

# The Immigrant “Other”: Racialized Identity and the Devaluation of Immigrant Family Relations

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*This Article explores how current terminations of undocumented immigrants’ parental rights are reminiscent of historical practices that removed early immigrant and Native American children from their parents in an attempt to cultivate an Anglo-American national identity. Today, children are separated from their families when courts terminate the rights of parents who have been, or who face, deportation. Often, biases toward undocumented parents affect determinations concerning parental fitness in a manner that, while different, reaps the same results as the removal of children from their families over a century ago. This Article examines cases in which courts terminated the parental rights of undocumented parents because of biases about the parents’ immigration status, language, race, culture, and the belief that life in the United States is better for children than returning with a parent to a poorer country, such as Mexico or Guatemala. This Article suggests that these termination decisions are reflective of tensions around identity and how to cultivate a preferred American identity. Further, this Article explores how using the law to cultivate a preferred identity can subvert the constitutional rights of undocumented parents and undermine their family relationships.*

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#### INTRODUCTION

Her lifestyle, that of smuggling herself into the country illegally and committing crimes in this country, is not a lifestyle that can provide stability for a child . . . . A child cannot be educated in this way, always in hiding or on the run.<sup>1</sup>

The above quote comes from a juvenile court decision that terminated the parental rights of Encarnación Maria Bail Romero, an undocumented immigrant from Guatemala. Immigration and Customs Enforcement (ICE) arrested Bail Romero in 2007 during a workplace raid of the poultry processing plant in Missouri that had employed her.<sup>2</sup> She pled guilty to aggravated identity theft and received a mandatory two-year sentence.<sup>3</sup> Her son, Carlos, was seven months old at the time.<sup>4</sup> While incarcerated, a local couple offered to assist Bail Romero's relatives who had been caring for Carlos.<sup>5</sup> Within a few months of this arrangement, this couple, without first contacting child welfare services, gave Carlos to another couple that was interested in adopting a Latino child.<sup>6</sup> Two days later, the second couple moved to terminate Bail Romero's parental rights and adopt Carlos.<sup>7</sup> The juvenile court eventually terminated Bail Romero's parental rights and approved the

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1. Ginger Thompson, *After Losing Freedom, Some Immigrants Face Loss of Custody of Their Children*, N.Y. TIMES, Apr. 23, 2009, at A15 (quoting the presiding judge). The first juvenile court decision remains sealed, but a copy of it was allegedly leaked to the *New York Times*. Therefore, the information about the first decision could only be obtained from this *New York Times* article.

I drafted an amicus brief in this case while working as a staff attorney for the Mexican American Legal Defense and Educational Fund.

2. *S.M. v. E.M.B.R. (In re Adoption of C.M.B.R.)*, 332 S.W.3d 793, 801 (Mo. 2011).

3. *Id.* at 802; *see also In re Adoption of Romero*, No. 07AO-JU00477 at \*9 (Mo. Cir. Ct. July 18, 2012) (on file with author) (second termination decision, which, unlike the first decision, is not sealed). Bail Romero's conviction preceded the Supreme Court's decision in *Flores-Figueroa v. United States*, 556 U.S. 646, 647 (2009) (requiring proof, for purposes of an aggravated identity theft conviction, that an individual knew that a social security number or identity card belonged to someone else).

4. *In re Adoption of C.M.B.R.*, 332 S.W.3d at 801.

5. *In re Adoption of Romero*, No. 07AO-JU00477, at \*15–16.

6. *Id.* at \*21.

7. *In re Adoption of C.M.B.R.*, 332 S.W.3d at 802 (noting that Carlos's first overnight visit with the Mosers was on October 3, 2007, and the Mosers filed the petition on October 5, 2007).

adoption.<sup>8</sup> Bail Romero appealed to the Missouri Supreme Court, which reversed the termination and adoption but remanded the case for a new trial before the juvenile court.<sup>9</sup> In July 2012 the juvenile court once again terminated Bail Romero’s parental rights and approved the adoption,<sup>10</sup> and in October 2013 the Missouri Court of Appeals affirmed the juvenile court’s decision.<sup>11</sup>

Undocumented<sup>12</sup> parents—like Bail Romero—are losing their parental rights.<sup>13</sup> Cases involving improper terminations of undocumented parents’ parental rights that are appealed are often reversed.<sup>14</sup> While this is reassuring, the problem is that most undocumented parents do not have the resources to appeal, especially when the parent has already been deported. Even when the problem is corrected, families face prolonged separations, and if the child is later returned to the parent, the child must deal with a second separation from his or her adoptive or foster parents. Moreover, tracking these cases is difficult because juvenile court records are frequently sealed, and there often is no published opinion.

The federal government deported 46,000 parents of U.S.-citizen children in the first six months of 2011.<sup>15</sup> To determine how these deportations have affected parents and their children, the Applied Research Center (ARC) conducted a

8. *Id.* at 804.

9. *See id.* at 823–24.

10. *In re* Adoption of Romero, No. 07AO-JU00477, at \*62.

11. *S.M. v. E.M.B.R. (In re Adoption of C.M.)*, No. SD32228 (Mo. Ct. App. Oct. 7, 2013).

12. I use the term “undocumented” throughout this Article to describe both those who entered surreptitiously and those who overstayed a visa. For a more detailed discussion about terms such as “illegal alien,” “unauthorized,” and “undocumented,” see STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 1140–41 (5th ed. 2009).

13. This problem likely not only affects undocumented parents. Because all noncitizens—lawful permanent residents and those on a temporary immigrant status, for instance—can be subject to deportation, all noncitizen families may be at risk of separation. As of July 2012, 1.4 million immigrants had been deported. Under President Obama’s administration, 1.5 times more immigrants have been deported compared with the number of deportations under former President Bush’s administration. Suzy Khimm, *Obama Is Deporting Immigrants Faster Than Bush. Republicans Don’t Think That’s Enough*, WASH. POST WONKBLOG (Aug. 27, 2012, 2:07 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/08/27/obama-is-deporting-more-immigrants-than-bush-republicans-dont-think-thats-enough/>; see also Helen O’Neill, *U.S.-Born Kids of Deported Parents Struggle as Family Life Is ‘Destroyed,’* HUFFINGTON POST (Aug. 25, 2012, 3:26 PM), [http://www.huffingtonpost.com/2012/08/25/us-born-kids-deported-parents\\_n\\_1830496.html?](http://www.huffingtonpost.com/2012/08/25/us-born-kids-deported-parents_n_1830496.html?)

14. *See, e.g., In re* Interest of M.M., 587 S.E.2d 825, 832–33 (Ga. Ct. App. 2003); *In re* Interest of V.S., 548 S.E.2d 490, 490 (Ga. Ct. App. 2001); *In re* Termination of the Parental Rights of Doe, 281 P.3d 95, 95–96 (Idaho 2012); *In re* B., 756 N.W.2d 234, 237, 242 (Mich. Ct. App. 2008); *State v. Maria L. (In re* Interest of Angelica L.), 767 N.W.2d 74, 74–75 (Neb. 2009); *State v. Mercedes S. (In re* Interest of Mainor T.), 674 N.W.2d 442, 449, 464 (Neb. 2004); *In re* Interest of E.N.C., 384 S.W.3d 796, 796 (Tex. 2012).

15. SETH FREED WESSLER, APPLIED RESEARCH CTR., *SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM* 5 (2011).

qualitative study on family separations involving undocumented parents in six states. In six other states, ARC relied upon media and advocacy reports to confirm the prevalence of these cases. Additionally, it interviewed attorneys, caseworkers, and officials from foreign consulates in ten other states. ARC's research confirmed that parents in detention or facing deportation risk permanent separation from their children.<sup>16</sup> It conservatively estimates that there are 5100 children in foster care in the United States who have parents who were detained or deported and that should the rate of these types of separations continue, in the next five years there will likely be at least 15,000 children who might not be able to reunify with their parents.<sup>17</sup>

This Article explores how current terminations of undocumented immigrants' parental rights are reminiscent of historical practices that removed early immigrant and Native American children from their parents in an attempt to cultivate an Anglo-American national identity. Today, children are separated from their families when courts terminate the rights of parents who have been, or who face, deportation. Often, biases toward undocumented parents affect determinations of parental fitness in a manner that, while different, reaps the same results as the removal of children from their families over a century ago. This Article examines cases in which courts terminated the parental rights of undocumented parents because of biases about the parents' immigration status, language, race, culture, and the belief that life in the United States is better for children than returning with a parent to a poorer country, such as Mexico or Guatemala. This Article suggests that these termination decisions are reflective of tensions around identity and how to cultivate a preferred American identity.<sup>18</sup> Further, this Article explores how using

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16. *Id.* at 22–25. For other publications documenting this problem, see UNIV. OF ARIZ., DISAPPEARING PARENTS: A REPORT ON IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 2 (2011), [http://sirow.arizona.edu/sites/sirow.arizona.edu/files/disappearing\\_parents\\_report\\_final.pdf](http://sirow.arizona.edu/sites/sirow.arizona.edu/files/disappearing_parents_report_final.pdf) (indicating that through its research, attorneys, judges, and caseworkers all reported experience with cases involving parents in immigration detention or deportation proceedings); Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 CONN. L. REV. 99, 114–18 (2011) (noting that because the child welfare system and ICE do not collect this information, it is difficult to determine the number of families affected). Rabin does state that the Department of Homeland Security (DHS) Inspector General reported that from 1998 to 2007, 108,434 parents of U.S.-citizen children were deported. *Id.* at 114. Additionally, she conducted surveys and interviews of personnel in the Pima County Juvenile System to determine the frequency with which children are involved with the child welfare system as a result of a parent's deportation. *Id.* at 115. Based on the information she gathered, Rabin concluded that “the numbers of such cases in the system suggest that immigration status arises frequently enough for it to be an issue about which personnel in the child welfare system are aware, but not so frequently that they are accustomed to dealing with such cases in a prescribed, uniform manner.” *Id.* at 118.

17. WESSLER, *supra* note 15, at 6.

18. Sociologists have defined identities as “linguistic labels, indexes of the self that individuals simultaneously claim and have imputed to them based on items, such as residence, group membership, shared social experience, and place identification.” Linda M. Burton, Raymond Garrett-Peters & John Major Eason, *Morality, Identity, and Mental Health in Rural Ghettos*, in COMMUNITIES, NEIGHBORHOODS, AND HEALTH: EXPANDING THE

the law to cultivate a preferred identity can subvert the constitutional rights of undocumented parents and undermine their family relationships.

Both immigration and family law “broker boundaries”<sup>19</sup> around belonging and identity. Immigration law sets the parameters around who may enter the United States and who may remain in the country. Historically, immigration and citizenship law have used race—however constructed at a particular time—to determine these parameters. Likewise, economic and political conditions within the United States have also influenced how immigrant groups are perceived and treated.<sup>20</sup> Immigrants whose culture and values more closely aligned with Anglo-Protestants of Northern European heritage have historically been favored under immigration law and have integrated more easily into American society.<sup>21</sup>

As sociologists Douglas Massey and Magaly Sánchez describe, when natives view a particular immigrant group with hostility, this can make assimilation and integration much more difficult for the immigrant.<sup>22</sup> Irish, Chinese, Japanese, Italians, Poles, and Eastern European Jews were all viewed as a threat to American society at one point, making the process of assimilation more difficult for members of these groups.<sup>23</sup> “[A]ssimilation is about the restructuring of group identities and the redefinition of social boundaries so that immigrants and their descendants are perceived and treated by natives as ‘us’ rather than ‘them.’”<sup>24</sup> It is a process, and a

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BOUNDARIES OF PLACE 91, 101 (Linda M. Burton et al. eds., 2011) (citation omitted). In this Article, I explore tensions around group identity—American versus other—where differences in language, culture, race, social experience, and place identification become a basis for the exclusion, othering, and stigmatization of immigrant newcomers.

19. DOUGLAS S. MASSEY & MAGALY SÁNCHEZ R., BROKERED BOUNDARIES: CREATING IMMIGRANT IDENTITY IN ANTI-IMMIGRANT TIMES 15 (2010) (“Like all human beings, immigrants and natives have both group and individual identities, and membership in social categories plays a critical role in how people develop a sense of themselves as social beings. Whenever two people interact, they engage one another not only as individuals but as representatives of the social groups to which they belong. In their interaction, they broker intergroup boundaries and through this process of brokering extract meaning to construct and modify identity on an ongoing basis.” (internal citations omitted)).

20. *See id.* at 13 (describing one researcher’s observation that immigrants of European origin were able to assimilate because of their “whiteness,” the suspension of immigration from 1930 to 1970, their strong motivation to advance economically, and, most importantly, the New Deal and the economic strength of the country after World War II).

21. *See* ROGER DANIELS, GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882, at 49 (2004) (The impetus for the quota system was “the beleaguered feeling of so many old-stock Protestant Americans. Immigrants and their non-Protestant cultures, they felt, represented a serious and sustained challenge to American values.”); MASSEY & SÁNCHEZ, *supra* note 19, at 12 (noting the “massive assimilation among Euro-Americans by the 1990s” and contrasting it with “segmentation and transnationalism” of new immigrant groups); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” Into the Heart of Darkness*, 73 IND. L.J. 1111, 1130–31 (1998) (“Despite persistent criticisms, including claims that it adversely affected U.S. foreign policy interests, the Anglo-Saxon, northern European preference in the immigration laws remained intact until 1965.”).

22. MASSEY & SÁNCHEZ, *supra* note 19, at 13–14.

23. *Id.* at 14.

24. *Id.*

difficult one for natives and immigrants.<sup>25</sup> Yet, according to Massey and Sánchez, those who have more resources and power “are prone to undertake boundary work to define one or more out-groups and then frame them as lacking basic human attributes of warmth and competence, thus justifying their ongoing exploitation and exclusion.”<sup>26</sup>

Today, there are close to twelve million undocumented immigrants who are present in the United States without permission and, thus, who do not belong.<sup>27</sup> Simply stating that they do not belong, however, ignores important nuances. Immigration and economic policies and a labor market that has encouraged migration from the south have facilitated the growth of the undocumented immigrant population. The proliferation of the undocumented population was not simply the result of migrants deciding to cross the border unlawfully, but also involved complicated economic and political factors, as well as contradictory immigration policies, which have simultaneously encouraged and restricted migration.<sup>28</sup>

As a practical matter, the existence of a large undocumented population means that there are approximately twelve million people who are both included and excluded within American society.<sup>29</sup> They are included in the sense that they are actively participating in society—in the workforce, in schools, and in communities.<sup>30</sup> At the same time, they are excluded.<sup>31</sup> They cannot obtain drivers’

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25. There are many theories of assimilation and acculturation that are beyond the scope of this Article. Generally, however, it is important to note that the concept of assimilation has various meanings. Classical or straight-line assimilation argued that immigrants, after arrival, go through three basic stages: acculturation—adopting the language and values of the new country; structural assimilation—immigrants and their children develop personal networks with natives; and marital assimilation—the descendants of immigrants intermarry with natives of the new country. *Id.* at 2. Contrary to this assimilation theory, in the 1990s social scientists began to acknowledge that assimilation was not always such a smooth, linear process for immigrant groups. From this research emerged the theory of segmented assimilation. Under segmented assimilation an immigrant group’s assimilation may move upward or downward depending upon many factors, including, but not limited to, race, ethnicity, legal status, level of education, and whether a group speaks English. *See id.* at 5–6.

