

2008

Whose Child Is This?: Genetic Analysis and Family Reunification Immigration in France

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Tera R. Murdock, Whose Child Is This?: Genetic Analysis and Family Reunification Immigration in France, 41 *Vanderbilt Law Review* 1503 (2021)

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Whose Child Is This?: Genetic Analysis and Family Reunification Immigration in France

ABSTRACT

In an attempt to limit fraudulent family reunification immigration and control how many migrants enter its borders, France statutorily implemented the use of DNA testing in family reunification immigration in late 2007. Where an immigrating child possesses suspicious documentation, and the child is seeking to reunite with his or her mother in France, the statute provides for voluntary DNA testing to establish that the child has a biological connection with the mother. The requirement of proof of a biological link between family members is diametrically opposed to family recognition policies that apply to French citizens, which emphasize the establishment of social ties rather than genetic links.

This Note asserts that the European Court of Human Rights (ECHR) would find France's 2007 immigration statute violative of the right to family life under § 8 of the European Convention on Human Rights, as the statute creates a dual standard of family recognition for French citizens and immigrant families who are seeking to be unified in that country. In turn, this Note analyzes the public policy rationale behind the DNA testing statute and concludes that the statute could adversely affect desirable social standards. Finally, this Note analyzes how states can limit immigration and protect themselves from immigration fraud while also being mindful of human rights.

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I. INTRODUCTION

The Treaty of Rome, which created the European Economic Community and established the foundation for the modern European Union, provided for the free movement of persons across the internal borders of its member countries.¹ As migration within the European Union has grown, there has been an increasingly negative sentiment towards persons immigrating to the European Union from non-member countries.² In response, member countries have strengthened their external border controls.³ In the 1990s, existing external border controls were not viewed as entirely exclusionary because of a Union-wide commitment to family reunification and human rights.⁴ However, in the past decade, family reunification immigration has grown, accounting for nearly two-thirds of total immigration in some countries, and is now viewed as part of the problem.⁵ Since 2001, migration as a whole has added 0.5% per year

1. DAVID JACOBSON, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP 91 (1996).

2. *Id.* at 92.

3. *Id.*

4. *Id.*

5. KARA MURPHY, MIGRATION POLICY INSTITUTE, FRANCE'S NEW LAW: CONTROL IMMIGRATION FLOWS, COURT THE HIGHLY SKILLED (2006), http://www.migrationpolicy.org/pubs/Backgrounder2_France.php.

to Europe's workforce, surpassing migration to the United States.⁶ In an attempt to limit fraudulent family reunification immigration and control how many migrants enter their borders, eleven nations have incorporated the voluntary use of DNA testing into family reunification immigration. These countries include: Germany, Austria, Belgium, Denmark, Finland, Italy, Lithuania, Norway, the Netherlands, Britain, Switzerland, and Sweden.⁷ These countries allow for the voluntary use of DNA tests where documents are suspicious or missing and require that children have a biological connection to the persons with whom they wish to reunite.⁸ The requirement of proof of a biological link between family members is often diametrically opposed to family recognition policies in these countries, which emphasize recognition of a child by the parent as their own and the establishment of social ties rather than genetic links.⁹

France is the most recent country to implement the use of DNA testing when granting family reunification immigration.¹⁰ This Note asserts that the European Court of Human Rights (ECHR) would find that France's 2007 immigration statute violates of the right to family life under Section 8 of the European Convention on Human Rights, because it creates a dual standard of family recognition for French citizens and immigrant families seeking to be unified in that country. Part II provides an overview of the history of immigration law in France and the new immigration laws promulgated in 2007. Part III explores the family recognition standards applied to French citizens. Part IV discusses the right to family life under the European Convention on Human Rights and analyzes arguments for and against involving the ECHR in cases involving admission standards. Part V, in turn, focuses on the public policy rationale for requiring a genetic link in family reunification immigration and how the DNA testing statute could adversely affect desirable social standards. Finally, Part VI analyzes how states can limit immigration and protect their countries from immigration fraud while also being mindful of human rights.

6. *The Trouble with Migrants*, ECONOMIST, Nov. 22, 2007, at 46, available at http://www.economist.com/world/europe/displaystory.cfm?story_id=10193441.

7. *Controversial Gene Tests Already Used by Swiss*, SWISS INFO, Oct. 24, 2007, http://www.swissinfo.org/eng/front/detail/Controversial_gene_tests_already_used_by_Swiss.html?siteSect=105&sid=8349858&cKey=1193248577000&ty=st.

8. *Id.*

9. *See id.* (noting that "[f]amilies are not biological constructs" and that "[t]here is no universally recognized definition of 'family'").

10. *Id.*

II. AN OVERVIEW OF FRENCH IMMIGRATION HISTORY

A. *Immigration in France: The 1920s to 2006*

France has had two waves of guest laborer immigration in its history—the first wave occurred in the 1920s to rebuild the country after World War I, and the second occurred in the late 1950s and 1960s to rebuild and industrialize the nation after World War II.¹¹ Increasingly, as laborers stayed in the country, they “filled economic niches that local workers showed little interest in filling.”¹² By the 1970s, these guest laborers had become a vital part of the French economy and no longer regularly traveled back and forth from their country of origin to France.¹³ As the lives of these guest workers became more stable in France, they arranged to have their families join them.¹⁴ The flow of guest workers slowed further as unemployment began to rise in the early 1970s and recruitment abroad halted.¹⁵ In 1974, immigration to France shifted from mostly guest workers to families.¹⁶ Since then, family reunification immigration has continued to grow, to the point that in 2006 family reunification immigration accounted for 64% of total French immigration.¹⁷

Recently, the political climate in France has grown increasingly hostile to immigration. In April 2002, French presidential candidate Jean Marie Le Pen of the National Front Party gained 17% of the vote in the national election based on promises to deport illegal immigrants, defend white families in housing developments, and give preference to native French persons in jobs and welfare.¹⁸

The French Parliament enacted a new immigration law in November 2003 in response to the concerns about immigration raised in the 2002 election with the stated goal of fostering integration.¹⁹ Under the law, foreigners who have resided legally in France for one year may apply for family reunification to have their family join them.²⁰ The family was defined as the person’s spouse and minor

11. Emmanuel Peignard, *Immigration in France* (2001), http://www.ideels.uni-bremen.de/immigration_in_france.html.

12. JACOBSON, *supra* note 1, at 27.

13. *Id.* at 27–28.

14. Peignard, *supra* note 11.

15. JACOBSON, *supra* note 1, at 28.

16. MURPHY, *supra* note 5.

17. *Id.*

18. ROXANNE LYNN DOTY, *ANTI-IMMIGRANTISM IN WESTERN DEMOCRACIES: STATECRAFT, DESIRE, AND THE POLITICS OF EXCLUSION* 70 (2003).

19. HAOUA LAMINE & LUCIE BROCARD, *EUROPEAN COORDINATION FOR FOREIGNERS’ RIGHT TO FAMILY LIFE, POLICIES CONCERNING FAMILY REUNIFICATION: OVERVIEW OF FRENCH LEGISLATION ON FAMILY IMMIGRATION*, pmb. (2004), http://www.coordeurop.org/sito/en/06polstat/fra/06en_pol_fra.html.

20. *Id.* § I(1).

children, whether natural (regardless of whether they have been legitimized) or adopted.²¹ The foreign applicant must show that they are capable of supporting their family financially and that they possess adequate housing.²² Further, partial family reunification is generally not allowed under the law; after applying, the applicant must bring their entire family at once.²³ The law does not explicitly allow for other family members, such as non-minor children or brothers and sisters, to be unified with their families.²⁴ However, other family members could apply for a residency permit if they proved that their family life exists in France.²⁵ When applying for a residency permit, an embassy official analyzes the strength of family ties.²⁶ The most successful cases involve young adults who are alone in their country of origin with their entire family legally residing in France.²⁷ Under the 2003 law, illegal residency is punishable by deportation and a bar against admission for three years.²⁸

Despite these restrictions on immigration, there continued to be a push for more stringent law. Riots in the suburbs of Paris during October and November of 2005 increased anti-immigration sentiment and fueled concerns that families reuniting in France were failing to integrate into French culture.²⁹ The riots began after two teenagers of African descent were accidentally electrocuted while running from police in a suburb of Paris.³⁰ Protests led to riots—largely led by second-generation immigrant youths—in 274 cities across France, and resulted in the French government declaring a state of emergency.³¹ Damage from the torching of nearly 9,000 cars and dozens of buildings and schools totaled nearly € 200 million.³²

On July 25, 2006, France adopted a new immigration and integration law restricting family reunification immigration and

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* § I(4).

25. *Id.*

26. *Immigration: Nicolas Sarkozy, as Ministre d'Etat, Minister of the Interior and Town and Country Planning Between 2002 and 2007, and as President of the French Republic since May 2007, Presented Several Bills on Immigration and Integration*, France in the United States: Embassy of France in Washington, <http://ambafrance-us.org/spip.php?article627> (last visited Oct. 29, 2008).

