

# The CPS Took My Baby Away: Threats to Immigrant Parental Rights and a Proposed Federal Solution

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Vinita Andrapallyal\*

## INTRODUCTION

In November 2008, Cirila Baltazar Cruz, a Mexican woman of Chatino descent, gave birth to a baby girl at Singing River Hospital in Pascagoula, Mississippi.<sup>1</sup> Ms. Baltazar Cruz speaks limited Spanish and very little English.<sup>2</sup> Upon being visited by a representative of the hospital's social services department and a Spanish-speaking "patient advocate," the hospital questioned Ms. Baltazar Cruz about her living situation.<sup>3</sup> The hospital erroneously concluded that Ms. Baltazar Cruz was trading sex for housing, filed a "Report of Suspected Abuse and Neglect" with the Mississippi Department of Human Services (MDHS), and informed the young mother she would be unable to leave the hospital with her baby.<sup>4</sup> The hospital also contacted federal immigration authorities to investigate Ms. Baltazar Cruz's immigration status.<sup>5</sup>

MDHS failed to confirm Ms. Baltazar Cruz's living situation before obtaining a custody order for her baby<sup>6</sup> and placing the infant with a white couple whose home was not in fact licensed as a foster care facility.<sup>7</sup> During MDHS's investigations and at the initial Youth Court hearings, Ms. Baltazar Cruz was not provided Chatino interpretation.<sup>8</sup> MDHS argued that Ms. Baltazar Cruz's plans to breastfeed her child instead of purchasing baby formula, co-sleep with her instead of purchasing a crib, and reside in an apartment with males to whom she was unrelated instead of renting an apartment in her own name constituted evidence of parental neglect.<sup>9</sup> MDHS

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\* J.D. Candidate 2013, Emory University School of Law. The author previously worked as a paralegal for the Southern Poverty Law Center's Immigrant Justice Project. I wish to thank Professor Polly J. Price, Michelle LaPointe, Enbar Toledano, Julia Hueckel, R. Cameron Gower, and Bala and Prema Andrapallyal for their advice, support, and revisions to previous versions of this article.

<sup>1</sup> Complaint at 5, *Baltazar Cruz v. Miss. Dep't of Human Servs.*, No. 3:2010cv00446 (S.D. Miss. Aug. 12, 2010). The Chatino people are an indigenous community in Mexico. *Id.*

<sup>2</sup> *Id.* Her first language is Chatino. *Id.*

<sup>3</sup> *Id.* at 6.

<sup>4</sup> *Id.* at 7.

<sup>5</sup> *Id.* at 10.

<sup>6</sup> *Id.* at 15.

<sup>7</sup> *Id.* at 10.

<sup>8</sup> *Id.* at 14, 19.

<sup>9</sup> *Id.* at 15–16. Breastfeeding and co-sleeping are common Chatino practices. *Id.*

also requested Ms. Baltazar Cruz learn English before she could reunify with her daughter.<sup>10</sup>

In June 2009, the Agency began the process of terminating Ms. Baltazar Cruz's parental rights.<sup>11</sup> Ms. Baltazar Cruz had only been allowed sporadic visits with her child up to that point.<sup>12</sup> It was only after she received legal assistance from the Southern Poverty Law Center's Immigrant Justice Project and federal authorities began investigating MDHS for potential civil rights abuses that the mother regained custody of her daughter.<sup>13</sup> She regained physical custody in November 2009, a year after giving birth; it took another three months for her to regain permanent legal custody.<sup>14</sup>

While Ms. Baltazar Cruz's parental rights were not ultimately terminated and she regained custody of her child, her case is a dramatic example of the trials many immigrant parents in the United States face in maintaining custody of their children. For parents who are undocumented, not fluent in English, and poor, and who embrace parenting traditions considered uncommon by American standards, threats to their parental rights are especially acute. Such parents must battle cultural prejudice, language barriers, and lack of financial access to an attorney. Moreover, if they are simultaneously detained by immigration officials, they also face difficulty in adequately defending themselves in their custody proceedings while in immigration detention or after having been deported. Lack of coordination between state child protective services (CPS) agencies and federal immigration enforcement officials compounds the problems of immigrant parents ensnared in concurrent family law and immigration proceedings.<sup>15</sup>

Data suggest that the U.S. government removed<sup>16</sup> approximately 46,000 immigrant parents of U.S. citizen children in the first six months of 2011 alone, and there are currently at least 5100 children in foster care whose parents have either been detained or removed.<sup>17</sup> The numbers represent a dramatic increase in rates of removal: the U.S. government reported removing 108,000 parents of U.S. citizen children between 1998 and 2007.<sup>18</sup> Nonetheless, it is difficult to determine exactly how many immigrant parents have had their parental rights terminated for reasons related to their status as immigrants. Immigrant parents rarely appeal the family court decisions for

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<sup>10</sup> *Id.* at 19.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 17–18.

<sup>13</sup> *Id.* at 21.

<sup>14</sup> *Id.*

<sup>15</sup> See *infra* notes 92–96 and accompanying text.

<sup>16</sup> In 1996, “removal” replaced “deportation” in immigration law parlance. See *infra* note 69.

<sup>17</sup> SETH FREED WESSLER, APPLIED RESEARCH CTR., SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 5–6 (2011), available at <http://arc.org/shatteredfamilies>.

<sup>18</sup> OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., REMOVALS INVOLVING ILLEGAL ALIEN PARENTS OF UNITED STATES CITIZEN CHILDREN 5 (2009), available at [http://www.oig.dhs.gov/assets/Mgmt/OIG\\_09-15\\_Jan09.pdf](http://www.oig.dhs.gov/assets/Mgmt/OIG_09-15_Jan09.pdf).

financial and logistical reasons, especially if they have been deported.<sup>19</sup> Further, since many child custody case records are sealed, it is impossible to estimate the rate of parental-rights terminations with a high degree of certainty.<sup>20</sup>

Despite the difficulties many immigrant parents face in appealing termination decisions, a few courts have recently considered such termination appeals, giving scholars a glimpse into the legal standards used to terminate immigrants' parental rights.<sup>21</sup> Further, recent scholarship has compiled anecdotal data suggesting that substantial numbers of immigrant parents are struggling to maintain their parental rights.<sup>22</sup> Even if courts ultimately restore custody to the parent after a child's removal from the parent's custody, as was the case for Ms. Baltazar Cruz, the months of separation, fear, and insecurity felt by both parents and children as a function of our nation's flawed immigration and family law coordination system is itself a problem that deserves correction.<sup>23</sup>

Immigrant parents unnecessarily face termination of their parental rights largely as a function of two bodies of law: family law, in which state child protection officials sometimes pursue termination for procedural reasons or cultural biases that are contrary to family law principles,<sup>24</sup> and immigration law, where recent legislation has led to a remarkable increase in the number of immigrants detained for lengthy periods, deported, or both.<sup>25</sup> The result is what one commentator calls a "practical disconnect between state and federal agencies [that] creates Kafka-esque results"<sup>26</sup> in the intersection of immigration and family law in this country. Consequently, immigrant parents, especially undocumented ones, are at a heightened risk of losing their parental rights.<sup>27</sup>

Unfortunately, these threats are not an entirely new phenomenon. Ms. Baltazar Cruz's situation and those of other immigrant parents recall the problems faced by Native American parents during the twentieth century. In

<sup>19</sup> See Marcia Yablon-Zug, *Separation, Deportation, Termination: Why Undocumented Immigrant Families Are Losing Their Children*, 32 Bos. C. J.L. & Soc. Just. 63, 98 (2012).

<sup>20</sup> See, e.g., KY. REV. STAT. ANN. § 625.108(2) (West 2011); N.H. REV. STAT. ANN. § 170-C:14 (2011); S.C. CODE ANN. § 63-7-2600 (2010).

<sup>21</sup> See, e.g., *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 815 (Mo. 2011) (en banc); *In re Interest of Angelica L.*, 767 N.W.2d 74 (Neb. 2009); *Tenn. Dep't of Children's Servs. v. Ahmad*, No. M2004-02604-COA-R3-PT, 2006 WL 975339 (Tenn. Ct. App. Apr. 26, 2005); *Perez-Velazquez v. Culpeper Cnty. Dep't of Soc. Servs.*, No. 0360-09-4, 2009 WL 1851017 (Va. Ct. App. June 30, 2009).