26. *Id.* at 14.

27. Julia Preston, *Illegal Immigrants Number 11.5 Million*, N.Y. TIMES, Mar. 24, 2012, at A14.

28. DOUGLAS S. MASSEY, JORGE DURAND & NOLAN J. MALONE, *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* 1–3 (2002).

29. Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955 (describing the undocumented immigrant as both an insider and outsider).

30. “DREAMers”—those who entered the United States before the age of sixteen and who have lived in the United States continuously for at least five years—are the perfect example of undocumented immigrants who are participating in society (having grown up exclusively in the United States) but who are excluded because of their undocumented status. Though the Deferred Action for Childhood Arrivals (DACA) provides temporary status for undocumented youth, it does not create a pathway to lawful permanent status or citizenship. For information about Deferred Action for Childhood Arrivals, see *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGRATION SERVS., [www.uscis.gov/childhoodarrivals](http://www.uscis.gov/childhoodarrivals) (last updated July 2, 2013).

licenses, work without authorization, or access most public benefits. And, of course, they cannot join the political community.

Once here, however, their ties to the United States grow stronger. Most noticeably, if an undocumented immigrant has a child that is born in the United States, that child automatically becomes a U.S. citizen.<sup>32</sup> As of 2008, there were 5.5 million children living in the United States with at least one undocumented parent.<sup>33</sup> Of those children, seventy-three percent were U.S. citizens.<sup>34</sup> This presents a difficult situation—while U.S.-citizen children who have undocumented parents are entitled to certain benefits because of their citizenship status, their parents, who make decisions on their behalf, do not have equal status and are not entitled to the same benefits.

The federal government has addressed unlawful migration by securing the border,<sup>35</sup> increasing deportations,<sup>36</sup> and developing harsh immigration laws and policies that transform traditionally civil immigration violations into criminal offenses.<sup>37</sup> Additionally, States have attempted to enforce immigration laws through the passage of anti-immigrant legislation, some of which make immigration-related offenses criminal.<sup>38</sup>

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31. See MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 2 (2004) ("Marginalized by their position in the lower strata of the workforce and even more so by their exclusion from the polity, illegal aliens might be understood as a caste, unambiguously situated outside the boundaries of formal membership and social legitimacy.").

32. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

33. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 7 (2009), [pewhispanic.org/files/reports/107.pdf](http://pewhispanic.org/files/reports/107.pdf).

34. See *id.*

35. See U.S. CUSTOMS & BORDER PROT., DEP'T OF HOMELAND SEC., BORDER PATROL AGENT STAFFING BY FISCAL YEAR (2012), [http://www.cbp.gov/linkhandler/cgov/border\\_security/border\\_patrol/usbp\\_statistics/usbp\\_fy12\\_stats/staffing\\_1993\\_2012.ctt/staffing\\_1993\\_2012.pdf](http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/usbp_fy12_stats/staffing_1993_2012.ctt/staffing_1993_2012.pdf) (noting that there were over 21,000 agents tasked with securing the border); César Cuauhtémoc García Hernández, *Cluster Introduction—Immigrant Outsider, Alien Invader: Immigration Policing Today*, 48 CAL. W. L. REV. 231, 231–33 (2012) (arguing that the reach of immigration policing is motivated by fear and racism).

36. See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., ICE TOTAL REMOVALS (2012), available at [http://www.ice.gov/doclib/about/offices/ero/pdf/ero\\_more-removals1.pdf](http://www.ice.gov/doclib/about/offices/ero/pdf/ero_more-removals1.pdf) (showing that total removals in 2007 were 291,060, but as of August 2012 they had already reached 366,292).

37. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 371 (2006) ("Deportation became the consequence of almost any criminal conviction of a noncitizen, including legal permanent residents. Immigrants who had previously been subject only to civil immigration proceedings, including tourists and business travelers who had overstayed their visas and students working beyond allotted hours or in unauthorized employment, were newly subject to criminal sanctions in addition to removal.").

38. See, e.g., ALA. CODE §§ 31-13-7 to -35 (2011) (various measures ranging from access to public benefits to employer verification of immigration status); ARIZ. REV. STAT. ANN. § 13-1509(A) (Supp. 2012) (criminal sanction for failing to carry documentation

The increased criminalization of immigrants fosters negative stereotypes about them—stereotypes that not only relate to their immigration status but also to their personhood.<sup>39</sup> For instance, an undocumented immigrant is not simply perceived as having violated immigration laws, but is also, as legal scholar David Thronson suggests, part of a “societal narrative that constructs an expanding notion of unworthiness and ‘illegality.’”<sup>40</sup> As expressed by one resident in Tulsa when explaining his frustrations with undocumented immigrants, “[y]ou come in illegally; everything you do from that point on is illegal.”<sup>41</sup> Because Latino immigrants constitute about half of the immigrants who have come to the United States since 1965<sup>42</sup> and comprise the largest group of undocumented immigrants,<sup>43</sup> negative views about undocumented immigrants usually coexist with views about Latinos.<sup>44</sup>

Tensions around identity also exist in the family law context. Because the family is where language, culture, and values are transmitted,<sup>45</sup> it is, in essence, where

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demonstrating lawful immigration status), *invalidated by* Arizona v. United States, 132 S. Ct. 2492, 2503 (2012); GA. CODE ANN. § 35-6A-10 (2012) (establishing a grant or incentive program to local law enforcement agencies to enter into a 287(g) agreement with the Department of Homeland Security); S.C. CODE ANN. § 16-17-750 (Supp. 2012) (making it a misdemeanor if someone eighteen or older fails to carry documentation demonstrating lawful immigration status), *invalidated by* United States v. South Carolina, 720 F.3d 518, 532 (4th Cir. 2013); UTAH CODE ANN. § 76-9-1001 (LexisNexis 2012).

39. Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. RACIAL & ETHNIC JUST. 163, 177 (2010).

40. David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL’Y 45, 54–55 (2005).

41. Kari Huus, *Turmoil in Tulsa: The Illegal Immigration Wreck*, NBCNEWS.COM (July 17, 2007, 7:31 PM), [http://www.today.com/id/19466978/ns/today-today\\_news/t/turmoil-tulsa-illegal-immigration-wreck/#.UfcwZhaPDG4](http://www.today.com/id/19466978/ns/today-today_news/t/turmoil-tulsa-illegal-immigration-wreck/#.UfcwZhaPDG4).

42. PEW HISPANIC CTR., A NATION OF IMMIGRANTS: A PORTRAIT OF THE 40 MILLION, INCLUDING 11 MILLION UNAUTHORIZED 2 (2013), *available at* [pewhispanic.org/files/2013/01/statistical\\_portrait\\_final\\_jan\\_29.pdf](http://pewhispanic.org/files/2013/01/statistical_portrait_final_jan_29.pdf).

43. JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 11 (2011) <http://www.pewhispanic.org/files/reports/133.pdf> (noting that Mexicans comprised 58% of the unauthorized population and that immigrants from other parts of Latin America comprised 23% of unauthorized immigrants).

44. See MASSEY & SÁNCHEZ, *supra* note 19, at 79 (“With 12 million people out of status and temporary worker migration now pushing toward 400,000 per year and constituting the bulk of new entrants, the share of migrants who lack full legal rights in the United States has never been greater. Undocumented migrants alone now constitute one-third of all immigrants in the United States, but . . . the share is much greater among Latin Americans. The large share of respondents in our sample who lack documents (62%) thus reflects a fundamental facet of contemporary Latino immigration to the United States. Latin Americans living in the United States are probably more vulnerable and exploitable than at any point in American history.”).

45. Annette R. Appell, “Bad” Mothers and Spanish-Speaking Caregivers, 7 NEV. L.J. 759, 759 (2007) (explaining that the lack of discussion about child welfare in civil rights and critical race studies “is surprising given that children are both primary receivers and transmitters of race, ethnicity, culture, language, and values; and that the constitutional civil



identity is cultivated. Since child raising norms are often viewed through the lens of one's class, race, and ethnic culture, tensions arise when members of a dominant group make childrearing assessments about parents who are members of a less powerful, subordinate group. Dominant groups may justify removal of children from parents whose identity is perceived as bad or harmful by arguing that it is in the child's best interests.<sup>46</sup> Such actions, however, allow members of a dominant group to instill in children their preferred culture, language, class, and values. The effect of these actions cannot be minimized. As Professor Annette Appell argued, when parents lose the ability to transmit these social goods, it "can compromise individual, cultural, and even political identity."<sup>47</sup>

Two historical child welfare practices support this assertion.<sup>48</sup> "Child-saving" agencies in the 1880s sought to save poor children of Irish, Polish, and Italian

rights to family autonomy—the parental rights so often denigrated—recognize the importance of children in the creation and perpetuation of moral values and, ultimately, to a diverse and critical polity").

46. The state also constructs abandonment through detention and deportation. *See, e.g., In re B & J*, 756 N.W.2d 234, 237–38 (Mich. Ct. App. 2008) (undocumented parents who were investigated for child abuse were reported to ICE by state child welfare authorities). Though the allegations of abuse were later found to be unsubstantiated, the parents' separation from their children because of their deportation led the family court to find that the parents had abandoned their children and, therefore, their parental rights should be terminated. *Id.*

47. Appell, *supra* note 45, at 760 ("Women who are compliant, English-speaking, not ethnically diverse, White, and middle class are most successful in the child welfare system; those who diverge from these norms are most likely to lose their motherhood. When mothers lose their children, they lose their chance to pass on their language, culture, and values, and their children lose their chance to receive these social goods. This loss can compromise individual, cultural, and even political identity.").

48. The historical practice of taking children from parents who were viewed as inferior was not limited to the United States. For instance, in Spain, under the Franco regime, it is now estimated that from 1939 to 1950 up to 30,000 children were taken from their mothers after their mothers had been imprisoned for being leftist. A psychiatrist who is claimed to have orchestrated these abductions stated, "[T]hose women had inside the seed of Marxism, and if those children remained with their mothers, the Marxism [would] grow in those children." Sylvia Poggioli, *Families of Spain's 'Stolen Babies' Seek Answers—And Reunions*, NAT'L PUB. RADIO (Dec. 14, 2012, 3:18 AM), <http://www.npr.org/2012/12/14/167053609/families-of-spains-stolen-babies-seek-answers-and-reunions>. The process continued after Franco's death and lasted through the 1980s. In later years babies were taken from poor mothers and given to affluent, conservative, and devout Catholic families. *Id.*

Additionally, between 1910 and 1975 white Australians removed 100,000 children from aboriginal women. Light-skinned children were given to white couples for adoption, and dark-skinned children were sent to orphanages. LINDA GORDON, *THE GREAT ARIZONA ORPHAN ABDUCTION* 310 (1999).

From 1920 to 1972 the Swiss government removed Roma children from their parents and sent them to be raised by non-Roma families. Mary Ellen Tsekos, *Minority Rights: The Failure of International Law to Protect the Roma*, 9 HUM. RTS. BRIEF 26, 26 (2002), available at <http://www.wcl.american.edu/hrbrief/09/3tsekos.pdf>; *see also* GORDON, *supra*, at 310.

Though some claim it to be a conspiracy theory, others believe that in the late 1940s, with the assistance of doctors in Israel, Ashkenazi Jewish women stole babies, who had been

immigrants, who were classified as nonwhite on the East Coast, by sending them on orphan trains from the East Coast to be raised by families who could “raise him far above the class from which he sprang.”<sup>49</sup>

Similarly, in the 1800s—at a time when Native Americans were still denied American citizenship—Christian missionaries, and later the federal government, forcibly removed Native American children from their homes and placed them in boarding schools.<sup>50</sup> “[T]he aim was the assimilation of Indian children into Anglo-American society.”<sup>51</sup> According to Tsianina Lomawaima, a professor specializing in American Indian Studies, the government’s intention behind establishing these boarding schools was to “erase and replace” Native American culture.<sup>52</sup> Native American language, dress, and cultural practices were not allowed in the boarding schools.<sup>53</sup> Families were discouraged from visiting their children or even knowing their location.<sup>54</sup> These practices not only resulted in family destruction but also caused children to become conflicted about their own racial and cultural identities.<sup>55</sup>

Further, from 1958 to 1967, the Bureau of Indian Affairs, the U.S. Children’s Bureau, and the Child Welfare League of America developed the “Indian Adoption Project,” whereby Native American children from western states were taken from their biological parents and placed for adoption with non-Native American families in the East and Midwest.<sup>56</sup> This project came about as the result of ignorance, cultural insensitivity, assimilationist goals, and racism.<sup>57</sup>

Like these historical child welfare practices that forcibly assimilated children into the dominant culture, recent terminations of parental rights, as will be described more fully in Part III, suggest similar tensions around identity and struggles to cultivate a preferred “American” identity. If a U.S.-citizen child

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born to Sephardic Yemeni Jewish mothers, from the hospital. The Sephardic Yemeni mothers were informed that their children had died. GORDON, *supra*, at 310; *see also* Joel Greenberg, *The Babies from Yemen: An Enduring Mystery*, N.Y. TIMES, Sept. 2, 1997, at A4.

49. GORDON, *supra* note 48, at 9–12. In her book, Gordon describes a slight twist to the normal child-saving practices. A Catholic child-saving agency at the beginning of the twentieth century attempted to place immigrant children, who on the East Coast were considered nonwhite but who out west were considered white, with Mexican families in a small southwestern mining town. *Id.* at 13–19. Anglos reacted by abducting the immigrant children on the grounds that Mexicans—nonwhites—were unfit to raise white children. *Id.* at 65–79, 109–117.

50. THE HARVARD PROJECT ON AM. INDIAN ECON. DEV., THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION 199–202, 236 (2008) [hereinafter THE HARVARD PROJECT].

51. *Id.* at 199.

52. Charla Bear, *American Indian Boarding Schools Haunt Many*, NAT’L PUB. RADIO (May 12, 2008, 12:01 AM), <http://www.npr.org/templates/story/story.php?storyId=16516865>.

53. Marsha King, *Tribes Confront Painful Legacy of Indian Boarding Schools*, THE SEATTLE TIMES (Feb. 3, 2008, 12:00 AM), [http://seattletimes.com/html/localnews/2004161238\\_boardingschool03m.html](http://seattletimes.com/html/localnews/2004161238_boardingschool03m.html).

54. THE HARVARD PROJECT, *supra* note 50, at 236.

55. King, *supra* note 53.

56. THE HARVARD PROJECT, *supra* note 50, at 237.

57. *Id.*

follows her mother after her mother's deportation, she will be raised outside of the United States—likely in a poorer country compared to the United States—by a mother who is not an American citizen and who may not speak English. Her mother cannot instill in her American values, and some argue that the United States may view this as a threat to American democracy.<sup>58</sup> Even if a child is not a U.S. citizen, a juvenile court may still feel compelled to terminate parental rights, believing that the child could be brought into "full citizenship" if raised in the United States by American parents.<sup>59</sup>

Political scientist Samuel Huntington warned in his article, *The Hispanic Challenge*, that because Mexican Americans no longer see themselves as the minority that has to accommodate the dominant group and instead are committed to their own culture and identity, they pose a threat to American democracy.<sup>60</sup> Huntington argued that "American identity" has been defined by culture and creed—a creed that derives from the Anglo-Protestant culture. Huntington further stated:

Key elements of that culture include the English language; Christianity; religious commitment; English concepts of the rule of law, including the responsibility of rulers and the rights of individuals; and dissenting Protestant values of individualism, the work ethic, and the belief that humans have the ability and the duty to try to create a heaven on earth, a 'city on a hill.'<sup>61</sup>

According to Huntington, this national identity has been threatened by many factors, including, but not limited to, individual identities that are based on race, ethnicity, and gender. He claimed that the growth of the Latino population threatened the values and identity of Anglo-Protestants and the "cultural and political integrity" of the nation<sup>62</sup> and that the burden to assimilate and adopt the culture and values of the United States rests solely on the immigrant, a burden he

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58. See Marcia Zug, *Should I Stay or Should I Go: Why Immigrant Reunification Decisions Should Be Based on the Best Interest of the Child*, 2011 BYU L. REV. 1139, 1147–52 (arguing that it is in the interest of the State to teach American children "the fundamental values of a democratic society" and to keep "children connected to America" and that this justifies the State's interest in not reunifying children with parents following the parents' deportation).

