FAMILIES DIVIDED: THE DENIAL OF FAMILY INTEGRITY RIGHTS IN THE IMMIGRATION CONTEXT

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ABSTRACT

Every day, the United States legally separates families. During the Trump Administration, family separations at the southern border drew justified outrage as horrific images of children in cages, longing for their parents, spread. Far more frequently, though, families are separated through family regulation systems and immigration enforcement in the United States. Although the U.S. Constitution supports a foundational right to family integrity, the jurisprudence around family rights in immigration law has fallen short of protecting children from the deportation of their parents. This article will explore the underlying family regulation and immigration systems, present legal arguments for family integrity, and discuss how these rights may be applied in immigration law practice. This article will also consider new potential applications for family rights arguments to defend families from immigration enforcement.

∞ J.D., New York University Law School 2022, B.A., Wesleyan University 2016. This article would not have been possible without the leadership, support, and dedication of my professors and editors. A special thank you to Professor Martin Guggenheim, who worked closely with me to develop this paper; to Professor Adam Cox for his guidance and feedback; to Professors Nancy Morawetz, Alina Das, and Jessica Rofé, whose clinic course was integral to deepening my understanding and practice of immigration law; and to the incredible editing team at the *N.Y.U. Review of Law & Social Change* for their thoughtful collaboration and work improving this article.

I.
INTRODUCTION

Family separations at the southern border drew justified outrage throughout the duration of the Trump Administration. More quietly, however, many more family separations continue to be enacted through the family regulation and immigration enforcement systems within the United States. These systems reinforce one another. Deportation and detention under the immigration system can threaten parents' custody of their children.[1] Meanwhile, noncitizens in family court proceedings face heightened immigration risks.[2] These systems are also mismatched. Not only do they fail to recognize the impacts they have on one another, they often fail to recognize the rights implicated by their overlapping enforcement. Characteristics of both family law and immigration law have created a system in which the right to family integrity is routinely denied when immigration enforcement separates families. This paper will examine the rights of children and parents

1. Olivia Saldaña Schulman, *"Now They've Robbed Me:" The Use of Termination of Parental Rights in Government-Fractured Immigrant Families*, 43 N.Y.U. REV. L. & SOC. CHANGE 361 (2019).

2. *See* Memorandum from the Advisory Council on Immigr. Issues in Fam. Ct. to Chief Administrative J. Marks, Adverse Consequences to Family Court Dispositions (Oct. 27, 2017), https://www.nycourts.gov/ip/Immigration-in-FamilyCourt/PDFs/AdvisoryMemorandum3.pdf [https://perma.cc/4AN6-6YJQ].

living in the United States whose families become enmeshed with the immigration system.

Although the right to family integrity has been historically ignored in the immigration context, I argue that it is a foundational right that can be applied to prevent detention and deportation.[3] Part II will provide an overview of family separation in the United States by discussing the various sites of family separation and the ways in which they interact. Part III will outline the history of the right to family integrity and explore the limitations on children who seek to exercise this constitutional right. Part IV will examine the role of family rights in immigration law. Part V will provide background on how fundamental rights claims are addressed under immigration law, and a history of denying family integrity rights in that context. This section will also discuss recent applications of such rights that signal new opportunities for arguments against family separation in immigration law. Finally, this section will provide an overview of potential avenues through which advocates may assert family integrity arguments to protect children and parents from the violence of detention and deportation.

As an initial matter, I would also like to acknowledge the shortcomings of this rights-based approach and argument. This article focuses on the right to family integrity and the contexts within which that right may be raised. This article, however, does not address critical components of long-term goals to secure justice for immigrants faced with the family regulation and immigration systems. Namely, this article does not focus on movement-led lawyering, strategies centered upon organizing and building power in marginalized communities, or decolonial approaches to migration, and it fails to challenge the assumption that traditional (i.e., nuclear or biologically related) families are entitled to rights that other familial structures are not.[4] Further, recognizing due process rights does not guarantee that such rights would be meaningfully protected.[5] This article aims to fortify and elaborate on specific rights that families can leverage to stay together when confronted with overlapping family regulation and immigration systems. This is a limited goal

3. In June 2022, the Supreme Court overturned *Roe v. Wade* and denied a constitutional right to abortion. *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242 (2022). The Court's decision to overturn a well-recognized substantive right in *Dobbs* rejects decades of precedent. This decision does not necessarily implicate the right of family integrity. Even so, since family rights were recognized prior to the right to abortion in 1973, this type of bold action by the Court suggests that the Court may narrow recognition of previously established substantive due process rights in the future. While this article does not directly discuss this threat, the newfound uncertainty in this area of law and its severe, lived consequences may eventually implicate family integrity in fundamentally threatening ways.

4. *See generally* E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509 (2019); FRANK J. BEWKES, CTR. FOR AM. PROGRESS, EXPANDING DEFINITIONS OF FAMILY IN FEDERAL LAWS (2020), https://www.americanprogress.org/wp-content/uploads/2020/05/Definitions-of-Family-4.pdf [https://perma.cc/7FJE-WT7F].

5. *See* Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51 (1989); Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23 (1994).

that can serve as one tactic among many to support individuals and communities in long-term struggles towards collective liberation.

II.
FAMILY SEPARATION IN THE U.S.

A. Consequences of Family Separation

Forced family separation has catastrophic, irreversible impacts.[6] The evidence of negative effects is "overwhelming."[7] Studies of children who were removed from their parents show markedly higher rates of anxiety and depression.[8] Separation can lead to increased aggression and cognitive difficulties.[9] Even brief separations can cause irreparable damage.[10] The "moment when a child is taken from her parents is the source of lifelong trauma, regardless of how long the separation lasts".[11] Children are placed in unfamiliar places, causing ambiguity, loss, and confusion that some children equate to kidnapping.[12]

The way families are disrupted under U.S. law disproportionately harms children and families of color, causing lasting consequences for parents, children, and communities. Damaging parent-child relationships erodes family integrity, weakening personal identity, economic opportunity, and the political power of impacted communities.[13] The harms of family separations are augmented by punitive policies that hyperregulate families while failing to provide services needed. Dorothy Roberts has also explored how services are continuously pushed towards the private sector, further leaving families behind, saying, "People suffer not only because the government has abandoned them but also because punitive policies make their lives more difficult. These two trends—private remedies for systemic

6. William Wan, *What Separation From Parents Does to Children: 'The Effect Is Catastrophic,'* WASH. POST (June 18, 2018), https://www.washingtonpost.com/national/health-science/what-separation-from-parents-does-to-children-the-effect-is-catastrophic/2018/06/18/c00c30ec-732c-11e8-805c-4b67019fcfe4_story.html [https://perma.cc/2TR4-MH92].

7. Vivek Sankaran, Christopher Church, & Monique Mitchell, *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1161, 1167 (2019) [hereinafter *Impact of Removal*].

8. *Id. See also* Wan, *supra* note 6 ("[S]tudies have shown that those "left-behind" children have markedly higher rates of anxiety and depression later in life.").

9. Wan, *supra* note 6 ("Other studies have shown separation leading to increased aggression, withdrawal and cognitive difficulties.")

10. *Impact of Removal*, *supra* note 7, at 1167.

11. Eli Hager, *The Hidden Trauma of "Short Stays" in Foster Care*, THE MARSHALL PROJECT (Feb. 11, 2020, 6:00 AM), https://www.themarshallproject.org/2020/02/11/the-hidden-trauma-of-short-stays-in-foster-care [https://perma.cc/G2X6-9TCN].

12. *Id.*; *Impact of Removal*, *supra* note 7, at 1168.

13. Wendy Jennings, *Separating Families Without Due Process: Hidden Child Removals Closer to Home*, 22 CUNY L. REV. 1, 10 (2019).

inequality and punitive state regulation of the most disadvantaged communities—are mutually reinforcing."[14]

Separation from parents also increases the likelihood that a child will later be detained or incarcerated,[15] creating cyclical harm for families enmeshed in these systems. Children who spend time in foster care are more likely to become incarcerated later on in life.[16] Meanwhile, if parents are detained or deported for extended periods of time, their custodial rights may be challenged, and their children may face foster care placements. This suggests that the children of people who are detained or deported are then more likely to be separated from their own children one day.

Racialized policing and enforcement intensify this cycle of child removal. In fact, heightened immigration enforcement and policing in certain localities is linked to an increase in foster children with detained or deported parents.[17] Together, criminal, immigration, and family regulation systems continuously interact, creating a sustained ecosystem of family separations and trauma.

B. Sites of Family Separation in the U.S.

This paper focuses on two main sites of family separation in the United States: the immigration system and the family regulation system. The criminal legal system and family separations also intersect. However, because of additional constitutional protections in the criminal context, the criminal and immigration doctrinal landscapes are fundamentally distinct. For that reason, the criminal legal system will not be an explicit focus of the comparisons drawn here. Nonetheless, no discussion of the almost routine quality of family separation in the United States that disproportionately impacts Black and Brown families could be complete without mentioning the world-outlying number of Americans who are incarcerated each day in our jails and prisons.[18]

Family separation in the immigration context typically conjures images of the Trump Administration's "Zero Tolerance" policy of separating families at the border, which drew mass scrutiny and outrage.[19] But detention and deportation processes have systematically separated families at a much larger scale over the past

14. Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1477–79 (2012).