27. LAMINE & BROCARD, *supra* note 19, § I(4).

28. *Id.* § V.

29. *NewsHour with Jim Lehrer, Rioting Continues in France* (PBS television broadcast Nov. 7, 2005), available at http://www.pbs.org/newshour/bb/europe/july-dec05/france_11-07.html.

30. *Unrest Reaches French Capital*, CNN.COM, Nov. 5, 2005, <http://www.cnn.com/2005/WORLD/europe/11/05/france.riots/index.html>.

31. Peter Sahlins, *Riots in France: Civil Unrest in the French Suburbs, November 2005*, Oct. 24, 2006, <http://riotsfrance.ssrc.org/>.

32. *Id.*

encouraging migration of highly-skilled workers.³³ Interior Minister—and presidential contender at the time—Nicholas Sarkozy promoted the law arguing that selective immigration was an “expression of France’s sovereignty.”³⁴ In addressing family reunification, Parliament extended the time period during which immigrants must wait before applying for reunification.³⁵ The 2006 law extended from twelve to eighteen months the requirement of lawful presence before submitting an application for family reunification application.³⁶ The 2006 law also states that immigrating family members must respect the basic principles of family life in France, which include respect for a secular state, equality between man and woman, and monogamy, and that immigrants prove they can support all family members who seek to come to France.³⁷ Finally, the law deletes provisions in the previous statute that allowed illegal immigrants to apply for legal residency after ten years in France; now, the government may directly deport any unauthorized immigrant no matter how long they have been present in the country.³⁸

B. Changes to French Immigration Law in 2007

During his presidential campaign in 2006, Nicholas Sarkozy again promised to toughen France’s immigration policy.³⁹ After President Sarkozy’s election on May 6, 2007, his chief of staff remarked that President Sarkozy had been given “a real mandate” to implement his pledge to be tough on immigration.⁴⁰ One of President Sarkozy’s first actions was to create a Ministry of Immigration, Integration, National Identity and Co-Development, which was assigned the task of “tackling illegal immigration, better integrating newcomers and protecting French identity.”⁴¹

With the stated goal of increasing the proportion of skilled to non-skilled immigrants in France from seven percent to fifty percent, representatives from Sarkozy’s Union for a Popular Movement party

33. MURPHY, *supra* note 5.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. Deirdre Jurand, *France Passes Bill Allowing DNA Tests for Immigrants*, JURIST, Oct. 23, 2007, available at <http://64.41.216.61/paperchase/2007/10/france-passes-bill-allowing-dna-tests.php>.

40. *France Looks to New Sarkozy Era*, BBC NEWS, May 7, 2007, <http://news.bbc.co.uk/2/hi/europe/6631813.stm>.

41. *Critics Fear New French Ministry of Immigration and National Identity Hurts Democracy*, INT’L HERALD TRIB., June 22, 2007, available at <http://www.iht.com/articles/ap/2007/06/22/europe/EU-GEN-France-Immigration-Ministry.php>.

proposed a new law addressing family reunification immigration.⁴² As proposed on September 20, 2007, the law authorized the use of DNA testing to determine whether immigrants applying for visas have a blood relation to the family members they seek to join in France.⁴³ The proposal was part of Sarkozy's plan to assuage "angst over the loss of traditional national identities."⁴⁴ In fact, the title of the bill referenced concern about the failure of immigrants to integrate into French society. The law was entitled, "Projet de loi relatif à la maîtrise de l'immigration à l'intégration et à l'asile,"⁴⁵ or "Bill relating to the control of immigration, integration, and asylum." This law affects the chapter of the French Code entitled "Dispositions relatives à l'immigration pour des motifs de vie privée et familiale et à l'intégration,"⁴⁶ meaning "Provisions relating to immigration affecting private and family life and integration." DNA testing was viewed as a way for embassy authorities to deal quickly with fraudulent birth certificates and marriage licenses and as a way for immigrants to supplement suspicious documentation, in the hopes of reducing previously uncontrolled immigration.⁴⁷ The testing, while voluntary, would be paid for by the immigrant in question under the proposal.⁴⁸

The law was met with widespread criticism,⁴⁹ even from within President Sarkozy's own party. Fadela Amara, the Secretary of State for Urban Affairs and the daughter of Algerian immigrants, threatened to resign over the proposal.⁵⁰ The fiercest opponents said that the use of genetics as the basis for entry into the country was reminiscent of the country's policies under Nazi occupation, which

42. Nathalie Schuck, *France Adopts Controversial Immigration Law*, OAKLAND TRIB., Oct. 24, 2007, at 1, available at http://findarticles.com/p/articles/mi_qn4176/is_20071024/ai_n21078639.

43. Molly Moore, *French Plan to Screen DNA of Visa-Seekers Draws Anger*, WASH. POST, Sept. 21, 2007, at A14, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/20/AR2007092002620.html>.

44. *Id.*

45. Cf. Law No. 2007-1631 of Nov. 20, 2007, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Nov. 21, 2007 [hereinafter Law on Immigration Control, Integration and Asylum] (labeling the final law "Loi No 2007-1631 du 20 Novembre 2007 relative à la maîtrise de l'immigration, à l'intégration et à l'asile")

46. *Id.* at 2.

47. Moore, *supra* note 43.

48. Nathalie Schuck, *French Lawmakers Pass Immigration Bill*, NETSCAPE MONEY & BUS., Sept. 21, 2007, <http://channels.netscape.com/pf/story.jsp?floc=FF-APO1333&idq=fff/story/0001%2F20070921%2F0852083787.htm&sc=1333>.

49. Editorial, *Pseudoscientific Bigotry in France*, N.Y. TIMES (LATE EDITION (E. COAST)), Oct. 21, 2007, at 4.13, available at http://www.nytimes.com/2007/10/21/opinion/21sun2.html?_r=1&oref=slogin.

50. Elaine Sciolino, *Proposal in France to Test Some Immigrants' DNA*, N.Y. TIMES, Oct. 11, 2007, at A3, available at <http://www.nytimes.com/2007/10/11/world/europe/11france.html>.

discriminated against Jews.⁵¹ More than 280,000 persons, including people from all political parties, signed a petition against the law, and thousands participated in street protests on October 20.⁵²

When both houses of Parliament approved the immigration bill on October 24, 2007, the law as passed had been modified from its proposed version. The enacted law, as detailed in Article 13 states that:

Le demandeur d'un visa pour un séjour d'une durée supérieure à trois mois, ou son représentant légal, ressortissant d'un pays dans lequel l'état civil présente des carences, qui souhaite rejoindre ou accompagner l'un de ses parents mentionné aux articles L. 411-1 et L. 411-2 ou ayant obtenu le statut de réfugié ou le bénéfice de la protection subsidiaire, peut, en cas d'inexistence de l'acte de l'état civil ou lorsqu'il a été informé par les agents diplomatiques ou consulaires de l'existence d'un doute sérieux sur l'authenticité de celui-ci qui n'a pu être levé par la possession d'état telle que définie à l'article 311-1 du code civil, demander que l'identification du demandeur de visa par ses empreintes génétiques soit recherché afin d'apporter un élément de preuve d'une filiation déclarée avec la mère du demandeur de visa. Le consentement des personnes dont l'identification est ainsi recherchée doit être préalablement et expressément recueilli. Une information appropriée quant à la portée et aux conséquences d'une telle mesure leur est délivrée.⁵³

Les agents diplomatiques ou consulaires saisissent sans délai le tribunal de grande instance de Nantes pour qu'il statue, après toutes investigations utiles et un débat contradictoire, sur la nécessité de faire procéder à une telle identification.

Si le tribunal estime la mesure d'identification nécessaire, il désigne une personne chargée de la mettre en œuvre parmi les personnes habilitées dans les conditions prévues au dernier alinéa.⁵³

The amended bill still allows for voluntary DNA testing of children seeking to join a mother already in France.⁵⁴ This testing may only

51. *French Parliament Adopts DNA Bill*, BBC NEWS, Oct. 24, 2007, <http://news.bbc.co.uk/2/hi/europe/7059186.stm>.

52. Meryem Marzouki, *Update on DNA and Biometrics in French Immigration Law*, Oct. 24, 2007, <http://www.edri.org/edriagram/number4.20/dna-french-immigration-law>.

53. Law on Immigration Control, Integration and Asylum, *supra* note 45, art. 13. Article 411-1 referenced within the code states that a foreign national who has lived within France for at least one year may assert his right to have his family (spouse and minor children) be admitted to join him in France. Code De L'entrée Et Du Séjour Des Etrangers (2005), available at http://www.ambafrance-dz.org/IMG/Code_entr_e_s_jour2.pdf. Article 411-2 states that a minor child may also initiate the proceedings for family reunification. *Id.* Article 311-1 of the Civil Code details parental recognition standards as applied to French citizens. See *infra* Part III.

