm in favor of keeping polygamous families intact. Yet these factors must be balanced against the human right to family integrity. As those immigrants whose homes the *loi Pasqua* broke apart can attest, the forcible separation of families is usually emotionally traumatizing for all members and frequently brings harsh economic and social consequences. This is especially true when such separation results in deportation.

International law recognizes a right against arbitrary deportation. The deportation of women as a response to their husbands' practice of polygamy may well be considered arbitrary, particularly given the law's retroactive application. As French jurist Emmanuelle Andrez and sociologist Alexis Spire have stated, "[I]t is indisputable that polygamy must be combated as a practice that is hostile to the dignity of women and contrary to the equality of the sexes. But instead of protecting women in polygamous situations, the legislature chose to penalize them."[242]

A more general concern underlies the debate about polygamy: what limits, if any, does international law place on the state's ability to define what constitutes a legitimate family? This concern has applications far beyond the sphere of immigration. A government's legal recognition of a marriage or other family relationship generally brings a range of legal and practical advantages, often including taxation, welfare, private and public benefits eligibility, child custody, inheritance, and many others. To what extent may a state determine what relationships may be granted these advantages, thus discriminating against family arrangements that diverge from the societal norm? An obvious contemporary example of such a dilemma is the debate over same-sex marriage. Should states be required to authorize such marriages domestically or at least to recognize the validity of those that have been legally performed abroad? Most advocates of same-sex marriage do not endorse polygamy, just as most polygamists do not support same-sex marriage.[243] But is there a principled way to distinguish between the two for the purpose of developing international legal norms?[244] We return to this issue below.[245]

240. Weisbrod, *supra* note 235, at 95.

241. Simons, *supra* note 189.

242. Andrez & Spire, *supra* note 203 (translated from French).

243. Chambers, *supra* note 174, at 74, 79-80 (noting that Mormon doctrine views homosexuality as sinful, while most advocates of same-sex marriage have taken pains to distinguish it from polygamy).

244. *See generally* Jorge Martin, *English Polygamy Law and the Danish Registered Partnership Act: A Case for the Consistent Treatment of Foreign Polygamous Marriages and Danish Same-Sex Marriages in England*, 27 CORNELL INT'L L.J. 419 (1994) (arguing that because England recognizes polygamous marriages of immigrants legally married abroad, it should apply same standard to foreign same-sex partnerships).

245. *See infra* notes 254-256 and accompanying text.

In the immigration context, concerns for sovereignty and international comity complicate the issue. International law recognizes that states have the sovereign right to exclude aliens, although this right is subject to a number of limitations such as certain non-discrimination principles, due process rights, and perhaps a concern for familial integrity.[246] This right arguably provides states with the authority to require immigrants, as a condition of entry or of residence, to comply with policies that reflect national cultural norms. On the other hand, international comity principles generally encourage states to give effect to marriages and other legal acts performed in other countries. From this perspective, France's lack of recognition of a Senegalese polygamous marriage is an affront not just to the family concerned but to Senegal itself. French choice-of-law rules generally *do* measure the validity of marriages (and other legal acts related to families) performed abroad according to the laws of an immigrant's country of nationality.[247] This principle (known as *statut personnel*) is grounded partly in comity concerns and partly in deference to the individual in matters of his or her private life.[248] Against the background of this legal rule, the anti-polygamy law is an anomaly.

Finally, the situation of polygamous immigrants is complicated by concerns for the accommodation of cultural difference. African women in France face a number of different but interlocking forms of oppression: racial, cultural, gender-based, and socioeconomic. Western feminism has frequently and notoriously failed to approach gender issues with an adequate understanding of the problems and perspectives of Third World women (as well as Western women of color).[249] The need to account for different forms of oppression is not merely a matter for feminist theorizing; it is of tremendous practical importance. In the French polygamy example, legitimate concerns about gender inequality gave rise to an immigration policy that ultimately facilitated the further subordination of a racial and cultural minority group, in many cases literally throwing women and children out on the streets.

At the same time, however, an appreciation of cultural difference should not blind us to the forms of subjugation that take place within cultures.[250] In France, it was African women who first brought attention to the problems women and children face in polygamous families. Aided by these advocates, many other African women in France who may previously have been afraid to raise their voices now have shared stories of the indignities they have suffered in polygamous households.[251] A truly intersectional analysis of discriminatory so-

246. These limitations are explored in Section II.C.

247. Andrez & Spire, *supra* note 203; Bissuel, *supra* note 186.

248. *See* Andrez & Spire, *supra* note 203.

249. *See, e.g.*, Elizabeth M. Iglesias, *LatCrit Theory: Some Preliminary Notes Towards a Transatlantic Dialogue*, 9 U. MIAMI INT'L & COMP. L. REV. 1, 23-25 (2001).

250. *See* Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57 (1994) (critiquing the relativistic application of the "cultural defense" to excuse violence against women, and arguing instead for an intersectional analysis that accounts for cultural difference as well as subordination within cultures and the existence of multiple interpretations of what norms a given "culture" embraces).

251. *See* Simons, *supra* note 189.

cial structures must give heavy weight to these concerns.[252] The question, then, is how to address them without making things worse.

5. *Equality and Family Formation: Legitimacy of Restrictions on Polygamous Marriage*

We believe France's enforcement of the *loi Pasqua* should be considered a violation of international legal norms against family separation, primarily because the law's retroactive application fails to respect family members' autonomy interests in maintaining their existing family relationships. But this claim should not be understood to mean that French law may not make any distinctions between polygamous and monogamous marriages, nor that France must authorize the performance of polygamous marriages. There is a meaningful distinction between laws limiting the *formation* of families and those that require the separation of families that are already formed. For the most part, we believe international law does and should give states considerable leeway in determining what constitutes a legally cognizable family. Because conceptions of the family vary so much among and within cultures, it is necessary to allow each nation to develop its own evolving consensus regarding what types of relationships should be granted the legal advantages that attach to marriage or other familial ties. It is unreasonable to expect states to grant these advantages to all groups of people who self-identify as families, no matter how loose their connections to one another.[253]

We do think, however, that international law places limits on the latitude of states in this regard.[254] For example, international law clearly forbids states to ban interracial marriages.[255] We would like to see the evolution of an international legal prohibition on discrimination on the basis of sexual orientation, including discrimination against same-sex marriages or partnerships; we recognize, however, that today such a norm is a long way off. On the other hand, we believe that international law properly does *not* require states to recognize polygamous marriages, and, in fact, there may be an evolving international norm *against* polygamy.

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252. *See, e.g.*, Volpp, *supra* note 250.

253. For example, in one Australian Aboriginal society, "a Manitjamaat woman with a Wardangmaat mother and a Manitjamaat father would accept all Wardangmaat women as 'mother' and all Manitjamaat men as 'father.'" Lynch, *supra* note 131, at 522 (critiquing the "dominant conception of 'parent'"). While this is a perfectly legitimate cultural practice, it would probably be unworkable for another country to use such broad and culturally contingent definitions of family relationships for the purposes of immigration policy. *But cf.* James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 174 (1997) (arguing that government policies for the reunification of refugee families frequently inappropriately exclude extended families, and that they should use a "functional" criterion for what constitutes a family rather than relying on arbitrary categories such as "spouses" and "children").

254. In the *Cziffra* case, the Human Rights Committee held that a state's definition of a family, although it could be culturally specific, must be "without discrimination." *See* VAN BUEREN, *supra* note 17, at 69.

255. *See* CERD, *supra* note 23, art. 5 (prohibiting race, ethnicity, and national origin discrimination in "the right to marry and the choice of spouse").

The distinction is grounded in equality considerations. Although polygamy and same-sex marriage are similar in the sense that they are both deviations from "normal" Western family structure, in other senses they are quite different. Polygamy tends to support women's subordination within the family and in society at large. Same-sex marriage, on the other hand, is a partial *solution* to the subordination of gays and lesbians; it tends to promote equality rather than to undermine it. Neither domestic nor international law can or should be value-neutral with respect to family formation, and we believe that the promotion of equality norms should be one central guiding value. Such an approach would be consistent with the widespread adoption of international legal norms against discrimination, which have sometimes been interpreted to encompass discrimination on the basis of sexual orientation in areas other than marriage.[256]

France, therefore, has the right under international law not to recognize polygamous marriages performed within its borders. The question regarding its treatment of polygamous immigrants, however, hinges on France's obligation (or lack thereof) to recognize these marriages when they are validly performed abroad. This question, which cuts to the central problem with the *loi Pasqua*, is the focus of the remainder of this Section.

6. *Separation of Polygamous Families as a Violation of International Law*

When immigrants are already married before their arrival in France, an immigration policy that disrupts these marriages involuntarily separates existing families rather than simply restricting family formation. The legitimacy of this involuntary family separation can in turn be separated into three distinct questions regarding France's specific international obligations. First, may France, consistently with international law, refuse to allow polygamous families to immigrate in the first place; more specifically, may it refuse to issue spousal visas and benefits to more than one wife of each male immigrant? Second, if it may do this, is it nonetheless precluded from revoking the visas and benefits (and otherwise forcing the separation) of polygamous families that were already admitted to France before the anti-polygamy policy was adopted? Third, if it is so precluded, must it also continue to allow entry to the additional wives and children of polygamous men who immigrated before the policy was adopted?

As to the first question, it should be noted that France's new policy of excluding polygamous families (or, more precisely, refusing to consider them to be families for immigration purposes) is not at all unusual. Many Western countries, including the United States, refuse to recognize polygamous marriages

256. *See Mouta*, 31 Eur. H.R. Rep. 1055 (holding that sexual orientation discrimination in child custody decisions violates Articles 8 and 14 of the European Convention, taken together); Toonen v. Australia, U.N. Human Rights Comm., 50th Sess., Communcation No. 488/1992, U.N. Doc. U.N. Doc CCPR/C/50/D/488/1992 (1994) (holding that sexual orientation discrimination violates the prohibition of sex discrimination under Article 26 of the ICCPR); Sutherland v. United Kingdom, App. No. 25186/94, 24 Eur. H.R. Rep C.D. 22 (1997) (Commission report) (holding that differences in age of consent for homosexual and heterosexual sex violate Articles 8 and 14 taken together).

even when they are validly performed abroad.[257] We believe that these policies are, and should be, permissible under international law.[258] The right to set conditions for immigration is a sovereign state right, subject only to the limits found in particular international legal prohibitions; these conditions are presumptively legitimate.[259] While international law prohibits certain forms of discrimination in immigration policy (racial discrimination, most clearly), no such norm exists proscribing discrimination against polygamous families. If anything, as discussed above, international law may encourage this form of discrimination.

Immigration policy ought to be subject to an international norm against involuntary family separation, as we argue further in Section II.C. But this norm ought not to be interpreted so rigidly as to prohibit any policy that places burdens on families that wish to stay together. In this case, would-be immigrants who are told that France will not recognize their marriages and will therefore not allow more than one spouse to immigrate have an obvious option that will allow their families to stay intact: they can stay in their home country. This option is obviously not ideal; however, international law does not afford any person a right to live in the country of his or her choice.[260] Unless we are ready to demand that all nations open their borders to unrestricted immigration, countries will continue to turn away millions of would-be immigrants each year based on any number of reasons. The strong equality concerns underlying opposition to polygamy constitute valid reasons for exclusion.

The second and third questions posed above, however, bring us to the central problem with the anti-polygamy provisions of the *loi Pasqua*: their retroactivity. Once immigrants are admitted to a country, they acquire rights that they did not have before they came, and they may not be deported arbitrarily or without due process of law.[261] Once immigrants have arrived in France, they are entitled to respect for the basic integrity of their families. It is in this respect that French law violates international norms against family separation. Even though France retains the right to control the legal creation of marriages (and other non-biological family relationships), its obligations under international law, including Article 8 of the European Convention and other existing provisions discussed in Section I, should be interpreted to obligate it to accommodate situations where people's practical reality does not match the legal fictions surrounding the definition of "family."