<sup>22</sup> See Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 CONN. L. REV. 99, 101-03 (2011); Yablon-Zug, *supra* note 19, at 63 ("There is a growing practice of separating immigrant children from their deportable parents."); C. Elizabeth Hall, Note, *Where Are My Children . . . And My Rights? Parental Rights Termination as a Consequence of Deportation*, 60 DUKE L.J. 1459, 1461-62 (2011).

<sup>23</sup> Rabin, *supra* note 22, at 104; Hall, *supra* note 22, at 1462.

<sup>24</sup> See *infra* notes 45-54 and accompanying text.

<sup>25</sup> See *infra* notes 78-80 and accompanying text.

<sup>26</sup> Rabin, *supra* note 22, at 103. Family law is primarily under the purview of state law, while the federal government oversees most of our immigration law. See *infra* Parts I-II.

<sup>27</sup> See Yablon-Zug, *supra* note 19, at 105.

that era, child protective services officials disproportionately separated Native American families due in large part to cultural prejudices against Native American family traditions and Native Americans' difficulty in successfully navigating the American family court system.<sup>28</sup> The parallels suggest Congress may need to enact a solution similar to the one it enacted for Native Americans in 1978, the Indian Child Welfare Act (ICWA),<sup>29</sup> for children of immigrant parents today. Other legal commentators have identified the same problem, and some have even made the connection between the current plight of immigrant parents and that of Native American parents several decades ago.<sup>30</sup> However, this article is the first to call for a federal solution modeled on the Indian Child Welfare Act.

Part I of this article explores the relevant family law background, emphasizing recent developments that make it more likely for immigrant parents to face termination of their parental rights. Part II examines the relevant immigration law background, particularly recently passed legislation that threatens more immigrants with deportation. It analyzes the coordination concerns between the bodies of law, suggesting that lack of coordination between immigration enforcement officials and child protective services officials heavily contributes to immigrant parents unnecessarily facing termination of their parental rights. Finally, Part III proposes a federal statute modeled on the Indian Child Welfare Act that attempts to stem the tide of separations.

#### I. FAMILY LAW: FEDERAL CONCERNS, STATE CONCERNS, AND THE INCONSISTENTLY APPLIED FITNESS DETERMINATION

While family laws determining parental unfitness and grounds for termination of parental rights vary from state to state, the federal Adoption and Safe Families Act (ASFA) has imposed an automatic trigger for states to initiate termination of parental rights (TPR) proceedings when a child has been separated from her parent for fifteen of the preceding twenty-two months. This part briefly examines family law at the constitutional, state, and federal levels and how it relates to immigrant parents. It concludes that the ASFA trigger mechanism, combined with the propensity of some family courts to consider immigration status in parental fitness determinations and to devalue non-Western parenting traditions, has led to unnecessary initiations of TPR proceedings and even unnecessary terminations of parental rights.

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<sup>28</sup> See *infra* notes 100–102 and accompanying text.

<sup>29</sup> See *infra* note 102 and accompanying text.

<sup>30</sup> See, e.g., Yablon-Zug, *supra* note 19, at 105–08.

A. *Constitutional Principles Behind and State Procedures for the Termination of Parental Rights*

While family law is typically the purview of state legislatures and courts,<sup>31</sup> the Supreme Court has imposed federal constitutional safeguards to protect the due process rights of parents subject to termination of their parental rights.<sup>32</sup> In spite of constitutional protections and state procedures governing the termination of parental rights, state child protective officials sometimes initiate TPR proceedings because of normative assumptions and misperceptions of immigrant parenting abilities, particularly those of undocumented parents.

The Court has found that a natural parent's right to raise his child is a fundamental liberty interest.<sup>33</sup> Terminating a parent's parental rights "work[s] a unique kind of deprivation" that, beyond infringing, extinguishes the liberty interest identified above.<sup>34</sup> Accordingly, the state must afford the parent a hearing<sup>35</sup> and prove by clear and convincing evidence that the parent is unfit before terminating his parental rights.<sup>36</sup> As the Fourteenth Amendment applies to documented and undocumented persons in the United States,<sup>37</sup> the clear and convincing evidentiary standard applies to undocumented immigrant parents as well.<sup>38</sup> The Court has also held that the U.S. Constitution does not guarantee parents the appointment of counsel or the right to appeal in TPR proceedings.<sup>39</sup> However, the majority of states provide for those rights,<sup>40</sup> and indigent parents have equal protection and due process rights to receive trial transcripts for preparing an appeal of a court's termination decision if and when an appeal is available.<sup>41</sup>

Procedures for initiating TPR vary among the states, as do the grounds that justify termination.<sup>42</sup> However, a general pattern may be identified. Once a child has been placed in the temporary custody of the state or of a foster family, child protective services agencies have an obligation to make "reasonable efforts" to implement a reunification plan between parent and child and assist the parent in complying with the plan before initiating TPR

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<sup>31</sup> *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890).

<sup>32</sup> See *infra* notes 33–41 and accompanying text.

<sup>33</sup> See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); see also *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

<sup>34</sup> *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981).

<sup>35</sup> *Stanley*, 405 U.S. at 657–58.

<sup>36</sup> *Santosky*, 455 U.S. at 769–70. The "best interests of the child" standard that permeates the courts' approach to family law issues involving children cannot be considered until a parent has been found unfit after applying a clear and convincing evidentiary standard. *Id.* at 760.

<sup>37</sup> See *Plyler v. Doe*, 457 U.S. 202, 211–12 (1982).

<sup>38</sup> See, e.g., *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 815 (Mo. 2011) (en banc).

<sup>39</sup> See *Lassiter*, 452 U.S. at 33; *Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

<sup>40</sup> See *Griffin*, 351 U.S. at 18; Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 15 TEMP. POL. & CIV. RTS. L. REV. 635, 638–39 (2006).

<sup>41</sup> See *M.L.B. v. S.L.J.*, 519 U.S. 102, 107 (1995).

<sup>42</sup> See S. Adam Ferguson, Comment, *Not Without My Daughter: Deportation and the Termination of Parental Rights*, 22 GEO. IMMIGR. L.J. 85, 94 (2007).

proceedings.<sup>43</sup> Once the reasonable-efforts test has been satisfied, courts often terminate parental rights on grounds of abandonment, abuse or neglect, failure to support or maintain contact with the child, failure to adhere to a reunification or rehabilitation plan, failure to remedy a persistent condition that caused the removal of a child, mental illness or deficiency, drug- or alcohol-induced incapacity, or the prior termination of parental rights in another child.<sup>44</sup>

Recent family court case law is littered with cases in which courts have considered the illegal entry of a parent into the United States or that parent's status as an immigrant detainee as a negative factor in determining parental fitness.<sup>45</sup> One example is *Angelica L.*, where the juvenile court found the parent unfit and terminated her parental rights in part because she "either A) embarked on an unauthorized trip to the United States with a newborn premature infant or B) [after entering illegally,] gave birth to a premature infant in the United States."<sup>46</sup> This reasoning is problematic because a parent's immigration status has virtually no bearing on his intrinsic ability to provide care considered adequate for parental fitness. The trend of family courts conflating parental fitness with immigration status is jeopardizing the parental rights of immigrant parents,<sup>47</sup> and courts must immediately correct this erroneous interpretation of fitness.<sup>48</sup>

Cultural considerations may also influence agency determinations to seek the termination of parental rights. Maria Yablon-Zug and others have highlighted the contention that the state may easily call into question the fitness of undocumented parents.<sup>49</sup> They have found that when an immigrant parent is to be deported, courts and child protective agency officials may (1) be leery of sending U.S. citizen children to live with their deported parents

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<sup>43</sup> The reasonable-efforts requirement is imposed by federal law. See Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 37 HARV. J. ON LEGIS. 1, 5 (2001).

<sup>44</sup> CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH AND HUMAN SERVS., GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 2 (2010), available at [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/groundtermin.cfm](http://www.childwelfare.gov/systemwide/laws_policies/statutes/groundtermin.cfm); see, e.g., N.H. Rev. Stat. Ann. § 170-C:5 (2011).

<sup>45</sup> See, e.g., *In re B & J Minors*, 756 N.W.2d 234, 238 (Mich. Ct. App. 2008) (holding that the deported parents in question "were unable to provide proper care and custody for the children"); *S.M. v. E.M.B.R. (In re Adoption of C.M.B.R.)*, No. SD 30342, 2010 WL 2841486, at \*4 (Mo. Ct. App. July 21, 2010) (finding that the parent's lifestyle of "smuggling herself into a country illegally . . . is not a lifestyle . . . for a child"), *rev'd*, 332 S.W.3d 793 (Mo. 2011).