59. See GORDON, *supra* note 48, at 293–94 (describing how the adoption of the immigrant children from the Foundling hospital, "would bring the children into a full citizenship, unqualified by their parents' economic or moral failings").

60. Samuel P. Huntington, *The Hispanic Challenge*, FOREIGN POL'Y, Mar.–Apr. 2004, at 30, 44–45, available at [http://www.foreignpolicy.com/articles/2004/03/01/the\\_hispanic\\_challenge](http://www.foreignpolicy.com/articles/2004/03/01/the_hispanic_challenge). But see Kevin R. Johnson & Bill Ong Hing, *National Identity in a Multicultural Nation: The Challenge of Immigration Law and Immigrants*, 103 MICH. L. REV. 1347, 1389 (2005) (critiquing Samuel Huntington's book, *Who Are We? The Challenges to America's National Identity*, and arguing that a "multiracial, multicultural nation may necessitate a more diffuse national identity," differing from Huntington's assertion that immigrants must assimilate into the Anglo-Protestant identity).

61. Huntington, *supra* note 60, at 31–32.

62. *Id.* at 32–33.

claims Hispanics have not met.<sup>63</sup> He concluded his piece by stating, “There is no Americano dream. There is only the American dream created by an Anglo-Protestant society. Mexican Americans will share in that dream and in that society only if they dream in English.”<sup>64</sup> His view is not simply an ivory tower one. In 2006 forty-eight percent of Americans believed that “newcomers from other countries threaten traditional American values and customs.”<sup>65</sup>

One way to maintain an Anglo-American identity is through children. Raising children—even if they are children of immigrants—in an English-speaking environment by Anglo parents preserves the Anglo-American identity.<sup>66</sup> This assimilation of sorts is even more important when the children are U.S. citizens, but their birth parents are not.

The intersection of immigration and family law is sorely underexplored, and the literature addressing it has not examined the historical relationship between immigration law and early child welfare practices and the tensions around identity that have existed under both.<sup>67</sup> Nor has the literature examined how each area can

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63. *Id.* at 36–39.

64. *Id.* at 45.

65. MASSEY & SÁNCHEZ, *supra* note 19, at 71. Jason Richwine, who now works for the Heritage Foundation, who coauthored the Heritage Foundation’s study on immigration reform, and who received his Ph.D. in public policy from Harvard, argued in his 2009 dissertation that because current immigrants lack “the average cognitive ability that natives possess,” the United States should focus its immigration policies on admitting those with high IQs. Jason Richwine, *IQ and Immigration Policy 59* (May 1, 2009) (Dissertation, Harvard University Graduate School of Arts and Sciences), available at <http://www.scribd.com/doc/140239668/IQ-and-Immigration-Policy-Jason-Richwine>. Further, Richwine argued that Hispanics have lower IQs than whites, stating, “Finally, it is worth asking ‘how long is too long?’ when it comes [sic] Hispanic assimilation. No one knows whether Hispanics will ever reach IQ parity with whites, but the prediction that new Hispanic immigrants will have low-IQ children and grandchildren is difficult to argue against.” *Id.* at 66.

66. *Cf.* Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1439 (2004) (arguing that in the educational context “[l]anguage-based subordination” has been harmful to Latinos). Perea notes that some of the techniques used in the educational context “can be characterized as assimilative in nature—pressuring Spanish speakers to abandon their language and culture or to integrate into Anglo society as an underclass. Some of the techniques are not assimilative, but rather discriminatory—residential or educational segregation, or teacher prejudice against Spanish-speaking students. All of these techniques, intentionally or not, reflect and enforce a racist, subordinating attitude toward Latino students.” *Id.* Just as in the educational system, the family is also another arena where state-intervention can reflect—whether intentionally or unintentionally—attempts at assimilation.

67. David Thronson’s significant pieces were the first to frame many of the issues that arise when these two areas of law intersect. *See generally* David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1167 (2006); Thronson, *supra* note 40. In addition to David Thronson, a few other scholars have explored this intersection. *See, e.g.*, Kerry Abrams, *Immigration Status and the Best Interests of the Child Standard*, 14 VA. J. SOC. POL’Y & L. 87, 97–101 (2006); Rabin, *supra* note 16; Sarah Rogerson, *Unintended and Unavoidable: The Failure to Protect Rule and Its Consequences for Undocumented Parents and Their Children*, 50 FAM. CT. REV. 580 (2012); Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C. J. L. & SOC. JUST. 63 (2012);

be a forum for cultivating an American identity. This historical relationship is important because it illuminates how negative perceptions toward certain immigrant groups and Native Americans influenced Anglo assessments of their child-rearing practices. Essentially, members of the dominant Anglo culture sought to cultivate a preferred American identity by removing children from the care of their parents. In this way, these children became a blank slate on which to craft an identity, or through which to remove the threat of a competing, alternative identity—in a manner that completely disregarded the family’s relationship and what would later be established as a constitutional right of the parents to care for their children and of the children to be cared for by their parents.<sup>68</sup> This Article connects these historical practices to contemporary court decisions that terminate the parental rights of undocumented parents and suggests that these decisions may have more to do with tensions around identity than the protection and welfare of children. Moreover, as scholars such as Annette Appell and Dorothy Roberts have demonstrated, parents who are outside the dominant cultural norms—poor, racial minorities, outlaws—have consistently been more vulnerable to state intervention.<sup>69</sup> Undocumented parents not only face deportation, but also, like other “out” or subordinate groups, the loss of their parental rights. When parents lose the right to raise their children, they also lose the ability to transmit their culture and values.

Part I illustrates how, historically, immigration and citizenship laws regulated American identity by determining which group of immigrants could immigrate and become citizens. It then explores how similar efforts to regulate identity were

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Zug, *supra* note 58.

A few student notes have also examined the prevalence of termination of parental rights involving undocumented parents. *See generally, e.g.*, Vinita Andrapalliyal, Note, *The CPS Took My Baby Away: Threats to Immigrant Parental Rights and a Proposed Federal Solution*, 7 HARV. L. & POL’Y REV. 173 (2013); Trang Bui, Note, *Battle Scars from the Fight Between Family Law and Immigration Law: Incarcerated Immigrant Parents and Missouri’s Response*, 81 UMKC L. REV. 183 (2012); C. Elizabeth Hall, Note, *Where Are My Children . . . and My Rights? Parental Rights Termination as a Consequence of Deportation*, 60 DUKE L.J. 1459 (2011); Timothy E. Yahner, Note, *Splitting the Baby: Immigration, Family Law, and the Problem of the Single Deportable Parent*, 45 AKRON L. REV. 769 (2012).

68. *Cf.*, Appell, *supra* note 45, at 759 (“Children are an essential but often overlooked bounty in the regulation of race, culture, and rights.”).

69. *Id.* at 759 (exploring the role that culture and language play when Spanish-speaking mothers are subject to state intervention); *see also* DOROTHY ROBERTS, SHATTERED BONDS 8–10 (2002) (discussing the disproportionately African American face of the child welfare system); Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 585–87 (1997) (describing the way in which the child welfare system focuses on punishing mothers who are outside the dominant cultural norms rather than fostering familial reunification); Deseriee A. Kennedy, *Children, Parents & the State: The Construction of a New Family Ideology*, 26 BERKELEY J. GENDER L. & JUST. 78, 95–96 (2011) (discussing how laws and policies relating to incarcerated parents impede reunification); Janet L. Wallace & Lisa R. Pruitt, *Judging Parents, Judging Place: Poverty, Rurality and Termination of Parental Rights*, 77 MO. L. REV. 95, 112–13 (2012) [hereinafter *Poverty, Rurality and Termination of Parental Rights*] (examining the way in which poor parents living in rural parts of the country are vulnerable to termination of parental rights).

present in the child welfare context. The purpose of this Part is to suggest that historical tensions around identity and exclusion present in both immigration and child welfare law often mirrored one another. In other words, hostility toward a particular immigrant group and rejection of its culture and values not only informed and influenced immigration policies but also affected the manner in which their families were treated.

Part II explores the ways in which harsh immigration policies and anti-immigrant sentiment contribute to public perceptions that associate Latino immigrants with criminality, cultural deviance, and overarching illegality. This background is important for understanding how anti-immigrant biases and hostile perceptions toward certain immigrant groups may creep into and undermine child welfare proceedings.

Part III details the constitutional rights that undocumented parents possess and illustrates how anti-immigrant animus can threaten the fundamental rights of undocumented parents in the family law context. It highlights cases in which the parental rights of undocumented Latino parents were terminated, and explores the subtle and not so subtle ways in which the identity of the parent was perceived by decision-makers to be inferior. Concerns about criminality, as well as a belief that Latino immigrants threaten the Anglo-American identity, can result in the loss of legal rights for undocumented immigrants: specifically, the right of a parent to raise her child and to develop the child's identity and culture.

Part IV responds to one scholar's proposal to change the standard used in termination proceedings when such proceedings involve undocumented parents of U.S.-citizen children. This Part argues against this approach because it would undermine the constitutional rights of undocumented parents and devalue their family relationships.

#### I. IMMIGRATION AND FAMILY LAW: HISTORICAL POLICIES AND PRACTICES OF EXCLUSION AND THE TENSIONS AROUND CULTIVATING A NATIONAL IDENTITY

This Part provides an overview of how immigration and citizenship laws regulated national identity in the 1800s through the second half of the twentieth century by determining who could enter the United States and who could become a citizen. It also closely examines the influence of immigration policies and practices on migration from Mexico, which continues to affect present day perceptions and attitudes toward Latino immigrants. It then examines early child welfare practices that removed immigrant and Native American children from their homes because Anglos perceived the identity of the children's parents—their race, culture, language, class, and values—to be inferior and un-American.

This Part's purpose is to parallel the ways in which tensions around identity and its cultivation existed within both immigration law and child welfare practices. More precisely, Part A explores the exclusion of Native Americans, Southern and Eastern European immigrants, and Mexicans to provide a framework for Part B, which details the treatment of their families. Combined, this Part illustrates how both forums excluded these groups because their culture, race, and values did not align with that of the dominant culture—Anglo-Saxon Northern European.

*A. Cultivating an Anglo-American Identity Under Immigration and Citizenship Law*

Immigration and citizenship law define who may enter the United States and who may join the political community as a U.S. citizen. The history of immigration and citizenship law reveals that race and culture—combined with economic and political conditions—influenced who was permitted to enter and remain in the United States and who was entitled to U.S. citizenship. These laws affected not only immigrants but also Native Americans, who were restricted from citizenship until nearly the second half of the twentieth century.<sup>70</sup> Ultimately, immigrants whose identities more closely aligned with those of Anglo-Protestants were treated more favorably under immigration and citizenship law.<sup>71</sup>

1. Immigration and Citizenship Laws and the Exclusion of Native Americans and Southern and Eastern European Immigrants

As legal scholars such as Ian Haney López and historian Mae Ngai demonstrated in their books,<sup>72</sup> our nation’s immigration and citizenship laws have used race as a basis for restricting who could immigrate to the United States and who could become a citizen. These legislative efforts sought to cultivate an Anglo-American identity within the United States through the law.

The original qualification for naturalization was premised on race, and whether a group was racially eligible for citizenship often depended upon how well it could culturally assimilate into Anglo-Protestant society.<sup>73</sup> After the Civil Rights Act

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70. See Nationality Act of 1940 § 201(b), Pub. L. 76-853, 54 Stat. 1137, 1138 (providing that “[a] person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe” is a national and citizen of the United States).

71. See NGAI, *supra* note 31, at 23 (noting that the 1924 quota law “served contemporary prejudices among white Protestant Americans from northern European backgrounds and their desire to maintain social and political dominance. Those prejudices had informed the restrictionist movement since the late nineteenth century. But the nativism that impelled the passage of the act of 1924 articulated a new kind of thinking, in which the cultural nationalism of the late nineteenth century had transformed into a nationalism based on race.”). See generally IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996) (examining early cases and immigration and naturalization laws to explore the legal and social construction of race in America).

72. See LÓPEZ, *supra* note 71, at 37 (“Federal law restricted immigration to this country on the basis of race for nearly one hundred years, roughly from the Chinese exclusion laws of the 1880s until the end of the national origin quotas in 1965.”); NGAI, *supra* note 31, at 23. López later explains that birthright citizenship was tied to race until 1940 and naturalized citizenship until 1952. LÓPEZ, *supra* note 71, at 39.

73. See *United States v. Thind*, 261 U.S. 204, 215 (1923) (“The children of English, French, German, Italian, Scandinavian, and other European parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.”); LÓPEZ, *supra*

declared that all persons born in the United States (except for “Indians not taxed”) were citizens, regardless of race, color, or slavery,<sup>74</sup> Congress allowed persons “of African nativity” or “African descent” to naturalize.<sup>75</sup> It did not remove the requirement that a person be white because of concerns about extending citizenship to Native Americans and Asians.<sup>76</sup> One senator, in explaining his opposition to extending citizenship to Native Americans, referred to “the rank, privileges, and immunities of citizenship upon the cruel savages who destroyed [Minnesota’s] peaceful settlements and massacred the people with circumstances of atrocity too horrible to relate.”<sup>77</sup> Another senator questioned “whether this door [of citizenship] shall now be thrown open to the Asiatic population,” which would result in “an end to republican government there [on the Pacific Coast], because it is very well ascertained that those people have no appreciation of that form of government; it seems to be obnoxious to their very nature; they seem to be incapable either of understanding or carrying it out.”<sup>78</sup>

*Jus soli*—the acquisition of citizenship at birth—did not apply to Native Americans. In 1884 the Court held that Native American children did not acquire citizenship at birth because they owed allegiance to their tribe and not to the United States.<sup>79</sup> Though the Supreme Court in 1898 held that children of parents racially ineligible to naturalize could acquire citizenship at birth,<sup>80</sup> this did not include Native American children. In 1924 Congress passed the Indian Citizenship Act, which granted citizenship to Native Americans born in the United States, though it was uncertain whether those born after the Act’s enactment were conferred citizenship.<sup>81</sup> It was not until 1940 that all Native Americans who were born in the United States were considered citizens.<sup>82</sup>

Racial restrictions on immigration persisted into the twentieth century. Intense nativism resulted in the passage of a temporary quota system in 1921,<sup>83</sup> which was made permanent in 1924.<sup>84</sup> This system intentionally discriminated against immigrants from eastern and southern Europe who had been arriving in large numbers in the early 1900s and who were considered racially and culturally

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note 67, at 79–80 (discussing *United States v. Thind* and another Supreme Court decision, *Ozawa v. United States*, and explaining that the Court in both cases “abandoned scientific explanations of race in favor of those rooted in common knowledge when science failed to reinforce popular beliefs about racial differences”).

