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WRONGS AGAINST IMMIGRANTS' RIGHTS: WHY TERMINATING THE PARENTAL RIGHTS OF DEPORTED IMMIGRANTS RAISES CONSTITUTIONAL AND HUMAN RIGHTS CONCERNS

By Rachel Zoghlin *

Introduction

Felipe Montes is a good father. Neither abusive nor neglectful, and but for his undocumented immigration status, he would be living happily with his wife and three children in North Carolina. In late 2010, Immigration and Customs Enforcement (ICE) officials detained and deported Felipe. Felipe did not even have the chance to say goodbye to his pregnant wife and two young sons. After he was deported, Felipe's wife gave birth to their third son, who Felipe had yet to meet. Because Felipe's wife suffers from mental illness, she could not care for their children alone, the three children were put into foster care. Throughout 2012, the state of North Carolina tried to terminate Felipe's parental rights—his legal relationship with his children—so his three boys can be “freed” for adoption by another family. Because Felipe crossed the U.S.-Mexico border without inspection nearly ten years ago, his three children were in jeopardy of being taken away from him – forever.¹

Carlitos was only seven months old when ICE caught his mother, Encarnación Bail Romero, during a raid at the plant where Encarnación worked. Encarnación was convicted and imprisoned for identity fraud; after she completed her sentence, ICE transferred Encarnación to immigration detention, incarcerating and initiating removal proceedings against her. First, Carlitos stayed in the custody of Encarnación's sister, and then with a child-less American family who attended her sister's church. After two years of caring for Carlitos – whom the American

* Rachel Zoghlin is an immigration attorney at Grossman Law, LLC in Rockville, MD. She is an alumna of Vassar College and American University Washington College of Law. She acknowledges the staff and editors of the *Law Journal for Social Justice* for their assistance. She expresses deep appreciation to her professors and mentors who have inspired her to fight for justice, fairness, and equality: Molly Shanley, Ali Beydoun, Erin Palmer, Trish Maskew, Amy Myers, Sandra Grossman, and Christina Wilkes. She dedicates this paper to her clients and friends, for whom this topic hits very close to home.

¹ Seth Freed Wessler, *Deported Dad Begs North Carolina To Give Him Back His Children*, COLORLINES (Feb. 14, 2012, 10:38 AM), http://colorlines.com/archives/2012/02/deported_dad_begs_north_carolina_not_put_kids_into_adoption.html.

couple renamed Jamison – the couple sought to adopt him. Before they could start the adoption process, however, a court needed to terminate Encarnación’s right to her child. The judge determined that during Encarnación’s involuntary incarceration (first in prison and subsequently in immigration detention), she had abandoned her child and made insufficient efforts to reunite with him. Meanwhile, ICE officials provided Encarnación no way to get in touch with her son. If she were forced to return to Guatemala, she wanted to bring her son with her. Encarnación was deported in 2010, and her son stayed with his “adoptive parents” in Missouri. Encarnación has not seen her son since he was seven months old – since the morning that ICE raided her employer’s plant in 2007.²

The dilemmas of Felipe and Encarnación are not unique and have become a growing problem. Since President Barack Obama first took office in January 2009, his administration has made immigration enforcement a top priority. In 2012, the U.S. government spent more money to deport immigrants – \$18 billion – than on the FBI, Secret Service, DEA, U.S. Marshal Service and the Bureau of Alcohol, Tobacco, and Firearms combined.³ Since January 2009, the Obama administration has removed over 2.2 million immigrants.⁴ Of the over 211,000 individuals deported between January and June of 2011, nearly 22% (over 46,000) are parents of U.S.-citizen children.⁵ One collateral consequence of these deportations is that over 5,100 children have been placed into

² Michelle Brané, *Delayed Justice for Guatemalan Mother Encarnación Bail Romero*, HUFFINGTON POST (Feb. 5, 2011, 1:32 PM), http://www.huffingtonpost.com/michelle-bran/delayed-justice-for-guate_b_817191.html.

³ Doris Meissner et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, MIGRATION POL’Y INST. (Jan. 2013), *available at* <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>. *See also* Elise Foley, *Immigration Enforcement Cost Higher Than FBI, Policing Drugs, Guns Combined: Report*, HUFFINGTON POST (Jan. 7, 2013, 1:49 PM), http://www.huffingtonpost.com/2013/01/07/immigration-enforcement-cost_n_2425647.html.

⁴ This statistic reflects the number of people removed from February 2009 through August 25, 2012. *See* DEP’T OF HOMELAND SEC., U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE TOTAL REMOVALS (2012), *available at* <http://www.ice.gov/doclib/about/offices/ero/pdf/ero-removals1.pdf> [hereinafter ICE TOTAL REMOVALS].

⁵ DEP’T OF HOMELAND SEC., U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, DEPORTATION OF PARENTS OF U.S-BORN CHILDREN (2012), *available at* <http://www.lirs.org/wp-content/uploads/2012/07/ICE-DEPORT-OF-PARENTS-OF-US-CIT-FY-2011.pdf>. *See also* ICE TOTAL REMOVALS, *supra* note 4; Seth Freed Wessler, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, APPLIED RES. CENTER 5 (2011), *available at* <http://arc.org/shatteredfamilies> [hereinafter *Shattered Families*].

foster care.⁶ The deported parents of these 5,100 children in foster care are at high risk of losing their parental rights through termination of parental rights proceedings, thereby losing their legal relationship with their children forever.

The termination of parental rights of fit, deported immigrant parents occurs largely due to two different flaws in the family law system: first, the Adoption and Safe Families Act requires that a state bring termination proceedings against a parent whose child has been “out of custody” for fifteen of the proceeding twenty-two months;⁷ second, instead of discerning a parent’s fitness to deciding whether to terminate parental rights, family courts are employing a “best interest of the child” test—an extremely subjective determination, vulnerable to abuse and bias. The United States has a sinister history of discriminating against non-whites and immigrants, which is deeply embedded into both immigration and family law. This history has set the stage for the problematic practice of terminating the parental rights of fit but deported immigrant parents, raising very serious constitutional and human rights concerns.

Remedying past injustices and present discrimination against immigrant parents requires consideration of Critical Race Theory, LatCrit, and other critiques of traditional and liberal jurisprudence. It requires consideration of the various competing interests at play in termination of parental rights proceedings and the various constitutional provisions affected. Only by considering the unique legal situation of immigrants and people of color, the various competing interests at play, and the constitutional and human rights held by immigrant parents, will we be able to craft fair family laws and discern the best way to prevent undue terminations of parental rights of fit but deported immigrant parents.

I. Background and Analytical Basis

Given that the termination of parental rights of fit, deported immigrant parents disproportionately affects a distinct ethnic and racial minority, a legal analysis of the issue would be remiss if it did not consider Critical Race Theory (CRT), LatCrit, and a general critique of traditional liberal jurisprudence. The goal of Critical Race Theory is to “recognize the voices of outsiders by employing the narrative form and by

⁶ *Id.* at 6.

⁷ A deported parent, regardless of fitness or desire to reunite with his/her child, most often cannot re-enter the country to fulfill this requirement due to immigration laws which: (1) criminalize the re-entry of deported individuals, or (2) refuse admission to individuals who have accrued “unlawful presence” in the United States, by being present for an extended period of time without a valid visa. 8 U.S.C. § 1326 (2006); 8 U.S.C. § 1182(a)(9)(B)(ii) (2006).

focusing on interrelationships of race, gender, and other identity characteristics.”⁸ Professor Richard Delgado summarizes various themes of critical race scholarship:

(1) an insistence on “naming our own reality”; (2) the belief that knowledge and ideas are powerful; (3) a readiness to question basic premises of moderate/incremental civil rights law; (4) the borrowing of insights from social science on race and racism; (5) critical examination of the myths and stories powerful groups use to justify racial subordination; (6) a more contextualized treatment of doctrine; (7) criticism of liberal legalisms; and (8) an interest in structural determinism.⁹

Examining the termination of parental rights of fit immigrant parents solely through the lens of traditional jurisprudence fails to acknowledge the deep inequities embedded in our society and our legal system. As Stephen Shie-Wei Fan explains, “Critical race theorists . . . seek to clarify that . . . conventional jurisprudence may be based upon a flawed premise that racism (as well as other forms of discrimination . . .) exists solely as discrete occurrences of anomalous, sociopathic behavior that can be confronted by, and ameliorated through, the accepted tenets of the law.”¹⁰ Professor Angela Harris observes that Critical Race Theory exists between, and draws from, Critical Legal Studies(CLS) and traditional civil rights scholarship. Harris explains:

CRT inherits from CLS a commitment to being ‘critical,’ . . . to locate problems not at the surface of doctrine but in the deep structure of American law and culture. . . . CRT inherits from traditional civil rights scholarship a commitment to a vision of liberation from racism through right reason. . . . CRT’s ultimate vision is redemptive, not deconstructive. . . . [C]rafting the correct theory of race and racism can help lead to enlightenment, empowerment, and finally to emancipation: that, indeed, the truth shall set you free.¹¹

⁸ Stephen Shie-Wei Fan, *Immigration Law and the Promise of Critical Race Theory: Opening the Academy to the Voices of Aliens and Immigrants*, 97 COLUM. L. REV. 1202, 1204 (1997).

⁹ Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 95 n.1 (1990).

¹⁰ Fan, *supra* note 8, at 1208.

¹¹ Angela P. Harris, *The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 743

By employing critical race theory methodology, I hope to help debunk the notion that discrimination against immigrants in termination of parental rights proceedings exists not as a unique, exceptional occurrence, but rather as part of deeply embedded discrimination in the United States legal system.¹²

I begin by addressing the history and context of discrimination within the realms of immigration law and family law. Discrimination inherent in the U.S. legal system, including discrimination in termination of parental rights proceedings, is not simply discrimination against immigrants *as immigrants*. It carries embedded racial discrimination, sexism, and ethnocentrism, among many other forms of discrimination. This multi-layered discrimination is relevant because an individual who identifies with multiple fronts of potential discrimination experiences a compounded discrimination, a distinct discrimination from this “multiple consciousness,” rather than experience each basis for discrimination divisibly.¹³ It is relevant, therefore, to examine many types of discrimination inherent in the immigrant experience.¹⁴ Acknowledging this nation’s history and context shows that discriminating against undocumented immigrant parents is neither unusual, nor an exceptional circumstance, but rather it is consistent with the evolution and structure of the United States legal system.

Additionally, I include two narratives, excerpts from two fit undocumented parents’ stories, which help illustrate the diversity of experience for individuals who face unjust termination of their parental rights. Using narratives here also humanizes the issue, and puts a face and a life to an otherwise faceless and lifeless legal issue. Professor Delgado explains the importance of narratives and utilizing the “voice” of oppressed peoples:

(1994).

¹² See generally Fan, *supra* note 8, at 1210.

¹³ See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 584 (1990). Professor Harris calls “multiple consciousness” the notion that “we are not born with a ‘self,’ but rather are composed of a welter of partial, sometimes contradictory, or even antithetical ‘selves.’ . . . [C]onsciousness is ‘never fixed’ . . . but a process, a constant contradictory state of becoming, in which both social institutions and individual wills are deeply implicated.”

¹⁴ Discussing the legal construction of Mexican-American identity, Professor Haney-Lopez stresses the importance of considering both the impact of one’s ethnicity, as well as one’s race. See Ian Haney-Lopez, *Retaining Race: LatCrit Theory and Mexican American Identity in Hernandez v. Texas*, 2 HARV. LATINO L. REV. 279, 283 (1997) (“Utilizing ethnicity focuses our attention on the experience of being constructed as culturally removed from the norm; using race forces us to assess the imposition of an inferior identity constructed in immutable terms.”) (emphasis added).