54. The test will be voluntary because the statute says "peut," which translates to can or may, rather than "doit" which would translate to should and denote a requirement. See also Agence France-Presse, *France: Parliament Approves DNA Immigration Bill*, N.Y. TIMES, Oct. 24, 2007, at A9 ("In the face of criticism that the government's measure was racist, lawmakers watered it down to an 18-month

be requested where there is serious doubt about the authenticity of documents in the child's possession, the person to be identified has given consent, and the Court of Nantes has reviewed the need for such identification.⁵⁵ The law will not test paternity in order to avoid embarrassing revelations about fidelity in past relationships.⁵⁶ Additionally, by stating, "[c]es analyses [des empreintes génétiques] sont réalisées aux frais de l'État," the state subsidized the cost of DNA analysis.⁵⁷ The law includes a sunset provision, stating "[l]a durée de cette expérimentation, qui ne peut excéder dix-huit mois à compter de la publication de ce décret et qui s'achève au plus tard le 31 décembre 2009." Under this provision, the law will be in effect for no longer than eighteen months after publication, which will be December 31, 2009, at the latest.⁵⁸

A challenge was filed with the French Constitutional Council immediately after the enactment of the law on November 15, 2007.⁵⁹ The Court upheld the DNA provision because the law stipulated that the genetic analysis was to be conducted strictly on a voluntary basis.⁶⁰

III. FAMILY RECOGNITION STANDARDS FOR FRENCH CITIZENS

In France, the notion of family used in civil family law is not based on blood, but instead on recognition of a child as one's own.⁶¹ In 2000, French family law was reformed to take into account changes to the family unit over time, which included a rise in single-parent households and a move towards cohabitating, unmarried couples sharing a household.⁶² These reforms included modification to the law of parental recognition.⁶³ The new parental recognition

experiment and with a DNA comparison being made only for a child seeking to join a mother already in France.”).

55. Law on Immigration Control, Integration and Asylum, *supra* note 45, art. 13.

56. Sciolino, *supra* note 50.

57. Law on Immigration Control, Integration and Asylum, *supra* note 45, art. 13; Sciolino, *supra* note 50.

58. Law on Immigration Control, Integration and Asylum, *supra* note 45, art. 13. Additional provisions in the law require immigrants to pass a French language test and an examination about French history and values before they may enter into the country. *Id.*

59. *French State Council Upholds DNA Immigration Law*, HAABA, Nov. 15, 2007, <http://www.haaba.com/news-story/french-state-council-upholds-dna-immigration-law>.

60. *Id.*

61. Sciolino, *supra* note 50.

62. EMBASSY OF FR. IN THE U.S., FAMILY POLICY (2001), available at http://web.archive.bibalex.org/web/20060927070035/http://www.info-france-usa.org/atoz/fam_pol.asp.

63. *Id.*

standard, applicable to both legitimate and illegitimate children, states that “apparent status shall result from a sufficient collection of facts showing a bond of parentage and relationship between an individual and the family to which he is said to belong.”⁶⁴ The determining factors for a parent-child relationship includes whether the child bears the name of those from whom they are said to descend; whether the parents have provided for the child’s education and support; and whether the child is so recognized in society.⁶⁵ The reforms sought to abolish distinctions in the law between legitimate and illegitimate children and to focus instead on the social ties established between parents and their children.⁶⁶ The French government did not wish to base a child’s status on life choices made by the child’s parents before their birth.⁶⁷

IV. RIGHT TO FAMILY LIFE UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Despite approval by the French Constitutional Council, reservations exist that the 2007 immigration law violates human rights principles by relying on genetics to decide who may have a place in France.⁶⁸ Persons who attempt to enter France for family reunification under this statute and feel their rights are violated may have a remedy outside of the French Judiciary.

The European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted in 1950 by the Council of Europe to protect civil and political rights and freedoms within the signing countries.⁶⁹ The Convention created the European Court of Human Rights (ECHR), a type of pan-European constitutional court which sets common legal standards that influence and shape domestic law.⁷⁰ The European Union, though not tied formally to the Court, plays a role in ensuring that rulings are taken seriously by

64. C. CIV. art. 311-1 [Fr.], available at http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm#CHAPTER%20I%20-%20PROVISIONS%20%20COMMON%20TO%20LEGITIMATE.

65. *Id.* art. 311-2.

66. EMBASSY OF FR. IN THE U.S., *supra* note 62.

67. *Id.*

68. *French State Council Upholds DNA Immigration Law*, *supra* note 59.

69. European Court of Human Rights, Historical Background, <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/> (last visited Oct. 29, 2008). France was one of the original signatories in 1950, but did not ratify the protocol until 1974. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&D F=&CL=ENG> (last visited Oct. 29, 2008).

70. L. Wildhaber, *The Place of the European Court of Human Rights in the European Constitutional Landscape*, <http://www.concourt.am/hr/ccl/vestnik/2.16-2002/vildxaber-rez.htm> (last visited Oct. 29, 2008).

requiring that countries applying for membership comply with the judgments of the court.⁷¹ Today, the ECHR has jurisdiction over forty-six countries and 800 million persons.⁷² Any person who feels that their civil and political rights have been violated by a signatory may bring their case before the ECHR.⁷³ Individuals have the right to bring their case directly before the Court regardless of whether they are a national of the country they are bringing a charge against, as long as the violation occurred in the territory of that country.⁷⁴ All decisions are legally binding, but the court is not responsible for execution of its judgments and may not overrule national opinions or annul national laws.⁷⁵ Compliance is generally the norm, although sometimes nations delay in implementing the judgments.⁷⁶

The Convention consists of three parts, the first of which lists the rights and freedoms recognized for all persons. Article 8 describes the right to respect for private and family life:

Everyone has the right to respect for his private and family life, his home and his correspondence.⁷⁷

71. Jay Walljasper, *The Most Hopeful Courtroom in the World*, ODE, Apr. 2006, available at http://www.odemagazine.com/doc/32/the_most_hopeful_courtroom_in_the_world.

72. *Id.*

73. See European Court of Human Rights, Frequently Asked Questions, <http://www.echr.coe.int/ECHR/EN/Header/Applicants/Information+for+applicants/Frequently+asked+questions/> (last visited Oct. 29, 2008) (describing the process through which an individual may file an application with the Court).

74. *Id.*

75. *Id.*

76. See Walljasper, *supra* note 71 (“Turkey has recently settled the Court’s longest outstanding ruling after eight years of stalling . . . Only a fraction of the almost 6,000 judgments over the past 30 years have posed any problems in enforcement.”).

77. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights]. Article 8 also states that persons have a right to respect for their private life. *Id.* Enforcement of the French law requiring DNA testing for immigrants who have no documents, or flawed documents, necessarily implicates this right as well. Private life is a concept that covers both the physical and psychological integrity of a person, as a person’s body involves the most intimate aspects of private life. *Y.F. v. Turkey*, Eur. Ct. H.R. App. No. 24209/94, ¶ 33 (2003). Such interference will constitute a violation of Article 8, unless the law pursues one of the legitimate aims detailed in subsection two of the article and is in accordance with the law. *Id.* ¶ 36. In the case of the French statute, DNA tests will be given on a voluntary basis after a finding that there is no documentation to support the child’s status that has been asserted. This law considers interference with a person’s physical integrity, by prescribing that a physical sample be taken from the child and resident mother for genetic analysis, but requires the consent of both persons. One might argue that a forceful violation of an intending immigrants physical integrity will occur regardless of whether the test is voluntary or not, because no immigrant will want to decline the test. However, because of the protections that the French statute put in place before the physical sample may taken, such as the court hearing and

The right to respect for family life “does not mean ‘rights of the family,’ but rights of the individual pertaining to his family relations.”⁷⁸ The right protected “is the actual living together of . . . parents with their children, also those from before the marriage who are not related to one parent, when they are taken into the family.”⁷⁹ Everyone, including aliens, has the right.⁸⁰

When interpreting the construction of the right, the ECHR has recognized the way family relationships have changed, and focuses on the both the biological and social reality evident in family relationships, rather than focusing on concerns about legitimacy. In *Kroon v. the Netherlands*, the ECHR analyzed the long-term relationship between Kroon, a Dutch national, and a Moroccan national named Zerrouk.⁸¹ At the time, Kroon was married to another man named M’Hallem-Driss.⁸² Kroon had lived apart from her husband for seven years before instituting divorce proceedings, and her husband’s whereabouts remained unknown at the time of the case.⁸³ However, one month before filing for divorce, Kroon had a child with Zerrouk.⁸⁴ Although Kroon knew that her husband was not the father of the child, under the law of the Netherlands she was unable to deny her former husband’s paternity of the child.⁸⁵ Kroon and Zerrouk never married or lived together, but subsequently had three more children.⁸⁶ Zerrouk cared for and contributed to the upbringing of their children.⁸⁷

The ECHR stated that the notion of family life “is not confined . . . to marriage based relationships and may encompass other de facto family ties.”⁸⁸ These ties may come from parties living together or the demonstration of a consistent relationship.⁸⁹ The ECHR, finding a violation of Article 8 of the Convention, held that “respect for family life requires that *biological and social reality*

investigation into documents, it is unlikely that the ECHR will find a violation of the Article 8 right to respect for private life, unless there is a finding of actual force.