<sup>46</sup> *In re Angelica L.*, 767 N.W.2d 74, 87–88 (2009) (quoting the juvenile court decision, which it reversed).

<sup>47</sup> María Pabón López, *A Tale of Two Systems: Analyzing the Treatment of Noncitizen Families in State Family Law Systems and Under the Immigration Law System*, 11 HARV. LATINO L. REV. 229, 235–36 (2008).

<sup>48</sup> The Texas Supreme Court recently ruled that while a parent's deportation is a relevant factor in the parent's fitness determination, it is insufficient to terminate a parent's rights in his children without additional evidence of abuse or neglect. See *In re E.N.C.*, No. 11-0713, 2012 WL 4840710, at \*6 (Tex. Oct. 12, 2012). This is an encouraging step towards correcting erroneous findings by state courts of parental unfitness on the basis of immigration status.

<sup>49</sup> See Yablon-Zug, *supra* note 19, at 81.

in foreign countries where economic opportunities are lacking and the children may not be familiar with the language or customs; (2) consider life in the United States to be more desirable and in the children's best interests; and (3) favorably consider the situation in which an American family, usually in current custody of the child, petitions to adopt the child.<sup>50</sup> Officials may also assume undocumented immigrant parents are unable to financially provide for their children, particularly if they are unable to verify legal employment.<sup>51</sup> Since employers are legally prohibited from hiring undocumented workers, proving a source of legal income is difficult for many undocumented parents.<sup>52</sup>

Additionally, child protective agency officials may be more willing to recommend that a court remove a child from his parent's custody or terminate parental rights because, as in the case of Ms. Baltazar Cruz, they view some immigrant parenting traditions as undesirable and disfavor parents who cannot speak English.<sup>53</sup> This cultural narrow-mindedness disadvantages immigrant parents in the struggle to maintain their parental rights.<sup>54</sup>

#### B. Federal Law: *The Adoption and Safe Families Act of 1997*

Despite the fact that family law is an area traditionally reserved to the states, Congress has occasionally dipped its oar into the regulation of family law.<sup>55</sup> Its relevant contribution in this area is the Adoption and Safe Families Act of 1997.<sup>56</sup> Here, Congress attempted to achieve stability for children in the foster care system<sup>57</sup> by requiring states that receive federal funds for child protective services to begin TPR proceedings for children who have lived in foster care for fifteen of the preceding twenty-two months.<sup>58</sup>

The mechanics of the ASFA are as follows. Twelve months after a child has entered foster care, the state must schedule a "permanency hearing" to determine whether the child should be "(1) returned to the parents; (2) placed for adoption, in which case the state will petition to terminate parental rights; (3) referred for legal guardianship; or (4) placed in another planned living arrangement."<sup>59</sup> A state court may accept a child protective

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<sup>50</sup> See *id.* at 102–03; see also Hall, *supra* note 22, at 1481.

<sup>51</sup> See WESSLER, *supra* note 17, at 20.

<sup>52</sup> See *id.*

<sup>53</sup> See *supra* note 9 and accompanying text; see also Annette R. Appell, *Bad Mothers and Spanish-Speaking Caregivers*, 7 NEV. L.J. 759, 776–79 (2007).

<sup>54</sup> See Yablon-Zug, *supra* note 19, at 113–14.

<sup>55</sup> See, e.g., Adoption Assistance and Child Welfare Act of 1980 § 471, 42 U.S.C. § 671(a)(15) (2006) (conditioning federal funds on states making "reasonable efforts" to reunify children with their parents before placing the children in foster care).

<sup>56</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.).

<sup>57</sup> See Adler, *supra* note 43, at 1.

<sup>58</sup> See 42 U.S.C. § 675(5)(E) (2006).

<sup>59</sup> See Adler, *supra* note 43, at 1.

agency's conclusion that reunification is unreasonable as sufficient grounds for terminating parental rights.<sup>60</sup>

While the ASFA does not consider a parent unfit by virtue of his child living in foster care for fifteen of the preceding twenty-two months, some state courts have attached that presumption.<sup>61</sup> Given that immigrant parents are frequently bounced around our nation's patchwork of immigration detention facilities and then scheduled for deportation, it is very easy for them to meet the twelve-month or fifteen-month mark. Agency officials may determine that reunification is unreasonable, especially if the parent has been deported, or a state court may determine the child was abandoned, and parental rights terminations may sometimes proceed over the parent's objections without a proper fitness determination.<sup>62</sup>

## II. IMMIGRATION LAW AND COORDINATION CONCERNS

In addition to state and federal family laws that make it easier for states to initiate TPR proceedings against parents in immigrant detention, recent federal immigration legislation has increased the likelihood that parents may be placed in immigration detention. This part describes the basic immigration policy framework and recent legislation that expands the categories of immigrants subject to detention and deportation. It notes that while the Obama Administration has increased prosecutorial discretion of immigration enforcement officials to limit deportations of otherwise law-abiding immigrants, subsequent administrations may not be as flexible. Further, this part concludes that the recent anti-immigrant development in immigration law has exacerbated coordination problems between immigration and family law for immigrant parents as they simultaneously seek to avoid losing their children and being deported.

### A. *Immigration Policy: Federal Laws, Pendulum Swings*

Unlike family law, immigration law has generally been an area of exclusive federal control.<sup>63</sup> American immigration policy has been shaped by the citizenry's alternately friendly and hostile sentiments towards immigrants.

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<sup>60</sup> See *id.* at 7.

<sup>61</sup> See Hall, *supra* note 22, at 1469–70.

<sup>62</sup> See *id.* at 1472.

<sup>63</sup> See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (“The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as . . . delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.”). *But see* Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749, 1751–54 (2011) (examining the “expanding landscape of immigration enforcement” at the state and local level “under the auspices of regulating crime”).



The Court has recognized “plenary power” of the federal government to set immigration policy, with minimal judicial review.<sup>64</sup> The seminal piece of federal immigration legislation is the Immigration and Nationality Act of 1952, which Congress has periodically amended in the decades since its enactment.<sup>65</sup> Presidential administrations also affect immigration policy; for example, the President may direct administrative officials to use discretion in enforcing removal laws or allowing for cancellation of deportation.<sup>66</sup>

In the 1990s, federal immigration policy swung towards the exclusion of immigrants.<sup>67</sup> Congress passed two laws tightening immigration policy, making it easier to detain noncitizens: the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).<sup>68</sup> AEDPA scaled back administrative officials’ authority to cancel removal for certain classes of immigrants by changing the standard for discretion from “exceptional” hardship to the immigrant and his family to “exceptional and extremely unusual hardship.”<sup>69</sup> AEDPA also limited judicial review of removal decisions.<sup>70</sup>

Meanwhile, IIRIRA expanded the definition of an aggravated felony to include any convictions that resulted in a prison sentence of one year or more.<sup>71</sup> Given that immigrants who have committed an aggravated felony are not eligible for cancellation of removal,<sup>72</sup> the IIRIRA further reduced administrative discretion to cancel removal and expanded the universe of immigrants who cannot successfully appeal their removal to include those convicted of misdemeanor crimes.<sup>73</sup>

The AEDPA and the IIRIRA increased the likelihood that immigrant parents would be removed, thus increasing the likelihood that U.S. citizen children would be separated from their immigrant parents. An immigrant parent who has been detained and who has been convicted of an act for which he was sentenced to a year or more in prison is no longer eligible for

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<sup>64</sup> See Adam B. Cox, *Immigration Law’s Organizing Principles*, 151 U. PA. L. REV. 341, 348 (2008).

<sup>65</sup> See Jacqueline Hagan et al., *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799, 1803 (2010).

<sup>66</sup> See Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 611 (2006).

<sup>67</sup> See Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL’Y REV. 349, 351–53 (2005) (providing an in-depth discussion of the reasons for the shift).

<sup>68</sup> See Lee Gelernt, *The 1996 Immigration Legislation and the Assault on the Courts*, 67 BROOK. L. REV. 455, 455 (2001).

<sup>69</sup> See 8 U.S.C. § 1229b(b)(1)(D) (2006). AEDPA also changed the language of turning out immigrants from our borders from “deportation” or “exclusion” to “removal.” Diana R. Podgorny, Comment, *Rethinking the Increased Focus on Penal Measures in Immigration Law as Reflected in the Expansion of the “Aggravated Felony” Concept*, 99 J. CRIM. L. & CRIMINOLOGY 287, 295 (2009).