74. Civil Rights Act of 1866, ch. 31, 14 Stat. 27. For a discussion of early citizenship laws, see LÓPEZ, *supra* note 71, at 37–47.

75. Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256.

76. LÓPEZ, *supra* note 71, at 43.

77. *Id.* (quoting CONG. GLOBE, 42nd Cong., 1st Sess. 2939 (1866) (statement of Sen. Hendricks)).

78. *Id.* (quoting CONG. GLOBE, 42nd Cong., 1st Sess. 2939 (1866) (statement of Sen. Cowan)).

79. *Elk v. Wilkins*, 112 U.S. 94, 94 (1884).

80. *See United States v. Wong Kim Ark*, 169 U.S. 649, 705 (1898).

81. Act of June 2, 1924, Pub. L. No. 68-175, 43 Stat. 253; LÓPEZ, *supra* note 71, at 41 (“[Q]uestions arose regarding the citizenship of those born in the United States after the effective date of the 1924 act.”).

82. Nationality Act of 1940, Pub. L. No. 76-853, § 201(b), 54 Stat. 1137, 1138.

83. Act of May 19, 1921, Pub. L. No. 67-5, 42 Stat. 5.

84. Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153, 159.



undesirable.<sup>85</sup> The system placed annual quotas on the number of immigrants admitted from a particular country, with the quotas based on the 1890 census.<sup>86</sup> Because Northern Europeans constituted the largest group in the 1890 census, it received the largest quota.<sup>87</sup> In passing this system, Congress acknowledged that it wanted "to confine immigration as much as possible to western and northern European stock"<sup>88</sup> and expressed fears that non-Protestant cultures endangered American values.<sup>89</sup> For example, the chairman of the immigration committee of the

85. See LÓPEZ, *supra* note 71, at 38; Johnson, *supra* note 21, at 1127–31 (describing how the animosity toward southern and eastern Europeans led to the passage of the quota system); cf. RODOLFO F. ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS 185 (Robert Miller & Lauren G. Shafer eds., 3d ed. 1988) (describing how some leaders in Congress wanted a quota that would limit Mexican migration but others worried that doing so would anger agribusiness, which relied upon Mexican labor and would block the bill's passage). Though the Immigration and Naturalization Committee tried to appease the opponents by promising that another bill would be presented that would create border patrol and would limit Mexican migration, the chairman of the House Appropriations Committee stated that the 1924 Act, which would make the quota system permanent, "opens the doors for perhaps the worst element that comes into the United States—the Mexican *peon* . . . [It] opens the door wide and unrestricted to the most undesirable people who come under the flag." ACUÑA, *supra*, at 186.

86. Immigration Act of 1924, Pub. L. No. 68-139, § 11(a), 43 Stat. 153, 159; see also NGAI, *supra* note 31, at 25 (explaining how the law required the allocation of quotas to countries in the same proportion in which Americans traced their origins to those countries). Ngai further explains that the problem with developing this system was that national origins data regarding immigrants was not recorded until 1899. NGAI, *supra* note 31, at 25. Therefore, the newly established quota board had to create the categories that would make up the national origins quota system—that is, "national origin," "native stock," "nationality"—and also the definitions for these categories. *Id.* at 25–26. As an example of the imprecise and, arguably racist, nature of these categories, "nationality" was defined as country of birth, but the law provided that individuals who lived in the United States in 1920 did not include "(1) immigrants from the [Western Hemisphere] or their descendants, (2) aliens ineligible for citizenship or their descendants, (3) the descendants of slave immigrants, or (4) the descendants of the American aborigines." *Id.* at 26 (quoting Immigration Act of 1924, Pub. L. No. 68-139, § 11(d), 43 Stat. 153, 159). Ngai argued that the system "proceeded from the conviction that the American nation was, and should remain, a white nation descended from Europe." *Id.* at 27. She also noted, "[W]hile the national origins quota system intended principally to restrict immigration from southern and eastern Europe and used the notion of national origins to justify discrimination against immigrants from those nations, it did more than divide Europe. It also divided Europe from the non-European world. It defined the world formally in terms of country and nationality but also in terms of race. The quota system distinguished persons of the 'colored races' from 'white' persons from 'white' countries." *Id.*

87. See Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927, 1932–33 (1996) (describing the law and explaining how it favored immigrants from northern and western Europe).

88. LÓPEZ, *supra* note 71, at 38 (citing Act of May 19, 1921, Pub. L. No. 67-5, 42 Stat. 5).

89. See DANIELS, *supra* note 21, at 49 (noting that the impetus for the quota system was "the beleaguered feeling of so many old-stock Protestant Americans. Immigrants and their non-Protestant cultures, they felt, represented a serious and sustained challenge to American

House of Representatives argued that the United States was in danger of being overtaken by “abnormally twisted” and “unassimilable” Jews, “filthy, un-American and often dangerous to their habits.”<sup>90</sup>

## 2. Mexican Migration and the Emergence of a Latino Identity Associated with Criminality and Illegal Status

Mexican immigrants were also excluded under immigration laws, though in different ways. In order to contextualize contemporary issues involving Latino immigrants that will be discussed throughout this Article, a brief detour into the complicated history of America’s immigration policies toward Mexico is necessary.

Mexicans were not racially restricted from naturalization. In 1897 a district court in Texas held that though a thirty-seven-year-old Mexican man, Ricardo Rodriguez, was not “white,” citizenship could be conferred to him and other Mexicans because of rights established by treaties between the United States and Mexico.<sup>91</sup> While this holding may belie a claim that immigration and citizenship laws discriminated against Mexicans, the following section will explore the ways in which “[t]heir legal whiteness was contingent and unstable[.]”<sup>92</sup>

The border between the United States and Mexico was created in 1848 through the Treaty of Guadalupe Hidalgo. Mexico had surrendered California, Arizona, New Mexico, Texas, and parts of Colorado, Nevada, and Utah.<sup>93</sup> Around this time, Mexicans provided labor in the southwestern United States in mines, farms, and railroads.<sup>94</sup>

Despite the unrestricted flow of labor from Mexico to the United States, tensions between Mexicans and Anglos were prevalent in the Southwest.<sup>95</sup> Historian Linda Gordon described the racial relationship between Mexicans and Anglos in a small southwestern mining town as “immigrant” and “American”—irrespective of the legal citizenship of Mexicans.<sup>96</sup> Another historian noted, “Casting Mexicans as foreign *distanced* them both from Euro-Americans culturally and from the Southwest as a spatial referent: it stripped Mexicans of the claim of belonging that they had had as natives, even as conquered natives.”<sup>97</sup> For Mexicans, citizenship—whether by birth or through naturalization—was not beneficial because regardless of their citizenship status, Anglos viewed them as foreigners.<sup>98</sup>

In the late 1800s, lynching of Mexicans was so common that southwesterners came to believe that white men received trials while Mexicans were hanged.<sup>99</sup> In

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values.”).

90. *Id.* 47–48.

91. *In re Rodriguez*, 81 F. 337, 337, 350–51, 355 (W.D. Tex. 1897); NGAI, *supra* note 31, at 53–54.

92. NGAI, *supra* note 31, at 54.

93. MASSEY ET AL., *supra* note 28, at 24–26.

94. NGAI, *supra* note 31, at 129.

95. *See* GORDON, *supra* note 48, at 24.

96. *Id.* at 312.

97. NGAI, *supra* note 31, at 133 (emphasis in original).

98. *Id.* at 132.

99. GORDON, *supra* note 48, at 268.

1873 in Tucson, where Mexicans still maintained greater power compared to other locations in the United States, individuals protesting the hanging of white men accused of murder stated, “You can hang a Mexican, and you can hang a Jew, and you can hang a nigger, but you can’t hang an American citizen.”<sup>100</sup> In one Arizona county, over the course of a decade in the late 1800s, there were a total of five legal hangings—one Native American, one black man, and three Mexicans.<sup>101</sup>

These racial tensions did not curb demand for Mexican labor in the United States.<sup>102</sup> In the early 1900s, U.S. employers relied on private labor contractors to recruit Mexican workers. These contractors or recruiters were paid for each worker that they obtained. Their practices were called “*el enganche*,” meaning “the hook” or “indentured.”<sup>103</sup> The recruiters advanced Mexican laborers money to travel to the United States.<sup>104</sup> Once the laborers had arrived, they soon discovered that they were indentured—low wages, poor working conditions, and high interest rates had been placed on their loans.<sup>105</sup>

While the Immigration and Nationality Act of 1917 imposed a head tax and literacy test on arriving immigrants,<sup>106</sup> the attorney general exempted Mexicans.<sup>107</sup> Even though the Act was intended to restrict immigration, the government excluded Mexicans because of the reliance on Mexican labor within the United States.<sup>108</sup>

Though the 1924 quota system did not apply to immigrants from the Western Hemisphere, the formation of Border Patrol that same year, as well as other immigration restrictions that were included in the 1924 law, led to a new focus on deportation and immigration enforcement, which dramatically increased deportations.<sup>109</sup> For instance, in 1920 there were 2762 deportations and nine years later there were 38,796.<sup>110</sup> Border Patrol focused its efforts more aggressively on the Mexican border than the Canadian, with Mexicans emerging as “iconic illegal aliens.”<sup>111</sup> Historian Mae Ngai notes:

It was ironic that Mexicans became so associated with illegal immigration because, unlike Europeans, they were not subject to numerical quotas and, unlike Asiatics, they were not excluded as racially ineligible to citizenship. But as numerical restriction assumed primacy in immigration policy, its enforcement aspects—inspection procedures, deportation, the Border Patrol, criminal prosecution, and

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100. *Id.*

101. *Id.*

102. MASSEY ET AL., *supra* note 28, at 27–28.

103. *Id.* at 27.

104. *Id.* at 27–28.

105. *Id.* at 28.

106. Immigration Act of 1917, Pub. L. No. 301, 39 Stat. 874.

107. MASSEY ET AL., *supra* note 28, at 29.

108. *Id.*

109. *See* NGAI, *supra* note 31, at 64–75.

110. *Id.* at 60.

111. *Id.* at 58.

irregular categories of immigration—created many thousands of illegal Mexican immigrants.<sup>112</sup>

Yet even during this period of enforcement, immigration policies vacillated between encouraging more migration from Mexico and carrying out mass deportations of Mexicans.<sup>113</sup> For example, Mexican laborers were relied upon during World War I, but after the stock market crash of 1929, the government initiated a deportation campaign that removed 458,000 Mexicans between 1929 and 1937.<sup>114</sup> Instead of providing benefits during the Depression, local relief agencies reported Mexicans, including citizens and lawful permanent residents, to immigration authorities so that they would be deported.<sup>115</sup> Estimates indicate that sixty percent of those repatriated during this period were either children or American citizens by birth.<sup>116</sup> During the 1930s, the size of the Mexican population in the United States was reduced by forty-one percent.<sup>117</sup>

Immigration policy would shift once again. In the late 1930s, agricultural growers claimed a labor shortage, even though the Immigration and Naturalization Service (INS) argued that one did not exist, and the director of the Texas Works Progress Administration stated that labor existed when “reasonable wages” were paid.<sup>118</sup> Nonetheless, with pressure from members of Congress from southwestern districts, the U.S. Employment Service certified that six thousand contract laborers should be imported.<sup>119</sup> In 1942 President Roosevelt negotiated a treaty with Mexico that brought Mexican farmworkers to the United States.<sup>120</sup> Termed the “Bracero Program,” it provided visas to Mexican workers.<sup>121</sup>

The Bracero Program, which ended in 1965, led to greater illegal migration, in large part because there were more Mexicans who wanted to become braceros than the Mexican government could accommodate.<sup>122</sup> Those workers who arrived outside of the program came to be referred to as “wetbacks” and some employers preferred to hire them because they could pay them “wetback wages.”<sup>123</sup> “Wetbacks” were associated with “misery, disease, crime and many other evils,” but these stereotypes extended to all Mexicans.<sup>124</sup> An immigration official noted that “wetbacks” were “superficially indistinguishable from Mexicans legally in the United States.”<sup>125</sup>

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112. *Id.* at 71.

113. MASSEY ET AL., *supra* note 28, at 33–34.

114. *Id.*

115. NGAI, *supra* note 31, at 71.

116. *Id.* at 72.

117. MASSEY ET AL., *supra* note 28, at 34.

118. NGAI, *supra* note 31, at 136–37.

119. *Id.* at 137.

120. MASSEY ET AL., *supra* note 28, at 34–41.

121. *Id.* at 35.

122. NGAI, *supra* note 31, at 148; MASSEY ET AL., *supra* note 28, at 41.

123. NGAI, *supra* note 31, at 148–49.

124. *Id.* at 149.

125. *Id.*

With the recession that followed the Korean War, and in response to those concerned about unlawful migration, in 1954 the former INS instituted "Operation Wetback."<sup>126</sup> It militarized the border and deported undocumented migrants.<sup>127</sup> At the same time, to appease agricultural growers who relied upon Mexican laborers, it increased the number of bracero visas available.

At one point the INS was raiding agricultural fields in the southwestern United States, arresting undocumented workers, transporting them back to the border, and deporting them into the waiting arms of officials from the U.S. Department of Labor, who promptly processed them as braceros and retransported them back to the very fields where they had been arrested in the first place!<sup>128</sup>

The Bracero Program ended in 1965,<sup>129</sup> and a year prior, Congress abandoned the visa quota system.<sup>130</sup> For the first time, however, Congress placed an annual cap on migration from the entire Western Hemisphere because of fears of unrestricted Latin American migration.<sup>131</sup> In 1976 Congress extended the 20,000 migrant-per-country limit, which had previously applied only to the Eastern Hemisphere, to the Western Hemisphere, and also subjected the Western Hemisphere to the preference system.<sup>132</sup>

Because quotas had never before applied to the Western Hemisphere, the avenues for Latinos to migrate legally to the United States became limited. To illustrate this point, from 1960 to 1980 the *number* of migrants who came to the

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126. MASSEY ET AL., *supra* note 28, at 37–41.

127. *Id.*

128. *Id.* at 37 (citation omitted).

129. *Id.* at 41.

130. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. § 1151 (2006)) (amending the Immigration and Nationality Act). Under the new system, Congress allocated a quota of up to 20,000 visas annually for countries in the Eastern Hemisphere (Europe, Africa, the Middle East, Asia, and the Pacific), and the Hemisphere received a total annual cap of 170,000 visas. § 2, 79 Stat. at 911–12 (codified as amended at 8 U.S.C. § 1152(a) (2006)). The family-based and employment-based preference system that exists today was developed. § 1, 79 Stat. at 911 (codified as amended at 8 U.S.C. § 1151(a) (2006)).

131. § 21(e), 79 Stat. at 921 (codified as amended 8 U.S.C. § 1259 (2006)); *see also* H.R. Rep. No. 89-745, at 48 (1965) (stating that "[t]he most compelling reason for placing a numerical ceiling upon immigration from the Western Hemisphere relates to the worldwide population explosion and the possibility of a sharp increase in immigration from Western Hemisphere countries"); S. Rep. No. 89-748, at 17 (1965) (further providing that "[t]he committee has become increasingly concerned with the unrestricted flow of immigration from the nonquota countries"); HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 134 (2006); Johnson, *supra* note 21, at 1132 (discussing the racial implications of the quota system).