78. Torkel Opsahl, *The Convention and the Right to Respect for Family Life, Particularly as Regards the Unity of the Family and the Protection of the Rights of Parents and Guardians in the Education of Children*, in *PRIVACY AND HUMAN RIGHTS* 182, 188 (A.H. Robertson ed., 1973).

79. *Id.* at 195.

80. *Id.* at 202–03.

81. *Kroon and Others v. the Netherlands*, Eur. Ct. H.R. App. No. 18535/91, ¶ 7 (1994).

82. *Id.* ¶ 8.

83. *Id.* ¶ 9.

84. *Id.* ¶¶ 9–10.

85. *Id.* ¶¶ 12–13.

86. *Id.* ¶ 15.

87. *Id.*

88. *Id.* ¶ 30.

89. Allen E. Shoenberger, *Messages from Strasbourg: Lessons for American Courts from the Highest Volume Human Rights Court in the World—The European Court of Human Rights*, 27 *WHITTIER L. REV.* 357, 389 (2005).

prevail over a legal presumption which . . . flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone.”⁹⁰

The ECHR will not recognize all social relationships, limiting itself to the social reality of that which is generally perceived across member countries. Where states do not generally recognize a proffered social relationship, no one state will not be required to recognize that relationship.⁹¹ For instance, in *Case of X, Y, and Z*, the ECHR found that the state did not have to recognize a relationship between a female-to-male transsexual and a woman because the law concerning recognition of similar relationships was in a transitional state across countries who were signatories to the European Convention on Human Rights.⁹² Thus, any decision by the ECHR concerning changes to the French immigration law regarding recognition between a mother and a child would not lead to a forced recognition of relationships that are not currently recognized by the states of the European Union.

While the ECHR will find a balance between biological and social constructs, it has found that family ties can exist where there is no biological relationship. The largest exception to the purely biological construct is legally recognized adoption where there are no biological ties—only the social construct of a family.⁹³ In *Wagner and J.M.W.L. v. Luxembourg*, the court found that there was a violation of Article 8 of the Convention where the state failed to recognize the family ties created by a judgment of full adoption delivered in Peru to Wagner, a single woman.⁹⁴ Luxembourg claimed that the Peruvian decision was not enforceable because the civil code in Luxembourg did not allow full adoption by a single woman.⁹⁵ While there was a conflict of laws, the ECHR found that the Luxembourg law interfered with the right to respect for family life.⁹⁶ While Luxembourg possessed the right to protect “health and morals” and the “rights and freedoms of the child” when creating its adoption laws, the social reality across Europe was

90. Kroon, Eur. Ct. H.R. App. No. 18535/91, ¶ 40 (emphasis added); see also Shoenberger, *supra* note 89, at 389.

91. X, Y and Z v. the United Kingdom, Eur. Ct. H.R. App. No. 75/1995/581/667, ¶¶ 41, 44 (1997).

92. *Id.* ¶ 44.

93. ROBERT WINTEMUTE, ILGA-EUROPE, SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION: THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE EUROPEAN COURT OF JUSTICE (2006), [http://www.ilga-europe.org/content/download/9913/58423/file/Council%20of%20Europe%20\(Commissioner%20for%20Human%20Rights\).doc](http://www.ilga-europe.org/content/download/9913/58423/file/Council%20of%20Europe%20(Commissioner%20for%20Human%20Rights).doc).

94. Press Release, Eur. Ct. H.R., Chamber Judgment Wagner and J.M.W.L. v. Luxembourg, § 3, (June 8, 2007), available at http://www.coe.int/t/e/legal_affairs/legal_co-operation/family_law_and_children's_rights/Judgments/Press%20release%20Wagner.pdf [hereinafter Wagner Press Release].

95. *Id.*

96. *Id.*

that single persons could adopt without restriction.⁹⁷ The court emphasized that in cases such as these, the interests of the child take precedence over biological constructs.⁹⁸

Where a family tie with a child has been established, "the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible . . . the child's integration in his family."⁹⁹ In *Sen v. the Netherlands*, the ECHR found that the Netherlands violated the Convention in refusing to grant a residence permit to a child of foreign parents in order to allow family reunification.¹⁰⁰ The Sen family had migrated from Turkey to the Netherlands ten years earlier but had left their daughter in the care of an aunt.¹⁰¹ While in the Netherlands, the Sen's had two other children.¹⁰² When the Sen's applied for family reunification for the daughter to join their family in the Netherlands, the Netherlands denied their request as it felt that the child had established a life in Turkey and would be unlikely to integrate into Dutch society comfortably.¹⁰³ However, the ECHR found that a family bond still existed with the members in the Netherlands, and while the child had only lived in Turkey, the family's other two children had always lived in the Netherlands.¹⁰⁴ The family, as a whole, had few links to Turkey other than nationality, and as the child was still an adolescent, she could be integrated into the family unit.¹⁰⁵ Some might argue that this case creates an argument that biological ties should be favored over social ties as the genetic bond was valued over the bond between the child and her caregiver aunt; however, in this instance, the Court found that social ties did not exist with the aunt.¹⁰⁶ The aunt was simply a temporary caregiver, and it was the wish of both the aunt and the parents, with whom the child did have a biological and social bond, that the child be sent to the Netherlands.

When analyzing the new French law, one can imagine a situation where a mother, now living in France and separated from her child, seeks to have the child join her in France. It may be the case that neither the child nor the mother has the papers to prove the basis of their relationship, such as a birth certificate, nor can the mother document that she has contributed to the child's education

97. *Id.*

98. *Id.*

99. Kroon and Others v. the Netherlands, Eur. Ct. H.R. App. No. 18535/91, ¶ 32 (1994).

100. *Sen v. the Netherlands*, Eur. Ct. H.R. App. No. 31465/96, ¶ 42 (2001).

101. *Id.* ¶ 19.

102. *Id.* ¶¶ 12, 20.

103. *Id.* ¶ 21.

104. *Id.* ¶ 28.

105. *Id.* ¶ 40.

106. *Id.* ¶ 33.

and support or that the child is viewed as her own in society. Under the law, if the mother is also the child's biological mother, a genetic test would be conducted to prove the biological link and the child would be reunited with her mother in France. However, if the child is adopted or is a step-child, the child and mother would not be reunited. These relationships are not extraordinary—they are more than common-place. While the new immigration law references article 311-1 of the French Civil Code, which focuses on a variety of factors when determining the basis of a parent-child relationship, the genetic test is used only where these factors are not sufficiently documented. Where documents are not available, only children with a biological link to their mother may have hopes of being reunited with their parent in France.¹⁰⁷

One can also imagine a situation where the parents of the child have an unconventional relationship, such as in the *Case of X, Y and Z*. The relationship between the parents of a child, however, does not affect the relationship between the parents and that child. For example, a state may choose not to recognize same-sex marriage; however, recognizing a parent-child relationship between a child who is the biological child of one or the adopted child of both will not disrupt this policy choice.

While the European Convention on Human Rights generally prohibits interference with family life, the state may intervene where it is in the best interest of the country.¹⁰⁸ The French statute at issue not only presents concerns about violating the individual's right to family life, but it also raises important questions about the state's right to regulate immigration and the status of entering aliens when in the best interests of the country.¹⁰⁹ This standard is outlined in Article 8, Section 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.¹¹⁰

Under Section 2, the court considers whether a fair balance has been struck between the competing interests of the individual and the

107. *X, Y and Z v. the United Kingdom*, Eur. Ct. H.R. App. No. 75/1995/581/667, ¶¶ 41–46 (1997).

108. European Convention on Human Rights, *supra* note 77, art. 8.

109. See *The Trouble with Migrants*, *supra* note 6 (noting the Western European concern about the influx of legal and illegal immigrants from poor countries, including the newest Eastern European members of the EU).

110. European Convention on Human Rights, *supra* note 77, art. 8.

community as a whole.¹¹¹ Generally, the state enjoys a “margin of appreciation” when balancing these interests.¹¹² The ECHR has specifically held that nations have a strong interest in regulating who may enter or be admitted to their country and who may establish residence.¹¹³ Although the right to family life protects the interest of the family staying together even against the interest of a state in deporting non-citizens, a state is not required to reunite a family within its borders if the domestic immigration laws prohibit it.¹¹⁴ Generally put, the state has no obligation to respect the choice of persons to reside in a country and then authorize family reunion in its territory.¹¹⁵ Despite the margin of appreciation, the Convention may still supersede a country’s domestic immigration statute; where the applicant does not meet conditions set by national immigration policy, the ECHR will conduct an independent investigation to decide whether family life exists, and if so, whether the European Convention on Human Rights imposes an obligation on the state to permit residence.¹¹⁶

When establishing the scope of the State’s obligations where immigration policy is involved, the Court conducts a fact-specific examination in light of the following principles:

- (a) the extent of a State’s obligation to admit to its territory relatives of settled immigrants [which] will vary according to the particular circumstances of the persons involved and the general interest;
- (b) [that] as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory;
- (c) [that] where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory.¹¹⁷

The issue of immigration was further emphasized in *Tuquabo-Tekle and Others v. the Netherlands*. The applicant, Goi Tuquabo-Tekle, fled Ethiopia during a civil war, leaving her daughter, Mehret, with an uncle and her grandmother in what became the state of Eriteria.¹¹⁸ Norway granted Tuquabo-Tekle a residence permit on

111. *Kroon and Others v. the Netherlands*, Eur. Ct. H.R. App. No. 18535/91, ¶ 31 (1994).

