

“NOW THEY’VE ROBBED ME:” THE USE OF TERMINATION OF PARENTAL RIGHTS IN GOVERNMENT-FRACTURED IMMIGRANT FAMILIES

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ABSTRACT

Today, immigrant parents in civil detention are vulnerable to losing their parental rights. When a parent is detained or otherwise unable to care for his children for more than 15 months, the Adoption and Safe Families Act requires a state to petition to terminate his parental rights—in every case, without any allegation of unfitness, and over the objection of both the parent and the children. In other words, the state imposes enormous physical and temporal distance between a parent and her children by detaining her while her immigration case is pending, and then uses that distance as a justification to extinguish her legal rights to her children. This devastating practice is the result of the overlapping but uncoordinated interaction between immigration law and family law, which allows and even encourages states to strip noncitizen parents of their parental rights as a consequence of their civil detention and, by extension, their immigration status. Parents can be forced into the cruel dilemma to fight their immigration case and lose their parental rights, or preserve their family's unity, even if it means deportation. This Article explores the fundamental unfairness and irrationality of the government's intrusion into immigrant families in these situations and suggests potential solutions at federal, state, and local levels to restore agency to immigrant parents and defend family integrity.

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I. INTRODUCTION

One day in 2010, Hilaria was arrested for defending herself against her abusive husband.¹ His threats escalated into a physical altercation, and he began

1. Seth Freed Wessler, *Thousands of Kids Lost from Parents in U.S. Deportation System*, COLORLINES (Nov. 2, 2011, 8:00 AM), <http://www.colorlines.com/articles/thousands-kids-lost-parents-us-deportation-system> [<https://perma.cc/ESV6-7B2T>].

The examples shared in this Article are of immigrant parents and their children who have been threatened with the termination of the parents' rights to custody of their children. A parent is referenced only by her first name as a result of the limited information available about some of the parents and in the interest of continuity. Additionally, many of these cases are several years old. Recent examples are difficult to find as state courts generally seal child custody cases. *See, e.g.*, Garance Burke & Martha Mendoza, *AP Investigation: Deported Parents May Lose Kids to Adoption*, AP NEWS (Oct. 9, 2018), <https://www.apnews.com/97b06cede0c149c492bf25a48cb6c26f> [<https://perma.cc/SD7X-PYAX>] (discussing the difficulty of gathering data in child custody cases and tracking how often state court judges allow the children of immigrants to be given up for adop-

beating and choking her.² She resisted—struggling out of his grasp and running to the kitchen, where she reports she picked up a screwdriver and threw it at him, drawing blood.³

A neighbor heard yelling and called the police.⁴ When officers arrived at their home, Hilaria’s husband told them she had attacked him and the police arrested her for assault.⁵ Upon learning their children were in the home during the altercation, the police called Child Protective Services (“CPS”).⁶ However, after the officers and Hilaria’s abusive husband told the CPS caseworker that Hilaria was the attacker, the caseworker left the children in the husband’s care.⁷ Two weeks later, the caseworker returned to check on the children, and suspecting their father was using drugs, removed the children from the home and placed them in foster care.⁸

A couple months after the abusive episode, Hilaria discussed the incident in a small visitation room inside an immigration detention center.⁹ Crying, she shared, “I’ve had domestic violence before, but I took it for my kids Now they’ve robbed me. I did what I did to defend myself and my kids.”¹⁰

Faced with deportation, Hilaria applied for a type of immigration relief available to certain victims of domestic violence.¹¹ However, given the assault charges against her, she was in violation of a zero-tolerance policy against so-called “criminal” immigrants, reducing the chances the government would grant her a visa.¹² Twelve months after the incident, Hilaria was still in a detention center, and her children were still in foster care.¹³

At the time journalist Seth Freed Wessler published his report detailing her story, Hilaria had, at most, three months before the state of Arizona petitioned to terminate her parental rights. Under federal law, states are required to file a Termination of Parental Rights (“TPR”) petition if a parent’s child has been in foster

tion). As a result, the cases referenced in this Article are generally from published cases that were appealed to higher courts.

2. Wessler, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* Wessler’s article does not specify which kind of visa this is, but the author may be referring to U nonimmigrant status or a “U visa,” a form of immigration relief granted by U.S. Citizenship and Immigration Services to victims of qualifying crimes who have been helpful to law enforcement. See *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (June 12, 2018), <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status> [<https://perma.cc/AJD3-N>].

12. See Wessler, *supra* note 1.

13. *Id.*

care for fifteen consecutive months.¹⁴ In Hilaria’s case, she was almost certainly detained for several more months while her application for relief was adjudicated. As a result of these policies, Hilaria faced a strong likelihood that the state would initiate proceedings to terminate her parental rights.

Parents in Hilaria’s position have no right to an appointed attorney to help them navigate the numerous, complex and interlocking immigration proceedings they will face. Like the vast majority of detained immigrants, they will have to fight their removal without an attorney, often in their second or third language, with very limited ability to gather and translate documents to support their cases while in detention.¹⁵ If the Immigration Judge denies their application for relief, they have the right to appeal the denial to the Board of Immigration Appeals (“BIA”), and ultimately to the federal court of appeals.¹⁶ Even if they win before the immigration judge, the Department of Homeland Security can appeal a grant of relief to the BIA.¹⁷ The process takes months, even years, during which time many parents remain in immigration detention.¹⁸

Hilaria’s case illustrates the devastating circumstances many immigrants and their children face when parents are threatened with deportation. When parents are detained or otherwise unable to care for their children for more than 15 months, the Adoption and Safe Families Act (“ASFA”) requires states to automatically initiate proceedings to terminate their parental rights in every case, regardless of any allegations of unfitness on the part of the parent.¹⁹ Fighting to retain one’s parental rights while in immigration detention (hereinafter

14. See 42 U.S.C. § 675(5) (1935), amended by 42 U.S.C. § 675(5)(E) (1997).

15. See Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 *FORDHAM L. REV.* 541, 542 (2009); see also *Legal Representation Needed to Fill Justice Gap, Says Immigration Panel*, A.B.A., (Aug. 12, 2014), http://www.americanbar.org/news/abanews/aba-news-archives/2014/08/representation_isla.html [<https://perma.cc/BX9J-KYUF>] (noting that approximately 83% of detained individuals are unrepresented).

16. *Fact Sheet: Immigration Courts*, NAT’L IMMIGRATION FORUM, (Aug. 7, 2018), <https://immigrationforum.org/article/fact-sheet-immigration-courts/> [<https://perma.cc/B9AZ-VVA9>].

17. See, e.g., FLORENCE IMMIGRANT & REFUGEE RIGHTS PROJECT, *APPEALING YOUR CASE TO THE BOARD OF IMMIGRATION APPEALS 11* (May 2013), https://www.dioceseofjoliet.org/siteimages/peace/documents/Jail_and_Prison_Ministry/BIA-Appeal-Guide-2013_new-BIA-address-2013.pdf [<https://perma.cc/8SY7-JPZZ>].

18. Although cases for detained individuals are supposed to move “relatively quickly” in comparison to non-detained cases, they can still take months—or more—to conclude if appeals are taken. BRYAN LONEGAN & THE IMMIGRATION LAW UNIT OF THE LEGAL AID SOC’Y, *IMMIGRATION DETENTION AND REMOVAL: A GUIDE FOR DETAINEES AND THEIR FAMILIES 24* (Feb. 2006), https://www.nilc.org/wp-content/uploads/2015/12/detentionremovalguide_2006-02.pdf [<https://perma.cc/L3TT-YPM4>]. For example, the average length of detention for individuals in the Central District of California was 13 months, and the median was one year. See Brief for Respondents at 8, *Jennings v. Rodriguez*, No. 15-1204 (Oct. 17, 2016). Over 20% of those individuals were detained for more than 18 months and 10% for more than two years. *Id.* See also FLORENCE IMMIGRANT & REFUGEE RIGHTS PROJECT, *supra* note 17, at 10 (“... the BIA is supposed to make a decision within six months if you are detained.”) (emphasis in original).

19. Adoption and Safe Families Act, Pub. L. No. 105–89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.).

"detention")²⁰ poses onerous, if not insurmountable, challenges and can subject parents to the cruel dilemma of choosing to fight their immigration case to the utmost or preserving their family's unity, even if it means deportation.

This convergence of immigration and family law has immense human costs, as almost one in four deportations involve the parent of a U.S. citizen child.²¹ However, the percentage of people deported who are also parents is likely far greater, as current data does not reflect immigrant parents of undocumented children.²² Despite promises from Immigration Customs and Enforcement ("ICE") that its "immigration enforcement activities, including detention and removal, do not unnecessarily disrupt the parental rights or family ties of alien parents,"²³ in 2011, there were "at least 5,100 children" living in foster care with parents who had been detained or deported.²⁴ The Applied Research Center estimated that 15,000 more children would be in the same position in 2016.²⁵

The detention of noncitizen parents often precipitates a family's involvement with child protective services, foster care, and family court. Once a parent is detained, often as a result of a home or work raid or, as in Hilaria's case, contact with the criminal law system, children are forced into foster care when no other parent or family member with lawful immigration status is able or approved to care for the children.²⁶ Once fifteen months have passed, the ASFA requires that the state petition to terminate the parent's rights to her children.²⁷ Put simply, the state takes children from their devoted noncitizen parent, places them in foster care, and later moves to terminate the parent's rights to their children for no reason other than the length of their immigration detention, even when a

20. Immigration detention is the only type of civil detention contemplated in this Article. As such, it will be referred to simply as "detention" throughout the Article.

21. Seth Freed Wessler, *Nearly 205K Deportations of Parents of U.S. Citizens in Just Over Two Years*, COLORLINES (Dec. 17, 2012, 9:45 AM), <http://www.colorlines.com/articles/nearly-205k-deportations-parents-us-citizens-just-over-two-years> [<https://perma.cc/N8WL-VSC8>].

22. *Id.* Moreover, "experts say that the total number of deportations of parents may be higher because some mothers and fathers fear telling authorities they have kids." *Id.*

23. U.S. IMMIGR. AND CUSTOMS ENF'T, DEP'T OF HOMELAND SEC., DEPORTATION OF ALIENS CLAIMING U.S.-BORN CHILDREN 2 (Apr. 28, 2014), <http://big.assets.huffingtonpost.com/2013-report1.pdf> [<https://perma.cc/B85J-RRK2>] [hereinafter U.S. IMMIGR. AND CUSTOMS ENF'T].

24. SETH FREED WESSLER, APPLIED RES. CTR., SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 6 (2011), <http://arc.org/shatteredfamilies> [<https://perma.cc/8HHX-X43R>].

25. *Id.* More specific or recent data regarding the number of children in foster care with parents who had been detained or deported is difficult to find. The estimate from the Applied Research Center is "one of the only available counts of these children because state child welfare agencies don't track this information," and was based on anecdotal evidence and case studies. Beth Cortez-Neavel, *Left Behind: Trump's Immigration Plans Could Spur Uptick in Foster Care Numbers*, THE CHRONICLE OF SOC. CHANGE (Dec. 19, 2016), <https://chronicleofsocialchange.org/featured/left-behind-trumps-immigration-plans-could-increase-children-of-deported-immigrants-in-foster-care> [<https://perma.cc/DMV2-HCUT>].

26. See Wessler, *supra* note 24, at 52–56 (discussing the unwillingness of CPS to place children with family members who are noncitizens, including non-custodial parents).

27. See 42 U.S.C. § 675(5) (1935), amended by 42 U.S.C. § 675(5)(E) (1997).

parent has never previously been involved with child protective agencies or been anything less than an engaged, dedicated parent.

This devastating practice is the result of the overlapping but uncoordinated interaction between these two bodies of law, which allows and even encourages states to strip noncitizen parents of their parental rights as a consequence of their immigration status. This Article seeks to address the fundamental unfairness and irrationality of the state's action to terminate parental rights when a child is placed in foster care as a consequence of a noncitizen parent's civil detention.²⁸ Parts II and III provide background on the relevant family and immigration law, respectively; Part IV discusses how these two systems operate simultaneously to tear apart immigrant families. Part V considers possible solutions to the current crisis immigrant families face and suggests ways to restore some measure of agency to detained immigrant parents who are simultaneously forced to confront two of their greatest fears—deportation and the loss of their children.

II.

THE CONSTITUTIONAL RIGHTS OF PARENTS AND THE STATE'S INTERVENTION TO TERMINATE THEM

A. The Parents' Right to the Care and Custody of Their Children

Custody determinations and family law issues in general are the province of state courts.²⁹ However, the Supreme Court has long stressed the federal constitutional protections given to parents and consistently upheld parents' rights against state involvement.³⁰ The Court has held that parental rights represent a fundamental interest triggering the highest constitutional protection.³¹

28. The adjudicatory process for immigration removal and detention is civil, not criminal, in nature. *See, e.g.*, *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (“A deportation proceeding is a purely civil action Consistent with the civil nature of a proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing.”). Although the Supreme Court maintains that “removal proceedings are civil in nature,” it has acknowledged the unique nature of removal proceedings, noting that “deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century . . .” *Padilla v. Kentucky*, 559 U.S. 356, 365–66 (2010).

29. *E.g.*, *Rose v. Rose*, 481 U.S. 619, 625 (1987) (quoting *In re Burrus*, 136 U.S. 586, 593–94 (1890)); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979).

30. *See generally* *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (holding that a statutory scheme assuming unwed fathers were unfit parents violated the Equal Protection Clause); *Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (1972) (finding that Amish parents were permitted to raise their children in the Amish religion and choose to have their children forgo attending secular schools); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 32–33 (1981) (emphasizing parental rights but declining to find a constitutional right to counsel in termination proceedings); *Santosky v. Kramer*, 455 U.S. 745, 747 (1982) (holding that the Due Process Clause of the Fourteenth Amendment requires more than a preponderance of the evidence standard in a termination of parental rights hearing); *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000) (striking down a Washington state law that allowed a third party to petition state courts for child visitation rights over parental objection).

31. *See, e.g.*, *Santosky*, 455 U.S. at 753; *Troxel*, 530 U.S. at 65.