15. *Id.* at 1476.

16. *Id.*

17. AM. IMMIGR. COUNCIL, FALLING THROUGH THE CRACKS: THE IMPACT OF IMMIGRATION ENFORCEMENT ON CHILDREN CAUGHT UP IN THE WELFARE SYSTEM (2012), https://www.americanimmigrationcouncil.org/sites/default/files/research/falling_through_the_cracks_3.pdf [https://perma.cc/2LLT-DSJ5].

18. *See* Adam Liptak, *U.S. Prison Population Dwarfs That of Other Nations*, N.Y. TIMES (Apr. 23, 2008), https://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html [https://perma.cc/E9MV-B8RH].

19. Alexandra Yoon-Hendricks & Zoe Greenberg, *Protests Across U.S. Call for End to Migrant Family Separations*, N.Y. TIMES (June 30, 2018), https://www.nytimes.com/2018/06/30/us/politics/trump-protests-family-separation.html [https://perma.cc/RGM3-L75M].

few decades. Between 2009 and 2013, there were 5.1 million minors living in the United States with at least one parent without immigration authorization.[20] Nearly six million U.S. citizen children live with an undocumented family member.[21] An even greater number of children live in families at risk of separation by immigration enforcement because parents with legal status may still be subject to detention and deportation.

The number of families currently separated due to immigration enforcement is difficult to ascertain. The Department of Homeland Security is only required to report how many *parents* of U.S. citizen children are removed annually, which excludes separations through detention and the total number of children impacted.[22] Such reporting also fails to include parents of children with DACA or other immigration statuses, or situations where a parent is removed but a child without citizenship is not.[23]

At peak periods of immigration enforcement from 2011–12, Immigration and Customs Enforcement ("ICE") deported approximately 90,000 parents of U.S. citizen children annually.[24] In the first six months of 2020, ICE removed more than 9,000 parents who were raising at least one U.S. citizen child.[25] Trends in family separations may be associated with trends of increases and decreases in enforcement, detention, and deportation.[26] For example, a study found that children in foster care were 29% more likely to have a detained or deported parent in localities where local police work with federal immigration enforcement through a 287(g)

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20. RANDY CAPPS, MICHAEL FIX, & JIE ZONG, MIGRATION POL'Y INST., A PROFILE OF U.S. CHILDREN WITH UNAUTHORIZED IMMIGRANT PARENTS (2016), https://www.migrationpolicy.org/sites/default/files/publications/ChildrenofUnauthorized-FactSheet-FINAL.pdf [https://perma.cc/B3NM-XEH6].

21. SILVA MATHEMA, CTR. FOR AM. PROGRESS, KEEPING FAMILIES TOGETHER (2017), https://www.americanprogress.org/wp-content/uploads/2017/03/KeepFamiliesTogether-brief.pdf [https://perma.cc/37RN-TFUE].

22. AM. IMMIGR. COUNCIL, *supra* note 17.

23. *Id.*

24. RANDY CAPPS, HEATHER KOBALL, ANDREA CAMPETELLA, KRISTA PERREIRA, SARAH HOOKER, & JUAN MANUEL PEDROZA, URBAN INST. & MIGRATION POL'Y INST., IMPLICATIONS OF IMMIGRATION ENFORCEMENT ACTIVITIES FOR THE WELL-BEING OF CHILDREN IN IMMIGRANT FAMILIES: A REVIEW OF THE LITERATURE, at v–1 (2015), https://www.urban.org/sites/default/files/alfresco/publication-exhibits/2000405/2000405-Implications-of-Immigration-Enforcement-Activities-for-the-Well-Being-of-Children-in-Immigrant-Families.pdf [https://perma.cc/84TN-C7Z3].

25. U.S. IMMIGR. & CUSTOMS ENF'T, DEP'T OF HOMELAND SEC., DEPORTATION OF PARENTS OF U.S.-BORN CHILDREN: FIRST HALF, CALENDAR YEAR 2020, at 3 (2021) https://www.dhs.gov/sites/default/files/publications/ice_-_deportation_of_parents_of_u.s.-born_children_first_half_cy_2020.pdf [https://perma.cc/LNQ5-MTXZ] ("ICE . . . [r]emoved 9,172 noncitizens who claimed to have at least one U.S.-born child.").

26. The increase may also be attributed to shifts in immigration enforcement and increased cooperation with local law enforcement through programs like Secure Communities and 287(g) agreements. Named for their section in the Immigration and Nationality Act (INA), these are agreements between local law enforcement and federal immigration enforcement agencies that authorize local enforcement to perform immigration functions. *See* Immigration and Nationality Act § 287(g), 8 U.S.C.A. § 1357(g) (West).

agreement, a program which expanded drastically in the late 2000s.[27] More recently, there has been increasing public pressure for the federal government and localities to end these agreements due to racial profiling and civil rights violations, and federal legislation has been introduced that would end the program.[28]

The child welfare system in the United States separates a shockingly high number of children from their families. Enforcement disproportionately targets low-income Black and Brown mothers and displaces their children.[29] Rather than protecting children from harm, Dorothy Roberts explains that removals are much more commonly "linked to poverty, racial injustice, and the state's approach to caregiving, which addresses family economic deprivation with child removal rather than services and financial resources."[30]

Every day in the United States, 700–800 children are forcibly removed through child welfare systems.[31] Because these removals are governed by state law,[32] they occur under a variety of different standards and processes. In some cases, these removals are made before more formal legal process begins. In New York, for example, the Administration for Children's Services can remove children without prior judicial approval in emergencies and only brings the matter to court on the following business day, when a judge will determine whether there was any need for the removal in the first place.[33]

Around 25,000 children are removed from their homes for less than 30 days each year, a majority of whom spend less than two weeks in foster care.[34] Although seemingly brief, even this amount of time away from one's family can have major negative consequences for children.[35] Moreover, the speed with which they are returned to their families strongly suggests the separation was needless to begin with.

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27. AM. IMMIGR. COUNCIL, *supra* note 17; 287(g) agreements refer to a specific provision in the Immigration and Nationality Act that enables the federal government to empower local law enforcement to collaborate and conduct immigration related arrests. U.S. IMMIGR. AND CUSTOMS ENF'T, *supra* note 25.

28. *End the Federal 287(g) Program in Maryland*, ACLU OF MD., https://www.aclu-md.org/en/campaigns/end-federal-287g-program-maryland [https://perma.cc/6D2A-TMNU] (last visited Oct. 17, 2022); Nicole Acevedo, *Democrats Push to end ICE Partnerships Amid Calls for Police Reform*, NBC NEWS (Apr. 22, 2021, 2:23 PM), https://www.nbcnews.com/news/latino/democrats-push-end-ice-partnerships-calls-police-reform-rcna746 [https://perma.cc/C9LX-LCVT].

29. *See* Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The Reality of 'Jane Crow,'* N.Y. TIMES (Jul. 21, 2017), https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html [https://perma.cc/LJ3F-7UFT].

30. Roberts, *supra* note 14, at 1484.

31. Paul Chill, *Hundreds of U.S. Children Taken From Home*, HARTFORD COURANT (June 25, 2018, 4:50 PM), https://www.courant.com/opinion/op-ed/hc-op-chill-removing-children-20180625-story.html [https://perma.cc/E874-AQPR].

32. *See* Saldaña Schulman, *supra* note 1, at 373.

33. Jennings, *supra* note 13, at 13.

34. Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 216–17 (2017).

35. *Id.* at 210–11.

C. Mutual Reinforcement of Immigration and Family Regulation

Despite their distinct doctrinal backgrounds, family regulation and immigration enforcement systems mutually reinforce the state's power to separate families. Doctrinal immigration law has failed to recognize parental rights in deportation processes because they are legally distinct from family regulation proceedings—a reality which ignores the extent to which deportation can destroy vital family interests. Involvement in family court proceedings can trigger immigration enforcement consequences.[36] The reverse is also true; the detention or deportation of a parent commonly leads to children being placed in foster care which, in short order, can result in the permanent destruction of family ties.[37] These systems, created independently, fail to account for each other's consequences.[38]

1. Immigration Consequences of Family Court

Family court proceedings can have grave immigration consequences. Unlike criminal defense lawyers, attorneys for parents in civil Family Court proceedings are not required to provide advice about immigration consequences.[39] Many criminal convictions will trigger deportation proceedings and bar individuals from benefits or discretionary relief.[40] However, adjudications in civil proceedings involving neglect or abuse can result in the same consequences,[41] without the constitutional requirement of access to immigration advice from a defense attorney that is provided in criminal cases. What a noncitizen parent says in a family law case may be used against them in immigration removal proceedings.[42] In addition, criminal convictions related to Family Court, including domestic violence charges and "crimes against a child," carry serious immigration consequences.[43] A single conviction related to domestic violence or crimes against a child can

36. Memorandum from the Advisory Council on Immigr. Issues in Fam. Ct., *supra* note 2.

37. AM. IMMIGR. COUNCIL, U.S. CITIZEN CHILDREN IMPACTED BY IMMIGRATION ENFORCEMENT 3–4 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/us_citizen_children_impacted_by_immigration_enforcement_0.pdf [https://perma.cc/W5DP-NQBF]. *See also* Saldaña Schulman, *supra* note 1, at 387–88.