<sup>70</sup> See ANNA O. LAW, *THE IMMIGRATION BATTLE IN AMERICAN COURTS* 222 (2010).

<sup>71</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 321, 110 Stat. 3009-546, 3009-627–28; see also Hagan et al., *supra* note 65, at 1804.

<sup>72</sup> 8 U.S.C. § 1229b(a)(3).

<sup>73</sup> See Podgorny, *supra* note 69, at 287–89.

cancellation of removal. Further, AEDPA's stricter standard for discretion means that immigrant parents cannot argue that being separated from their U.S. citizen children is a hardship that merits cancellation of removal, as family separation is not viewed as "extremely unusual."<sup>74</sup> The sole remaining argument immigrant parents may advance to seek cancellation due to family hardship is to claim that their children will face extraordinary and extremely unusual hardship in the country to which they depart.<sup>75</sup>

Moreover, in 2001, following the September 11th terrorist attacks, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (PATRIOT Act),<sup>76</sup> which further increased the likelihood that immigrants would be detained and separated from their families for months at a time. The PATRIOT Act "further expanded the categories of immigrants eligible for deportation . . . [to those] who are perceived as threats to national security or seen as opposing U.S. foreign policy."<sup>77</sup>

As a result of these three laws, the number of immigrants in immigration detention has risen dramatically in the last ten years.<sup>78</sup> For example, the number of immigrant detainees doubled between 2003 and 2008.<sup>79</sup> In fiscal year 2010, the U.S. government detained approximately 363,000 immigrants.<sup>80</sup>

#### *B. The Obama Administration and Increased Prosecutorial Discretion*

The Obama Administration has taken a somewhat more tolerant approach to immigration policy. While legislation like the proposed Dream Act has failed in Congress,<sup>81</sup> President Obama recently exercised his administrative authority to implement a new deportation policy in which the Department of Homeland Security will no longer initiate removal proceedings against many immigrants who came to this country as children.<sup>82</sup> This policy builds on the Administration's 2011 policy that relies on prosecutorial discretion to target its immigration enforcement resources at national secur-

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<sup>74</sup> See David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1171 (2006).

<sup>75</sup> See *id.*

<sup>76</sup> Pub. L. No. 107-56, § 412(a), 115 Stat. 272, 351 (2001).

<sup>77</sup> Hagan et al., *supra* note 65, at 1805; see also Michael T. McCarthy, *USA Patriot Act*, 39 HARV. J. ON LEGIS. 435, 449 (2002).

<sup>78</sup> See *supra* notes 17–18 and accompanying text.

<sup>79</sup> Nina Bernstein, *Immigration Detention Lapses Detailed*, N.Y. TIMES, Dec. 2, 2009, at A25.

<sup>80</sup> WESSLER, *supra* note 17, at 12.

<sup>81</sup> See David M. Herszenhorn, *Senate Blocks Bill for Young Illegal Immigrants*, N.Y. TIMES, (Dec. 18, 2010), <http://www.nytimes.com/2010/12/19/us/politics/19immig.html>.

<sup>82</sup> See Julia Preston & John H. Cushman, Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES, June 15, 2012, at A1.

ity risks, serious felons, known gang members, and those who have repeatedly flouted the nation's immigration laws.<sup>83</sup>

At the same time, immigration officials are deemphasizing enforcement against undocumented immigrants who do not pose a threat to public safety and are explicitly considering an immigrant's family ties in the United States, including whether he has any U.S. citizen children, as a factor weighing against enforcement.<sup>84</sup> The Administration is also centralizing our nation's immigration detention system<sup>85</sup> and focusing on sanctioning employers of illegal immigrant labor as opposed to raiding workplaces to punish the immigrants.<sup>86</sup>

Advocates for immigrants are hopeful these policies will help to preserve family unity between immigrant parents and their children in the short run by decreasing the number of immigrant parents who have not committed serious crimes that are targeted for removal.<sup>87</sup> However, it is too soon to fully evaluate the effect these administrative policies have had on immigrant parents.<sup>88</sup> Further, these policies may change upon the election of a new President, which highlights the need for a statutory, not administrative, remedy to protect immigrant parents.

### C. *Immigration and Family Law Intersections and Coordination Concerns*

As the above review of family law and immigration law principles and legislation demonstrates, “[t]he vindication of immigration law goals often results in the compromise of family integrity, and achievement of family integrity often can be accomplished only in violation of immigration laws.”<sup>89</sup> This is an ironic result, considering that “[f]amily unity is a foundation of contemporary United States immigration law and policy.”<sup>90</sup> More problems result when an immigrant parent must simultaneously navigate our immigration and family law systems, usually as an immigrant detainee against whom the state has initiated TPR proceedings. These problems stem from a failure of coordination between the two systems of law, further jeopardize an immigrant's parental rights, and are explored below.

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<sup>83</sup> See Memorandum from John Morton, Dir., Immigration & Customs Enforcement, to all Field Office Dirs., Special Agents in Charge, and Chief Counsel 5 (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

<sup>84</sup> See *id.* at 4; see also Charlie Savage, *2901 Arrested in Crackdown on Criminal Immigrants*, N.Y. TIMES, Sept. 28, 2011, at A16.

<sup>85</sup> See Nina Bernstein, *U.S. to Reform Policy on Detention for Immigrants*, N.Y. TIMES, Aug. 6, 2009, at A1.

<sup>86</sup> See Julia Preston, *U.S. Shifts Strategy on Illicit Work by Immigrants*, N.Y. TIMES, July 2, 2009, at A1.

<sup>87</sup> See *id.*

<sup>88</sup> Preliminary data, however, reveal that immigrant parents are benefiting from this administrative policy shift. See Julia Preston, *In Test of Deportation Policy, 1 in 6 Get a Fresh Look and a Reprieve*, N.Y. TIMES, Jan. 19, 2012, at A13.

<sup>89</sup> Thronson, *supra* note 74, at 1165.

<sup>90</sup> Pabón López, *supra* note 47, at 229.

This article identifies three coordination concerns. First, as mentioned above, officials placing a parent in immigration detention can pull the ASFA trigger mechanism to initiate state TPR proceedings, thereby separating the parent from his child for what can end up being years.<sup>91</sup> Second, practical problems with communication and legal representation arise when an immigrant parent is held in immigration detention while an involuntary child custody proceeding is initiated against him.<sup>92</sup> For example, 1.4 million detainees were transferred between 1999 and 2008, often to locations hundreds of miles away from their homes and families in the United States.<sup>93</sup> Consequently, officials may easily shift a parent across the country from one detention facility to another with little or no warning, diminishing his ability to receive notice of and defend himself in the proceedings, especially if he lacks representation.<sup>94</sup> Third, the court is likely to consider the parent's restricted movement and ability to contact his child during his time in detention as a negative factor in its parental fitness determination by construing the parent's failure to communicate as abandonment or neglect.<sup>95</sup>

Even when termination of parental rights is not at issue for immigrant parents facing deportation, such parents must still make the wrenching decision of whether to uproot their children from the United States and bring them to the often unfamiliar and economically underdeveloped nations of their origin or leave their children with family members or friends.<sup>96</sup> Lack of coordination between federal immigration authorities and state child protective agencies, however, may sometimes lead state courts to initiate TPR proceedings, thus stripping that decision-making authority from parents—a troubling development in the intersection between family law and immigration law.<sup>97</sup>

### III. RECOMMENDATION: A FEDERAL LEGISLATIVE REMEDY

As Parts I and II of this article demonstrate, immigrant parents face the possibility of losing their rights in their children for a variety of reasons, including recent developments in both immigration and family law and a lack of coordination between our nation's immigration and family law structures.<sup>98</sup> Swiftly and comprehensively addressing these issues is crucial from both a parents' rights and a children's rights perspective.<sup>99</sup> Accordingly, a

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<sup>91</sup> See *supra* notes 59–62.

<sup>92</sup> See Hall, *supra* note 22, at 1486–91.

<sup>93</sup> Bernstein, *supra* note 79, at A25.

<sup>94</sup> See Rabin, *supra* note 22, at 151.

<sup>95</sup> See Hall, *supra* note 22, at 1472.

<sup>96</sup> See Erica Stief, *Impractical Relief and the Innocent Victims: How United States Immigration Law Ignores the Rights of Citizen Children*, 79 UMKC L. REV. 477, 477–80 (2011).

<sup>97</sup> See Rabin, *supra* note 22, at 104, 109–111.

<sup>98</sup> See *supra* Parts I–II.

