

DEPORTING AMERICA’S CHILDREN: THE DEMISE OF DISCRETION AND FAMILY VALUES IN IMMIGRATION LAW

Lori A. Nessel*

Deportation “may result . . . in loss of both property and life, or of all that makes life worth living.”¹

“In approaching cases . . . in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect.”²

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* Professor of Law and Director, Center for Social Justice, Seton Hall University School of Law. I am grateful to Ryan Dunn and Lorenz Gomez-Rivera for invaluable research assistance, as well as to my colleagues at Seton Hall Law School for their insightful comments during a works-in-progress presentation. Thank you to the wonderful student editors at *Arizona Law Review* for all their work.

1. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).
2. Oyama v. California, 332 U.S. 633, 636 (1948).

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INTRODUCTION

There has been a sustained focus, and properly so, on the tragedy of de jure child separation at the southern border of the United States.³ But largely unobserved has been the more widespread, deeply problematic practice of de facto child separation or de facto deportation of U.S.-citizen children occurring with greater frequency throughout the interior of the nation.⁴ The trend toward removing

3. Over the past year, the Administration's "zero-tolerance" policy of separating families at the southern border has rightfully resulted in a sustained public outcry and moral crisis for the nation. Audio recordings of screaming children torn from their parents after a harrowing journey to seek safety in America have gone viral. *See* Ginger Thompson, *Listen to Children Who've Just Been Separated from Their Parents at the Border*, PROPUBLICA (June 18, 2018, 3:51 PM), <https://www.propublica.org/article/children-separated-from-parents-border-patrol-cbp-trump-immigration-policy>. A detained father committed suicide after having his child taken away. Nick Miroff, *A Family Was Separated at the Border, and This Distraught Father Took His Own Life*, WASH. POST (June 9, 2018), https://www.washingtonpost.com/world/national-security/a-family-was-separated-at-the-border-and-this-distraught-father-took-his-own-life/2018/06/08/24e40b70-6b5d-11e8-9e38-24e693b38637_story.html?utm_term=.92a8a9d3a63a. Mothers have reported being threatened with losing their children forever if they don't give up their claims to asylum protection. *See, e.g.*, Dara Lind, *Judge Blocks Trump from Deporting Reunited Families*, VOX (Aug. 17, 2018, 10:10 AM), <https://www.vox.com/2018/8/17/17714918/children-separated-parents-deport-asylum>. The United States government has forcibly taken over 3,000 traumatized children from their parents and, despite a federal court order to reunite the families, hundreds of children in U.S. custody remain missing. *See* Hannah Wiley, *Hundreds of Migrant Kids Haven't Been Reunited with Their Parents. What's Taking So Long?*, TEX. TRIB. (Oct. 4, 2018, 12:00 AM), <https://www.texastribune.org/2018/10/04/zero-tolerance-policy-reunite-separated-immigrant-families/>. When ordered to reunite children with their parents, the Administration has responded by setting up military bases and petitioning the court to allow the indefinite detention of families. *See* Nick Miroff & Paul Sonne, *Trump Administration Preparing to Hold Immigrant Children on Military Bases*, WASH. POST (May 15, 2018), https://www.washingtonpost.com/world/national-security/trump-administration-preparing-to-shelter-migrant-children-on-military-bases/2018/05/15/f8103356-584e-11e8-b656-a5f8c2a9295d_story.html?noredirect=on&utm_term=.1e0ae257dfa8. The President has also taken the position that immigrants should be deported without any judicial hearing or due process whatsoever. Donald Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 AM), <https://twitter.com/realdonaldtrump/status/1010900865602019329?lang=en> ("We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.").

4. *See* discussion *infra* notes 15–46 and accompanying text. However, as this Article goes to print, ICE just carried out its biggest single-state enforcement action in U.S. history, resulting in approximately 680 immigrant arrests. *See infra* note 33. Because ICE

discretion in immigration law has been rapidly accelerated by the Trump Administration.⁵ This has resulted in a policy and practice that is profoundly unfair and inhumane to millions of U.S.-citizen children, and, less obviously, extremely counter-productive to the interests of the U.S. economy and social fabric.

Take for example, Adolfo Mejia, who was apprehended by Immigration and Customs Enforcement (“ICE”) agents after dropping off two of his children at school.⁶ Although he had lived in the United States for 26 years and was married with six American children, he was targeted for detention and deportation on the basis of a Class A misdemeanor that resulted in a suspended sentence and community service, completed 25 years ago.⁷ In prior administrations, a man like Mr. Mejia would have benefitted from discretion as to whom to target for deportation.⁸ However, under the current administration, Mr. Mejia, like countless other parents of American children, was arrested and placed in removal proceedings without regard for the dire consequences for his American children or the fact that he has been a fit parent and primary income earner for his family.⁹

American-citizen children whose parents are deported by a regime that fails to take the children into account face the Hobson’s choice of either leaving their country of citizenship with their (deported) parents and growing up in conditions that will deprive them of the benefits of education, healthcare, and economic

targeted immigrants during the work day at multiple sites, many children returned from school to find their parents were missing. For coverage of the impact the raids had on children, see for example, Sophie Tatum, *Kids Left Without Either Parent at Home for 8 Days After Mississippi ICE Raid*, ABC NEWS (Aug. 23, 2019, 4:47 PM), <https://abcnews.go.com/Politics/kids-left-parent-home-days-mississippi-ice-raid/story?id=65150421>; Angela Fritz & Luis Velarde, *ICE Arrested Hundreds of People in Raids. Now ‘Devastated’ Children are Without Their Parents*, WASH. POST (Aug. 8, 2019), <https://www.washingtonpost.com/immigration/2019/08/08/ice-arrested-hundreds-people-raids-now-devastated-children-are-without-their-parents/>.

5. See *infra* note 8.

6. Dianne Solis, *U.S. Citizen Kids Face the Deportation of Their Immigrant Parents*, DALLAS MORNING NEWS (Apr. 5, 2018, 7:54 AM), <https://www.dallasnews.com/news/immigration/2018/04/05/deported-us-citizen-kids-face-loss-immigrant-parents>.

7. *Id.*

8. In 2013, the Obama Administration promulgated a Parental Interests Directive that, *inter alia*, directed ICE officers undertaking enforcement activities to identify primary caregivers and utilize prosecutorial discretion towards this population. U.S. IMMIGRATION & CUSTOMS ENF’T, 11064.1: FACILITATING PARENTAL INTERESTS IN THE COURSE OF CIVIL IMMIGRATION ENFORCEMENT ACTIVITIES §§ 2, 5.2 (Aug. 23, 2013), https://cis.org/sites/default/files/Parental_Interest_Directive_8-23-13.pdf [hereinafter 2013 Directive]. In 2017 (made public in 2018), the current Administration rescinded this Directive and replaced it with the Directive on Detention and Removal of Alien Parents or Legal Guardians. U.S. IMMIGRATION & CUSTOMS ENF’T, 11064.2: DETENTION AND REMOVAL OF ALIEN PARENTS OR LEGAL GUARDIANS (Aug. 29, 2017), <https://www.ice.gov/doclib/detention-reform/pdf/directiveDetainedParents.pdf> [hereinafter 2017 Directive]. Significantly, this new Directive rescinds both the prior instruction for officers to identify primary caregivers and to exercise discretion toward them. Compare 2013 Directive, with 2017 Directive.

9. Solis, *supra* note 6.

resources and opportunities that they are entitled to as American citizens, or remaining in their country of citizenship but deprived of the right to be raised by their parents. These children may be left with a friend or relative, placed in foster care, or adopted by other families.¹⁰

In this Article, I explore the demise of discretion in immigration law, particularly as it impacts U.S.-citizen children. I then explain why, as a policy matter, the absence of discretion in the context of deporting parents of citizen children is both economically and socially counter-productive and inhumane. In prior scholarship, I have called for immigration policy to cede to labor law goals when in conflict in order to advance the interest of all employees in the workplace.¹¹ I have also argued against the domestic implementation of human rights treaties such that torture victims are unnecessarily forced to choose between their own safety and the opportunity to reunify with their children,¹² and critiqued the United States' move away from its tradition of valuing family unification in immigration policies.¹³ The collision of immigration enforcement and family unity policies in this context similarly demands a new approach to assessing the impact of deportation on U.S.-citizen children. This approach must take into account not only the children's constitutional rights as U.S. citizens, but also the societal interest in avoiding the "creation of an underclass of future citizens," which cannot be reconciled with basic principles of equality.¹⁴ After examining constitutional infirmities posed by a legal regime that allows for the deportation of parents without regard for the de facto

10. See Teresa Wiltz, *If Parents Get Deported, Who Gets Their Children?*, PEW CHARITABLE TRUSTS (Oct. 25, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/25/if-parents-get-deported-who-gets-their-children>.

According to a 2015 report from the Urban Institute, approximately 5,000 children in child-welfare custody in 2011 had a detained or deported parent. See RANDY CAPPAS ET AL., URB. INST. & MIGRATION POL. INST., *IMPLICATIONS OF IMMIGRATION ENFORCEMENT ACTIVITIES FOR THE WELL-BEING OF CHILDREN IN IMMIGRANT FAMILIES VII* (Sept. 2015), <https://www.urban.org/sites/default/files/alfresco/publication-exhibits/2000405/2000405-Implications-of-Immigration-Enforcement-Activities-for-the-Well-Being-of-Children-in-Immigrant-Families.pdf>. However, most of these cases were ones in which the child was in foster care before the parent was detained. *Id.* Once the parent is detained, this can result in permanent separation. *Id.* In addition to the dramatic increase in deportations, studies also suggest that deported parents are much more likely to remain in Mexico rather than return to the United States. See RYAN SCHULTHEIS & ARIEL G. RUIZ SOTO, *MIGRATION POL. INST., A REVOLVING DOOR NO MORE? A STATISTICAL PROFILE OF MEXICAN ADULTS REPATRIATED FROM THE UNITED STATES 2* (May 2017), <https://www.migrationpolicy.org/sites/default/files/publications/RevolvingDoor-Mexico-FINAL.pdf>. For example, in 2005, 95% of deported Mexican adults intended to return to the United States. *Id.* Ten years later, only 49% planned to return. *Id.*

11. Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 381–86 (2001).

12. Lori A. Nessel, *Forced to Choose: Torture, Family Reunification and United States Immigration Policy*, 78 TEMP. L. REV. 897, 924–46 (2005).

13. Lori A. Nessel, *Families at Risk: How Errant Enforcement and Restrictionist Integration Policies Threaten the Immigrant Family in the European Union and the United States*, 36 HOFSTRA L. REV. 1271, 1289–92 (2008).

14. *Plyler v. Doe*, 457 U.S. 202, 239 (1982) (Powell, J., concurring).

deportation of American children, or the deprivation of family integrity that occurs when children are left behind, I propose legislative reform to safeguard the constitutional rights of American children and families.

Part I of this Article examines the move away from discretion in enforcing immigration law, particularly as it relates to U.S.-citizen children. Part II explores the societal dangers posed by deporting the parents of American children without taking the children into account. It then analyzes the harm inflicted on these American children; either because they are left behind in the United States without access to their parents or because of the lifetime of disabilities imposed when children are de facto deported along with their parents. Part III examines the accepted legal justifications for countenancing this regime under the Constitution and explores expanded arguments for challenging family separation and de facto deportation. Part IV analyzes the shortcomings in existing statutory protection and proposes legislative reform to immigration law in order to more appropriately balance competing underlying policies.

I. THE DECOUPLING OF ENFORCEMENT AND DISCRETION

Unfortunately, deporting immigrants and separating families is not a new phenomenon. Under the Obama Administration for example, over five million immigrants were deported; a record high.¹⁵ According to Mexico's most recent census, more than half a million U.S.-citizen children were living in Mexico as of 2010.¹⁶ Researchers cite higher numbers, estimating that up to 800,000 American children have arrived in Mexico since 2008.¹⁷ And Mexico is not the only country with a sizeable population of U.S. children. The Northern Triangle countries

15. Muzaffar Chishti et al., *The Obama Record on Deportations: Deporter in Chief or Not?*, MIGRATION POL'Y INST. (Jan. 26, 2017), <https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not>.

16. *Half a Million American Minors Now Live in Mexico*, THE CONVERSATION (July 1, 2019, 6:52 AM), <https://theconversation.com/half-a-million-american-minors-now-live-in-mexico-119057>.