112. *Id.*

113. *Sen v. the Netherlands: Right to Respect for Family Life—Violation*, 12 HUM. RTS. CASE DIG. 963, 964 (2001).

114. Shoenberger, *supra* note 89, at 394, 402.

115. *Sen v. the Netherlands: Right to Respect for Family Life—Violation*, *supra* note 113, at 964.

116. *Tuquabo-Tekle and Others v. the Netherlands*, App. No. 60665/00, ¶ 25 (2003).

117. *Id.* ¶ 43.

118. *Id.* ¶ 9.

humanitarian grounds.¹¹⁹ She subsequently married Tarreke Tuquabo, who was living in the Netherlands as a refugee and joined him in the Netherlands.¹²⁰ The couple had two children.¹²¹ Four years after moving to the Netherlands, Tuquabo-Tekle filed a request for a residence visa for Mehret, now fifteen.¹²² Under a “restrictive immigration policy owing to the population and employment situation in the Netherlands,” the Netherlands denied their request for a visa on the grounds that close family ties had ceased to exist between Mehret and Tuquabo-Tekle and had never existed between Mehret and her stepfather.¹²³ The ECHR found several extenuating circumstances that had created the delay: barriers to reaching contacts in Eritrea due to their refugee status, the impossibility of obtaining travel documents, and finding appropriate housing within the Netherlands.¹²⁴ Despite these obstacles, Tuquabo-Tekle and her husband had been sending money by courier to Eritrea to provide support to their child, which the Court found maintained family ties.¹²⁵ Finally, while the ECHR had rejected claims by failed applicants for family reunification in which the children have reached an age where they can care for themselves, Mehret was still a minor in this case.¹²⁶ Considering the circumstances together, and keeping in mind that the state’s right to regulate immigration is strong, the ECHR found that the state had “failed to strike a fair balance between the applicants’ interests on the one hand and its own interest in controlling immigration on the other.”¹²⁷ While the domestic immigration law itself was not in violation of the Convention, the ECHR found the statute’s application was a violation of the right to family life.

Thus, based on past decisions of the ECHR, a child immigrating to France for the purposes of family reunification who can establish social family ties, but who is denied entry because of the results of genetic analysis under the 2007 immigration statute, would likely have a remedy under the Convention, despite the margin of appreciation granted to states to establish immigration policy.

119. *Id.* ¶ 10.

120. *Id.*

121. *Id.*

122. *Id.* ¶ 11.

123. *Id.* ¶¶ 14, 21.

124. *Id.* ¶ 13.

125. *Id.* ¶¶ 13, 41.

126. *Id.* ¶¶ 48–50.

127. *Id.* ¶ 50.

V. REVIEWING THE PUBLIC POLICY RATIONALE

Analyzing the potential public policy rationale and the circumstances surrounding the general interest behind the 2007 immigration statute would help the ECHR establish the scope of the State's obligations where immigration policy is involved.

A. Changing Views of Family Recognition

DNA testing seems to lead society back towards an emphasis on biology in defining principles of family recognition, rather than emphasizing who has assumed the role of parenthood.¹²⁸ In the past, parenthood was understood as a "natural relationship founded on biological reproduction."¹²⁹ Adoption was viewed as a formal creation of a substitute relationship that replicates biology.¹³⁰ Today in France, people generally marry later in life after a period of cohabitation.¹³¹ As modern technology has flourished, reproduction has occurred later in life, resulting in an alteration of the traditional biological connections between parent and child; artificial insemination, assisted reproduction, surrogacy, and in vitro fertilization procedures all have the potential to divide biological parents from those who ultimately nurture and rear a child.¹³²

Studies show that the *fact* that a genetic connection exists implies nothing about the dimensions of the concomitant interpersonal relationship.¹³³ Reuniting families allows for easier assimilation into the new country. All families, when trying to maintain connections across borders, are unable to cut the umbilical cord that ties them to their home country. Feelings of responsibility towards one's family necessarily requires divided families to remain involved politically, socially, and economically in the affairs of their home country, as well as the new home to which they have immigrated. Once a family is united, they can happily merge into a nation's society by fully participating politically, economically, and socially.¹³⁴ It does not follow that states can assume that genetic-based families will have a greater sense of responsibility or will be

128. David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 126 (2006).

129. *Id.* at 125.

130. *Id.* at 126.

131. *Id.* at 132.

132. *Id.* at 134–35.

133. *See generally id.* at 134–36 (noting the various ways in which courts have expanded parental rights to persons without a genetic connection).

134. *See* Anna Gorman, *Making for Easier Assimilation*, L.A. TIMES, Feb. 7, 2008, at B2, available at <http://www.latimes.com/news/local/politics/cal/la-me-assimilate7feb07,1,2678111.story>.

more loving than families made of members-by-choice.¹³⁵ Thus, it is logical to presume that families who do not have a genetic relationship are no less likely to resist integration when apart, and are just as likely as those with genetic relationships to assimilate once reunited.

Disparate recognition standards are negative and further isolate non-citizens from citizens in their path to integrate into their new society. In France, a different parental recognition standard applies to French citizens.¹³⁶ While parenthood is considered a multi-faceted relationship for French citizens, immigrants are limited to defining the parent-child relationship as genetics-based. While French family law was modified to prevent the creation of any formal distinction between legitimate and illegitimate children, the differing standard applied to immigrants creates a new foundation for disparity.¹³⁷ Children of immigrants who are not genetically linked to their parents are given a secondary status and the relationship is not recognized, despite the fact that the child may be with the only parent she has ever known. This dual standard implies that French families may recognize multi-faceted relationships, but without documentation, an immigrating family may only be trusted when they assert the most basic nuclear family structure.

B. Questionable Testing Results

Modern technology must satisfy questions about effectiveness. Chromosomes, which are contained in every human cell, are made up of strands of DNA—deoxyribonucleic acid.¹³⁸ DNA is made up of four kinds of molecular sub-units called nucleotides.¹³⁹ There are nearly three billion nucleotide pairs within the human genome.¹⁴⁰ When DNA is tested, technicians extract DNA from bodily tissue and analyze the nucleotide base pairs.¹⁴¹ Of these DNA base pairs, 99.9% are identical to all humans; differences occur in only 0.1 percent of DNA.¹⁴² When a person is tested to determine paternity or maternity, genetic markers are compared to determine whether a

135. Janet L. Dolgin, *Personhood, Discrimination, and the New Genetics*, 66 BROOK. L. REV. 755, 815 (2000).

136. See *supra* Part III.

137. Sciolino, *supra* note 50.

138. Jeremy A. Colby, *An Analysis of Genetic Discrimination Legislation Proposed by the 105th Congress*, 24 AM. J. L. & MED. 443, 446 (1998).

139. *Id.*

140. *Id.*

141. *Id.* at 449.

142. Nicholas Bakalar, *New DNA Mapping Project to Trace Genetic Ills*, NATIONAL GEOGRAPHIC NEWS, Oct. 26, 2005, http://news.nationalgeographic.com/news/2005/10/1026_051026_dna_hapmap.html.

biological relationship exists.¹⁴³ While most DNA is identical among all humans, the differences that appear are unique to each individual. Fifty percent of each individual's genetic makeup, however, is inherited from each of the individual's biological parents. Thus, every genetic marker contained in a child's DNA must match a genetic marker in one of the potential parent's DNA.¹⁴⁴ Without taking human error into account, paternity tests are generally effective 99,999 times out of 100,000.¹⁴⁵ However, human error cannot be so easily discounted. DNA evidence can be negligently or intentionally misidentified.¹⁴⁶ Misinterpretation may also be a problem in labs where technicians are overworked.¹⁴⁷

Additionally, where natural-born children do not have the same DNA as their parents because of chimerism, DNA testing may be inconclusive.¹⁴⁸ A chimera is a person with more than one set of genetically distinct cells.¹⁴⁹ In as many as fifteen percent of pregnancies, a fetus is conceived alongside a twin who does not survive the earliest stages of development.¹⁵⁰ That embryo may be absorbed into the body of the developing fetus; the fetus then grows with two sets of DNA.¹⁵¹

While fused embryos are rare, chimerism can also result from cell swapping in utero or genetic mutation.¹⁵² In utero, it is common for the mother and fetus to exchange blood cells.¹⁵³ These cells can migrate into the fetus' organs and reside alongside native cells.¹⁵⁴ If these cells migrate to a future test site, the paternity test may not produce a match.¹⁵⁵ Some scientists assert that as many as fifty to seventy percent of all people are chimeras due to cell-swapping in utero.¹⁵⁶

143. JACKIE TAITZ, *EXPLORING THE USE OF DNA TESTING FOR FAMILY REUNIFICATION* 12 (2001).

144. See, e.g., DNA Paternity Testing, http://www.dnareplication.info/paternity_testing.php (last visited Oct. 30, 2008).