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257. Simons, *supra* note 189; *see also, e.g.*, Jean Pineau, *L'ordre public dans les relations de famille*, 40 C. de D. 323, 332 (1999) (Canada); Gonzalez & Mac Bride, *supra* note 176, at 179 (Spain); *id.* at n.106 (Germany). However, Britain recognizes the validity of polygamous marriages performed overseas. Martin, *supra* note 244, at 420, 424.

258. French opponents of the *loi Pasqua* generally recognize the legitimacy of its *prospective* application. *See, e.g.*, Alaux, *supra* note 206.

259. *See, e.g.*, Abdulaziz v. United Kingdom, App. Nos. 9214/80, 9473/81, 9474/81, 7 Eur. H.R. Rep. 471 ¶ 67 (1985) (holding that State's right to "control the entry of non-nationals" is a matter of "well-established international law and subject to its treaty obligations").

260. *See id.* ¶¶ 61, 68 (holding that Article 8's protections of family life "cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence").

261. *See, e.g.*, ICCPR, *supra* note 21, art. 13.

The need for a flexible, substantive approach to defining "family life" under Article 8—one that focuses on the real strength of the ties between people—has already been endorsed by the European Commission on Human Rights in *Khan v. United Kingdom*, a decision involving the protection of polygamous families.[262] Polygamous families are, in short, families. They are made up of mothers and fathers—and children, who have a strong and internationally recognized interest in growing up with both of their parents. Although France may legitimately attempt to prevent people from forming such families, or from bringing them to the country, once they have already done so with the full understanding that France would respect their right to stay together, France may not force them apart.

For this reason, we believe that the *loi Pasqua* violates international law when applied to polygamous families already present in France before its passage. Specifically, it violates the right to respect for family life protected by the European Convention on Human Rights and other international conventions; it also may violate the right to marry, though not under the ECHR's restrictive interpretations, as well as the individual rights of parents and children reflected in various treaties.[263]

In addition, the *loi Pasqua*'s prospective application to families is problematic when the husband, but not one or more of the wives, immigrated prior to the law's passage. In France, it has traditionally been very common for a man to immigrate first, then bring his family once he has found work and housing and acquired visas for them. None of the measures France has passed to soften the law's blow do anything to help such families. These situations impose perhaps somewhat less of a hardship on families than does the entirely retroactive application discussed above, because they do not require families to uproot themselves but simply to stay separated as they already were. In another sense, however, the burden is much more severe, because it requires families to be separated entirely by national borders (usually on different continents) rather than simply maintaining two separate households in the same city. Moreover, polygamous men who arrived in France prior to 1993 had the legitimate expectation that they would be able to take advantage of the laws enabling familial immigration.

Therefore, we believe that, in situations where the marriages in question as well as the husband's immigration preceded the passage of the *loi Pasqua*, its enforcement violates the international norm against family separation. Where the marriage occurred subsequent to the law's passage, however (even when the husband immigrated first), no similar legitimate expectation of the right to family integrity would exist, and the situation should be treated similarly to that of whole families who have not yet immigrated. Enforcing the law against such

262. *See* VAN BUEREN, *supra* note 17, at 70 (discussing this case); Khan v. United Kingdom, App. Nos. 2991/66, 2292/66, 10 Y.B. Eur. Conv. on H.R. 478 (1967) (Euro. Comm'n on H.R).

263. *See supra* Part I; *see also* Oyog, *supra* note 199 (citing argument of the immigrants' rights group GISTI that the *loi Pasqua* violates two aspects of this protection: "the right to live with one's spouse and the right to protect the family from breaking apart").

marriages would have the benefit of discouraging the rightly decried practice of men returning to Africa and acquiring additional wives without the permission or knowledge of their first wives living in France.[264]

The ultimate difference between the retroactive and prospective applications of the anti-polygamy policy is grounded in their different implications for the subjective autonomy interests of the family members' concerns. When men and women today choose to immigrate to France despite their knowledge of its anti-polygamy policy, they make a conscious decision to accept that limitation on their family lives as a condition of immigration, or to stay in their countries of origin in order to pursue the family arrangements of their choice. In contrast, when they have immigrated on the understanding that their family relationships will be allowed to remain intact, a sudden change in this policy that forces them to abruptly change their situation or be deported does not adequately respect the autonomy of any of the family members.

Clearly, in instances where women or girls have been forced into polygamous marriages or otherwise wish to escape them, this notion of autonomy may be illusory. France should make every effort to identify such cases and to give the women involved a chance to make a meaningful choice; such possibilities will be discussed further at the end of this section. But it is too simplistic, and too disrespectful of the actual choices some women make, to assume that all choices to enter polygamous marriages are inherently coerced. Cultural conditioning in favor of certain marriage arrangements is not the same as forcible marriage from a legal or moral perspective. Women's freely expressed choices should not be disregarded simply because they occur against a background of cultural norms that are inconsistent with principles of equality. Women's lives (like men's) are made up not just of principles, but of people and relationships, and to sacrifice these on the altar of abstract principle after women have chosen and structured their lives around them is no vision of true autonomy.

In addition to its retroactivity, certain features of the French anti-polygamy policy are particularly harsh and uncompassionate, to such an extent that they may raise concerns under international law.[265] First, the policy requires physical separation of families, not simply legal divorce or annulment of marriages. As a matter of simple freedom of association, this seems problematic. Consenting adults in France are generally permitted to live with whomever they like, and today many families consist of unmarried parents and/or half-siblings from different marriages or relationships. A policy that restricts this freedom should

264. *See* Simons, *supra* note 189 (describing the practice of men going home "to buy new, young brides, often still teen-agers."); Richard Grenier, *Polygamy and Multiculturalism the French Way*, WASHINGTON TIMES, Dec. 1, 1993, at A17 (criticizing African practice of marketing wives to be sent to France, where they will be accorded "a pitiable social standing barely distinguishable from slavery"). Grenier accuses African men in France of buying wives as an investment in future welfare benefits; we believe that this characterization is largely unfair, and echoes the stereotypes being propagated by the xenophobic French right wing in the early 1990s. *See supra* notes 201-203 and accompanying text. Still, to the extent that his description of wives being sold at auction is accurate, *see* Simons, *supra* note 189, the practice it describes should be eradicated.

265. *See Polygamie: mieux vaut tard . . . , supra* note 226 (describing the enforcement method of the *loi Pasqua* as 'blind" and "without nuance," and the measures themselves as "demagogic").

raise concerns, particularly when applied disproportionately against certain immigrant groups. If France does not prohibit unmarried people from living together generally, it should not prohibit African immigrants from doing so on the mere basis that they had been married in a different country. Although France need not grant legal advantages to those foreign marriages, it should not impose disadvantages on them that would not apply if the couple had never married at all.

Second, the enforcement mechanisms of the *loi Pasqua* are arbitrary and irrational, since they harm the very people the law was ostensibly designed to help.[266] Deportation is a terribly severe punishment that wreaks havoc on people's lives. After families acquire jobs and housing, enroll their children in school, and otherwise build ties to their new communities, deportation forces them to leave all that behind and return to a country to which they may have cut all ties. The trauma of deportation—perhaps most of all for children—is even graver when it results in the separation of families.[267] Deportation should not be used as a threat to coerce families living in a country to separate from one another—nor, for that matter, should the revocation of work permits and the termination of welfare benefits. Parents should not be forced to choose between abandoning their families and throwing them into economic ruin.

Finally, notwithstanding the problems with the current policy, France can and should undertake other, non-punitive measures to alleviate the harms suffered by women and children in polygamous households. Some African women's groups are already making such efforts—for example, providing counseling for women and helping them to find jobs and housing if they choose to leave their marriages voluntarily.[268] No reasonable principle of international law would forbid *voluntary* family separation. Women (and men) who want to leave bad marriages, whether polygamous or otherwise, should have the right to do so. France may need to alter its policy to make this easier. For example, many African women's groups in France are working to eliminate the system of derivative rights, under which married women's residency and work permits and social benefits are actually issued to their husbands.[269] Some groups have requested the European Parliament to mandate that states issue permits directly to women, "which would make them much less vulnerable in cases of divorce or spousal abuse."[270] In the special case of polygamous immigrants, where the women often face both misery in their marriages and significant cultural and economic obstacles to divorce, governments should make a special effort to enable those who want to escape polygamy to do so.

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266. Alaux, *supra* note 206 (stating, in French, that "the struggle against polygamy, in its current form, hurts almost exclusively the victims of polygamy").

267. We will explore this issue further in our discussion of U.S. immigration law in the next Section.

268. *See* Henley, *supra* note 187 (citing work of Afrique Partenaire Service); Simons, *supra* note 189 (describing support group meetings).

269. Scales-Trent, *supra* note 189, at 734.

270. *Id.* at 735.

The problem of anti-polygamy laws in France provides a useful example for the development of international legal norms against involuntary family separation. Unlike the Australian child removal policy discussed in Section A, the polygamy situation presents a "hard case" for international law because the various legally cognizable and important values and interests at stake tug in opposite directions. Women's interests in structural gender equality and in being protected individually from oppressive or coerced polygamous marriages weigh in favor of France's policy, while the values of family integrity, economic and social stability for immigrants, respect for cultural difference, and respect for the (arguably) autonomous choices of family members weigh against it. None of these concerns can be disregarded, but balances must be struck and hard choices must be made. We believe that these choices should be guided by an understanding of the intersectional nature both of the cultural life of the immigrant women whose protection is, at least ostensibly, the goal of these policies, and of the various forms of oppression they face.

Ultimately, when a policy is supposed to protect women, it is essential to analyze its likely and actual outcomes realistically. A policy that results in immigrant women being thrown out on the streets ought not to be praised by feminists. Whatever abstract principles are at play in the shaping of international legal norms, they need to be adapted to this reality. A stronger recognition of international norms against family separation, and an understanding of how those norms can actually *help* women, might prevent states from jumping into major policy changes like France's without fully considering their ramifications for the individuals and the families they affect.

C. Family Interests and Exceptional Hardship in United States Immigration Law

Beyond the particular circumstances of polygamous immigrants, international legal protection of family integrity has broad implications for immigration law. This Section analyzes the ways that United States immigration law does and does not accommodate the rights and interests of families. In particular, we argue that provisions of two 1996 laws restricting the consideration of family hardship in deportation proceedings, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA), violate the United States' international obligations to protect families.[271] United States courts have traditionally been notoriously reluctant to incorporate international norms into their interpretation of domestic laws.[272] However, two recent federal district court decisions by Judge Jack Weinstein, enjoining deportations on international law grounds, break this mold, and in fact contain quite detailed assessments of the United States' obligations to

271. Pub. L. 104-208, Div.C., 110 Stat. 3009-546 (1996); Pub. L. 104-32, 110 Stat. 1214 (1996).

272. *See, e.g.*, Martha F. Davis, *International Human Rights and United States Law: Predictions of a Courtwatcher*, 64 ALB. L. REV. 417, 417-20 (2000) (suggesting that a change in U.S. courts' insularity may be approaching).

protect families and children.[273] We draw heavily on this analysis and argue that other courts should similarly integrate these international law requirements into their review of immigration and removal decisions. In addition, we compare these decisions to those of the European Court of Human Rights, which has developed a relatively robust jurisprudence regarding the limitations international law places on immigration decisions that separate families.