17. Kristen Hwang, *As American Kids Pour Across the Border, Mexican Schools Struggle to Keep Up*, DESERT SUN (Sept. 5, 2017, 7:53 AM), <https://www.desertsun.com/story/news/2017/09/05/americans-exile-increased-deportation-parents-pushes-southern-california-children-into-mexican-school/494301001/>; Amelia Shaw, *An Invisible Tide: Undocumented U.S. Kids in Mexico*, FOREIGN SERV. J. (Oct. 2016), <http://www.afsa.org/invisible-tide-undocumented-us-kids-mexico> (600,000 U.S.-citizen children may be an underestimation because there have been 2.4 million Mexicans deported but no statistics on their family members); Emily Green, *There Are About 600,000 Children in Mexico Who were Born in the U.S. but Struggle to Claim Citizenship*, PUB. RADIO INT'L (June 26, 2018, 12:00 PM), <https://www.pri.org/stories/2018-06-26/there-are-about-600000-children-mexico-who-were-born-us-struggle-claim>. As reported in this Article, Mexican nationals who were deported with American-born children often lacked U.S. birth certificates for their children. Even those with U.S. birth certificates for their children, once deported, often listed the place of birth of children as Mexico in order to enroll them in school in Mexico. This has resulted in inconsistent legal documentation, making it difficult for American children to return to the United States.

(Guatemala, El Salvador, and Honduras), which are plagued by pervasive gang violence, also have significant populations of U.S.-citizen children residing there.¹⁸

In addition to the hundreds of thousands of American children growing up in Mexico and the Northern Triangle nations, almost six million U.S.-citizen children live in the United States with a parent or family member who is undocumented and are thus at risk of being separated from their families.¹⁹ Every year, tens of thousands of American children have at least one parent deported.²⁰ In just one year between July 2015 and June 2016, ICE data indicates the agency deported 30,121 immigrants claiming to have at least one American child.²¹ Other data indicates that 90,000 parents of U.S.-citizen children are deported per year.²²

While these figures demonstrate that American children have been losing their parents or being forced into exile for many years, the demise of discretion in the enforcement of immigration law is exacerbating the family-separation crisis. Although President Obama was at times referred to as the “Deporter-in-Chief,”²³ he also signed the Executive Order initiating the Deferred Action for Childhood Arrival (“DACA”) program in order to shield law-abiding young adults from deportation.²⁴ This two-pronged approach to strengthening enforcement efforts while simultaneously granting deserving immigrants a reprieve from deportation had been the norm in light of Congress’s longstanding failure to reform the immigration laws.²⁵

The current Administration, however, has prided itself on its move away from prioritization or discretion when enforcing immigration laws. Whereas past

18. CAPPS ET AL., *supra* note 10, at 12.

19. Am. Immigration Council, *U.S. Citizen Children Impacted by Immigration Enforcement* 1 (May 2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/us_citizen_children_impacted_by_immigration_enforcement.pdf. The Migration Policy Institute estimates there are about 4.5 million U.S.-citizen children living in the United States with at least one undocumented parent. CAPPS ET AL., *supra* note 10, at 7.

20. *See* Am. Immigration Council, *supra* note 19, at 1; *see* CAPPS ET AL., *supra* note 10, at 7.

21. Hwang, *supra* note 17.

22. David B. Thronson, *Thinking Globally, Acting Locally: The Problematically Peripheral Role of Immigration Law in the Globalization of Family Law*, 22 *TRANSNAT’L L. & CONTEMP. PROBS.* 655, 659 (2013).

23. *See, e.g., Obama Leaves Office as Deporter-in-Chief*, NPR (Jan. 20, 2017, 3:04 PM), <https://www.npr.org/2017/01/20/510799842/obama-leaves-office-as-deporter-in-chief>; Chishti et al., *supra* note 15.

24. U.S. DEP’T OF HOMELAND SEC., *CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA)* (June 15, 2012), <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca>.

25. In fact, in striking down parts of Arizona’s immigration law, the Supreme Court rejected the State’s claim that its law mirrored federal immigration law and therefore didn’t violate the preemption clause. *Arizona v. United States*, 567 U.S. 387, 402 (2012). As the Court noted, just because particular deportation grounds existed as part of the federal immigration statute did not mean that they would necessarily be fully enforced. *Id.* at 396. It correctly stated that decisions as to how to enforce the immigration law involved the use of discretion by the executive branch. *Id.* at 394–96.

administrations focused limited resources on targeting those alleged to pose a danger to the nation, and generally regarded law-abiding families as low priority for deportation, from the start, the current Administration announced that “there’s no population that’s off the table” for deportation.²⁶ In the words of the Acting Director of ICE, “If you’re in the country illegally, we’re looking for you.”²⁷

This mindset has dramatically increased the number of enforcement actions across the country. Between 2016 and 2017 alone, apprehensions of undocumented immigrants jumped by approximately a third.²⁸ Moreover, these dramatically enhanced enforcement efforts were carried out in the interior of the country, where more settled immigrants with U.S.-born children reside, rather than at the borders, thus impacting a greater number of U.S.-citizen children.²⁹ Once apprehended, undocumented immigrants with citizen children encounter a legal regime that fails to provide an appropriate mechanism for taking the children’s needs into account. And an increasing number of parents find themselves in this situation as the current Administration has ended long-standing programs that provided lawful status to large numbers of immigrants. For example, over the next few years, approximately 350,000 immigrants from the Northern Triangle countries may lose their lawful right to live and work in the United States as a result of the President’s decision to revoke their Temporary Protected Status (“TPS”).³⁰ Revoking the lawful status of 350,000

26. Haley Sweetland Edwards, ‘No One Is Safe.’ *How Trump’s Immigration Policy Is Splitting Families Apart*, TIME (Mar. 8, 2018), <https://time.com/longform/donald-trump-immigration-policy-splitting-families/> (quoting Thomas Homan, Acting Director, ICE); *H. Approps. Subcomm. on Homeland Sec. Hearing on the ICE and CBP F.Y. 2018 Budget*, 2017 WLNR 18737622 (June 13, 2017).

27. Edwards, *supra* note 26.

28. Kristin Bialik, *ICE Arrests Went Up in 2017, with Biggest Increases in Florida, Northern Texas, and Oklahoma*, PEW RESEARCH CENTER (Feb. 8, 2018), <http://pewrsr.ch/2slfPJJa>; see Virgil Dickson, *Undocumented Parents Fear Enrolling Their U.S.-Born Children for Insurance*, MODERN HEALTHCARE (Oct. 14, 2017, 1:00 AM), <https://www.modernhealthcare.com/article/20171014/NEWS/171019934/undocumented-parents-fear-enrolling-their-u-s-born-children-for-insurance>; see also DEP’T OF HOMELAND SEC., REMOVALS INVOLVING ILLEGAL ALIEN PARENTS OF UNITED STATES CITIZEN CHILDREN 5–6 (Jan. 2009), <https://www.dhs.gov/immigration-statistics/enforcement-actions>. Immigration enforcement activities by ICE and local law enforcement agencies operating under ICE have significantly increased over the past decade. According to a report by the DHS Inspector General’s Office, over 108,000 parents of U.S.-citizen children were removed from the U.S. between 1998 and 2007. *Id.*

29. Bialik, *supra* note 28 (“Recent immigration arrest patterns demonstrate a growing emphasis by federal authorities on *interior* enforcement efforts. While ICE arrests went up significantly between 2016 and 2017, arrests made by U.S. Customs and Border Protection (CBP) – the federal agency responsible for enforcing U.S. immigration laws on the border – have declined.”).

30. Rocio Cara Labrador & Danielle Renwick, *Central America’s Violent Northern Triangle*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/backgrounder/central-americas-violent-northern-triangle> (last updated June 26, 2018); see Designation of El Salvador Under Temporary Protected Status Program, 66 Fed. Reg. 14214-01 (Mar. 9, 2001); see Extension of the Designation of El Salvador for Temporary Protected Status, 81 Fed. Reg. 44645-03 (July 8, 2016); see Designation of Honduras Under Temporary Protected Status

Central American immigrants with long-standing ties³¹ to this country will also impact more than 275,000 U.S.-citizen children who now face de facto deportation from the only country they have known, or the loss of the ability to be raised by their parents.³²

In furtherance of its new enforcement-only policy, “ICE has carried out the three biggest workplace immigration raids of the past decade” in the interior of the nation.³³ For example, on June 5, 2018, ICE raided a nursery in rural Ohio, “where 114 gardeners, florists, and other workers were detained and put into court proceedings for deportation,” without any consideration given to the U.S. children who were suddenly left without parents.³⁴ Many of the workers had lived for several years in a nearby community known as Little Mexico, where it is now estimated that more than 90 U.S.-citizen children are missing one parent and at least 20 U.S.-citizen children are left without any parents at all.³⁵

Under the prior Administration, if an undocumented immigrant was apprehended during a workplace raid or at another location, the immigration officer had discretion to decide whether to initiate removal proceedings if the undocumented immigrant had U.S.-citizen children and no criminal record.³⁶ In fact,

Program, 64 Fed. Reg. 524-02 (Jan. 5, 1999); see Extension of the Designation of Honduras for Temporary Protected Status, 82 Fed. Reg. 59630 (Jan. 6, 2018); Letter from Nat’l Org. and State and Local Org. to Kristjen Nielsen, U.S. Sec’y of Homeland Sec., and Michael Pompeo, U.S. Sec’y of State (July 25, 2018) (citing a letter from Kirsten Gillibrand, U.S. Senator, to Michael Pompeo, U.S. Sec’y of State, et al. (June 28, 2018)) (on file with author). As of this writing, a federal district court judge found enough evidence of racially-motivated bias to temporarily enjoin the termination of temporary protected status for nationals of Sudan, Haiti, Nicaragua, and El Salvador. See *Ramos v. Nielson*, 336 F. Supp. 3d 1075, 1098, 1108 (N.D. Cal. 2018).

31. For example, TPS is available for nationals of El Salvador who have resided in the United States since February 13, 2001, when a series of strong earthquakes killed over a thousand people in El Salvador. Designation of El Salvador for Temporary Protected Status Program, 66 Fed. Reg. 14214-01 (Mar. 9, 2001).

32. Letter from Karl A. Racine, Attorney General, District of Columbia, et al., to Mitch McConnell, U.S. Senate Majority Leader, et al., 3 (Mar. 13, 2018), <https://nj.gov/oag/newsreleases18/TPS-Final-Letter.pdf> (urging Congress to pass legislation to protect the TPS beneficiaries who face deportation upon the termination of the program).

33. Eli Saslow, *Are You Alone Now?*, WASH. POST (June 30, 2018), https://www.washingtonpost.com/news/national/wp/2018/06/30/feature/are-you-alone-now-after-raid-immigrant-families-are-separated-in-the-american-heartland/?utm_term=.6520b360b650. As this Article goes to print, ICE has just carried out “the largest single-state workplace enforcement action in U.S. history” arresting approximately 680 people in seven different work sites in cities across Mississippi. Abigail Hauslohner, *ICE Agents Raid Miss. Work Sites, Arrest 680 People in Largest Single-State Immigration Enforcement Action in U.S. History*, WASH. POST (Aug. 7, 2019), https://www.washingtonpost.com/immigration/ice-agents-raid-miss-work-sites-arrest-680-people-in-largest-single-state-immigration-enforcement-action-in-us-history/2019/08/07/801d5cfe-b94e-11e9-b3b4-2bb69e8c4e39_story.html?noredirect=on.

34. Saslow, *supra* note 33.

35. *Id.*

36. See 2013 Directive, *supra* note 8.

in 2013, in response to concern over the increasing number of deportations involving parents of U.S.-citizen children, ICE issued a directive on the vulnerability of children impacted by enforcement actions.³⁷ This directive explicitly advised that “[p]articular attention should be paid to immigration enforcement activities involving . . . parents or legal guardians whose minor children are physically present in the United States and are [U.S. citizens].”³⁸ Even if the officer issued a charging document to begin removal proceedings, he or she retained discretion as to whether to detain the individual.³⁹ Once in removal proceedings before the immigration judge, the judge could administratively close proceedings or move the case slowly if he or she felt it necessary in order to allow the family time to remain in the United States or to gather evidence to build a defense to deportation.⁴⁰

But the current Administration has issued new directives to explicitly remove an officer’s discretion when children are impacted.⁴¹ For example, one of those new directives eliminates prior guidance for immigration officials to take into account an individual’s role as a parent, legal guardian, or primary caretaker of a minor child when deciding whether to exercise prosecutorial discretion in a case.⁴² It also eliminates guidance for ICE to facilitate a parent’s temporary return to the United States in order to participate in court proceedings affecting his or her parental rights.⁴³ Finally, the current Administration has promulgated rules to prohibit immigration judges from closing cases,⁴⁴ and put stringent quotas in place so that immigration judges must adjudicate removal cases in record speed.⁴⁵ This evisceration of discretion dramatically impacts citizen children with undocumented parents because Congress and the Board of Immigration Appeals have already worked in tandem to restrict the applicability of any existing statutory protection for

37. *See id.*

38. *Id.*

39. *See* Immigration & Nationality Act (“INA”) § 236(a)(2)(B), 8 U.S.C. § 1226(a)(2)(B) (2001); *see also* 8 C.F.R. § 1236.1(c)(8) (2015) (noting that the DHS officer “may, in the officer’s discretion, release an alien not described in section 236(c)(1) of the Act . . . provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding”).