145. See *id.*

146. Mark A. Rothstein & Meghan K. Talbott, *The Expanding Use of DNA in Law Enforcement: What Role for Privacy?*, 34 J.L. MED. & ETHICS 153, 155 (2006).

147. Susan Kruglinski, *Who's Your Daddy? Don't Count on DNA Testing to Tell You*, DISCOVER, Apr. 2006, at 68-69.

148. *Id.* at 69.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. Gina Kolata, *Cheating, or an Early Mingling of the Blood?*, N.Y. TIMES, May 10, 2005, at F1, available at http://www.nytimes.com/2005/05/10/health/10bloo.html?_r=1&oref=slogin.

In fact, while it was long thought that a person's DNA remains unchanged after birth,¹⁵⁷ recent medical advances have unearthed instances where a person's DNA is temporarily changed.¹⁵⁸ Doctors have learned to improve effectiveness of organ transplants by helping the donor's cells take over parts of the recipient's body.¹⁵⁹ Advances in transplant science may lead to permanent chimerism.¹⁶⁰

Finally, though rare, genetic mutation may also lead to inaccurate DNA testing.¹⁶¹ When a fertilized egg divides, one of the DNA bases may be deleted or multiplied.¹⁶² The mutation would therefore lead to different cells in the fetus than in either the biological mother or father.¹⁶³

Taken together, human error and biological quirks may confound modern technology so that a DNA test may not be able to prove that a natural-born child is biologically linked to a parent.

C. Refusal as a Proxy for Testing

Article 8 protects particularly vulnerable immigrants against arbitrary acts by public officials.¹⁶⁴ In *Y.F. v. Turkey*, the applicant alleged that after his wife was arrested, the police forced her to undergo a gynecological examination in order to protect themselves against possible accusations of rape during her questioning.¹⁶⁵ The government argued that the procedure had been explained to the applicant's wife prior to the examination and that she could have refused to undergo the examination.¹⁶⁶ The government alleged that she had not refused, so the procedure could not have been conducted

157. Alan Davis, *Are You My Mother? The Scientific and Legal Validity of Conventional Blood Testing and DNA Fingerprinting to Establish Proof of Parentage in Immigration Cases*, 1994 BYU L. REV. 129, 136.

158. See generally Stephen I. Alexander et al., *Chimerism and Tolerance in a Recipient of a Deceased-Donor Liver Transplant*, 358 NEW ENG. J. MED. 369, 372-73 (2008), available at <http://content.nejm.org/cgi/reprint/358/4/369.pdf> (discussing temporary chimerism in a 9-year old liver transplant recipient).

159. *Id.* at 373.

160. In an effort to reduce the need for immunosuppressive drugs by producing a permanent chimera, some doctors have begun to combine organ transplants with accompanying bone marrow transplants. So far, this procedure has led to temporary chimerism, with the hope that chimerism might be made more permanently. Tatsuo Kawai et al., *HLA-Mismatched Renal Transplantation without Maintenance Immunosuppression*, 358 NEW ENG. J. MED. 353, 360-61 (2008), available at <http://content.nejm.org/cgi/reprint/358/4/353.pdf>; see also Alice Park, *Organ Transplants Without the Drugs*, TIME, Feb. 11, 2008 at 57.

161. Kruglinski, *supra* note 147 at 69.

162. *Id.*

163. *Id.*

164. *Y.F. v. Turkey*, Eur. Ct. H.R. App. No. 24209/94, ¶ 43 (2003).

165. *Id.* ¶¶ 10, 12, 21.

166. *Id.* ¶ 30.

against her consent.¹⁶⁷ The ECHR found that, considering the police officers had hit her and threatened her while she was in custody, the applicant's wife could not have been expected to object.¹⁶⁸

Similarly, a request from an immigration official to a person intending to immigrate would be inherently coercive.¹⁶⁹ It is likely that persons choosing not to submit to the test would be asked to leave the country and lose the opportunity to be reunited with their family. Immigrants may also lack knowledge of their right to refuse or the consequences of consent.¹⁷⁰ Immigrants can face additional hardships when documents establishing genetic or marital ties are missing or insufficient.¹⁷¹ Immigration officials may even come to find the responses to be self-selective; many feel that those who deny request for DNA testing already know that the outcome will be negative.¹⁷²

The statute provides that the cost of the tests will be subsidized, removing cost as an issue; however, there are other reasons a person might refuse to undergo DNA testing.¹⁷³ Religious constraints, for instance, may prevent a person from providing the required biological sample.

D. Maintaining Distance between the ECHR and Domestic Issues

It may be argued that creating an obligation to protect the rights preserved in the European Convention on Human Rights of all persons, citizen or non-citizen, who wish to enter into the states of the European Union, extends the ECHR's jurisdiction too broadly.¹⁷⁴ However, while matters relating to domestic security and policing

167. *Id.*

168. *Id.* ¶¶ 11, 24.

169. Rothstein & Talbott, *supra* note 146, at 156.

170. *Id.*

171. TAITZ, *supra* note 143, at 25–26.

172. *Id.* The tendency for national courts to view a refusal to undergo DNA tests as a positive indication of paternity is evident in *Mikulic v. Croatia*. In that case, the Zagreb Municipal Court heard evidence in a civil suit to establish paternity. *Mikulic v. Croatia*, Eur. Ct. H.R. App. No. 53172/99, ¶ 8 (2002). The Court found that the defendant's failure to appear at six different scheduled appointments for a DNA test supported the applicant's mother's testimony that the defendant was the applicant's father. *Id.* ¶¶ 8–25, 30. As no measures existed under domestic law to compel the defendant to comply with the first-instance court's order that DNA tests be carried out, the ECHR found a violation of Article 8. *Id.* ¶¶ 61, 64–66. Similarly, while genetic analysis is mentioned in the French law, it is not required, and immigration officials could not compel any intending immigrants to yield to a DNA test.

173. TAITZ, *supra* note 143, at 26.

174. See *Tuquabo-Tekle and Others v. the Netherlands*, Eur. Ct. H.R. App. No. 60665/00, ¶¶ 26, 30 (2003). The Government's preliminary objection in this case concerned jurisdiction; however, the objection was not raised prior to the Court's decision as to the admissibility of the application, and the objection was dismissed. *Id.* ¶ 32.

should be given deference, some check on state legislatures is necessary when making such important human rights decisions. The European Court of Justice, the court that governs appeals from states in the European Union, lacks jurisdiction over matters concerning visas, asylum, and immigration.¹⁷⁵ Thus, states need not fear conflicting rulings from these two pan-European courts. Additionally, some protection is offered against frivolous lawsuits in the ECHR, as relief is generally prospective and applicants may not benefit financially from judgments in their favor.¹⁷⁶ Finally, the relief that is available where the ECHR finds a violation is payment of “just satisfaction”; the court cannot overrule a nation’s lower court decision, and litigants cannot appeal a domestic statute created by the nation’s lawmakers.¹⁷⁷

Some may argue that regulating immigration is one of the sovereign rights of a nation with which the ECHR should not interfere. The signatories to the European Convention on Human Rights are signatories to a charter that lists fundamental human rights, including the right to family life and the right to privacy. As such, these countries, including France, opened themselves to regulation and should be bound to protect these basic human rights and allow themselves to be regulated by the ECHR in this regard. While nations have the right to decide which voluntary migrants they may accept, European states should not shut their eyes to the human tragedy of refugees. Europe needs immigrants to protect its economy from dropping birth and death rates.¹⁷⁸ According to the Berne Initiative created by the Swiss government in 2001, one of the common understandings for the management of international migration is that “[a]ccording to customary international law, states are bound to protect and respect the fundamental human rights of all migrants, irrespective of their status.”¹⁷⁹

175. Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT’L L. 95, 116 n.101 (2003).

176. *Id.* at 147.

177. European Court of Human Rights, Frequently Asked Questions, *supra* note 73.

178. Press Release, The Secretary-General, A Europe Open to Well-Managed Migration Will Be Fairer, Richer, Stronger, Says Secretary-General in Brussels Address, U.N. Doc. SG/SM.9134 (Jan. 29, 2004), available at <http://www.un.org/News/Press/docs/2004/sgsm9134.doc.htm>. Without immigration, the twenty-five members of the EU, who had a collective population of 452 million in 2000, are projected to have a population of only 400 million by 2050. *Id.*

179. PHILIP L. MARTIN ET AL., *MANAGING MIGRATION: THE PROMISE OF COOPERATION* 240 (2006).

E. Promoting Marriage as Society's Ideal Relationship

Laws that recognize family relationships have long presumed that any child born to a woman while she is married, or shortly after the marriage has been dissolved, is the biological child of the woman's husband.¹⁸⁰ Laws requiring that families immigrating for family reunification be genetically linked may be seeking to promote the marriage relationship. Marriage proponents believe it brings stability to a population by providing a forum to create emotional attachments and find individual happiness.¹⁸¹ Marital relations also ensure the continuance of the population and provide an additional forum for educating the young.¹⁸² In fact, the state often uses marriage as a secondary vehicle to ensure the welfare of the population because the value of responsibility is attached to the marriage relationship.¹⁸³ For example, when a person loses their job, they may turn to their spouse for support before relying on the welfare of the state.