1. U.S. Immigration Law's Treatment of the Family

U.S. immigration law has traditionally required that exclusion and removal decisions take family integrity into account, yet even before the 1996 reforms, concerns for the family were frequently subordinated to other concerns.[274] In most circumstances, U.S. immigration law favors spouses of U.S. citizens, who are entitled to visas and eventually permanent resident status provided that they do not fall into certain categories of inadmissible aliens. The Immigration and Nationality Act (INA) of 1952 set forth both bases for inadmissibility—including, for example, some criminal convictions—as well as criteria for waivers of inadmissibility decisions.[275] A typical example of these waiver provisions was Section 212(c), which, before its repeal in 1996 as part of the IIRIRA, provided for discretionary waivers of inadmissibility decisions for lawful permanent residents who, after traveling abroad, were denied the right to return to the United States. In deciding whether to grant these waivers, immigration judges were required to "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of section 212(c) relief appears in the best interests of this country."[276] Family ties in the United States, as well as hardship to the family that would result if the alien was deported, were among the relevant "social and humane considerations" to be evaluated.[277]

However, even a simple reading of the text of section 212(c) demonstrates that it never provided a very robust protection of family integrity. The alien bore the burden of proving he or she met the criteria for the waiver; the default presumption was in favor of family separation, not against it. In addition, the harm of family separation was measured only in terms of its effect on "the best interest of this country," not on that of the alien. The distinction is important because international human rights limitations on immigration proceedings are primarily oriented toward the protection of the individual immigrant. The INA

273. *See* Maria v. McElroy, 68 F. Supp. 2d 206 (E.D.N.Y. 1999); Beharry v. Reno, 183 F. Supp. 2d 584 (E.D.N.Y. 2002).

274. *See, e.g.*, Enid Trucios-Haynes, *"Family Values" 1990's Style: U.S. Immigration Reform Proposals and the Abandonment of the Family*, 36 BRANDEIS J. FAM. L. 241, 241 (1998) (citing the "longstanding family unity goals reflected in immigration law").

275. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212, 66 Stat. 163, 182-89 (codified as amended at 8 U.S.C. § 1182); *see* Matter of Marin, 16 I. & N. Dec. 581, 582 (Bd. of Immigration Appeals 1978).

276. *Marin*, 16 I. & N. Dec. at 584.

277. *Id.* at 584-85.

waiver provisions, even pre-1996, took into account family ties not as an individual right, but as simply one measure of U.S. interests.[278]

Pursuant to INA Section 240A, the cancellation of removal provision, Section 212(c) waiver proceedings were also available to most aliens facing deportation proceedings.[279] This provision allowed the Attorney General (in practice, the Board of Immigration Appeals (BIA)) to stop any deportation so long as the alien met certain "residency and character requirements" and could show that the deportation would cause "extreme hardship" to himself or to U.S. citizen or legal permanent resident family members.[280] BIA decisions are subject to review by federal appellate courts, which at first tended frequently to overturn denials of the waiver on the basis that the BIA had interpreted the "extreme hardship" requirement too stringently.[281] Specifically, some courts placed emphasis on family unity, holding that family separation alone may constitute extreme hardship and that family ties are the single most important factor in a hardship determination.[282] In *INS v. Wang*, however, the Supreme Court reversed an appellate decision that had overturned a BIA waiver decision.[283] The Court held that the INA granted broad discretion to the BIA in making waiver decisions, and that the courts must therefore defer to administrative interpretations of "extreme hardship," which are reviewable only on the basis of abuse of discretion.[284] Even with this limited review authority, some court decisions in the wake of *Wang* nonetheless ordered the BIA to increase the weight given to the harms of family separation in its balancing of interests.[285]

As limited as it has always been, the availability of hardship waivers for immigrants facing deportation orders has decreased in the wake of IIRIRA and AEDPA. First, both bills greatly increase the range of criminal offenses defined as "aggravated felonies," for which immigrants, even lawful permanent re-

278. Similar waiver provisions existed throughout the INA, and still exist, though many have been modified by the 1996 reforms. For example, Section 212(e) of the INA, 8 U.S.C. § 1182, provides for discretionary waivers of rules prohibiting foreign students in certain exchange programs from applying for permanent resident status after completion of the program until after they have returned to their host countries for two years. *See* Inna V. Tachkalova, Comment, *The Hardship Waiver of the Two-Year Foreign Residency Requirement Under Section 212(e) of the INA: The Need for a Change*, 49 AM. U. L. REV. 549, 558-65 (1999) (describing and critiquing U.S. courts' narrow interpretation of section 212(e), which like section 212(c) is focused on U.S. interests, taking into account the interests of American family members but not those of the alien herself). Courts interpreting this section have imposed a limiting interpretation of "exceptional hardship," holding that "separation of families by itself never will qualify as exceptional hardship because temporary separation from a spouse is a problem that many families face." *Id.* at 563.

279. Act of Oct. 24, 1962, Pub. L. No. 87-885, § 4, 76 Stat. 1247, 1248 (codified at 8 U.S.C. § 1229b (2003)).

280. Susan L. Kamlet, Comment, *Judicial Review of "Extreme Hardship" in Suspension of Deportation Cases*, 34 AM. U. L. REV. 175, 175 (1984).

281. *Id.* at 176.

282. Mejia-Carillo v. INS, 656 F.2d 520, 522 (9th Cir. 1981); Villena v. INS, 622 F.2d 1352, 1357 (9th Cir. 1980).

283. 450 U.S. 139 (1981) (per curiam).

284. *Id.*

285. *E.g.*, Antoine-Dorcelli v. INS, 703 F.2d 19, 20 (1st Cir. 1983); Contreras-Buenfil v. INS, 712 F.2d 401, 403-04 (9th Cir. 1983); *see* Kamlet, *supra* note 280, at 199-200.

sidents, are automatically subject to deportation.[286] AEDPA also excludes all aggravated felons from consideration for any sort of hardship waiver, and immunizes their deportation orders from judicial review.[287]

Other provisions of the IIRIRA also threaten family integrity. For example, Section 212(a)(9) bars persons who have been present illegally in the United States for one year or more from applying for permanent resident status at any time in the next ten years.[288] Because many undocumented immigrants have legal resident family members—for example, their children born on American soil are U.S. citizens—these policies pose a major danger of family separation.[289] Undocumented immigrants must continue to hide from authorities in order to avoid this risk. There is no exception for immigrants who marry U.S. citizens, a major change from long-standing policy; indeed, there are no waivers at all.[290] Similarly, Section 245(i) repealed a provision that enabled undocumented immigrants to acquire visas without first returning to their home countries; essentially, this provision prevents these immigrants from legalizing their status even temporarily.[291]

2. *Consistency of U.S. Immigration Policy with International Law Relating to Family Separation: Recent Court Decisions*

Various aspects of U.S. immigration law, especially post-1996, may be inconsistent with international legal norms against family separation. International law has traditionally recognized a sovereign right to exclude and deport aliens.[292] This right, however, is limited by countervailing provisions of international law.[293] For example, a number of human rights conventions require that deportees be provided with various procedural protections.[294] Some require that proceedings be individualized, specifically banning mass expulsion.[295] Exile of citizens, or restrictions on their right of return, is banned.[296] Immigration policy may not discriminate on the basis of illicit factors such as race.[297] No specific human rights treaty provision bans separation of families through deportation. However, the general treaty provisions protecting family integrity, those protecting child welfare, and the customary international norms that they represent all implicate the legality of immigration policies that separate families.

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286. *See* Maria v. McElroy, 68 F. Supp. 2d. 206, 209-10 (1999).

287. *Id.* at 212.

288. Immigration and Nationality Act § 212(a)(9), 8 U.S.C. § 1182 (2000).

289. *See* Emma O. Guzman, Comment, *The Dynamics of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996: The Splitting-Up of American Families*, 2 SCHOLAR 95, 121-23 (2000).

290. 8 U.S.C. § 1182.

291. *See* Guzman, *supra* note 289, at 123-25.

292. *See, e.g.*, Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892); Dalia v. France, 1998-I Eur. Ct. H.R. 76, ¶ 52.

293. *See Dalia*, 1998-I Eur. Ct. H.R. 76 ¶ 52.

294. *E.g.*, ICCPR, *supra* note 21, art. 13; American Convention, *supra* note 25, art. 22.

295. American Convention, *supra* note 25, art. 22(9); African Charter, *supra* note 25, art. 12.

296. *E.g.*, American Convention, *supra* note 25, art. 22(5); African Charter, *supra* note 25, art. 12.

297. CERD, *supra* note 22, art. 5(d)(i)-(ii).

For example, the U.N. Human Rights Committee has recognized that deportation can interfere with family life in violation of Article 17 of the ICCPR.[298] Accordingly, Congress and administrators should take care that they comply with these international norms when designing and implementing immigration policies, as should the courts in interpreting and reviewing them.

In a groundbreaking decision in 1999, the Eastern District of New York did just that, overturning a BIA deportation order on international law grounds. *Maria v. McElroy* dealt with a challenge to a BIA decision that the petitioner, Eddy Maria, was deportable pursuant to the IIRIRA's provisions regarding aggravated felons.[299] Maria, a 24-year-old citizen of the Dominican Republic, had lived in the U.S. continuously since the age of ten and was a lawful permanent resident. His parents were U.S. citizens, as were some of his siblings.[300] In 1996, Maria was convicted of attempted unarmed robbery in the second degree, an offense that the AEDPA redefined as an "aggravated felony" when it was passed later that year. The INS began deportation proceedings against him and held a hearing in 1997. After serving his two-year sentence, Maria was immediately taken into INS custody.[301] The BIA approved the INS decision on the basis that Maria "had been convicted of an 'aggravated felony' and was thus both deportable and ineligible for any form of relief from deportation."[302] Although the AEDPA barred direct judicial review, Maria filed a petition for habeas corpus in district court.[303]

Although denying Maria's request to be declared non-deportable, the court held that he was entitled to a humanitarian hearing allowing consideration of his claim to a hardship waiver. Specifically, the court held that to deport Maria without a hardship hearing would violate a number of principles of international law preventing interference with family life.[304] The court gave a particularly detailed analysis of the provisions of the ICCPR, including Article 23(1)'s statement that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State" and Article 17's establishment of an individual right against arbitrary or unlawful interference with the family.[305] Citing decisions by the Human Rights Committee, the court held that deportation proceedings that do not take family separation into account violate these principles, and also may constitute "cruel, inhuman, and degrading treatment" in violation of Article 7.[306]

298. Aumeeruddy-Cziffra v. Mauritius, U.N. GAOR, Hum Rts. Comm., 36th Sess., Supp. No. 40, Annex 13, at 134, U.N. Doc. A/36/40 (1981). In addition, Article 19(6) of the Convention on Economic, Social, and Cultural Rights requires states to "facilitate as far as possible the reunion of the family of a foreign worker" who has legally migrated, while the 1977 European Convention on the Legal Status of Migrant Workers provides similar protections for migrant workers' families. DETRICK, *supra* note 48, at 186-87.

299. 68 F. Supp. 2d 206, 219-20 (1999).

300. *Id.* at 213.

301. *Id.* at 215.

302. *Id.*

303. *Id.*

304. 68 F. Supp. 2d at 231-34.

305. *Id.* at 231.

306. *Id.* at 231-32.

In addition, the court held that customary international law prohibited arbitrary expulsion and arbitrary interference with family life.[307] Judge Weinstein cited a range of international treaties, including the Universal Declaration of Human Rights and the three regional human rights conventions, as well as U.S. Supreme Court decisions recognizing a domestic constitutional right to family integrity.[308] He held that the denial of a humanitarian hearing to establish hardship—at which the impact of family separation could be raised and considered—made the expulsion and interference with family life "arbitrary" within the meaning of international law.[309] Therefore, the court vacated the deportation decision and ordered that Maria be granted such a hearing.

The court in *Maria* stopped short of declaring that the AEDPA aggravatedfelony provisions violated international law. Rather, it followed the principle of avoidance of conflict with international law by construing the statute narrowly so as not to apply to Maria's particular case.[310] Specifically, the statute was ambiguous as to whether the redefinition of aggravated felonies applied retroactively to crimes committed before its passage. To avoid reaching the international law issue, the court held that the statute was not retroactive, thus exempting Maria from its provisions and entitling him to the hardship waiver to which he would have been entitled prior to 1996.