Accordingly, the standard for terminating a parent’s rights is a rigorous one. Termination of a parent’s rights is one of the most invasive actions a government actor can take into a family’s life; it is the legal extinguishment of the parent-child relationship, working “a unique kind of deprivation.”³² Because of the gravity and permanence of state action rendering a parent and his³³ child legal strangers, there are additional legal hurdles to termination meant to protect the parent’s right to be involved in his child’s life. For example, the Supreme Court has required states to provide additional due process protections to parents in termination of parental rights proceedings, such as conducting a hearing on the parent’s fitness,³⁴ applying a standard of proof at least as high as clear and convincing evidence (as opposed to the preponderance of the evidence standard usually applied in civil cases),³⁵ and ensuring the equal right of indigent parents to appeal a termination of their parental rights.³⁶ Additionally, while the Supreme Court has held that appointment of counsel is not required for parents in termination proceedings,³⁷ almost all states have chosen to provide appointed attorneys to parents by statute.³⁸

These constitutional protections apply to all families. Citizen families, noncitizen families, and mixed-status families are all entitled to the same due process protections under the Fourteenth Amendment, which apply to “any person within [a state’s] jurisdiction.”³⁹

32. *Lassiter*, 452 U.S. at 27.

33. Both he/his and she/her pronouns are used to refer to parents in this Article. Given the nature of this Article and its focus on parenthood, the author wanted to ensure that the parental rights of detained immigrant fathers were also highlighted. In many publicized examples, the image of a mother separated from her child is broadcast as especially cruel and unnatural, when the idea of a father separated from his child should be regarded as equally egregious.

34. *Stanley*, 405 U.S. at 658 (“[A]ll . . . parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody.”); *see also* *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (“We have little doubt that the Due Process Clause would be offended ‘[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.”) (quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring in judgment)).

35. *Santosky*, 455 U.S. at 768–70.

36. *M.L.B. v. S.L.J.*, 519 U.S. 102, 107 (1996) (finding that equal protection and due process require states provide an opportunity for parents to appeal terminations of their parental rights without regard to parents’ ability to pay for trial transcripts).

37. *Lassiter*, 452 U.S. at 32–33.

38. Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, CLEARINGHOUSE REV. J. OF POVERTY L. & POL’Y 245, 246 (2006); *see also* Vivek Sankaran, *A National Survey on a Parent’s Right to Counsel in Termination of Parental Rights and Dependency Cases*, U. MICH. L. SCH., <http://youthrightsjustice.org/Documents/SurveyParentRighttoCounsel.pdf> [<https://perma.cc/WT5Y-LC7K>] (finding that all states except for Mississippi, Hawaii, and Wyoming had a clear statutory right to appointed counsel in TPR proceedings).

39. U.S. CONST. amend. XIV, § 1. The Supreme Court has consistently held that due process protections apply to noncitizens as well as citizens. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 679 (2001) (holding that the Due Process clause applies to all people within the United States, including “aliens, whether their presence is lawful, unlawful, temporary or permanent”); *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (noting that due process under the Fifth and Fourteenth Amendments

Under this line of family law cases, the Supreme Court has articulated a strong parental rights doctrine that undergirds all state family law decisions and limits state involvement in the protected family sphere.⁴⁰ Because of this, parents, theoretically, need only meet a minimum degree of acceptable care of their children to ward off government intervention in their family life.⁴¹ As the Court has explicitly maintained:

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.⁴²

B. The State's Duty to Protect Children

Though protected, a parent's rights to the care and custody of his child are not absolute. The government retains a *parens patriae* interest in the physical safety and welfare of children.⁴³ In *Prince v. Massachusetts*, the Supreme Court noted a parent's right to direct the care and religious upbringing of a child—but qualified that “against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end . . .”⁴⁴ Several decades later, the Court elaborated in *Wisconsin v. Yoder* that the State's *parens patriae* interest should only be found to trump a parent's constitutional right in limited circumstances, such as where a child is endangered by the parent's choices.⁴⁵

applies “even [to] aliens whose presence in this country is unlawful . . .”; *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (finding that “all persons within the territory of the United States are entitled to the protections guaranteed by [the Fifth and Six Amendments], and that even aliens shall not be . . . deprived of life, liberty or property without due process of law”).

40. See generally *Stanley v. Illinois*, 405 U.S. 645 (1969); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Lassiter*, 452 U.S. 18; *Santosky v. Kramer*, 455 U.S. 745 (1982); *Troxel v. Granville*, 530 U.S. 57 (2000).

41. See, e.g., Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C. J. L. & SOC. JUST. 63, 70 (2012) (citing MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* 36 (2005) (stating that, under the Supreme Court's elucidation of a parental rights doctrine, the government's role is restricted to deciding the “outer limits of what is acceptable parenting”).

42. *Santosky*, 455 U.S. at 753.

43. Stacy Byrd, *Learning from the Past: Why Termination of a Non-Citizen Parent's Rights Should Not be Based on the Child's Best Interest*, 68 U. MIAMI L. REV. 323, 329 (2013) (referencing *Prince v. Massachusetts*, 321 U.S. 158 (1944)).

44. *Prince*, 321 U.S. at 165.

45. *Yoder*, 406 U.S. at 230 (“This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred.”).

C. The Adoption and Safe Families Act

Although family law is governed primarily by the states, Congress has at times flexed its *parens patriae* interest to further regulate state family law. In 1980, Congress passed the Adoption Assistance and Child Welfare Act ("AACWA"), which focused on finding permanent homes for children.⁴⁶ Under AACWA, permanence for children was still "firmly rooted in the traditional ideas of family preservation."⁴⁷ The Act centered around ameliorating the underlying problems in a family home that could lead to children's removal and required "reasonable efforts" to reintegrate children into their families after removal.⁴⁸ However, children's rights advocates in the late twentieth century became increasingly critical of AACWA and its goal of family preservation, arguing greater emphasis should be placed on permanency and adoption for children rather than family preservation.⁴⁹

In response, Congress passed the Adoption and Safe Families Act under the Clinton Administration in 1997, drastically altering the landscape of family law and shifting the government's policy focus to adoption over family reunification and restoration.⁵⁰ For example, the ASFA requires states that receive federal funding for child protective services to conduct a permanency hearing no more than twelve months after a child enters the foster care system.⁵¹ The hearing is imposed to determine whether a child should be "(1) returned to the parent; (2) placed for adoption, in which case the state will petition to terminate parental rights; (3) referred for legal guardianship; or (4) placed in another planned living arrangement."⁵² A state court can defer to a child protective agency's judgment

46. Adoption Assistance and Child Welfare Act (AACWA), Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified as amended in scattered sections of 42 U.S.C.).

47. Yablon-Zug, *supra* note 41, at 75.

48. *Id.*; see also AACWA § 471(a)(15).

49. See Yablon-Zug, *supra* note 41, at 73 n.57 (citing ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE (1999) (exploring the history of the child welfare system and arguing that it does not adequately account for the best interest of the child, and should instead focus on increased state intervention, removal of children from their homes, and adoption); R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875 (1998) (asserting that race preferences in adoption are damaging because they limit the possibility of adoption and arguing in favor of a non-accommodation policy that would preclude adoption agencies from facilitating these racial preferences).

50. Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.). See also Adoption and Safe Families Act of 1997, Proceedings and Debates of the 105th Cong., 143 Cong. Rec. S12668-03, 12671 (1997) (statement of Sen. Jay Rockefeller) ("This legislation is designed to move children out of foster care and into adoptive and other permanent homes more quickly and more safely than ever before The legislation also substantially cuts the time a child must wait to be legally available for adoption into a permanent home by requiring States to file a petition for termination of parental rights for a child who has been waiting too long in a foster care placement.").

51. See ASFA § 101(a)(15)(C), 42 U.S.C. § 671(a)(15)(C) (1935, as added and amended).

52. See Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 37 HARV. J. ON LEGIS. 1, 8 (2001).

that reunification is unreasonable as a sufficient reason to terminate a parent's rights.⁵³ The accelerated timeline of proceedings, the mandatory permanency hearings at twelve months, and the reliance on an agency's judgment about whether reunification is reasonable—without an independent judicial inquiry—all represented a shift towards more and faster adoptions. The ASFA also offers financial incentives for children to be adopted, paying states a bonus for foster child adoptions over an average baseline in the state, further illustrating a marked policy change in favor of adoption.⁵⁴

Additionally, and importantly, the ASFA mandates the initiation of TPR proceedings if a child has been in foster care for fifteen of the previous twenty-two months.⁵⁵ The ASFA does not independently establish that a parent is automatically unfit, or that termination is appropriate solely because her child has been in foster care for the statutory period; the statute only requires that the state "file a petition to terminate the parental rights."⁵⁶ However, some state courts have "erroneously assumed that a child's placement in foster care for fifteen of the previous twenty-two months is dispositive of unfitness."⁵⁷ In so doing, state courts have unfairly permitted the ASFA to "play a substantive, rather than a procedural, role in the termination process."⁵⁸

The case of Mercedes and her two children provides such an example:⁵⁹

Mercedes, a single mother, was born in Guatemala and sought asylum in the United States in 1992.⁶⁰ She did not know how to read and write and spoke no English and very little Spanish.⁶¹

53. *Id.* at 7.

54. See 42 U.S.C. § 673(b); Dorothy Roberts, *ASFA: An Assault on Family Preservation*, PBS.ORG (2002), <https://www.pbs.org/wgbh/pages/frontline/shows/fostercare/inside/roberts.html> [<https://perma.cc/GAE5-W3HU>] (excerpted from DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002)) ("The federal government pays states a bonus for foster child adoptions during the fiscal year that exceed a baseline of the average annual number of children adopted in the state between 1995 and 1997. States receive \$4,000 for each child adopted above the baseline.").

55. 42 U.S.C. § 675(5) (1935), amended by U.S.C. § 675(5)(E) (1997). The ASFA establishes three limited exceptions to the 15/22 rule regarding the initiation of TPR proceedings: if the child is being cared for by a relative at the option of the state; if there is a "compelling reason" for deciding that filing the petition is not in the child's best interests; or if the State has not made "reasonable efforts" to return the child to the family. 42 U.S.C. § 675(5)(E)(i)-(iii).

56. 42 U.S.C. § 675(5)(E).

57. C. Elizabeth Hall, *Where Are My Children . . . and My Rights? Parental Rights Termination as a Consequence of Deportation*, DUKE L. J. 1459, 1469–70 (2011); see, e.g., *In re Angelica L.*, 767 N.W.2d 74, 87–88 (Neb. 2009) ("The court questioned whether parental unfitness needed to be established in this case in order to terminate parental rights, but it concluded that, regardless, the State provided sufficient evidence of Maria's unfitness [in the form of failing to provide adequate pre- or post-natal care through either Maria's unauthorized trip to the United States with a premature infant or giving birth to a premature infant in the U.S.]").

58. Hall, *supra* note 57, at 1470.

59. *In re Mainor T.*, 674 N.W.2d 442 (Neb. 2004).

60. *Id.* at 448–49.

61. *Id.*

She spoke an indigenous Mayan dialect and moved to a Guatemalan community in Nebraska with her two young U.S. citizen children, six-year-old Mainor and four-year-old Estela.⁶²

On March 22, 2001, Mercedes was arrested for striking Mainor after a school psychologist noticed "red line markings" on his face.⁶³ Mercedes admitted to the police that she had struck Mainor once for being rough with his younger sister.⁶⁴ Mercedes was incarcerated for "child abuse," after which the Immigration and Naturalization Service ("INS") detained her in a county jail because she was in the country without lawful status.⁶⁵ Mercedes did not know that a default order of removal had been entered against her when she did not appear at an asylum hearing several years earlier—she had received temporary protected immigration status and continued to receive governmental work authorization every year in the meantime.⁶⁶ She was deported to Guatemala on May 15, 2001 without seeing her children before she was removed.⁶⁷

A month before she was deported, the family court conducted an adjudication hearing regarding her children.⁶⁸ Although she was in the jail next door to the courthouse, Mercedes was not brought to the hearing—a fact the judge held was sufficient to prove that she was homeless or indigent.⁶⁹ After she was removed to Guatemala, Mercedes tried to connect with her children, "writing to people in the States providing her address in Guatemala, and asking how her children [were] doing."⁷⁰ Despite living far away from a telephone, Mercedes managed to call "a crisis center in Grand Island and another relative in Alabama [to inquire] about her children."⁷¹

Fifteen months and five days after her children were taken from her, the State filed a motion to terminate Mercedes' parental rights, "alleging as its sole basis for termination of those rights that the children had been in out-of-home placement for 15 or

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 449–50.

67. *Id.*

68. *Id.* at 450.

69. *Id.* at 450, 455.

70. *Id.* at 451.

71. *Id.* at 463.

more months of the most recent 22 months.”⁷² The Court terminated Mercedes’ parental rights on a finding that the children had been in foster care for fifteen months and an additional abandonment finding that the judge suggested.⁷³

Mercedes’ case highlights the misinterpretation and misuse of the ASFA requirements as well as the astounding human cost suffered by immigrant families trapped in these proceedings.

The ASFA 15/22 rule requires a state to file a TPR petition in every case where a child has been in foster care for fifteen months as a standardized national procedure; it is not meant to be used to conclusively establish the grounds for termination or determine a parent’s unfitness.

In Mercedes’ case, the state’s only evidence in favor of termination was the fact that Estela and Mainor had been in foster care for fifteen months.⁷⁴ Even so, the juvenile court judge agreed with the state that termination was appropriate and even proposed an additional finding—abandonment.⁷⁵ However, the judge does not appear to have even discussed the legal standard for finding abandonment, much less to have applied it to the facts of the case.⁷⁶ Under Nebraska law, abandonment is predicated on a finding that a parent “*intentionally* with[eld]” her presence, protection, and care from her child.⁷⁷ Thus the question for abandonment is “largely one of intent, to be determined in each case from all the facts and circumstances.”⁷⁸

The judge could point to no evidence that Mercedes intended to deprive her children of her presence and parental care and, in fact, did not consider the involuntary nature of Mercedes’ deportation or her repeated efforts to reconnect with her children after her deportation.⁷⁹ Nor did the judge consider Mercedes’ attempts to involve herself in the termination proceedings despite overwhelming obstacles to accessing the Nebraska court system from her remote village in Guatemala.⁸⁰ While Mercedes’ forcible removal alone demonstrates that she did not intentionally leave her children, her many attempts to connect with her chil-

72. *Id.* at 453.