38. *See* Saldaña Schulman, *supra* note 1, at 388 (discussing the lack of communication from ICE agents to parents' lawyers during and after removal, which hampers lawyers' ability to advocate on their behalf).

39. *See* Padilla v. Kentucky, 559 U.S. 356 (2010).

40. For example, benefits like Cancellation of Removal for non-permanent residents requires an inquiry into "Good Moral Character," which may consider admissions made in family court. 8 U.S.C. § 1229a(b)(1)(B). *See* Memorandum from the Advisory Council on Immigr. Issues in Fam. Ct., *supra* note 2.

41. *See* 8 U.S.C. § 1182 (stating that inadmissibility grounds can be used as grounds of deportation for noncitizens present in the U.S. who were never formally "admitted" under the statutory scheme).

42. *See* Memorandum from the Advisory Council on Immigr. Issues in Fam. Ct., *supra* note 2 (requiring people in immigration proceedings to turn over their family court records or risk denial of their request for relief).

43. *See* 8 U.S.C. § 1227(a)(2)(E)(i) (describing deportability grounds for "admitted" nonimmigrants)

make a green card holder deportable.[44] Similarly, a violation of a protection order can carry grave immigration consequences, including deportation.[45]

Family Court adjudications can also prevent noncitizens from accessing benefits or relief. Neither children nor parents can derive immigration benefits through each other once parental rights are terminated.[46] Even relatively modest interim orders that are commonly issued in family law cases, such as civil orders of protection or violations of an order of protection, can be a significant factor in discretionary denials of relief in immigration cases.[47]

Noncitizens in ICE detention have limited capacity to work with and communicate with their legal representatives for Family Court proceedings. Attorneys are often unable to reach their clients in ICE detention and are not always informed of transfers.[48] One study found that attorneys tend to deprioritize cases when a parent is in ICE detention or deportation proceedings, possibly due to high caseloads and subconscious biases.[49]

The very act of attending Family Court can also create risks for noncitizens. In New York, fingerprints taken in connection with Family Court, including those taken for applications to become a foster parent, have triggered a call to ICE if individuals have previously been deported and have certain criminal histories.[50] ICE Officers also have a history of making arrests in or near courthouses.[51] Some states and localities, including New York, have now prohibited immigration arrests in courthouses to preserve access to the courts for noncitizens.[52]

2. Custody Implications of Detention and Deportation

According to census data, over five million children in the United States lived with at least one parent without immigration status between 2009 and 2013.[53]

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44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *See* Saldaña Schulman, *supra* note 1, at 387–88.

49. Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 CONN. L. REV. 99, 139–40 (2011).

50. N.Y. CIV. LIBERTIES UNION & IMMIGRANT DEF. PROJECT, NEW YORK PRACTICE ADVISORY: WHEN DOES FINGERPRINTING PUT YOUR CLIENT AT RISK WITH ICE? (2017), https://www.immigrantdefenseproject.org/wp-content/uploads/DCJS-advisory-7-27-17-6-PM-updated1.pdf [https://perma.cc/3DML-VFFN].

51. IMMIGRANT DEF. PROJECT, *ICE Out of Courts New York State Campaign*, https://www.immigrantdefenseproject.org/ice-courts-nys/ [https://perma.cc/K2XB-Q7RS] (last visited Sept. 30, 2022).

52. A coalition of immigrant rights activists in New York led a long-run campaign against this practice. On December 15, 2020, Governor Cuomo signed the "Protect Our Courts Act," which prohibits immigration-related arrests in courthouses based on administrative warrants. *See* Deanna Garcia, *Cuomo Finally Signs Protect Our Courts Act to Stop Courthouse Arrests* (Dec. 16, 2020), https://documentedny.com/2020/12/16/cuomo-finally-signs-protect-our-courts-act-to-stop-courthouse-arrests/ [https://perma.cc/2E47-VBJN].

53. CAPPS, FIX, & ZONG, *supra* note 20.

Many of these children have had a parent deported, detained, or apprehended by ICE. On top of the trauma and disruption that this causes the child, there also may be legal implications for parental custody.

When a parent is detained or deported, their children are placed in foster care if no other family member is available to take in the child. Under federal law, states must file a Termination of Parental Rights petition once a child has been in foster care for 15 consecutive months.[54] As Olivia Suldaña Schulman described,

> 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 the parent has never previously been involved with child protective agencies or been anything less than an engaged, dedicated parent.[55]

Many children with detained or deported parents live with close family members or "grandfamilies," where the grandparents care for the child without the parent in the home. A Generations United report found that over 500,000 children are living in "immigrant grandfamilies," where the child, parent, or grandparent is not a citizen.[56] Children in foster care with relatives have fewer school changes, better mental health outcomes, and are less likely to re-enter the foster care system after returning to birth parents.[57] At the same time, many immigrant grandfamilies operate outside of the formal foster care system, making it nearly impossible to access services, place children in school, or consent to health care without formal custody of the child.[58] This reality puts grandfamilies in a double bind: in order to access services, grandfamilies outside of the child welfare system would need to challenge the very parental custody rights that they seek to protect.[59] In response, some states have set up legislative schemes to allow parents to establish formal guardianships in the case of detention or removal.[60]

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54. Saldaña Schulman, *supra* note 1, 364–65 (citing 42 U.S.C. § 675(5), *amended by* 42 U.S.C. § 675(5)(E) (1997)).

55. *Id.* at 365–66.

56. GENERATIONS UNITED, LOVE WITHOUT BORDERS: GRANDFAMILIES AND IMMIGRATION 1 (2018), https://www.gu.org/app/uploads/2019/02/Grandfamilies-Report-LoveWithoutBorders.pdf [https://perma.cc/ZE3K-GUU3].

57. *Id.* at 7.

58. *Id.* at 4, 7.

59. *Id.* at 7.

60. Teresa Wiltz, *If Parents Get Deported, Who Gets Their Children?*, THE PEW CHARITABLE TRS. (Oct. 25, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/25/if-parents-get-deported-who-gets-their-children [https://perma.cc/Y4XM-TPEE].

III.
THE RIGHT TO FAMILY INTEGRITY

The fundamental right of a parent to raise their child is "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court."[61] This right was first recognized as a substantive due process right in *Meyer v. Nebraska*, decided in 1923.[62] The Due Process Clause, thus, sets a constitutional limit on the degree to which the state may interfere with a parent raising their child without a compelling interest. In *Meyer*, the Court struck down a state statute that forbid teaching young students German in school.[63] The statute violated the Constitution because it interfered with parental rights to shape their children's education by prohibiting students from learning the plaintiff parents' native tongue in school.[64] Soon after, this right was affirmed in *Pierce v. Society of Sisters*, when the Court struck down a compulsory public education statute, stating famously, "[T]he child is not the mere creature of the state."[65] The Court in *Pierce* ruled that under *Meyer*, it was "entirely plain" that the compulsory education statute interfered with the liberty rights of parents.[66]

Later cases reaffirmed the fundamental right of parents but also clarified its limits. For example, in *Prince v. Massachusetts*, the Court rejected a challenge to child labor laws, stating that "the family itself is not beyond regulation in the public interest."[67] By 2000, the Supreme Court stated that "[i]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[68]

The right of parents to keep or regain custody of their children is also well-established. *Stanley v. Illinois* held that a court must find that the parent is unfit before the state may take a child into custody.[69] In that case, an Illinois law required children of unwed fathers to become wards of the state after the death of the mother. The Supreme Court found that Illinois's failure to provide a hearing on his fitness as a parent before the children were taken from his custody violated the Due Process Clause of the Constitution.[70] In *Stanley*, the Court noted that this right compels adequate procedure including individualized determination of

61. Troxel v. Granville, 530 U.S. 57, 65 (2000).
62. *See* Meyer v. Nebraska, 262 U.S. 390, 400 (1923).
63. *Id.* at 403.
64. *Id.* at 399, 400.
65. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).
66. *Id.* at 534–35.
67. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
68. Troxel v. Granville, 530 U.S. 57, 66 (2000).
69. Stanley v. Illinois, 405 U.S. 645, 645 (1972).
70. *Id.*

parental fitness.[71] *Stanley* also described the right protected under the Fourteenth Amendment as "the integrity of the family unit."[72]

In practice, however, this right to keep or regain custody of one's children can be limited in its protections. Despite the strength of the substantive rights established, procedural due process jurisprudence often falls short of actually protecting families from forced separations. Although family law is comprised of procedures set at the state level, the line of cases establishing fundamental parental rights compels some constitutional floor of required procedure. This floor is too often lacking in adequate protection for families. For example, in *Lassiter v. Department of Social Services*, the Court held that due process did not require appointment of counsel in every parental termination proceeding, leaving this decision to trial judges moving forward.[73]

In a concurrence in *Lassiter*, Chief Justice Burger stressed that because proceedings of this kind are not "punitive," and merely "protective" of children, there is a diminished need to insist upon lawyers being assigned in each proceeding.[74] This limitation mirrors the immigration sphere, where the categorization of deportation as a civil proceeding serves to deny parties the right to court-assigned counsel,[75] even though both proceedings can result in the same weighty punishment of family separation.