<sup>99</sup> See, e.g., AJAY CHAUDRY ET AL., THE URBAN INST., *FACING OUR FUTURE: CHILDREN IN THE AFTERMATH OF IMMIGRATION ENFORCEMENT* vii–x (2010) (providing an analysis of impacts on children whose parents are in immigration detention or deported).

federal legislative response is necessary to spare immigrant parents and children around the country months of separation and uncertainty when the state initiates TPR proceedings.

Current threats to immigrant family unity are analogous to problems faced by Native American families in the mid-twentieth century, when bias against Native American parents, borne of cultural differences and socioeconomic stratification, was built into the U.S. child welfare system, resulting in disproportionately high levels of separation between parents and children in these groups.<sup>100</sup> Some legal commentators, most notably Marcia Yablon-Zug, have mentioned this historical connection.<sup>101</sup> Yet none have extended the connection to apply Congress's remedy for Native American families, the Indian Child Welfare Act of 1978,<sup>102</sup> to assist immigrant families in maintaining unity.

This article proposes a federal statute partially modeled on the Indian Child Welfare Act that attempts to comprehensively solve the problems immigrant parents and their children face in maintaining family unity. Part III (1) examines other proposed solutions to these problems and their limitations, (2) provides recommendations partially modeled on the ICWA that would comprehensively address the problems identified above, and (3) explains why fixing the problem at the federal level is both constitutional and necessary.

#### A. Existing Proposed Remedies and Their Limitations

The federal government can alleviate current threats to preserving immigrant family unity by enacting legislation that protects the rights of immigrant families and brings the United States into compliance with international customary law on this issue.<sup>103</sup> However, existing legislative proposals, such as the recently reintroduced HELP Separated Children Act (HELP Act)<sup>104</sup> and certain provisions of the currently tabled Comprehensive

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<sup>100</sup> See Yablon-Zug, *supra* note 19, at 105–08; see also Linda Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 ARK. L. REV. 327, 356, 359 (1986); *Preserving the Indian Family*, CHILD. LEGAL RTS. J., May/June 1981, at 32, 33. While Native Americans did not face the possibility of being deported, they faced significant skepticism about their parenting abilities from the state, evidenced by the fact that approximately twenty-five percent of Native American children were living in foster care facilities in the 1970s. *Id.*

<sup>101</sup> See Yablon-Zug, *supra* note 19, at 105–08.

<sup>102</sup> 25 U.S.C. § 1912 (2006). See generally Michael C. Snyder, *An Overview of the Indian Child Welfare Act*, 7 ST. THOMAS L. REV. 815 (1995) (providing a general overview of the statute).

<sup>103</sup> See generally, e.g., Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213 (2003) (discussing how international norms address the issue of family separation).

<sup>104</sup> H.R. 2607, 112th Cong. § 6(a)(3)(A) (2011). The HELP Act was originally introduced in the 111th Congress and tabled. Hall, *supra* note 22, at 1495 n.208. However, it was reintroduced on July 21, 2011 and referred to the House Subcommittee on Immigration Policy and

Immigration Reform Act (CIR Act),<sup>105</sup> fall short in addressing the systematic difficulties immigrant detainees in particular face in contesting involuntary child custody proceedings.<sup>106</sup> Scholarly proposals on the issue contain similar limitations.<sup>107</sup>

The HELP Act would provide for greater communication between immigrant detainees, child protective services agencies, and relatives and friends of the families in question.<sup>108</sup> It calls for officials in charge of a case involving a child whose parent is in immigration custody to be able to communicate in the “native language of such child and of the family of such child.”<sup>109</sup> The Act would also

require that, in all decisions and actions relating to the care, custody, and placement of a separated child, the best interest of such child, including a preference for family unity, be considered and ensure that such decisions are based on clearly articulated factors that do not include predictions or conclusions about immigration status or pending Federal immigration proceedings.<sup>110</sup>

The CIR Act uses similar language to the HELP Act on those issues and also creates a family detention system to house immigrant families when immigrant parents are detained and cannot be immediately released.<sup>111</sup>

Despite the bills’ seeming prohibition on including immigration status among the “clearly articulated factors” that may be considered when evaluating the “care, custody, and placement of a separated child,”<sup>112</sup> neither bill succeeds in completely eliminating immigration status from evaluations of parental fitness: neither bill provides a right of counsel for indigent detainees, heightens the burden for terminating parental rights, or amends the ASFA to remove the fifteen-month trigger mechanism that initiates TPR proceedings against parents in immigration detention for a large portion of that period.<sup>113</sup> Further, while family detention facilities would prevent the separation of parents from children when parents are detained, uprooting children and placing them in an amorphous form of house arrest with their

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Enforcement on August 25, 2011. *Bill Summary and Status: 112th Congress (2011–2012) H.R.2607*, THOMAS, <http://thomas.loc.gov/cgi-bin/thomas> (last visited Nov. 26, 2012).

<sup>105</sup> Comprehensive Immigration Reform ASAP Act of 2009, H.R. 4321, 111th Cong. §§ 162–67 (2009). The CIR Act would require that “special non-penal, residential, home-like facilities that enable families to live as a family unit [be] designed to house families with children” for immigrant families in detention. *Id.* § 162(c)(2)(A).

<sup>106</sup> *See* H.R. 2607 §§ 3(b)(3), 6(a)(3)(E).

<sup>107</sup> *See infra* notes 115–18 and accompanying text.

<sup>108</sup> *See* H.R. 2607 § 3(b)(10).

<sup>109</sup> *Id.* § 6(a)(3)(D).

<sup>110</sup> *Id.* § 6(a)(3)(E).

<sup>111</sup> *See* Comprehensive Immigration Reform ASAP Act of 2009, H.R. 4321, 111th Cong. §§ 162–67 (2009).

<sup>112</sup> *Id.* § 164(a)(3)(E); *see also* H.R. 2607 § 6(a)(3)(E) (using similar language as the HELP Act).

<sup>113</sup> *See generally* H.R. 2607; H.R. 4321 §§ 162–67.

parents per the CIR Act would present its own set of problems.<sup>114</sup> Effectively preventing unjustified terminations of immigrant parental rights requires greater action than that contained in the HELP and CIR Acts.

Solutions proposed by legal commentators are similarly lacking. A small but growing number of legal scholars have focused on the struggles of immigrant parents to maintain family unity in recent years.<sup>115</sup> Commentators who have explored the problem identified in this article have proposed some solutions also embraced here, such as removing immigration status as a relevant factor for family courts to consider in determining parental fitness and improving portions of the HELP Act.<sup>116</sup> However, while some scholars have noted the comparison between the current situation of immigrant parents and the past situation of Native American parents,<sup>117</sup> none have proposed that parts of the Indian Child Welfare Act, like its notice requirements and heightened proof requirements for terminations, be adapted and applied to immigrant parents.<sup>118</sup> Without adopting such measures, any attempted solution to this problem would not adequately address the variety of issues identified earlier in this article.

### *B. Proposed Statute: Immigrant Child Welfare and Parental Rights Act*

To most effectively prevent unjustified threats to the parental rights of immigrants, this article proposes a statute, the Immigrant Child Welfare and Parental Rights Act (ICWPRA). The ICWPRA adopts and modifies particular elements of the Indian Child Welfare Act. The proposed statute also contains proposals specific to immigrant parents, including best practices for child protective services officials undertaking investigations of immigrant parents for potential abuse and neglect.

The ICWPRA could be proposed as an amendment to the HELP Act, as that piece of legislation is currently before the relevant House Subcommittee. If the HELP Act fails to advance, however, this article suggests the ICWPRA be introduced as a stand-alone piece of legislation.

#### *1. Incorporating Elements of the ICWA*

The ICWA contains numerous provisions on which to model parts of a federal statute protecting the rights of immigrant parents.<sup>119</sup> Such provisions

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<sup>114</sup> For example, one of the country's only family detention facilities, in Texas, recently closed after civil rights groups filed complaints over its detention conditions. See Nina Bernstein, *supra* note 85, at A1.

<sup>115</sup> See generally, e.g., Rabin, *supra* note 22; Hall, *supra* note 22; Yablon-Zug, *supra* note 19.

<sup>116</sup> See Hall, *supra* note 22, at 1498–99; see also Yablon-Zug, *supra* note 19, at 116.

<sup>117</sup> See Yablon-Zug, *supra* note 19, at 105–08.

<sup>118</sup> While Rabin has proposed providing effective assistance of counsel for immigrant parents, she has not suggested the other portions of the ICWA mentioned in this article. See *supra* note 22.