73. *Id.* Fortunately, the Supreme Court of Nebraska vacated and remanded the termination of Mercedes’ parental rights after holding that Mercedes had been denied due process, and the juvenile court erred in finding abandonment and concluding that termination was in the best interests of the children. *Id.* at 464.

74. *Id.* at 453.

75. *Id.*

76. *Id.* at 462 (“The record contains no specific findings of fact upon which the juvenile court determined that Mercedes abandoned her children.”).

77. *In re Sunshine A.*, 602 N.W.2d 452, 457 (1999) (emphasis added).

78. *Id.*

79. *In re Mainor T.*, 674 N.W.2d at 462-63.

80. *Id.*

dren and participate in the custody proceedings rebut any argument that she abandoned Mainor and Estela.⁸¹

The impact of ASFA’s built-in, 15-month termination trigger is especially glaring in the context of immigration detention. It is nearly impossible for detained immigrant parents, “who are often bounced around our nation’s patchwork of immigration detention facilities for many months and then scheduled for deportation,” to beat the twelve-month or fifteen-month mark of being apart from their children if they choose to pursue their immigration case.⁸² Under the ASFA regime, an agency caseworker can decide reunification is unreasonable (a likelihood increased by deportation if, as explained below, the caseworker assumes a parent can no longer comply with a case plan or participate in court hearings from another country), or the court might find that a child has been abandoned or neglected and terminate parental rights without a proper fitness determination, as was the case with Mercedes’ family.

D. State Laws and the Mechanics of TPR Proceedings

As noted above, state governments determine and enforce family law matters, including laws regarding the termination of parental rights.⁸³ Although states independently decide parental fitness standards and procedures for the purposes of termination, states have devised substantially similar standards and procedures.⁸⁴ For example, all states require that once a child has been removed from a parent and placed in temporary custody, the state’s child protective agency must undertake “reasonable efforts” to compose and execute a family reunification plan and support the parent in complying with the plan before initiating TPR proceedings.⁸⁵ Only after reasonable efforts have been unsuccessful may a court terminate parental rights, which it most frequently does on the grounds of severe or chronic abuse or neglect, sexual abuse, abandonment, the parent’s

81. *Id.* at 462–63.

82. Vinita B. Andrapalliyal, *History Repeats Itself: Parallels Between Current-Day Threats to Immigrant Parental Rights and Native American Parental Rights in the Twentieth Century*, 8 U. MASS. L. REV. 562, 573 (2013).

83. *See Rose*, 481 U.S. at 625.

84. *See* CHILD WELFARE INFO. GATEWAY, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 2 (2016), [https://www.childwelfare.gov/pubPDFs/groundtermin.pdf#page=2&view=Grounds for Termination of Parental Rights](https://www.childwelfare.gov/pubPDFs/groundtermin.pdf#page=2&view=Grounds%20for%20Termination%20of%20Parental%20Rights) [<https://perma.cc/BJ6U-XDUU>] [hereinafter GROUNDS FOR INVOLUNTARY TPR]. *See also* S. Adam Ferguson, *Not Without My Daughter: Deportation and the Termination of Parental Rights*, 22 GEO. IMMIGR. L.J. 85, 94 (2007).

85. *See* ASFA, 42 U.S.C. § 671(a)(15) (2012); *see also* CHILD WELFARE INFO. GATEWAY, REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN (2016), <https://www.childwelfare.gov/pubPDFs/reunify.pdf> [<https://perma.cc/BT59-WA39>] [hereinafter REASONABLE EFFORTS]. In limited circumstances, reasonable efforts to family reunification are not required when a court has determined certain conditions are met: for example, if the parent subjected the child to aggravated circumstances such as torture, chronic abuse, and sexual abuse; if the parent committed murder of another child of the parent; or if the parent committed a felony assault that resulted in serious bodily injury to the child or another child of the parent. *See* REASONABLE EFFORTS, *supra*, at 2.

mental illness or substance abuse, failure to support or maintain contact with the child, or involuntary termination of the rights of the parent to another child.⁸⁶

The usual grounds for termination highlight the absurdity of terminating a parent's rights because of her immigration detention. A parent's forced absence from her child's life is not comparable to sexual or severe physical abuse, neglect, or a parent's substance use or mental health challenges which prevent the parent from providing a minimum level of care to a child. In the case of immigration detention, it is the state's action, not the parent's choices, that temporarily renders the child without a caregiver. A parent's civil detention has no bearing on her role as a dedicated parent. Nevertheless, detained parents are penalized for allegedly neglecting or abandoning their children while their immigration cases are pending based solely on their involuntary detention.

Furthermore, formal immigration removal proceedings usually include various court hearings, such as individualized hearings on the merits of claims for relief and appeals of unfavorable decisions, all of which can extend the immigration case for many months.⁸⁷ While these due process protections are necessary for an immigrant parent in her removal case, they can have the effect of working against the parent in her family law case, extending the length of time a parent is detained and separated from her children. If a parent's case is delayed until she has been away from her children for fifteen months—which might happen, for example, if she chooses to appeal an order of removal—her family will be forced into TPR proceedings as a result. This practice could put parents in the tragic situation of choosing between accepting an earlier unfavorable decision in their removal case if it means retaining their parental rights, or exhausting their opportunities for immigration relief but potentially losing their rights to their children.

If a parent does end up reaching the fifteen-month mark while in detention, he will receive a hearing on his parental fitness as part of the TPR proceedings.⁸⁸ Here, as in other government schemes, immigrant families can be expected to suffer the consequences of a system that discriminates against low-income communities, noncitizen communities, and communities of color.⁸⁹

86. GROUNDS FOR INVOLUNTARY TPR, *supra* note 84, at 2.

87. See Lonagan, *supra* note 18, at 6, 8, 19–21 (Feb. 2006) (discussing three common immigration court hearings, the bond hearing, the master calendar hearing, and the individual hearing). An immigrant in removal proceedings is able to appeal an unfavorable decision to the Board of Immigration Appeals and to the Circuit Court of Appeals. See *id.* at 23–24, 25–26.

88. See, e.g., *Stanley*, 405 U.S. at 658; see also *Quilloin v. Walcott*, 434 U.S. at 255 (1978) (discussing the determination on a parent's fitness as a necessary initial step to termination of parental rights).

89. There is a wealth of secondary source material discussing racism and bias in termination of parental rights proceedings and child custody proceedings more broadly. See generally Solangel Maldonado, *Bias in the Family: Race, Ethnicity, and Culture in Custody Disputes*, 55 FAM. CT. REV. 213 (2017) (discussing the role of explicit and implicit bias with respect to a parent's racial, ethnic, and cultural backgrounds in the context of child custody proceedings); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010) (summarizing empirical evidence of implicit bias that rejects claims of perceptual, cognitive, and behavioral colorblindness); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias*,

In addition to other biases that pervade family law against poor parents of color and immigrant parents, some family courts improperly consider a parent’s immigration status in termination proceedings. Recent cases reveal that family courts have unfairly considered the unauthorized entry of immigrant parents into the United States or a parent’s civil detention as a negative factor in deciding parental fitness.⁹⁰ For instance, a Nebraska juvenile court in *In re Angelica L.* terminated a Guatemalan mother’s parental rights to her infant daughter Angelica even after the Nebraska DHHS found reports alleging abuse to be unfounded.⁹¹ The juvenile court held that the state had demonstrated sufficient parental unfitness because the mother, Maria, had ““either A) embarked on an unauthorized trip to the United States with a newborn premature infant [Angelica] or B) gave birth to a premature infant in the United States. In either event, it is clear that [Maria] did not provide the basic level of prenatal and postnatal care . . .””⁹²

In yet another case, the father’s undocumented status alone was sufficient to terminate his rights to his one-year-old daughter.⁹³ The Georgia juvenile court expressed concern that the father did not have lawful authorization to live in the country and that, although the father was not detained or even in removal proceedings, it had a ““problem with [the father’s] INS situation.””⁹⁴ It went on to terminate the father’s parental rights on the basis that the father had been unable to receive lawful status and that, “even if he later attempted to do so, he would face deportation . . .”⁹⁵

While these particular cases were fortunately reversed on appeal due to their flawed reasoning, appeals in undocumented immigrant TPR cases are generally rare.⁹⁶ In many cases, poor, limited English proficient parents are “severely curtailed” in their ability to appeal, particularly if they have been deported, at which

Decisionmaking, and Misremembering, 57 DUKE L.J. 345 (2007) (discussing the findings of an empirical study confirming that participants remember and misremembered legally relevant facts in racially biased ways); Dale Margolin Cecka, *Inequity in Private Child Custody Litigation*, 20 CUNY L. REV. 203 (2016) (studying the demographics of marriage rates and finding that a higher rate of unmarried parents with custody disputes are poor and/or people of color as compared to matrimonial custody disputes).

90. See, e.g., S.M. v. E.M.B.R. (*In re Adoption of C.M.B.R.*), No. SD 30342, 2010 WL 2841486 at *4 (Mo. Ct. App. July 21, 2010) (holding that the mother’s “lifestyle, that of smuggling herself into a country illegally . . . is not a lifestyle that can provide any stability for a child”), *rev’d*, 332 S.W.3d 793 (Mo. 2011); *In re B. and J.*, 756 N.W.2d 234, 237–239 (Mich. Ct. App. 2008) (reversing the lower court’s determination that, because the children’s parents were deported, they were necessarily unable to properly care for their children and would be unable to do so in a reasonable time).

91. *In re Angelica L.*, 767 N.W.2d 74, 80–81 (Neb. 2009) (referencing the juvenile court’s decision, which it reversed).

92. *Id.* at 87–88.

93. See *In re M.M.*, 587 S.E.2d 825, 832 (Ga. Ct. App. 2003) (“Essentially, the termination of the father’s parental rights was based on the possibility that the father could someday be deported . . .”).

94. *Id.* at 831.

95. *Id.* at 832.

96. Yablon-Zug, *supra* note 41, at 98.

point they are even less likely to gain access to the United States legal system.⁹⁷ In the rare occasion parents successfully appeal their terminations and their parental rights are ultimately restored, families have already suffered from prolonged separations and the children must then face what can be a painful second separation from their adoptive or foster parents.⁹⁸

Unfortunately, the flimsy reasoning and improper considerations of juvenile courts are sometimes accepted at the appellate level.⁹⁹ For example, the Tennessee Court of Appeals affirmed the termination of the parental rights of Binta Ahmad, an immigrant mother who had been deported to Nigeria.¹⁰⁰

Binta, an undocumented mother of two, was convicted of theft and subsequently detained by immigration officials.¹⁰¹ She was detained for more than two years before her deportation to Nigeria, despite her claims that she was an Egyptian citizen.¹⁰² Her parental rights were terminated and she appealed.¹⁰³ On appeal, the court affirmed the termination, noting “[p]erhaps termination of the mother’s parental rights would not have been necessary had the mother not migrated illegally to the United States, or had she not committed a felony in Alabama . . . ,”¹⁰⁴ thereby asserting that Binta was an unfit mother due to her entry into the United States and her criminal conviction.

The cases of Hilaria, Mercedes, and Binta establish that immigrant parents, like parents from low-income communities and communities of color, face cultural and economic bias on the part of child protective agencies and the courts. Undocumented immigrant families are more likely to live below the poverty line, in part because of undocumented parents’ inability to access public programs available to citizens, such as Medicaid and Temporary Aid for Needy Families.¹⁰⁵ Furthermore, they face additional barriers because their undocumented status precludes them from maintaining the verifiable or legal employ-

97. See *id.*; see also Anita Ortiz Maddali, *The Immigrant “Other”: Racialized Identity and the Devaluation of Immigrant Family Relations*, 89 IND. L.J. 643, 645 (2014) (explaining that while these cases are often reversed, “most undocumented parents do not have the resources to appeal, especially when the parent has already been deported”).

98. Maddali, *supra* note 97, at 645.

99. See, e.g., *Perez-Velasquez v. Culpeper Cty. Dep’t of Soc. Servs.*, No. 0360-09-4, 2009 WL 1851017, at *2 (Va. Ct. App. June 30, 2009) (upholding termination of a father’s rights for failing to maintain continuing contact after he was incarcerated and deported because the “father’s own actions led to this situation.”); *In re M.A.P.A.*, No. 98-1218, 1999 WL 711447, at *2 (Iowa Ct. App. July 23, 1999) (upholding termination of a father’s rights in part because the court expected he would be deported, and it was “not likely he will have sufficient time to develop a relationship with [his child]”).

100. See *State Dep’t of Children’s Servs. v. Ahmad*, No. M2004-02604-COA-R3-PT, 2005 WL 975339, at *4 (Tenn. Ct. App. Apr. 26, 2005).

101. See *id.* at *1.

102. *Id.*

103. *Id.*

104. *Id.* at *3.

105. See Seth Freed Wessler, *supra* note 24, at 18–19.

ment that may be required by state agencies and courts for their case plans.¹⁰⁶ As a result, their lower socioeconomic status makes them more likely to be discriminated against by child welfare agencies and the court.¹⁰⁷ These officials may incorrectly assume parents are unable to adequately care for their children if they are not able to verify legal employment or obtain public assistance.¹⁰⁸

The assumption by judges and child welfare agencies that immigrant parents are too poor to provide for their children is especially improper given that some courts have explicitly held that poverty alone is not a sufficient basis for a finding of unfitness.¹⁰⁹ In fact, some state legislatures have added a poverty exemption to statutory definitions of child abuse and neglect in an attempt to shield poor families from being investigated or separated by child welfare agencies merely because they are poor.¹¹⁰ As such, even if immigrant parents are unable to verify their lawful employment or qualify for public assistance, that still should not be a permissible basis for a finding of unfitness.