132. *See* Immigration Act of 1965, Pub. L. No. 89-236, § 2, 79 Stat. 911, 911–12 (codified as amended at 8 U.S.C. § 1151 (2006)); *see also* MASSEY ET AL., *supra* note 28, at 43 (describing the economic and political conditions in the United States that made immigration a political issue and led to further restrictions on migration from the Western Hemisphere).

United States annually from Mexico *did not change*, but illegal entry became much more common because legal avenues had been closed off.<sup>133</sup> At the same time, industries continued to recruit and employ undocumented labor. “During the twenty-one-year history of mass undocumented migration, the United States, in effect, operated a de facto guest-worker program.”<sup>134</sup> Border enforcement symbolically reassured a public concerned about illegal migration, but the flow of workers to fill jobs in the United States continued.<sup>135</sup>

In 1986 Congress attempted to reform the immigration system through the Immigration Reform and Control Act (IRCA).<sup>136</sup> IRCA did two main things: it legalized those who were unlawfully present and had arrived prior to 1982, and it created provisions that would sanction employers who knowingly hired undocumented workers.<sup>137</sup> Though Congress sought to curb future unlawful migration by deterring employers from hiring undocumented workers, it did not stop employers from doing so.<sup>138</sup>

The continued growth of the undocumented population and public resentment toward undocumented immigrants in the second half of the twentieth century led to harsh immigration policies that were justified based on undesirable attributes associated with Latino immigrants.<sup>139</sup> In reviewing comments by legislators recorded in the *Congressional Record* from 1994 to 1996, Lina Newton stated:

The language officials employed to justify [the legislation] combined the contemporary ideology of balanced budget conservatism and the divisions forged between deserving and undeserving members with ascriptive traditions that linked Mexicans to undesirable attributes. Not only did deviant constructions of the unauthorized correspond with punitive policy measures, but these constructions also accentuated a list of qualities and behaviors that marked immigrants more broadly as unworthy of consideration for social membership. The immigrant family was portrayed as another invasion of the nation, as individuals brought their unproductive dependents into the nation: pregnant wives, children, and elder family members would end up on welfare or take up space in schools, hospitals, and communities.<sup>140</sup>

In 1996 Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA),<sup>141</sup> the Personal Responsibility and Work Opportunity Reconciliation Act

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133. MASSEY & SÁNCHEZ, *supra* note 19, at 73.

134. MASSEY ET AL., *supra* note 28, at 45.

135. *Id.* at 45–47.

136. Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. § 1324a (2006)).

137. 8 U.S.C. §§ 1324a(a)(1)(A), (a)(2).

138. After the passage of IRCA, immigrants began using fake documents, often with the assistance of employers, and employers hired subcontractors to shield their own liability. *See MASSEY & SÁNCHEZ, supra* note 19, at 96.

139. *See id.* at 68–71.

140. *Id.* at 69–70 (quoting LINA NEWTON, *ILLEGAL ALIEN, OR IMMIGRANT: THE POLITICS OF IMMIGRATION REFORM* 164 (2008)).

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

(PRWORA),<sup>142</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),<sup>143</sup> arguably the most drastic and harsh changes made to our U.S. immigration laws. Together, these laws increased border patrol, initiated 287(g) programs, expanded the crimes that would lead to deportation, restricted undocumented immigrants from receiving public benefits, and required family members sponsoring immigrants to provide affidavits of support demonstrating that their household income was at least 125% above the poverty line.<sup>144</sup>

Today, one basis for a common identity among Latinos—likely because of anti-immigrant sentiment that has fostered marginalization and exclusion—is undocumented status. During a study conducted by Massey and Sánchez, in which they interviewed 159 first- and second-generation immigrants of Caribbean, Central American, Mexican, and South American origin<sup>145</sup> and asked “what accounted for the emergence of a common identity among Latin American immigrants in the United States,”<sup>146</sup> one Mexican man living in New York City responded, “Well, maybe you see that we are illegal immigrants.”<sup>147</sup> In a follow-up question, the interviewer asked whether undocumented status was a basis for identity and the man replied, “that *is* the identity.”<sup>148</sup>

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Stat. 1214.

142. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105.

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

144. Antiterrorism and Effective Death Penalty Act of 1996, § 442, 110 Stat. at 1279–80 (allowing local law enforcement to arrest and detain illegal aliens); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, §§ 102–104, 110 Stat. at 3009-554 to 556 (increasing border patrol); § 321, 110 Stat. at 3009-627 to -628 (expanding definition of aggravated felonies for immigration purposes); § 236, 110 Stat. at 3009-585 to -587 (identification of criminal aliens); Subtitle C, 110 Stat. at 3009-635 to -641 (additional grounds of inadmissibility and deportability); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 110 Stat. at 2260–74 (see sections 401 to 412 limiting public benefits to undocumented immigrants and section 423 providing the requirements for sponsor’s affidavit of support).

145. MASSEY & SÁNCHEZ, *supra* note 19, at 181–212. As part of their study, Massey and Sánchez interviewed immigrants of Caribbean, Mexican, Central American and South American origin and asked them questions, which were intended to explore the ways in which immigrants constructed their identity in the United States. *Id.* at 256. Based on the answers respondents provided, the authors discovered that there had been an emergence of a Latino identity that took form after immigrants arrived in the United States—an identity that extended beyond a particular country. *Id.* at 183–84. Part of this Latino identity included culture and language, but it also included the experience of exclusion and marginalization. *Id.* On the other hand, close to two-thirds of respondents rejected an American identity. *Id.* at 203–21. The authors concluded that a “rejection of an American identity stems from the exclusion and discrimination that immigrants experience the more time they spend in the United States. Paradoxically, resistance to an American identity is something ‘made in the USA’ through the accumulation of negative experience with U.S. people and institutions.” *Id.* at 212.

146. *Id.* at 189.

147. *Id.*

148. *Id.* (emphasis in original).

*B. The Cultivation of an Anglo National Identity Through Child Welfare Practices:  
The Experiences of Early Immigrants and Native Americans*

Tensions around national identity and how to cultivate that identity have, historically, not only been the domain of immigration and citizenship law, but also have been present in early child welfare practices. Just as certain groups were excluded under immigration and citizenship law, their family relationships were devalued as well. Measures taken to protect early immigrant and Native American children—in the name of the best interests of the child—also reflected attempts at forced assimilation. This Part describes the historical practices of removing immigrant and Native American children from their parents.

1. Early Immigrants and Orphan Trains

Early child welfare practices elucidate the manner in which hostility toward particular immigrant groups influenced assessments about their families. As noted above, immigrants from eastern and southern Europe were the targets of anti-immigrant sentiment because their race, culture, and values were perceived to be misaligned with Anglo-Protestants. These perceptions influenced the treatment of their family relationships in the child welfare context as well.

The social construction of race in the late 1800s was slightly different than it is today. Knowing the social construction, though, is helpful for understanding the way in which race influenced child welfare practices. On the East Coast, Anglo-Saxons of Northern European heritage constituted the “superior race.”<sup>149</sup> Those who arrived from other countries were categorized as separate races—“the Irish, Italians, Slavs, ‘Hebrew,’ or ‘Hindus,’ for example.”<sup>150</sup> Elite Protestants, for instance, described the Irish as wild, undisciplined, and primitive.<sup>151</sup> That is not to say that the Irish were categorized the same as African Americans. According to Gordon, “These [race categories] were not physical or cultural descriptions of innocuous ‘difference,’ but social and economic markings of rank.”<sup>152</sup> Certain groups, mostly those from Europe, eventually “worked their way into whiteness.”<sup>153</sup> The West Coast’s definition included other groups more quickly compared with the East Coast, and part of the appeal of living out west was the opportunity to be considered white.<sup>154</sup> Nevertheless, even there, Mexicans remained nonwhite.<sup>155</sup>

In 1853, Protestant minister Charles Loring Brace founded the Children’s Aid Society and initiated what has been termed “orphan trains.”<sup>156</sup> The Children’s Aid Society placed orphans<sup>157</sup> on trains and sent them to live with families in rural

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149. GORDON, *supra* note 48, at 104.

150. *Id.*

151. *Id.* at 12.

152. *Id.*

153. *Id.* at 104.

154. *Id.*

155. *Id.*

156. *Id.* at 8–9.

157. The term “orphan” had various meanings. Some of the children who were referred



areas, usually out west.<sup>158</sup> The parents who received these children viewed it as a form of apprenticeship: children could provide needed labor, for instance, on the farm.<sup>159</sup> The children who were sent on orphan trains came from poor immigrant—Irish, Italian, or Polish—families, and more than half of the children were being raised by single mothers.<sup>160</sup> By 1910, over 110,000 orphans had been placed with other families.<sup>161</sup> In support of his mission, Brace stated:

When placed in a farmer's family, he grows up as one of their number . . . The peculiar temptations to which he has been subject—such, for instance, as stealing and vagrancy—are reduced to a minimum; his self-respect is raised, and the chances of success held out to a laborer in this country . . . soon raise him far above the class from which he sprang.<sup>162</sup>

Agents—prosperous, white Protestants—who had come to be known as “child savers” roamed the streets looking for street children and made minimal efforts to locate their parents.<sup>163</sup> “The child savers . . . imagined proper child raising in norms specific to their class and ethnic culture, as we all do.”<sup>164</sup> Poor parents referred to these agents as “child stealers,” terrified that their children would be kidnapped.<sup>165</sup> Parents were compelled to give up their children, and it would later be determined that in about half of these cases, the removal was based on poverty alone.<sup>166</sup>

## 2. “A Conflict Between Americans and Half-Breed Mexican Indians”<sup>167</sup>

Around the same time period, Catholic charities in New York, whose leadership was mostly Irish, defended their faith against the mission of the Children's Aid Society to send away orphans it deemed religiously and racially inferior, by forming their own child-saving agencies.<sup>168</sup> These Catholic agencies were less

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to as orphans were actually turned over to institutions by single mothers who could not afford to provide for them. Many others who were also labeled “orphans” were children who had not been placed in institutions but who were living on the streets trying to earn money. The largest group considered orphans was comprised of children who had been living with single mothers. In fact, almost 55% of the neglect cases in New York City involved single mothers, but only 10–15% of households in New York City at this time were headed by single mothers. *Id.* at 7–8. According to Gordon, “The child neglect of which they were accused was often difficult to distinguish from, simply, poverty: the children were malnourished, poorly clad, without medical care, or living in unheated flats; they were left unsupervised or with slightly older siblings while mothers worked.” *Id.* at 8.

158. *Id.* at 9.

159. *Id.* at 9–10.

160. *Id.* at 8–11.

161. *Id.* at 10.

162. *Id.* at 9 (omissions and alterations in original).

163. *Id.* at 10–11.

164. *Id.* at 10.

165. *Id.* at 10–11.

166. *Id.* at 11.

167. GORDON, *supra* note 48, at 294.

168. *See id.* at 12–13.

concerned about racial classifications; instead, their main priority was to grow the Catholic faith westward by placing immigrant orphans with Catholic families who could transmit Catholic values.<sup>169</sup>

One child custody case unearthed by historian Linda Gordon involving orphans who were placed out west by a New York City Catholic orphanage, the Foundling, illustrates the social construction of race in the early 1900s and its effect on child welfare practices. Further, in her examination of this particular child custody case, Gordon explores the ways in which race, religion and ethnicity were and continue to be “varying, fluid, and easily reshaped.”<sup>170</sup>

In 1904 the Foundling sent a group of immigrant orphans on a train to Clifton-Morenci, a small mining town in Arizona.<sup>171</sup> In looking for homes for the orphans, the Foundling’s primary concern was placing the children with Catholic families.<sup>172</sup> Because most of the Catholic residents in the town were Mexican, a local Catholic priest arranged for Mexican families to take in the orphans.<sup>173</sup>

Upon the arrival of the orphans, Anglo families in Clifton-Morenci learned that these children (who were mostly Irish but were viewed as white) would be taken in by Mexican families (who were viewed as nonwhite), which caused them to become enraged.<sup>174</sup> Because many of the Anglos did not practice any religion, they found the transmission of Catholic values to be of little importance.<sup>175</sup> “The problem as the ladies began to construct it right there at the station was that the lovely orphans were Anglos, not only elegantly dressed but also blond and light-skinned, and most of the crowd at the station was Mexican.”<sup>176</sup>

Rather than following legal procedures, the Anglo families engaged in vigilantism in the belief that something needed to be done immediately. Armed men, along with a mob of approximately 400 (of a town of about 735 Anglo

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169. *Id.* at 16, 17–18 (discussing a faction within the Catholic Church referred to as the “American or assimilationist tendency”).

170. *Id.* at 302 (explaining that the child custody battle in Clifton-Morenci “was never an either/or question, religion or race. To ask the question this way is to assume something fixed and fundamental about prejudice and about categories such as religion, race, and ethnicity, when they were in fact varying, fluid, and easily reshaped. Those who insisted that religion was primary were either easterners whose interests lay in assimilating foreigners of different racial ‘stock’ or Catholic leaders who knew that the Mexican flock was vital to their religious empire.”).

171. *See id.* at 34–43.

172. *See id.* at 16–18.

173. *Id.* at 18.

174. *See id.* at 41–43, 72–79.

175. *Id.* at 71 (“Two of the groups were united by religion, two of the groups by ‘race.’ But they did not all recognize the alignments. The New Yorkers did not feel bound to the Anglos by whiteness. The Anglos did not understand how the Catholics felt about preserving the young souls for the faith. . . . To the Clifton Anglos, religion was not an issue; the majority of them were not church-goers and, although most were Protestants, among their number were some who were born Catholics and Jews. To the sisters religion remained the overriding issue, although they would come to ‘see’ that white Catholics were better than brown Catholics as they learned the Anglo racial system. And the Mexican women had not yet learned how intensely Anglos felt about racial borders.”).

176. *Id.* at 42.

adults), demanded that the children be turned over.<sup>177</sup> The day after the children’s arrival in Clifton-Morenci, Anglos summoned a judge to write up the adoption papers.<sup>178</sup> As Gordon described, “[t]hey were taking their first step toward *ex post facto* legalization of their vigilantism.”<sup>179</sup>

The Anglo women’s motives for wanting the children were mixed, as some had personal and self-interested reasons (like the Mexicans),<sup>180</sup> evidencing that they were not simply motivated by charity or child saving. Some had fertility problems.<sup>181</sup> Others had adult children, but desired more children.<sup>182</sup> According to Gordon, however, “they not only wanted the babies, they were beginning to think it wasn’t right for the Mexicans to take the babies, and it is hard to know—perhaps even hard for them to know—which came first.”<sup>183</sup>

When the matter did reach the courts, Gordon described the trial as both entertainment and political discourse.<sup>184</sup> Not one Mexican person testified—or was even present in the courtroom.<sup>185</sup> “It was an Anglo courtroom in its personnel and equally in its definitions of non-Anglo people.”<sup>186</sup>

Many of the white witnesses focused their testimony on “disparaging the Mexicans’ standard of living and morality.”<sup>187</sup> According to Anglos being Mexican meant being “poor, ignorant, degraded.”<sup>188</sup> Anglos referred to Mexicans as unclean, even though some Mexican women cleaned the homes of Anglo families.<sup>189</sup>

One Anglo woman testified that the orphans were ill when she first saw them, and she then described how they were throwing up “chili and beans and tortillas, and watermelon, and Mexican beans” and that some of the children had a “very strong odor of whiskey and beer.”<sup>190</sup> Gordon noted that the vomiting, if true, would not have been surprising “since the children may have just drunk Clifton water and eaten beans for the first time. They may have had a version of ‘Montezuma’s revenge.’ Everyone knew the water was terrible.”<sup>191</sup>

There were strong emotions in the courtroom, making it difficult to differentiate between real emotion and strategy.<sup>192</sup> Lawyers encouraged the Anglo parents to display the children to the court so that those present could see that they were being

177. *Id.* at 111.