<sup>119</sup> The ICWA cannot fully be applied to immigrant parents. The statute concerns termination of Native American parental rights, but it also contains provisions allowing for Native

include the ICWA's (1) notice requirements to ensure parents are aware of involuntary child custody proceedings filed against them, (2) guarantee of assistance of counsel, (3) heightened burden of proof requirements for TPR proceedings, and (4) community-based foster care placement preference system.<sup>120</sup> The first three provisions may be adopted wholesale from the ICWA. The foster care placement preference system provision, however, must be modified to apply to immigrant parents.

*a. Notice Requirements*

Prior to the ICWA, Native American parents were often not adequately informed that the state had commenced an involuntary child custody action against them.<sup>121</sup> The ICWA remedied this issue by requiring that child protective services agencies provide written notice to Native American parents upon the initiation of an involuntary child custody proceeding, with return receipt requested.<sup>122</sup>

Immigrant parents are also sometimes not informed that involuntary child custody proceedings have been initiated against them because they are in immigration detention<sup>123</sup> and may be abruptly transferred to other facilities within the detention system. Thus, the ICWPA should borrow from the ICWA and mandate that the state must request a return receipt from the parent indicating that he is aware of the proceedings pending against him before the court continues with the proceeding, in order to give the parent enough time to properly defend himself in the proceedings. Child protective services agencies may object to delays this proposed provision might create. However, any delays that may result would be worth the certainty that immigrant parents understand when their parental rights are in jeopardy.

*b. Right to Assistance of Counsel*

The ICWA addressed the fact that Native American parents often lacked the financial resources to retain counsel in termination, removal, or placement proceedings by guaranteeing assistance of counsel.<sup>124</sup> This ICWA provision is relevant because immigrant parents, especially those imprisoned for months in immigration detention without the ability to generate income, often lack the funds to retain representation.<sup>125</sup> Further, as immigrants, the

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American tribes to have jurisdiction over certain child custody proceedings and preventing Native American children from being placed with non-Native American foster parents. 28 U.S.C. §§ 1911–15 (2006). Native Americans are uniquely situated so as to allow for tribal jurisdiction in such instances; immigrant parents are not. Further, it is beyond the scope of this article to advocate that immigrant children to be placed with foster parents of the same ethnicity or who speak the same language.

<sup>120</sup> See 25 U.S.C. §§ 1912, 1915 (2006).

<sup>121</sup> See *Preserving the Indian Family*, *supra* note 100, at 33.

<sup>122</sup> See 25 U.S.C. § 1912(a).

<sup>123</sup> See Rabin, *supra* note 22, at 139–40.

<sup>124</sup> See 25 U.S.C. § 1912(b).

<sup>125</sup> See Michael Kaufman, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 126 (2008).



parents may be unfamiliar with the American legal system, handicapping their ability to adequately defend themselves.

Thus, the ICWPRA should also provide for assistance of counsel for immigrant parents faced with TPR proceedings against them, if not in all involuntary custody proceedings. Equipping indigent immigrant parents with assistance of counsel at the federal level may cut down on unjustified parental rights terminations by ensuring that all immigrant parents have a knowledgeable advocate to inform them about the law and make their case. As in the ICWA, perhaps the U.S. Department of Health and Human Services (DHHS) can pay the costs and fees associated with the appointments.<sup>126</sup>

Fiscal conservatives may attack this provision for costing the federal government additional money. On the other hand, parental advocates may argue that this provision should apply to all parents, not just to those who are immigrants or of Native American descent. This article does not address the issue of whether all parents should have a right to assistance of counsel in child custody proceedings. And with respect to the funding issue, the number of immigrant parents facing TPR proceedings without an attorney every year is small enough such that DHHS would not have to expend an inordinate amount of money administering the program.<sup>127</sup> Further, providing a right to assistance of counsel would presumably result in children being less likely to become wards of the state in foster care or staying in foster care for shorter periods of time, alleviating the currently considerable state and federal costs in that area.<sup>128</sup>

*c. Beyond a Reasonable Doubt Standard of Proof for Terminating Parental Rights*

The ICWA heightened the standard of proof for termination of parental rights of immigrant parents from the default of “clear and convincing evidence” to “beyond a reasonable doubt.”<sup>129</sup> The ICWA did so because such a disproportionate number of Native American parents had their parental rights terminated so as to suggest that the clear and convincing standard was an insufficient safeguard against unnecessary terminations.<sup>130</sup>

While the Supreme Court later determined that a “clear and convincing evidence” standard in TPR cases passes constitutional muster,<sup>131</sup> recent cases

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<sup>126</sup> See 25 U.S.C. § 1912.

<sup>127</sup> See *supra* note 21.

<sup>128</sup> For example, the federal government contributes approximately five billion dollars every year to state foster care systems. See OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, U.S. DEPT' OF HEALTH & HUMAN SERVS., FEDERAL FOSTER CARE SYSTEMS: HOW AND WHY THE CURRENT FUNDING STRUCTURE FAILS TO MEET THE NEEDS OF THE CHILD WELFARE FIELD 2 (2005), available at <http://aspe.hhs.gov/hsp/05/fc-financing-ib/ib.pdf>.

<sup>129</sup> 25 U.S.C. § 1912.

<sup>130</sup> See *Indian Child Welfare Program: Hearing Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93d Cong. 18–21(1974) (statement of William Byler, Executive Director, Association of American Indian Affairs).

<sup>131</sup> *Santosky v. Kramer*, 455 U.S. 745, 769 (1982).

have highlighted that immigrant parents are losing their parental rights upon specious court reasoning under the “clear and convincing evidence” standard.<sup>132</sup> Further, scholars have noted how hard it is for immigrant parents to appeal involuntary child custody decisions due to financial and logistical constraints, especially if they are deported soon thereafter.<sup>133</sup>

Thus, the ICWPA should heighten the standard for immigrant parental rights terminations to “beyond a reasonable doubt” to reduce the risk of erroneously terminating immigrant parental rights.<sup>134</sup> Some may argue that raising the standard of proof may mean that some children will continue to live with abusive immigrant parents and that this goes against the “best interests of the child” doctrine that currently pervades American family law.<sup>135</sup> While heightening the burden of proof does mean that fewer children will be removed from the custody of immigrant parents who are suspected of parental unfitness, the parental fitness determination should be made with the interests of both the parent and the child in mind.<sup>136</sup> As the Court in *Santosky* noted, the judicial finding of parental unfitness “bears many of the indicia of a criminal trial.”<sup>137</sup> It is logical to require a higher burden of proof when some courts are applying the existing standard so as to result in unnecessary terminations of immigrants’ parental rights.<sup>138</sup> Further, as the ICWA itself reminds us, a finding of parental unfitness in itself is “likely to result in serious emotional or physical damage to the child.”<sup>139</sup> To truly promote the best interests of the child, “[t]he continuity of family relationships therefore must be a priority.”<sup>140</sup>

#### *d. Foster Care Placement Preference System*

Recognizing the importance of extended family and tribal networks in Native American communities, the ICWA provided for Native American children to be placed into foster care with other members of their tribes

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<sup>132</sup> See *supra* notes 47–49 and accompanying text.

<sup>133</sup> See *supra* note 19 and accompanying text.

<sup>134</sup> See Douglas E. Cressler, *Requiring Proof Beyond a Reasonable Doubt in Parental Rights Termination Cases*, 32 U. LOUISVILLE J. FAM. L. 785, 812 (1994).

<sup>135</sup> See, e.g., *Santosky*, 455 U.S. at 760 (“[A]t the dispositional stage . . . [the] judge [may] make his order ‘solely on the basis of the best interests of the child’ . . .”).

<sup>136</sup> See *id.* at 753, 760–61, 765 (“[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.”).

<sup>137</sup> *Id.* at 762.

<sup>138</sup> See *supra* notes 47–54 and accompanying text.

<sup>139</sup> 42 U.S.C. § 1912(f) (2006).