“voice” scholarship can bring to our attention breaches of *both* types of equality. It can sharpen our concern, enrich our experience, and provide access to stories beyond the stock tale. Heeding new voices can stir our imaginations, and let us begin to see life through the eyes of the outsider. Not only can it broaden our point of view; bringing to light the abuses and petty and major tyrannies that minority communities suffer can enable us to see and correct systemic injustices that might otherwise remain invisible.¹⁵

As a white American woman¹⁶ writing this paper, I am conscious of my privileged position and hope to avoid what Professor Delgado refers to as “Imperial Scholarship[:.]” “[i]t does not matter where one enters this universe; one comes to the same result: an inner circle of about a dozen white, male writers who comment on, take polite issue with, extol, criticize, and expand on each other’s ideas. It is something like an elaborate minuet.”¹⁷ Particularly for issues which predominately affect communities of color, conversations within the academy must include diverse perspectives. As such, I include in this work scholarship from academics of color, and, generally, scholarship that refuses to “ignore[] the position of its ostensible subjects.”¹⁸

A. Historical context

1. Discrimination in Immigration Law: Plenary Power and Prosecutorial Discretion

The United States has a long and committed history of sewing discrimination into immigration law. The most heralded legal defense to a questionable immigration law is that Congress enjoys plenary power over immigration matters. As Professor Gabriel Chin notes, the plenary power doctrine is itself a discriminatory doctrine, having evolved from two

¹⁵ Delgado, *supra* note 9, at 109 (internal citations omitted).

¹⁶ In light of Professor Shie-Wei Fan’s discussion, I think it is relevant for me to disclose, and for readers to know, that I come to this issue, and come to analyze this issue, from a position of racial, socio-economic, and immigration-status privilege. See also Derrick A. Bell, *Who’s Afraid of Critical Race Theory*, 1995 U. ILL. L. REV. 893, 898 (1995) (“Those critical race theorists who are white are usually cognizant of and committed to the overthrow of their own racial privilege.”).

¹⁷ Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 563 (1984).

¹⁸ See Fan, *supra* note 8, at 1211.

Supreme Court decisions that uphold racist immigration rules by giving deference to Congress's power.¹⁹

Following the California gold rush in the mid-1800s, massive numbers of Chinese immigrants flocked to the United States. With discriminatory bias and anti-immigrant fervor, angry Americans urged both national and state legislators to react.²⁰ In 1882, Congress passed the Chinese Exclusion Act, suspending the immigration of not solely Chinese nationals, but anyone of Chinese ancestry. The Supreme Court examined the Constitutionality of Congress's blatantly racist and xenophobic law only a few years later, upholding the Act.²¹ The Court's decision laid the foundation for the evolution of the plenary power doctrine.²²

Though race-neutral on its face, the plenary power doctrine introduced a rule of broad deference to congressional lawmaking; it remains solid law, and courts have applied it in a wide range of scenarios over the course of American history to justify discrimination.²³ Rather than permitting isolated incidents of discrimination, Professor Chin notes that the plenary power doctrine has enabled, and continues to enable the United States government and federal courts to implement systematic

¹⁹ See Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 5 (1998) (citing *Chan Chae Ping v. United States*, 130 U.S. 581 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)).

²⁰ See Erika Lee, *The Chinese Exclusion Example: Race, Immigration, and American Gatekeeping, 1882-1924*, 21 J. AM. ETHNIC HIST. 36 (Spring 2002) (quoting a San Francisco lawyer "sounding the alarm" before the California Senate: "The Chinese are upon us. How can we get rid of them? The Chinese are coming. How can we stop them?"); *id.* at 50 (quoting a keynote speaker at a lobby for the permanent exclusion of Chinese immigrants: "We want the Englishman, who brings [] capital, industry and enterprise; the Irish who build and populate our cities; the Frenchmen, with his vivacity and love of liberty; the industrious and thrifty Italians; . . . the Swedes, Slavs, and Belgians; we want *all good people from all parts of Europe.*") (emphasis in original).

²¹ See *Chae Chan Ping*, 130 U.S. at 609 ("Whatever license . . . Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure. [sic]").

²² See *id.* at 603 ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy."). See also *Fong Yue Ting*, 149 U.S. at 707 ("The right of a nation to expel or deport foreigners who have not been naturalized . . . is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.").

²³ See Chin, *supra* note 19, at 6-7 (noting that the plenary power doctrine has enabled Congress and federal courts to exclude hopeful immigrants grounds based on characteristics they considered "undesirable," including: "homosexuals, Mormons, the mentally retarded, Southern and Eastern Europeans, persons of African descent . . . Mexicans[,] political dissidents, non-English speaking persons, and illegitimate children).

discrimination against any unpopular group. Given that the doctrine was “motivated by racism,” Professor Chin justifiably urges for a departure from this precedent and encourages courts to exercise their discretion to ensure fundamental principles of justice.²⁴

The Supreme Court addressed allegations that the Immigration and Naturalization Service (INS) specifically targeted eight immigrants for deportation because they were affiliated with an unpopular group in *Reno v. American-Arab Anti-Discrimination Commission*.²⁵ INS initiated deportation proceedings against a group of immigrants who belonged to the Popular Front for the Liberation of Palestine (PFLP). INS charged the eight petitioners under the McCarran-Walter Act, which, although repealed at the time the Supreme Court addressed the issue, “provided . . . for the deportation of aliens who ‘advocate . . . world communism.’”²⁶ The immigrants filed suit in federal district court, arguing that the INS was *selectively* using its discretionary power to “prosecute” individuals for immigration violations, in a way that infringed upon these individuals’ First and Fifth Amendment rights.²⁷ Again, the Court upheld the law²⁸ which gave the Attorney General discretionary power to initiate deportation proceedings, or *not* initiate, removal proceedings, as she, and INS—the agency under her control—saw fit.²⁹ Evaluating how the *American-Arab* decision applies to the racialized U.S. immigration system, and the dearth of relief available to forcibly exiled immigrants, Professor Daniel Kanstroom proffers, “It is one thing to favor nationals of selected foreign countries. It is more problematic to explicitly disfavor or bar others. And it is most problematic of all to disfavor one group through selective enforcement of punitive deportation laws.”³⁰ Because of the tremendous amount of bias inherent in discretionary authority, the selective enforcement of immigration enforcement and the exercise of ICE

²⁴ *Id.*

²⁵ *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 474 (1999) (citing 8 U.S.C. §§ 1251(a)(6)(D), (G)(v) & (H) (1982)).

²⁶ *Id.* at 473 (citing 8 U.S.C. §§ 1251(a)(6)(D), (G)(v) & (H) (1982)).

²⁷ *Id.* at 474.

²⁸ At issue in this case is the federal jurisdiction-stripping provision in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). The statute deprives federal courts of the power to review the Attorney General’s “decision or action” to “commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.” See *Reno*, 525 U.S. at 473 (citing 8 U.S.C. § 1252(g) (1994, Supp. III)).

²⁹ *Reno*, 525 U.S. at 492.

³⁰ Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?*, 3 STAN. J. C.R. & C.L. 195, 214-15 (2007).

prosecutorial discretion remains a hotly contested issue in the immigration community today.³¹

2. *Discrimination in Family Law: From Coverture and Slavery to Loving and Sidoti*

Like the realm of immigration, family law in the United States is plagued by an unsavory history of discrimination and racism. The legal and political recognition of the family unit is characterized by male dominance and female submission.³² The common law rule of coverture—that a woman's identity was subsumed in the identity of her husband upon marriage—was based on the notion that women were the chattel of their husbands.³³ Coverture justified discrimination against women, especially denial of equality for women in the realm of family, throughout American history and well into the twentieth century.³⁴

Especially prior to the abolition of slavery, the family has been a racialized institution. Slaves were forbidden from creating their own families.³⁵ Slave-owners denied slaves the right to marry, largely based

³¹ See, e.g., Seth Fried Wessler, ICE Vows More 'Discretion' in Deportations. Don't Hold Your Breath, COLORLINES (June 24, 2011, 10:50 AM), http://colorlines.com/archives/2011/06/the_department_of_homeland_security.html (calling "toothless" an ICE memo advising agency attorneys on properly exercising prosecutorial discretion); Abby Sullivan, Note, *On Thin Ice: Cracking Down on the Racial Profiling of Immigrants and Implementing A Compassionate Enforcement Policy*, 6 HASTINGS RACE & POVERTY L. J. 101 (2009) (urging ICE to "prudently exercise its prosecutorial discretion when families are concerned"). See also Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 630-31 (2006) ("Immigration officials may choose deportees . . . that would otherwise be constitutionally suspect, and they may choose based on standards of conduct that are never revealed and cannot be challenged. The [American-Arab] decision leaves ambiguous whether the enforcement officials violate an unenforced constitutional duty when they engage in selective enforcement on such grounds, or whether they can do so without even self-reproach.").

³² See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 981 (2002) (quoting a Congressman in 1915: "Faithful to the doctrine of the old Bible and true to the teachings of the new, our fathers founded this Government upon the family as the unit of political power, with the husband as the recognized and responsible head.").

³³ See *id.* at 983 (quoting Robert Steinfeld: "[T]he law of marriage gave men control over women and the ability to represent and speak for their wives in dealings with other men.").

³⁴ *Id.* ("Even the briefest look at antisuffrage discourse reveals that core concepts of coverture were a vibrant part of American legal culture well into the twentieth century and shaped public as well as private law.").

³⁵ See PEGGY COOPER DAVIS, *NEGLECTED STORIES* 39 (1997) ("The slave could sustain none of those relations which give life all its charms. He could not say my wife, my child, my body. . . . The law pronounced him as chattel, and these are not the rights

on the notion of coverture: how could a slave woman's rights be subsumed by her husband, when neither had rights to begin with? How could a slave woman become the property of her husband, when she was already the property of someone else, when he was the property of someone else, and when everything he owned became the property of his owner? Slave children were not legally the "family" of their parents. It is the legal duty of a parent to guard and protect one's child. How could a slave-parent protect his child when he had no right to control his child, and certainly no way to intervene with the actions of his owner, or meddle with the property of his owner. Harriet Beecher Stowe wrote, "[T]he worst abuse of the system of slavery is its outrage upon the family . . . it is one which is more notorious and undeniable than any other."³⁶

After the abolition of slavery and the passage of the Fourteenth Amendment, the government could no longer wholly deny the legal protections of family based on race. Still, racial considerations in family-law matters persevered. It was not until 1967 that the ubiquitous state-imposed bans on interracial marriages³⁷ were invalidated as unconstitutional in *Loving v. Virginia*. In examining a challenge by an interracial couple to Virginia's criminal anti-miscegenation law, the Court concluded "[t]here can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. . . . [T]his Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'"³⁸

In 1984, the Supreme Court considered a vicious custody dispute between two white parents based on the mother's decision to cohabit with, and marry, a Black man.³⁹ The Florida court exercising jurisdiction over the case originally granted custody to the child's father, reasoning that, while "strides that have been made in bettering relations between the races in this country, it is inevitable that [the child] will, if allowed to

and attributes of chattels.") (quoting a reconstruction-era Congressman).

³⁶ See *id.* at 35; see also *id.* (quoting an 1867 essay on family in *The Liberator*: "[T]he most appalling feature of our slave system is, the annihilation of the family institution.").