40. *See, e.g.*, 8 U.S.C. § 1229a (2017); *see* 8 C.F.R. § 1240.1(a)(1)(iv) (2015).

41. 2017 Directive, *supra* note 8.

42. *Compare* 2013 Directive, *supra* note 8 at §§ 2, 5.2, *with* 2017 Directive, *supra* note 8 at §§ 5.

43. *Compare* 2013 Directive, *supra* note 8 at § 5.7.1, *with* 2017 Directive, *supra* note 8. The new directive also doesn’t specify that, should a parent be detained, initial detention should be as close as practically possible to the minor child(ren); and it eliminates training instructions, requirements, and compliance mechanisms related to parental rights and interests.

44. U.S. DEP’T OF HOMELAND SEC., PM-602-0050.1 UPDATED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAS) IN CASES INVOLVING INADMISSIBLE AND DEPORTABLE ALIENS 3 (June 28, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>.

45. *See Matter of S-O-G & F-D-B*, 27 I&N Dec. 462 (A.G. 2018).

parents facing deportation.⁴⁶ When viewed in totality, all of these changes have made the interests of U.S.-citizen children largely irrelevant when their parents face removal from the United States.

II. LONG-TERM CONSEQUENCES TO SOCIETY WHEN PARENTS OF U.S.-CITIZEN CHILDREN ARE DEPORTED

Deporting parents without regard to the impact on their American children undermines important economic and societal interests. In the short-term, children left behind when their parents are deported often end up in the foster care system, at a significant financial cost to taxpayers.⁴⁷ Longer-term, there are significant heightened healthcare costs associated with the trauma of children losing their parents.⁴⁸ As with the growing awareness that incarceration and family separation of juveniles in the criminal justice context bears long-term societal fiscal costs, the same is true in the immigration context.⁴⁹

46. In 1996, Congress removed and replaced a discretionary remedy entitled Suspension of Deportation with Cancellation of Removal. *See* The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, Div. C. In doing so, Congress increased the required residency in the United States from seven to ten years and further specified that all ten years must accrue before ever having contact with immigration authorities. 8 U.S.C. § 1229b(b)(1)(A) (2008) (cancellation of removal). Congress also changed the hardship that must be demonstrated towards the U.S.-citizen or lawful-permanent-resident spouse, child, or parent from “extreme hardship” to “exceptional and extremely unusual hardship.” 8 U.S.C. § 1229b(b)(1)(D). Since the statutory change, the Board of Immigration Appeals has interpreted the hardship standard to require a level of harm well above that which would normally befall a child who is removed from their country, language, schools, and culture. *Zacarias-Velasquez v. Mukasey*, 509 F.3d 429, 434 (8th Cir. 2007).

47. *See* Am. Immigration Council, *supra* note 19, at 3 (“If a parent is unable to arrange childcare or custody prior to detention or deportation, the child may be taken by the state’s Child Protective Services (CPS) for placement and case management”). Approximately 5,000 U.S.-citizen children in foster care had a detained or deported parent in 2011. *Id.*; Amanda Fixsen, *Children in Foster Care: Societal and Financial Costs*, AFFEC 4 (Nov. 2011), http://www.afamilyforeverychild.org/wp-content/uploads/2018/04/children_in_foster_care.pdf (stating that the foster care system cost \$9 billion annually as of 2011); Nicholas Zill, *Better Prospects, Lower Costs: The Case for Increasing Foster Care Adoption*, NATIONAL COUNCIL FOR ADOPTION, NAT’L COUNCIL FOR ADOPTION 2 (May 2011), http://www.adoptioncouncil.org/images/stories/NCFA_ADOPTION_ADVOCATE_NO35.pdf.

48. *See, e.g.*, L.E. Gulbas et al., *Deportation Experiences and Depression Among U.S. Children with Undocumented Mexican Parents*, 42 CHILD: CARE, HEALTH AND DEV. 220, 228 (2015), <http://onlinelibrary.wiley.com/doi/abs/10.1111/cch.12307>.

49. *See* N.W. Bluhm Legal Clinic, *The Costliest Choice: Economic Impact of Youth Incarceration*, COMMUNITY SAFETY & THE FUTURE OF ILLINOIS’ YOUTH PRISONS, 1 (Mar. 2018), https://www.law.northwestern.edu/legalclinic/cfjc/documents/community_safetymarch.pdf; *see* Paul Ashton, et al., *Sticker Shock: Calculating the Full Price Tag for Youth Incarceration*, JUSTICE POLICY INST. (Dec. 2014), http://www.justicepolicy.org/uploads/justicepolicy/documents/sticker_shock_final_v2.pdf; *see* ELLA BAKER, CENT. FOR

Similarly, the children subjected to de facto deportation along with their immigrant parents pose significant costs to the United States when (and if) the children return later in life. Over 30 years ago, Justice Brennan warned of the societal cost posed by state action that would create an illiterate underclass within society.⁵⁰ In *Plyler v. Doe*, the U.S. Supreme Court found that a state statute that limited access to a public grade school education to children with lawful immigration status posed stigmatic and practical harms to the excluded children, which were constitutionally significant in the context of education access.⁵¹ The Court found that, because the state statute would impermissibly impose a lifetime hardship on a discreet class of children not accountable for their disadvantaged status, it could not survive constitutional scrutiny.⁵² Ultimately, the Court held that *all* children in the United States have a right to a free public grade school education, regardless of immigration status.⁵³

In the situation at hand, forcing a large segment of children to live as an underclass deprived of their parents, or to grow up in lesser circumstances outside of their country of citizenship with the right to return as adults, presents even more severe dangers than those foreseen by the Court in *Plyler*. The current situation disadvantages a sizeable portion of the U.S.-child population who will have every right to return later in life. After having spent their formative years in countries with limited educational opportunities or access to healthcare, assimilation back into the U.S. economy will be challenging.⁵⁴ This group is not likely to have the language skills or training to fare well financially in the United States. This is also likely to be a population with significant health needs based on past trauma and years of socioeconomic and healthcare deprivation.⁵⁵ Finally, this population is likely to experience significant social isolation, disaffection, and disillusionment with the United States, still traumatized and angry over how their families have been treated.

Although there is a scarcity of empirical data on the reassimilation of American children after deportation, the stories of those who lived through the Mexican repatriations of the 1930s provide an instructive picture of the likely impact of such large-scale displacement of U.S. citizens. Over a million persons of Mexican heritage were repatriated during the Great Depression, 60% of whom were U.S.-citizen children.⁵⁶ As has been described, the U.S. children experienced three separate traumas: (1) the forced expulsion from their country of birth; (2) the

HUMAN RIGHTS, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 7 (Sept. 2015), <http://whopaysreport.org/executive-summary/>.

50. *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

51. *Id.* at 236.

52. *Id.*

53. *Id.* at 230.

54. *Reverse Culture Shock: The Challenges of Returning Home*, U.S. DEP'T OF STATE, <https://2009-2017.state.gov/m/fsi/tc/c56075.htm> (last visited Sept. 4, 2019) (surveying the challenges in returning to the U.S. after a significant period abroad).

55. *See Statement on the Effects of Deportation and Forced Separation on Immigrants, their Families, and Communities*, 62 AM. J. CMTY PSYCHOL. 3, 4-7 (2018).

56. FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930'S* 266 (Rev. Ed. 2006).

difficult assimilation into an unknown country, often without the required language skills, and with depleted educational, health, and financial resources; and finally, (3) for those who returned, the trauma surrounding reentry into American society after many years of lesser opportunities.⁵⁷

Likely due in large part to the shame and anger experienced by this population, there is a lack of documentation to quantify how many of the repatriated American children returned later in life. One narrative describing a U.S. citizen subject to de facto deportation at the age of 5, who later returned at age 19, is likely representational of the experiences of many who returned. Even after working for the Ford Motor Company for 40 years in Detroit upon his return to the United States and raising a successful family, Jose Lopez remained scarred by the experience of his de facto deportation to Mexico. He reported ongoing resentment at being “deprived of an education, deprived of medical care, deprived of food. All the necessities that growing children need.”⁵⁸

In empirical studies, repatriated U.S. citizens who returned later in life commonly express resentment and regret at being denied an education.⁵⁹ Formerly repatriated returnee citizens also note the lack of remaining family bonds after years of separation, difficulty finding family members who remained in the United States, embarrassment at limited English skills, and a feeling of being a misfit in both Mexico and the United States.⁶⁰ Many of the U.S.-born repatriates were not able to return to the United States because of the difficulty of establishing U.S. citizenship if their parents had died. The trauma of being forced from their homeland has stayed with many of the U.S.-born repatriates for life. As 80-year-old Ignacio Piña explained when referring to his repatriation nearly 75 years ago, “Today, many years later, I still have nightmares.”⁶¹

A. Harm to American Children When Parents Deported

Encarnación Bail Romero is a Guatemalan mother who worked at a poultry factory in Missouri when ICE raided the plant and apprehended her, along with about 135 other workers.⁶² ICE agents charged Ms. Romero with using false identification and she placed her six-month-old son Carlos in the custody of two aunts.⁶³ However, these aunts were also undocumented and indigent and placed Carlos into the foster care system.⁶⁴ While Ms. Romero was in immigration

57. *Id.*

58. *Id.* at 268.

59. The U.S.-citizen children left behind in the United States when their parents are deported also express similar emotional anguish. Luis H. Zayas, et al., *The Distress of Citizen-Children with Detained and Deported Parents*, 24 J. CHILD AND FAM. STUD. 3213, 3214–15 (2015).

60. BALDERRAMA & RODRÍGUEZ, *supra* note 56, at 273.

61. *Id.* at 276.

62. LUIS H. ZAYAS, FORGOTTEN CITIZENS: DEPORTATION, CHILDREN, AND THE MAKING OF AMERICAN EXILES AND ORPHANS 195 (2015); *In re C.M.B.R.*, 332 S.W.3d 793, 801–02 (Mo. 2011) (en banc).

63. ZAYAS, *supra* note 62.

64. *Id.*

detention, she was notified that the American foster parents wished to adopt Carlos.⁶⁵ Ms. Romero refused to relinquish her parental rights, wanting to maintain family unity even if deported.⁶⁶ She wrote to the court making it clear that she was not willing to relinquish custody of her son. She also asked the court in writing to allow her visitation with Carlos. The prospective adoptive parents wrote to Ms. Romero while she was in detention, but the letters were returned unopened. Notwithstanding all of Ms. Romero's efforts to see her son, a Missouri judge granted custody to the adoptive parents and found that Ms. Romero's detention and deportation amounted to an abandonment of Carlos. Citing Ms. Romero's poverty and undocumented status, the judge ruled that placing her child with her would not be in his best interest.⁶⁷

Ms. Romero's situation illustrates some of the ways that detaining and deporting parents can permanently impact American children. When parents are deported, family reunification often becomes impossible, especially because child protection agencies and courts often seek to terminate parental rights after the deportations are carried out.⁶⁸ While parents have the right to receive notification of custody proceedings affecting their children, attend such proceedings, and receive copies of related court documents, these due-process rights are insufficient to protect the substantive right to family in the context of immigration enforcement. For example, under federal law, parental rights can be terminated if a child has been out of the parent's custody for 15 of the past 22 months.⁶⁹ Generally, child and family services agencies implement family reunification plans that require parents to have regular contact with their children and to participate in family court hearings related to the children.⁷⁰ For parents who are detained or who have been deported, these requirements all too often pose insurmountable barriers.⁷¹ As one scholar sums it up, "parental deportation after removal is one of the most effective means of achieving termination of an immigrant parent's rights and state agencies have taken

65. *Id.*

66. *Id.*

67. *Id.*; see also *In re V.S.*, 548 S.E.2d 490, 493 (Ga. Ct. App. 2001) (reversing juvenile court's finding of abandonment and termination of parental rights based in part on its finding that "[t]he father is an illegal alien and is subject to deportation").