Despite procedural limitations, the history of strong recognition of this right compels serious consideration in legal settings that threaten to divide families. Opponents of recognizing a right to family integrity may raise arguments that this right is held only by parents, rather than a reciprocal right held by both parents and children. I argue, however, that this right is reciprocal and can be invoked by both parents and children.

Although the word "child" does not appear in the Constitution, the Supreme Court has limited some constitutional rights when applied to children. For example, the state is permitted to regulate obscene reading materials so long as it is not irrational for legislatures to find that the material is harmful to minors.[76] Another example includes the less stringent Fourth Amendment protections in public schools.[77] The Fourth Amendment does not protect children in public school from mandatory drug testing for sports teams based on an extremely narrow view of children's rights: "unemancipated minors lack some of the most fundamental

71. *See id.* at 656–57.

72. *Id.* at 651.

73. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31–32 (1981).

74. *See id.* at 34 (Burger, J., concurring).

75. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (holding that "the order of deportation is not a punishment for a crime" to differentiate civil immigration proceedings from criminal trials).

76. Ginsberg v. New York, 390 U.S. 629, 641 (1968).

77. *See* New Jersey v. T.L.O, 469 U.S. 325 (1985).

rights of self-determination—including even the right of liberty in its narrow sense."[78]

In *Stanley*, the Supreme Court stated that "[t]he *integrity of the family unit* has found protection in the Due Process Clause of the Fourteenth Amendment."[79] Five years after *Stanley*, the Second Circuit described this right as "the most essential and basic aspect of familial privacy: the right of the family to remain together without the coercive interference of the awesome power of the state." [80] The Second Circuit went on to specify that the right to family integrity "encompasses the reciprocal rights of both parents and children."[81] In *Wooley v. City of Baton Rouge*, the Fifth Circuit considered a child's right to family integrity as "concomitant to that of a parent," and defined the child's right "with reference to his mother's rights."[82]

Another way to understand the reciprocity of this right is to consider the distinction between holding rights and exercising them. In an article on the parent-child relationship and immigration, David B. Thronson explains, "The existence of rights often is falsely equated with the exercise of rights. Yet thinking about the existence of rights separately from the exercise of rights allows us to envision parents as empowered, not to usurp children's rights, but rather to vindicate them."[83] This distinction demonstrates that the right to family integrity has been construed as a parental right only because it is traditionally exercised by parents.

While there are some limits on parental decision-making, there is a traditional presumption that a parent will act in the best interests of their children.[84] The parental right to raise a child follows naturally from this presumption, and similarly, this presumption is critical to protecting the rights of children. As Thronson describes, "[d]iscussions of rights tend to focus on adults rather than children because, in part, the real needs and dependency of children at various stages of development fit poorly with notions of autonomy and individual choice associated with traditional rhetoric about rights."[85] In situations where children are unable to advocate directly for themselves, their rights are often asserted against the state *through* their parents.[86]

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78. Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995).

79. Stanley v. Illinois, 405 U.S. 645, 651 (1972) (emphasis added).

80. Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977).

81. *Id.* at 825.

82. Wooley v. Baton Rouge, 211 F.3d 913, 923 (2000).

83. David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1175 (2006).

84. Parham v. J. R., 442 U.S. 584, 604 (1979) (finding that "[the Supreme Court's] precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interests of their child should apply").

85. Thronson, *supra* note 83, at 1175.

86. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (considering how a parent's free exercise rights implicate the constitutionality of a compulsory education statute).

In the foundational cases establishing a right to family integrity, children were not included as plaintiffs.[87] Thus, it is difficult to track when the rights being asserted should be construed as the parents' own right, or the parents exercising the rights of the children on their behalf. However, even Justice Scalia considered the possibility that a child has a liberty interest reciprocal to their parents. In dismissing the child's interest along with the parent's interest in *Michael H. v. Gerald D.*, the Supreme Court refused to settle the question.[88] The Court stated explicitly, "We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. We need not do so here because, *even assuming that such a right exists,* [the child]'s claim must fail."[89]

Opponents could also argue that the *Gluckbserg* approach should be applied to evaluate the right to family integrity. The right to family integrity was recognized before the Supreme Court articulated a narrow approach to recognizing substantive due process rights in *Washington v. Glucksberg*.[90] However, the *Glucksberg* approach should not apply here because it is used to define *new* substantive due process rights, rather than be applied to pre-established rights. Due to the long history of the right to family integrity, this analysis should not be applied here. Even if it is applied, however, I argue that this analysis further demonstrates that the right to family integrity is well-established.

Even if the *Glucksburg* test did apply to well-established rights, there is a strong argument that the right to family integrity complies with even the most conservative notions of tradition. The *Glucksberg* approach outlines the Court's approach to recognizing substantive due process rights.[91] First, it requires that courts assess whether a right is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." Second, it mandates a "'careful description' of the asserted fundamental liberty interest."[92] Parental rights are some of the oldest rights recognized under U.S. constitutional law, with nearly a century of recognition under the Supreme Court.[93] The Court has described the institution of the family as "deeply rooted in this Nation's history and tradition,"[94] and the "traditional relation of the family" as "a relation as old and as fundamental as our entire civilization."[95]

87. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Prince v. Massachusetts, 321 U.S. 158 (1944).

88. Michael H. v. Gerald D., 491 U.S. 110 (1989).

89. *Id.* at 130 (emphasis added).

90. *See* Stanley v. Illinois, 405 U.S. 645 (1972); Washington v. Glucksberg, 521 U.S. 702 (1997).

91. *Glucksberg*, 521 U.S. at 721.

92. *Id.*

93. *See* Meyer v. Nebraska, 262 U.S. 390 (1923).

94. Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 503 (1977).

95. Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

Some may argue that the substantive due process right to family integrity lacks the specificity the Supreme Court has historically required since *Glucksburg*. In *Glucksburg*, Justice Rehnquist criticized the lack of careful description in the varied definitions of the right questioned in that case, e.g., a right to "determin[e] the time and manner of one's death," the "right to die," a "liberty to choose how to die," a right to "control of one's final days," "the right to choose a humane, dignified death," and "the liberty to shape death."[96] Considering this broad range of potential descriptions of the right in question, the Court held that a right to assisted suicide was not a constitutionally recognized due process right.[97]

In contrast, I argue that the right to family integrity can be defined with specificity. At its narrowest, it is the freedom from the state's forceful separation of parents from children without cause. For example, in *Serna v. Texas Department of State Health Services, Vital Statistics Unit*, the District Court noted that while "the right to family integrity may be nebulous, the Court concludes its parameters extend to the issue of food, shelter, medical care and religious participation by a parent on behalf of his or her child."[98] This outline provides a clear example of court's ability to define this right with specificity and comply with a *Glucksberg* analysis.

In sum, the right to family integrity can withstand rigorous scrutiny and has a long history of recognition under Supreme Court law. This background suggests that the right would be rigorously protected, but in practice, the law falls short in protecting families from being separated by the state. To help understand why, the next section will provide an overview of the unique ways in which rights can be analyzed and applied in the immigration context.

IV.
BACKGROUND ON IMMIGRATION LAW

Despite the strength of the right to family integrity, its applications in the immigration context remain limited. This is due, in part, to the unique way that immigration law regulates families. Immigration law jurisprudence has also created a unique landscape for asserting constitutional rights, often described as the "plenary power doctrine."[99] In this section, I will provide an overview of families and immigration law and discuss background on immigration jurisprudence around constitutional rights.

96. *Glucksberg*, 521 U.S. at 722.

97. *Id.*

98. Serna v. Tex. Dep't of State Health Servs., No. 1-15-CV-446 RP, 2015 WL 6118623, at *6 (W.D. Tex. Oct. 16, 2015).

99. *See infra* Section IV.B.

A. Families in Immigration Law

Family rights are rarely applied in the immigration context. This is due, in part, to the nature of these two incongruent yet overlapping systems, described above in Part II. Family regulation systems operate at the state level while immigration law is federal.[100] Despite the mutual reinforcement of family regulation and immigration enforcement, these systems do not formally interact.