<sup>140</sup> Susan L. Brooks, *A Family Systems Paradigm for Legal Decision Making Affecting Child Custody*, 6 CORNELL J.L. & PUB. POL’Y 1, 14 (1996). On the other hand, parental advocates may again argue that this provision should apply to all parents, not just to immigrants and those of Native American descent. See generally Cressler, *supra* note 134. Again, it is beyond the scope of this article to discuss whether heightened burden of proof requirements should apply to TPR decisions in the case of all parents.

unless willing and able tribal members were unavailable, in which case the children would enter the state foster care system.<sup>141</sup>

Extended family networks play a similarly critical role in many immigrant communities in the United States.<sup>142</sup> The ICWPRA should modify the preference system that applies to immigrant families today by requiring states to give preference to available extended family members when deciding with whom to place a child in foster care. This provision would be helpful for immigrant families because placement with an uncle or grandmother, for example, would reduce the anxiety first-generation American children have upon losing their biological, immigrant parents.<sup>143</sup>

## 2. *Going Beyond the ICWA*

While the ICWA serves as a useful starting point to remedying unnecessary TPRs for immigrant parents, additional steps need to be taken to improve immigration law and coordination between immigration detention facilities and child protective services agencies. The provisions below modify certain provisions of the proposed HELP Act and solutions other scholars have put forth on the issue. The proposed additions include (1) removing immigration status as a permissible factor for family courts to consider when determining a parent's fitness; (2) amending the ASFA to prevent initiation of TPR proceedings against a parent who has been in immigration detention for at least six of the previous twenty-two months; (3) providing funds to immigration detention facilities to make it easier for immigrant parents to communicate with their children and family law attorneys; and (4) providing funds to child protective services agencies to provide language access for immigrant parents and cultural sensitivity training for agency officials.

### a. *Immigration Status Irrelevant in Termination of Parental Rights Proceedings*

Part I described the ways in which courts sometimes use a parent's immigration status against them in determining parental fitness.<sup>144</sup> A parent's immigration status does not inherently reflect on his ability or willingness to provide the basic levels of food, shelter, and care to his child that the courts and child protective services agencies demand of fit parents. It is true that some types of welfare benefits, such as food stamps, are not accessible to

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<sup>141</sup> 25 U.S.C. § 1915 (2006).

<sup>142</sup> See Appell, *supra* note 53, at 776–78.

<sup>143</sup> For example, “kinship foster care,” as the concept is known, has been empirically shown to yield positive results for African American children, in part because of the importance extended family networks play in the African American community. Dorothy E. Roberts, *Child Welfare's Paradox*, 49 WM. & MARY L. REV. 881, 895 (2007). Many states already provide for kinship foster care, though state provisions on this type of foster care and the amount of financial support given to kinship foster parents vary. See Note, *The Policy of Penalty in Kinship Care*, 112 HARV. L. REV. 1047, 1049–52 (1999).

<sup>144</sup> See *supra* notes 50–54.

undocumented immigrants.<sup>145</sup> However, U.S. citizen children are eligible to receive welfare benefits.<sup>146</sup> In any case, a parent's immigration status should be separated from his ability to provide for his child until there is proof that the parent's lack of access to welfare benefits is an endangering factor.

Using immigration status as a proxy for assumptions about a parent's financial status or lifestyle choices would be irresponsible.<sup>147</sup> Prohibiting courts from using a parent's immigration status against him in TPR proceedings is imperative to stemming the tide of parental rights terminations of immigrant parents. Thus, the ICWPRA should contain unconditional language preventing immigration status from being used as a factor in evaluating parental fitness.<sup>148</sup>

While some would argue that the ban is unnecessary, since state laws do not explicitly state that a court may use immigration status as a factor in evaluating parental fitness,<sup>149</sup> the cases identified above indicate that some courts are using immigration status either directly or indirectly as such a factor.<sup>150</sup> A preventative solution is necessary because immigrant parents face unique difficulties in appealing termination decisions.<sup>151</sup>

*b. ASFA Amended to Except Immigrant Detainees*

This ICWPRA provision would amend the ASFA to preclude the automatic initiation of termination of parental rights proceedings in cases where the parent is detained. The ASFA triggers these proceedings when the parent has been in immigrant detention for at least half of the amount of time he has been separated from his child during the preceding twenty-two months.<sup>152</sup> Because immigrant detainees often languish for months in immigration detention, the provision would halt some of the termination proceedings that begin because the parent's detention adds to the length of time his child is in foster care. This would spare immigrant parents the pain, expense, and possibility of losing their children simply because they were detained by Immigration and Customs Enforcement (ICE) for an extended amount of time.

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<sup>145</sup> Ann Laquer Estin, *Global Child Welfare: The Challenges for Family Law*, 63 OKLA. L. REV. 691, 708 (2011).

<sup>146</sup> See, e.g., SOC. SEC. ADMIN., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM FACTS 1 (2012), available at <http://www.ssa.gov/pubs/10101.pdf>.

<sup>147</sup> See *supra* note 51 and accompanying text.

<sup>148</sup> This recommendation differs from a similar suggestion Elizabeth Hall offers. See Hall, *supra* note 22, at 1498–99. Hall has advocated for a narrower approach that only prohibits courts from using the initiation of deportation proceedings as a parental fitness factor. *Id.* Further, she suggests that instead of a federal ban, states should adopt this provision. *Id.* However, a narrower and state-level version of this provision would be inadequate. See *supra* notes 50–54 and accompanying text.

<sup>149</sup> See Hall, *supra* note 22, at 1474–81.

<sup>150</sup> See *supra* note 21 and accompanying text.

<sup>151</sup> See *supra* note 19.

<sup>152</sup> As the ASFA currently stands, TPR proceedings are initiated if a parent has been separated from his child for fifteen of the preceding twenty-two months. 42 U.S.C. § 675(5)(E) (2006).

The ASFA's proponents may argue that allowing a parent to be separated from his child for up to fourteen months without initiating a TPR proceeding allows for virtually all detained parents to sort out their immigration status before the trigger mechanism is activated. In fact, however, a significant number of immigrant detainees are held for a year or more.<sup>153</sup> Further, if an immigrant parent is held for several months in immigration detention and then deported without his children, he may be separated from his child for at least fifteen months and the AFSA trigger will apply. The proposed provision would prevent TPR proceedings from commencing against many more deported parents before they have the chance to make arrangements for their children in the United States.

*c. Funds for Immigration Detention Facilities*

Detained immigrant parents also face problems in communicating with their children and fully participating in involuntary child custody proceedings against them. Parents are often moved around to other facilities without adequate notice or may have trouble getting in touch with family members, attorneys, and child protective services officials.<sup>154</sup> Instructing the U.S. Department of Homeland Security to create a policy that emphasizes family unity in its detention facilities by mandating that parent detainees receive daily telephone access to call their children, for example, might help prevent courts from finding that a parent has abandoned his child because he has been unable to communicate with the child from immigration detention.<sup>155</sup> As one commentator has already suggested, immigration detention officials should attempt to keep immigrant parents in the same detention facility throughout the detention process or immediately notify the children and any relevant child protective services officials if a parent has to be moved.<sup>156</sup>

Additionally, ensuring parents involved in involuntary child custody proceedings have regular telephone and physical access to their attorneys would facilitate the parent's ability to defend himself in an involuntary child custody proceeding. Such a policy would prevent unnecessary breakdowns in family relationships due to a parent being detained and reduce the possibility that a court would terminate a parent detainee's parental rights.

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<sup>153</sup> IMMIGRANTS' RIGHTS PROJECT, AM. CIVIL LIBERTIES UNION, ISSUE BRIEF: PROLONGED IMMIGRATION DETENTION OF INDIVIDUALS WHO ARE CHALLENGING REMOVAL 4 (2009), *available at* [http://www.aclu.org/files/assets/prolonged\\_detention\\_issue\\_brief.pdf](http://www.aclu.org/files/assets/prolonged_detention_issue_brief.pdf).

<sup>154</sup> See *supra* note 95 and accompanying text.

<sup>155</sup> Hall, *supra* note 22, at 1496. This suggested provision is partially inspired by sections 8 and 9 of the HELP Act. HELP Separated Children Act, H.R. 3531, 111th Cong. §§ 8–9 (2009). Section 8 provides for vulnerable-population and child-welfare trainings for immigrant enforcement officers, while section 9 provides access to the children by detained parents, legal guardians, and primary caregiver relatives. *Id.*

<sup>156</sup> Hall, *supra* note 22, at 1496–97.

*d. Funds for Child Protective Services Agencies and Best Practices Recommendations*

As Ms. Baltazar Cruz's case and others indicate, child protective services agencies can display ignorance about appropriate non-Western parenting styles and fail to ensure language interpretation for immigrant parents as they investigate the parents' caretaking abilities.<sup>157</sup> The agencies' cultural insensitivity increases the likelihood that they will prematurely initiate TPR proceedings against immigrant parents.<sup>158</sup> By authorizing DHHS to fund cultural education about immigrant parenting for child protection officials and to ensure interpretation services and adequate notice for immigrant parents involved in involuntary child custody proceedings, Congress may alleviate this problem.