³⁷ To be clear, anti-miscegenation laws were largely aimed at preventing non-whites from marrying whites. Marrying outside of one's race was not a criminal act if both parties were non-white. See *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (criticizing Virginia's reliance on Virginia Supreme Court case which upheld miscegenation laws, concluding that its purposes, "'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride,'" were not legitimate, and "obviously an endorsement of the doctrine of White Supremacy.").

³⁸ *Id.* at 11 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

³⁹ See *Palmore v. Sidoti*, 466 U.S. 429 (1984).

remain in [the custody of her mother and Black step-father] and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.”⁴⁰ The Supreme Court decried the consideration of the mother’s new spouse’s race in their amendment to the parents’ custody agreement, famously stating: “Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”⁴¹ The Court concluded,

Whatever problems racially mixed households may pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917. The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.⁴²

Although such Supreme Court developments should suggest that racism and discrimination embedded in family law is subsiding, such discrimination remains alive and seriously compromises the integrity of our legal system. Even though laws overtly discriminating on the basis of race and gender have largely disappeared,⁴³ the prevalence of discretionary decision-making authority (for prosecutors, judges, and government service-providing employees), leave vast potential for private biases to keep in place the discriminatory foundation of family law in the United States.

B. Narratives

The following stories illustrate only two situations of a reported 5,100⁴⁴ across 22 states where the legal relationship between a parent and child may be or has been terminated due to the parent’s undocumented status, detention in an immigration facility, or deportation from the United States.⁴⁵ Neither story is meant to essentialize either parent’s

⁴⁰ *Id.* at 431.

⁴¹ *Id.* at 433.

⁴² *Id.* at 434.

⁴³ It is worth noting, however, that state laws which deny marriage to same-sex couples constitute overt discrimination against certain families.

⁴⁴ It is also worth noting that these statistics are from November 2011, and the numbers have indubitably risen significantly since that time. See *Shattered Families*, *supra* note 5.

⁴⁵ *Stolen Babies? Controversy in Missouri*, ABCNEWS (Feb. 1, 2012),

experience.⁴⁶ Taken together, they illustrate the gravity of this problem that affects undocumented immigrant parents regardless of their gender, marital status, or nationality.

1. Encarnación Bail Romero

*I need him to feel my love, as the mother of Carlitos. I am the mother of Carlitos and I need him to be with me soon. . . . I never gave my consent for the boy to be adopted. I couldn't give the adoption. Even though I was going to be deported back to my country, I wanted to go back with my son to Guatemala. . . . I start crying and get sad because he's not with me. I need him with me. . . . I started to ask for help and ask what could I do to find out where my son Carlitos was. Nobody could help me because I don't speak English. . . . I'm thankful he's in good hands, but as Carlitos's mother, I need him to be with me, because I'm his real mother.*⁴⁷

Carlitos Bail Romero was only 7-months old when his mother—Encarnación Bail Romero, a single mother and undocumented immigrant from Guatemala—was swept up in an ICE raid at her place of employment, and incarcerated.⁴⁸ Initially, Encarnación's brother took care of Carlitos. Then, her sister took care of him. A few days a week, a couple at Encarnación's sister's church, the Velazcos, would babysit.⁴⁹ A few days a week turned into five days a week, and Carlitos only stayed with his aunt and uncle on the weekends. The Velazcos knew of a childless couple, the Mosers, who were interested in adopting a baby; after a few visits, Carlitos went to live with the Mosers on a more permanent

<http://abcnews.go.com/Nightline/video/stolen-babies-controversy-missouri-15495159> [hereinafter *Stolen Babies?*]; see also *Shattered Families*, *supra* note 5.

⁴⁶ See generally Harris, *supra* note 13, at 585 (defining gender essentialism as “the notion that a unitary, ‘essential’ women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.”). Although Harris explicitly addresses gender essentialism, the analogy fits here as well: essentializing the immigrant experience would not only silence some voices “in order to privilege others[,]” but worse, it may silence “the same voices silenced by the mainstream legal voice of ‘We the People’” *Id.*

⁴⁷ *Stolen Babies?*, *supra* note 45.

⁴⁸ Brané, *supra* note 2.

⁴⁹ *In re Adoption of C.M.B.R.*, No. SD 30342, 2010 WL 2841486 (Mo. Ct. App. July 21, 2010), *transferred to* 332 S.W.3d 793 (Mo. 2011).

basis.⁵⁰ At this time, the Velazcos unilaterally granted the Mosers custody of Carlitos, without consideration or a formal order by a judge. The Velazcos even informed Encarnación's sister that there was nothing she could do to stop them from giving Carlitos to the Mosers.⁵¹ In December 2007, even though Encarnación had been given no notice of the family court guardianship hearing or the motion to terminate her parental rights to her son, the Court granted the Mosers' petition for temporary custody.⁵²

Less than a year later, the Court considered the Mosers' adoption petition, which included a motion to terminate Encarnación's parental rights. The hearing lasted approximately an hour and a half, and consisted mostly of the Mosers' own testimony, showing their fitness as parents. ICE refused to let Encarnación attend the hearing, so the Court only considered two letters Encarnación wrote, which indicated that she did not want her child to be adopted. The court also considered statement presented on Encarnación's behalf:

I have suffered too much by knowing nothing about my little one, asking God to take care of him for me and let me be reunited with him soon. Please, Mr. Dominguez, look for the means to send my son [Carlitos] with my family in Guatemala. This is the telephone number of my sister in Guatemala, I spoke to her and she will welcome him in my country.⁵³

Encarnación's attorney—the only person advocating for her rights—was provided by and paid by the Mosers.⁵⁴ The judge did not request evidence regarding, or consider Encarnación's fitness as a parent. In

⁵⁰ *Id.* See also Mariano Castillo, *Heart-wrenching fight for Immigrant's Son*, CNN (Dec. 20, 2010), http://articles.cnn.com/2010-12-20/us/missouri.immigrant.child_1_biological-mother-adoptive-parents-illegal-immigrant?_s=PM:US.

⁵¹ See *In re Adoption of C.M.B.R.*, 2010 WL 2841486, at *2 n.6 (The Court included the full text of this letter from the Velazcos to Encarnación's family: "To Whom It May Concern: I am writing this letter in regards to [Child]. Who will no longer be in our care or living in our house after 10-7-2007. The couple [Respondents are] pursuing adoption in the case of [Child]. The papers for them to get guardianship of [Child have] already been sent to the family courts of Jasper County by their lawyer. And there is nothing that we can do legally nor can you. The only person that has the chance to do anything is [Mother]. The proper papers have already been sent to [Mother] at the jail. If you wish to know more about this matter you need to be in contact with [Child's Mother]. And we ask that you please no longer contact us in respect to this matter. Because it is out of our hands now. Sincerely, The Velazco Family").

⁵² See *id.* at *3.

⁵³ *Id.*

⁵⁴ Brané, *supra* note 2.

terminating Encarnación's parental right to Carlitos, the judge criticized her "lifestyle" rather than her ability to parent her son: "smuggling herself into a country illegally and committing crimes in this country is not a lifestyle that can provide any stability for a child. A child cannot be educated in this way, always in hiding or on the run."⁵⁵

On appeal, the Missouri Court of Appeals determined that: (1) the Velazcos had no authority to grant the Mosers custody of Carlitos; (2) Encarnación was substantially prejudiced by proceedings for which she was provided little to no notice; and (3) that by conducting the proceeding without adequately notifying Encarnación, the court violated her "fundamental liberty interest" in raising her son.⁵⁶ The Court of Appeals also condemned the lower court's clear consideration of Encarnación's immigration status in determining her fitness as a parent:

There is no Missouri case expressly addressing how to handle immigration status of the parents. The closest we come to an answer is through a case in the Nebraska Supreme Court [*In re Angelica L.* 767 N.W.2d 74, 94 (Neb. 2009)], which stated: "whether living in Guatemala or the United States is more comfortable for the children is not determinative of the children's best interests ... the 'best interests' of the child standard does not require simply that a determination be made that one environment or set of circumstances is superior to another."⁵⁷

The Missouri Court of Appeals vacated the lower court's decision and remanded so that the trial court could dismiss the motion.

The Mosers appealed the Court of Appeals' decision to the Missouri Supreme Court, which agreed with the appellate court—that the trial court failed to adhere to notice requirements when it ordered the termination of Encarnación's parental rights to Carlitos. In January 2011, the court determined that it could not fully consider many of Encarnación's claims regarding her constitutional rights because such evidence had not been presented at the trial court level and therefore was not part of the record on appeal.⁵⁸ The Missouri Supreme Court remanded the case back to the trial court for a new and fair trial.

In July 2012, Missouri Circuit Court Judge Jones ruled that Encarnación had "abandoned" her son, and therefore had no parental right to challenge her son's adoption by the Mosers. The Judge permitted the

⁵⁵ *In re Adoption of C.M.B.R.*, 2010 WL 2841486, at *4.

⁵⁶ *Id.* at *7.

⁵⁷ *Id.* at *7-8.

⁵⁸ *See In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 824 n.26 (Mo. 2011).

Mosers' adoption petition to proceed.⁵⁹ Although her lawyer discussed the possibility of appealing the decision, Encarnación may never be reunited with her son.⁶⁰

2. Felipe Montes

*Fui a dejar a mis hijos a la guarderia a las ocho en la mañana. Levante a mis hijos, como de custumbre. Les cambio. Los arregle para la guarderia. . . . Tenia una cita porque tuve unas multas por trafico, por no licencia y por no aseguransa. Me encuentre con dos oficiales del ICE de inmigracion. Alli se me hizo la detencion, y me llevaron al otro estado. Sin decir nada a mi esposa, sin ver a mis hijos uno vez mas. Como, como iba recoger a mis hijos? Mi esposa se quedo completamente sola y embarazada. . . . Y este es algo que a mi me duele ahorita que mis hijos estan en la custodia de social services. En este mundo hay muchos injusticias. Y ahorita, por lo menos, quisiera que enviaran mis hijos a Mexico. Aqui los ofreceria lo mas que podiera.*⁶¹

"I love my kids to death. . . . When they were born, it's something so wonderful you can't explain."⁶²

Felipe Montes is a 31-year old Mexican national who was deported from the United States—separated from his wife and three children—in 2010. He came to the United States in 2001 and worked in landscaping.

⁵⁹ Mariano Castillo, *Undocumented Immigrant Mother Loses Adoption Battle*, CNN (July 18, 2012, 1:26 PM), <http://www.cnn.com/2012/07/18/us/missouri-immigrant-child/index.html>.

⁶⁰ *Missouri Supreme Court Sends Case on Immigrant Parental Rights Back to Lower Court*, WOMEN'S REFUGEE COMMISSION (Jan. 28, 2011), <http://www.womensrefugeecommission.org/press-room/1099-missouri-supreme-court-sends-case-on-immigrant-parental-rights-back-to-lower-court>.

⁶¹ Wessler, *supra* note 1.

Translation: I took my kids to daycare at 8:00 in the morning. I woke them up, as usual. I changed them. I fixed some things for them to take to daycare. . . . I had an appointment because I had some traffic tickets, for having no license and for having no insurance. There were two ICE officials from immigration there. They detained me and they took me to another state. Without being able to say anything to my wife, without seeing my children even one more time. How, how were my children going to get picked up? My wife was left completely alone, and pregnant. . . . That's something that hurts me right now, that my children are in the custody of social services. In this world there are a lot of injustices. For now, at the very least, I would like them to send my kids to Mexico. I would provide them with all that I can.

⁶² *Id.*

He worked 9-hour days before coming home to cook dinner for his family. His family and his wife's family agree: Felipe would do anything for his children. He is the model of a devoted father.