Families are given *some* consideration in the Immigration Code. In 1965, the Hart-Cellar Act repealed national origin-based quotas, which functioned as a legal preference for white, European immigrants.[101] In an effort to move away from the white supremacist rationale for the national-origin quota, the new legislation introduced family-based immigration.[102] This system placed preferences based on relationships with U.S. Citizens or U.S. Green Card holders.[103]

However, this law failed to provide a pathway to citizenship for the parents of children with citizenship or permanent residence that could protect families from separation. The immigration code includes long and complicated definitions of "child,"[104] and in order to sponsor a parent, a child must be 21 years of age.[105] This framework still defines the U.S. immigration system today.[106]

The Hart-Cellar Act was not intended to be revolutionary.[107] In fact, some legislators hoped it would promote whiteness in the United States by prioritizing migrants with a family connection to citizens or Green Card holders in the U.S.[108] Ultimately, however, the law contributed to a major shift in the racial and ethnic makeup of the United States. In 1965, Hispanic people comprised four percent of the U.S. population, and Asian people constituted less than one percent.[109] By 2015, Hispanic people accounted for 18% of the U.S. population, and Asian people comprised six percent.[110] The proportion of white people in the U.S. declined from 84% in 1965 to 62% in 2015.[111] The Hart-Cellar Act also set the stage for a major increase in the informal immigration system by eliminating a large-scale

100. *See* Saldaña Schulman, *supra* note 1, at 379.

101. Muzaffar Chishti, Faye Hipsman, & Isabel Ball, *Fifty Years On, the 1965 Immigration and Nationality Act Continues to Reshape the United States*, MIGRATION POLICY INSTITUTE (Oct. 15, 2015) https://www.migrationpolicy.org/article/fifty-years-1965-immigration-and-nationality-act-continues-reshape-united-states [https://perma.cc/LEW5-Z6LB].

102. *Id.*

103. *Id.*

104. Immigration and Nationality Act § 101(b)(1) (West).

105. Immigration and Nationality Act § 201(b)(2)(A)(i) (West).

106. Chishti, Hipsman, & Ball, *supra* note 101.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

guestworker program for Mexican agricultural workers, forcing people to arrive and live in the U.S. without pathways to legal status.[112]

The INA also provides some avenues for relief for people seeking to immigrate based on hardship to a family member. In some areas of discretionary relief, immigration law applies an "extreme hardship" standard, which requires demonstrating hardship to a spouse or child who is a citizen or permanent resident.[113] Case law has defined "extreme hardship" to require "hardship that is unusual or beyond that which would normally be expected upon deportation."[114] Cancellation of Removal is another form of relief that looks to impact on family members.[115] For noncitizens who are not lawful permanent residents, this relief requires an even higher standard of "exceptional and extremely unusual hardship" for a family member to qualify.[116]

This type of immigration relief which requires unusual levels of suffering fails to adequately consider the impact of any deportation on families and leaves most immigrant families vulnerable to separation. The case law seems designed to ignore the systemic harms of the immigration system by providing relief only in "extreme" or "exceptional" cases. By casting situations where families are forcefully separated as a matter of routine policy, this relief is defined far too narrowly to protect the right to family integrity. As discussed, forced separations have severely detrimental effects on children and families.[117] The hardship faced is always extreme.

B. The Plenary Power Doctrine

Despite the unique role of families in the Immigration Code itself, immigration jurisprudence is subject to a doctrine known as the "plenary power doctrine."[118] This doctrine affords high levels of deference to political branches over immigration law[119] and illustrates that alternative constitutional standards are often applied to noncitizens.[120] Government actors weaponize the plenary power doctrine to heighten deference to the government and deny foundational rights.[121] Since this doctrine can shape how judges analyze all constitutional rights in

112. *Id.*

113. *See* Immigration and Nationality Act § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D).

114. Perez v. Immigr. & Naturalization Serv., 96 F.3d 390, 392 (9th Cir. 1996).

115. 8 U.S.C. § 1229b(a)–(b).

116. 8 U.S.C. § 1229b(b)(1)(D).

117. *See supra* Section II.A.

118. *See generally* David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (2017).

119. *Id.* at 597.

120. *See* David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 Okla. L. Rev 29, 35–36 (2015).

121. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (ruling in favor of Trump Administration in lawsuit concerning targeted policy of barring people from six predominantly Muslim countries from entering United States).

immigration law, understanding the failures of some past case law to recognize the right to family integrity is critical.

As early as 1889, the Supreme Court established the broad power of the federal government to exclude and deport, rejecting the supposition that resident noncitizens have any vested rights to remain in the U.S.[122] The Court has subsequently reinforced the power of the federal government to exclude and deport noncitizens as an incident of sovereignty.[123]

Despite the limited protections guaranteed in immigration proceedings, the Supreme Court has held that noncitizens are protected by the Constitution. In *Yick Wo v. Hopkins*, the Supreme Court determined that the Due Process and Equal Protection Clauses of the Fourteenth Amendment were not limited to citizens, but rather are "universal in their application, to all persons within the territorial jurisdiction."[124] Thus, other rights arising under the Fourteenth Amendment could theoretically apply to noncitizens and citizens alike as well.

In the mid-20th century, the Court began further developing the plenary power doctrine to limit the constitutional protection of noncitizens.[125] Under this doctrine, courts applied more deferential standards in lieu of the typical constitutional standards when claims relate to immigration.[126] For example, in *Trump v. Hawaii*, the Court considered claims about the Muslim travel ban enacted in 2017.[127] Although a First Amendment Free Exercise claim would typically require heightened scrutiny,[128] the Court still chose to apply rational basis review in this context.[129] In some cases, the doctrine suggests that the mere involvement of the noncitizen is what triggers heightened deference.[130] For example, a noncitizen seeking initial entry to the U.S. has very limited protections from being denied admission, even if they have physically entered the U.S at a port of entry.[131] The

122. Chae Chan Ping v. U.S., 130 U.S. 581, 600 (1889).

123. *Id.* at 603–04; *see also* Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893) ("It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." (quoting Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892))).

124. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

125. *See, e.g.*, Knauff v. Shaugnessy, 338 U.S. 537, 544 (1950).

126. *Compare Trump v. Hawaii*, 138 S. Ct. 2392 (applying rational basis review); Mathews v. Diaz, 462 U.S. 67 (1976) (refusing to apply strict scrutiny or analysis of compelling state interest to an equal protection claim); Kleindenst v. Mandel, 408 U.S. 753, 769 (1972) (limiting review to a "facially legitimate and bona fide" standard).

127. *Trump v. Hawaii*, 138 S. Ct. 2392.

128. *Id.* at 2441 (Breyer, J., dissenting) ("[I]n other Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review.").

129. *Id.*

130. *See, e.g.*, *Knauff*, 338 U.S. at 544 (granting a noncitizen heightened deference).

131. Shaugnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) (holding that immigrants at the "threshold of initial entry" into the U.S. are not entitled to proceedings "conforming to the traditional standards of fairness encompassed in due process of law" before removal).

Court sometimes applies a "facially legitimate and bona fide" standard, which looks exclusively at the explanation provided for a denial, regardless of its brevity.[132] The context in which each standard should be applied remains unclear.[133]

Procedural due process jurisprudence demonstrates the limitations placed on noncitizens' rights by the plenary power doctrine. Some procedural protections apply to at least some noncitizens facing deportation.[134] In a few cases, the Court applies a straightforward approach of requiring basic notice and a meaningful opportunity to be heard.[135] More often, however, the plenary power doctrine complicates the degree to which procedural due process is rigorously applied, leaving immigrants in deportation proceedings.[136] In theory, procedural due process analyses should apply the *Mathews v. Eldridge* balancing test to ensure adequate procedure protecting "liberty" or "property" under the Constitution.[137] However, the foundational plenary power cases were decided before *Mathews*,[138] and courts have remained reluctant to square the *Mathews* test with immigration and the plenary power doctrine ever since.[139] Today, courts are inconsistent about whether and when they recognize the cognizable interests of noncitizens and what constitutional standards are applied, often failing to apply the *Mathews* balancing test in the immigration context without clear reason.[140]

Even when the Court applies the *Mathews* balancing test, the plenary power doctrine influences the rigor with which private interests are weighted in favor of the government. In *Landon v. Plasencia*, the Court applied the *Mathews* test, describing Plasencia's interest in staying in the United States as "a weighty one."[141] The Court identified the immigrant's ties to the United States and her right to rejoin her immediate family as a "right that ranks high among the interests of the individual."[142] Nonetheless, the Court limited the holding due to the fact that

132. Kleindenst v. Mandel, 408 U.S. 753, 769 (1972). *See also* Kerry v. Din, 576 U.S. 86, 101–06 (2015) (Kennedy, J., concurring).

133. *See Trump v. Hawaii*, 138 S. Ct. 2392 (explaining that a facially legitimate and bona fide standard was applicable but applying rational basis review instead).

134. Yamataya v. Fisher, 189 U.S. 86, 101 (1903) (holding that immigrants who have become "part of [the country's] population" must have an opportunity to be heard prior to being taken into custody or deported).

135. *See, e.g.*, Jacinto v. Immigr. & Naturalization Serv., 208 F.3d 725 (9th Cir. 2000).