68. SETH FREED WESSLER, RACE FORWARD: THE CENTER FOR RACIAL JUSTICE INNOVATION, SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 44 (2011), <https://www.raceforward.org/research/reports/shattered-families>.

69. Adoption and Safe Families Act of 1997, 42 U.S.C. § 675(5)(E) (2011) ("[I]n the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months . . . the State shall file a petition to terminate the parental rights of the child's parents (or, if such a petition has been filed by another party, seek to be joined as a party to the petition), and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption . . .").

70. See generally CHILD WELFARE INFORMATION GATEWAY, REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN 1–3 (2016), <https://www.childwelfare.gov/pubPDFs/reunify.pdf>.

71. Am. Immigration Council, *supra* note 19, at 3.

advantage of this fact.”⁷² Moreover, in prosecutions of parents for illegal reentry, courts have consistently held that it is irrelevant whether a deported parent was attempting to reenter the country to contest the termination of their parental rights and subsequent adoption of their child.⁷³

Unfortunately, the separation and adoption of children left behind as a result of detention and deportation, contrary to their parents’ wishes, have many dark parallels throughout our nation’s history. They harken back, for example, to a period when Native American children were routinely separated from their parents. Indeed, Congress enacted the Indian Child Welfare Act in 1978 after considering extensive evidence that large numbers of Native American children separated from their families and tribes were being placed in non-Native American homes through state adoption, foster care, and parental rights termination proceedings. Congress found “that an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children [were] placed in non-Indian foster and adoptive homes and institutions.”⁷⁴

The separation of children from their Central American parents also parallels historic abuses in foreign adoptions. For Guatemalan women who find themselves detained or deported while their children are moved into the foster care system and placed for adoption without consent, the situation may be eerily reminiscent of Guatemala’s 36-year civil war during which thousands of children were taken from their mothers and trafficked through unlawful adoption agencies to

72. Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C. J.L. & Soc. JUST. 63, 95 (2012).

73. *United States v. Hernandez-Baide*, 392 F.3d 1153, 1155, 1158 (10th Cir. 2004); *see also* *United States v. Saucedo-Patino*, 358 F.3d 790, 794–95 (11th Cir. 2004); *United States v. Dyck*, 334 F.3d 736, 741–42 (8th Cir. 2003); *United States v. Carrasco*, 313 F.3d 750, 755–56 (2d Cir. 2002); *Anita C. v. Superior Court*, 2009 WL 2859068, at *4, *8 (Cal. Ct. App. Sept. 8, 2009).

74. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34–35 (1989) (citing Congressional hearings).

be placed in American homes.⁷⁵ During this period, over 1 in 100 babies born in Guatemala were adopted in the United States.⁷⁶

The separation of children from their parents through deportation is also reminiscent of the early nineteenth century “orphan trains.”⁷⁷ As with the citizen

75. Guatemala was the second most popular country for American adoptions (after China) until its international anti-corruption commission, set up with the United Nations, halted all foreign adoptions in 2007 after documenting over 3,000 cases of irregular adoptions. *See, e.g.,* Arthur Brice, *Guatemalan Army Stole Children for Adoption, Report Says*, CNN (Sept. 12, 2009, 9:16 AM), <http://www.cnn.com/2009/WORLD/americas/09/12/guatemala.child.abduction/index.html>; *see also* Lee Tucker, *Guatemala's Forgotten Children*, HUMAN RIGHTS WATCH (July 1997), <https://www.hrw.org/reports/1997/guat1/>; Schuster Inst. for Investigative Journalism, *Adoption: Guatemala*, BRANDEIS U. (Mar. 8, 2012), <https://www.brandeis.edu/investigate/adoption/guatemala.html>. Notwithstanding that Guatemala is approximately one hundredth the size of China, the number of Guatemalan children adopted in the U.S. was roughly equivalent to the number of Chinese children adopted in the U.S. for a few years prior to the UN's halting of foreign adoptions from Guatemala. Schuster Inst. *supra*. In 2007, and for several years before, 1 out of every 110 Guatemalan children was adopted in the United States. *Id.* According to a Hague 2007 fact-finding mission, a number of rural Guatemalan families recounted selling their babies for small amounts of money in order to support their families. *Id.* Moreover, UNICEF Guatemala reported that a significant number of mothers relinquished children year after year, suggesting that “pregnancy had become a salaried job.” *Id.* Indeed, “a successful pregnancy brought in the same earnings as a year's domestic servitude.” *Id.* Guatemalan mothers were also defrauded into relinquishing their babies during this period. *Id.* As reported in *Adoptions in Guatemala: Protection or Business?*, some young pregnant women were offered a place to stay for free or in exchange for light housekeeping. *Id.* (citing Casa Alianza, *Adoptions in Guatemala: Protection or Business?*, BRANDEIS EDU (Nov. 2007) <https://www.brandeis.edu/investigate/adoption/docs/InformedeAdopcionesFundacionMyrnaMack.pdf>). But once the young women gave birth, they were given high bills for prenatal expenses and services, and told the costs would be waived if the new mothers agreed to relinquish their babies. *Id.* The same report also identified “adoption rings,” in which a small group of midwives, nurses, and obstetricians delivered many of the babies who were then given up for adoption. *Id.* Some of these midwives, nurses, and obstetricians were later found to have drugged the mothers in order to steal their infants, or to have coerced the mothers into giving up their babies by defrauding them with inflated medical bills. *Id.* During this same period of U.S. adoptions, women reported having their children kidnapped. *Id.* For example, in 2006, a Guatemalan woman reported being drugged while riding on a bus with her one-year-old baby. When she awoke, her baby was missing. *Id.* The following year she learned that an American couple had adopted her baby. *Id.* Similarly, another woman reported having her son taken while she was working selling tortillas. *Id.* By the time she found her son, she discovered that fraudulent paperwork had already been prepared for his adoption. *Id.* Another Guatemalan mother, whose infant daughter was stolen from her grandmother's arms, regularly appeared at government offices, searched through daycare centers and held a five-day hunger strike to draw attention to the problem. *Id.* When she finally located her daughter, she had been stripped of her identity and renamed, and was within weeks of being taken home by adoptive parents in Indiana. *Id.*

76. *See* Schuster Inst., *supra* note 75.

77. The term “orphan trains” refers to a controversial social experiment that was carried out in the United States between 1854 to 1929. *See generally* Angeliqne Brown,

children who are freed for adoption by U.S. parents once their biological immigrant parents' rights are severed through detention and deportation, the so-called orphans were actually children of recent Catholic immigrants who were shipped off to Protestant parents.⁷⁸

We now know that these past and current threats to family unity pose documented threats to children's health. A child's risk of mental-health issues such as depression, anxiety, and severe psychological distress increases following the detention or deportation of a parent. Increasingly, mental-health professionals have been documenting toxic stress due to fear that a family member will be deported.⁷⁹ According to Howard Zucker, the Commissioner of the New York State Department of Health, "[p]rolonged stress (also known as toxic stress) can permanently disrupt the structure and function of a child's developing brain. These changes can manifest as greater likelihood of adopting unhealthy behaviors (e.g., smoking and illicit drug use), increased risk of diseases (e.g., obesity, heart disease, and cancer), depression and socioeconomic inequalities."⁸⁰

The disruption of families because of immigration enforcement also poses severe financial hardship on children. A study of immigration enforcement in six U.S. locations between 2002 and 2009 found that families' incomes declined by an average of 70% within six months of a parent's immigration-related arrest, detention, or deportation.⁸¹ This also adversely affects families' housing and stability. A 2016 study of immigration enforcement and housing foreclosures found that "deportations exacerbate rates of foreclosure among Latinos by removing income earners from owner-occupied households."⁸²

In fact, even separation of mother and child for short periods of time negatively impacts the mother-child relationship and results in "negative socio-

Orphan Trains (1854-1929), SOCIAL WELFARE HISTORY PROJECT (2011), <https://socialwelfare.library.vcu.edu/programs/child-welfarechild-labor/orphan-trains>.

During this period, an estimated 250,000 orphaned, abandoned, and homeless children were rounded up from cities on the east coast and sent via train to rural areas. *Id.*

78. *Id.*; Dan Scheuerman, *Lost Children: Riders on the Orphan Train*, 28 HUMANITIES 44, 44–47 (2007); Andrea Warren, *The Orphan Train*, THE WASH. POST (Nov. 11 1998), <https://www.washingtonpost.com/archive/1998/11/11/the-orphan-train/613ad975-9c02-4f32-9a6e-82b8afec894d/>; Rebecca S. Trammell, *Orphan Train Myths and Legal Reality*, 5 MOD. AM. 3, 3–13 (2009).

79. Am. Immigration Council, *supra* note 19, at 1.

80. Ex. 79 Declaration of Howard A. Zucker, M.D., J.D. in support of States' Motion for Expedited Discovery and Regular Status Conferences at 9 ¶ 35, *Washington v. United States*, No. 2:18-cv-00939-MJP (W.D. Wash. 2018); *see also* Ex. 51 Declaration of Shadi Houshyar in support of States' Motion for Expedited Discovery and Regular Status Conferences at 4 ¶ 8, *Washington v. United States*, No. 2:18-cv-00939-MJP (W.D. Wash. 2018) ("Frequent exposures to strong, frequent, and/or prolonged adversity without adequate adult support can cause 'toxic stress' that leads to physiological effects on a child's neuroendocrine and immune systems, stress regulatory system, and brain development. Children suffering from separation from a parent may show signs like those of posttraumatic stress disorder, including loss of appetite, trouble sleeping, and regressive behaviors.").

81. Am. Immigration Council, *supra* note 19, at 2.

82. *Id.*

emotional outcomes such as aggression and negativity.”⁸³ Extended separations have been linked to low achievement in math and reading in middle childhood,⁸⁴ and behavioral problems, such as increased likelihood of symptoms of borderline personality disorder in adolescence and adulthood.⁸⁵ Other evidence suggests that placing children in foster care “increases their likelihood of becoming delinquent during adolescence and requiring emergency healthcare in the short term.”⁸⁶ The “physical accessibility” of the mother has been found to have significant implications for positive child development.⁸⁷

There is also a significant body of literature on the impact of incarceration of parents on children. Studies show that children whose fathers are incarcerated are significantly more likely to experience material hardship, residential instability, and family dissolution.⁸⁸ They are also more likely to receive public benefits and are at heightened risk of being placed in foster care.⁸⁹ Children with an incarcerated parent are three to four times more likely to engage in delinquent behavior, and two and a half times more likely to suffer from mental-health issues.⁹⁰ In the long-term, children with incarcerated parents are more likely to have substance-abuse problems, to be unemployed, and to experience divorce and separation from their own children.⁹¹ Many of these same hardships apply equally to children who grow up without their parents because the parents have been deported.

B. Harm to American Children from De Facto Deportation

In most circumstances, the deportation of parents will inevitably result in the de facto deportation of the children as well. Although the family unity is

83. *In re Wunika A.*, 65 N.Y.S.3d 421, 427 n.4 (N.Y. Fam. Ct. 2017); Kimberly Howard, et al., *Early Mother-Child Separation, Parenting, and Child Well-Being in Early Head Start Families*, 13 ATTACHMENT & HUM. DEV. 5, 14 (2011).

84. Howard et al., *supra* note 83, at 21.

85. *Id.* at 7.

86. Joseph J. Doyle, Jr., *Causal Effects of Foster Care: An Instrumental Variables Approach*, 35 CHILD. AND YOUTH SERVS. R. 1143, 1149 (2013), <http://mitgmtfaculty.mit.edu/jjdoyle/research-publications/>.

87. Zucker, *supra* note 80, at 23; *see also* Mokhtar Malekpour, *Effects of Attachment on Early and Later Development*, 53 BRIT. J. OF DEV. DISABILITIES 81, 82–88 (2007).

88. *See* Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, 278 NAT'L INST. OF JUST. J. (Mar. 2017), <https://nij.gov/journals/278/Pages/impact-of-incarceration-on-dependent-children.aspx>; ROSS D. PARKE & K. ALLISON CLARKE-STEWART, EFFECTS OF PARENTAL INCARCERATION ON YOUNG CHILDREN 19 (Dec. 2001), <https://aspe.hhs.gov/basic-report/effects-parental-incarceration-young-children>.