Congress may help avoid misunderstandings between CPS officials and immigrant parents about parental fitness by (1) using funds to execute cultural trainings for child protective agency officials across the country about common immigrant/non-Western parenting traditions and (2) conditioning receipt of such funds upon the state agencies' implementation of policies that require investigatory officials to question a non-English speaking family in its primary language. Encouraging child protective agencies to implement best practice policies that emphasize cultural understanding and providing immigrant parents with sufficient notice about child protective services investigations and actions would also alleviate some of the confusion and alienation immigrant parents experience in interacting with child protective services officials.

By borrowing from the ICWA, incorporating currently proposed statutory language from the HELP Act, and proposing ways to remedy coordination issues between immigration detention facilities and child protective services agencies, the ICWPRA's eight provisions would go a long way towards solving the problem of unnecessary terminations of parental rights of U.S. immigrant parents. Passing a bill similar to the ICWPRA is critical to stemming the tide of terminations of parental rights of U.S. immigrant parents. Given that Congress has recently proposed legislation that attempts to address this issue in the form of the HELP Act, it is possible that Congress will be willing to entertain a more comprehensive solution. Hopefully, it will do so.

*C. The ICWPRA's Constitutionality and the Need for a Federal Response*

As discussed above, family law has historically been considered exclusively within state, not federal, domain.<sup>159</sup> At first glance, then, calling for a

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<sup>157</sup> See *supra* notes 1–14, 45–54 and accompanying text.

<sup>158</sup> See *supra* notes 50–54 and accompanying text.

<sup>159</sup> See *supra* note 31.

federal statute to regulate the way states decide custody issues involving immigrant parents may appear problematic, particularly given that Congress justified the Indian Child Welfare Act under its commerce power to govern relations with Native Americans, and such a justification is unavailable here.<sup>160</sup>

Though the ICWPRA cannot be supported under the Commerce Clause, the Act would be otherwise constitutional. First, multiple pieces of federal legislation regulating familial relations have been enacted in the past fifteen years alone, belying the contention that the family law is an exclusively state endeavor.<sup>161</sup> Second, all ICWPRA provisions, with the exception of section 4, pertain exclusively to immigrant parents, and the federal government would be able to justify the legislation as within the scope of its “broad, undoubted power over the subject of immigration.”<sup>162</sup> As one commentator has noted, “[i]n a federal system in which states have primary authority over family law issues and . . . the political branches of the federal government . . . have exclusive control over immigration, immigration law [allows] Congress . . . to engage in extensive regulation” of family law when it intersects with matters of immigration.<sup>163</sup> For example, federal law establishes what constitutes a sham marriage, a “legal union,” and a “bona-fide parent-child relationship” when one or more of the members of the relationship is a noncitizen.<sup>164</sup> Section 4, on the other hand, modifies the ASFA in a way that does not interfere with the current constitutionality of that statute.<sup>165</sup> Therefore, the ICWPRA should survive any challenges to its constitutionality.

Not only should the ICWPRA pass constitutional muster, it should also overcome normative arguments that the solution should not occur at the federal level. Other commentators who have written on this issue have called for states to change the way they interpret parental unfitness and for child protective agencies to change their practices with respect to immigrant par-

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<sup>160</sup> 25 U.S.C. § 1901 (2006).

<sup>161</sup> See, e.g., Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.); Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. II 1996) and 28 U.S.C.A. § 1738C (West Supp. 1998)); Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified as amended at 42 U.S.C. §§ 620–28, 670–79a (1994)).

<sup>162</sup> *Arizona v. United States*, 132 S. Ct. 2492 (2012); see also *supra* note 63 and accompanying text.

<sup>163</sup> Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1632 (2007); accord Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1379 (1998) (“[F]amily law, and disputes over its content . . . occupy an important place in federal policy regulating United States citizenship . . .”).

<sup>164</sup> Hasday, *supra* note 163 (quoting 8 U.S.C. §§ 1154(c)(2), 1101(b)(1)(D) (1994)); Abrams, *supra* note 163, at 1673.

<sup>165</sup> See *supra* notes 55–60 and accompanying text. The ASFA is a federal funds act. See Hasday, *supra* note 163, at 1380. Federal funds acts are generally held to be constitutionally permissible exercises of congressional taxing and spending power. See *New York v. United States*, 505 U.S. 144, 167 (1992). Thus, section 4 is unlikely to be challenged as unconstitutional.

ents on a state-by-state basis,<sup>166</sup> whereas this article incorporates changes in state family law practices within the ICWPRA. A federal statute would be a more efficient and reliable solution that protects all American immigrant parents. Moreover, only the federal government can implement certain proposed provisions, such as amending the Adoption and Safe Families Act and improving communication at immigration detention facilities.

While a partial state solution to the deficiencies in family law with respect to immigrant parents would allow states more autonomy to regulate family law, some states may take longer than others to pass such legislation or may pass legislation that is not comprehensive enough to effectively bring about the changes suggested. Further, recent anti-immigrant legislation passed in Georgia, Alabama, South Carolina, Utah, Indiana, and Arizona suggests that some states might fail to pass any legislation that might assist undocumented immigrant parents, due to a currently high level of hostility towards immigrants in some parts of the country.<sup>167</sup> A federal statute similar to the one suggested in this article, if passed in a timely manner, would effectively stem the increasing threat to the parental rights of immigrant parents across the country and do so under Congress's valid authority to regulate immigration and provide conditioned funds to the states.<sup>168</sup>

#### CONCLUSION

Immigrant parents are currently at risk of having their parental rights terminated due to forces outside their control. This unjustified destruction of family unity violates well-settled principles in U.S. constitutional, family, and immigration law and must be corrected.

Passing the Immigrant Child Welfare and Parental Rights Act would bring our family and immigration laws into line with our normative conceptions about the importance of undivided families. The ICWPRA would allow immigrant parents to receive greater notice of involuntary custody proceedings initiated against them, retain counsel in termination of parental rights proceedings, and ensure that their children who have been removed are placed in kinship foster care if possible. Further, the proposed statute would prevent family courts from using immigration status as a negative factor in determining parental fitness, require a "beyond a reasonable doubt" standard of proof for terminating parental rights of immigrant parents, and

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<sup>166</sup> Elizabeth Hall proposes that states exclude the initiation of immigration proceedings and illegal entry into the country from parental fitness determinations, while Nina Rabin proposes that child protective services agencies implement best practices that involve appointing liaisons to interface with federal immigration officials. Hall, *supra* note 22, at 1498–99; Rabin, *supra* note 22, at 151–52.

<sup>167</sup> See Mary Slosson, *States Hope to Implement Laws After Arizona Ruling*, CHI. TRIB. (June 27, 2012), [http://articles.chicagotribune.com/2012-06-27/news/sns-rt-us-usa-immigration-lawsuitsbre85q1ry-20120627\\_1\\_immigration-laws-supreme-court-s-arizona-immigration-status](http://articles.chicagotribune.com/2012-06-27/news/sns-rt-us-usa-immigration-lawsuitsbre85q1ry-20120627_1_immigration-laws-supreme-court-s-arizona-immigration-status).

<sup>168</sup> See *supra* notes 157–63 and accompanying text.



amend the Adoption and Safe Families Act to avoid prematurely triggering TPR proceedings against parents in immigration detention. Finally, the statute would provide funding for immigration detention facilities and child protective services officials, making it easier for immigrant parents to fully participate in child protective services investigations and involuntary child custody proceedings.

Let us return to Ms. Baltazar Cruz's story. If a statute similar to the ICWPRA had been in place when the Mississippi Department of Human Services separated the child from her mother in 2009, MDHS would probably have conducted its investigation into Ms. Baltazar Cruz's parental fitness with greater cultural sensitivity.<sup>169</sup> Further, MDHS would have inquired into whether Ms. Baltazar Cruz's baby could have been placed with an extended family member instead of with strangers.<sup>170</sup> Finally, MDHS likely would have refrained from beginning the process that would have led to the initiation of TPR proceedings against Ms. Baltazar Cruz.<sup>171</sup> Preventing situations like Ms. Baltazar Cruz's from happening to other families should be a governmental priority. The ICWPRA or its equivalent represents an opportunity for federal legislators to significantly advance this goal.

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<sup>169</sup> See *supra* notes 1–14 and accompanying text; *supra* Part III.

<sup>170</sup> See *id.*

<sup>171</sup> See *id.*