178. *See id.* at 208.

179. *Id.*

180. *Id.* at 67.

181. *Id.* at 72.

182. *Id.*

183. *Id.*

184. *See id.* at 275–306 (describing the trial that took place).

185. *Id.* at 276–77.

186. *Id.* at 277.

187. *Id.* at 291.

188. *Id.* at 122.

189. *Id.* at 202; *see also* ACUÑA, *supra* note 85, at 157 (describing how, around the same time period, Mexicans were also prevented from attending Anglo-American schools, their reasons including that Mexicans were poorly dressed, unclean, and immoral; they were not white; and they were slower learners).

190. GORDON, *supra* note 48, at 203.

191. *Id.* at 204.

192. *See id.* at 278.

well taken care of by Anglo families.<sup>193</sup> According to one newspaper account, when a father told his child (one of the orphans) to go to sleep, the child responded, “Won’t you watch me so the Mexicans can’t get me?”<sup>194</sup>

The children, however, had lived with the Anglo parents for three-and-a-half months, creating a conflict between how the children were taken and the subsequent bonds that formed.<sup>195</sup> “Arguments for the best interests of the child could, in the extreme, benefit anyone who kidnapped a child and managed to evade capture or legal action for an extended period of time.”<sup>196</sup>

Unsurprisingly, the court held that adoption by the Anglo families would be in the best interests of the children.<sup>197</sup> The judge’s opinion did not describe the vigilantism that resulted in the children being kidnapped.<sup>198</sup> Instead, he described the mob as “committee meetings” and the kidnapping as “volunteer” actions.<sup>199</sup> He wrote that the events were a conflict between “Americans and half-breed Mexican Indians . . . impecunious, illiterate . . . vicious.”<sup>200</sup>

### 3. Native American Children and Cultural Assimilation

As mentioned in Part I.A, it was not until 1940 that all Native Americans were able to acquire citizenship at birth.<sup>201</sup> Hostility toward Native Americans led to government practices that removed Native American children from their parents in order to force cultural assimilation.

As early as colonial times, missionaries undertook to “educate” Native American children.<sup>202</sup> In 1819 the federal government created the Civilization Fund that provided grants to churches to develop programs that would “civilize the Indian.”<sup>203</sup> The Commissioner of Indian Services provided a report to Congress in 1867 stating that the only way to deal with the “Indian problem” was to separate children from their tribes.<sup>204</sup> In the late 1860s President Grant directed church missionaries, as part of his Peace Policy, to “Americanize” Native Americans

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193. *Id.*

194. *Id.*

195. *See id.* at 278–79.

196. *Id.* at 279.

197. *Id.* at 294.

198. *Id.*

199. *Id.*

200. *Id.*

201. Nationality Act of 1940, Pub L. No. 76-853, § 201(b), 54 Stat. 1138.

202. Annette Ruth Appell, *Uneasy Tensions Between Children’s Rights and Civil Rights*, 5 NEV. L.J. 141, 145 (2004) (describing how Native American families have been “subject to brutal disruption and whose culture has been so heavily and forcefully devalued under color of law”).

203. *Testimony of the National Indian Child Welfare Association: Hearing on S. 569 and H.R. 1082 Before the S. Comm. on Indian Affairs and H. Res. Comm. 1, 105th Cong.* (June 18, 1997), available at [http://www.nicwa.org/legislation/HR2750/nicwa\\_testimony.pdf](http://www.nicwa.org/legislation/HR2750/nicwa_testimony.pdf) [hereinafter *Testimony of the National Indian Child Welfare Association*].

204. *Id.*

through education and to provide social services for the purpose of "pacification."<sup>205</sup>

Native American families were torn apart in an effort to assimilate Native American children into mainstream Anglo culture. For example, federal practices in 1884 included placing Native American children on farms in the East and Midwest so that they would learn the "values of work and the benefits of civilization."<sup>206</sup> Around the same time period, the government and private institutions established mission boarding schools. As part of this program, children were forcibly removed from their homes and placed in boarding schools.<sup>207</sup>

Comments by the founder of one of the first boarding schools illustrate how the goal of these schools was in essence to cultivate a preferred identity—one that reflected Anglo norms. The founder, Colonel Richard Pratt, said in 1892:

A great general has said that the only good Indian is a dead one, and that high sanction of his destruction has been an enormous factor in promoting Indian massacres. In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man.<sup>208</sup>

He went on to explain that former slaves were able to assimilate because of their association with the "higher race" (that is, slave owners), but that the Native American remained a "savage." He stated:

The schools did not make [African Americans] citizens, the schools did not teach them the language, nor make them industrious and self-supporting. Denied the right of schools, they became English-speaking and industrious through the influences of association. Scattered here and there, under the care and authority of individuals of the higher race, they learned self-support and something of citizenship, and so reached their present place. No other influence or force would have so speedily accomplished such a result. Left in Africa, surrounded by their fellow-savages, our seven millions of industrious black fellow-citizens would still be savages. Transferred into these new surroundings and experiences, behold the result. They became English-speaking and civilized, because forced into association with English-speaking and civilized people; became healthy and multiplied, because they were property; and industrious, because industry, which brings contentment and health, was a necessary quality to increase their value.

The Indians under our care remained savage, because forced back upon themselves and away from association with English-speaking and

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205. THE HARVARD PROJECT, *supra* note 50, at 236.

206. *Testimony of the National Indian Child Welfare Association*, *supra* note 203, at 1.

207. *Id.*; see also THE HARVARD PROJECT, *supra* note 50, at 200.

208. Charla Bear, *American Indian Boarding Schools Haunt Many*, NPR (May 12, 2008, 12:01 AM), <http://www.npr.org/templates/story/story.php?storyId=16516865> (quoting Col. Richard Pratt).

civilized people, and because of our savage example and treatment of them.<sup>209</sup>

In cultivating this preferred identity, or “Americanizing” the Indian, the orchestrators viewed their efforts as necessary for the preservation of a civilized Anglo society. The Federal Board of Indian Commissioners in 1880 noted:

As a savage, we cannot tolerate him any more than as a half-civilized parasite, wanderer or vagabond. The only alternative left is to fit him by education for civilized life. The Indian, though a simple child of nature with mental facilities dwarfed and shriveled, while groping his way for generations in the darkness of barbarism, already sees the importance of education . . . .<sup>210</sup>

Though federal policies in the 1930s shifted away from placing Native American children in boarding schools, the destruction of Native American families continued. In 1959 the Bureau of Indian Affairs, the U.S. Children’s Bureau, and the Child Welfare League of America developed the “Indian Adoption Project,” which removed approximately 400 Indian children from their homes and placed them with white families in the East and Midwest.<sup>211</sup> The project lasted until 1967.<sup>212</sup> It is estimated that between 1941 and 1978, sixty percent of Native American children were removed from their homes and placed either in orphanages or with white families.<sup>213</sup>

Recognizing that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children,” Congress passed the Indian Child Welfare Act (ICWA) in 1978.<sup>214</sup> At the time of its passage, extensive testimony described the harmful effects these practices had on Native American families and the preservation of Native American culture. During congressional hearings, one tribal chief noted:

Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously

209. Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, in AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIAN” 1880–1900, at 260, 263 (Francis Paul Prucha ed. 1973).

210. THE HARVARD PROJECT, *supra* note 50, at 201.

211. *Id.* at 237.

212. *Id.*

213. *Id.*

214. 25 U.S.C. § 1901 (2006). As a result of the passage of ICWA, greater procedural protections are provided when an Indian child is involved in child welfare proceedings. In the context of termination of parental rights, it must be proven *beyond a reasonable doubt* that the child will be emotionally or physically harmed if he remains with the parent. 25 U.S.C. § 1912(f) (2006). Additionally, because of ICWA’s emphasis on preservation of culture, when deciding out-of-home placements for Indian children, preference is to be given first to extended family, then to families of the same tribe, and when that is not possible, other Indian families. 25 U.S.C. § 1915 (2006).

undercut the tribes’ ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.<sup>215</sup>

He went on to convey how these practices were being carried out because of cultural biases and ignorance and reflected attempts to destroy Native American cultural identity:

Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.<sup>216</sup>

Early child welfare practices toward Native Americans and immigrants illustrate how negative perceptions about their culture, race, class, and values led to practices that devalued and destroyed their family relationships. Though members of the dominant Anglo society justified these actions in the name of protecting children, they were also efforts—some more explicit than others—to cultivate a preferred Anglo-American identity or to remove the threat of a competing identity.

## II. CONTEMPORARY HOSTILITY TOWARD UNDOCUMENTED IMMIGRANTS

Part I provided a historical overview of how immigration and citizenship laws, as well child welfare practices, excluded groups whose culture, race, class, and values did not align with the dominant Anglo-American culture.

This Part explores how current anti-immigrant sentiment frames perceptions about Latino immigrants. First, changes in migration patterns that have resulted in a large influx of Latino immigrants into previously homogenous communities have resulted in hostility toward newcomers. Second, these tensions, along with a pervasive national anti-immigrant rhetoric, have led to increased legislation at the state and local level, which seeks to make life so prohibitive for undocumented immigrants that they will presumably self deport.<sup>217</sup> Combine these local measures

215. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 (1989) (quoting *Hearing on S. 1214 Before the Subcomm. on Indian Affairs & Pub. Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 193 (1978) [hereinafter *1978 Hearings*] (statement of Calvin Isaac, Tribal Chief, Mississippi Band of Choctaw Indians)).

216. *Id.* at 34–35 (quoting *1978 Hearings*, *supra* note 215, at 191–92 (statement of Calvin Isaac, Tribal Chief, Mississippi Band of Choctaw Indians)).

217. McKanders, *supra* note 39, at 177; see also MARC R. ROSENBLUM & KATE BRICK, REG’L MIGRATION STUDY GRP., U.S. IMMIGRATION POLICY AND MEXICAN/CENTRAL AMERICAN MIGRATION FLOWS: THEN AND NOW 2 (2011), available at <http://www.migrationpolicy.org/pubs/rmsg-regionalflows.pdf> (explaining the factors that motivate migration, including push and pull factors and social networks). “Push factors” refer to conditions in the sending country, which encourage outflow of members of the

with harsh federal immigration laws that focus enforcement efforts largely on the criminal justice system, and the result is that the identity of the undocumented immigrant is transformed into not only a violator of immigration laws, but also a criminal and culturally deviant person.

*A. Changing Migration Patterns & Community Tensions*

In 2010 estimates placed the number of undocumented immigrants within the United States at approximately 11.2 million.<sup>218</sup> Though there was a slight decline in migration over the past two years, the undocumented population has tripled since 1990.<sup>219</sup> Of the 11.2 million undocumented immigrants, 8 million are in the workforce.<sup>220</sup>

Migration patterns have also changed largely as a result of industries—such as meatpacking—that rely upon undocumented labor relocating from large urban centers to small rural communities.<sup>221</sup> Between 2000 and 2009, for example, the Central American populations doubled in Georgia, Indiana, Maryland, Minnesota, Missouri, North Carolina, Tennessee, and Washington—states that in the past have not had large immigrant populations.<sup>222</sup>

Today, immigrants are residing in previously homogenous communities where “[t]he sense of who is a newcomer spans generations, not years; counties, not countries.”<sup>223</sup> These migration changes have led to tensions within many communities.<sup>224</sup> For instance, in 2006 in Grand Island, Nebraska, Latinos comprised eleven percent of the town’s population of 450,000.<sup>225</sup> Since Latinos did not begin arriving until the 1980s, this growth occurred fairly rapidly.<sup>226</sup> One native

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population. These conditions include poverty, lack of economic opportunities in the sending country, and government instability. *Id.* The “pull factors”—those that make the United States a destination country—include demand for low-skill/low-wage workers and economic opportunities. Social networks refer to the communities of individuals from the sending country already present in the United States. These networks connect migrants to jobs and other resources, easing the transition for newcomers. *See id.*

218. PASSEL & COHN, *supra* note 43, at 1.

219. *Id.* at 2.

220. *Id.* at 1.

221. *See* Anna Williams Shavers, *Welcome to the Jungle: New Immigrants in the Meatpacking and Poultry Processing Industry*, 5 J.L. ECON. & POL’Y 31, 60 (2009) (describing the meatpacking industry’s move from urban to rural locations).

222. ROSENBLUM & BRICK, *supra* note 217, at 16 (indicating that the Central American population in each of these states grew by at least 50,000 people in the last decade).

223. Sylvia R. Lazos Vargas, “*Latina/o-ization*” of the Midwest: *Cambio de Colores (Change of Colors) as Agromaquilas Expand into the Heartland*, 13 BERKELEY LA RAZA L.J. 343, 345 (2002); *see also* McKanders, *supra* note 39, at 165–66 (explaining that many communities throughout the United States have witnessed a large influx of Latino immigrants in recent years).

224. *See* Vargas, *supra* note 223.

225. Kate Linthicum, *A Modern Tale of Meatpacking and Immigrants*, L.A. TIMES (Jan. 28, 2010), <http://articles.latimes.com/2010/jan/28/nation/la-na-immigrant-nebraska28-2010-jan28>.

226. *See id.*



of Grand Island noted, "A lot of people don't like the Latinos, they just don't."<sup>227</sup> He went on to state, "There has been more bigotry . . . because there has just been more and more and more of them."<sup>228</sup> When ICE raided the Swift meatpacking plant in 2006 and other Latino immigrants protested afterward outside the factory, some townspeople held up signs reading, "Go back to Mexico, wetbacks."<sup>229</sup> As one scholar noted, "When faced with a sudden, destabilizing change in local demographics, and when a salient national rhetoric politicizes that demographic change, people's views turn anti-immigrant."<sup>230</sup>

The demographic changes also place new economic constraints on communities. School districts must respond to the growing needs of Limited English Proficient (LEP) students.<sup>231</sup> Lack of affordable housing and social services for low-income Latino residents create financial strains as well.<sup>232</sup>

### *B. Anti-Immigrant Legislation and the Criminalization of Immigration Violations*

In recent years, states and local governments have increasingly passed anti-immigrant legislation and ordinances. Additionally, the federal government has expanded the relationship between the immigration and criminal justice systems. These efforts have contributed to the exclusion and marginalization of Latinos.<sup>233</sup>

In 2011, 1607 bills and resolutions regarding immigration were introduced by state legislatures.<sup>234</sup> Not all of the legislation was "anti-immigrant." Some laws

227. *Id.*

228. *Id.*

229. *Id.* Interestingly, and supporting the argument presented in this Article, anti-immigrant hostility within certain communities makes undocumented Latino immigrants more susceptible to the loss of their parental rights. For instance, two termination of parental rights cases involved undocumented parents who had been living in Grand Island, Nebraska. As noted in the text, Grand Island, Nebraska experienced a large influx of immigrants that resulted in tension between long-time residents and newcomers. *See State v. Maria L. (In re Interest of Angelica L.)*, 767 N.W.2d 74 (Neb. 2009); *In re Mainor T.*, 674 N.W.2d 442 (Neb. 2004).