136. *See Mezei*, 345 U.S. at 212 (comparing standards of review applied to assess immigrants' claims and demonstrating the role of the plenary power doctrine in limiting the rigor with which constitutional analysis is applied).

137. Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

138. *Mezei*, 345 U.S. 206; Knauff v. Shaugnessy, 338 U.S. 537 (1950).

139. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (applying rational basis review rather than pursuing a *Mathews* analysis); Kerry v. Din, 576 U.S. 86 (2015) (applying a standard from *Kleindenst v. Mandel*, 408 U.S. 753 (1972), rather than pursuing a *Mathews* analysis); Fiallo v. Bell, 430 U.S. 787, 794–95 (1977) (applying a "facially legitimate and bona fide" standard rather than heightened scrutiny for sex discrimination).

140. *See, e.g.*, Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959 (2020).

141. Landon v. Plasencia, 459 U.S. 21, 34 (1982).

142. *Id.*

Plasencia could invoke the Due Process Clause and declined to "decide the contours of the process that is due or whether the process accorded Plasencia was insufficient."[143]

The Supreme Court's varied opinions in *Kerry v. Din* illustrate the influence of the plenary power doctrine on family rights in immigration.[144] The case involved a spousal right derived from *Meyer*, rather than a parental right;[145] Din's spouse was denied a visa without explanation.[146] Din argued for procedural due process to protect her interest of living in the U.S. with her spouse and, specifically, an explanation as to why the visa was denied.[147]

Din's spouse was a civil servant during the Taliban regime in Afghanistan.[148] Thus the context of "foreign policy," or rather, heightened islamophobia, could explain the high level of deference applied in this case. Justice Kennedy, in a controlling concurrence, applied the "facially legitimate and bona fide" standard and refused to consider any applicable family rights of Din or her spouse.[149] Justice Scalia, writing for the majority, also refused to recognize any substantive or protectable interest in this case, going so far as referring to the right established in *Meyer v. Nebraska* as "dicta," despite its clear foundations in constitutional case law.[150]

Justice Breyer's dissent, however, identified Ms. Din's interest in living with her spouse and raising a family as well as her right to live in this country as a U.S. citizen.[151] He argued that together these rights create a protectable interest that was insufficiently protected under the *Matthews* balancing test.[152] Contesting Scalia's characterization of his analysis as creating new constitutional rights, Breyer asserted, "I break no new ground here," citing historical cases establishing familial rights.[153] I argue that Breyer's analysis is correct here, and based on this, families can and should assert family integrity claims in immigration contexts, which the article explores further in the next section.

143. *Id.* at 32.
144. *Din*, 576 U.S. 86.
145. *Id.* at 88.
146. *Id.* at 110 (Breyer, J., dissenting).
147. *Id.* at 88 (majority opinion).
148. *Id.* at 88.
149. *Id.* at 102 (Kennedy, J., concurring).
150. *Id.* at 94 (majority opinion).
151. *Id.* at 108–09 (Breyer, J., dissenting).
152. *Id.* at 112–13.
153. *Id.* at 109.

V.
ASSERTING FAMILY RIGHTS IN THE DETENTION AND DEPORTATION CONTEXTS

Circuit courts have claimed that a parent's deportation does not violate children's constitutional rights.[154] However, the Supreme Court has not yet assessed such claims in the modern context. Cases typically provide a conclusory denial of family rights, relying on precedent developed in the 1970s and 1980s.[155] The precedent tends to invoke children's constitutional rights with varying strengths and without articulating the right in question or explaining what theory justified denying relief.[156] While these cases reject the applicability of some constitutional rights, I argue that these cases do not foreclose an argument for children or parents to assert their right to family integrity to trigger heightened *procedural* protections in immigration enforcement proceedings against their parents. In fact, more recent cases demonstrate that courts may be willing to engage with a thoughtful reconsideration of the constitutional implications of the right to family integrity.[157] This section will review how courts have assessed children and parents' arguments invoking family integrity in immigration contexts. Then, I will discuss recent developments and potential applications of this argument.

A. A History of Dismissing Family Rights

The U.S. Courts of Appeals that deny family integrity rights rely on limited Supreme Court precedent. In 1957, the Supreme Court decided *U.S. ex rel. Hintopoulos v. Shaugnessy*, a case that focuses on lower courts' proper discretion and standards of review.[158] The majority opinion does not discuss or consider the role of children's or parents' rights, but it denied a suspension of deportation over claims about the noncitizen's U.S.-citizen child.[159] In dissent, Justice Douglas emphasized the child's Fifth Amendment rights, writing that the five-year-old "cannot enjoy the educational, spiritual, and economic benefits which our society

154. *See, e.g.*, Acosta v. Gaffney, 558 F.2d 1153, 1153 (3d Cir. 1977) (holding that an "infant, citizen child was not entitled to a stay of her alien parents' deportation order because that order . . . would operate, if executed, to deny to her the right which she has as an American citizen to continue to reside in the United States"); Gonzalez-Cuevas v. Immigr. & Naturalization Serv., 515 F.2d 1222 (5th Cir. 1975) (noting that deporting a citizen child's parents is not a constitutional violation); Ayala-Florez v. Immigr. & Naturalization Serv., 662 F.2d 444 (1981).

155. *See, e.g.*, *Gonzalez-Cuevas*, 515 F.2d at 1224 ("In *Perdido v. INS*, we rejected the argument that deportation of parents of a citizen child deprives the child of a constitutional right." (citing 420 F.2d 1179, 1181 (5th Cir. 1969))).

156. *See e.g.*, Gallanosa v. United States, 785 F.2d 116, 120 (4th Cir. 1986) (stating broadly that courts of appeals have held that deportation does not infringe on the constitutional rights of children); *Acosta*, 558 F.2d at 1157 (construing the right in question as a citizen's right to reside in the U.S.).

157. *See, e.g.*, Aguilar v. U.S. Immigr. & Customs Enf't, 510 F.3d 1, 19 (1st Cir. 2007) (distinguishing from *Payne-Barahona v. Gonzales*, 474 F.3d 1, 2 (1st Cir. 2007)); Ms. L. v. U.S. Immigr. & Customs Enf't, 302 F. Supp. 3d 1149, 1164 (S.D. Cal. 2018)).

158. United States *ex rel.* Hintopoulos v. Shaugnessy, 353 U.S. 72 (1957).

159. *Id.* at 77.

affords *unless he is with his parents*."[160] This broad description implies both a right to reside in the United States and a right to family integrity.

Cases decided by various circuit courts inconsistently connect *Hintopoulos* to contemporary cases. *Perdido v. INS*, decided by the Fifth Circuit in 1969, provides an early example where the court relied on *Hintopoulos* to hold that the deportation of a parent of a citizen child did not violate a constitutional right.[161] Since its announcement, *Perdido* has been cited in numerous cases across many circuits that assert vague and varied interpretations of rights that children lack.[162] For example, in the Sixth Circuit, *Ayala Florez v. INS* and *Newton v. INS* rejected "citizenship rights" of the child.[163] Similarly, *Acosta v. Gaffney* in the Third Circuit rejected the citizenship right of a child to live in the U.S.[164] In contrast, *Gonzalez-Cuevas v. INS* in the Fifth Circuit referred broadly to the "constitutional right of children," without defining the right in question.[165]

These cases are often cited to dismiss claims related to a child's right to family integrity. However, these cases generally refer to a citizenship right to reside in the U.S., not a substantive due process right to family integrity. For example, in *Acosta*, the Third Circuit described the child's right as an American citizen to "reside wherever he wishes, whether in the United States or abroad, and to engage in the consequent travel."[166] These courts' failures to define this substantive right may be explained by the jurisprudential landscape in the 1970s and 1980s as compared to today. Modern substantive due process doctrine was still being developed as the cases described above were decided. While a right to family integrity was firmly established during this period, rights related to privacy, including contraception or marriage, were newly recognized.[167]

More recently, the First Circuit rejected a family integrity claim on behalf of U.S. citizen children challenging their parents' deportation in 2007.[168] In this case, *Payne-Barahona v. Gonzales*, the court stated broadly that "a parent's otherwise valid deportation does not violate a child's constitutional right."[169] However, the

160. *Id.* at 79 (Douglas, J., dissenting) (emphasis added).

161. Perdido v. Immigr. & Naturalization Serv., 420 F.2d 1179, 1181 (5th Cir. 1969) (citing *Hintopoulos*, 353 U.S. 72).

162. *See, e.g.*, Acosta v. Gaffney, 558 F.2d 1153, 1157 (3d Cir. 1977); Gonzalez-Cuevas v. Immigr. & Naturalization Serv., 515 F.2d 1222, 1224 (5th Cir. 1975); Ayala-Florez v. Immigr. & Naturalization Serv., 662 F.2d 444, 446 (6th Cir. 1981).

163. *Ayala-Florez*, 662 F.2d at 446; Newton v. Immigr. & Naturalization Serv., 736 F.2d 336 (6th Cir. 1984).

164. *Acosta*, 558 F.2d at 1157.