Felipe went to the local traffic court to deal with a few tickets. North Carolina is one of the many states that do not issue driver's licenses to undocumented immigrants, thus Felipe had no way of obtaining legal permission to drive. Still, he did whatever he could to support his family, which included driving to work without a proper license. He had no idea that when he dropped his kids off at daycare that morning that it would be the last time he'd see them in at least two years. ICE arrested Felipe at traffic court, detained him far away from his family, and quickly deported him to Mexico.

Felipe's wife Marie (a U.S. citizen) suffers from mental illness, and could not care for their children on her own. Soon after Felipe was deported, Marie's rights to the children were terminated. Felipe's older sons were placed together in one foster home, and his infant son, as soon as he was born, was placed in a different home.

In February of 2012, the Allegany County Department of Social Services brought a petition to involuntarily terminate Felipe's parental rights to his three boys. The department conducted a home study to discern whether Felipe's home in Mexico would be an appropriate home for his children. A court document states, "[the county] did not approve the father's home for placement because water is hauled in, there is a concrete roof and cement floor."⁶³ The home study generally approved the conditions of the home, noting that the conditions are "good," and stated clearly that Montes' "uncles would help care for [the children] and they would lend him a room inside the house to live in."⁶⁴ Still, the Department expressed hesitation in placing U.S. citizen children in Mexico; they say that the living situation would be problematic because the house has no running water. Felipe explained that, even though they don't have running water, "there is clean water that we bring in to clean, drink, cook. We drink it every day."⁶⁵

Felipe does whatever he can to stay in touch with his kids, even though he is thousands of miles away. He calls the daycare every day, and the women at the daycare help him connect with his kids. Felipe says: "I talk to the 4 year old and he says 'Hola papa. Miss you. I love you. I'm playing.' The middle one doesn't talk much yet."⁶⁶ These calls are insufficient evidence for the Department, however. The Department

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

persists in its suit to terminate Felipe's parental rights. The Department believes Felipe is not fit to take care of his kids because "[he] has not made an [sic] progress toward trying to obtain a temporary VISA or become legal to come back to the United States to visit or get his children."⁶⁷ The Department officials clearly have failed to consult with immigration attorneys; after deportation. It takes a rare and extraordinary measure for a deported person to re-enter the United States on any visa, whether to visit or "get" his/her children.

On August 1, 2012, DHS granted that rare and extraordinary measure to Felipe. He was granted temporary parole, permission to enter the United States and stay for three months, so he could attend his children's custody hearing.⁶⁸ Illustrating the rarity of this measure, Mexican Consul Carlos Flores stated, "This is the first time in my 11 years here that we've been successful in bringing someone [who was deported] back on humanitarian parole. . . . We've gotten people here for short periods who just need to come into the country, but never someone who's been deported."⁶⁹ After weeks of numerous postponements, Felipe was permitted visitation with his sons:

When Montes walked into the [Department of Social Services] room where the older two of his three children sat, he says his 4-year-old son, the oldest of his three, asked, "You're my daddy, right? You come from Mexico right?" "Yeah, I came from Mexico," Montes said. "I talk to you every Monday, every week on the phone." The boy started to smile. . . .

As Felipe left the visitation room where he saw his two children, his four-year-old asked his father, "Will you take us with you, daddy, will you adopt us?" "No," he replied, holding back tears, "I don't have to adopt you, you're my babies, you'll go with me as soon as I fix everything."⁷⁰

After months of waiting and nearly two years of fighting, Felipe was provisionally reunited with his sons on November 27, 2012.⁷¹ The North

⁶⁷ *Id.*

⁶⁸ Seth Freed Wessler, *Deported Dad Wins Rare 'Parole' to Re-Enter Country for Custody Hearing*, COLORLINES (Aug. 2, 2012, 2:22 PM), http://colorlines.com/archives/2012/08/deported_dad_wins_rare_parole_to_re-enter_country_for_custody_hearing.html.

⁶⁹ *Id.*

⁷⁰ Seth Freed Wessler, *Decision on Deported Dad's Parental Rights Will Have to Wait*, COLORLINES (Sept. 26, 2012, 9:38 AM), http://colorlines.com/archives/2012/09/on_tuesday_evening_after_two.html.

⁷¹ Seth Freed Wessler, *Felipe Montes Reunited With His Children, On Trial Basis*,

Carolina County Court Judge granted Felipe a “trial placement,” whereby Felipe’s children could live with him in a local hotel from December 7th until February 19th.⁷² If the trial placement goes well, the Judge will close the case, reinstating Felipe’s full parental rights over his children.

C. Termination of Parental Rights: The “Family’s Civil Death Penalty”⁷³

1. Race Neutral Standards?

A parent’s right to a relationship with his/her child is fundamental.⁷⁴ This relationship can be terminated only by a court order, to protect the child, after a showing by clear and convincing evidence that the parent is unfit.⁷⁵ Parental unfitness is evaluated by a variety of factors, including: neglect; deprivation; a parent’s substance abuse; a parent’s emotional, mental illness, or mental deficiency; abandonment; or abuse.⁷⁶

States have diverse standards for determining parental unfitness and different calculi to decide whether the termination of parental rights is appropriate. In Missouri, for example, where Encarnación’s parental rights were terminated, the court considered: (1) if the child has been abandoned;⁷⁷ (2) if the child has been neglected; (3) if the child has been under the jurisdiction of the juvenile court for over one year; (4) if the parent was convicted of a crime involving domestic abuse or rape; and (5) if the parent suffers from substance abuse problems that “render[] the parent unable, for the reasonably foreseeable future, to care appropriately

COLORLINES (Nov. 27, 2012, 1:52 PM), http://colorlines.com/archives/2012/11/felipe_montes_reunified_with_his_children_on_trial_basis.html.

⁷² *Id.*

⁷³ *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 824 (Mo. 2011) (Stith, J., concurring in part, dissenting in part).

⁷⁴ *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (“The absence of dispute reflected this Court’s historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.”).

⁷⁵ *See Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (concluding that parents are “constitutionally entitled to a hearing on their fitness before their children are removed from their custody”). *See also* 2A Horner Probate Prac. & Estates § 58:12 (explaining that in ruling on parental unfitness, a court will not consider the child’s “best interests” but will consider only evidence that bears on parental fitness relevant to the particular grounds of unfitness alleged).

⁷⁶ *See Parent and Child*, 59 AM. J. JURIS. § 16 (2003).

⁷⁷ In Encarnación’s case, the court determined that she had abandoned her child while she was incarcerated. *See In re Adoption of C.M.B.R.*, No. SD 30342, 2010 WL 2841486, at *3 (Mo. Ct. App. July 21, 2010), *transferred to* 332 S.W.3d 793 (Mo. 2011).

for the ongoing physical, mental or emotional needs of the child.”⁷⁸ The Missouri statute specifies that the court should also consider the following circumstances in determining whether to terminate a parent’s rights:

(1) The emotional ties to the birth parent; (2) The extent to which the parent has maintained regular visitation or other contact with the child; (3) The extent of payment by the parent for the cost of care and maintenance of the child when financially able to do so including the time that the child is in the custody of the division or other child-placing agency; (4) Whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent within an ascertainable period of time; (5) The parent's disinterest in or lack of commitment to the child; (6) The conviction of the parent of a felony offense that the court finds is of such a nature that the child will be deprived of a stable home for a period of years; provided, however, that incarceration in and of itself shall not be grounds for termination of parental rights; (7) Deliberate acts of the parent or acts of another of which the parent knew or should have known that subjects the child to a substantial risk of physical or mental harm.⁷⁹

Only if “clear, cogent and convincing evidence” exists to terminate parental rights will the court consider whether such termination is in the best interest of a child whom prospective parents wish to adopt.⁸⁰

In North Carolina, where Felipe Montes’s parental rights were in question, the court considered whether some of the following factors were met by clear and convincing evidence: (1) whether “[t]he parent has abused or neglected the [child]”; (2) whether the parent “willfully left the [child] in foster care” or in an out-of-home placement “for more than 12 months without” an attempt to correct the conditions which led to the child’s removal from the home; (3) whether “the parent is incapable of providing [] the proper care and supervision of the [child]”; (4) whether “[t]he parent has willfully abandoned the [child] for at least six consecutive months”; (5) whether the parent has committed domestic abuse or violence against the child, other children, or the child’s other parent; and (6) whether the parent’s rights to another child have already

⁷⁸ MO. ANN. STAT. § 211.447(5) (West 2011).

⁷⁹ *Id.* at (7).

⁸⁰ *Id.* at (6).

“been terminated involuntarily” “and the parent lacks [] ability or willingness to establish a safe home.”⁸¹

While these statutes are race-neutral as written, because the calculation is so fact-specific and so much discretion is left to the trial court judge, bias is inevitably intertwined in the assessment. Professor Dorothy Roberts expounds on the problematic consequences of broad discretion in child welfare and child custody determinations. Even though abuse and neglect is statistically no more prevalent in families of color than in white families, children of color—specifically black children—are more likely to end up involved in the foster care system.⁸² Roberts challenges the dubious: “Spend a day at dependency court in any major city and you will see the unmistakable color of the child welfare system.”⁸³ Deeply ingrained stereotypes and biases embedded in the child welfare system and held by the actors involved in the child welfare system work to destroy families of color, largely because they do not conform with “acceptable” white notions of family.⁸⁴

Although race-neutral statutes do not explicitly require consideration of a parent’s immigration status, unsurprisingly, the same biases that torment the child welfare system manifest here, too. The trial court judge who terminated Encarnación’s parental rights to Carlitos condemned her for bringing a child into the world while she lacked proper immigration

⁸¹ N.C. GEN. STAT. ANN. § 7B-1111 (West 2011). For a succinct description of all the grounds of termination of parental rights state-by-state, visit Child Welfare Information Gateway at http://www.childwelfare.gov/systemwide/laws_policies/statutes/groundtermin.pdf.

⁸² DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 47-56 (2003) (“In San Diego . . . African American children were overrepresented in foster care at a rate six times their census proportion”). See also Charlton C. Copeland, Book Note, *Private Pathologies and Public Policies: Race, Class, and the Failure of Child Welfare*, 20 YALE L. & POL’Y REV. 513, 515-16 (2002) (summarizing various studies included in Roberts’ work *Shattered Bonds*) (“In Illinois, black children are 19% of the child population, but comprise over 75% of all children in foster care. In Chicago, black children constitute over 95% of the foster care population. While black children represent only 10% of the child population in San Francisco, they make up over 70% of the city’s foster care population. In New York City, white children are 30% of the child population, but comprise less than 3% of the city’s foster care population.”).

⁸³ ROBERTS, *supra* note 82, at 6.

⁸⁴ See Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 NW. J.L. & SOC. POL’Y 303 (2006) (“Deeply rooted stereotypes about black family dysfunction place no value on the relationship between poor, black parents and their children.”); *id.* (“[These stereotypes] make it difficult to imagine poor, black parents actually caring for their children. [With legislation like the ASFA, the child welfare system] focuses on punishing what white America has deemed ‘disgraceful parenting’ instead of deciding what is actually best for the child.”).

documents for life in the United States.⁸⁵ Because she successfully completed the extremely dangerous journey from Guatemala through Mexico into this country, and because she used false documents to secure a job at a factory—likely the only way she could obtain a job—this judge felt that she could never be an adequate parent for her baby. Given that racism, sexism, and xenophobia are so entrenched in our nation's history and law, how do we avoid unjustly terminating the parental rights of parents of color, including undocumented immigrant parents, even where race or immigration status is neither a statutory factor, nor explicitly mentioned in a judge's opinion?