230. MASSEY & SANCHEZ, *supra* note 19, at 76 (emphasis omitted) (quoting Daniel J. Hopkins, *Threatening Changes: Explaining Where and When Immigrants Provoke Local Opposition* 34 (Yale Univ. Ctr. for the Study of Am. Politics, Working Paper, 2008)).

231. *See* Vargas, *supra* note 223, at 351. During an ethnographic study conducted in a rural community in Iowa, one researcher noted that poor Mexicans who were newcomers to the community "posed a significant challenge to the community identity of the town's white European residents." *See* Burton et al., *supra* note 18, at 92.

232. *See id.* at 360 ("The costs and consequences of rapid immigration have put pressure on affordable housing, social services, and local school districts, and have vexed local law enforcement officers unable to speak Spanish.").

233. *See* McKanders, *supra* note 39, at 166–67.

234. NAT'L CONFERENCE OF STATE LEGISLATURES, IMMIGRATION POLICY REPORT: 2011 IMMIGRATION-RELATED LAWS AND RESOLUTIONS IN THE STATES (2011), *available at* <http://www.ncsl.org/issues-research/immig/state-immigration-legislation-report-dec-2011.aspx> [hereinafter IMMIGRATION POLICY REPORT] (citing examples from Alabama, Indiana, Georgia, South Carolina, and Utah of laws requiring law enforcement to verify the immigration status of individuals during a lawful stop and making it a violation for failing to

sought to combat human trafficking,<sup>235</sup> provide in-state tuition to those without lawful immigration status,<sup>236</sup> and provide services to undocumented immigrants.<sup>237</sup> The top issues addressed by most of the legislation, however, continued to be “anti-immigrant,” and concerned issues such as driver’s licenses, unauthorized employment of undocumented immigrants, and cooperation between local and federal law enforcement officials (287(g) programs) to enforce immigration laws.<sup>238</sup>

These anti-immigrant measures have ranged from high profile multi-issue legislation to the passage of local anti-immigrant ordinances. The most high profile legislation, of course, has been Arizona’s S.B. 1040.<sup>239</sup> Other states, such as Alabama, Georgia, South Carolina, Utah, and Indiana have followed Arizona’s lead.<sup>240</sup> Additionally, five states introduced legislation in 2012 that would require law enforcement officers to request proof of immigration status during lawful stops, allow undocumented immigrants to be charged criminally for failure to carry documents that demonstrate lawful immigration status, and would create penalties for the harboring and transportation of undocumented immigrants.<sup>241</sup> In recent years, local governments, such as in Hazleton, Pennsylvania; Fremont, Nebraska; and Valley Park, Missouri, have passed ordinances, which were later challenged in court, that sought to prohibit undocumented immigrants from renting housing, obtaining public benefits, and working.<sup>242</sup>

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carry an alien registration card).

235. *Id.* (providing an example where Missouri passed a law that would allow victims of human trafficking to receive English language instruction and interpretation and translation services).

236. *See, e.g.*, NAT’L CONFERENCE OF STATE LEGISLATURES, 2011 STATE IMMIGRATION LEGISLATION: NSCL’S IMMIGRANT POLICY PROJECT 9 (2011), *available at* [www.ncsl.org/documents/immig/2011ENACTEDbystate.pdf](http://www.ncsl.org/documents/immig/2011ENACTEDbystate.pdf) (noting that Connecticut passed a law that would allow those without lawful immigration status to receive in-state tuition if certain criteria are met).

237. *See, e.g.*, IMMIGRATION POLICY REPORT, *supra* note 234 (noting that Indiana passed a law that would establish a domestic violence fatality review team and would provide child care for migrants if domestic violence was found and that a Colorado appropriations bill included a line item that would provide funds for refugee assistance).

238. *See id.*

239. ARIZ. REV. STAT. ANN. § 11-1051 (2012).

240. For a summary of these states’ bills, including Alabama’s H.B. 56, Georgia’s H.B. 87, Indiana’s S.B. 590, South Carolina’s S. 20, and Utah’s H. 116, H. 466, H. 469, H497 see NAT’L CONFERENCE OF STATE LEGISLATURES, IMMIGRATION POLICY PROJECT: STATE OMNIBUS IMMIGRATION LEGISLATION AND LEGAL CHALLENGES(2012), *available at* <http://www.ncsl.org/issues-research/immig/omnibus-immigration-legislation.aspx>.

241. *See id.*

242. *Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010) (finding an ordinance that prohibited renting to undocumented immigrants preempted), *vacated*, 131 S.Ct. 2958 (2011); *Gray v. City of Valley Park*, 567 F.3d 976 (8th Cir. 2009) (challenging an ordinance that prohibited landlords from renting to undocumented immigrants and prohibited employers from hiring individuals not authorized to work); *Keller v. City of Fremont*, 853 F. Supp. 2d 959 (D. Neb. 2012) (holding in part that city ordinance barring landlords from renting to undocumented immigrants not preempted by federal law), *aff’d in part and rev’d in part*, 719 F.3d 931 (2013).

Additionally, with the expansion of crimes leading to deportation, the immigration system has become more and more integrated into the criminal justice system.<sup>243</sup> Over the years, Congress has expanded the list of crimes that lead to deportation.<sup>244</sup> Local law enforcement is increasingly entering into Memoranda of Understanding with ICE to coordinate enforcement efforts.<sup>245</sup> In 2011 immigration offenses accounted for nearly thirty-five percent of criminal prosecutions in federal court.<sup>246</sup>

Moreover, while Congress has not imposed criminal sanctions for workers who work without authorization,<sup>247</sup> workplace raids have led to the prosecution of thousands for aggravated identity theft, social security fraud, and other crimes relating to the use of false documents, reinforcing the image of undocumented immigrants as dangerous lawbreakers.<sup>248</sup> This is not to minimize the significance of identity theft, but the criminal label that attaches to the undocumented immigrant who wanted to work seems incongruous.<sup>249</sup>

The criminalization of immigrants and a national anti-immigrant rhetoric foster negative stereotypes about Latinos.<sup>250</sup> These stereotypes portray Latinos as dangerous and culturally deviant. A U.S. Representative for Oklahoma, John Sullivan, in support of efforts to train local sheriffs to enforce immigration laws under the federal government's 287(g) program, stated that "[he] want[ed] to create fear in rapists, drunk drivers, drug dealers and people who conceal weapons," associating immigrants with dangerous criminal behavior.<sup>251</sup> A sheriff in North Carolina, who is under investigation by the Department of Justice for racial

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243. See generally Anita Ortiz Maddali, *Padilla v. Kentucky, A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?*, 61 AM. U. L. REV. 1, 16–21 (2011); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

244. See Maddali, *supra* note 243; Stumpf, *supra* note 243.

245. Maddali, *supra* note 243; see also Wessler, *supra* note 15, at 27 (noting that in communities that have 287(g) agreements with ICE, children in foster care were 29% more likely to have a detained or deported parent compared with 3.8% in other counties).

246. U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2011 5 (2012), available at [http://www.usc.gov/Research\\_and\\_Statistics/Research\\_Publications/2012/FY11\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](http://www.usc.gov/Research_and_Statistics/Research_Publications/2012/FY11_Overview_Federal_Criminal_Cases.pdf).

247. Leticia M. Saucedo, *Immigration Enforcement Versus Employment Law: The Case for Integrated Protections in the Immigrant Workplace*, 38 FORDHAM URB. L.J. 303, 306 (2011).

248. *Id.* at 308–09 (2011) (describing ICE's workplace immigration enforcement and the immigration and criminal sanctions that undocumented immigrants face when arrested during a worksite raid); see also Bosniak, *supra* note 29 (describing the undocumented worker's dual identity as insider and outsider).

249. See Juan F. Perea, *A Brief History of Race and the U.S.-Mexican Border: Tracing the Trajectories of Conquest*, 51 UCLA L. REV. 283, 309 (2003) (describing how the agricultural industry relies on migrant farm workers, but the laborers "are condemned as illegal and criminal").

250. See MASSEY & SANCHEZ, *supra* note 19, at 68–80 (arguing that the pervasive themes in the media and in politics frame Latinos as a threat to the country).

251. Kari Huus, *Turmoil in Tulsa: The Illegal Immigration Wreck*, NBC NEWS (July 17, 2007, 7:31 PM), <http://www.nbcnews.com/id/19466978/#.UnlHaxZkhUQ>.

profiling, stated: “Their values are a lot different, their morals, than what we have here . . . . In Mexico, there’s nothing wrong with having sex with a 12-, 13-year-old girl . . . . They do a lot of drinking down in Mexico.”<sup>252</sup>

Such stereotypes affect all Latinos—irrespective of immigration status. “Latin Americans living in the United States are probably more vulnerable and exploitable than at any point in American history.”<sup>253</sup>

### III. TERMINATIONS OF PARENTAL RIGHTS OF UNDOCUMENTED IMMIGRANTS

In their book, *Brokered Boundaries: Creating Identity in Anti-Immigrant Times*, Douglas Massey and Magaly Sánchez explore the role that anti-immigrant sentiment and hostility play in shaping the experiences of Latinos in the United States. In doing so, they look specifically at discrimination toward Latino immigrants in the workplace. This Article, and this Part in particular, seeks to explore how negative perceptions of Latino immigrants—and specific notions about what culture and values are best for their children—can impact parental fitness determinations and can lead to a devaluation of certain family relationships, often in a manner that violates the legal rights of both children and parents.

Like the historical practices discussed in Part I, contemporary views about undocumented immigrants may be influencing decisions to terminate parental rights. Negative perceptions about Latino parents—their language, race, culture, immigration status, national origin, and class—lead to biased assessments about their fitness as parents and their children’s best interests. Informing these biases may be an underlying belief that cultivating an “American” rather than a “Latino” identity is best for children—particularly U.S.-citizen children of undocumented parents—and best for the United States. More precisely, issues of race and culture become intertwined with attitudes about immigration policy and what the racial and cultural makeup of the United States should be.

The historical child welfare practices described in Part I reflected policies and practices aimed at removing children from parents who had been deemed undesirable. Contemporary actions taken against undocumented parents are not part of an official policy or practice to tear these families apart. But the terminations of parental rights that are occurring today, which often go unnoticed, are just as troubling because the effects are similar—they tear families apart because of biases surrounding the identity of the parent.

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252. Billy Ball, *Criminal Minds: Racial Profiling in Alance County*, INDYWEEK.COM (Aug. 14, 2012), <http://www.indyweek.com/indyweek/criminal-minds-racial-profiling-in-alamance-county/Content?oid=3126336>.

253. MASSEY & SANCHEZ, *supra* note 19, at 79; *see also* McKanders, *supra* note 39, at 166 (describing how anti-immigrant laws “targeting undocumented immigrants . . . are also directed at all Latinos who are perceived as unwilling to assimilate to American cultural values. These laws encourage and lend legitimacy to exclusion of ‘the other’—the Latino other”).

*A. Undocumented Parents’ Rights Are Protected Under the Constitution*

Under the Fourteenth Amendment, “no State shall ‘deprive any person of life, liberty, or property, without due process of law.’”<sup>254</sup> The Due Process Clause requires more than fair process.<sup>255</sup> When fundamental rights and liberty interests are at stake, heightened protection must be afforded against governmental interference.<sup>256</sup>

The right to parent one’s child is “perhaps the oldest of the fundamental liberty interests” recognized by the Supreme Court.<sup>257</sup> As the Supreme Court noted, parents’ fundamental interest in raising their child “does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.”<sup>258</sup>

A parent’s right in this regard is not absolute, however. The State, as *parens patriae*, has an interest in preserving and promoting the welfare of children within its jurisdiction and can intervene in situations of abuse, abandonment, and neglect and terminate parental rights.<sup>259</sup> Because a state possesses enormous power, a parent must be found unfit by clear and convincing evidence.<sup>260</sup> “Few consequences of judicial action are so grave as the severance of natural family ties.”<sup>261</sup> This higher standard balances the rights of natural parents with the State’s *parens patriae* interests.<sup>262</sup> After a finding of unfitness, a court will then assess whether termination is in the child’s best interest.<sup>263</sup>

An undocumented parent’s interest in raising her child is no less fundamental than a citizen parent’s interest. Undocumented immigrants are considered “persons” entitled to due process and equal protection under the Fifth and Fourteenth Amendments.<sup>264</sup> The “Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent.”<sup>265</sup>

*B. Termination Proceedings and Undocumented Parents*

Biases within child welfare departments and juvenile courts about undocumented immigrants are influencing assessments about their fitness as parents. Some of these termination decisions purport to be about the best interests of the child—like the historical examples discussed in Part I—but these decisions

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254. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (quoting U.S. Const. amend. XIV).

255. *Id.*

256. *Id.*

257. *Id.*

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

259. *Id.* at 766.

260. *Id.* at 769.

261. *Id.* at 787 (Rehnquist, J., dissenting).

262. *See id.* at 769 (majority opinion).

263. *Id.* at 760.

264. *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

265. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

also reveal tensions around identity and how best to cultivate a preferred American identity.<sup>266</sup>

Determining the motivations influencing each of these decisions is, of course, difficult, and there are likely many different and competing ones. The termination cases discussed below involved parents who required assistance and support, and, as is the case in many best interest assessments, there was likely a “better” family available to care for the child.<sup>267</sup> As one family court judge observed, “One wonders if any natural parents of children in foster care could pass muster if the superior capabilities of the foster parents are the measure of ‘best interests.’”<sup>268</sup> At the same time, issues that are raised in these decisions, such as a comparison of resources between the United States and that of the parent’s country, the parent’s undocumented immigration status, the “un-American” culture and values of the parent, do reveal the way biases creep into and influence parental fitness and best interest determinations involving immigrant parents and their children. I posit that underlying these biases may be a larger tension around identity (“American” versus “other”), and a conscious or unconscious assessment by decision makers about which identity is better for children.

### 1. Immigration Status

Some courts and child welfare departments explicitly discriminate against undocumented parents because of their undocumented immigration status, equating this status with abuse and/or neglect.<sup>269</sup> An attorney in Michigan, for instance, stated that during one termination proceeding, his department argued that an

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266. Cultural and racial biases often undermine termination of parental rights proceedings. In 1971 the Supreme Court in *Santosky v. Kramer* noted:

Permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge. . . . In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent. Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, . . . such proceedings are often vulnerable to judgments based on cultural or class bias.

455 U.S. at 762–63. In the early 1980s a divorced, Caucasian mother lost custody of her daughter because she married an African American man. The Supreme Court noted that “private biases and the possible injury they might inflict” were impermissible considerations. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). In the context of termination proceedings involving undocumented parents, while cultural and racial biases are present in many of these decisions, I argue here that the tension between an American identity and an “other” or (more often than not) Latino identity also pervades these assessments.

267. See *State v. Maria L. (In re Interest of Angelica L.)*, 767 N.W.2d 74, 94 (Neb. 2009) (“[U]nless [the undocumented mother] is found to be unfit, the fact that the State considers certain adoptive parents, in this case the foster parents, ‘better,’ or this environment ‘better,’ does not overcome the commanding presumption that reuniting the children with [their mother] is in their best interests—no matter what country she lives in.”).