These examples of poverty discrimination, and other related issues of conscious and unconscious bias, often surface in the context of the termination of parental rights. Law professor Marcia Yablon-Zug has explored this phenomenon in depth: her research has revealed that the main justifications for terminating an immigrant parent's rights are often couched in amorphous "best interest" terms, and that judges use the "best interest" standard to consider a parent's risk of deportation.¹¹¹ Yablon-Zug identifies three main overlapping justifications provided by courts for terminating the rights of immigrant parents: (1) it is not in a child's best interest to move to an unfamiliar foreign country that may have fewer opportunities; (2) it is in a child's best interest to remain in the United States where the child feels at home, there is a higher standard of living, and greater opportunities; and (3) it is in a child's best interest to remain in the U.S.

106. *Id.* at 20.

107. *See id.* at 17–20.

108. *Id.*; Vinita Andrapalliyal, *The CPS Took my Baby Away: Threats to Immigrant Parental Rights and a Proposed Federal Solution*, 7 HARV. L. & POL'Y REV. 173, 179 (2013) (citing Wessler, *supra* note 24).

109. *See, e.g., In re G.S.R.*, 72 Cal. Rptr. 3d 398, 406 (Cal. Ct. App. 2008) ("Put differently, indigency, by itself, does not make one an unfit parent and 'judges [and] social workers . . . have an obligation to guard against the influence of class and life style biases.'") (quoting *In re Cheryl E.*, 207 Cal. Rptr. 728 (Cal. Ct. App. 1984)); *In re Adoption of Leland*, 842 N.E.2d 962, 967 (Mass. App. Ct. 2006) ("Poverty is not a reason upon which to base a determination of unfitness."); *T.C.B. v. Florida Dep't of Children & Families*, 816 So.2d 194, 197–98 (Fla. Dist. Ct. App. 2002) ("Moreover, parental rights cannot be terminated simply because the parent is poor, uneducated, and without sufficient financial resources to care for her children in the manner the Department deems advisable, or because she has not been a model parent.").

110. *See* ROBIN E. CLARK, JUDITH FREEMAN CLARK, CHRISTINE A. ADAMEC, *THE ENCYCLOPEDIA OF CHILD ABUSE* 42–47 (2001) (noting that Arkansas, Florida, Louisiana, Pennsylvania, West Virginia, Wisconsin, as well as the District of Columbia include poverty exemptions within their state statutory definitions of child abuse and neglect).

111. Yablon-Zug, *supra* note 41, at 102.

because she is already bonded to a caregiver and has the opportunity to become integrated into a stable, American family.¹¹²

Such “best interest” determinations privilege an American way of life with its perceived superior opportunities, economic stability, and, often, white Anglo-American identity.¹¹³ The idea that a child separated from their often indigent, often Latinx, often criminalized immigrant parent would have a superior life in the United States is predicated on the misconception that life in another country, in addition to being unfamiliarly foreign, is dangerous, dirty, and poor.¹¹⁴ The belief that it is in a child’s best interests to remain in the United States without his parent rather than in a poorer country with his parent “represents socioeconomic, racial, cultural, and global inequity that plays out in this context as a cultural clash.”¹¹⁵ It also assumes that a child’s parent would not have something more meaningful to share with her own child than a foster or adoptive parent living in the U.S. Even when judges are well-intentioned, these determinations turn into “value assessments that afford greater weight to certain social goods—such as wealth, Anglo-American cultural values, and the English language—and diminish the social and cultural goods of their parents, and by doing so, afford less protection to their constitutional right to raise their children.”¹¹⁶ Thus, best interest determinations in this context play to a judge’s biases about countries other than the United States and lead to the devaluation and destruction of immigrant families, families of color, and poor families.

112. *Id.*; see also Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 CONN. L. REV. 99, 138–139 (2011) (describing the hesitance of judges to approve case plans that work towards reunification in Mexico); Hall *supra* note 57, at 1481 (detailing belief by courts that the life of a child with American adoptive parents will inherently be superior to the life that child would otherwise have with her birthparents in Mexico).

113. See, e.g., Maddali, *supra* note 97, at 686–691.

114. See *id.* at 687 (first citing *In re Termination of Parental Rights of Doe*, 281 P.3d 95, 102 (Idaho 2012) (reversing the termination of an undocumented father’s parental rights and ordering the child to be reunited with her father in Mexico) (“The prosecutor offered the testimony of the guardian ad litem, who stated: ‘I think it is in the best interest of [Daughter] obviously to remain in the United States because there’s no comparison between being in Mexico and being in the United States, being a United States citizen. She has all the luxuries or all the things that we can offer.’ The fact that a child may enjoy a higher standard of living in the United States than in the country where the child’s parent resides is not a reason to terminate the parental rights of a foreign national.”); and then citing Seth Freed Wessler, *supra* note 24, at 46 (discussing statements by a parents’ and children’s attorney in Texas that: “Most of the attorneys don’t want to send the kids back to Mexico and their arguments are, one, poor conditions in the country and, two, they only get public education up to a certain age before the parents have to pay for it. Most of our parents don’t have education themselves; they are poor and they don’t have the ability to pay for further education.”)).

115. *Id.* at 687.

116. *Id.* at 695.

III.

THE CURRENT IMMIGRATION ENFORCEMENT SCHEME AND ITS EFFECT ON
IMMIGRANT FAMILIES*A. Background on Immigration Law and Recent Legislative Changes*

Unlike family law, immigration law is largely under federal control.¹¹⁷ In addition to presidential directives on enforcing immigration policies, the primary legislation governing immigration policy is the Immigration and Nationality Act (“INA”), which has been amended many times since its enactment in 1952.¹¹⁸ Through such amendments and the passage of other exclusionary laws, the federal government has drastically restricted the ability of immigrant families to live safely in our communities.

In 1996-97, Congress passed the Antiterrorism and Effective Death Penalty Act (“AEDPA”),¹¹⁹ the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”),¹²⁰ and the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”),¹²¹—combined, these acts mark a dramatic and draconian shift in immigration policy.¹²² PRWORA restricted undocumented families from receiving public assistance and required family members sponsoring immigrants to provide affidavits of support proving their household income was at least 125% above the poverty line.¹²³ In addition to limiting judicial review of removal decisions and expanding the grounds of deportability, AEDPA retroactively made lawful permanent residents removable for past crimes.¹²⁴ It also made it significantly more difficult for undocumented individuals to gain

117. *See, e.g.*, *Arizona v. United States*, 567 U.S. 387, 394–395 (2012) (holding that Arizona statute relating to undocumented immigrants was preempted by federal law) (“The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens The federal power to determine immigration policy is well settled.”) (internal citations omitted).

118. *See* Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2006)); *see also* *Public Laws Amending the INA*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 2013), <https://www.uscis.gov/ilink/docView/PUBLAW/HTML/PUBLAW/0-0-0-1.html> [<https://perma.cc/R876-WM7K>] (cataloguing and briefly explaining the amendments to the INA).

119. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

120. Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

121. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

122. Maddali, *supra* note 97, at 664–665.

123. *Id.* at 665 (citing PRWORA, 110 Stat. at 2260-74). *See also* §§ 410, 412 (limiting public assistance for undocumented individuals); § 423 (requiring an affidavit of support for individuals trying to sponsor immigrants).

124. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440, 110 Stat. 1214, 1276-78. *See also* Andrapalliyal, *supra* note 108, at 181 (citing Diana R. Podgorny, *Rethinking the Increased Focus on Penal Measures in Immigration Law as Reflected in the Expansion of the “Aggravated Felony” Concept*, 99 J. CRIM. L. & CRIMINOLOGY 287, 295 (2009)).

relief from removal by changing the standard of discretion for granting relief from “exceptional” hardship to herself and her family, to “exceptional and extremely unusual hardship” to her U.S. citizen or lawful permanent resident family members, which has been found to not encompass separation from family members.¹²⁵ IIRIRA increased criminal penalties for unauthorized reentry into the United States after an order of removal—up to 20 years in prison¹²⁶—and requires mandatory detention of “virtually any noncitizen with a criminal conviction and arriving [noncitizens] who lack proper documentation” during their removal proceedings.¹²⁷ Perhaps most importantly, both AEDPA and IIRIRA expanded the definition of “aggravated felonies,” which mandated summary deportation in most cases, to include certain convictions with a custodial sentence of one year or more.¹²⁸ In other words, “[t]he aggravated felony restrictions expanded the scope of the convictions covered to include criminal conduct that is neither aggravated nor a felony by federal criminal law standards,”¹²⁹ This triggered mandatory detention post-incarceration and precluded many noncitizens from eligibility for cancellation of removal, asylum, and other forms of relief.¹³⁰

Approximately six weeks after the September 11, 2001 attacks, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (“USA PATRIOT Act”).¹³¹ In practice, the Act had the effect of making it easier for the government to detain immigrant parents and separate them from their children.¹³² The USA PATRIOT Act expanded the categories of deportable immigrants to those

125. Andrapalliyal, *supra* note 108, at 181–82. Courts have been unwilling to find exceptional or extremely unusual hardship when a parent is separated from his child who was left behind upon removal. *See, e.g., Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1013 (9th Cir. 2005) (affirming that a father’s deportation and resulting separation from his two U.S. citizen children would not qualify as “exceptional and extremely unusual hardship” when the children would suffer emotionally and economically without him) (“... Petitioner demonstrated sadly common hardships that can result when an alien parent is removed and must make the heart-wrenching decision between family unity and the children’s ability to enjoy the educational and economic advantages of living in the United States.”).

126. *See* 8 U.S.C. § 1326(a-b)(2006).

127. Rabin, *supra* note 112, at 152.

128. *See* 8 U.S.C. § 1101(a)(43)(F-G)(2006).

129. Podgorny, *supra* note 124, at 314–15. For a general discussion on the immigration consequences of criminal convictions and guilty pleas for misdemeanor and low-level felonies (with an emphasis on New York convictions), see Manny D. Vargas, *The Immigration Consequences of Guilty Pleas or Convictions*, 30 N.Y.U. REV. L. & SOC. CHANGE 701 (2006).

130. *See* 8 U.S.C. § 1226(c)(1)(B)(1996) (imposing mandatory detention for individuals convicted of qualifying criminal offenses and who were transferred from serving a custodial sentence to immigration detention); 8 U.S.C. § 1229b(a)(3)(2006) (barring lawful permanent residents with aggravated felony convictions from receiving cancellation of removal); 8 U.S.C. § 1158(b)(2)(B)(i)(2008) (precluding individuals from receiving asylum if they have aggravated felony convictions).

131. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 412(a), 115 Stat. 272, 350 (codified as amended at § 8 U.S.C. § 1226(a) (2001)).

132. *See* Andrapalliyal, *supra* note 108, at 182.

perceived as threats to national security and mandated the detention of noncitizens whom the Attorney General has “reasonable grounds to believe” have engaged in “terrorist” activity (very broadly defined) or “any other activity that endangers the national security of the United States.”¹³³

The impact of this series of laws, in particular the 1996 reforms, is almost impossible to overstate. But to put the changes in perspective, 70,000 immigrants were deported in 1996, compared to 420,000 in 2012,¹³⁴ and 2014 data reflects that over 4.5 million people had been deported from the United States since the 1996 legislation.¹³⁵ And the statistics about the increase in civil immigration detention are equally alarming. ICE’s own data reveals that between fiscal years 1995 and 2011, the total number of people detained by ICE annually jumped from 85,730 to 429,247, a more than fivefold increase.¹³⁶ By 2010, ICE was detaining a total of 363,064 noncitizens, “more than five times the number of people entering prison for federal criminal offenses.”¹³⁷

B. Presidential Action and Immigration Policy

In part due to congressional inaction on comprehensive immigration reform, the Obama Administration took an increasing executive role in immigration policy and enforcement.¹³⁸ For example, after one of the iterations of the Development, Relief, and Education for Alien Minors (“DREAM”) Act failed in Con-

133. USA PATRIOT Act § 1226a(a)(3); 8 U.S.C. § 1182(a)(3)(B)(2013); *see also* Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA PATRIOT Act for Bona Fide Refugees*, 16 GEO. IMMIGR. L. J. 505, 519 (2002) (“For example, the INS could argue that non-citizens residing in the United States who gave money to certain Muslim charities are deportable for providing material support to a terrorist organization and, consequently, are not eligible for asylum and withholding of removal. One such charity, the Holy Land Foundation for Relief and Development, which had raised over \$13 million in the United States last year, was accused of funding Hamas’ efforts to recruit suicide bombers and had its records and assets seized by the Treasury Department.”).

134. MARC R. ROSENBLUM & DORIS MEISSNER, MIGRATION POLICY INST., THE DEPORTATION DILEMMA: RECONCILING TOUGH AND HUMANE ENFORCEMENT 1 (2014), <http://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement> [<https://perma.cc/X77F-X2SP>]; *see also* Dara Lind, *The Disastrous, Forgotten 1996 Law that Created Today’s Immigration Problem*, VOX.COM (Apr. 28, 2016), <https://www.vox.com/2016/4/28/11515132/iirira-clinton-immigration> [<https://perma.cc/4XS5-M4NY>] (exploring the consequences of the 1996 laws).

135. *See* ROSENBLUM & MEISSNER, *supra* note 134, at 1. For a more in-depth exploration on the shifts in immigration policy and enforcement as a result of IIRIRA, *see* Lind, *supra* note 134 and AJ Vicens, *The Obama Administration’s 2 Million Deportations, Explained*, MOTHER JONES (Apr. 4, 2014), <https://www.motherjones.com/politics/2014/04/obama-administration-record-deportations/> [<https://perma.cc/Q4WR-N27L>].

136. DORIS MEISSNER, DONALD M. KERWIN, MUZZAFFAR CHISHTI, AND CLAIRE BERGERON, MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 126 (2013), <https://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery> [<https://perma.cc/V3D4-ZE2J>].