However, this presumption seeks to answer only whether a child is legitimate or illegitimate (legitimacy is the relationship between a child and its father);¹⁸⁴ it does not help in establishing whether there is a parent-child relationship with the father or mother.¹⁸⁵ Further, French family law concerning recognition of children does not use the marriage relationship as a factor in deciding parental recognition in order to prevent differentiation between children born legitimately and illegitimately.¹⁸⁶ As the standard for French citizens does not promote the marriage relationship above others, it is counterintuitive that the state would wish to emphasize this relationship in their immigrant populations.

Increasingly, French citizens are deciding not to get married and are instead living together and creating life-long partnerships.¹⁸⁷ As immigrant populations enter France, the state may feel that promoting marriage in this new community may affect broader change and increase marriage rates throughout France. While the

180. Egon Guttman, *Presumptions of Legitimacy and Paternity Arising out of Birth in Lawful Wedlock*, 5 INT'L. & COMP. L.Q. 217, 219 (1956).

181. Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscengenation Policy*, 25 SUFFOLK U. L. REV. 981, 991-92 (1991).

182. *Id.* at 991.

183. *Id.* at 991-92.

184. Guttman, *supra* note 180, at 219.

185. *See generally id.* at 217 (noting the traditional correlation of the legitimacy of the child with the validity of the marriage).

186. *See supra* Part III.

187. Molly Moore, *More Longtime Couples in France Prefer L'Amour Without Marriage*, WASH. POST, Nov. 21, 2006, at A22, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/20/AR2006112001272.html>. In 2006, marriage rates in France were 45% below those in the United States. *Id.* In 2004, the marriage rate was 4.3 per 1000 people. *Id.*

state has the ability to regulate marriage as a social institution, it should not entirely control decisions about marriage. Marriage is as much a private choice as it is a public institution, and, ultimately, it has no effect on whether a child is biologically linked to her parent. Finally, the presence or absence of a marriage does not affect the fact that children may be adopted or that genetic variation can occur.

The state may argue that recognizing only biological children promotes the interest of legal certainty in several areas of law, including inheritance law. However, inheritance law in France provides equal inheritance rights for children who are legitimate or illegitimate, as long as a parent-child relationship has been established.¹⁸⁸

F. Preventing Child-Trafficking

Another argument for suggesting a biological basis for family immigration is that doing so may prevent persons from trafficking children. Persons could appear at the French border with children in their arms, claiming that they are bringing the child to reunite them with their mother, only to later force the child into trafficking rings once across the border. Some may argue that requiring a biological relationship would cut down on these false claims and promote the safety of children internationally.

In fact, the percentage of minors who are trafficked for prostitution in Europe is considerably lower than in other regions of the world due to harsher criminalization.¹⁸⁹ The majority of persons who are trafficked for prostitution into Europe are between the ages of 18 and 25,¹⁹⁰ past the age of majority and outside of the scope of the new French immigration statute. One must also ask whether an individual who smuggles children would actually attempt to bring them through the border by spinning an elaborate lie about kinship and family connections. Rather than individuals committing trafficking crimes by moving through the border, the majority of trafficked persons pass through professional trafficking syndicates that are sophisticated, well-organized, and well-funded.¹⁹¹ Focus should be placed on dismantling these crime networks rather than creating barriers to the entry of all children who hope to be reunited with their families. While preventing trafficking of all persons should be a major concern for all nations, this concern does not provide meaningful support for the statute.

188. *Id.*

189. Martti Lethi & Kauko Aromaa, *Trafficking for Sexual Exploitation*, 34 CRIME & JUST. 133, 148 (2006).

190. *Id.*

191. Melanie R. Wallace, *Voiceless Victims: Sex Slavery and Trafficking of African Women in Western Europe*, 30 GA. J. INT'L & COMP. L. 569, 587 (2002).

G. Preventing Fraud

Requiring a biological connection may cut down on fraud in situations where one individual pays another to claim a family relationship with them in order to immigrate. The genetic testing amendment was purposely added to ensure that visa-seekers were not utilizing fraudulent papers, which are widespread in African countries.¹⁹²

Again, implementing the statute as it stands is not the only possible solution in seeking to prevent fraud. In the United States, marriage fraud is fought in the immigration arena by looking at factors other than the marriage certificate.¹⁹³ Officers interview the husband and wife separately and analyze whether the couple appears to be building a life together.¹⁹⁴ When the interviewer is satisfied, the non-citizen spouse is granted conditional, permanent residence for two years.¹⁹⁵ The non-citizen spouse may petition to have the conditions on the permanent residence removed after two years, provided that they are still married; or, if they are no longer married, they must prove that they entered the marriage in good faith and the marriage had been terminated for good cause.¹⁹⁶

A similar tactic could be used to combat fraud in the family reunification arena rather than focusing solely on the veracity of documents. Although some children are too young to be interviewed, their accompanying guardian could show proof of a parent relationship through facts about the family and their life together. Children as young as three could be interviewed about specific memories with the interviewer helping to narrate their experience without influencing their disclosure.¹⁹⁷ Once children reach the age of five, they are generally better able to recall kinship outside the context of the nuclear family (aunts, first cousins, etc.).¹⁹⁸ An interviewer may be able to discern whether a child actually knows the person to whom they are claiming to be related.

192. Nathalie Schuck, *Contested French Immigration Bill Passes*, BOSTON GLOBE, Oct. 23, 2007, http://www.boston.com/news/world/europe/articles/2007/10/23/contested_french_immigration_bill_passes/.

193. James A. Jones, *The Immigration Marriage Fraud Amendments: Sham Marriages or Sham Legislation?*, 24 FLA. ST. U. L. REV. 679, 681–83 (1997).

194. *Id.* at 682.

195. *Id.*

196. *Id.* at 682–83.

197. LOUISE SAS, CANADIAN DEPT. OF JUST., THE INTERACTION BETWEEN CHILDREN'S DEVELOPMENTAL CAPABILITIES AND THE COURTROOM ENVIRONMENT: THE IMPACT ON TESTIMONIAL COMPETENCY 44–46 (2002), http://justicecanada.net/eng/pi/rs/rep-rap/2002/rr02_6/rr02_6.pdf.

198. *Id.* at 41; *see also id.* at 34 (“In general, research has shown that increased information processing abilities, better use of memory strategies and greater knowledge, all interact to produce more accurate and stronger memory traces in children older than five.”).

H. Use of the Procedure in Other Countries

President Sarkozy defended the bill by stating that, “[t]his DNA test exists in eleven countries in Europe—including some [s]ocialist ones, like Great Britain. How is it that it doesn’t pose a problem in these countries, but it creates a debate here?”¹⁹⁹

The ECHR often looks to reform in other signatory countries as a sign of whether a particular case decision or statute violates human rights principles.²⁰⁰ In fact, DNA technology has been used in the immigration context by several nations since the early 1990s.²⁰¹ Therefore, the likelihood that the ECHR will find that the French statute violates the Convention depends on the construction of similar statutes in these other countries and whether they have been successfully challenged in any of these nations’ courts of first instance.

While some countries will accept DNA tests only where they are provided by the immigrant on their own initiative as evidence of a family relationship, other countries will recommend DNA tests where authenticity of documents are in doubt. Switzerland has been using DNA tests where there are doubts about the authenticity of documents since 2004.²⁰² Switzerland, however, does not provide the safeguard of court approval for testing as the French statute does.²⁰³ Finland, using a method similar to that in the French statute, allows for voluntary DNA testing after giving the issue separate consideration on an individual basis and after allowing family members to present oral and written evidence of the family relationship.²⁰⁴ Neither country, however, focuses solely on children under eighteen and only on the relationship between a child and their mother. In fact, the Finnish web site states that

[a] purely biological relationship is not, however, sufficient for a positive decision on resident permit without the background of a genuine, permanent family life. A foster child, for example, could therefore be granted a resident permit on the basis of family ties if identifiable as an integral member of the family.²⁰⁵

199. Sciolino, *supra* note 50.

200. See Wagner Press Release, *supra* note 94, § 3 (observing that adoption by unmarried persons was permitted without further restriction in a study of the member States’ legislation and subsequently holding that a failure to recognize an adoption by a single woman was a violation of the Article 8 right to family life).

201. TAITZ, *supra* note 143, at 7.

202. Doreen Carvajal, *French Council Approves DNA Testing for Immigrants*, INT’L HERALD TRIB., Nov. 15, 2007, <http://www.iht.com/articles/2007/11/15/europe/france.php>.