In his more recent decision in *Beharry v. Reno*, Judge Weinstein again narrowly construed the AEDPA aggravated felony provisions, this time in a case where the conviction had occurred after AEDPA and IIRIRA were passed, but the crime had been committed earlier.[311] The petitioner, Don Beharry, was a lawful permanent resident who had moved to the United States from Trinidad at the age of seven; his six-year-old daughter and his sister were U.S. citizens.[312] Beharry was convicted of second-degree robbery for helping a friend to steal $714 from the cash register of the coffee shop where he worked.[313] While he was in prison, the INS initiated deportation proceedings, and the BIA held that he was ineligible for hardship waivers.[314] In overturning this decision, Judge Weinstein relied on many of the same principles of customary and conventional international law that formed the basis for the *Maria* holding. In addition, however, because Beharry had a U.S. citizen daughter, the court found that several provisions of the Convention on the Rights of the Child applied. These included the Preamble's general requirement for the "protection and assistance" of the family, the Article 3 protection of the best interests of the child, and the Article 7 protection of the child's "right to know and be cared for by his or her parents."[315] Although the United States has not ratified the Convention, the court

307. *Id.* at 232-33.
308. *Id.*
309. 68 F. Supp. 2d at 234.
310. *Id.* at 231.
311. 183 F. Supp. 2d 584 (E.D.N.Y. 2002).
312. *Id.* at 586.
313. *Id.*
314. *Id.* at 587.
315. *Id.* at 595.

reasoned that its ratification by every other organized government in the world demonstrated clearly that its prohibitions constitute customary international law.[316]

The difficulty in *Beharry* was that under United States domestic law, all provisions of international law may be statutorily overruled by Congress; where domestic and international law unavoidably conflict, the last-in-time rule normally applies.[317] But the court held that taken together, two competing principles—that Congress may override international law, but courts must construe statutes to avoid conflicts—"create a principle of clear statement."[318] Thus, "in order to overrule customary international law, Congress must enact domestic legislation which both postdates the development of a customary international legal norm and which clearly has the intent of repealing that norm."[319] This principle best ensures that court decisions will promote the compliance of the United States with its international obligations. Because Congress, in passing the immigration bills, did not unequivocally state its intention to override international law, Judge Weinstein construed the legislation to be in conformance with it—that is, to allow hardship hearings in cases where family separation may occur and where the underlying crime was committed prior to the statutory change that defined it as an "aggravated felony." The court described this non-retroactive construction as the "most narrowly targeted way to bring the INA into compliance with international law."[320] It remains to be seen whether the rationale of *Maria* and *Beharry* will be applied to cases where application of the AEDPA would be entirely non-retroactive. Given the international principles discussed in the two cases, there is no apparent reason, other than a desire to craft a narrow holding in these particular cases, that the hearing requirement ought to hinge on retroactivity.

3. Approach of the European Court of Human Rights

The case law of the European Court of Human Rights regarding family separation in immigration proceedings provides an interesting comparison to these American cases. Like Judge Weinstein, the ECHR has emphasized the procedural protections available to persons being excluded or deported. In *Ciliz v. Netherlands*, the Court held that a father's rights to a family life under Article 8 of the European Convention were violated by his immigration-related exclusion from the country during proceedings concerning custody of his son and visitation rights.[321] Pursuant to Dutch policy, Ciliz had lost his right to stay in the country as soon as he got divorced because his visa had been contingent on his marriage to a Dutch resident. The European Commission on Human Rights, in an opinion approved by the Court's decision, acknowledged the state's eco-

316. *Id.* at 600.

317. *See* 183 F. Supp. 2d at 599 (citing The Paquete Habana, 175 U.S. 677, 694 (1900) and RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115(1)(a) (1987)).

318. *Id.* at 598-99.

319. *Id.*

320. *Id.* at 604.

321. Ciliz v. Netherlands, 2000-VII Eur. Ct. H.R. 267.

nomic interests in controlling immigration. It concluded, however, that because Ciliz was excluded from critical proceedings concerning access to his son, "the respondent State had failed to strike a fair balance between the interest of the applicant and his son in continued contact and the general interest of the economic well-being of the country."[322] Therefore, the Court found a violation of Article 8 and ordered the government to pay damages.

However, the European Court noted in *Ciliz*, that "the applicant was not convicted of any criminal offences warranting his removal from the Netherlands."[323] This distinction, though seemingly just an aside in *Ciliz*, is apparently significant. In *Dalia v. France*, the Court approved the removal and permanent exclusion of a woman who had been convicted of heroin trafficking, which it described as a "scourge" with "devastating effects . . . on people's lives."[324] The Court held that this removal did not violate Article 8 notwithstanding the fact that it separated Dalia permanently from her mother, seven siblings, and French citizen son, as well as the country where she had lived for nineteen years. The Court acknowledged that the woman's "family ties" were "essentially in France," yet premised its decision on the extremely dubious ground that Dalia still maintained "certain family relations" and social ties in Algeria, and therefore the removal did not effect a "drastic" interference with her family life.[325] The Court also noted that Dalia had given birth to her child while illegally in France after the initial removal order, which, in the Court's view, estopped her from relying on this relationship in subsequent immigration proceedings.

The core of the Court's rationale, however, appears to have been the basic proposition that

> It is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens. To that end they have the power to deport aliens convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued. . . . The Court's task accordingly consists in ascertaining whether the refusal to lift the order in issue struck a fair balance between the relevant interests, namely the applicant's right to respect for her private and family life, on the one hand, and the prevention of disorder or crime, on the other.[326]

This type of balancing test has in other contexts led the Court to broad interpretations of the Article 8 right to family life.[327] But in the immigration context, any realistic assessment of the magnitude of the interference approved in *Dalia* suggests that from the ECHR's perspective, *any* interference with family life is justified when a cause the Court considers important, like the "scourge" of

322. *Id.* ¶ 55; *see id.* ¶ 71 (agreeing with the Commission's reasoning).

323. *Id.* ¶ 69.

324. *Dalia*, 1998-I Eur. Ct. H.R. 76 ¶ 54 (1998).

325. *Id.* ¶ 53.

326. *Id.* ¶ 52.

327. *See, e.g.*, *infra* notes 369-380 and accompanying text (discussing ECHR review of child welfare decisions).

drugs, is involved. The fact that the Court downplayed the significance of the interference, while not engaging in any analysis of whether this particular woman's exclusion was truly "necessary" to the successful prosecution of France's war on drugs, suggests the malleability of balancing tests; the Court did not really engage in much balancing at all.[328]

4. Conclusions

The district court decisions in *Maria* and *Beharry* provide a paradigmatic example of the effective incorporation of international legal norms against family separation into U.S. immigration decisions. These norms may extend farther than Judge Weinstein took them—that is, beyond the non-retroactive interpretation of immigration statutes and beyond the requirement of a humanitarian hearing to a substantive command against family separation under at least some circumstances. Some nations, such as France, as a general rule bar the deportation of aliens with citizen children;[329] international law could reasonably be interpreted to require such a rule. Stopping short of an absolute bar, international law could specify that the state needs to meet a certain standard of justification, such as a compelling state interest, for deporting aliens and thereby separating them from their families. In any event, however, *Maria* and *Beharry* go much further in the direction of implementing international protections of the family than had any previous decision. Moreover, the hearing requirement seems to strike a reasonable balance between the state's interests in deportations and the alien's interests in family integrity—at least to the extent that the hearings actually give meaningful consideration to the alien's interests. All in all, it is too early to tell whether Judge Weinstein's rationale will ever be followed by other United States courts; at least one has already rejected it based on a belief that Congress overrode international law when it passed the immigration statutes.[330] Still, the decisions are an encouraging sign.

328. The ECHR's protections, if not totally effective, exceed those given to deportees by the Human Rights Committee in its interpretation of the ICCPR. *See* Stewart v. Canada, U.N. Human Rights Comm., 58th Sess., Communcation No. 538/1993, U.N. Doc. CCPR/C/58/D/538/1993 (1996) (upholding deportation of a person who had been convicted of a range of petty offenses even though it meant separation from his whole family); *see also* Geraldine Van Bueren, *Annual Review of Family Law*, *in* THE INTERNATIONAL SURVEY OF FAMILY LAW 1997 8 (Andrew Bainham ed. 1999) (discussing *Stewart* and comparing it to ECHR precedent).

329. As the case of the petitioner in *Dalia* indicates, this rule is apparently not applicable to removals on the basis of criminal convictions. *See supra* notes 324-328 and accompanying text.

330. Taveras-Lopez v. Reno, 127 F. Supp. 2d 598, 607-08 (M.D. Pa. 2000). This decision predated *Beharry*, and thus did not specifically address the clear statement rule argument. Instead, it assumed that Congress had abrogated international law, and held that this abrogation was not barred by *jus cogens* principles. *Id.* at 608; *see also* Gonzales-Polanco v. INS, 2002 U.S. Dist. LEXIS 14303 at *1 (refusing to extend *Beharry* to a case where a non-lawful resident was convicted of a drug crime).

D. *Family Integrity vs. Child Welfare: Protective Removal under International Law*

International norms against family separation have, naturally, significant implications for family law and particularly for the involuntary removal of children from their parents.[331] The protection of children from abuse and neglect is a legitimate and strong state interest that international law recognizes.[332] This interest sometimes requires the separation of families. However, international law places some limits even on protective family separation. These limits are grounded both in the rights of parents and in those of children, whose interests may be ill served by some forms of supposedly protective removals. In this section, we analyze these limits with respect to child welfare law in the United States. We focus on a recent U.S. case that applies international law as a limit on child welfare agencies' removal authority, and compare it with analogous cases in the European Court of Human Rights. We believe this case study is crucial, because the ultimate test of the viability of an international norm against family separation is its ability to adapt to the situations where there is a good argument that the family *should* be separated. Protective removal of children is perhaps the core example of such a situation. Moreover, given that probably the strongest and most specific international norms implicating family matters are those that protect the rights and interests of the child, it will be essential for any norm in favor of family unity to accommodate the strong, treaty-based prerogative afforded to child protection.

1. Evolution of the "Best Interests of the Child" Standard

The prevailing legal standard for protective removal of children from their parents in the United States is the "best interests of the child."[333] This model, which replaced an earlier parental rights focus, has evolved considerably over the years. The "best interests" standard has been applied by courts in a wide variety of contexts; its origins in child custody cases date back to the late nineteenth century.[334] In the child welfare context, "best interests" analysis has long drawn on the pioneering work during the 1960s by child psychologists Joseph Goldstein, Anna Freud, and Albert Solnit.[335] As they conceived it, the model placed heavy emphasis on the maintenance of a stable family environment. Goldstein et al. argued that continuity in a child's surroundings and care was

331. *See generally* Dyer, *supra* note 3.

332. *See supra* Section I.B.2 (discussing the "best interests of the child" principle in international law).

333. *See, e.g.*, LeAnn Larson LaFave, *Origins and Evolution of the "Best Interests of the Child" Standard*, 34 S.D. L. REV. 459 (1989).

334. *See id.* at 467-68 (tracing origins of the standard); *see also* Chapsky v. Wood, 26 Kan. 650 (1881) (awarding custody over a child to the foster parent who raised her at her parents' request, rather than to her biological father, on the basis of the child's interests); Finlay v. Finlay, 240 N.Y. 429 (1925) (holding that the state must act paternalistically to protect the child in child custody disputes, rather than simply adjudicating the competing interests of the parents).