89. Doyle, Jr., *supra* note 86, at 9. Ninety-one percent of those deported are men, making the comparison applicable. *Id.*

90. Kalina M. Brabeck, et al., *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families*, 84 AM. J. ORTHOPSYCHIATRY 496, 500 (2014).

91. *Id.*

preserved, this situation raises a different set of concerns. As has been aptly described:

An American child of undocumented immigrant parents deported to Mexico . . . will find himself or herself living in abject poverty, experiencing substandard (if any) schooling, and witnessing (if not experiencing) gang and criminal violence of a degree and nature that is completely foreign to the streets of . . . American communities where undocumented immigrants have been swept up in ICE raids.⁹²

U.S.-citizen children who are de facto deported to Mexico with their parents are deprived of the benefits of U.S. citizenship like access to healthcare and quality education.⁹³ The transition between school systems in the United States and Mexico is not easy, particularly if the children are moved to rural areas.⁹⁴ These American children in Mexico must now adjust to a new educational system and face hurdles in terms of language and access issues, as well as discrimination as children of deported parents. As sociologist Joanna Dreby concludes, “[n]ot only is that return disruptive, but it robs the United States of these children’s future potential and productivity, losing out on the talent of native born citizens. Perhaps most disturbing is the permanent loss of U.S.-citizen children’s aspirations when they return to Mexico.”⁹⁵

While children who experience migration and cultural change by family choice will not necessarily suffer, the U.S.-citizen children at issue here are those who experience forced migration when their parents are deported. As has been rightly noted, “[i]t is the negation of choice and the unjust circumstances that make relocation by deportation an ordeal harmful to citizen-children, not necessarily that the idea of growing up in Mexico is inherently incongruent with the rights of the child.”⁹⁶ Without a comparable education, “children who are already disadvantaged by racial prejudice and by an inability to speak English ‘will become permanently locked into the lowest socio-economic class.’”⁹⁷

III. LEGAL CHALLENGES TO DE FACTO DEPORTATION OF AMERICAN CHILDREN

A. A Striking Consistency in the Circuit Court of Appeals in Challenges to the Constitutionality of “Deporting” American Children

Notwithstanding the profound societal costs of deportation and the undermining of rights inherent in citizenship, all of the circuit courts that have examined the issue have held that deporting the parents of U.S.-citizen children does not constitute a de facto deportation of U.S.-citizen children in violation of their

92. ZAYAS, *supra* note 62, at 173–74 (internal citations omitted).

93. Brabeck et al., *supra* note 90, at 501.

94. *Id.*

95. ZAYAS, *supra* note 62, at 170 (internal citations omitted).

96. *Id.*

97. *Id.* at 173 (internal citations omitted).

guaranteed constitutional rights.⁹⁸ These decisions have reflected several justifications: (1) that deportation of a child's parent does not directly cause the deportation of the child; (2) that U.S.-citizen children can remain in the United States without their parents or return to the United States once they are adults; and (3) that recognizing that U.S.-citizen children have a constitutional right to remain in the United States and be raised by their parents would advantage and incentivize undocumented immigrants to have children in the United States, a policy outcome that should be avoided.⁹⁹

Over the years, the circuit courts of appeals have consistently held that deporting a parent of a U.S.-citizen child does not violate the citizen child's constitutional right to family, to live in the child's country of citizenship, or to travel. In *Acosta v. Gaffney*, a case involving an infant-child citizen with parents facing deportation, the Third Circuit acknowledged the constitutional right of a U.S. citizen to reside wherever he or she wishes, and to engage in travel.¹⁰⁰ Although the court acknowledged the significance of this right, it held that it was inapplicable in the case of an infant child who was too young to make a conscious choice as to where to reside.¹⁰¹ According to the court, the fact that the child's birth in the United States was fortuitous, as compared to a citizen who makes a conscious decision to live in America, meant the child had a lesser right to remain.¹⁰² The court reasoned that all an infant child wants is to be with his or her parents and that can be in any country.¹⁰³ Furthermore, the court relied on the fact that the right to reside in the United States is a lifelong right so the child can return later in life if the child so chooses.¹⁰⁴

The district court's decision upholding the child's claim that deporting her parents would violate her constitutional right to remain in the United States contrasted with the circuit court's summary disposal of the matter with minimal analysis.¹⁰⁵ Even though the district court rejected the plaintiff's claim that she was being deprived of her parents based solely on her nationality in violation of the Fifth

98. There have, however, been strong dissents on this issue. For example, Judge Harry Pregerson of the Ninth Circuit Court of Appeals, dissented in 60 unpublished decisions and each time noted that ordering the deportation of a noncitizen parent would in effect also deport the U.S.-citizen child. Immigration Prof., *Judge Pregerson Dissents in 60 Cases: Objects to Effective Deportation of U.S. Citizens*, IMMIGRATIONPROF BLOG (Oct. 20, 2007), <https://lawprofessors.typepad.com/immigration/2007/10/judge-pregerson.html>. In a published dissent to a decision deporting the father of two U.S.-citizen children, Judge Pregerson wrote: "This de facto banishment also denies the children their constitutionally protected right to remain in the country of their birth with their family intact, in violation of due process." *Platas-Hernandez v. Lynch*, 611 F. App'x 404 (9th Cir. 2015) (Pregerson, J., dissenting).

99. See, e.g., *Acosta v. Gaffney*, 558 F.2d 1153 (3d Cir. 1977); *Mamane v. Immigr. & Naturalization Serv.*, 566 F.2d 1103 (9th Cir. 1977).

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

101. *Id.*

102. *Id.*

103. *Id.* at 1158.

104. *Id.*

105. *Acosta v. Gaffney*, 413 F. Supp. 827 (D.N.J. 1976), *overruled by Acosta v. Gaffney*, 558 F.2d 1153 (3d Cir. 1977).

Amendment guarantee of due process, it held that deporting the plaintiff's parents would be a de facto deportation of an American-citizen child.¹⁰⁶ Describing the de facto deportation of the infant American child as "repugnant to the Constitution," the court noted that no branch of government has the power to abridge the constitutional right to remain that is afforded to citizens.¹⁰⁷ It characterized the right to remain for as long as desired as "the central privilege of an American citizenship already vested."¹⁰⁸ The court recognized that, with both parents being deported, abandoning the child to remain in the United States alone was not an option.¹⁰⁹

By reversing the lower court, the Third Circuit's analysis disregarded the constitutional interests of the children on multiple levels. First, if it is in the best interests of children to live in the United States, the presumption should be that it would also be in their best interests to have their parents present to raise them. Second, the right to remain in the United States is not the same as a right to return later in life. If a U.S.-citizen child is raised with limited access to healthcare and education in another country, returning to the United States as an adult will not ameliorate the lifetime impact of growing up without those resources.

The circuit court in *Acosta* focused on the young age of the children and characterized them as not being at the age of maturity to exercise the choice as to where to live. According to the court, "[i]t is the fundamental right of an American citizen to reside wherever he wishes, whether in the United States or abroad, . . . In the case of an infant . . . the right is purely theoretical, however, since the infant is incapable of exercising it."¹¹⁰ This analysis fails to take into account the need to safeguard children's constitutional rights.

Additional courts of appeals have followed suit, guided largely by the policy concern with creating a loophole in the immigration law whereby undocumented parents could avoid deportation by having children on American soil. In *Mamanee v. Immigr. & Naturalization Serv.*, the Ninth Circuit similarly rejected a claim that the deportation of immigrant parents resulted in an unconstitutional de facto deportation of an American child.¹¹¹ The circuit court devoted little time to this issue, relying on reasoning from other courts that: (a) deportation is a term of art and is limited to de jure deportation carried out directly by the federal government; and (b) prohibiting the deportation of parents of U.S.-citizen children would allow immigrants to enter the country easily on visas and then forestall deportation by having children on American soil.¹¹² In *Lee v. Immigr. & Naturalization Serv.*, the Ninth Circuit similarly rejected a de facto deportation claim relying on the Fifth Circuit's ruling that "an alien illegally present in the United States cannot gain a

106. *Id.* at 830–34.
107. *Id.* at 832.
108. *Id.* at 832–33.
109. *Id.* at 833.
110. *Acosta v. Gaffney*, 558 F.2d 1153, 1157 (3d Cir. 1977).
111. 566 F.2d 1103, 1106 (9th Cir. 1977).
112. *Id.* at 1105–06.

avored status merely by the birth of his citizen child.”¹¹³ In *Application of Amoury*, the U.S. District Court for the Southern District of New York also expressed little reticence in punishing children for the status of their parents.¹¹⁴ The court stated:

It is all too true that oftentimes individuals, entirely innocent of wrongful conduct, suffer equally with those who commit the wrongful act which brings penalties in its wake. But this does not mean that a constitutional violation has been visited upon the innocent person. It is not required that the procedural due process due [sic] an accused must also be accorded to those who may be affected by the final result of proceedings against the accused.¹¹⁵

The terminology used by the court when describing an immigration proceeding is striking. In dismissing the claim that the child was entitled to due process before being de facto deported from his country of citizenship along with his parents, the court referred to the parents as “the accused.”¹¹⁶ Although the criminal justice terminology matches well with the factual reality that deportation constitutes punishment or banishment, the Supreme Court has historically rejected the characterization of immigration proceedings as criminal in nature.¹¹⁷ By doing so, the Supreme Court has insulated immigration proceedings from the constitutional protections that would otherwise be afforded to immigrants facing deportation, such as the right to counsel at no expense, protection from cruel and unusual punishment, and double jeopardy.

If the Supreme Court were to recognize deportation as punishment, an argument could be made that de facto deportation of U.S.-citizen children, or deporting the parents of U.S.-citizen children and depriving them of family unity, constitutes cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution. There is ample evidence that the separation of children and parents is being carried out as a means of punishment, or as a deterrent, one of the prime policy goals animating the criminal justice system.¹¹⁸ Here, it is the intentional

113. 550 F.2d 554, 556–57 (9th Cir. 1977) (overruled on other grounds) (citing *Gonzalez-Cuevas v. Immigr. and Naturalization Serv.*, 515 F.2d 1222, 1224 (5th Cir. 1975)). In *Gonzalez-Cuevas*, the Fifth Circuit stated that “[p]etitioners’ violations of the immigration laws create no extraordinary rights in them, directly or vicariously through their citizen children.” *Gonzalez-Cuevas*, 515 F.2d at 1224. In an earlier case, the Fifth Circuit did not dispute that the deportation of parents results in a de facto deportation of the American child. See *Aalund v. Marshall*, 461 F.2d 710, 714 (5th Cir. 1972). However, it found that the de facto deportation of the child did not impact the validity of the parents’ deportation order. *Id.*

114. 307 F. Supp. 213, 216 (S.D.N.Y. 1969).

115. *Id.*

116. *See id.*

117. *See, e.g.*, Lori A. Nessel, *Instilling Fear and Regulating Behavior: Immigration Law as Social Control*, 31 GEO. IMMIGR. L.J. 525, 533, 541–42 (2017) (discussing the tension between the increasing criminalization of immigration law and the long-standing jurisprudence holding deportation to be a civil matter, rather than a criminal law proceeding).

118. John Burnett, *Transcript: White House Chief of Staff John Kelly’s Interview with NPR*, NPR (May 11, 2018, 11:36 AM), <https://www.npr.org/2018/05/11/610116389>

banishment of the citizen's parent that constitutes cruel and unusual punishment of the citizen child.

The Supreme Court, however, at least in the context of undocumented children's access to public education, has been far more circumspect about vesting harm upon children because of their parents' immigration violations. Specifically, in *Plyler v. Doe*, the Supreme Court held that the State of Texas could not deny a public education to children because of the unlawful immigration status of their parents.¹¹⁹ Noting the important role of education, the risks to society in creating an illiterate underclass, and the fact that the children could not be faulted for the decisions of their parents, the Supreme Court held that children could not be held accountable and treated unfairly because of the immigration violations of their parents.¹²⁰ The Supreme Court stopped short of finding that undocumented children were a suspect class, or that education was a fundamental right, but it nevertheless found that the State's action in limiting access to education to those who are lawfully present in the United States violated the equal protection guarantees of the Fourteenth Amendment.¹²¹

The relevance of *Plyler* to the plight of U.S.-citizen children faced with de facto deportation is significant because that case involved undocumented children, whereas the children at issue here are full U.S. citizens entitled to enhanced levels of constitutional protection. President Obama's Executive Order allowing a temporary reprieve from deportation to law-abiding parents of "dreamers"¹²² also signaled recognition that children need their parents and a move away from villainizing parents who lack authorization to remain in the United States.