203. *Id.*

204. Press Release, Finnish Immigration Service, DNA Testing Has United a Record Number of Immigrant Families (Jan. 1, 2008), <http://www.migri.fi/netcomm/content.asp?article=3234&frontpage=true>.

205. *Id.*

Other countries that use DNA tests in some form when making decisions about family reunification immigration include Germany, Austria, Belgium, Denmark, Italy, Lithuania, Norway, the Netherlands, Britain and Sweden.²⁰⁶

To date, no case has been brought before the ECHR questioning the validity of a DNA testing statute. The use of DNA testing varies widely across Europe, and only one-quarter of the signatories to the convention use a form of DNA testing for immigration purposes. At this point, it would not be possible to predict how the ECHR would rule based on the construction of similar statutes in other countries. The variation between who may be tested, when the test may be used, when court approval is required, and who bears the cost, creates a situation where no general guiding thought or paradigm can be determined.

VI. LIMITING MIGRATION WHILE RESPECTING HUMAN RIGHTS

A. A Plan that Mitigates the Worst Effects

“Family reunification is first and foremost a matter of rights and humanitarianism. But promoting family reunification is also sound social policy, with positive economic consequences. Any calculation of the costs of family class immigrants needs to be balanced by a calculation of the costs of keeping families separate.”²⁰⁷

The solution is not for France to repeal the statute and open its doors to all persons claiming a family relationship, as some scholars have suggested.²⁰⁸ This would create security problems for the state and fill established immigration quotas with persons without family ties to persons already working in France. Neither should France adopt more restrictive immigration policies, such as creating quotas or eliminating family reunification immigration entirely. Persons who wish to be unified with their families may simply come without authorization if prohibited from entering the country legally, again creating a security risk by encouraging illegal entry.²⁰⁹

France’s concern about encouraging integration is valid and should be addressed. However, the current solution of requiring biological ties between a mother and child before entry is allowed does not adequately address the problem. According to the United

206. *Controversial Gene Test Already Used by Swiss*, *supra* note 7.

207. TAITZ, *supra* note 143, at 7 (quoting CANADIAN COUNCIL FOR REFUGEES, BRIEF TO THE IMMIGRATION LEGISLATIVE REVIEW (1997), available at <http://www.ccrweb.ca/legrev.htm>).

208. JONATHON W. MOSES, INTERNATIONAL MIGRATION: GLOBALIZATION’S LAST FRONTIER 3, 59 (2006).

209. MARTIN ET AL., *supra* note 179, at 229.

Nations High Commissioner for Refugees, integration into a new country succeeds when an individual is accompanied and supported by their family.²¹⁰

France could limit immigration without encroaching on human rights by focusing on limiting employment-based immigration. However, on a continent where the native-born workforce will shrink by forty-four million by the middle of this century, immigrants will be necessary to keep the economy afloat;²¹¹ thus, placing quotas on those coming to France to work is not an attractive option. Employment immigration provides the economic impetus for international migration.²¹² In fact, this statute was introduced with the intention of increasing the inflow of skilled workers from seven to fifty percent.²¹³ However, encouraging the permanent settlement of skilled workers has an unintended effect; once these laborers begin to live in France permanently, their labor is no longer cheaper than indigenous labor.²¹⁴ As settlers, laborers make demands on social services, housing, and public education.²¹⁵ Finally, by being unable to be united with their families, laborers will fail to become integrated and will instead come to rely on “private transnational ties” that unite them with their country of origin.²¹⁶ When integration is the goal, employment immigration cannot be severed from family reunification immigration because the two are intrinsically connected.

Ultimately, any plan that France adopts must carefully balance a non-citizen’s right to family life and the state’s sovereign right to determine the number and types of persons to be admitted into their country by discouraging fraud and ensuring that both biological families and social families are reunited. While a DNA sample may be proffered by the applicant, it should not be used at the suggestion of an immigration official, in order to avoid coercion. Genetic analysis should be but one factor that interviewers consider when making determinations about entry and admission, whether accurate

210. U.N. High Comm’r for Refugees [UNHCR], Exec. Comm. of the High Comm’r’s Programme, *Family Protection Issues*, ¶ 16, U.N. Doc. EC/49/SC/CRP.14 (June 4, 1999), available at <http://www.unhcr.org/excom/EXCOM/3cc414164.pdf>.

Experience has shown that the family unit has a better chance of successfully . . . integrating in a new county, than do individual refugees. In this respect, protection of the family is not only in the best interest of the refugees themselves, but is also in the best interests of States.

Id.

211. *The Trouble with Migrants*, *supra* note 6.

212. JACOBSON, *supra* note 1, at 36.

213. Schuck, *supra* note 42.

214. JACOBSON, *supra* note 1, at 37.

215. *Id.*

216. *Id.*

paperwork is available or not. Genetic analysis should not be the final say in any immigration decision, especially where it concerns a child.

Immigration officials should apply the fact-specific test that the ECHR applies when it considers whether there is a violation under Article 8.²¹⁷ France could provide for officials to conduct interviews that analyze whether the family lived together at any time; whether the relationship was consistent; whether the child was supported financially; whether there are obstacles to living in the country of origin; the age of the child; the child's situation in the country of origin; and whether the child is dependent on the parents. Finally, the same definition of family applied to French citizens should be used in immigration proceedings. All natural-born children, whether legitimate or illegitimate, and adopted children should be allowed to reunite with their mothers who are living as residents in French territory.

Currently, the French statute has a sunset provision that will allow the law to lapse by December 31, 2009.²¹⁸ Until the law is amended or lapses, immigration officials should have counselors available to both explain the intrusive nature and requirements for the testing process and to deal with family crises that might result from the test results.²¹⁹ There is a risk of children being abandoned in such situations.²²⁰

B. What Should Be Done to Implement This Rule?

Implementation of this solution would likely prove to be cost-neutral. Genetic analysis, currently used under the statute, can cost up to € 600 per test.²²¹ There are nearly 23,000 immigration cases in France each year that involve children,²²² signifying that the state could be subsidizing a cost upwards of € 13,800,000. While genetic analysis would not be required in every case, the cost of the test is still staggering. As court approval is required for the test,²²³ the French court system may be more conscious of funding and the cost of tests approved throughout the year. However, relying on the court to regulate cost may place immigrants arriving late in the year at a disadvantage.

217. See *supra* Part IV.

218. Law on Immigration Control, Integration and Asylum, *supra* note 45, art. 13.

219. TAITZ, *supra* note 143, at 28.

220. *Id.* at 6.

221. Alasdair Sandford, *Immigrant DNA Tests Plan Raises Storm for Sarkozy*, GUARDIAN (U.K.), Sept. 14, 2007, at 26, available at <http://www.guardian.co.uk/france/story/0,,2169068,00.html>.

222. *Id.*

223. *Id.*

Instead, funding should be allocated by the legislature to allow for training for immigration officials on how to successfully interview children. This approach would likely be significantly less expensive. Admittedly, because interviews would require a longer time commitment from each individual, the cost will not be directly financial but will require a use of more resources. It is likely that more immigration officials would need to be hired. But again, the expense would not approach the massive cost of subsidizing genetic analysis. The interview could even be integrated with the interview in which intending immigrants are asked about their understanding of the French language and French values.

VII. CONCLUSION

Limiting immigration to biological families only will cause France to frustrate the very goal of family reunification and integration that the state is trying to encourage. While the construct of family varies across cultures, France should at least apply the same definition of family to intending immigrants as they do their own citizens. While violence among immigrant populations disturbs the French public, that violence will only increase if immigrants are isolated and kept from formally recognizing their parent-child relationships. France need not resort to genetics to determine who should be welcome within the nation, but should instead rely on human rights principles.

Failure to amend the statute's provision that provides for voluntary genetic analysis may lead to a finding by the ECHR that the statute violates the European Convention on Human Rights, despite the state's interest in regulating immigration. Specifically, there would be a violation of Article 8 and the right to respect for family life due to a refusal to enable the family ties between a mother and child to be developed and to allow the child's integration into that family. The court would likely find a violation regardless of whether the applicant child was a natural-born or adopted child of their mother because the court generally finds a balance between biological and social constructs of family. Rather than offering a DNA test to a child seeking family reunification where documents are absent or fraudulent, immigration officials should interview the child to determine whether family ties exist. DNA testing is a technical tool that can be used properly, but may also be abused. A DNA test might be accepted and considered as a factor in the decision where the test is offered by the child or their parent, but should not be considered where it is offered by the immigration official to avoid imposing a feeling of obligation on the intending immigrant. When interviewing the child, the immigration official should apply the same fact-intensive inquiry that the ECHR applies and that the French

government applies to their own citizens when determining whether a parent-child relationship exists.²²⁴ This solution will enable immigration officials to take into account that family is both a social and biological construct and will prevent a genetic-based barrier to entry into France for immigrants.

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224. C. CIV. art. 311-1 [Fr.].

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