335. *See generally* JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, SONJA GOLDSTEIN, & ANNA FREUD, THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE (1996) (a compilation of J. Goldstein, Solnit, and Freud's earlier writings on the subject).

crucial to his or her psychological and emotional development.[336] Furthermore, they found that healthy parent-child relationships are more likely to develop when parents have considerable autonomy in their caretaking.[337] The implication for governmental regulation of child welfare was a strong presumption against intervention and removal, with removal justified only on the basis of imminent risk of severe harm.[338] Furthermore,

> [t]he degree of intrusion on family integrity at each stage of decision [invocation of state intervention, adjudication, and disposition] should be no greater than that which is necessary to fulfill the function of the decision. . . . [N]o state intrusion ought to be authorized unless probable and sufficient cause has been established with limits prospectively and carefully defined by the legislature.[339]

Over the past several decades, the prominence of the "best interests" standard in child welfare law has varied, as has the prevailing approach to defining those interests. In the 1970s, placement of children in foster care for long periods of time became common as authorities cracked down on abuse and neglect.[340] This system produced the increasingly criticized problem of "foster care drift," as children often spent years in the foster care system without any continuity in care.[341] Congress responded to this problem in 1980 with the passage of the Child Welfare Act, the goal of which was to reduce the time children spent in foster care.[342] The Act emphasized family reunification, imposing for the first time the requirement that social workers make "reasonable efforts" toward reunification of separated families, as well as measures designed to prevent removals initially.[343] Another law passed in 1993, the Family Preservation and Family Support Act, further emphasized the goal of reunification.[344] However, as family preservation policies, both of these laws were fairly unsuccessful.[345] Children continued to languish in foster care,[346] and at the same time, there were a number of highly publicized tragedies in which children were returned to

336. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 31-34 (2d ed. 1979).

337. JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 9 (1979).

338. *Id.* at 194-95.

339. GOLDSTEIN ET AL., *supra* note 336, at 97.

340. Madelyn Freundlich, *Expediting Termination of Parental Rights: Solving a Problem or Sowing the Seeds of a New Predicament?*, 28 CAP. U. L. REV. 97, 97 (1999).

341. *Id.* at 97-98.

342. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No 96-272 (1980); *see* Freundlich, *supra* note 340, at 98 (describing reasons for passage of the Act); Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1, 2-3 (2001).

343. *See* Jim Moye & Roberta Rinker, *It's a Hard Knock Life: Does the Adoption and Safe Families Act of 1997 Adequately Address Problems in the Child Welfare System?*, 39 HARV. J. ON LEGIS. 375, 379 (2002); Adler, *supra* note 342, at 5.

344. Family Preservation and Family Support Act, Pub. L. No. 103-66, 107 Stat. 312; *see* Freundlich, *supra* note 340, at 98.

345. *See* Freundlich, *supra* note 340, at 98-99 (stating that foster care populations "increased significantly" during this period); Dorothy E. Roberts, *Poverty, Race, and New Directions in Child Welfare Policy*, 1 WASH. U. J. L. & POL'Y 63, 65 (1999).

346. Stephanie Jill Gendell, *In Search of Permanency: A Reflection on the First 3 Years of the Adoption and Safe Families Act Implementation*, 39 FAM. CT. REV. 25, 25 (2001).

violent homes pursuant to reunification policies and then killed.[347] The outcry surrounding these cases was a major impetus[348] for Congress's passage in 1997 of the Adoption and Safe Families Act (ASFA),[349] which remains the main governing federal child welfare statute.

Often described as a "sea change" in child welfare law,[350] ASFA "shifted the priority of the child welfare system from family reunification to child protection."[351] ASFA's main purpose was to facilitate adoption, which was viewed as a better permanent solution for many children than family reunification.[352] ASFA's centerpiece was a mandate that state authorities accelerate the timetable for the involuntary termination of parental rights, a legal process that permanently severs the parent-child relationship and clears the way for adoption.[353] The provision requires states to initiate involuntary termination proceedings in any case in which a child has been in foster care for fifteen out of the previous twenty-two months.

Although hailed by some as a potential safe solution to foster care drift,[354] ASFA has also been criticized as unduly draconian. Critics have argued that this hasty movement toward permanent separation of families risks emotional damage to children, who may move to more stable adoptive families but lose the lifelong loving relationships they have had with their biological parents.[355] Moreover, the policy has a disparate impact on poor and minority families, an effect exacerbated by the juxtaposition of ASFA with contemporaneous welfare policy reforms that may force poor single mothers to place children in foster care so that they can meet work requirements,[356] as well as with harsh penalties for drug and other crimes that make it impossible for imprisoned single parents to keep their children out of foster care for the requisite number of months.[357] Thus, a mother sentenced to fifteen months or more in prison for drug possession risks losing her child forever, without any showing of her unfitness as a parent.[358] Finally, critics of ASFA argue that past family reunification approaches failed not because of any basic flaw with reunification as a goal, but

347. Roberts, *supra* note 345, at 66.

348. *Id.*

349. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) [hereinafter ASFA]; *see* Rachel Venier, *Parental Rights and the Best Interests of the Child: Implications of the Adoption and Safe Families Act of 1997 on Domestic Violence Victims' Rights*, 8 AM. U. J. GENDER SOC. POL'Y & L. 517, 517-18 (2000) (outlining the Act's provisions).

350. Freundlich, *supra* note 340, at 97.

351. Alison B. Vreeland, Note, *The Criminalization of Child Welfare in New York City: Sparing the Child or Spoiling the Family?*, 27 FORDHAM URB. L.J. 1053, 1069 (2000); *see also* Moye & Rinker, *supra* note 343, at 379-80.

352. *See* Adler, *supra* note 342, at 9 (noting that the CWA and ASFA shared the goal of permanence but employed radically different strategies toward that goal).

353. 42 U.S.C. § 675(5).

354. *E.g.*, Gendell, *supra* note 346.

355. Roberts, *supra* note 345, at 70-71.

356. Gwendolyn Mink, *Violating Women: Rights Abuses in the Welfare Police State*, 577 ANNALS 79, 87 (2001); Moye & Rinker, *supra* note 343, at 387.

357. Mariely Downey, *Losing More than Time: Incarcerated Mothers and the Adoption and Safe Families Act of 1997*, 9 BUFF. WOMEN'S L.J. 41 (2001).

358. *See id.* at 47.

because they were never given the resources they needed to succeed, such that insufficient assistance was given to struggling families while some truly dangerous situations were allowed to slip through the cracks.[359]

Rapid movement toward permanent termination of parental rights poses a particular threat to the principle of family integrity because of the frequently weak grounds on which initial removal decisions are often made. Child removals are often preventive in nature; that is, they are justified on the basis of merely potential harm to the child without any showing of pre-existing abuse or neglect. For example, in many jurisdictions, evidence of past or present parental drug use has justified removal of children independent of any evidence that it has in any way affected the child's wellbeing. In the late 1990s, for instance, the California Child Protective Services agency in Sacramento adopted a "zero tolerance" policy, removing children automatically from any home in which there was any evidence of drug use, whether past or present.[360] Over the course of 18 months, approximately seven thousand children were removed from their families and placed in "protective custody holds." About half of these children were never returned to their parents.[361] No showing of actual abuse or neglect of children was required, and in the vast majority of cases, there was no evidence whatsoever that any abuse or neglect had occurred. Participation in drug treatment did not exempt parents from the removals. Many newborn babies were removed from their mothers at birth.[362] Critics of the policy have argued that the separations not only devastated parents, but also caused major and traumatic disruption to the children's lives and development.[363]

We believe, therefore, that policies such as these pervert the notion of "best interests of the child." Moreover, these policies also give little or no weight to parental rights, and may therefore be inconsistent with Supreme Court rulings establishing a fundamental constitutional right to raise one's children. For example, in *Moore v. City of East Cleveland*, the Supreme Court held the substantive due process protection of the "right to live together as a family" to extend to grandparents, citing a long line of cases demonstrating that the "constitutional right of parents to assume a primary role in decisions concerning the raising of their children" is an "enduring American tradition" that is "basic to the structure of our society."[364] In *Lyng v. Castillo*, the Court clarified the standard for finding a violation of this fundamental right: strict scrutiny would apply to policies that "directly and substantially interfere with family living arrangements."[365]

359. Roberts, *supra* note 345, at 67-68.

360. John McCarthy, *The CPS Drug Use Dilemma*, SACRAMENTO MED., Nov. 1998, at 11, *available at* http://www.lindesmith.org/library/mccarthy2.cfm (last visited Oct. 22, 2002).

361. *Id.*

362. *Id.*

363. *Id.*

364. 431 U.S. 494, 500, 503 n.12 (1977) (plurality opinion).

365. 477 U.S. 635, 638 (1986).

2. *Balancing Parents' and Children's Interests*

The characterization of the right to live with family members as a fundamental right aptly captures the tremendous significance of family ties in peoples' lives. Child removals are frequently traumatic for all concerned. Even when judicial or administrative application of the best interests test results in the eventual return of children to their parents, temporary removal in the interim may cause lasting harm to the children and to the stability of the family relationship, especially if frequent visitation is not allowed during the removal period. As the European Court of Human Rights has noted in a child removal case, the "ties between members of a family and the prospects of their successful reunification will perforce be weakened if impediments are placed in the way of their having easy and regular access to each other."[366] The problem, then, is not the state's right to remove children per se but the too-hasty resort to removal any time a child's well-being is at all in doubt—a practice that, indeed, is the official policy of many child protective services agencies.

The obvious difficulty is that protective services must retain some flexibility in their decisions to remove children or they will lose their ability to intervene in truly dangerous situations. The challenge, then, is to strike a balance between the state's (and children's) interest in prevention of abuse and neglect and the interests of parents and children in staying together. International law, which recognizes each of these interests, may provide guidance or, indeed, impose obligations regarding the proper balance.

The international obligation of states to refrain from arbitrary or unjustified interference with the unity and privacy of families does not, of course, prohibit states from *ever* separating families. Rather, it simply demands an internationally cognizable justification that overrides the interests supporting family unity. International law not only recognizes the protection of children's welfare as a legitimate state interest; it affirmatively obligates states to protect children. Indeed, the protection of children's best interests is the primary stated objective of the Convention on the Rights of the Child.[367] The use of "best interests" language in treaties, however, does not by any means imply that the requirements of international law are exactly coextensive with the best interests standard as currently interpreted and applied in the United States. The terminology is fairly open-ended, as demonstrated by the variation in interpretation of the test in the past several decades in the United States. Indeed, as discussed in Section I, the best interests standard has been widely criticized internationally for being too open-ended. Similar criticisms have been voiced in the United States by those

366. Olsson v. Sweden, App. No. 10465/83, 11 Eur. H.R. Rep. 259, ¶ 81 (1987). In another case, the ECHR found that "there is a significant danger that a prolonged interruption of contact between parent and child or too great a gap between visits will undermine any real possibility of their being helped to surmount the difficulties that have arisen within the family and of the members of the family being united." Scozzari v. Italy, App. No. 39221/98, 35 Eur. H.R. Rep. 243, ¶ 177 (2002).

367. *See* discussion *supra* Part I.

who consider the ill-defined standard to be a poor guide to policy and, worse, subject to manipulation.[368]

Moreover, the combination of different international law principles discussed here suggest that parental and other interests in family integrity deserve at least some weight in the balance alongside children's interests. Experiences with application of the best interests test internationally—notably in the Aboriginal child removal policies discussed in Section II.A—demonstrate the dangers of officials exercising unfettered discretion to act on their ideas of the child's best interests. The test is simply too subjective. Rather, international law should require that the test be applied against a background presumption against family separation that may only be overcome by evidence of danger to the child's welfare.