2. *Length-of-Time-Out-of-Custody Termination Ground*

One of the most controversial bases for the termination of parental rights has been dubbed the “length of time out of custody” ground.⁸⁶ Beginning in the 1970s, the child welfare system in the United States moved to a “permanency” model, emphasizing the need for children to have a stable family; if a child's parent could not provide such stability, courts opted to “free” the child for adoption into a more permanent family.⁸⁷ Summarizing this concept, Professor Michael Wald articulated, “[t]ermination would be the norm after a child has been in care a given period of time unless there are specific reasons why termination would be harmful to the child.”⁸⁸

In 1980, Congress first attempted to attack the problem of “foster care drift” by enacting the Adoption Assistance and Child Welfare Act (“CWA” or “AACWA”).⁸⁹ The CWA “emphasized family preservation,”

⁸⁵ See, e.g., *In re Adoption of C.M.B.R.*, No. SD 30342, 2010 WL 2841486 (Mo. Ct. App. July 21, 2010), transferred to 332 S.W.3d 793 (Mo. 2011) (“[T]he court stated that “[Mother's] lifestyle, that of smuggling herself into a country illegally and committing crimes in this country is not a lifestyle that can provide any stability for a child. A child cannot be educated in this way, always in hiding or on the run.”).

⁸⁶ See Jennifer Hand, *Preventing Undue Terminations*, 71 N.Y.U. L. REV. 1251, 1252, 1256 (1996) (relying on the groundbreaking work of HENRY S. MAAS & RICHARD E. ENGLER, *CHILDREN IN NEED OF PARENTS* (1959), which introduced the concept of “foster care drift” and underscored the importance of permanence and stability to child development).

⁸⁷ See *id.* at 1256-57 (“Once the child is placed in foster care, however, the goal of ‘permanency planning’ shifts to getting the child out of foster care as soon as possible . . .”).

⁸⁸ Michael S. Wald, *State Intervention on Behalf of “Neglected” Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 690 (1976).

⁸⁹ See Cheryl A. DeMichele, *The Illinois Adoption Act: Should A Child's Length of Time in Foster Care Measure Parental Unfitness?*, 30 LOY. U. CHI. L.J. 727, 738-39 (1999) (“The AACWA intended for permanency planning to curb the problem of ‘foster

urging states “to make reasonable efforts to keep families together”, and only to terminate parental rights “where the the child's safety was so imperiled as to make reunification untenable.”⁹⁰

In the 1980s, growing concern about “foster care drift” motivated Congress to take further action.⁹¹ In 1997, President Clinton signed into law the Adoption and Safe Families Act (“ASFA”), which, among other things, required that states initiate proceedings to terminate the rights of parents whose children had been in foster care for 15 out of the preceding 22 months.⁹² Remarking on the evolution of family law from CWA to ASFA, Professor Libby Adler notes that, although “[t]he goal of permanence is common to both the CWA and ASFA, . . . the CWA embodied a preference for family preservation, ASFA favors expeditious termination of parental rights.”⁹³ The “length of time out of custody” ground is the *only* legal basis for a court to terminate the rights of a parent with no showing of abuse, neglect, or parental incapacitation. Swift movement to terminate parental rights, combined with discretionary authority of child welfare workers and judges, and deeply rooted social biases (against people of color, against immigrants, against single mothers and against fathers) ultimately result in permanent destruction of many families that do not fit within the socially established (read: white, middle/upper-class, U.S. citizen, heterosexual, married, two-parent) norm.

II. Conflicting Considerations in Terminating the Rights of Fit Immigrant Parents

A. State's Interests

In 1982, the Supreme Court noted two distinct state interests relevant to “parental rights termination proceedings[:]*a parens patriae* interest in preserving and promoting the welfare of a child[:]*and a fiscal and administrative interest in reducing the cost and burden of such proceedings.*”⁹⁴ Professor Marcia Zug additionally argues that the State

care drift’-- children ‘stuck’ in the foster care system for extended periods of time while bouncing from foster home to foster home with little or no contact with their biological families.”).

⁹⁰ Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1, 3 (2001).

⁹¹ See generally *id.* at 17-21.

⁹² Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (current version at 42 U.S.C. §§ 670-679 (2006)), available at <http://www.gpo.gov/fdsys/pkg/PLAW-105publ89/html/PLAW-105publ89.htm>.

⁹³ Adler, *supra* note 90, at 9. See also *id.* at 23 (remarking that the ASFA marked a policy shift from social responsibility for poverty to individual blame or responsibility).

⁹⁴ *Santosky v. Kramer*, 455 U.S. 745, 766 (1982).

has an interest in ensuring that U.S. citizen children form and maintain strong bonds with the United States.⁹⁵

1. Parens Patriae

Parens patriae was not always used as it is today—as a protective measure to intervene and protect vulnerable populations. Professor Douglas Rendleman, examining the history and evolution of the Latin phrase, explains that, in feudal England, “[*parens patriae*] was an equitable concept[,]” employed to mediate disputes “between private parties . . . usually where property or guardianship was in issue.”⁹⁶ In the English legal system, the Court of Chancery, “as an agent of the monarchy,” used *parens patriae* to fulfill its duty to the crown: “to harmonize testamentary and guardianship problems in the interest of order and hierarchy.”⁹⁷ Chancery relied on *parens patriae*, “to prevent the victimization of vulnerable parties by prohibiting litigation by anyone outside the formal feudal hierarchy.”⁹⁸ This foundation of *parens patriae*—verifying, establishing, and reinforcing lineages and feudal hierarchies—is especially relevant because the context of feudal English law is drastically divergent from modern American law; by transplanting legal concepts across extremely different legal systems and times, much may be lost, misinterpreted, or mistaken.⁹⁹

In 1839, in *Ex parte Crouse*, a U.S. court employed *parens patriae* and “transplanted [the concept] into a branch of the poor law where it was used to justify the state statutory schemes to part poor or incompetent parents from their children.”¹⁰⁰ *Parens patriae* evolved from *Crouse* as a

⁹⁵ Marcia Zug, *Should I Stay or Should I Go: Why Immigrant Reunification Decisions Should be Based on the Best Interest of the Child*, 2011 BYU L. REV. 1139, 1150-52 (2011).

⁹⁶ Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205, 219 (1971).

⁹⁷ *Id.* at 208.

⁹⁸ *Id.* at 208.

⁹⁹ See generally Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003). See also Michele Graziadei, *Legal Transplants and the Frontiers of Legal Knowledge*, 10 THEORETICAL INQUIRIES L. 723, 728 (2009) (“[T]he finding that law is mobile has also been criticized . . . on the basis of the assumption that law as a social construct cannot remain the same, once it is dislocated. On this account, the ‘transplant’ cannot survive the change of context. In the new context, the original meaning of what is transplanted is, of necessity, lost.”); Rendleman, *supra* note 96, at 233 (“The phrase *parens patriae* and the idea that children were being rescued from a downward course combined to detract the attention of the upper classes from inequalities in income and the need for adequate cash assistance for those in need.”).

¹⁰⁰ *Id.* at 219. See *Ex parte Crouse*, 4 Whart. 9 (Pa. 1839).

judicially approved guise to continue an “Elizabethan policy of severing poor parents from their children.”¹⁰¹

This use of *parens patriae* has been widely condemned in the realm of family law.¹⁰² Specifically with respect to removing children from their family home and terminating the parental rights of poor parents, scholars, and legislators alike have reinforced that poverty cannot serve as the basis for terminating the legal relationship between a parent and a child.¹⁰³ The Supreme Court has explained that the State’s *parens patriae* interest in proceedings involving children is ensuring that every child has a permanent home.¹⁰⁴ However, the Court noted that, where there is “reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors *preservation*, not *severance*, of natural familial bonds.”¹⁰⁵

2. Fiscal and Administrative Interest in Termination of Parental Rights Proceedings

Although many courts recognize that states have a fiscal interest in making judicial proceedings efficient and brief, few courts venture to explain in detail the state’s fiscal and administrative interests in termination on parental rights proceedings and the significance of those interests.¹⁰⁶ The Court has suggested that constitutionally required

¹⁰¹ Rendleman, *supra* note 96, at 239.

¹⁰² See, e.g., *id.* at 205 (“[B]ecause of ethnocentrism and an unwillingness to admit that poor people were entitled to full citizenship, [society] continued to derogate children’s right to liberty and parent’s right to custody. . . . [C]alling the statutes ‘protective’ and by borrowing the idea of *parens patriae*, [] reformers . . . prevented . . . true protection and *parens patriae*.”).

¹⁰³ See, e.g., ROBERTS, *supra* note 82, at 26-29; N.C. GEN. STAT. ANN. § 7B-1111 (West 2011) (“[N]o parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.”); KY. REV. STAT. ANN. § 625.090 (West) (ordering that termination of parental rights not be ordered unless at least one of certain enumerated factors are met, including “[t]hat the parent, *for reasons other than poverty alone*, has continuously or repeatedly failed to provide or is incapable of providing . . . for the child’s well-being and that there is no reasonable expectation of significant improvement in the parent’s conduct in the immediately foreseeable future”) (emphasis added).

¹⁰⁴ Santosky v. Kramer, 455 U.S. 745, 766 (1982).

¹⁰⁵ *Id.* at 766-67 (emphasis added); “The State’s interest in finding the child an alternative permanent home arises *only* ‘when it is clear that the natural parent *cannot* or *will not* provide a normal family home for the child.’” *Id.* at 767 (emphasis added).

¹⁰⁶ See *id.* at 766 (acknowledging that one of two state interests at stake in parental rights termination proceedings is “a fiscal and administrative interest in reducing the cost and burden of such proceedings.”).

hearings, court-appointed counsel,¹⁰⁷ and complex procedures¹⁰⁸ might impose financial burdens on the State. Where the individual's interest at risk in the proceedings is particularly high, however, a state's interest in judicial and administrative efficiency is an insufficient basis alone to infringe upon the individual interest.¹⁰⁹ While the State's administrative interests may be important—and are certainly relevant to a due process calculation—at the very minimum, courts faced with the potential deprivation of a parent's parental rights should be clear regarding what administrative or fiscal interests are at stake and how significantly those interests should be weighed.

3. *Keeping American Children Connected to America*

In addition to the notion that the State maintains a *parens patriae* right to protect vulnerable populations (in this case, children), by terminating the parental rights of fit immigrant parents, Professor Zug argues that the State maintains an interest in ensuring that U.S. citizen children are instilled with “the [f]undamental [v]alues of a [d]emocratic [s]ociety.”¹¹⁰ According to Zug, instilling these “fundamental values” requires U.S. citizen children be educated in U.S. schools; she asserts that the “mere presence [of children] in the United States ensures” that they “are exposed to the ideas necessary for their effective participation as future citizens.”¹¹¹ Zug's argument here devalues the quality and result of a foreign education. “[T]he problem of citizen children living outside the United States [is that] exposure to such fundamental values through either formal or informal training is much less likely.”¹¹² Her argument also fails to recognize that many people, both citizens by birthright and by naturalization, have been educated outside the United States, have still developed important values of our society, and have become active citizens.

Professor Zug also uses *Tuan Ahn Nguyen v. INS*¹¹³ to argue that the State has an interest in ensuring that children born in the United States to immigrant parents maintain substantial and significant ties to this

¹⁰⁷ *Id.* at 767.

¹⁰⁸ *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31 (1981).

¹⁰⁹ *See Reed v. Reed*, 404 U.S. 71, 76 (1971) (holding that a statute that aimed to improve administrative efficiency by eliminating hearings was “the very kind of arbitrary legislative choice forbidden by . . . the Fourteenth Amendment.”).

¹¹⁰ Zug, *supra* note 95, at 1147.