As discussed above, in claims involving equal-protection challenges based on disparate treatment of children with deportable parents versus children of U.S.-citizen parents, courts have held that the plenary power doctrine mandates broad discretion to Congress and a minimal role for the court. For claims based on constitutional deprivations to the American children, the courts have recognized a fundamental right to live in the country of the citizen's choosing, but held that this

/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr. ("[family separation] . . . would be a tough deterrent.").

119. 457 U.S. 202, 230 (1982).

120. *Id.* at 220–24, 230.

121. *See id.*

122. *See* Memorandum from Jeh Johnson, Sec'y, Dep't of Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship and Immigr. Serv., et al. 3 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_2.pdf (DAPA was announced in November 2015 by the Obama Administration with a goal of allowing for deferred action status for certain undocumented immigrants who had resided in the United States since 2010 and had children who were either U.S. citizens or lawful permanent residents). However, DAPA never took effect because of litigation resulting in an injunction. *See Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015) (holding that implementation of DAPA was properly enjoined because the States had proven a likelihood of success on the merits on their substantive claim that DAPA was contrary to the INA).

was not violated because children can return to their country of citizenship in the future.

B. Citizenship and Contingent Rights

The decisional law countenancing de facto deportation of U.S.-citizen children discussed above suggests that for U.S. citizens, the possession of rights that may be exercised at a later date, even if, for practical purposes, they cannot be enjoyed now, undercuts any claim to an extant constitutional deprivation. This raises important normative questions about the meaning of contingent rights and citizenship. Legal theorists have described the difference between having a right and enjoying that right. For example, legal philosophers have explained that there may be moral or legal rights that can be saved for a child until he or she is an adult, such as the preservation of a right to freedom of movement for an infant not yet capable of walking.¹²³ But even though these rights cannot yet be enjoyed by a child, they can be violated in advance, before the child is even in a position to exercise them. “Legal philosopher Joel Feinberg has observed that ‘[t]he violating conduct guarantees *now* that when the child is an autonomous adult, certain key options will already be closed to him. His right while he is still a child is to have these future options kept open until he is a fully formed self-determining adult capable of deciding among them’”¹²⁴

Here, deporting parents of citizen children effectively deports the children as well, violating their right to live in their country of citizenship. Although it is true that they can return later in life, they will have missed out on the myriad of opportunities available in their country of citizenship. Returning with limited English language skills, potential health conditions that have gone untreated, and a lower level of education, the citizen will not be able to enjoy the life he or she could have enjoyed had that citizen grown up in the United States. Similarly, American children who grow up in the United States, but without access to their parents, cannot fully avail themselves of the right to family during their formative years, even if that right may be exercised later in life. It is a right that will be lost if not protected during childhood.

123. See, e.g., John H. Garvey, *Freedom and Choice in Constitutional Law*, 94 HARV. L. REV. 1756, 1758–60 (1981) (“[T]he rationales thought to justify protection of the various constitutional freedoms presuppose that the claimant can make rational decisions that will not result in significant social or individual harm. . . . the qualities of experience, judgment, and moral conviction that govern those [religious] choices are not ones that we attribute . . . to young children.”); Laurence D. Houlgat, *Three Concepts Of Children’s Constitutional Rights: Reflections On The Enjoyment Theory*, 2 U. PA. J. OF CONST. L. 77, 86–87 (1999) (“For example, an infant of two months has the right to walk freely down the public sidewalk, even though she is not yet capable of enjoying this right. What then could it mean to say that she has the right to freedom of movement? The answer is that it is a right-in-trust. It is a right to be saved for the child until she gains the ability to walk. One would violate this right now by cutting off her legs, making it physically impossible for her to ever be capable of self-locomotion at some future time.”).

124. Houlgat, *supra* note 123 (quoting Feinberg); see also Garvey, *supra* note 123.

The notion that children's constitutional rights are viewed as lesser than those held by adults is premised on the idea that children can enjoy their full constitutional rights later. Under this notion of "rights in trust," it is the duty of the parents and the state to serve as custodians, ensuring that the children's rights are safeguarded to be enjoyed later.¹²⁵ However, here, the state is violating its duty to safeguard children's constitutional rights until adulthood.¹²⁶ As the Supreme Court has noted, "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."¹²⁷

U.S.-citizen children have a liberty interest in residing in their country of citizenship and in being raised by their parents.¹²⁸ It is manifested in the reciprocal rights of parent and child to one another's companionship.¹²⁹

As discussed at greater length above, current immigration law and policies fail to provide any appropriate mechanism for taking into account the impact of parental deportation on American children. The only statutory provision that accounts for the impact of parental deportation on the U.S.-citizen or lawful-permanent-resident children and can result in lawful immigration status for the parent is cancellation of removal.¹³⁰ For cancellation of removal, in order to even be statutorily eligible to seek discretionary relief, the parents must show that they have remained undetected in the United States for at least ten years, are of good moral character, have not committed particular crimes, and that their removal would cause "exceptional and extremely unusual" hardship to the U.S.-citizen or lawful-permanent-resident child (or spouse or parent).¹³¹ There is no judicial review of cancellation of removal because it is a discretionary form of relief.¹³² However, the

125. See generally, e.g., LAURENCE D. HOULGATE, PHILOSOPHY, LAW AND THE FAMILY: A NEW INTRODUCTION TO THE PHILOSOPHY OF LAW 221–24 (Mortimer Sellers & Ann E. Cudd eds., 2017).

126. *Id.*

127. *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976).

128. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

129. See *id.* at 787 (Rehnquist, J., dissenting).

130. INA § 240(A)(b), 8 U.S.C. § 1229b(b)(1)(D). While there are other provisions that weigh hardship to children if the parent is deported, they are waivers of particular inadmissibility or deportability grounds, rather than provisions that would provide lawful status to an undocumented parent. See, e.g., 8 U.S.C. § 1182(h) (2017) (allowing discretion for the Attorney General to waive particular crime-related inadmissibility grounds for noncitizens who can show that their exclusion or deportation would cause extreme hardship to their citizen or lawful permanent resident spouse, parent, son, or daughter).

131. 8 U.S.C. § 1229b; see generally U.S. DEP'T OF HOMELAND SEC., PM-602-0050.1 UPDATED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAs) IN CASES INVOLVING INADMISSIBLE AND DEPORTABLE ALIENS (June 28, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>.

132. 8 U.S.C. § 1252(a)(2)(B) (2017) ("no court shall have jurisdiction to review— (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to

Board of Immigration Appeals has clarified that the hardship standard is stringent and requires a degree of hardship well above that which would typically befall an immigrant facing deportation.¹³³ Financial hardship or lack of language skills are not sufficient factors.¹³⁴ Because of the extremely limited nature of cancellation of removal, most undocumented parents with U.S.-citizen children have no statutory mechanism for seeking to remain with their children. Moreover, the Administration's move away from discretion means that the laws are enforced without consideration of the impact on children. This failure to take American children into account results in their de facto deportation along with their parents.

Two different constitutional doctrines come into play with respect to de facto deportation of U.S. citizens. On the one hand, because of the federal government's plenary power over immigration matters, courts have held as a matter of equal protection that Congress, within the context of regulating immigration, is free to draw whatever classifications it chooses between various groups of immigrants.¹³⁵ However, it is not permissible for Congress to treat individuals within the same classification differently.¹³⁶

On the other hand, a well-established body of law recognizes a fundamental constitutional right to family unity.¹³⁷ The Supreme Court stated that "freedom of personal choice in matters of family life is a fundamental liberty interest" protected by the Constitution.¹³⁸ Moreover, according to the Court, "[a]mong the most important of the liberties accorded this special treatment is the freedom of a parent and child to maintain, cultivate, and mold their ongoing relationship."¹³⁹ This parent-child relationship includes a parent's right to control the manner in which his child is reared and educated and to direct the religious upbringing of a child.¹⁴⁰ And, most importantly, it is manifested in the reciprocal rights of parent and child to one another's "companionship."¹⁴¹ Thus, to the extent that children are not subject to de

be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.").

133. *In re Gonzalez Recinas*, 23 I. & N. Dec. 467, 468–69 (B.I.A. Sept. 19, 2002); *see also In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 59 (B.I.A. May 4, 2001).

134. *See In re Monreal-Aguinaga*, 23 I. & N. Dec. at 64–65.

135. *See Frances v. Immigration & Naturalization Serv.*, 532 F.2d 268, 273 (2d Cir. 1976).

136. *Id.*

137. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the rights of parents to control the upbringing of their children constitute a liberty interest protected by the Due Process Clause of the Fourteenth Amendment); *see also Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."); *Smith v. Org. of Foster Families for Equal. and Reform*, 431 U.S. 816 (1977).

138. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

139. *Franz v. U.S.*, 707 F.2d 582, 595 (D.C. Cir. 1983).

140. *See Meyer*, 262 U.S. at 399–400.

141. *See generally Obergefell v. Hodges*, 135 S. Ct. 2584, 2600–01 (2015).

facto deportation and remain in the United States, they are deprived of the fundamental right to be raised by their parents.¹⁴²

Indeed, depriving a parent of a custodial relationship with a child is “among the most drastic actions that a state can take against an individual’s liberty interest, with profound ramifications for the integrity of the family unit and for each member of it.”¹⁴³ When the government intrudes on the parent-child relationship, it implicates “a fundamental liberty interest of the parent who loses custody” and risks liability for having caused such a deprivation wrongly.¹⁴⁴

As discussed in Section III.A, the Supreme Court has held that children cannot be penalized for the wrongdoing of their parents.¹⁴⁵ These arguments are even stronger where, as here, the children are U.S. citizens. Courts have found laws to be unconstitutional if they target undocumented parents of U.S. citizens, thereby depriving the children of equal protection of the laws. After *Plyler*, the Court made clear that the decision was limited to its particular circumstances, described as: (a) penalizing children for the illegal conduct of their parents; and (b) risking significant and enduring adverse consequences to the children.¹⁴⁶ For example, in *Lewis v. Thompson*, the Second Circuit applied heightened scrutiny and ruled that denying undocumented mothers Medicaid benefits for their U.S. children violated the children’s rights to equal protection.¹⁴⁷

Similarly, courts have found constitutional violations when college students have been denied access to in-state tuition based on the immigration status of their parents.¹⁴⁸ Courts have held that citizen children cannot be treated differently because of the immigration status of their parents. In a case involving U.S.-citizen children challenging a state procedure that impeded their right to obtain necessary paternity affidavits required for legitimization, the court again held that children

142. See *Franz*, 707 F.2d at 595 (“The constitutional interest in the development of parental and filial bonds free from government interference has many avatars. It emerges in a parent’s right to control the manner in which his child is reared and educated and in the child’s corresponding right not to have the content of his instruction prescribed by the state. It contributes heavily to a parent’s right to direct the religious upbringing of his child. And, above all, it is manifested in the reciprocal rights of parent and child to one another’s ‘companionship.’”) (internal citations omitted).

143. *B.S. v. Somerset Cty.*, 704 F.3d 250, 272 (3d Cir. 2013).

144. *Id.*; see also Alison M. Osterberg, *Removing The Dead Hand On The Future: Recognizing Citizen Children’s Rights Against Parental Deportation*, 13 LEWIS & CLARK L. REV. 751, 777 (2009).

145. See *Plyler v. Doe*, 457 U.S. 202, 220 (1982).

146. *Kadmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 459–60 (1988).

147. 252 F.3d 567, 591 (2d Cir. 2001) (noting, however, that the challenge involved a Medicaid Benefit issue wholly apart from immigration regulation); see also HEATHER KOBALL ET AL., HEALTH AND SOCIAL SERVICE NEEDS OF U.S. CITIZEN CHILDREN WITH DETAINED OR DEPORTED IMMIGRANT PARENTS (Sept. 2015), <https://www.migrationpolicy.org/research/health-and-social-service-needs-us-citizen-children-detained-or-deported-immigrant-parents> (providing a comprehensive review of the economic and social service needs of children with deported and detained parents and the lack of resources for these children).

148. *Ruiz v. Robinson*, 892 F. Supp. 2d 1321, 1332 (S.D. Fl. 2012).

could not be held accountable for the immigration status of their parents.¹⁴⁹ In that case, the court used heightened scrutiny because the classification at issue was the immigration status of the plaintiff's parents.