3. *European Court of Human Rights Decisions*

International courts have been reluctant to interfere with the decisions of states with respect to protective removal of children. Nonetheless, some limits have been imposed. The jurisprudence of the European Court of Human Rights provides some interesting contrasts. In *Olsson v. Sweden*, for example, the ECHR held that despite the legitimacy of the goals of Sweden's child welfare policy,

> it is an interference of a very serious order to split up a family. Such a step must be supported by sufficiently sound and weighty considerations in the interests of the child; as the [European] Commission rightly observed, it is not enough that the child would be better off if placed in care.[369]

The balancing test suggested by the Court in this passage was grounded in the requirement of Article 8 of the European Convention that all interferences with family life be "necessary in a democratic society" to fulfill one of a list of enumerated objectives.[370] The Court explained that the concept of "necessity" required both that there be a "pressing social need" and that the solution chosen be "proportionate to the legitimate aim pursued."[371] In *Olsson*, the Court held that the protective removal of three children from parents who were believed to be neglecting them was not in and of itself a violation of Article 8. It held that protective removals might be appropriate and necessary even in some cases where no harm had yet been documented, noting that discretion had to be given to authorities since "it would scarcely be possible to formulate a law to cover every eventuality."[372] The Court also placed emphasis on the procedural protections available to the parents, noting that judicial review safeguards against the "arbitrary" use of the power of preventive removal.[373]

368. *See, e.g.*, LaFave, *supra* note 334, at 486, 497 (describing the best interests test as "value-laden," "poorly defined," and a "vague platitude"); Bartlett, *supra* note 120, at 303.

369. *Olsson*, 11 Eur. H.R. Rep. 259 ¶ 72.

370. European Convention, *supra* note 25, art. 8.

371. *Olsson*, 11 Eur. H.R. Rep. 259 ¶ 67.

372. *Id.* ¶ 62.

373. *Id. See also* W. v. United Kingdom, App. No. 9749/82, 10 Eur. H. R. Rep. 29, ¶ 64 (1988) (holding that Article 8's procedural requirements included the involvement of parents in the deci-

However, the ECHR in *Olsson* held that the state's actions *subsequent* to the removal violated Article 8—placing the three children in separate foster homes at considerable distance from one another and their parents, allowing extremely limited visitation, and failing to return the children to their parents within a reasonable length of time. The Court held that Article 8 required removal to be treated "as a temporary measure, to be discontinued as soon as circumstances permitted, and any measures of implementation should have been consistent with the ultimate aim of reuniting the Olsson family."[374] Moreover, ease of administration simply could not justify keeping families separate longer or more completely than is necessary; "in so fundamental an area as respect for family life, such considerations cannot be allowed to play more than a secondary role."[375]

Other ECHR cases have reached similar results. For example, in at least three fairly recent cases, the Court has again shown deference to a state's decision to remove children from their families, but still found violations of Article 8 due to lack of visitation opportunities and an inadequate commitment to eventual family reunification.[376] In *Johansen v. Norway*, the Court reaffirmed the principle that reunification must be the ultimate goal of removal policies;[377] in *Scozzari and Giunta v. Italy*, it held that "a measure as radical as the total severance of contact can be justified only in exceptional circumstances."[378] Although acknowledging the importance of the "best interests of the child," the Court in both cases made it clear that parents' rights count too; the child's interests may outweigh the parents' "depending on their nature and seriousness," and in particular when the child's "health and development" is at serious risk of harm.[379] Moreover, in *Johansen* the Court explained the reasoning behind the different degrees of deference given to state authorities in initial removal decisions, on the one hand, and in their subsequent conduct as well as procedural protections, on the other. It found that

> perceptions as to the appropriateness of intervention by public authorities in the care of children vary from one Contracting State to another, depending on such factors as traditions relating to the role of the family and to State intervention in family affairs and the availability of resources for public measures . . . . [Also,] national authorities have the benefit of direct contact with all the persons concerned. . . . It follows from these considerations that the Court's task is not to substitute itself for the domestic authorities . . . but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation.

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sion-making process "to a degree sufficient to provide them with the requisite protection of their interests").

374. *Olsson*, 11 Eur. H.R. Rep. ¶ 81.

375. *Id.* ¶ 82.

376. Johansen v. Norway, App. No. 17383/90, 23 Eur. H.R. Rep. 33 (1996); Scozzari v. Italy, App. No. 39221/98, 35 Eur. H.R. Rep. 243, ¶ 177 (2002); E.P. v. Italy, App. No. 31127/96, 31 Eur. H.R. Rep. 463 (1999).

377. *Johansen*, 23 Eur. H.R. Rep. 33 ¶ 78.

378. *Scozzari*, 35 Eur. H.R. Rep. 243 ¶ 170.

379. *Id.* ¶ 169 (citing *Johansen*, 23 Eur. H.R. Rep. 33 ¶ 78).

The margin of appreciation so to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake. . . . Thus, the Court recognizes that the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care. However, a stricter scrutiny is called for both of any further limitations, such as restrictions placed by those authorities on parental rights and access, and of any legal safeguards. . . . Such further limitations entail the danger that the family relations between the parents and a young child are effectively curtailed.[380]

Thus, the differing standards applied by the ECHR are intended to strike a balance between, on the one hand, deference to states' discretion in areas involving sensitive cultural issues and to their ability to tailor decisions to a particular situation, and, on the other, the strong rights of parents and children in eventual successful reunification as protected by Article 8. The balancing tests in these cases are probably not ideal; the American child removal situations discussed above and below demonstrate that significant abuses can happen at the initial removal stage as well. But there is something important to be said for deference to state authorities when it comes to decisions that, for children, may sometimes make a life-or-death difference. One possibility to keep in mind is that international courts, given their temporal, physical, and cultural distance from the actual situations, may be well advised to be more deferential in these situations than would be national courts reviewing similar decisions. Yet national courts can, and should, take into account their international obligations as well, and should do so with heightened vigilance.

4. *Incorporating International Law into U.S. Child Welfare Decisions:* Nicholson v. Williams

In the United States, when an international law obligation conflicts with domestic federal law, United States judges are required to interpret the domestic law in a way that avoids the conflict if possible; if not, the two have equal status and the last-in-time rule applies.[381] State and local law, however—which comprises the great majority of American family law—is trumped by international law, whether treaty-based or customary.[382] Following this rule, judges must interpret state and local child welfare laws in a way that conforms to the international legal norms set forth above, and if they conflict unavoidably, the domestic laws cannot be applied. This clear constitutional principle (grounded in the Supremacy Clause) notwithstanding, federal and state judges rarely cite interna-

380. *Johansen,* 23 Eur. H.R. Rep. 33 ¶ 64.

381. *See supra* note 317.

382. *See* Erik G. Luna & Douglas J. Sylvester, *Beyond Breard,* 17 BERKELEY J. INT'L L. 147, 153 (1999) (stating that treaty provisions trump state law); Leslie Wells, *A Wolf in Sheep's Clothing: Why Unocal Should Be Liable Under U.S. Law for Human Rights Abuses in Burma,* 32 COLUM. J.L. & SOC. PROBS. 35, 57 (1998) (stating that customary international law trumps state law).

tional law at all in family law cases.[383] A recent decision of the Eastern District of New York, again by Judge Weinstein,[384] provides a notable exception. *Nicholson v. Williams* was a class action lawsuit by a group of mothers against the New York City Administration for Child Services (ACS).[385] The lawsuit challenged ACS's policy of automatically removing children from homes where domestic violence had occurred even if it meant removing them from the *victims* rather than the perpetrators of that violence. Pursuant to this policy, an incident of domestic violence (that is, committed by a man against a mother, not against her child) would result in ACS citing both parties for "engaging in domestic violence," with no distinction between abuser and victim.[386] Sometimes, in fact, ACS would cite only the victim and not list the abuser at all.[387] Then the child would be preemptively taken away from the mother and placed in foster care. All this would occur absent any showing that either parent, much less the mother, had committed abuse or neglect of the child. However extraordinary this policy may sound, New York was not alone in adopting it; indeed, the widespread problem of termination of domestic violence victims' parental rights has been "well-documented."[388]

The children of the named plaintiffs in *Nicholson* were kept in foster care for several weeks. The court cited the emotional and developmental damage done to the children, the destruction of their family relationships, and the disruption to their schoolwork and daily lives inflicted even by these relatively short-term placements in foster care. The *Nicholson* court held that the ACS policy resulted in "the forcible and unjustified separation of abused mothers and their children."[389] Specifically, the court relied on both constitutional and international protections of the right to family integrity, with respect to both parents' and children's rights. The court cited specific international provisions including the Universal Declaration of Human Rights, the ICCPR, and the Convention on the Rights of the Child.[390] As to the last, the court, citing *Beharry v. Reno*, stated that its protections had the force of customary international law. The court thus held that the ACS policy violated the basic human rights of family integrity and freedom from arbitrary interference with family life, as well as the specific right of a child to be cared for by her parents. Unlike in the immigration cases discussed in the previous Section, however, in *Nicholson* the court did not rely heavily on international law arguments, which were not really used as independent grounds for the decision. Rather, the court's citations to interna-

383. *Cf.* Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 568 (1997) (noting that "the federal government has refused to press the states into conforming" with international norms in traditionally state-dominated areas including family law).

384. *See supra* notes 298-319 and accompanying text (discussing Judge Weinstein's decisions in recent immigration cases).

385. 203 F. Supp. 2d 153 (E.D.N.Y. 2002).

386. *Id.* at 192-93.

387. This, amazingly, occurred in 46.2 percent of cases where ACS cited parents for engaging in domestic violence. *See id.* at 209.

388. Venier, *supra* note 349, at 528.

389. *Nicholson*, 203 F. Supp. 2d. at 168.

390. *Id.* at 234.

tional law provided support for the claim that family integrity and privacy are fundamental rights, interference with which merits heightened scrutiny under the Constitution.

5. *Application of International Norms Governing Family Separation to the Protective Removal of Children*

Protective removal of children provides a difficult case for the formation and application of international norms governing family separation. Unlike the Aboriginal child removal policy discussed in Section II.A, the various international obligations at stake in this context compete with one another; they pull the state in opposite directions. Balancing the interests of parents and children in family integrity against the state's strong interest in protecting children from abuse can often be difficult, whether one employs principles of international or domestic law or both. But there are cases in which child protection agencies have clearly crossed the line, wherever the line may be drawn. The New York policy at issue in *Nicholson*, and the Sacramento policy discussed above, are two such cases. Not only do these policies conflict with United States constitutional protections of family integrity; they also violate U.S. obligations at international law.[391] The *Nicholson* case shows that one effective enforcement mechanism for those obligations is to incorporate them in the rulings of courts reviewing decisions to remove children.

But how, then, to strike the balance in more marginal cases? This is an area in which we hope international norms will evolve to incorporate the shared wisdom of a variety of national experiences. For now, we suggest a few basic principles. First, there should be a presumption against child removal that can be overcome only by a showing of parental wrongdoing or some other actual danger to the child's safety. That is, the state should not remove children simply because it believes that to do so would be marginally better for the child. Not only are such judgment calls unreliable predictors of the child's actual best interests, but they also give too little weight to the fundamental human right of parents to raise their children. Instead, children should generally not be removed absent a showing of actual (not merely potential) abuse or neglect. As a corollary, children should only be removed for purely preventive purposes (that is, absent a showing of past harm) if there is a strong reason to believe they are in imminent and serious danger, and then there should be a hearing as soon as possible to determine whether this belief is supported. In general, all removal decisions should be subject to very prompt administrative and judicial review. Finally, child welfare agencies should never rely on facile assumptions that certain groups of people are inadequate parents, absent actual showings of harm to children in specific cases. Blanket policies like those that remove children automatically from domestic violence victims, former drug users, and so forth violate the family's right to individualized decision-making, and set the stage for

391. The actions of state and local governments are imputed to the United States under international law. *See* Marian Nash Leich, *U.S. Practice*, 77 AM. J. INT'L. L. 135, 135 (1983).

"indiscriminate intervention on the basis of current moral panics."[392] The stakes for families are too high to let stereotypes take the place of reasoned judgments.

E. *Mass Family Separation in Crisis Situations*

In each of the case studies discussed above, family separation was implemented pursuant to specific state policies adopted through a legislative or legal process. But state-enforced separation of families frequently occurs without such processes and without an official state policy. Families are often forcibly separated en masse as a result of wars or refugee crises. In this Section, we analyze the implications of international law for mass family separation in crises, both when it results from a deliberate state policy that itself constitutes a major human rights violation (as in mass expulsion campaigns) and when it is an inadvertent consequence of other types of disaster situations. We argue that international law places both negative and positive obligations on states in crises: they must refrain from forcibly separating families and work toward the reunification of those that have been separated.