137. *Id.*

138. *See generally* Adam B. Cox & Christina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015).

gress (which would have provided permanent resident status to undocumented youth upon completion of two years of college or service in the military),¹³⁹ President Obama announced his executive action, Deferred Action for Childhood Arrivals (“DACA”) in 2012.¹⁴⁰ DACA did not represent a pathway to citizenship or legal permanent status, but instead provided short-term, discretionary relief from deportation to eligible undocumented young people living in the United States.¹⁴¹

Despite the veneer of immigrant inclusion on these executive policies, the reality of the Obama Administration’s action on immigration was in fact less than kind to immigrant families. By early 2016, President Obama was already responsible for the record detention and deportation of 2.5 million immigrants, 23% more than President Bush.¹⁴² He deported more people than the sum total of the nineteen U.S. presidents between 1892-2000.¹⁴³ This trend garnered him the title of “deporter-in-chief” from numerous immigrant advocacy groups and from Janet Murguía, President and CEO of the nation’s largest immigrant rights organization, the National Council of La Raza (“NCLR”).¹⁴⁴

In both of his speeches announcing DACA and its developments, President Obama touted that, under his leadership, “deportation of criminals [wa]s up 80 percent.”¹⁴⁵ In his November 2014 speech announcing DACA’s expansion, President Obama stated that his proposed action would focus immigration enforce-

139. See *A Comparison of the DREAM Act and Other Proposals for Undocumented Youth*, AM. IMMIGRATION COUNCIL (June 5, 2012), <https://www.americanimmigrationcouncil.org/research/comparison-dream-act-and-other-proposals-undocumented-youth> [<https://perma.cc/SJ58-BJZ9>].

140. *Frequently Asked Questions: The Obama Administration’s Deferred Action for Childhood Arrivals (DACA)*, NAT’L IMMIGRATION LAW CTR. (2015), <https://www.nilc.org/issues/daca/faqdeferredactionyouth/> [<https://perma.cc/V99L-FCLX>] (last updated Dec. 16, 2016).

141. *Id.* See also President Barack Obama, *Remarks by the President on Immigration*, OFFICE OF THE PRESS SEC’Y (Jun. 15, 2012), <https://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration> [<https://perma.cc/8G7V-48Y7>] [hereinafter Obama 2012 Remarks].

142. Tim Rogers, *Obama Has Deported More Immigrants than Any Other President. Now He’s Running Up the Score.*, SPLINTER (Jan. 7, 2016, 5:35 PM), <https://splinternews.com/obama-has-deported-more-immigrants-than-any-other-presi-1793853940> [<https://perma.cc/N5AH-UU8R>].

143. *Id.* See also Serena Marshall, *Obama Has Deported More People than Any Other President*, ABC NEWS (Aug. 29, 2016, 2:05 PM), <http://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661> [<https://perma.cc/AW6E-GC8Q>].

144. See Janet Murguía, *NCLR 2014 Capital Awards Speech: President’s Message*, UNIDOSUSBLOG (Mar. 4, 2014), <https://blog.unidosus.org/2014/03/04/nclr-2014-capital-awards-speech-presidents-message/> [<https://perma.cc/U46L-K9KL>]; Please note that the NCLR has renamed itself UnidosUS. See *About Us*, UNIDOSUS, (June 2018), http://publications.unidosus.org/bitstream/handle/123456789/1854/unidosus_aboutus_42418.pdf?sequence=6%20. [<https://perma.cc/WL5R-X7QD>].

145. Obama 2012 Remarks, *supra* note 141; President Barack Obama, *Remarks by the President in Address to the Nation on Immigration*, OFFICE OF THE PRESS SEC’Y (Nov. 20, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [<https://perma.cc/SS79-7FA8>] [hereinafter Obama 2014 Remarks].

ment to target “felons, not families.”¹⁴⁶ In practice this rhetoric reflected and promoted a “simplistic, binary approach that render[ed] invisible those who simultaneously occupy both categories.”¹⁴⁷ What the Obama Administration’s policy failed to note was that even “felons” love and support their families, and that many of the “criminals” ordered removed were detained and deported solely for immigration violations or minor, nonviolent offenses.¹⁴⁸ Using internal government records obtained through a FOIA request, the New York Times in 2014 found that almost two-thirds of deportation cases “involve[d] people who had committed minor infractions, including traffic violations, or had no criminal record at all.”¹⁴⁹ A nonpartisan report from the Migration Policy Institute similarly found in 2014 that “[a]bout 21 percent of the criminal aliens deported in FY 2009-12 had been convicted exclusively of immigration-related crimes, and about 23 percent of *nonimmigration* crimes have consisted of minor, nonviolent offenses.”¹⁵⁰

Immigrant families have been further imperiled by a shifting immigration landscape under the Trump Administration. President Trump has been particularly outspoken in his racist, anti-immigrant rhetoric, stating in June 2015 that Mexico was “not sending their best” to the United States, and saying of Mexican immigrants, “They’re bringing drugs. They’re bringing crime. They’re rapists. . . .”¹⁵¹ Since taking office, the Trump Administration has enacted sweeping policies and practices that continue to disrupt and destroy families with immigrant parents.¹⁵²

146. Obama 2014 Remarks, *supra* note 145.

147. Rebecca Sharpless, *Immigrants are Not Criminals’: Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 703 (2016).

148. See ROSENBLUM & MEISSNER, *supra* note 134, at 47.

149. Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, N.Y. TIMES (Apr. 6, 2014), <http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html> [<https://nyti.ms/POlwXy>] (finding that only twenty percent of the cases involved immigrants who had received convictions for serious crimes, including drug-related offenses).

150. See ROSENBLUM & MEISSNER, *supra* note 134, at 7 (emphasis in original).

151. Michelle Ye Hee Lee, *Donald Trump’s False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime> [<https://perma.cc/RTN3-AJS6>].

152. See, e.g. SARAH PIERCE, JESSICA BOLTER & ANDREW SELEE, MIGRATION POLICY INST., U.S. IMMIGRATION POLICY UNDER TRUMP: DEEP CHANGES AND LASTING IMPACT 2–10 (July 2018), <https://www.migrationpolicy.org/research/us-immigration-policy-trump-deep-changes-impacts> [<https://perma.cc/QQ5R-2B6F>] [hereinafter MIGRATION POLICY INST.]. One example of these sweeping changes was Trump’s termination of DACA. *Id.* at 9; see also Vanessa Romo, Martina Stewart & Brian Naylor *Trump Ends DACA, Calls on Congress to Act*, NPR (Sept. 5, 2017), <https://www.npr.org/2017/09/05/546423550/trump-signals-end-to-daca-calls-on-congress-to-act> [<https://perma.cc/Z8YA-TV3G>]; Associated Press, *Trump’s Immigrant Roundups Increasingly Net Noncriminals*, NBC NEWS (Sept. 20, 2018), <https://www.nbcnews.com/news/us-news/trump-s-immigrant-roundups-increasingly-net-noncriminals-n911366> [<https://perma.cc/GNE9-3X5N>].

One such practice captured the nation's attention beginning in April 2018, quickly garnering the title of "family separation." Under a new "zero-tolerance" policy announced by former Attorney General Jeff Sessions,¹⁵³ families fleeing to the United States were separated at or near the border. Parents were criminally prosecuted for illegal entry under 8 U.S.C. § 1325(a) in federal court and then funneled into detention centers and placed in removal proceedings,¹⁵⁴ and children were placed separately in shelters for unaccompanied minors under the custody of the Office of Refugee Resettlement.¹⁵⁵ Families who presented themselves at the border requesting asylum at times fared no better; parents were still separated from their children even when, as asylum seekers who turned themselves in at the border, they could not be prosecuted for entering the U.S. without inspection.¹⁵⁶

Soon images of devastated parents and sound bites of sobbing children flooded national media outlets.¹⁵⁷ The public response was overwhelming. Immigration services providers near the border, such as the Refugee and Immigrant Center for Education and Legal Services ("RAICES"), were inundated with donations,¹⁵⁸ and the Vera Institute of Justice quickly developed its Immigrant Connection Project ("ICON") for immigration attorneys across the country to locate children that had been taken from their parents and connect desperate family members with each other.¹⁵⁹ Elected officials from different political backgrounds, facing huge social mobilization and pressure, decried the practice and urged the Trump Administration to bring it to an immediate end.¹⁶⁰

153. Office of Attorney General, Memorandum for Federal Prosecutors Along the Southwest Border (Apr. 6, 2018), <https://www.justice.gov/opa/press-release/file/1049751/download>.

154. *See id.*; *see also* Julia Preston, *Zero-Tolerance Lives On*, THE MARSHALL PROJECT (Sept. 14, 2018), <https://www.themarshallproject.org/2018/09/14/zero-tolerance-lives-on> [<https://perma.cc/757A-44WU>].

155. *See, e.g.*, Maya Rhodan, *Here Are the Facts About President Trump's Family Separation Policy*, TIME (June 20, 2018), <http://time.com/5314769/family-separation-policy-donald-trump/> [<https://perma.cc/978V-VNZX>]. *See also* MIGRATION POLICY INST., *supra* note 152, at 4–5 (explaining that the "government expected the policy to deter families").

156. *See, e.g.*, Amrit Cheng, *Fact-Checking Family Separation*, ACLU (June 19, 2018), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/fact-checking-family-separation> [<https://perma.cc/6KXY-T3YZ>] (describing multiple cases in which families seeking asylum at ports of entry have had their children taken away, spurring the ACLU to file a class action lawsuit against ICE).

157. *See, e.g.*, *Family Separations and the Border Situations in Photos*, NEWSDAY (July 1, 2018), <https://www.newsday.com/news/nation/family-separations-migrants-border-photos-1.19495300> [<https://perma.cc/C7NY-3XAB>]; Dylan Scott, *Listen: Children Sob at US Border Facility After Being Separated from Their Families*, VOX (June 18, 2018), <https://www.vox.com/policy-and-politics/2018/6/18/17476460/family-separation-immigration-trump-audio-listen> [<https://perma.cc/V768-BN2U>].

158. Olga R. Rodriguez, *People Donate Millions to Help Separated Families*, SEATTLE TIMES (June 20, 2018), <https://www.seattletimes.com/nation-world/apxpeople-donate-millions-to-help-separated-families/> [<https://perma.cc/8W6X-YRWG>].

159. Anne Marie Mulcahy, *Immigrant Connection Project (ICON)*, VERA INST. OF JUST., <https://www.vera.org/projects/immigrant-connection-project> [<https://perma.cc/YR6E-T7FF>].

160. *See, e.g.*, Peter Baker, *Leading Republicans Join Democrats in Pushing Trump to Halt*

Faced with mounting political pressure and lawsuits challenging the practice, President Trump capitulated and signed an executive order on June 20, 2018 designed to curb family separation at the border.¹⁶¹ Nonetheless, the aftermath will continue. The reunification process is slow and costly, and the psychological consequences for children and their parents are incalculable.¹⁶² Now, parents are confronted with another difficult choice: to try to reunite with their children and return them to their birth countries—often the same countries they fled under threat of extreme violence—or request that their children live with sponsors in the United States while they are deported, so at least their children have the opportunity to find safety in the U.S.¹⁶³

The recent practice of separating parents and their children at the border is a horrific one that has drawn much-needed attention, but family separation is not an issue confined to the border regions or to a family’s initial entry to the U.S. It is nothing new. Rather, family separation is embedded in U.S. immigration policy and enforcement. Every time a parent is detained, a family is separated. While most of the children initially taken from their parents at the border under the Trump policies have now been reunified with their parents,¹⁶⁴ the practice of family separation for thousands of other children and immigrant parents persists.

Family Separations, N.Y. TIMES (June 17, 2018), <https://www.nytimes.com/2018/06/17/us/politics/melania-trump-family-separation.html> [<https://nyti.ms/2JUhA4p>].

161. Exec. Order No. 13841, 83 Fed. Reg. 4233 (June 25, 2018), <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/> [<https://perma.cc/BBK3-MC55>]; see also Alana Abramson, *President Trump Signs Executive Order to Keep Immigrant Families Together*, TIME (June 20, 2018), <http://time.com/5317367/trump-executive-order-immigration/> [<https://perma.cc/8D7V-C8GY>].

162. See, e.g., Lauren Katz & Dara Lind, *Your Questions About the Family Separation Crisis at the Border, Answered*, VOX (Aug. 1, 2018), <https://www.vox.com/2018/8/1/17631632/family-separation-border-policy-deadline-questions> [<https://perma.cc/272G-CFNF>] (detailing various difficulties in tracking the location of parents and children); Michelle Lou, *Here’s What’s Happening with Trump Administration’s Family Reunification Efforts*, HUFFINGTON POST (July 18, 2018), https://www.huffingtonpost.com/entry/trump-family-reunification-children-border_us_5b4cb469e4b0bc69a7899aa8 [<https://perma.cc/AKH8-SA7G>] (“Families seeking refuge in the U.S. already endure emotional and physical stress, which is only exacerbated when they are separated from one another . . . [and] it is well known that childhood experiences created by inhumane treatment often create negative health impacts that can last an individual’s lifespan.”) (quoting Letter from Dr. James L. Madara, CEO of the Am. Med. Assoc., to Secretary Nielsen, Secretary Azar, and Attorney General Sessions (June 20, 2018), <https://www.ama-assn.org/press-center/press-release/ama-urges-administration-withdraw-zero-tolerance-policy> [<https://perma.cc/E75Z-ASCT>]) (urging administration to withdraw “zero tolerance” policy).

163. See, e.g., Dara Lind, *Trump Will Reunite Separated Families If They Agree to Deportation*, VOX (June 25, 2018), <https://www.vox.com/2018/6/25/17484042/children-parents-separate-reunite-plan-trump> [<https://perma.cc/5WFZ-FMW6>]; Julia Ainsley & Jacob Soboroff, *New Trump Admin Order for Separated Parents: Leave U.S. with Kids or Without Them*, NBC NEWS (July 3, 2018), <https://www.nbcnews.com/politics/immigration/new-trump-admin-order-separated-parents-leave-u-s-kids-n888631> [<https://perma.cc/7DRQ-3PMG>].

164. Leslie Shapiro & Manas Sharma, *How Many Migrant Children are Still Separated from Their Families?*, WASH. POST (Aug. 30, 2018), https://www.washingtonpost.com/graphics/2018/local/tracking-migrant-family-separation/?noredirect=on&utm_term=.6cff87bef7d3 [<https://perma.cc/4Q62-FXVK>].

IV.