165. *Gonzalez-Cuevas*, 515 F.2d at 1224.

166. *Acosta*, 558 F.2d at 1157.

167. *See* Meyer v. Nebraska, 262 U.S. 390, 400 (1923); Griswold v. Connecticut, 381 U.S. 479, 483, 485–86 (1965); Roe v. Wade, 410 U.S. 113, 164–66 (1973); *but see* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (overruling *Roe* and holding that abortion is not a constitutionally protected right because it is not "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty").

168. Payne-Barahona v. Gonzales, 474 F.3d 1 (1st Cir. 2007).

169. *Id.* at 2.

court cited to cases that rebuked a citizenship right to reside or some other vaguely defined constitutional right.[170] None of the cases cited referred to family integrity or substantive due process.[171] Thus, *Payne-Barahona* does not assess or evaluate a right to family integrity itself, but instead uses misplaced precedent and over-generalizations to deny children and families their constitutional rights.

The right to family integrity has also been invoked on behalf of parents in the immigration context. In *Aguilar v. ICE*, a First Circuit case from 2007, petitioners argued that their due process rights to the care, custody, and control of their children were violated by an ICE raid.[172] The parents were detained after a workplace raid, which was conducted using a "wide net" where ICE agents "paid little attention to the detainees' individual or family circumstances."[173] Here, the First Circuit distinguished *Payne-Barohana,* because *Payne-Barahona* was about family separation, not about removal itself.[174] The court weaponized this distinction to determine that ICE's main objective was deportation; their actions only incidentally interfered with family integrity and thus did not violate substantive due process.[175]

Although the Court ultimately ruled in favor of ICE, it undertook a nuanced analysis of the actions of the officers while recognizing the substantive due process right in question, which may signal new opportunities for advocates to raise arguments rooted in such rights. The opinion notes that the parents do not allege more traditional types of family integrity, such as permanent custodial rights or decisions regarding education or religious affiliation.[176] While these issues may not have been alleged, this article demonstrates how family separation through immigration enforcement consistently impacts such choices. Although the plaintiffs in this case are the parents, the invocation of precedent involving children's rights and terminology of "family integrity" suggest that this right may continue to be invoked by both children and parents.

While the preceding case law demonstrates limitations in recognizing this right, it does not foreclose additional arguments that implicate the right to family integrity in immigration proceedings. In Part III, *supra*, I argue that this right is reciprocal. While some cases have denied this right when asserted by children, I believe that the failure of the jurisprudence to define this right accurately leaves open the opportunity for additional arguments rooted in this right to be raised by both parents and children. Most importantly, I argue that the historical right to family integrity compels a conclusion that additional procedural protections must be provided to children facing detention and deportation.[177]

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170. *Id.* at 2 n.1.
171. *Id.*
172. Aguilar v. U.S. Immigr. & Customs Enf't , 510 F.3d 1, 19 (1st Cir. 2007).
173. *Id.* at 6.
174. *Id.* at 19.
175. *Id.* at 22.
176. *Id.* at 23.
177. *See generally* Mathews v. Eldridge, 424 U.S. 319 (1976).

B. Recent Developments in Case Law

In the ongoing litigation against the family separation policy at the border, courts have held that the right to family integrity was violated.[178] In *Ms. L. v. ICE*, an initial District Court decision from 2018 found that the plaintiffs demonstrated the right to family integrity encompassed their situation.[179] This case challenged the practice of separating parents and children at the border without any demonstration that the parents are unfit or a danger to their children.[180]

Similarly, plaintiffs who are U.S. citizen children of Temporary Protected Status (TPS) holders recently brought litigation around the TPS Program.[181] The case challenged the rescission of the TPS Program for Sudan, Nicaragua, Haiti, and El Salvador, raising issues of racial animus and statutory construction.[182] The complaint also raised the substantive due process right of TPS holders' children who were U.S. citizens and who would be forced to live in the country without their parents or leave their home country and return to a country that remains unsafe.[183] The complaint argues,

> It is well established that a U.S. citizen has an absolute right to reside in this country. It is equally well established that families have a fundamental right to live together without unwarranted government interference. The Secretary has not even considered the impact on U.S. citizen children of TPS holders, let alone advanced a valid reason for compelling them to make the impossible choice of forgoing one of these rights for the other.[184]

In denying a motion to dismiss, the Northern District of California affirmed that U.S. citizen children have a liberty interest in living with their parents.[185] However, the court ultimately rejected the notion that enforcement against parents violates the due process rights of U.S. children.[186]

178. *See e.g.*, Ms. L. v. U.S. Immgr. & Customs Enf't, 302 F. Supp. 3d 1149, 1164 (S.D. Cal. 2018).

179. *Id.*

180. *See* Ms. L. v. U.S Immigr. & Customs Enf't, 330 F.R.D. 284, 286 (S.D. Cal. 2019) ("On June 26, 2018, this Court granted Plaintiffs' motions for class certification and for a preliminary injunction, and ordered reunification of the children in ORR custody with their parents within 30 days. Pursuant to the Court's Orders, 2,816 children were identified as having been separated from their parents at the border, and nearly all of them have now been reunified with their parents or otherwise discharged in accordance with their parents' wishes." (citations omitted)).

181. Ramos v. Nielsen, 321 F. Supp. 3d 1083, 1092 (N.D. Cal. 2018).

182. *Id.* at 1091–92.

183. Complaint at 2, *Ramos*, 321 F. Supp. 3d 1083 (No. 3:18-cv-1554).

184. *Ramos*, 321 F. Supp. 3d at 1093.

185. *Id.* at 1117–18.

186. *Id.* at 1119–20.

Within this decision, the district court provided a substantive overview of due process jurisprudence.[187] The Court then noted that "[p]laintiffs' assertion that the government's action in terminating TPS status of four countries which foreshadows the deportation of parents of U.S.-citizen children places this case in relatively unchartered waters."[188] This recognition suggests that the case law remains unsettled, leaving open opportunities for additional litigation regarding family integrity rights.

Opponents may express policy concerns against arguments that families can intervene in proceedings that separate families due to right to family integrity. The right to family integrity has been most thoroughly shaped through family regulation proceedings.[189] In contrast, this right is given little formal consideration in criminal litigation or when parents are incarcerated.[190] However, the argument I raise here only requires recognizing a right to family integrity in immigration cases.[191] The immigration system is unique and distinct from the criminal legal system. Most importantly, incarceration is punitive, and the Constitution and criminal law jurisprudence provide additional protections to criminal defendants when compared with immigration respondents.[192] In contrast, immigration proceedings are civil and have historically been distinguished from "punishment."[193] This distinction, notably, is a legal one—it bears limited relevance to the harsh consequences of both forms of detention.[194] However, this legal distinction can be leveraged against opponents who argue that this right should not be recognized in immigration proceedings due to broad impacts in other spaces.[195] Due to the

187. *Id.* at 1120–23 (providing detailed analysis of plaintiffs' claims regarding their property interest and liberty interests to be weighed against the government's interest).

188. *Id.* at 1117.

189. *See supra* Part III.

190. *See generally* Caitlin Mitchell, *Family Integrity and Incarcerated Parents: Bridging the Divide*, 24 YALE J.L. & FEMINISM 175 (2012).

191. To be clear, I do not agree that these rights should not be raised outside of the limited circumstances within which my argument lies. I only point this out to address potential counterarguments and concerns.

192. *See, e.g.*, U.S. CONST. amend. VI. *See also* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("[G]overnment detention violates [the Fifth Amendment Due Process] Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections or, in certain special and 'narrow' non-punitive 'circumstances,' where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" (emphasis omitted) (citation omitted) (first quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992); and then quoting Kansas v. Hendricks, 521 U.S. 346, 356 (1997))).

193. *See, e.g.*, Wong v. U.S., 163 U.S. 228, 234 (1896) (drawing a distinction between forced labor, which is the Court considered punishment, and deportation, which is not considered punishment).

194. For example, immigrants are often detained in local jails alongside people facing the criminal legal system. *See, e.g.*, Matt Katz, *A Steady Rise in Immigrants, Revenue, at Orange County Jail*, WNYC NEWS (Sept. 25, 2018), https://www.wnyc.org/story/steady-rise-immigrants-revenue-orange-county-jail/ [https://perma.cc/8WJ6-KJH5].

195. Although I reference this argument, I want to be clear that I believe that immigration detention and deportation is punitive. For further reading on this, see generally César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346 (2014).

unique nature of immigration proceedings being civil, yet incredibly grave, this argument may be limited to this setting if necessary.

C. Potential Applications for Family Integrity Arguments

Arguments asserting the right to family integrity on behalf of both children and parents could be asserted in various types of immigration proceedings. They can be raised generally in opposition to deportation and as an equitable factor in arguments for relief from deportation, such as cancellation of removal or prosecutorial discretion. These arguments can also be applied in arguing "extreme hardship" to family members that arise in forms of relief, as discussed in Part IV.A.