Unlike each of the case studies discussed above, family separation is not necessarily the central element of the wrong that occurs in crisis situations.[393] In cases such as mass expulsions or unjust warfare, for example, recognition of a norm against involuntary family separation is not *necessary* in order to condemn the abuses or find a violation of international law. However, analysis of family separation in many such situations may be useful for at least three reasons. First, although it may seem "secondary" in terms of international law, family separation is a central element of the harm many victims of major human rights abuses experience. People simply care a great deal about their families, and often suffer more from losing them than they do even from serious individual harms they suffer personally. Recognition of the impact of family separation can thus help us to come to a fuller understanding of victims' experience. Second, recognition that family separation constitutes an important element of a particular human rights abuse may affect the choice of remedy for that abuse at international law. That is, family reunification should be a central element of any remedy ordered by a court or other international body, or of international humanitarian relief efforts. Current requirements for, and efforts toward, family reunification will be discussed further below. Third, family separation deserves attention because it can increase the likelihood of other human rights abuses

392. VAN BUEREN, *supra* note 17, at 87 (arguing that such indiscriminate interventions violate the principles of the CRC).

393. In the Stolen Generations, polygamy, and child welfare examples, the direct, immediate intent of the contested policy was to separate families. The motives or ultimate goals of the policies, of course, differed, ranging from benevolent (child welfare) to malign (cultural destruction); but in each of the three cases, the state deliberately employed a policy of family separation as a strategy to accomplish those goals. In the American immigration law case, although family separation was only a side effect of the state's deportation policy, it was nonetheless the central violation of international law; the unjustified or arbitrary separation of families made illegal deportations that ordinarily would have been permitted by international law.

occurring and compounding the initial crisis situation. This is particularly so in the case of children being separated from their parents, as the discussion of unaccompanied refugee children below will reveal.[394]

1. Mass Expulsion

One major cause of widespread separation of families is mass expulsion. Mass expulsion is widely recognized as a major violation of human rights, contravening numerous prohibitions of international law. For example, provisions in the American Convention on Human Rights and in the African Charter ban mass expulsion specifically.[395] As the African Commission on Human and Peoples' Rights has noted, "the drafters of the Charter believed that mass expulsion presented a special threat to human rights."[396] In addition to these specific prohibitions, mass expulsion violates treaty provisions that provide for procedural protections for deportees.[397] The International Law Association adopted a Declaration of Principle of International Law on Mass Expulsion in 1986, which suggested that mass expulsion of nationals might be considered an international crime and certainly a violation of international law.[398] The International Criminal Tribunal for the Former Yugoslavia has issued a number of indictments charging leaders for their roles in the expulsion of thousands of Kosovo Albanians and similar expulsions in Croatia and Bosnia and Herzegovina between 1991 and 1995.[399] The Rome Statute of the International Criminal Court includes "deportation or forcible transfer of population" as a crime against humanity.[400] Despite this international recognition, expulsions remain a serious problem. For example, shortly after the outbreak of hostilities between Ethiopia and Eritrea in 1998, Ethiopia began a campaign to deport persons of Eritrean national origin, many of them Ethiopian citizens. Over the next two to three years, tens of thousands of people were expelled.[401] Deportations occurred

394. *See* VAN BUEREN, *supra* note 17, at 80 (noting that, "when the family is unable to exercise its primary role in bringing up children, children become more vulnerable to violations of other fundamental rights").

395. American Convention, *supra* note 25, art. 22(9); African Charter, *supra* note 25, art. 12.

396. *See Rencontre Africaine pour la Defense des Droits de l'Homme v. Zambia*, African Comm. Hum. & Peoples' Rights, 20th Sess., Comm. No. 71/92, ¶ 40 (1997) (condemning the expulsion of 517 West Africans from Zambia); *see also Union Inter Africaine v. Angola,* African Comm. Hum. & Peoples' Rights (ACHPR), 22nd Sess., Comm. No. 159/96, ¶ 15 (1997).

397. *E.g.*, ICCPR, *supra* note 21, art. 13; American Convention, *supra* note 25, art. 22; African Charter, *supra* note 25, art. 12.

398. JEAN-MARIE HENCKAERTS, MASS EXPULSION IN MODERN INTERNATIONAL LAW AND PRACTICE 81 (1995).

399. *See, e.g.,* Prosecutor of the Tribunal v. Slobodan Milosevic, Indictment, Case IT-99-37, (May 24, 1999) ¶ 35, *available at* http://www.un.org/icty/indictment/english/mil-ii990524e.htm (last visited Oct. 22, 2002).

400. Rome Statute of the International Criminal Court, U.N. Doc. A/Conf. 183/9 (1998) art. 7 §1(d).

401. *See* Human Rights Watch World Report 2001: Ethiopia, *available at* http://www.hrw.org/wr2k1/africa/ethiopia.html (last visited Nov. 6, 2002) (stating that Ethiopia had expelled 70,000 people by early 2000). The authors have been, and Prof. Brilmayer remains, actively involved in advocacy on behalf of deportees from Ethiopia, including preparing claims against Ethiopia for an international war crimes compensation commission.

without judicial hearings; frequently people were rounded up at their homes at gunpoint during the night, thrown in jails or detention camps, and then herded onto buses for the border.[402]

Family separation is an inevitable consequence of mass expulsion campaigns. For example, in *Union Inter Africaine v. Angola,* the African Commission found that Angola had violated Article 18 of the African Charter by separating families during a mass expulsion.[403] In Ethiopia, separation of families was ubiquitous and well documented,[404] sometimes because families were of mixed national origin and those deemed "Ethiopian" were not permitted to join their deported family members.[405] Additionally, more than one thousand people were detained for months or years at detention camps and thus separated from their families.[406] Beyond the physical, financial, and emotional consequences of forced expulsion, the separation of families caused heightened trauma for the deportees and those left behind.[407] Today, although the war is over, the border remains closed and ordinary lines of communications cut off; there is no foreseeable prospect of deportees being allowed to return. Thus, although some families have been reunited in Eritrea due to succeeding waves of deportations, for some the separation has been total and is potentially permanent.

2. *Internal Displacement*

Internal displacement of populations, particularly in combination with restrictions on freedom of movement within a country, may also violate international norms against family separation. For example, the European Court of Human Rights found that Turkey violated Article 8's protections of family life, and many other provisions of the European Convention, by enacting a systemic policy designed to displace Greek Cypriots from northern Cyprus.[408] This policy included a number of restrictions on freedom of movement between north and south that "resulted in the enforced separation of families and the denial to the Greek Cypriot population in the north of the possibility of leading a normal family life."[409] The Court also cited the cutoff of normal lines of communication as well as surveillance members that made contacts between family members, when they did occur, restricted by a surrounding "hostile environment."[410]

402. *See* Ethiopia Country Report on Human Rights Practices for 1998, DEP'T ST,. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR Feb. 26, 1999, *available at* http://www.state.gov/ www/global/human_rights/1998_hrp_report/ethiopia.html (last visited Oct. 22, 2002).

403. *See Union Inter Africaine,* ACHPR, Comm. No. 159/96, ¶ 15.

404. *See* United Nations Consolidated Inter-Agency Flash Appeal for Humanitarian Assistance to Eritrea 46, Sept. 1998.

405. *See* AMNESTY INTERNATIONAL, ETHIOPIA AND ERITREA: HUMAN RIGHTS ISSUES IN A YEAR OF ARMED CONFLICT, AFR 04/03/99, 27, (1999).

406. *Id.* at 22, 28.

407. *Id.*

408. Cyprus v. Turkey, App. No. 25781/94, 35 Eur. H.R. Rep. 731 (2001).

409. *Id.* ¶ 293.

410. *Id.* ¶¶ 296, 300.

The situation of the Greek Cypriots parallels that of families separated by many instances of internal displacement worldwide. As UNHCR has explained,

> During the past decade, there has been a dramatic increase in the number of people who are internally displaced or directly affected by warfare but who do not cross international borders and do not benefit from the provisions of refugee law. Many of these people are children who have become separated from their families or whose parents lost their lives in the conflict.[411]

As this passage points out, an additional problem for the victims of such separations is that internally displaced persons may have fewer rights under current international law than do refugees. The development of a cohesive international norm against involuntary family separation—one that governs states' conduct generally, not just in situations to which refugee law applies—might thus offer internally displaced persons a measure of protection that they are currently denied.

3. Warfare

Family separation is also a frequent consequence of warfare, whether it results from family members being killed or from internal displacements or refugee migrations. Following wars, families may have a right, protected by the Geneva Conventions, to information about the fate of missing family members and, if possible, to reunification.[412] Refugee crises in general almost invariably separate families, and pose a particular threat to children, who are frequently left entirely alone.[413] Minors compose just over half of the refugee population receiving assistance from the United Nations High Commissioner for Refugees (UNHCR).[414] In 1999, Human Rights Watch documented the situation of many thousands of Sierra Leonean children living in refugee camps in Guinea.[415] Being left alone subjects refugee children to serious danger, including starvation, physical and sexual abuse, and labor exploitation.[416] A UNHCR report details some of these risks:

> Boys and girls on their own are easy targets for recruitment into armed groups, as combatants, porters, spies or servants, and they are at high risk of exploitation and physical or sexual abuse, and even death. Involuntary separation thus increases the risks faced by the displaced, refugee, and other war-affected children; it can be more traumatic than the displacement itself.[417]

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411. *Report of the United Nations High Comm'r for Refugees: Assistance to unaccompanied refugee minors*, U.N. GAOR, 53rd Sess. Agenda Item 108, ¶ 5, U.N. Doc. A/53/325 (1998), *available at* http://www.un.org/documents/ga/docs/53/plenary/a53-325.htm (last visited Oct. 22, 2002) [hereinafter UNHCR Report].

412. *See* Vaughn A. Ary, *Concluding Hostilities: Humanitarian Provisions in Cease-Fire Agreements*, 148 MIL. L. REV. 186, 207-10 (1995).

413. *See* Megan E. Kures, Note, *The Effect of Armed Conflict on Children: The Plight of Unaccompanied Refugee Minors*, 25 SUFFOLK TRANSNAT'L L. REV. 141, 141-44 (2001).

414. *Id.* at 144.

415. *See* HUMAN RIGHTS WATCH, FORGOTTEN CHILDREN OF WAR: SIERRA LEONEAN REFUGEE CHILDREN IN GUINEA (1999), *available at* http://www.hrw.org/reports/1999/guinea /guine997.htm (last visited Oct. 22, 2002).

416. *Id.; see also* Kures, *supra* note 413, at 145 (describing "extreme violence" including "mass rape," as well as other dangers to children's survival and wellbeing).

417. UNHCR Report, *supra* note 411, at ¶ 6.

Indeed, family separation is emotionally traumatic for refugees of all ages. According to Professors Hathaway and Neve, "[o]ne of the strongest emotional needs of refugees is to be reunited with close family members."[418]

4. *International Legal Obligations in Crisis Situations: Reunification and Prevention of Separation of Families*

Not all forms of warfare, and not all causes of refugee crises, constitute violations of international law in and of themselves. But all may raise an international obligation for states to attempt to minimize family separation, and to reunify families who have unavoidably been separated. One problem for the enforcement of existing international norms against family separation during times of international or internal crisis is that the relevant international provisions have generally been considered derogable in emergency situations.[419] However, at least where no derogation has taken place, countries may already have an affirmative obligation under international law to prevent and redress the separation of families in crisis circumstances, particularly when such separations affect children.