THE CURRENT IMMIGRATION ENFORCEMENT REGIME AND THE INITIATION OF
FAMILY LAW PROCEEDINGS*A. Complications for Detained Immigrant Parents in Their Immigration and
Family Law Cases*

The increased detention and removal of immigrant parents facilitates the termination of their parental rights in numerous ways. Most obviously, as previously discussed, the ASFA requires the initiation of TPR proceedings when immigrant parents have been detained for 15 of the previous 22 months and their children placed in foster care.¹⁶⁵

Additionally, there is no right to state-provided counsel in immigration proceedings, which means that the vast majority of detained parents are not represented in their immigration cases.¹⁶⁶ These unrepresented individuals receive little to no help wading through complicated legal arguments regarding the government's authority to deport them and their eligibility for immigration relief. For example, a 2009 study conducted by the City Bar Justice Center of New York focusing on noncitizens detained at the Varick Street federal detention center in Manhattan found that while 39.2% of detained individuals appeared to have meritorious defenses against removal, "almost none" had any knowledge of them.¹⁶⁷ The laws governing removal are notoriously difficult to understand, and the INA has been called "second only to the Internal Revenue Code in complexity."¹⁶⁸

On top of the inherent difficulty of the immigration laws governing detention and removal are the serious language barriers disadvantaging immigrants. Some detained individuals do not speak English, and many are trying to defend themselves in their second, third, or fourth language.¹⁶⁹ Even if detained parents understand some English, they face additional obstacles in accessing detention facilities' law libraries, either because they are not stocked with appropriate or current resources or, in one case, because they were only taken to the library during sleeping hours at 3:00 a.m.¹⁷⁰ Many detained people also face enormous dif-

165. See 42 U.S.C. § 675(5)(E).

166. See 8 U.S.C. § 1362 (1952) (amended 1996) ("[T]he person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."); Markowitz, *supra* note 15, at 542; A.B.A., *supra* note 15.

167. NYC KNOW YOUR RIGHTS PROJECT, CITY BAR JUSTICE CTR., AN INNOVATIVE PRO BONO RESPONSE TO THE LACK OF COUNSEL FOR INDIGENT IMMIGRANT DETAINEES 2, 11, 14–15 (2009), http://www2.nycbar.org/citybarjusticecenter/pdf/NYC_KnowYourRightsNov09.pdf [<https://perma.cc/7KW8-6VHT>].

168. *Baltazar Alcazar v. INS*, 386 F.3d 940, 948 (9th Cir. 2004) (citing *Castro-O’Ryan v. Dep’t of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987)).

169. See Markowitz, *supra* note 15, at 551 (noting that census data reveals that 52 percent of the foreign-born population is limited English proficient).

170. See, e.g., DETENTION WATCH NETWORK, EXPOSE AND CLOSE, ONE YEAR LATER: THE

ficulties obtaining important documentation, often from other countries, to serve as evidence in their removal cases.¹⁷¹

The stress felt by families in termination proceedings is made even more strenuous by the reality of immigration detention itself. Ricardo’s story illustrates the coalescence of several problems for detained parents:

Ricardo’s children were removed from his custody when the children’s babysitter left them alone for less than an hour. He was arrested for child endangerment and transferred to immigration detention once his information was run through a federal database. He languished in immigration detention for months, 800 miles away from his two infant children, who were placed in foster care and sent to live with strangers.

Ricardo learned weeks too late that the dependency court held a hearing about his case without informing him. He did not know if he had been issued a case plan or provided with an attorney. He finally reached a caseworker from detention, who told him the child welfare department was advocating to have the children adopted by their new foster caregivers. From inside detention, there was very little Ricardo could do to prevent the splintering of his family.¹⁷²

Once in immigration custody, noncitizens like Ricardo are often transferred to different immigration facilities at ICE’s whim—sometimes to detention centers thousands of miles away¹⁷³—making it impossible for them to visit or communicate with their children or even receive notice of family law proceedings.¹⁷⁴ Family law attorneys appointed for detained parents are often unable to reach

ABSENCE OF ACCOUNTABILITY IN IMMIGRATION DETENTION 6 (Nov. 2013), <http://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20One%20Year%20Later%20Report.pdf> [<https://perma.cc/9JFT-X28E>]. These practices are in flagrant violation of published ICE standards requiring detention centers to provide “meaningful access to law libraries, legal materials and related materials on a regular schedule,” that is, not during sleeping hours. IMMIGR. AND CUSTOMS ENF’T, 6.3: *Law Libraries and Legal Material*, in OPERATIONS MANUAL ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 401 (2011), https://www.ice.gov/doclib/detention-standards/2011/law_libraries_and_legal_material.pdf [<https://perma.cc/G4HE-A89M>].

171. See, e.g., *ACLU Settlement with ICE Will Allow Immigrants Held in Detention to Use Functional Telephones for Contacting Lawyers, Families, Government Agencies*, ACLU OF N. CAL. (June 14, 2016), <https://www.aclunc.org/news/aclu-settlement-ice-will-allow-immigrants-held-detention-use-functional-telephones-contacting> [<https://perma.cc/DXH6-GT8N>] (describing a class action settlement with ICE in four California detention centers that lifted severe restrictions on telephone use “that make placing outgoing calls nearly impossible and prevent many immigrants from obtaining legal representation and gathering documents to fight their deportation”).

172. Wessler, *supra* note 24, at 36.

173. Vargas, *supra* note 129, at 714 (noting that New York immigrants in detention are sometimes transferred to “rural communities in states as far away as Louisiana or Alabama”).

174. Andrapalliyal, *supra* note 108, at 184 (citing Rabin, *supra* note 112, at 151); see also Hall, *supra* note 57, at 1489–90.

their clients in detention, either in person or through phone communication, and frequently do not receive notice when their clients have been transferred.¹⁷⁵

According to empirical research conducted by Nina Rabin, an advocate and clinical professor at the University of Arizona, there is also a risk among family law attorneys that “a mix of high caseloads, limited resources, and conscious or unconscious biases can lead attorneys to view severance as inevitable once a parent is in detention and/or deportation proceedings.”¹⁷⁶ Attorneys may view their detained clients as less of a priority or a lost cause. According to one practitioner interviewed by Rabin, “a visit by the attorney to a client in immigration detention is the exception rather than the norm.”¹⁷⁷ In fact, of the fifteen family law attorneys Rabin surveyed, only two had ever been to an immigration detention facility even though thirteen of the attorneys had multiple cases involving a detained family member.¹⁷⁸ This grim sense of inevitability among service providers, while understandable given the myriad complications in representing detained parents, further isolates these parents from their families, their support systems, and their connection to the outside world. It also makes reunification less likely considering that courts may erroneously interpret a detained parent’s inability to communicate consistently with her children or her appointed counsel to be probative of her parental unfitness.¹⁷⁹

B. The Child Welfare Concerns Motivating the ASFA and Their Application to Detained Immigrant Parents

Immigration law and family law are two independently created systems, neither of which adequately account for the contemporaneous operation of the other. The systems converge when an immigrant parent is detained and placed in removal proceedings, leading to a “practical disconnect between the state and federal agencies creat[ing] Kafka-esque results in which immigrant parents are trapped between the two uncoordinated systems’ processes.”¹⁸⁰ To illustrate both the inhumanity and flawed logic behind the way these two systems operate on immigrant families, imagine the following hypothetical scenario:

Alejandra is a young mother fleeing domestic abuse and pervasive gang violence in Honduras. After escaping her abusive partner, she travels through Mexico and crosses the Río Grande with her two young children, four-year-old Carlos and seven-month-old Suyapa, with a group of other migrants. Walking through the desert the next night, the group is stopped by border patrol agents, their roving flashlights piercing the darkness.

175. Rabin, *supra* note 112, at 113.

176. *Id.* at 140.

177. *Id.* at 139.

178. *Id.* at 139–40.

179. Hall, *supra* note 57, at 1472; *see also* Part II.D, *supra*.

180. Rabin, *supra* note 112, at 103.

They begin to round up the group to be transported directly back to Mexico. As they reach Alejandra's family, they take Carlos and Suyapa from her and lock them in their squad car.

Alejandra does not speak English and cannot understand what is happening. She tries to give the officers a bottle of milk for Suyapa. She will be hungry soon and Alejandra does not know if she will see her later to feed her. The officers refuse to take the bottle and tell Alejandra that Carlos and Suyapa do not belong to her anymore, that they will be better off with new, American parents. One of the officers drags her into the truck with the rest of the group and drives away.

If we saw Alejandra's story on the news, there would be bipartisan outrage about the border patrol officers' unilateral decision to strip Alejandra of her children forever. We would call it kidnapping, abduction, baby-snatching. We would decry the practice and demand institutional reform to ensure this never happened again. We would say that even if Alejandra and her children entered the country without authorization, she still had rights to be with her children and her children to be with her.

And in fact, many with different political views *did* decry a similar practice when stories of separated families began making news in May of 2018, as discussed *supra*. In Alejandra's imagined hypothetical, however, the separation is not temporary: there is no explicit or implicit promise of future reunification or communication between parent and children. Instead, the border officials have torn Alejandra's children from her and told her she no longer has legal rights to them—she is effectively no longer their mother.

If a story like this were to become public, we would be outraged at the cruel manner of separation and the unfair state practices that essentially extinguished her parental rights. But the current reality of immigration enforcement is effectively the same. In fact, the way parental rights termination operates now is substantively no different than the imagined scenario: The government separates a fit parent from her child and terminates her rights to that child. A state actor determines without much evidence that the child is better off with another, American family, and without giving the parent an opportunity to retain her parental rights, separates them indefinitely. Granted, the hypothetical involves more egregious violations because the decision is not made by a family court judge and does not include the right to counsel and appeal; however, as discussed *infra*, many of the additional due process protections granted to parents in TPR proceedings are effectively hollow in the context of detained, indigent, immigrant parents. In practice, TPR proceedings function in much the same way as Alejandra's imagined scenario.

In many ways, the only appreciable difference between the hypothetical illustration above and the current reality of separation and parental rights termination is time. And in contrast to the uproar about family separation at the border,

in TPR cases there is relatively little outcry or political mobilization. In these cases, the government detains a noncitizen parent during her immigration proceedings, temporarily incapacitating her from continuing in her role as a loving caregiver and forcing her children into foster care, and then penalizes her for not being available to care for her children. The state places enormous temporal and physical distance between a parent and child, and then uses that distance as a justification to terminate a parent's rights, despite the fact that imposed distance cannot indicate parental unfitness.¹⁸¹

The requirements for certain hearings and procedural protections in TPR cases do not cure the fundamental issue that a parent's state-imposed inability to care for her child should not be considered sufficient grounds for termination. The ASFA's concerns about permanence for children should not be triggered in a case where a fit parent is removed from her home and placed temporarily in detention. In fact, the entire premise and constitutional justification of immigration detention is that it is *impermanent* and used exclusively to monitor noncitizens while they conclude their removal proceedings.¹⁸² Because there are no allegations of abuse or inadequate care of the child in such a case, the judicial inquiry into parental fitness is unwarranted.

C. Different Outcomes to Detention: What Release from Immigration Custody Means for Immigrant Parents and Their Families

Much of the discussion in this area of law is about the phenomenon of parents "disappearing" into immigration detention in the fifteen months leading up to the initiation of TPR proceedings.¹⁸³ And rightly so, because it is during this interim period where legal advocacy is most useful to detained parents, either directly in their child custody and termination proceedings, or indirectly by seeking release from detention and/or relief from removal in their immigration cases.

181. For example, the government's justification for termination of parental rights does not apply in a different context of forced, prolonged separation: the military draft. In fact, nearly all states have created their own laws or adopted the Uniform Deployed Parents Custody and Visitation Act ("UDPCA") to protect the parental rights of deployed parents who voluntarily enlist in the military. See, e.g., *Military Parent Custody and Visitation*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Sept. 6, 2018), <http://www.ncsl.org/research/military-and-veterans-affairs/military-parent-custody-and-visitation.aspx> [<https://perma.cc/8ZX5-VP9B>] (discussing the UDPCA and surveying other states' similar statutes to protect the rights of parents in the military). In addition to these state provisions, the Servicemember Civil Relief Act ("SCRA") is a federal statute designed to "protect single-parent service members." See *id.* Article 1 of the SCRA prohibits the court from considering past or future deployment when making a best interest of the child determination, and Article 3 prohibits a permanent custody arrangement to be ordered without the deployed parent's consent. *Id.* While the laws in question expressly protect servicemembers on voluntary deployment, it is reasonable to assume that these protections would be extended in the event of a forced military draft. Similar measures generally do not exist, however, for parents placed in supposedly non-punitive civil detention.

182. See *Demore v. Kim*, 538 U.S. 510, 513 (2003) (holding that noncitizens facing removal may be detained "for the brief period necessary for their removal proceedings.").

183. See Rabin, *supra* note 112, at 118–21.

We would be remiss, however, not to consider the potential outcomes of immigration detention and removal proceedings.

While being detained is a traumatizing experience with long-term psychological effects,¹⁸⁴ immigration detention itself does not last forever. At the conclusion of removal proceedings everyone is funneled into one of two paths: hopefully a reprieve from deportation through a form of lawful status such as a visa or a green card or, more often, a final order of removal. Most detained noncitizens are deported at the conclusion of their removal cases.¹⁸⁵ Many of them are parents.¹⁸⁶

If a parent is deported, it is even less likely that he will be able to retain his parental rights than if he were in detention. If his rights were terminated while he was still in detention, he would face an arduous uphill battle in appealing the termination given the many complications for detained parents fighting termination explored *supra* Part IV.A. However, he would still have the benefit of remaining in the country, closer to the termination proceedings, and continuing to argue that he could win relief in his removal case and ultimately return to his family. A parent who has already been deported is in a much more difficult situation: CPS caseworkers, courts, and even parents’ attorneys often view deported parents as a lost cause and refocus their efforts on other clients.¹⁸⁷ In this circumstance, it is more difficult to appeal a termination decision if his parental rights have recently been terminated, or the decision is final, and to find a way to connect with his children from a different country. A parent in this situation is left without any recourse to challenge the termination and may not even know where or with whom his children are living. Even if he is able to return to the United States, either with or without lawful status, he has lost his home, his job, his community, and most importantly, his children.