C. Will the Fundamental Right to Family Unity Loosen the Plenary Power Doctrine's Chokehold on Constitutional Review?

Although there is precedent and strong arguments to support heightened review in constitutional challenges to disparate treatment based on the immigration status of parents, these precedents have thus far arisen only in contexts apart from immigration regulation. In fact, judges often make special note of the fact that immigration regulation is not at issue. Historically, when immigration regulation is at issue, the Court relies on the plenary power doctrine to apply a deferential standard of review.

The U.S. Supreme Court first addressed the power to regulate immigration in the infamous case of *Chae Chan Ping v. United States*, known as the Chinese Exclusion Case.¹⁵⁰ At issue was the Chinese Exclusion Act, which at that time prohibited new Chinese immigration but allowed for Chinese laborers already in the United States to leave and return with advance permission.¹⁵¹ The petitioner, Mr. Ping, obtained permission to leave and reenter the United States.¹⁵² But while he was on his voyage back to the United States, Congress amended the Chinese Exclusion Act to revoke the provision which allowed for Chinese immigrants like Mr. Ping to reenter the United States.¹⁵³ Notwithstanding the certificate of reentry that Mr. Ping had lawfully obtained, he was denied admission to the United States under the amended law.¹⁵⁴

In holding that Congress had broad and largely permissible power to regulate immigration, Justice Field relied upon notions of sovereignty, political question, foreign policy, and cohesion as one nation.¹⁵⁵ Because the law in question was significant and implicated foreign affairs, the Court held that congressional

149. L.P. v. Comm'r, Ind. State Dep't of Health, 2011 WL 255807, *2 (S.D. Ind. Jan. 27, 2011).

150. 130 U.S. 581, 609 (1889).

151. Geary Act, ch. 60, §§ 1, 6, 27 Stat. 25 (1892).

152. *Id.*

153. *Chae Chan Ping*, 130 U.S. at 582.

154. *Id.*

155. *Id.* at 604 (“The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.”) (quoting *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812)).

power, and to a lesser extent, executive power, was plenary and largely unreviewable in immigration matters.¹⁵⁶

In subsequent cases, the Court extended this plenary power to immigrants within the interior as well, holding that traditional constitutional norms do not apply when immigration regulation is at issue.¹⁵⁷ Pursuant to the plenary power doctrine, the Court has held that deportation proceedings, even if conducted in a language which the immigrant does not speak, constitute “due process” of law.¹⁵⁸ Similarly, the Court has upheld a rule requiring that any Chinese laborers found within the United States without required documentation could defend themselves against deportation only by producing a white witness.¹⁵⁹ Indeed, for constitutional purposes, the plenary power doctrine has resulted in federal immigration regulation being subject only to a rational review standard. Acts that would be deemed unconstitutional in any other area of law are thus allowed in the context of regulating immigration.¹⁶⁰

The plenary power doctrine has been widely criticized by scholars over the years, and fissures have emerged over time.¹⁶¹ Lawyers have also had some success

156. *Id.* at 603–04 (“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. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.”).

157. *Fong Yue Ting v. United States*, 149 U.S. 698, 731 (1893).

158. *Yamataya v. Fisher*, 189 U.S. 86, 98 (1903).

159. *Fong Yue Ting*, 149 U.S. at 729.

160. *See Fiallo v. Bell*, 430 U.S. 787, 799–800 (1977) (applying a rational review standard notwithstanding issues of both gender and legitimacy, and holding that Congress could prefer immigrant benefit classification for unwed mothers over unwed fathers, and that such a distinction was a political question that should be left in the hands of Congress, not the judiciary); *see also* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215–16 (1953) (upholding as constitutional the exclusion and lack of a hearing for a returning long-time lawful permanent resident being held at Ellis Island); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (holding that the exclusion of a spouse of a United States citizen without a hearing, based on secret evidence, satisfied due process requirements under the Constitution); *Fong Yue Ting*, 149 U.S. at 729 (upholding the constitutionality of a white witness rule for Chinese laborers found in the United States without the required certificate of residence); *Yamataya*, 189 U.S. at 98 (finding that due process requirements were met when a noncitizen seeking entry was given a hearing in a language she could not comprehend).

161. *See* GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 10 (1996) (highlighting the role that states played in controlling immigration throughout the nineteenth century); *see also* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1627–28 (1992) (arguing that the courts’ willingness to decide constitutional claims sounding in procedural due process signifies an important exception to the plenary doctrine); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (1984) (first introducing the terms ‘plenary power doctrine’ and critiquing seven policy rationales that have been offered by the Court over the years, including the characterization of immigration

casting constitutional challenges as procedural, rather than substantive due process challenges.¹⁶² However, the plenary power doctrine has remained in place and has continued to insulate immigration regulation from appropriate constitutional standards and norms.¹⁶³

Scholars have pointed out the stark inconsistency in judicial rulings that, on the one hand, demonstrate a willingness to intervene to ensure that children's economic and educational welfare is not compromised as a result of their parents' undocumented status, while on the other hand refusing to intervene to assure that these same rights are not undermined as a result of children's de facto deportation based on their parents' undocumented status.¹⁶⁴ Notwithstanding the traditional deference to the legislative and executive branches when immigration regulation is at issue, the stakes—the constitutional interests of U.S. citizens as outlined above—are far too great for deferential treatment.

In recent cases, the Court has shown a willingness to apply conventional constitutional analysis free of plenary power deference to issues directly implicating immigration regulation. For example, in *Sessions v. Morales-Santana*,¹⁶⁵ the Supreme Court found that the immigration statute's greater residency requirements for unwed U.S.-citizen fathers seeking to impart citizenship to their children (as compared with unwed U.S.-citizen mothers) constituted an impermissible gender classification that violated the constitutional guarantee of equal protection.¹⁶⁶ Notwithstanding that the statute in question was an immigration provision regarding derivative citizenship for children born abroad, the Court rejected the government's invitation to invoke plenary power review and never mentioned the need to defer to Congress when immigration regulation is at issue.¹⁶⁷

law as inherently foreign policy); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990) (concluding that, “[t]he constitutional norms that courts use when they directly decide constitutional issues in immigration cases are not the same constitutional norms that inform interpretation of immigration statutes. To serve the latter function, many courts have relied on . . . ‘phantom constitutional norms,’ which are not indigenous to immigration law but come from mainstream public law instead. The result has been to undermine the plenary power doctrine through statutory interpretation.”).

162. See, e.g., HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRANTS AND CITIZENSHIP IN THE UNITED STATES* 109–10 (2006).

163. In fact, during the presidential campaign, prominent immigration law scholars opined that the plenary power doctrine might enable the Supreme Court to uphold President Trump's proposed ban on Muslim immigrants, particularly if Congress enacted such a law. See, e.g., Roque Planas, *U.S. Immigration Law is Racist Enough to Allow Trump's Muslim Visitor Ban*, HUFFINGTON POST (Dec. 8, 2015), http://www.huffingtonpost.com/entry/donald-trump-immigration-law-muslim-visitor-ban_us_5666ec0ce4b072e9d1c77979 (citing Stephen Legomsky and Natsu Taylor Seito).

164. See, e.g., Bill Piatt, *Born As Second-Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35, 40–41 (1988).

165. 137 S. Ct. 1678, 1698 (2017).

166. *Id.*

167. *Id.* However, as scholars have noted, the Court's remedy was unusual in that it made it more onerous for children of unwed fathers and mothers to derive citizenship, rather

The Court has also shown a greater willingness to protect the right to family integrity in recent years, albeit outside of the context of regulating immigration. For example, in *Obergefell v. Hodges*,¹⁶⁸ the Supreme Court recognized a constitutional right to same-sex marriage grounded in the Fourteenth Amendment's protection of liberty and equality. While this case was groundbreaking in the context of equality for LGBTQ families, scholars have also pointed out its potential impact in other areas of law, including establishing the right of immigrant children to be raised by their parents.¹⁶⁹

But it remains to be seen whether the fundamental right to marry or to be raised within the family of one's choosing will prevail when in conflict with immigration regulation. Even after *Obergefell*, district courts have held that the fundamental right to marry does not signify that there is a constitutional right to remain with one's spouse in the United States. For example, in *Struniak v. Lynch*, the United States District Court for the Eastern District of Virginia recognized that *Obergefell* has changed the way courts must analyze substantive due process claims based upon married persons' liberty interests.¹⁷⁰ But the court also clarified that central to the inquiry are questions of animus, or a desire to protect a vulnerable population. Thus, in *Struniak*, the court found that imposition of a statutory bar precluding a convicted child sex offender from benefitting from a family-based immigrant petition did not infringe upon a constitutional liberty interest because it applied based upon the respondent's own "choice to engage in criminal conduct that is illegal precisely because it harms vulnerable persons."¹⁷¹ The court noted that, where the denial of freedom is based on animus or moral condemnation, it is more susceptible to constitutional attack. This is because those who are outcast from society "do not achieve the full promise of liberty."¹⁷²

The court's focus on vulnerable populations and the dangers in treating groups of persons as outcasts is consistent with the *Plyler* Court's concern with creating an illiterate subclass within society. However, in another post-*Obergefell* case involving a citizen's right to live with an immigrant spouse, the court stressed that a constitutional right to marry does not encompass a constitutional right to receive a visa for one's spouse.¹⁷³ Here again, the right to live with a parent can be distinguished. While the court in *Makransky* could separate the right to marry from

than the usual remedy of affording the more generous protection to both of the similarly situated classes. See, e.g., Sandy De Sousa, *Sessions v. Morales-Santana: An Analysis of its Implications on the Plenary Power Doctrine and the Supreme Court's Approach to Equal Protection Challenges* (manuscript on file with author).

168. 135 S. Ct. 2584, 2604 (2015).

169. See, e.g., Susan Hazeldean, *Anchoring More Than Babies: Children's Rights After Obergefell v. Hodges*, 38 CARDOZO L. REV. 1397, 1397 (2017) (arguing that deporting the parents of American children contravenes their fundamental right to be raised by a loving parent, to equal protection of the law, and to remain in their country of citizenship).

170. 159 F. Supp. 3d 643, 664 (E.D. Va. 2016).

171. *Id.* at 668.

172. *Id.* at 667 (citing *Obergefell*, 135 S. Ct. at 2600).

173. *Makransky v. Johnson*, 176 F. Supp. 3d 217, 227 (E.D.N.Y. 2016).

the visa issuance, the deportation of a citizen child's parent often results in foster care and adoption, thereby severing the parent-child relationship entirely.

D. Procedural Due Process Requires that U.S.-Citizen Children Facing the Loss of a Parent or De Facto Deportation Be Provided with a Hearing and Opportunity to be Heard

At a minimum, given the liberty interest at stake, U.S.-citizen children should be afforded an individualized, discretionary assessment of whether removal of the citizen-child's parents is found appropriate by the executive officer, rather than an irrebuttable policy of refusing to consider the citizen-child's interests. In *Mathews v. Eldridge*, the Court articulated a three-part balancing test for determining what process is due once a right to due process has been established.¹⁷⁴ According to the Court, one must balance:

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 requirements would entail.¹⁷⁵

Here, the private liberty interests at stake—the right to family unity; the right of U.S.-citizen children to be raised by their parents; or the right of U.S. citizens to remain in their country of citizenship—are substantial. Under the Fourteenth Amendment to the United States Constitution, parents have been found to hold a protected liberty interest in the care, custody, and control of their children.¹⁷⁶ As the Supreme Court has noted, that interest is “perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court.”¹⁷⁷ Therefore, the Court has held that state officials may not remove children from the home without providing due process of law.¹⁷⁸

The risk of an erroneous deprivation is also substantial if parents of U.S.-citizen children are deported without consideration for the impact on the children. This is equally true if U.S.-citizen children are de facto deported with their parents without proper consideration of the equities at stake. Similarly, the probative value would be high in allowing for an individualized assessment of the impact deportation would have on the children.

174. 424 U.S. 319, 335 (1976).

175. *Id.*

176. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

177. *Id.* (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923)); *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.”).

178. *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1245 (10th Cir. 2003).

Finally, while allowing for this assessment might increase the fiscal and administrative burden on the government, this is the type of procedure that is routinely carried out in immigration court proceedings. As part of the existing deportation proceedings, the immigration judge could provide the undocumented parents an opportunity to establish that they are caring for the citizen child and are necessary for the child's ongoing care. This could take the form of discretionary relief from deportation, or the immigration judge could allow the parents to apply for a new nonimmigrant parent visa before the office of the United States Citizenship and Immigration Services ("USCIS"). Regardless of the method utilized, in light of the liberty interest at stake, the balance would tip in favor of providing an individualized assessment of the impact of deportation on the children.