¹¹¹ *Id.* at 1149.

¹¹² *Id.* at 1150.

¹¹³ *Nguyen v. INS*, 533 U.S. 53 (2001).

country.¹¹⁴ Zug misreads *Nguyen* to stand for the proposition that Congress intended for derivative citizenship law to “ensure that future American citizens have a significant connection to the United States.”¹¹⁵ In contrast, *Nguyen* dealt with whether foreign-born children with one U.S.-citizen parent should be permitted to derive citizenship. The Court upheld a statute that treated *potential* derivative citizen children differently based on their citizen parent’s sex.¹¹⁶ The Court’s consideration of the child’s ties to the United States are an afterthought, only mentioned as it related to the Court’s concern that the child have solid ties to his citizen parent before deriving citizenship.

Rather than attempting to ensure that “future American citizens have a significant connection to the United States,”¹¹⁷ the statutory distinction in *Nguyen* merely perpetuated sexist stereotypes about the relationship between illegitimate children and their unwed fathers.¹¹⁸ In practice, foreign-born “future American citizens” may have the exact same “connection to the United States,” but will be denied the benefit of derivative citizenship solely on the basis of their parent’s gender. Professor Zug uses the dicta of *Nguyen* to say that because “[*derivative*] citizenship [for foreign-born children of U.S. citizens] without a connection to the United States is not desirable,” birthright citizens *must* be raised *in* the United States.¹¹⁹ Arguing that *Nguyen* establishes a State interest in keeping U.S.-born children of immigrant parents “connected to America,” is illogical and untenable.

Zug uses this tenuous reading of *Nguyen v. INS* and the analogy to the State’s interest in the education of children to argue that “the State is justified in keeping citizen children in the United States after their parents’

¹¹⁴ Zug, *supra* note 95, at 1151.

¹¹⁵ *Id.*

¹¹⁶ *Nguyen*, 533 U.S. at 62, 64-65 (upholding “Congress’ decision to impose requirements on unmarried fathers that differ from those on unmarried mothers” and finding the gender-based distinction “justified by two important governmental objectives[:]” first, “assuring that a biological parent-child relationship exists[:]” and second, “ensur[ing] that *the child and the citizen parent* have some demonstrated opportunity or potential to develop . . . real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.”) (emphasis added).

¹¹⁷ Zug, *supra* note 95, at 1151.

¹¹⁸ See also *Johnson v. Whitehead*, 647 F.3d 120, 135-36 (4th Cir. 2011) (Gregory, J., dissenting) (evaluating a statute analogous to that in *Nguyen*, Judge Gregory noted that “Congress appears to have relied wholly on the invidious sex stereotype that an unmarried father has less of an interest than an unmarried mother in conferring citizenship to his child. . . . Discriminatory laws should not be allowed to stand on such undoubtedly fragile foundations.”), *cert. denied*, 132 S. Ct. 1005 (2012).

¹¹⁹ Zug, *supra* note 95, at 1151.

deportation.”¹²⁰ Overlooking the questionable legal foundation for this argument, Zug’s conclusion is paternalistic at best and racist at worst. It assumes that a child born in the United States will hold only American citizenship, when in practice, many immigrant parents secure dual citizenship for their children born in the United States. Zug further presumes that, even where children hold dual citizenship, their relationship to the United States is more important than their relationship to their parents’ country of origin.¹²¹ Finally, Zug’s conclusion assumes a unified “American” experience, essentializing the United States experience for all citizens, regardless of their ethnic origin, or birth nationality. Essentializing the “American” experience ignores and devalues the experience of millions of Americans—particularly immigrants to America, and bi- or multi-racial children of immigrant parents—whose identities as Americans are complex and involve multiple co-existing identities.¹²²

B. Children’s Rights

It is important to note that, while protecting children and vindicating the rights of children are venerable goals of parents, the State, and the legal academy alike, no court has established the fundamental rights of children. Still, Professor Zug argues that children’s rights should be paramount in proceedings to terminate parental rights.¹²³ Relying on the controversial scholarship of Professors Elizabeth Bartholet and James Dwyer, Zug highlights a few instances where favoring parents’ rights sometimes detrimentally affects children:

[I]n the context of foster care and termination . . .
[Professor Bartholet argues that] longer periods before
termination of parental rights, while arguably good for
parents, can be disastrous for their children who must spend

¹²⁰ *Id.* at 1152. “In cases where reunification with deported parents will harm a child’s future liberty, the State has the right, and maybe even the duty, to deny others, including parents, the ability to mandate reunification.” *See id.*

¹²¹ Zug’s presumptions here, and her assertions that an American education is a prerequisite to attaining “fundamental values” of our society, are consistent with the ethnocentric bias of white non-Jewish Americans noted by Professor David Raden. *See also* David Raden, *Ingroup Bias, Classic Ethnocentrism, and Non-Ethnocentrism Among American Whites*, 24 POL. PSYCHOL. 803, 815 (2003) (noting that White Non-Jews viewed Hispanics as less patriotic than Blacks, Asians, Jews, and White Non-Jews).

¹²² *See, e.g.,* Harris, *supra* note 13, at 584 (addressing the inherent flaws of an analysis which employs essentialist notions of individuals based on only one characteristic).

¹²³ *See generally* Zug, *supra* note 95, at 1167-70.

longer periods in foster care limbo. . . . Professor Dwyer discusses [the conflict between parents' rights and "children's rights"] in the context of education arguing that parental control over their children's education can deprive their children of the skills and knowledge that could benefit them in adulthood.¹²⁴

Professor Zug admits that "harsh immigration laws put parents in 'impossibly difficult positions,'" but concludes, with no legal authority or reasoning that, "it is unwise to assume that parents [in removal proceedings] act in their children's best interest."¹²⁵ As such, Zug deduces that when a parent is deported or in removal proceedings, a court should instead apply a "best interest of the child" test to evaluate whether to terminate the parent's rights.¹²⁶

The "best interest" test is malleable, reliant on innumerable considerations, and highly dependent on both the facts of the case and the biases of the welfare workers and judge(s) involved.¹²⁷ While the "best interest of the child" standard is prevalent in various aspects of family law, particularly in custody and visitation determinations, it has no place in proceedings to terminate parental rights. Factors underlying custody and visitation decisions change often; the "best interest" test is well suited to address evolving situations. The termination of parental rights, in contrast, is final and cannot be undone if and when circumstances change. Moreover, although the "best interest" test may be appropriate for custody or adoption proceedings, which involve various parties including the State, parents, and third parties (such as step-parents, grandparents, or prospective adoptive parents), in contrast, parties to a proceeding to terminate a parent's parental rights include *only* the State and the parents. Terminating parental rights permanently severs the relationship—legal, physical, and actual relationship—between parent and child. It cannot be undone.

The determination that it is in the "best interest" of a U.S. citizen child of an immigrant parent to remain in the United States after the parent is deported, that the child would be "better off" living in the United States without his/her parent, is a deeply racialized and paternalistic notion. This assumption fails to give credence to many other important considerations,

¹²⁴ *Id.* at 1168 n.134.

¹²⁵ *Id.* at 1174.

¹²⁶ *Id.* at 1176.

¹²⁷ See Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 57 (1991) ("Although the [best interest test] is intended to be a multi-factor balancing test, it may often allow race inappropriately to achieve a dominant position.").

negative externalities that would bear on a child whose relationship with his immigrant parents was permanently severed. Some of these considerations include: a link to and an understanding of the child's native culture; ability to speak the child's native language; connection with biological relatives, including other siblings; difficulty relating to both the adoptive family and the child's cultural group; and difficulty forming a self-identity.¹²⁸

Given that parenthood is a fundamental aspect of the human experience,¹²⁹ infringement on this fundamental right should occur *only* in the most serious of circumstances. Deportation of an otherwise fit immigrant parent cannot rise to this level of severity to warrant such a drastic measure, even if, according to the subjective opinion of child welfare workers or judges, continuing to live in the United States would arguably be in the "best interest" of the immigrant's child.

C. Parents' Rights

The Supreme Court has established and consistently reaffirms that parents have a *fundamental* right to establish and keep a relationship with their children. Nearly a century ago, the Court established that the right to conceive and raise one's children is "essential to the orderly pursuit of happiness."¹³⁰ In 1942, the Court remarked that one's right to have children and raise a family is "one of the basic civil rights of man."¹³¹ In addressing the right of parents to raise their children within a specific religious faith, the Court held, "[i]t is cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."¹³²

In 1971, the Supreme Court specifically dealt with the right of an unwed father to a judicial proceeding proving his unfitness before he was denied custody of his kids. In *Stanley v. Illinois*, the Court remarked that

¹²⁸ See generally *id*; see also BARRIERS TO ADOPTION: HEARINGS BEFORE THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES 214 (1985) (statement of William T. Merritt, President, National Association of Black Social Workers) ("We view the placement of Black children in white homes as a hostile act against our community. It is a blatant form of racial and cultural genocide."); GEORGE BERNARD SHAW, ON THE ROCKS 598 (1933) ("You can exterminate any human class not only by summary violence, but by bringing up its children to be different.").

¹²⁹ Congress, the Supreme Court, and the United Nations have endorsed the concept of parenthood as a fundamental aspect of the human experience, and affirmed that parental rights are both civil rights and human rights.

¹³⁰ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

¹³¹ *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

¹³² *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

“[i]t is plain that the interest of a parent in the companionship, care, custody, and management of his or her children ‘come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.’”¹³³ The Court concluded that the father’s interest in “retaining custody of his children is cognizable and substantial.”¹³⁴

Even where parents are alleged to be unfit, abusive, or neglectful, the Court has affirmed that the right to parent one’s children is *fundamental*, and should be infringed upon *only* in the most grave of circumstances.¹³⁵ In proceedings to terminate one’s parental rights, the Supreme Court has repeatedly held that the state bears the burden to overcome the presumption in favor of a parent’s right to his child, and that the State’s burden in those proceedings is substantial.¹³⁶

III. Constitutional Implications

A. Due Process

1. *Procedural Due Process*

In 1972, the Supreme Court considered for the first time whether a parent has a fundamental interest in his relationship with his children. In *Stanley v. Illinois*, an unmarried father challenged the legitimacy of a state law that put children of unmarried parents into foster care upon the death of their mother.¹³⁷ Mr. Stanley was never afforded an opportunity to defend his relationship with his children. Illinois law presumed that, because Mr. Stanley was not married to his children’s mother, he was not a parent, and therefore not entitled to notice or an opportunity to challenge custody determinations for his children.

While the specific issue before the Court dealt with unwed fathers’ constitutional right to equal protection, the Court held that “as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a

¹³³ *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citation omitted).

¹³⁴ *Id.* at 652.

¹³⁵ See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (“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.”).

¹³⁶ See generally *id.* at 764-65 (quoting *Addington v. Texas*, 441 U.S. 418, 427 (1979)) (“Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate terminations will be ordered.”) (internal quotations omitted).

¹³⁷ *Stanley*, 405 U.S. at 646.

parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged.”¹³⁸ By denying Stanley proper procedure, including notice and an opportunity to contest the state’s custody determination, the Supreme Court held that the Illinois statute violated Stanley’s right to due process.