In a minority of cases, a detained parent wins relief and is released from detention. If this happens before her parental rights are terminated, she will be able to take a more active role in termination proceedings, although substantial barriers

184. See e.g., Graciela Lopez, *What Immigration Detention Did to My Mental Health*, MEDIUM (June 29, 2018), https://medium.com/@glopez_76731/what-immigration-detention-did-to-my-mental-health-d26111bdbba2; see also Katy Robant, Rita Hassan & Cornelius Katona, *Mental Health Implications of Detaining Asylum Seekers: Systematic Review*, 194 *British J. Psychiat.* 306, 310–311 (2009); see also generally Janet Cleveland, Cécile Rousseau & Rachel Kronick, *The Harmful Effects of Detention and Family Separation on Asylum Seekers’ Mental Health in the Context of Bill C-31* (Apr. 2012), https://csssdelamontagne.qc.ca/fileadmin/csss_dllm/Publications/Publications_CRF/brief_c31_final.pdf [<https://perma.cc/38AM-R2PN>].

185. *Decisions on ICE Detainees: State-by-State Details*, TRAC IMMIGRATION (May 22, 2013), <http://trac.syr.edu/immigration/reports/320/> [<https://perma.cc/A7CP-D9RC>] (noting that 66% of individuals detained by ICE were ultimately ordered removed and legally barred from reentry).

186. Wessler, *supra* note 1.

187. See, e.g., Rabin, *supra* note 112, at 135–36 (finding that many attorneys interviewed “commented on the tendency [of CPS caseworkers] to write off parents facing deportation”); Yablon-Zug, *supra* note 41, at 86–88 (describing court’s unwillingness to consider the difficulties of a deported parent).

ers remain to her returning to her role as a caregiver for her children. For example, she may have lost her housing and her job while in detention. She also may not be able to afford to visit her children if they live far away from her, and the foster parents are unable or unwilling to facilitate visits or share information about the children. The same biases about the best interests of the child noted by Yablon-Zug may still creep up in judicial determinations even once the parent is released,¹⁸⁸ especially considering that the length of the parent's detention will likely affect how emotionally bonded the judge determines the child to be with his foster parents, or how difficult she imagines it might be for the child to leave a new school and neighborhood community.

There is also the possibility that a parent is released from detention after her parental rights have been terminated. In this case, her liberty has been restored and she has lawful status to continue living in the country she has made her home, but she has lost all rights to her children. The detention in her case, the purpose of which is to effectuate a noncitizen's removal, was unnecessary but still served as the foundation for the termination of her parental rights. She has won her immigration case but lost her children.

V.

THE SOLUTION

There are many concrete steps that state and federal actors and individual advocates can take to address this inhumane infringement on detained noncitizens' parental rights. There have been many creative proposals for reform in the criminal justice and immigration enforcement systems that would allow noncitizen parents to avoid being placed in removal proceedings and detained in the first place.¹⁸⁹ This Article addresses potential solutions for parents already facing detention.

A. Federal Reforms

1. Congress

Congress has already contemplated legislative action that could benefit immigrant families with detained parents. The Humane Enforcement of Legal Protection for Separated Children ("HELP") Act was introduced into Congress in 2009.¹⁹⁰ This bill acknowledged the difficult situation immigrant families are forced into by current immigration and family law frameworks. The bill offered

188. Yablon-Zug, *supra* note 41, at 104–16. *See also supra* Part II.D (discussing cultural, socioeconomic, and racial biases in termination proceedings).

189. *See, e.g.*, Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751 (2013); William E. McAlvanah, *Strategies for Avoiding Adverse Immigration Consequences When Representing Foreign-Born Defendants*, 227 N.J. LAW. 30 (2004); Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California*, 20 NEW CRIM. L. REV. 12 (2017).

190. HELP Separated Children Act, H.R. 3531, 111th Cong. (2009).

many positive changes, such as providing free interpreters for families¹⁹¹ and requiring the Department of Homeland Security to produce memoranda and protocols facilitating communication between detained parents, children, family members, agencies, family courts, and child welfare agencies.¹⁹² However, the bill never made it out of committee in 2009, 2011, or 2014.¹⁹³

HELP was reintroduced into Congress most recently in May 2018 and has since been referred to the House and Senate Judiciary Committees and the House Subcommittee on Immigration and Border Security.¹⁹⁴ However, many of the reforms in the predecessor bills have been gutted in the most recent proposal. While the 2009 bill had numerous specific reforms laid out in detail over thirty pages,¹⁹⁵ the 2018 bill is only eleven pages and speaks generally about protections and protocols for detained parents and appears to focus more on the “best interest of their children, including a preference for family unity wherever appropriate.”¹⁹⁶

While stipulating a preference for family unity shows the legislative intent of preserving family integrity in the HELP Act, the use of the “best interests” language is problematic in this context. As noted *supra* Part II.D, the “best interest” standard has been used in TPR proceedings with immigrant families as a state-sanctioned veneer for cultural and socioeconomic bias. If the HELP Act is to continue its way through Congress, the vague “best interest” terminology should be clarified.¹⁹⁷ Instead of requiring a “preference” for family unity, the bill should state that the “best interests” inquiry is to be conducted with a presumption in favor of family unity, which would provide a much stronger legal safeguard for immigrant families. Whereas a mere preference standard would only purport to favor family unity over family separation,¹⁹⁸ a legal presumption in favor of family unity accepts and affirms that family unity is in the best interests of the child, unless proven otherwise.¹⁹⁹

Additionally, the federal government should take steps to allow effective legal representation for detained parents. While most states provide attorneys for

191. *Id.* § 3(b)(15).

192. *Id.* § 6(a)(3)(A).

193. See *H.R. 3531 (111th): HELP Separated Children Act*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/111/hr3531> [<https://perma.cc/RL47-5Q2U>]; *H.R. 5879—HELP Separated Children Act: 113th Congress*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/5879/all-actions?overview=closed> [<https://perma.cc/Y52W-VDQH>].

194. See *H.R. 5950—HELP Separated Children Act: 115th Congress*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/5950/all-actions?overview=closed#tabs> [<https://perma.cc/JS7J-EHE9>]; *S. 2937 —HELP Separated Children Act: 115th Congress*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/2937/all-actions?overview=closed#tabs> [<https://perma.cc/4XMX-MTES>].

195. See H.R. 3531.

196. See *HELP Separated Children Act*, H.R. 5950, 115th Cong. § 4(2)(D) (2018).

197. See Hall, *supra* note 57, at 1496.

198. See *Preference*, BLACK’S LAW DICTIONARY (10th ed. 2014).

199. See *Presumption*, BLACK’S LAW DICTIONARY (10th ed. 2014).

parents in termination proceedings, overburdened family law attorneys often do not have the resources or familiarity with the immigration detention system to communicate effectively with a detained parent, and in turn, to provide a robust defense.²⁰⁰ Although it is unlikely the government would fund attorneys for noncitizens in immigration proceedings, the government could lift the funding restrictions currently preventing legal services organizations from representing undocumented immigrants.²⁰¹ These restrictions on undocumented client representation are a relatively recent development. When the Legal Services Corporation Act was first passed in 1974, there were no limitations on representing noncitizens.²⁰² Over the next twenty years, however, Congress gradually limited the representation of noncitizen clients, eventually prohibiting legal service organizations from providing any legal assistance to undocumented communities if they received any amount of funding from the Legal Services Corporation (“LSC”)²⁰³—the single largest funder of civil legal aid for low-income people, established by Congress in 1974.²⁰⁴

Past congressional action indicates that LSC restrictions could be made more flexible given the overwhelming need and vulnerability of certain undocumented populations. In the reenactment of the Violence Against Women Act (“VAWA”) in 2005, Congress created a carve-out for representing undocumented victims of domestic violence, sexual assault, or trafficking.²⁰⁵ This change reflected increased congressional recognition that a specific class of noncitizens was particularly at risk and had “nowhere to turn for legal help.”²⁰⁶ Detained parents of children in foster care who are in danger of losing their children are likewise extremely vulnerable and in need of legal assistance. Many detained parents like Hilaria, and sometimes their children, have also experienced domestic violence and are part of the very population the LSC carve-out for battered and trafficked individuals was designed to protect.²⁰⁷ Further, the relaxing of

200. See e.g., Rabin, *supra* note 112, at 120 (discussing the challenges attorneys face in locating, visiting, and communicating with detained immigrants in order to represent them in family law proceedings).

201. See Rabin, *supra* note 112, at 150. The Legal Services Corporation is a federal institution that provides funding to legal aid organizations throughout the country. It is currently not permitted to grant funding to legal services organizations that represent or provide services to undocumented immigrants. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134 § 504(a)(11), 110 Stat. 1321, 53-55; 45 C.F.R. § 1626.3 (2006).

202. Michael J. Churgin, *An Essay on Legal Representation of Non-Citizens in Detention*, 5 INTERCULTURAL HUM. RTS. L. REV. 167, 173 (2010).

203. *Id.* at 173–74. In other words, “once a grant is accepted from the Legal Services Corporation, the ‘poison pill’ provision kicks in and a grantee is barred from using any funds, whatever the source, for representation of the prohibited classes of non-citizens.” *Id.*

204. See *Who We Are*, LEGAL SERVS. CORP., <https://www.lsc.gov/about-lsc/who-we-are> [https://perma.cc/3YPV-RDQ2].

205. See Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-62, 119 Stat. 2960 (2006).

206. See Rabin, *supra* note 112, at 150–51 (quoting statement of Sen. Edward Kennedy).

207. See generally Kavitha Sreeharsha, *Reforming America’s Immigration Laws: A Wom-*

LSC restrictions for detained parents would also be targeted at protecting the safety, wellbeing, and rights of children who have been isolated, endangered, and exposed to lasting psychological harm by the government’s decision to detain their loving caregivers and place them in unknown foster homes.²⁰⁸ These children would be best served by the swift return of their parents and the restoration of their family’s constitutional right to live together as a family. The lifting of LSC restrictions for detained noncitizen parents of children in foster care would also further the government’s interests in upholding the constitutional rights of these parents and protecting and promoting the interests and needs of children taken from their families and placed into state custody.²⁰⁹

2. *Immigration and Customs Enforcement*

In addition to congressional measures prioritizing family unity and security, ICE can take measures to live up to its own promises that its actions do not unnecessarily disrupt immigrant families.²¹⁰ If ICE did not want to disrupt immigrant families, it could choose not to detain immigrant parents, and it could release immigrant parents on their own recognizance if they are already detained.²¹¹ However, assuming parents are still to be detained, ICE should still make an effort to protect immigrant families and restore the decision-making power, whenever possible, to the immigrant parents of families.

When parents are apprehended by ICE officials near the border, in work and home raids, or through local partnerships with police and jails—and must remain detained—ICE should ensure that parents are given the opportunity to make caregiving arrangements for their children before they are transferred to a detention center. To accomplish this, ICE should promulgate and implement a time-of-apprehension policy guidance that gives clear, specific instructions to ICE officials to advise immigrants of the right to make childcare arrangements before they are transferred, and to allow them the opportunity to do so. Currently, there is no clear procedure for immigration officers to ensure that parents who must be

an’s Struggle, IMMIGRATION POL’Y CTR. (2010), <https://www.americanimmigrationcouncil.org/research/reforming-americas-immigration-laws-womans-struggle> [<https://perma.cc/JWM9-HY3P>] (exploring how abused immigrant women and their families are distinctly harmed by immigration detention).

208. According to a 2015 study by the Migration Policy Institute and the Urban Institute, children of detained parents experience, among other challenges, serious mental and emotional harm, economic hardship, housing instability, cognitive and behavioral challenges, and decreased academic performance. *See generally* HEATHER KOBALL, Randy Capps, Sarah Hooker, Krista Pereira, Andrea Competella, Juan Manuel Pedroza, William Monson, & Sandra Huerta, MIGRATION POL’Y INST. & URBAN INST., HEALTH AND SOCIAL SERVICE NEEDS OF US-CITIZEN CHILDREN WITH DETAINED OR DEPORTED IMMIGRANT PARENTS (Sept. 2015), <http://www.migrationpolicy.org/research/health-and-social-service-needs-us-citizen-children-detained-or-deported-immigrant-parents> [<https://perma.cc/33E2-8YWF>].

209. Rabin, *supra* note 112, at 151.

210. U.S. IMMIGR. AND CUSTOMS ENF’T, *supra* note 23.

211. *See, e.g., Wessler, supra* note 24, at 43, 58 (recommending that ICE “release parents on their own recognizance and expand the use of community-based supervisory programs”).

detained are able to make caregiving arrangements for their children before they are transferred to a detention facility.²¹² While there is one 2013 ICE Parental Interests Directive that suggests limited measures to consider the rights of immigrant parents in removal proceedings, the memorandum is vague, unenforceable, and does not provide for initial child care arrangements to be made by detained parents.²¹³ Instead, individual police officers and ICE officials in their unfettered discretion may inquire if a parent has children or allow a parent to make a telephone call to another family member or trusted friend with status to arrange for childcare.²¹⁴ Moreover, parents' inability to make childcare arrangements can result in children being left in an unsafe environment or being unnecessarily placed into state custody. In fact, according to extensive research conducted by the Applied Research Center, "[n]umerous detained parents whose children were not in foster care [shared in interviews] that they'd avoided this because they were allowed to make arrangements for their children at the time of apprehension."²¹⁵

The Department of Homeland Security has delegated broad discretion to local law enforcement and ICE officials to consider humanitarian factors during the apprehension of noncitizens.²¹⁶ Immigration officials have the authority to allow noncitizens to make a phone call at the time of apprehension; whether they choose to permit it is another matter. Instead of leaving this critical determination to the discretion of individual officials, ICE should explicitly direct immigration officials to first inquire whether each person they apprehend is a parent, and second, if the noncitizen is a parent who acts as a caregiver, allow the parent to telephone a family member or trusted friend to make arrangements for her or his children. Such a practice would respect the rights of immigrant parents and acknowledge that they are in the best position to decide what would be least traumatizing for their children and prevent the additional anguish of foster care placement and intrusive CPS and court involvement.