Plaintiffs may also be able to appeal decisions to the Board of Immigration Appeals (BIA) and to federal courts using this theory where other claims might fail. The Immigration and Nationality Act places limitations on federal courts' ability to review Immigration Judge and BIA decisions.[196] However, judicial review is not precluded for "constitutional claims or questions of law raised on a petition for review."[197] Therefore, assertions of the right to family integrity can be appealed in federal court cases more often than other types of immigration-related claims. In addition, typically, discretionary decisions are not reviewable by federal courts.[198] However, framing issues like "extreme hardship" around this constitutional right may also create an avenue for federal courts to consider or remand discretionary decisions based on an error of law.

1. Bond Arguments

Arguments that parents should not be detained due to the violation of the right to family integrity may be raised in bond hearings. Although advocates in bond hearings must address the right to liberty in keeping with the Constitution, these bond hearings do not require consideration of other substantive due process rights like the right to family integrity.[199] To argue that a noncitizen should be released on bond, the noncitizen must show that they are not a danger to the community, a flight risk, or a threat to national security.[200] Under this framework, connections to family members are only considered in terms of the community ties a noncitizen has that inform whether or not they are a "flight risk."[201] This inquiry does not legally require any consideration of the family separation caused by immigration detention. However, recognizing the role of family rights may compel judges to exercise their discretion by considering less intrusive means than detention to

196. Immigration and Nationality Act § 242(a)(2), 8 U.S.C. § 1252(a)(2).

197. § 242(a)(2)(D).

198. *See* 8 U.S.C. § 1252(a)(2)(B) (identifying "denials of discretionary relief" and other decisions as "not subject to judicial review" by federal courts).

199. Zadvydas v. Davis, 533 U.S. 678 (2001).

200. *See* Siniauskas, 27 I. & N. Dec. 207, 207 (Bd. of Immigr. Appeals 2018).

201. *Id.* at 209.

regulate individuals during removal proceedings, such as release on bond or other alternatives to detention.

2. Habeas Corpus

Advocates could raise arguments that the right to family integrity has been violated in habeas petitions under 28 U.S.C. § 2241. The writ of habeas can be used to free immigrants when their ongoing detention is "in violation of the Constitution or laws or treaties of the United States."[202] When these arguments are focused on the illegality of the detention itself, rather than a collateral attack on a removal order, they are fortified the immigration context.[203]

Habeas can be critical for immigrants left in prolonged detention. Extended periods detention may occur when a person has received an order of removal but has not yet been deported.[204] These people can be in prolonged detention with limited access to judicial review or bond hearings.[205] In this context, constitutional arguments challenging the violation of a right to family integrity can be raised through habeas corpus petitions to show that their ongoing detention violates the Constitution.

3. Prosecutorial Discretion

Arguments asserting the right to family integrity can also be raised through prosecutorial discretion requests. Advocates can request prosecutorial discretion for discretionary relief or closing of proceedings at various points in a legal case.[206]

The standards judges consider for these arguments are set by the Secretary of Homeland Security.[207] The current *Guidelines for the Enforcement of Civil Immigration Law* came into effect on November 29, 2021.[208] These guidelines cite the impact of deportation on family in the United States as a mitigating factor, such as loss of a caregiver.[209] However, the focus on losing a caregiver does not adequately address the right of families to stay together under the constitutional right

202. 28 U.S.C. § 2241(c)(3).

203. *See* AM. IMMIGR. COUNCIL, INTRODUCTION TO HABEAS CORPUS (2008), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/lac_pa_0406.pdf [https://perma.cc/8JMB-2FRF] (explaining how the Real ID Act of 2005 may limit habeas when used to challenge final orders of deportation, in contrast to arguments focused on detention itself).

204. *See* Immigration and Nationality Act § 241; 8 U.S.C. § 1231.

205. *See* Brief of *Amici Curiae* Asian Americans Advancing Justice—Asian Law Caucus, et al., in Support of Respondents, Garland v. Aleman Gonzalez, 142 S. Ct. 2057 (2022) (No. 20-322).

206. *Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor,* U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/about-ice/opla/prosecutorial-discretion [https://perma.cc/94WT-CADV] (last visited Apr. 4, 2022).

207. Memorandum from Alejandro Mayorkas, Sec'y, U.S. Dep't of Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. and Customs Enf't (Sept. 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf [https://perma.cc/A25R-UL3H].

208. *Id.*

209. *Id.*

to family integrity. Advocates can bolster arguments based upon this mitigating factor with constitutional arguments that deportation will violate the right to family integrity.

Further, advocates can pressure the Secretary of Homeland Security to enumerate the right to family integrity in the enforcement guidelines used in prosecutorial discretion. These guidelines are highly discretionary and the Secretary has the power to both articulate and apply this right through the guidelines. It is worth noting, however, that the attorneys prosecuting deportation cases for the Department of Homeland Security also exercise discretionary authority to determine the extent to which they actually adhere to these guidelines.[210]

4. Humanitarian Parole

The Secretary of Homeland Security wields broad discretion to issue humanitarian parole.[211] Parole allows an applicant to enter or remain in the United States without being formally admitted in legal status.[212] This permits individuals to access work authorization and prevents them from being immediately placed in deportation proceedings.[213] Parole is determined on a case-by-case basis, where granting parole confers a "significant public benefit."[214] Certain categories of people who may be granted parole are outlined in the regulations, including noncitizens defined as minors.[215] However, their parents are not in the same category,[216] which could contribute to separation of minor from their parents, who are not similarly prioritized in humanitarian parole considerations. DHS could update these regulations to include families separated by immigration proceedings and detention. Moreover, due to the broad discretion attorneys general wield in reviewing parole applications, parents and children could also be granted parole systematically based on this constitutional right to keep families together when entering the United States.

5. Statutory Reform

There are numerous points in the INA where the right to family integrity could be explicitly articulated to protect families. If articulated as a statutory right, there may be additional protections for families facing violation of this right throughout immigration processes. Critical examples include the INA's detention schemes

210. *Id.*

211. *See* CATH. LEGAL IMMIGR. NETWORK, ALL ABOUT PAROLE PRACTICE ADVISORY 8 (2021), https://cliniclegal.org/file-download/download/public/66999 [https://perma.cc/XAL2-ANKD].

212. *See* Immigration and Nationality Act § 212(d)(5)(A), 8 U.S.C.A. §1182(d)(5)(A) (West).

213. *See id.*

214. *Id.*

215. *See* 8 C.F.R. § 212.5(b) (2021).

216. *Id.*

and discretionary relief.[217] Both of these areas offer meaningful opportunities for statutory reform to present an avenue to raise these claims. Within the INA's detention scheme, consideration of this right could be articulated as a statutorily required consideration in bond hearings. The INA also requires placing certain immigrants in mandatory detention due to past interactions with the criminal justice system,[218] without access to bond hearings.[219] However, based on my argument, the right to family integrity must still be considered in this civil detention context. Thus, consideration of the right to family integrity could also be incorporated to loosen the rigidity of mandatory detention under INA § 236(c).

Finally, consideration of this right could be articulated in cancellation of removal, a more comprehensive form of relief from deportation proceedings. For noncitizens who do not have a green card, consideration for cancellation of removal requires demonstrating that removal would "result in exceptional and extremely unusual hardship to the [noncitizen's] spouse, parent, or child, who is a citizen of the United States or . . . lawfully admitted for permanent residence."[220] The standard falls short of recognizing the full range of the right to family integrity and could be amended to capture the constitutional requirement to consider due process rights against family separation regardless of the immigration status of parent or child and without showing that the hardship is extremely unusual or exceptional.

While each of the above strategies may not always be successful, they can serve as opportunities to demonstrate the gravity and history of family integrity rights and the weight they ought to be afforded before immigration judges, federal judges, legislators, and other decision-making actors.

VI.
CONCLUSION

Family separations happen every day in the United States through both the immigration and the family regulation systems. These separations disproportionately impact Black and Brown communities. Despite substantial case law developing a right to family integrity, the jurisprudence has fallen short of protecting children from the deportation of their parents. While the right to family integrity enjoys well-respected substantive due process protection in many contexts, these separations underline the failure to recognize children's rights in immigration law. In some circumstances, a child's right to remain with their parents is given great weight, yet in the deportation context, it has historically been ignored. Continuing

217. *See, e.g.*, Immigration and Nationality Act § 236, 8 U.S.C.A. § 1226 (West); § 241; § 240A.

218. *See* § 236(c) ("The Attorney General *shall* take into custody any alien who . . . ." (emphasis added)).

219. *See* HILLEL R. SMITH, CONG. RSCH. SERV., REP. NO. IF11343, THE LAW OF IMMIGRATION DETENTION: A BRIEF INTRODUCTION (2022).

220. Immigration and Nationality Act § 240A(b)(1)(D), 8 U.S.C.A. § 1229b(b)(1)(D) (West) (references to noncitizens as "aliens" have been altered or omitted).

to assert this right will force judges to witness and address the family separations that the immigration system regularly sanctions and could lead to substantive changes in immigration law that could help keep families unified.