Less than a decade later, in 1981, the Supreme Court answered the question of *how much* process is constitutionally required for a parent whose right to a legal relationship with his children is in jeopardy.¹³⁹ *Lassiter v. Dep’t of Soc. Services* addressed whether indigent parents are constitutionally entitled to legal representation in proceedings to terminate their parental rights.¹⁴⁰ Drawing from the three-factor test in *Mathews*,¹⁴¹ the Court conceded:

[T]he parent's interest is an extremely important one (and may be supplemented by the dangers of criminal liability inherent in some termination proceedings); the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest, and, in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high.¹⁴²

One year later, the Court again dealt with the issue of the procedural due process rights of parents in termination of parental rights proceedings.¹⁴³ In *Santosky v. Kramer*, two parents protested a New York state law that instructed a court to terminate a parent’s rights to his children if a preponderance of the evidence indicated that the parent neglected the child.¹⁴⁴ A New York family court terminated Mr. and Mrs.

¹³⁸ *Id.* at 649.

¹³⁹ *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981).

¹⁴⁰ *Id.*

¹⁴¹ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (“First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”).

¹⁴² *Lassiter*, 452 U.S. at 31.

¹⁴³ *Santosky v. Kramer*, 455 U.S. 745 (1982).

¹⁴⁴ *Id.* at 748-49 (citing N.Y. FAM. CT. ACT § 622 (McKinney 1975)).

Santosky's rights to their children, determining that a fair preponderance of the evidence tended to show that they were neglecting their children.¹⁴⁵ The parents appealed this determination, arguing that it violated their constitutional rights.

The Supreme Court decried New York for engraving this low burden in statute.¹⁴⁶ "[I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants."¹⁴⁷ At the very least, where the individual interests at stake in a proceeding are "particularly important," the Court reiterated¹⁴⁸ that the individual is constitutionally entitled to a hearing where the government bears the burden to establish by clear and convincing evidence.

Terminating the parental rights of fit immigrant parents simply because they have been deported cannot comport with the stringent constitutional requirements of due process. As mentioned, a parent's interest in protecting and maintaining a legal relationship with her child is extremely high. The State has an interest in protecting children from unfit or abusive parents. According to the ASFA, the State also has a fiscal and administrative interest (related to welfare and foster care costs) in facilitating the termination of rights of parents unlikely to regain custody of their children (so that those children do not languish in foster care but rather can be adopted into new families). The risk of erroneous deprivation is extraordinarily high here given that a fundamental right is at stake. Evaluated under *Mathews*, the practice of terminating the parental rights of fit, deported immigrant parents violates the parents' constitutional right to procedural due process.

2. Substantive Due Process

In addition to ensuring that individuals receive adequate procedural due process in proceedings to terminate their fundamental right to parent, the Due Process Clause "also includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'"¹⁴⁹ As addressed above,

¹⁴⁵ *Id.* at 751-52.

¹⁴⁶ *Id.* at 756-57.

¹⁴⁷ *Id.* at 755. "In parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight." *See id.* at 758.

¹⁴⁸ *See id.* at 756 (citing *Addington v. Texas*, 441 U.S. 418, 424 (1979)).

¹⁴⁹ *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (quoting *Washington v. Glucksberg*,

the Supreme Court has established that a parent's right to maintain a legal relationship with his or her children is fundamental. In the context of other fundamental rights, the Supreme Court has reiterated: "when a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."¹⁵⁰ The Due Process Clause incorporates a substantive fundamental right of parents to "make decisions concerning the care, custody, and control of their children."¹⁵¹

Because parents have a fundamental right to a relationship with their children, terminating a fit parent's relationship with his child, even if other potentially beneficial guardianship scenarios exist, violates the Due Process Clause of the Constitution. As the Court held in *Santosky*, "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."¹⁵² Even where a parent has been deported and physically incapable of visiting his or her child (and, some might argue, has thus abandoned his or her child), a parent retains the constitutional protection of due process and stringent examination of laws that might infringe upon his fundamental right to his child. The Court recognized that "even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life."¹⁵³ Terminating the parental rights of otherwise fit, deported immigrant parents based on the nebulous, low, and incredibly subjective "best interest of the child" standard cannot possibly withstand the stringent standard required by the Constitution and consistently reaffirmed by the Supreme Court. Rather, as with other cases involving the termination of parental rights, a court must first find that a parent is unfit before it terminates the legal relationship.

521 U.S. 702, 720 (1997)).

¹⁵⁰ *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (addressing the fundamental right to marry).

¹⁵¹ *Troxel*, 530 U.S. at 66 (relying on *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)). See also *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); *Parham v. J. R.*, 442 U.S. 584 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course").

¹⁵² *Santosky*, 455 U.S. at 753.

¹⁵³ *Id.*

B. Equal Protection

Given this country's historic discrimination against immigrants,¹⁵⁴ the growing problem of the termination of parental rights of fit immigrant parents raises serious equal protection concerns. Determining whether the practice violates equal protection involves four steps. First, is the discriminatory treatment aimed at a suspect class?¹⁵⁵ Second, whether the discrimination is aimed at a suspect class determines the level of scrutiny the court applies in evaluating the alleged constitutional violation. Next, one must determine whether the discrimination is sufficiently tailored for the purported government interest. Ultimately, if the discrimination is not sufficiently tailored, the court will determine the appropriate remedy.

1. Suspect Classification

In *United States v. Carolene Products*, Justice Stone wrote that there are certain groups of individuals—"suspect classes"—against whom discrimination is particularly egregious.¹⁵⁶ Although termination of parental rights statutes are facially nondiscriminatory, the increasing number of problematic cases involving the termination of immigrant parents' rights raises the concern that states are treating undocumented immigrant parents differently than citizen parents in these proceedings. A judge in Southwest Florida described how an undocumented parent's immigration status factors into a termination of parental rights proceeding:

Our child protection system has had very little, almost non-existent success at reunifying children . . . with parents who come the USA (1) undocumented, (2) poor, (3) uneducated/illiterate, (4) unable to communicate in English, (5) culturally segregated. . . . If children of these parents come into care, they are virtually doomed by these five factors and the probability of permanent loss of these children is overwhelmingly high. . . . [E]ven if a parent has some of these other factors—like lack of English language

¹⁵⁴ See, e.g., Chin, *supra* note 19, at 6-7; Lee, *supra* note 20; Kanstroom, *supra* note 30, at 195.

¹⁵⁵ See *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.").

¹⁵⁶ See *id.* (noting that "prejudice against discrete and insular minorities," including religious, national, or racial minorities, "may call for a correspondingly more searching judicial inquiry.").

ability and cultural segregation—they still have a fighting chance of getting their kids back but if you had the factor of being an undocumented immigrant, it makes it impossible.¹⁵⁷

While the federal government has a legitimate basis to treat immigrants differently than citizens in many situations,¹⁵⁸ differential treatment in a state family court based on a person's immigration status raises serious constitutional concerns.¹⁵⁹

Even though many immigrants are members of racial and national minorities and are often the target of substantial prejudice, in 1982, the Supreme Court rejected the argument that undocumented immigrants are a "suspect class."¹⁶⁰ Arguably, however, circumstances have changed so substantially over the past 30 years that re-examining this determination is warranted. At the time, the Court noted that there were an estimated three to six million undocumented immigrants living within the United States.¹⁶¹ That estimation has increased exponentially. The Pew Hispanic Research Center estimated that there were approximately 11.2 million unauthorized immigrants living in the United States in 2010.¹⁶² Furthermore, while entry into this country is sometimes a voluntary action,¹⁶³ because immigration law severely punishes individuals who are unlawfully present in the country for an extended period of time, one's status as undocumented is less voluntary. Many undocumented immigrants, especially the spouses of U.S. citizens, would seek to adjust to a lawful immigrant status, but fail to do so because of severe penalties levied

¹⁵⁷ *Shattered Families*, *supra* note 5, at 17.

¹⁵⁸ See *Adams v. Howerton*, 673 F.2d 1036, 1042 (9th Cir. 1982) ("Congress has almost plenary power and may enact statutes which, if applied to citizens, would be unconstitutional.").

¹⁵⁹ See *Plyler v. Doe*, 457 U.S. 202, 213 (1982) ("The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. That objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection.").

¹⁶⁰ *Id.* at 219 n.19 (1982) ("Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime.").

¹⁶¹ *Id.* at 218 n.17.

¹⁶² Jeffrey Passel & D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, PEW RES. HISP. CENTER (Feb. 1, 2011), <http://www.pewhispanic.org/2011/02/01/unauthorized-immigrant-population-national-and-state-trends-2010/>.

¹⁶³ It is debatable whether, for many individuals who enter this country to escape persecution or violence, fleeing to the United States is a purely voluntary act.

against them.¹⁶⁴ Furthermore, contrary to the Supreme Court's reasoning in *Plyler*, entry into class of "undocumented immigrants" is a civil infraction, not a crime.

In addition to a bias against immigrants, the differential treatment of immigrants in termination of parental rights proceedings suggests a racial bias, which indubitably warrants a high level of scrutiny. While the United States welcomes immigrants of all races from countries around the world, the majority of immigrants in the United States are Latino.¹⁶⁵ Due to uncontrolled violence and global poverty, many immigrants from Central America and Mexico flee to the United States with aspirations to make a better life.¹⁶⁶ Reports estimate that approximately 11 million people in the United States are undocumented immigrants.¹⁶⁷ The prevalence of undocumented immigrants and employment of unauthorized workers is a polarizing political issue, relevant not only on the national level, but for local communities and politics as well. Politicians at every level feed off racism and anti-immigrant biases and perpetuate the racism and dehumanization of immigrants through scare-tactics and propaganda.¹⁶⁸ One such organization is the Federation of American

¹⁶⁴ See 8 U.S.C. § 1182(a)(9)(B)(ii) (2006) (subjecting undocumented immigrants who have accrued 6 months of unlawful presence to a mandatory 3 year bar from the United States, and subjecting undocumented immigrants who have remained in the country for over one year without lawful presence to a mandatory 10 year bar from the United States).

¹⁶⁵ See U.S. CENSUS BUREAU, 2006-2010 AMERICAN COMMUNITY SURVEY, *available at* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_5YR_B05006&prodType=table (noting that 20 million of 38 million foreign-born people in the United States were born in Latin America).

¹⁶⁶ See, e.g., Julia Preston, *Losing Asylum, Then His Life*, N.Y. TIMES (June 28, 2010), <http://www.nytimes.com/2010/06/29/us/29asylum.html?pagewanted=all> (reporting on the ubiquity of uncontrolled violence in Central America, and the tragic gang-related murder of a young man who fled to the U.S. to escape gang violence in El Salvador, and was subsequently deported back to his death).

¹⁶⁷ Passel & Cohn, *supra* note 1622.

¹⁶⁸ See, e.g., *Immigration Ruling Could Have Broad Impact*, CBSNEWS (Feb. 11, 2009, 4:28 PM), www.cbsnews.com/stories/2007/07/28/national/main3107529.shtml (A Pennsylvania mayor justified his law that fined landlords for renting to undocumented immigrants on an influx in crime: "When you start seeing serious crimes being committed, very violent crimes being committed and time and time again those involved are illegal aliens, it doesn't take a brain surgeon to figure out [what to do].") Federal courts later deemed the ordinance unconstitutional.); *Website Called 'IllegalAlienReport' Allows People to Anonymously Report Suspected Undocumented Immigrants*, HUFFINGTON POST (May 7, 2012, 1:32 PM), http://www.huffingtonpost.com/2012/05/07/illegalalienreport-website-undocumented-immigrants_n_1496204.html (noting that the website has published "personal names and included locations on Google Maps of the whereabouts of alleged undocumented

Immigration Reform (“FAIR”), which has been designated as a hate group by the Southern Poverty Law Center.¹⁶⁹ Despite this, Congress has called on FAIR to provide expert testimony on immigration issues. Increasingly, this xenophobia and anti-immigrant rhetoric has been recognized and criticized.¹⁷⁰

2. Level of Scrutiny

It is not clear which level of scrutiny applies to immigrants whose parental rights are at risk for termination. Supreme Court precedent definitively establishes that the Constitution does apply to immigrants, even undocumented immigrants. “Whatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”¹⁷¹ If, as the Supreme Court

immigrants.”).