212. EMILY BUTERA, WOMEN'S REFUGEE COMM'N, TORN APART BY IMMIGRATION ENFORCEMENT 2 (Dec. 7, 2010), <https://www.womensrefugeecommission.org/resources/document/667-torn-apart-by-immigration-enforcement-parental-rights-and-immigration-detention> [<https://perma.cc/RLS8-5KM4>].

213. See Directive 11064.1, U.S. IMMIGR. AND CUSTOMS ENF'T, Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities (Aug. 23, 2013), https://cis.org/sites/default/files/Parental_Interest_Directive_8-23-13.pdf [<https://perma.cc/YWB6-AHCG>].

214. See Wessler, *supra* note 24, at 29.

215. *Id.*

216. See, e.g., Memorandum from John Morton of the U.S. Immigration and Customs Enft on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enft Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [<https://perma.cc/9HJ7-KT8C>].

B. State Solutions

I. State Legislatures

State authorities can also act to protect immigrant families with detained parents. Because family law is largely controlled by state governments,²¹⁷ state legislatures and bar associations wield considerable control in the mechanics of family law proceedings.

First, state legislatures should amend the statutes governing the grounds for termination to exclude immigration detention from the 15/22 ASFA calculus. As noted *supra* Part II.D, the concerns about neglect and abandonment of a child motivating the fifteen-month rule are not implicated when a parent is involuntarily and temporarily unable to care for his child. As such, the initiation of TPR proceedings is not appropriate when a parent is detained. Some states have begun to lean in this direction in the context of incarceration. For example, both Massachusetts and Oklahoma have statutes stipulating that incarceration alone is not sufficient grounds for termination.²¹⁸ Such a rule does not prevent the initiation of TPR proceedings after fifteen months, but it does prevent termination where the only basis is the parent’s incarceration. More protectively, Nebraska does not permit the filing of petitions to terminate if the sole basis is the parent’s incarceration, insulating families in this situation from TPR proceedings.²¹⁹ While these statutes reference criminal incarceration and not immigration detention, the rationale (i.e. not allowing the state to use involuntary imprisonment as fodder to terminate a parent’s rights) applies equally to immigration detention.

Second, state legislatures should clarify the statutes regarding termination of parents’ rights to explicitly forbid the consideration of a parent’s immigration status or detention in parental fitness determinations.²²⁰ We know from the cases discussed *supra* Part II.C that judges often improperly consider these factors—a provision prohibiting such a consideration would further shield immigrant parents from improper findings and provide them with an opportunity to appeal on

217. *See infra* Part II.A.

218. Hall, *supra* note 57, at 1499 (citing MASS ANN. LAWS ch. 210, § 3(c)(xiii) (“Incarceration in and of itself shall not be grounds for termination of parental rights . . .”) and OKLA. STAT. ANN. TIT. 10A, § 1-4-904(B)(12) (“[T]he incarceration of a parent shall not in and of itself be sufficient to deprive a parent of parental rights.”)).

219. *Id.* (citing NEB. REV. STAT. ANN. § 43-292.02(2) (“A petition shall not be filed on behalf of the state to terminate . . . parental rights . . . if the sole factual basis for the petition is that . . . (b) the parent or parents . . . are incarcerated.”)).

220. *Cf.* Andrapalliyal, *supra* note 108, at 191–92 (recommending the same solution but suggesting it be packaged as part of a comprehensive federal program). In light of the current political climate, and the slim likelihood of passing such an act in Congress and enforcing it nationally, this Article instead suggests states individually address this issue with the hope that at least some states would enact these changes. *Cf.* Hall, *supra* note 57, at 1498–99 (proposing that states explicitly state that the initiation of removal proceedings is not a permissible ground for terminating a parent’s rights). This Article expands Hall’s suggestion given judges’ problematic and unfounded assumptions about immigrant parents based on their entry into this country, current immigration status, and cultural and economic bias.

an unmixed question of law if a judge considered immigration status in her decision.

2. Child Welfare Agencies

Child welfare agencies should establish what Nina Rabin refers to as a “key liaison” qualified to address the immigration and international issues in each region. While her research revealed that the problem of a detained parent arises frequently, she found that no “particular caseworker is likely to develop an expertise in handling detention and deportation issues.”²²¹ Given the already limited ability of caseworkers to familiarize themselves with the issues implicated when a parent is detained, it would be more feasible to appoint at least one person in each county for caseworkers to contact when immigration-related issues arise.

3. Courts

Family law judges should faithfully follow the clear legal standards in adjudicating termination of parental rights. While ideally TPR proceedings would not be initiated solely because a parent is incarcerated or detained, a parent’s rights should not be terminated if the only reason for a parent’s unfitness is her incarceration or civil detention. As noted previously, the standard for maintaining one’s parental rights is a low bar, requiring only a minimum standard of conduct in which a child is not abused or abandoned, for example.²²² In cases like Mercedes and Binta’s, in which judges fail to adequately and completely consider a parent’s fitness determination as an important initial step, unjust and unlawful terminations result.²²³ If the family law judges in those cases had followed binding procedural and statutory requirements to consider the parents’ fitness, not simply imposed their own opinion about what would be best for the children, the parents’ rights would likely not have been terminated.

C. Local Organizations and Practitioners

When state and local actors fail to implement the sweeping changes that would uniformly benefit detained noncitizen parents, local attorneys and their organizations can still take steps to protect their clients’ rights and work towards family reunification. One excellent way to defend the rights of immigrant parents is through a holistic defense organizational model, by which an individual client has access to a team of interconnected, interdisciplinary advocates for their legal and non-legal needs, such as “criminal defense and civil lawyers, as well as social workers or other social service advocates.”²²⁴ As such, holistic defense of-

221. Rabin, *supra* note 112, at 156.

222. *See infra* Part II.D.

223. *See infra* Part II.C.

224. *The Four Pillars of Holistic Defense*, THE CENTER FOR HOLISTIC DEFENSE: A PROJECT

fices are particularly well-suited to facilitate wraparound or complementary legal services for an immigrant parent's overlapping immigration, family, and/or criminal cases, in addition to providing social services that may help to connect and sustain detained parents and their children.²²⁵ Even in areas of the United States without existing holistic defender networks, immigration and family law attorneys can communicate, collaborate, and coordinate their representation to best serve a detained parent's complex legal needs.

1. Immigration Attorneys

An immigration advocate's primary focus for a detained client is to advocate for her release, either during the pendency of her immigration proceedings through bond or conditional parole, or after winning relief from removal on the merits. What is good for a detained immigrant parent is good for her whole family. Her release means she can reunite with her loved ones and resume a hands-on role in caring for her children. When possible, an immigration attorney can coordinate with the client and the family law attorney to advocate for the client's release in an initial bond hearing, a changed circumstances bond hearing (based on the initiation or substantial change in the family court case), or a parole request to ICE, emphasizing the importance of releasing the client to attend to the family court case and documenting the inevitable progression of the family court case as the parent remains detained.²²⁶ During such hearings for bond and discretionary forms of relief, the attorney can try to arrange for the children's physical presence in the courtroom. If the client is willing, having her children in court can not only be a huge emotional support, it can also serve as a striking visual re-

OF THE BRONX DEFENDERS, https://www.americanbar.org/content/dam/aba/administrative/criminal_justice/FourPillars_HolisticDefense.pdf.

225. See generally Cynthia Lee, Brian Ostrom, & Matthew Kleiman, *The Measure of Good Lawyering: Evaluating Holistic Defense in Practice*, 78 ALBANY L. REV. 1215 (2015) (examining the fundamental principles of holistic defense and the need for empirical evaluation of holistic defense programs); Robin Steinberg, *Beyond Lawyering: How Holistic Defense Makes for Good Policy, Better Lawyers, and More Satisfied Clients*, 30 N.Y.U. REV. L. & SOC. CHANGE 625 (2006) (discussing the foundations of the holistic defense movement and the benefits of a holistic defender model).

226. There are several ways to leave detention while one's immigration case remains pending. While details of these different release methods are beyond the scope of this Article, both initial and additional bond hearings based on a change in circumstances in a detained immigrant's case after the initial bond hearing are sought through immigration court and are granted by an Immigration Judge after a bond hearing. See 8 U.S.C. § 1226(a) (bond hearings in immigration court); 8 C.F.R. § 1003.19(e) (changed circumstances bond hearings in immigration court); see generally *Practitioner's Guide: Obtaining Release from Immigration Detention*, CATHOLIC LEGAL IMMIGRATION NETWORK, INC. (May 2018), <https://cliniclegal.org/sites/default/files/A-Guide-to-Obtaining-Release-from-Immigration-Detention2.pdf> [<https://perma.cc/4XVW-PLF2>]; *Representing Clients in Bond Hearings: An Introductory Guide*, IMMIGRANT LEGAL RES. CTR. (Sept. 2017), https://www.ilrc.org/sites/default/files/resources/bond_practice_guide-20170919.pdf [<https://perma.cc/T2QZ-FYCS>]. Additionally, humanitarian parole or release may also be granted by ICE on a case-by-case basis, usually after a written request, and is separate from any court hearing. See, e.g., 8 C.F.R. 212.5(b) (discussing the reasons for ICE parole when there are "urgent humanitarian reasons" or a "significant public benefit" to release).

minder to the court of the emotional bond between parent and children, the human cost of detention, and the toll it takes on an entire family.

However, when a detained parent is unable to secure release on bond or is awaiting a final hearing, an immigration attorney can facilitate contact with their client's children by arranging phone calls, passing letters between children and parents, and facilitating in-person visits when possible. Not only does this important family contact sustain detained parents and comfort their children, it also creates a record to demonstrate a parent's ongoing, loving involvement in their children's lives for future hearings in both family court and immigration court. Indeed, the Nebraska Supreme Court in Mercedes' case explicitly relied on an immigration attorney's affidavit discussing her immigration case and relaying that Mercedes's priority "was to find a way to participate in the family law process regarding custody of her children" in reversing the termination of her parental rights.²²⁷ Further, in addition to submitting documentary evidence into the family court record, immigration lawyers may also be able to advocate for ICE to arrange transportation to family court hearings or, at least, a parent's telephonic presence from detention.

2. Family Law Attorneys

As noted *supra*, family law attorneys often face difficulties communicating with their clients once they are detained, and often may not even know where their clients are detained. Family law lawyers may be able to track their clients by reaching out to local immigration service providers who may be able to verify a detained parent's presence at a detention center and assist with providing family court documents to a parent. If the family law or immigration attorney is not able to arrange for a parent's telephonic or in-person presence at a family court hearing, the family law attorney can coordinate with the parent or the immigration attorney to get a letter from the parent detailing the steps taken to remain involved in her children's lives, including frequency of telephone calls, written correspondence to children, and so on. A family law attorney can also collaborate with the immigration lawyer to submit a letter or affidavit to the family court explaining the client's immigration case as it relates to the family court case, advising the court of the procedural posture of the immigration case, and informing the family court of upcoming immigration hearings and possibility of release. In addition to updating the family court on the parent's whereabouts and circumstances, such evidence can also educate the court—who may not have any familiarity or experience with litigants in immigration detention—on how the client's civil detention is unrelated to his fitness as a parent and rebut a potential finding of abandonment.²²⁸ A letter or affidavit from an immigration attorney could also help explain how a parent's civil detention can preclude him from ful-

227. *In re Mainor T.*, 674 N.W.2d at 463.

228. See Part II.C–D, *supra* (discussing the standards for parental fitness and abandonment).

filling certain requirements of a state welfare agency's family reunification case plan, such as maintaining employment or completing parenting classes. Further, depending on the size of the family law organization or firm, the office may have capacity to designate one of the attorneys as the lead manager or liaison for detained parents. As challenging as it can be to represent a detained parent, family law attorneys can attempt to communicate with their clients by mail, telephone when possible, and in-person visits if feasible.

VI. CONCLUSION

Many immigrants to the United States came to this country for their children. They came so their children would have the opportunity, the education, and the chance to live free from oppression that they themselves were never given. It is a supreme act of love for a parent to undertake another life in a new country.

Today, detained immigrant mothers and fathers are vulnerable to losing their parental rights to the children they so desperately want to protect. In an uncoordinated exercise of two distinct bodies of law, the government civilly detains a parent during the pendency of her removal proceedings—leaving her children without their parent—and then petitions to terminate her parental rights because she has been away from her children for fifteen months. In these cases, the government creates the family separation and then penalizes the parent for his involuntary absence by threatening to extinguish all legal rights to his children.

As a result of these convergent and conflicting government functions, devoted parents like Hilaria and Ricardo are taken from their children, forced into cages in concrete detention centers far away from home and threatened with deportation and the permanent loss of their children. In Hilaria's own words, we are robbing these parents of their children. Children like Angelica, Mainor, and Estela are taken from their parents, dropped into strange foster homes and new foster families, and told they may never see their parents again. They are robbed of their parents.

Because the issue of detained immigrants' parental rights is multi-faceted and the result of overlapping state, federal, and local action, the solutions must be equally comprehensive. The federal government can enact legislation to protect the rights of detained immigrant parents on a national scale, and the Department of Homeland Security, if so inclined, could curtail the detention and deportation of immigrant parents and implement time-of-apprehension policies to ensure children of detained parents are not needlessly placed into foster care. States should clarify the legal requirements of TPR proceedings to forbid the initiation of proceedings caused by a parent's detention and to exclude consideration of a parent's detention or immigration status if proceedings are underway. State welfare agencies should be given the support and resources necessary to provide the same level of service and support to all parents, regardless of a par-

ent's civil detention. Finally, local immigration and family law attorneys should keep themselves informed of their clients' interconnected legal proceedings, to collaboratively work towards the parents' prompt release and return home to their children, and to facilitate the parents' robust participation in both immigration and child custody proceedings.

In sum, there are many opportunities to limit the state's unnecessary involvement in immigrant families' lives. There are many ways to restore the rights of detained immigrant parents like Binta and Ricardo, to protect children like Angelica and Mainor, and to support family unity and integrity. But the crisis of family separation will continue unless and until we recognize and challenge the ways in which the systematic apprehension, detention, and deportation of noncitizens strips parents of their rights and devastates immigrant families and communities.