For example, as discussed in Section I, both the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child set forth detailed provisions regarding reunification measures that must be taken in refugee or conflict situations.[420] In addition, a number of U.N. soft law instruments specifically address the plight of refugee minors. For example, the Special Representative of the Secretary General on internally displaced persons has set forth a list of principles that "reaffirm the right of families to remain together and to be speedily reunited if separated."[421] The UNHCR Guidelines contain a number of directives mandating efforts to preserve and restore family unity during refugee crises.[422] Moreover, the Geneva Convention on the Protection of Civilian Persons in Time of War mandates that in any war, "the parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources."[423] Although not prohibiting family separation per se, this provision obligates states to address the consequences of it. In addition, the Convention on the Rights of the Child specifically mandates that all member states cooperate in U.N. efforts to reunify families by tracing the family

418. James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 163 (1997); *id.* at 173 (stating that family separation causes "extreme anxiety and fear," and "often interferes with efforts to become self-sufficient in the asylum country").

419. *See* VAN BUEREN, *supra* note 17, at 86 (arguing that this allowance of derogation weakens the "protection of the rights of the child at the time when they are most needed").

420. *See supra* notes 63-72 and accompanying text.

421. *See* UNHCR Report, *supra* note 411, at ¶ 11.

422. *See Evaluation of UNHCR's Efforts on Behalf of Children and Adolescents*, U. N. High Comm'r for Refugees, U.N. Doc. EVAL/06/97 (1997).

423. Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 24, 6 U.S.T. 3516, 213 U.N.T.S. 379.

members of child refugees.[424] To date, the U.N. reunification program has been greatly underutilized.[425] Yet reunification efforts can be successful when sufficient resources are devoted to them; for example, in 1997 and 1998, UNHCR, UNICEF, the Red Cross and other agencies reunited three-quarters of unaccompanied Rwandan refugee children in the Congo with their families.[426]

This case study thus suggests the need for greater international attention to the impact of wars and major human rights crises on family unity. In terms of their illegality under international law, and in terms of the resolution of competing values and interests, at least most of the cases discussed in this section are the paradigmatic "easy cases," much like the Stolen Generations case. That is, there are a number of strong internationally recognized values at stake, all of them pulling in the same direction: toward condemnation of these situations as major violations of international law. Yet when the ramifications for families are taken into account, it becomes evident, if it was not already, that condemnations are not enough; shattered families and children alone in refugee camps will not be significantly mollified by pronouncements that their treatment was, indeed, illegal. Rather, the international community needs to look for solutions. A paramount concern in responses to crises like these should be the reunification of families. International law already contains provisions imposing affirmative obligations on states in this regard; more efforts and resources should be put to making sure these on-paper commitments are fulfilled in reality.

III.
CONCLUSIONS

The diversity and complexity of the various issues discussed in Section II suggest that the problem of involuntary family separation does not admit of easy generalization. To an international lawyer, this may be a discouraging conclusion, for the successful functioning of international law depends on the ability to generalize—that is, to fashion general rules and principles that can work when applied to specific situations and cultural contexts. Conflicts of values and interests are inevitable in any area of law; without conflicts, one might say, law would not be necessary. But conflicts involving the family are especially difficult to resolve. Passions on the issues run deep, both because of people's strong feelings for their own families and because many people place great weight on the cultural values bound up in this central social institution. Moreover, there is a remarkably low degree of consensus, both between and within cultures, on basic assumptions such as what constitutes a "family." It is tempting, perhaps, to conclude that an area this sensitive and contested does not belong in the domain of international law at all.

This, of course, is not our conclusion. International law, especially international human rights law, often deals with complicated, difficult-to-resolve is-

424. CRC, *supra* note 12, art.22.
425. Kures, *supra* note 413, at 158.
426. UNHCR Report, *supra* note 411, at ¶ 15.

sues, and by its nature must accommodate cultural conflict. Perhaps one of the reasons the idea of "international family law" seems so problematic is that at least in the West, attitudes are only beginning to change as to whether and to what extent family relations are a proper object of *national* law, or even of law at all. The wall surrounding the proverbial man's castle is only beginning to crumble, and its doctrinal foundations are still for the most part in place. But these doctrines, no less than the meaning of "family," are cultural artifacts that are subject to transformation. Today, international law increasingly regulates matters involving the family, as reflected in a wide range of treaty provisions; there is no turning back. With respect to family separation, the task ahead is to make sense of and improve upon current international law requirements. We must construct from today's piecemeal approach a coherent set of substantive principles and effective procedures that can help to balance the various competing values and find solutions to the serious human rights concerns confronting us. We hope the near future will bring a concerted international effort in that direction. For now, we offer some tentative conclusions drawn from our case studies:

1. Involuntary family separation is a widespread and serious human rights concern.

We hope that if nothing else, this article will help to bring into focus a major problem that affects, we suspect, every country in the world. The forced separation of families occurs in a variety of contexts—from wars and refugee crises to immigration and family courts—but in every case, very serious interests are at stake. The breakup of families is typically devastating to the people involved and, as the Stolen Generations case makes clear, can have serious ramifications for societies and cultural groups. Although we know the number is large, we have no idea how many families are involuntarily broken up worldwide every year, and this is part of the problem; the international community is not paying enough attention. Family separation deserves to be treated as a major human rights issue. It should, accordingly, be incorporated into United Nations human rights reporting requirements for member states and into the U.N.'s own fact-finding assessments and those of non-governmental organizations assessing the human rights situations in particular countries. Protection against involuntary family separation should be part of the agenda of international and national bodies dealing with refugee crises, conflicts, immigration, child protection, gender, racial, and cultural discrimination, and other major human rights concerns.

2. Many instances of family separation occurring today violate already-existing international legal requirements and prohibitions.

Although we have described the current state of international law on the subject of family separation as fragmentary, we do not mean to suggest that it is insignificant. Rather, we simply mean that there is no cohesive and internally consistent set of principles addressing the subject of family separation per se. Instead, a variety of international provisions implicate different aspects of the

problem, while some aspects are not covered at all. Nevertheless, these existing provisions do impose substantial limits on state behavior, as well as some affirmative state obligations. Furthermore, some of these requirements may enjoy a sufficient level of consensus that they rise to the level of customary international law.

In some of the cases we have discussed, we think there is little serious controversy regarding the existence of international law violations—the Australian child removal policy, for example, or the crisis situations discussed in Section II.E. In other cases, we have deliberately selected situations that fall rather close to the line in terms of what international law permits, although we think that each involves some state behavior that crosses that line (or at least the one that we would draw). We have noted that the "hard cases" are characterized by conflicts between values and interests that international law properly recognizes—for example, between the rights of parents and the safety of children, or between the family relationships and economic security of immigrant women and the right to gender equality for those same women. However, we think existing international law can help to resolve the conflicts even in these cases. For example, the recent decisions on family and immigration law by U.S. District Judge Weinstein demonstrate an admirable effort to bring existing international legal principles to bear on a domestic legal system that is ordinarily quite resistant to international influences.

3. *International and domestic courts, and other institutions and individuals who help to shape and apply international law, should recognize an international norm against the involuntary separation of families, and should develop specific sets of rules dealing with family separation in particular contexts.*

The significance of this human rights concern is such that today's piecemeal approach, however helpful, is not enough. We believe that from these beginnings we can see the outlines of a customary international norm against family separation taking shape, and we hope that international and domestic courts and other international law institutions will recognize such a norm in the future. In addition, we think new treaties, protocols, and soft law instruments should address family separation in particular contexts in more specific ways—for example, delineating the procedural and/or substantive rights of immigrants whose families are divided by national borders. Ultimately, we think it is important that involuntary family separation be recognized as a violation of international law in and of itself, not merely a corollary of other human rights concerns such as privacy or protection of children.

4. *This norm should not, however, be considered an absolute rule, but should be subject to limitations grounded in the need to protect other internationally recognized human rights.*

As we have said repeatedly, the individual, cultural, and social interests underlying the value of family unity conflict in many circumstances with other

values and interests that are properly cognizable at international law. Although experience teaches that balancing tests are often so malleable that they can support any desired result, the fact is that when legitimate and important interests conflict there is no alternative but balancing, whether a concretized "test" is employed or not. At a minimum, we think there should be a clear presumption that involuntary family separation violates international law. To put this another way, the existence of involuntary family separation should be considered sufficient to overcome the ordinary baseline presumption of international law—that the actions of sovereign states are presumptively legitimate. Thus, states should have to justify separating families.

The adequacy of a state's justification will, of course, depend on the specific situation. But as a general rule, we think the interests of individuals in staying together with their families are strong enough that, to borrow language (if not doctrinal baggage) from United States constitutional law, the competing interest should be compelling. Sometimes, too, other factors beyond individual interests—such as the cultural integrity of minority groups—may weigh in favor of family unity and thus demand an even stronger justification for separation. Factors that may be considered sufficiently compelling include the safety and well-being of children and the prevention of gender-based and other forms of oppression and violence. But mere citation to these interests should not be sufficient; serious scrutiny as to whether family separation is necessary to accomplish these ends is required. The history of the application of the "best interests of the child" standard, as well as the specter of African immigrant women squatting in abandoned Paris apartments, demonstrate that too often, deference to state authorities' facile determinations regarding what actions are necessary to serve particular interests ends up hurting the very people the policies were designed to help.

5. *This balancing of interests should be conducted in forums that provide for the meaningful participation of all affected family members, including all necessary procedural protections.*

Judge Weinstein's recent immigration decisions have emphasized the importance of affording a fair hearing where potential deportees can argue for consideration of the impact of family separation, and where immigration authorities will genuinely weigh this impact against the state interests supporting deportation. We think that procedural protections such as these are a minimum requirement for the acceptability of any state-enforced family separation, not just in the immigration context but in *any* context. Due process should be afforded when fundamental rights are at stake; this is such a core principle of United States law that it is surprising how routinely it is ignored, as the child welfare case study shows. International law should and does also recognize this right, and the existing international customary and conventional due process protections should be applied consistently in cases of family separation.

6. *Justice within the family is an important objective of international law; to that end, international norms against family separation should not be understood to insulate the family from external scrutiny.*

As discussed in Section I, we think it is overly simplistic to jump to the conclusion that, because violence and injustice often occur within families, the family is necessarily an institution of violence and injustice and deserves no legal protection. But we do recognize the serious need for attention, in both international and domestic law, to issues of human rights within the family, including domestic violence and gender inequality. This is one of feminism's great insights, and today it holds an important place in international law, as the widespread ratification of CEDAW demonstrates. We think that norms of international law protecting families from forcible breakup by the state are fully compatible with a commitment to the individual and structural equality rights of women and children. In any balancing of interests, this latter commitment should weigh heavily. But as the polygamy case study demonstrates, sometimes what seems to be a simple issue of gender inequality does not admit of easy solutions, and policies that disregard concerns for family integrity can often have bad results for women. The polygamy case also shows that it is important to guard against well-intentioned concerns for equality being co-opted, in this case by xenophobic political forces, to serve anti-equality ends.

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We have in this article explored in some depth only a few cases of involuntary separation of families, a widespread problem that has vastly more incarnations and complexities than even this fairly varied sample illustrates. Similarly, we have drawn from these cases only a few general principles and propositions regarding the content and application of a legal norm that can only be developed effectively through international effort informed by international experience. We hope that more international attention will be paid to this problem in the future, because the problem of family separation is not going to go away. Some of the most frequent, yet most difficult to resolve, instances of family separation occur in the context of immigration and anti-immigration policies. Others result from wars and refugee crises, or from intra-cultural conflicts, including changing conceptions of what constitutes a family. We believe that the forces of globalization, combined with social movements worldwide pushing for and against rapid cultural transformation, are likely to bring these pressures and tensions into sharper and sharper focus in coming years. If so, the development of international norms governing family separation will probably become a yet more complicated task—but one that will be ever more important. The problem is vast and daunting taken as a whole, and on an individual level makes for many sad and painful stories. Yet the foundations for a serious international response to it are in place; we hope the international community rises to the challenge.