An advantage to focusing on the impact that parental deportation would have on the citizen child, and allowing the parent to seek a visa to remain and care for the child, is that it might avoid some of the negative consequences that attach when undocumented parents state that they will take their children with them if deported.¹⁷⁹ Such consequences include the possibility of involvement of Child Protective Services and removal of children from their parents.¹⁸⁰ For example, in *In re M.M.*, a Georgia juvenile court terminated a father's parental rights after finding him unfit because he was an undocumented immigrant and, even though he was not facing deportation, there was the "possibility that [he] could someday be deported."¹⁸¹

IV. THE NEED FOR LEGISLATIVE REFORM TO PROTECT FAMILIES

Notwithstanding the constitutional infirmities posed by deporting the parents of U.S.-citizen children, it is not at all clear that the courts will prohibit this practice. The combination of deference to Congress and the Executive, and the fear

179. Bridgette A. Carr, *Incorporating a 'Best Interests of the Child' Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 149–50 (2009) (noting that Canada utilizes a "best interest of the child" standard in immigration proceedings); David B. Thronson, *Of Borders and Best Interests: Examining the Experience of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45, 62 (2005).

180. David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1197–207 (2006); Jacqueline Bhabha, "Not a Sack of Potatoes": *Moving and Removing Children Across Borders*, 15 BOS. UNIV. PUB. INT. L. J. 197, 213 (2006).

181. 587 S.E. 2d 825, 831–32 (Ga. Ct. App. 2003); *see generally* Erin B. Corcoran, *Deconstructing and Reconstructing Rights for Immigrant Children*, 18 HARV. LATINO L. REV. 53, 57, 86–87 (2015) (arguing for federal best interest of child standard in immigration law); *see also* Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C.J.L. & SOC. JUST. 63, 97 (2012) (arguing that the best interest of the child standard is being used unjustly as a tool to separate, remove, and terminate parental rights in instances where children have a right to remain in the United States and the parent is subject to deportation); *see Olowo v. Ashcroft*, 368 F.3d 692, 695–98 (7th Cir. 2004) (mother who stated an intent to take her children with her if deported was reported to state child welfare authorities after being denied asylum for her and her daughters, because her daughters were at risk of being subjected to female genital mutilation in Nigeria).

of encouraging unlawful immigration by allowing those with children to remain, pose likely insurmountable hurdles to a juridical resolution to this problem. But there are a number of legislative changes that can and should ameliorate some of the harshest consequences of this crisis.

For example, immigration law provides that a child must be at least 21 years of age before she can petition for legal status for her parents.¹⁸² As Professor David Thronson has remarked, this is emblematic of the asymmetry that permeates immigration law between parents' rights to bestow immigration status on their child and the children's right to bestow immigration status on a parent.¹⁸³ It defies logic to require children to wait until they become adults in order to reunite with their parents. The requirement that a child turn 21 before being able to petition for a parent is often justified as an important check on the system. The logic is that if an immigrant could come to the United States and have a baby who could then petition for her parent, it would create a loophole and incentive for unlawful immigration. However, it is a huge leap from prohibiting automatic immigration through a baby born in America to requiring U.S.-citizen children to spend their entire childhood without their parents. Requiring U.S.-born babies to wait until they become adults to reunite with their parents undermines the notion of family reunification that is supposed to animate this area of law.

At a minimum, due to the gravity of the interests at stake, Congress should lower the age at which U.S.-citizen children can petition for legal immigration status for their parent. By looking to other provisions in immigration law that rely upon younger ages, an argument can be made that children should be able to petition for their parents to obtain lawful immigration status at the age of 14. For example, in the context of derivative citizenship through one American parent, immigration law requires that the citizen parent have resided in the United States for at least five years, two of which occurred after the age of 14.¹⁸⁴ Just as Congress utilized the age of 14 to delineate the age at which one develops significant ties to a nation, using the age of 14 would be a more appropriate age for when children should be allowed to petition for their parents.

Other comparable immigrant-receiving industrialized nations use the age of 18 as the age at which a child can petition for his or her parent to immigrate.¹⁸⁵ As discussed in Section III.D, another approach would be the creation of a parent

182. 8 U.S.C. § 1101(b)(1) (2017) (definition of child under the Immigration and Nationality Act); 8 U.S.C. § 1151(b)(2)(A)(i) (2017) ("For purposes of this subsection, the term 'immediate relatives' means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age.").

183. E.g., David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 FORDHAM URB. L.J. 393, 404 (2010).

184. 8 U.S.C. § 1401(g) (2017).

185. See, e.g., *Who is Eligible to Sponsor a Parent or Grandparent*, GOV'T OF CAN., <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/family-sponsorship/sponsor-parents-grandparents/eligibility.html> (last visited Aug. 29, 2019); Immigration and Refugee Protection Regulations, SOR/2002-227 (Can.); see *Migration Act of 1958* (Cth) pt I, div. 5 (Austl.); see *Migration Regulations of 1994*, (Cth) div 1.20LAA (Austl.).

visa, which exists in other countries, for a parent to join and care for a dependent child.¹⁸⁶ For example, in the United Kingdom, if the British child is under 18, and the parent can show that he or she will take an active role in child rearing, is self-sufficient, and can speak English, the parent can seek permission to join in the United Kingdom.¹⁸⁷

There have also been legislative attempts to restore discretion to immigration judges in cases in which U.S.-citizen children are impacted. For example, the Child Citizen Protection Act, H.R. 182, was introduced in 2009. Although it hasn't advanced significantly, it is a positive model for restoring discretion to immigration judges to decide whether to deport the parent of a U.S.-citizen child. Significantly, there is no particular length of residence required for the parent; the sole question is whether it would be in the best interest of the child for the parent to remain.

At a minimum, as set forth above, in any case involving deportation of a parent of a U.S.-citizen child, procedural due process requires an individualized determination of the impact on the child. In cases in which a determination is made that either: (a) deporting the parent would effectively deport the American child; or (b) the deportation of the parent would deprive the American child of the right to family integrity, the parent should be permitted to seek a new nonimmigrant visa. The visa would be similar to the existing S, T, and U visas, all of which allow for temporary lawful status in exchange for a willingness to assist the government in carrying out an enforcement goal.

Congress first introduced the S visa in 1994 as a way to encourage cooperation with law enforcement.¹⁸⁸ The S visas, referred to as “snitch visas,” allow for temporary immigration status in exchange for testimony in criminal prosecutions. In 2000, as part of the Victims of Trafficking and Violence Prevention Act, Congress created T and U visas.¹⁸⁹ T visas allow for immigration status for victims of human trafficking.¹⁹⁰ While assistance in prosecuting the trafficker is requested, it is not required. The U visas are for victims of violent crimes who are willing to assist law enforcement in the investigation or prosecution of particular crimes.¹⁹¹

In each of these scenarios, Congress demonstrated a willingness to provide immigration status in order to advance an important policy goal. Similarly, a new nonimmigrant visa would afford a parent immigration status in order to advance important societal goals. Allowing the parent to remain in the United States and to care for U.S.-citizen children would keep children out of foster care and protect them from the trauma of growing up without parents. There are also important societal

186. Although the Immigration & Nationality Act contains a provision for a U.S. citizen to seek a visa for a parent, current law requires that the U.S. citizen must already be an adult (21 years of age or over). 8 U.S.C. § 1151(b)(2)(A)(i).

187. See *Immigration Rules Part 8: Family Members*, SI 2016, Gov. UK ¶ 317–319 (2016), <https://www.gov.uk/guidance/immigration-rules>.

188. 8 U.S.C. § 1101(a)(15)(S).

189. 8 U.S.C. § 1101(a)(15)(T)-(U); see also 8 U.S.C. § 1184(o)-(p) (2017).

190. 8 U.S.C. § 1101(a)(15)(T); see also 8 U.S.C. § 1184(o).

191. 8 U.S.C. § 1101(a)(15)(U); see also 8 U.S.C. § 1184(p).

advantages to having U.S.-citizen children raised by a parent in their country of citizenship rather than returning later as adults.

Arguably, the T and U visas are different than the new visa I am proposing in that the T and U visas are intended to provide immigration status to those perceived to be helpless victims. As we have seen with regards to the dreamers, there is a greater willingness to single out and assist those who are deemed innocent victims than the adult parents who made the choice to bring their children to America, or to have them in the United States. But former President Obama realized that providing a temporary reprieve for the young adult dreamers who have lived in the United States since they entered as children only addressed part of the problem. The DACA executive order protected children while their parents remained at risk of deportation. In his subsequent executive order, former President Obama created the Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”). This program allowed for undocumented parents to seek a reprieve from deportation and employment authorization if they had been in the United States for approximately five years and had U.S.-citizen or lawful permanent resident children.¹⁹² While the DAPA program was never implemented due to litigation and was ultimately rescinded by the new administration, it stands as an example of a way to allow parents to remain in the United States to raise their children.

In past scholarship, I have addressed, and criticized, the dichotomy between “deserving” and “undeserving” immigrants.¹⁹³ As I have argued, immigration law’s focus on good versus bad immigrants has further distorted the development of the law in important areas such as the Convention Against Torture.¹⁹⁴ Rather than a myopic focus on whether the visa would benefit the victim or an immigrant who chose to come to the United States, the focus should be on offering immigration status in order to further important societal policy goals. So, for example, the S visas are not given to immigrants who are accused of crimes because they are deemed to be victims. Rather, the S visas are used to incentivize and reward those who are willing to offer evidence that is important to law enforcement’s goals. Similarly, the visa I propose would be given to parents in order to further societal goals of protecting family unity, minimizing foster care, and reducing longer-term physical- and mental-health costs that are incurred by U.S.-citizen children when they are deprived of the education and healthcare services they should have received here.

192. Memorandum from Jeh Johnson, *supra* note 122 (setting forth the parameters for exercising the “case-by-case use of deferred action for those adults who have been in this country since January 1, 2010, are the parents of U.S. citizens or lawful permanent residents, and who are otherwise not enforcement priorities, as set forth in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum.”)

193. See, e.g., Nessel, *supra* note 11, at 349; Lori A. Nessel, “Willful Blindness” to Gender-Based Violence Abroad: United States’ Implementation of Article Three of the United Nations Convention Against Torture, 89 MINN. L. REV. 71, 79 (Nov. 2004) [hereinafter Nessel, *Willful Blindness*]; Nessel, *supra* note 12, at 900.

194. See Nessel, *Willful Blindness*, *supra* note 193, at 90–94; Nessel, *supra* note 12, at 897–902.

At a minimum, statutory cancellation of removal, the one existing statutory remedy for parents of citizen or resident children who have already resided in the United States for at least ten years, should be amended to focus on whether the parent's deportation would cause exceptional and extremely unusual hardship to the citizen or lawful permanent resident child, *as compared to what life is like for similarly situated U.S. citizen or lawful permanent resident children who are raised in the United States with their parents*. As the statutory provision is currently interpreted, parents facing deportation must show that their deportation would cause exceptional and extremely unusual hardship to the child as compared to the presumptive hardship that always accompanies deportation. For example, a child's inability to obtain the same level of education, financial hardship, or lack of language skills if forced to leave the United States with the deported parent are not sufficient to show hardship that is exceptional and extremely unusual for purposes of cancellation of removal. According to the courts, those are hardships generally suffered when deported. At a minimum, the comparison should be to children who are not deported from the United States. The failure to do this reflects the view of citizen children with immigrant parents as not fully citizens.¹⁹⁵

CONCLUSION

Deporting parents of U.S.-citizen children without taking the impact on the children into account raises a myriad of constitutional concerns. As citizens, the children have a liberty interest in living in their country of citizenship, in maintaining family integrity, and in being raised by their parents. These are not rights that can be exercised in the future if they are not safeguarded in the present. While the plenary power doctrine will likely undermine substantive constitutional challenges, in light of the liberty interest at stake, at a minimum, procedural due process requires a hearing or mechanism for taking the impact on the children into account. Congress should also act to address the short- and long-term risks associated with de facto deportation of American children or family separation by enacting a new nonimmigrant visa to allow parents to remain and raise their children. As with the T visa for victims of human trafficking and U visas for victims of violent crimes, this new visa could allow for conversion to permanent immigrant status if certain conditions are met. Although parental deportation and family separation is not a new practice, the heightened enforcement focus coupled with the evisceration of discretion makes this an urgent situation that must be addressed.

195. See Piatt, *supra* note 164.