¹⁶⁹ See *About Fair*, FAIR, <http://www.fairus.org/about> (last visited May 7, 2012) (“FAIR advocates a temporary moratorium on all immigration except spouses and minor children of U.S. citizens and a limited number of refugees. . . . A workable immigration policy is one that would allow us time to regain control of our borders and reduce overall levels of immigration to more traditional levels of about 300,000 a year.”); see Heidi Beirich, *Federation for American Immigration Reform’s Hate Filled Track Record*, S. POVERTY L. CENTER: INTELLIGENCE REP. (2007) (quoting John Tanton, the founder of FAIR, on “the inevitability” of immigration resulting in whites becoming the minority racial group in the United States: “In the bacteriology lab, we have culture plates. . . . You put a bug in there and it starts growing and gets bigger and bigger. And it grows until it finally fills the whole plate. And it crashes and dies.”), available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2007/winter/the-teflon-nativists>. See also *About Fair*, *supra* note 169 (“FAIR advocates a temporary moratorium on all immigration except spouses and minor children of U.S. citizens and a limited number of refugees. . . . A workable immigration policy is one that would allow us time to regain control of our borders and reduce overall levels of immigration to more traditional levels of about 300,000 a year.”).

¹⁷⁰ See Rob Quinn, *Ala. Lawmaker: ‘Empty the Clip’ on Immigration*, NEWSER (Feb. 9, 2011, 1:41 AM), <http://www.newser.com/story/111590/ala-lawmaker-empty-the-clip-on-immigration.html> (criticizing the since-ousted Alabama Representative for using violent language to reference his stance on immigration reform); Cristina Costantini, *Mitt Romney Remains Quiet On Adviser Kris Kobach’s Tough Immigration Law In Alabama*, HUFFINGTON POST (Mar. 13, 2012, 4:44 PM), http://www.huffingtonpost.com/2012/03/13/mitt-romney-quiet-on-alabama-immigration-law_n_1342535.html (noting that Presidential hopeful Mitt Romney toned down his vocal anti-immigrant stance in an attempt to garner more votes. Mitt Romney is projected to capture only 14% of Latino votes if pitted against President Obama in the 2012 election).

¹⁷¹ See *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (citations omitted).

suggested in 1982, undocumented immigrants do not enjoy the elevated protections of a “suspect class,” a reviewing court may analyze the constitutionality of the termination of immigrant parents’ rights under rational basis review. To pass rational basis review, a law must be rationally related to a legitimate government objective. As long ago as 1886, the Supreme Court noted that, even a law which appears to be “fair on its face, and impartial in appearance,” could constitute “unjust and illegal discrimination,” and a denial of equal protection of the law pursuant to the Constitution, if it is “applied and administered by public authority with an evil eye and an unequal hand.”¹⁷² In *Yick Wo*, the Court determined that a law regulating commercial laundries in wooden buildings, which allowed local officials to grant or withhold operating permits, was unconstitutional because officials applied the law to overwhelmingly deny such permits to Chinese immigrants and citizens of Chinese descent.¹⁷³ Even where a statute is rationally related to a legitimate government purpose (here, relating to fire safety), it raises constitutional concerns if applied in a discriminatory manner.

To withstand intermediate scrutiny, a law that treats individuals differently must be substantially related to an important governmental interest.¹⁷⁴ If undocumented immigrants are a suspect class in today’s society, state laws to terminate parental rights that distinguish on this basis may violate the 14th Amendment. Do state laws that terminate parental rights of fit immigrant parents serve an *important* government interest? As addressed above, the Supreme Court has identified two distinct governmental interests in the involuntary termination of parental rights: “a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings.”¹⁷⁵ Since the Court has already established that the State gains nothing by terminating the rights of *fit* parents,¹⁷⁶ the remaining State interest in terminating the rights of fit immigrant parents is an administrative interest. The Supreme Court addressed a similar question in *Reed v. Reed*¹⁷⁷ and held that administrative judicial efficiency, while a legitimate goal, is an insufficient basis to sustain an otherwise discriminatory law.

¹⁷² *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

¹⁷³ *Id.* at 374.

¹⁷⁴ *See, e.g., Craig v. Boren*, 429 U.S. 190, 197 (1976) (“[S]tatutory classifications that distinguish between males and females . . . must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

¹⁷⁵ *Santosky v. Kramer*, 455 U.S. 745, 766 (1982).

¹⁷⁶ *See Stanley v. Illinois*, 405 U.S. 645, 652 (1972).

¹⁷⁷ *Id.* at 656 n.8.

Given that the majority of immigrants to the United States come from Latin America,¹⁷⁸ immigrants detrimentally affected by termination of parental rights suits may be overwhelmingly Latino. If this is the case, the practice may warrant strict scrutiny. To survive a strict scrutiny analysis, a law must be narrowly tailored to fit a compelling government interest. As mentioned above, the government interest involved here—administrative efficiency—is not likely compelling enough to warrant the discriminatory treatment between Latino immigrants and non-immigrants. Even if it were a compelling interest, terminating the parental rights of fit immigrant parents, rather than coordinating with the parents the best ways to reunite the family, is absolutely not the most ideal, most narrowly tailored way of achieving that goal.

C. International Human Rights

Although the issue of termination of parental rights of fit immigrant parents has not reached international tribunals, international laws related to the topic suggest that the practice violates human rights as well as civil rights. The American Declaration of the Rights and Duties of Man, ensures that “[e]very person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.”¹⁷⁹ It also guarantees the “right to establish a family,” and to receive protections for that family.¹⁸⁰ Other international legal documents and treaties, heralding the fundamental human right to family, include: UN Declaration of Human Rights;¹⁸¹ International Covenant on Civil and Political Rights;¹⁸² UN Declaration on the Social and Legal Principles relating to the Protection and Welfare of Children;¹⁸³ and UN Convention on the Rights of the Child.¹⁸⁴

¹⁷⁸ See U.S. CENSUS BUREAU, *supra* note 165 (noting that 20 million of 38 million foreign-born people in the United States were born in Latin America).

¹⁷⁹ AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN ch. 1, art. 5, adopted Apr. 1948, [hereinafter AMERICAN DECLARATION].

¹⁸⁰ *Id.* at art. 6.

¹⁸¹ Universal Declaration of Human Rights, G.A. Res. 217(III)A, U.N. Doc. A/RES/217(III), at art. 12 (Dec. 10, 1948) (“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”); *id.* at art. 16 (3) (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”).

¹⁸² International Covenant on Civil and Political Rights, G.A. Res. 2200A(XXI), U.N. Doc. A/6316, at art. 23(1) (1966) (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”).

¹⁸³ G.A. Res. 41/85, art. 3, U.N. Doc. A/RES/41/85 (Dec. 1986) (“The first priority for a child is to be cared for by his or her own parents.”); *id.* at art. 11 (“Foster family

Even the Convention on the Rights of the Child (CRC), which heralds the best interest of the child test, recognizes the damage that forced separation and involuntary termination of parental rights can cause. Article 9 of the CRC requires that state parties ensure that children are not separated from fit parents.¹⁸⁵ It further requires that parents alleged to be unfit be given an opportunity to participate in any such judicial proceedings that could result in separation.¹⁸⁶ It explicitly addresses separation between children and parents caused by state-ordered deportation:

“Where such separation results from any action initiated by a State Party, such as . . . deportation . . . of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.”¹⁸⁷

Considering the wide recognition of the human right to family, and the specific international legal obligations that the United States has in upholding these fundamental human rights, the continued termination of parental rights of deported fit immigrant parents warrants immediate recognition and remediation by all state authorities. Otherwise, an adverse decision in a case like Encarnación’s or Felipe’s may result in a petition to the Inter-American Commission on Human Rights and an embarrassing affirmation that the United States is responsible for violating human rights.

care, though temporary in nature, may continue, if necessary, until adulthood *but should not preclude* either prior *return to the child’s own parents* or adoption.”) (emphasis added); *id.* at art. 13 (“The primary aim of adoption is to provide the child who *cannot* be cared for by his or her *own parents* with a permanent family.”) (emphasis added).

¹⁸⁴ Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25, at art. 5 (Nov. 20, 1989) (“States Parties shall respect the responsibilities, rights and duties of parents . . .”) [hereinafter CRC]; *id.* at art. 8(1) (“States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and *family relations* as recognized by law without unlawful interference.”) (emphasis added).

¹⁸⁵ *Id.* at art. 9(1).

¹⁸⁶ *Id.* at art. 9(2).

¹⁸⁷ *Id.* at art. 9(4).

IV. Conclusion

As immigrants and immigration advocates have come to realize, the problem of termination of parental rights of immigrant parents is growing. In light of the arguments proffered in this paper, states must be more cautious and conscientious in considering motions to terminate the parental rights of deported immigrant parents. There are two important ways to implement this caution.

First, the ASFA's 15-month out-of-custody ground for the termination of parental rights should not be applied to deported parents who, due to tough immigration laws, cannot re-enter the United States within 15 months to reunite with their children.¹⁸⁸ The ASFA's 15-month rule was crafted in an era where "child welfare" was focused on "saving" children who were at risk to languish in foster care.¹⁸⁹ Today, the child welfare system aims to reunify families wherever possible.¹⁹⁰ As such, the ASFA's 15-month out-of-custody ground should not apply in cases where parents have been deported and are physically incapable of visiting with or reuniting with their children.

Second, to prevent unjust and constitutionally questionable terminations, courts must fervently adhere to the proper procedure for terminating parental rights. All proceedings to involuntarily terminate a parent's rights must begin with an allegation of unfitness, and the state must bear the burden of proving the parent's unfitness by clear and convincing evidence. Only after the state proves parental unfitness should the court consider the state's *parens patriae* interests or the best interests of the child.

Deporting parents not only severs families by dividing them geographically, but increasingly, it results in the termination of parental rights—the permanent severing of the family and the legal orphaning of children. Where parents are otherwise fit, and there is no evidence of

¹⁸⁸ See Help Separated Families Act, H.R. Res. 6128, 112th Cong. (2012) (In July 2012, Rep. Lucille Roybal-Allard (a Democrat from California's 34th district) introduced a bill to ensure that immigration status or involvement in immigration removal proceedings does not automatically disqualify an otherwise fit and willing parent from maintaining his/her rights.) (The bill died in committee. See GovTrack.us, <http://www.govtrack.us/congress/bills/112/hr6128> (last visited Feb. 3, 2013)).

¹⁸⁹ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (current version at 42 U.S.C. §§ 670-679(c) (2006)) (noting that the purpose is to "promote the adoption of children in foster care), available at <http://www.gpo.gov/fdsys/pkg/PLAW-105publ89/html/PLAW-105publ89.htm>.

¹⁹⁰ See U.S. Dep't of Health & Human Servs., *Family Reunification*, CHILD WELFARE INFO. GATEWAY, <http://www.childwelfare.gov/permanency/reunification/> (last visited May 7, 2012) ("When children must be removed from their birth families for their protection, the first goal is to achieve reunification as safely as possible.").

abuse or neglect, family courts should tread carefully on the fundamental rights of parents to raise their children. Family services and family court should avoid terminating parental rights and should focus efforts at reunification. Ultimately, courts should avoid outcomes like what happened to Encarnación Bail Romero, and protracted processes like what happened to Felipe Montes, and respect the rights of deported parents to create appropriate post-deportation plans of care for their children.