268. ROBERTS, *supra* note 69, at 113.

269. WESSLER, *supra* note 15, at 51–55.

undocumented father was “abusive or neglectful of his child because he is an illegal alien who is in danger of being arrested every time he walks out the door.”<sup>270</sup> According to this attorney, “[T]he theory is that because of his immigration status and lack of contingency plans for his child, should he be arrested on an immigration hold, he places his child at a substantial risk of harm.”<sup>271</sup> Another attorney who works for the child welfare department in Jacksonville, Florida, shared a similar view noting:

Typically, as a policy, we are reluctant to recommend a placement with a parent that we know is not legally here, because our position representing the best interests of the child is to ensure [they] have permanency and not set them up for further disappointment. To be placed back with a parent that may at any time be deported is not truly in the best interest of children. . . . [A]s a policy for the program, we typically don’t like to make those recommendations knowing full well that the parent is not documented.<sup>272</sup>

A juvenile court in Georgia terminated an undocumented father’s parental rights, indicating that he “had done nothing to legalize his residency in the United States.”<sup>273</sup> After the court found that the mother failed to comply with her reunification plan, in part because she “lived with and financially relied upon a man who . . . was an illegal alien,” it terminated her parental rights.<sup>274</sup> With regard to the decision concerning the father’s parental rights, the appellate court reversed the decision, noting that the father had complied with the reunification plan and made meaningful efforts to maintain a parental bond with his child.<sup>275</sup> The court stated that the father’s parental rights were terminated by the juvenile court not because of parental misconduct, but because of the possibility that the father could be deported.<sup>276</sup> The court went on to explain: “A court may not sever a parent-child relationship solely because it has determined that the child might enjoy certain advantages elsewhere.”<sup>277</sup> Though it was a physical altercation between the mother and father that led to state intervention, the juvenile court’s bias surrounding the father’s immigration status provided the basis for terminating his parental rights. While the appellate court reversed and noted that the possibility of deportation to a less affluent country cannot serve as a basis for termination of parental rights, it did not explicitly address the strong bias relating to immigration status and “illegality” that permeated the juvenile court’s decision.<sup>278</sup>

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270. *Id.* at 53 (describing, in addition, similar views held by child welfare authorities in Maricopa County, Arizona; Cabarrus County, North Carolina; and Collier County, Florida).

271. *Id.*

272. *Id.* at 52–53 (omissions in original).

273. *In re Interest of M.M.*, 587 S.E.2d 825, 832 (Ga. Ct. App. 2003).

274. *Id.* at 829.

275. *Id.* at 832.

276. *Id.*

277. *Id.*

278. Thronson, *supra* note 40, at 54 (“[E]ven as it reversed the decision, the appellate court relied on factual disagreements; it did little to discredit the trial court’s naked reliance on immigration status as a basis for decision.”).

Likewise, the juvenile court in Encarnación Maria Bail Romero's termination case—the case mentioned in the Introduction—determined that Bail Romero's undocumented immigration status supported its finding that she was an unfit, law-breaking mother.<sup>279</sup> The Missouri Supreme Court reversed the initial termination and adoption and remanded the case back to the juvenile court, but it did not acknowledge the bias and hostility surrounding her status.<sup>280</sup>

Unsurprisingly, on remand the same juvenile court focused extensively on Bail Romero's and her relatives' immigration status. Through its repeated references to the illegal status of her relatives,<sup>281</sup> Bail Romero's status as a “convicted felon,”<sup>282</sup> her previous unlawful employment and presence in the United States without authorization, which the court referred to as “criminal activity,”<sup>283</sup> and her testimony that she would cross the border illegally again,<sup>284</sup> the court painted a picture of a law-breaking mother to bolster its finding of unfitness. At one point the decision stated:

Ms. Romero and her family were always at risk of being arrested and deported. Yet, even with a newborn son, she elected to remain at risk in the United States instead of returning to Guatemala where she had two other children that she had not seen for years, an extended family and, perhaps most importantly, lawful residency.<sup>285</sup>

The Missouri Court of Appeals, in affirming the juvenile court's second decision terminating the mother's parental rights, found that the juvenile court did not improperly focus on the mother's immigration status.<sup>286</sup> The Court of Appeals described her immigration status as “an unavoidable fact” and noted that it “properly played a part in reviewing Mother's past behavior, predicted future behavior, and possible future harm to Child.”<sup>287</sup>

279. See *In re Adoption of Romero*, No. 07AO-JU00477 (Mo. Cir. Ct. July 18, 2012) (on file with author).

280. See *S.M. v. E.M.B.R. (In re Adoption of C.M.B.R.)*, 332 S.W.3d 793 (Mo. 2011).

281. *In re Adoption of Romero*, No. 07AO-JU00477 at \*12 (noting that Bail Romero at one point lived with her brother, “an illegal alien”); *id.* at \*13–14 (stating that her brother and his girlfriend “were illegally in the United States and subject to deportation”); *id.* at \*14 (noting that Bail Romero's sister was “illegally in the United States”).

282. *Id.* at \*36–37 (finding that her status as a “convicted felon” barring her entry into the United States and her willingness to commit more offenses by crossing the border illegally again demonstrated that her ability to parent Carlos had not improved).

283. *Id.* at \*36 (noting that the totality of the circumstances demonstrate Bail Romero's unfitness including her “continued engagement in criminal activity after the birth of the minor child, her continued failure to seek information about him, her medical, physical and nutritional neglect of him, her continued failure to provide support for him, her continued failure to attempt to communicate or contact him, and her expressed intentions to reengage in new criminal activity [cross the border again] along with her two children from Guatemala should [sic] be deported in the future”).

284. *Id.* at 36–37.

285. *Id.* at 31.

286. *In re Adoption of C.M.*, No. SD322228, at \*70 (Mo. Ct. App. Oct. 7, 2013).

287. *Id.* at \*71.



As the above cases demonstrate, in termination proceedings, a parent’s immigration status can be used to show that the parent not only violated immigration laws, but, by extension, is also an irresponsible and unfit parent. In some ways, these negative perceptions toward undocumented parents mirror congressional legislation that has increasingly criminalized immigration violations.<sup>288</sup> As Congress—and even some states—transforms traditionally civil immigration violations into criminal ones, the label attached to the violator also changes. Undocumented immigrants no longer commit civil immigration offenses, but instead criminal ones. And the criminal label attaches to the undocumented person.

This criminal characterization has permeated family law assessments. The law-breaking father who could not legalize his status became an unfit parent who could not offer a stable life to his child. Similarly, Bail Romero’s violation of immigration laws and use of false documents served as evidence of a mother who was continuing to engage in criminal activity, placing her child at risk. David Thronson—one of the first scholars to explore the intersection of immigration and family law—noted that “[j]udges who discriminate on the basis of immigration status reflect acceptance, consciously or otherwise, of a pervasive societal narrative that constructs an expanding notion of unworthiness and ‘illegality’ regarding undocumented immigrants and a diminished popular sense regarding the availability of protection from prejudice and discrimination.”<sup>289</sup> This expanding notion of illegality has the potential to construct the personhood of the undocumented parent and to influence assessments concerning parental fitness.

Crossing the border unlawfully and living in the United States as an undocumented person can be precarious for children and parents, but characterizing this as parental unfitness ignores the complicated choices parents face and the limited options available to provide for their children. By taking a broader view, the actions of undocumented parents should represent equities in the child welfare context.<sup>290</sup> Often, these are parents who desperately want to care for and provide for their children, which can be their primary motivation for migrating.<sup>291</sup> In Bail Romero’s situation, though she was convicted of a felony for using fraudulent documents, she used these identity documents to work and provide for her children.<sup>292</sup> Likewise, as a single mother, her decision to leave two of her children

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288. See Thronson, *supra* note 40, at 55–60.

289. *Id.* at 54–55.

290. Brief of the Young Center for Immigrant Children’s Rights at the University of Chicago et al. as Amici Curiae in Support of Appellant at 12, *S.M. v. E.M.B.R. (In re Adoption of C.M.B.R.)*, 332 S.W.3d 793 (Mo. 2011) (“Viewed through the prism of immigration enforcement, working without government authorization is a negative factor. But child welfare systems are not engaged in federal enforcement of immigration law and policy. Viewed through the prism of child welfare, a parent’s decision to work in order to feed, clothe and educate a child is a positive, even necessary parenting trait.”).

291. See Deborah A. Boehm, “For My Children:” *Constructing Family and Navigating the State in the U.S.-Mexico Transnation*, 81 ANTHROPOLOGICAL Q. 777, 786 (2008).

292. Interview by Laura Davenport with Encarnación (Angelica) Alvarado (Aug. 25, 2009) [hereinafter Encarnación Interview] (explaining to Davenport that by working “we get ahead with children” and that she left Guatemala “[b]ecause I wanted to do more. That’s

behind in Guatemala is one that many undocumented parents are compelled to make in order to support their families. As noted by anthropologist Deborah Boehm, “For mothers . . . the motivations to migrate are especially complicated—women typically migrate to reunite with a male partner or because of the necessity to work after being abandoned by a spouse. Transnational parenthood, and particularly ‘transnational motherhood’ . . . is indeed riddled with difficult decisions, ambivalent emotions, and multiple negotiations in the face of limited options.”<sup>293</sup>

Immigration status is not always an irrelevant factor in child welfare proceedings.<sup>294</sup> For instance, it may be a necessary consideration in determining child custody when one parent is deported but the other remains in the United States. It is also an appropriate consideration when assessing the family’s situation, generally.

The use of immigration status in child welfare proceedings becomes a problem when it is used to characterize a parent who is here unlawfully as illegal, unworthy, and automatically an abusive and/or neglectful parent simply by virtue of her undocumented immigration status. This leaves all undocumented parents—who work without authorization, cross the border unlawfully to provide for their families, and live without documentation in the United States knowing that they may be deported—at risk of termination of their parental rights because they are undocumented.

## 2. Culture and Values

In some termination decisions, greater emphasis is placed on American cultural values, which is often to the detriment of the parent’s culture. In *In re B.A.*,<sup>295</sup> for example, the parental rights of an undocumented mother from Mexico, who was serving a twenty-one-month sentence, were terminated by a district court in Iowa.<sup>296</sup>

The district court stated that there was no “practical alternative” to terminating the mother’s parental rights, despite the fact that the mother provided the child welfare department with the names and contact information of relatives in Mexico

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why I left . . . . If God doesn’t allow me to continue here, then I’ll have to go back to Guatemala.”).

293. Boehm, *supra* note 291, at 788.

294. Kerry Abrams, *Immigration Status and the Best Interests of the Child Standard*, 14 VA J. SOC. POL’Y & L. 87, 97–101 (2006) (noting that a possible solution regarding the consideration of immigration status in child custody disputes is to presume that immigration status is not relevant but provide courts with specific types of cases in which it could be rebutted); *see also* David B. Thronson & Judge Frank P. Sullivan, *Family Courts and Immigration Status*, 63 JUV. & FAM. CT. J. 1, 13 (2012) (“The appropriate line in child custody matters cannot be, or at least cannot always be, drawn to enforce absolute silence about immigration status.” Instead, they advocate restricting the introduction of information concerning immigration status “to instances where immigration concerns are demonstrably relevant on an individualized basis [to prevent] the introduction of material for discriminatory purposes.”).

295. 705 N.W.2d 507 (Iowa Ct. App. 2005) (unpublished table decision).

296. *Id.* at \*1.

who could care for her children until her release.<sup>297</sup> The Mexican Consulate arranged a home study, conducted criminal background checks of the relatives, and offered to make arrangements for the placement of children with their relatives.<sup>298</sup> Still, child welfare authorities refused to place the children with them.<sup>299</sup> Instead, over the course of eighteen months the children were placed with five foster families—none of whom the children had previously known.<sup>300</sup> The department, in fact, terminated one placement because of allegations of excessive drinking and sex parties.<sup>301</sup>

The State argued that terminating the mother's rights was in the best interests of her children because they had never been to Mexico and did not know their relatives there.<sup>302</sup> The district court agreed, stating:

Though the boys were very bonded to their mother at the time of her arrest, that bond has naturally diminished. Bryan and Richard are clearly bonded to their current foster parents who have gone to great lengths to assist the boys in maintaining contact with their mother and will likely continue that contact in the future. Because of the passage of time and the lack of another practical alternative, Bryan and Richard are now fully integrated into the English-speaking, Iowa culture. They are six- and four-year-old boys who were dual citizens of Mexico and the United States but who have never been to Mexico. They live in a safe, nurturing home with foster parents who hope to adopt them and will encourage the boys to remain aware of their now dual heritage. Termination of parental rights is clearly in their best interests.<sup>303</sup>

The Iowa Court of Appeals reversed the termination, highlighting the special relationship between the children and their mother, and the mother's ability to care for them.<sup>304</sup> Though the end result was positive, the fact that the juvenile court based its decision on the children's integration into the English speaking, Iowa culture is troubling. Essentially, the transmission of the English language and "Iowan" values were afforded greater weight than the mother's constitutional right to raise her children and the strong bond that existed between her and her children.

In another termination case involving undocumented parents of a U.S.-citizen child, a physician, who treated the child for anemia and an ear infection, reported the family to child welfare services because of the child's failure to thrive.<sup>305</sup> Child welfare services placed the child in foster care while the parents received services to facilitate reunification.<sup>306</sup> At the termination hearing, numerous social workers testified that the parents had made significant progress in improving their parenting

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297. *Id.* at \*2.

298. *Id.*

299. *See id.* at \*3.

300. *Id.* at \*1–4.

301. *Id.* at \*4.

302. *Id.* at \*5.

303. *Id.* at \*1.

304. *Id.* at \*4–6.

305. *In re Interest of S.H.A.*, 728 S.W.2d 73, 75–76 (Tex. Ct. App. 1987).

306. *Id.* at 77–81.

skills.<sup>307</sup> Yet the jury found that the parents engaged in conduct that endangered the child's well-being, a finding the appellate court affirmed.<sup>308</sup> The dissent, however, highlighted something subtle, yet important, that may have influenced decision makers:

[I]t is noteworthy that Child Welfare said that this child is "adoptable" and they are planning to place him with an American family. While it is true that this child was "Born in the U.S.A." his heritage and culture are Hispanic. To tear asunder the parent-child bond would also entail separating him from his brothers, sisters, grand-parents, etc. This would destroy the extended family bond that is especially important. It cannot be said that it is in this child's best interest to be torn apart from not only his parents but his other relatives that love him, and be placed with strangers.<sup>309</sup>

This statement is a keen observation of a possible underlying preference by some decision makers to have U.S.-citizen children placed with American families who can transmit American values to the children. Far less weight, particularly when the parents' resources are limited, is given to those social goods that undocumented parents can transmit and to the importance of family bonds.

### 3. National Origin, Class, and Life as an Undocumented Immigrant

A parent who comes from a poorer country, such as Mexico or Guatemala, is more vulnerable to termination of parental rights—not necessarily because of parental unfitness, but because of the belief that a more prosperous life in the United States would be better for their children.<sup>310</sup> One child welfare attorney stated: "When you break down the cases, placement with parents in Mexico happens very rarely. In my cases it might have happened every five years. The kneejerk reaction of almost everyone is that children are better off in [the] U.S."<sup>311</sup> An undocumented father's rights were terminated *because* he wanted to bring his children to Mexico. The attorney explained:

The father had taken sole custody of the children after charges were filed against the mother. He had never been accused of any neglectful behavior. Through [sic] the judge was otherwise ready to close the case entirely and let the family live without CPS [Child Protective Services]

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307. *See id.* at 80–81 (summarizing testimony by social workers who believed parents were making progress and that termination was not appropriate). One social worker noted that parents' problems were due, in part, to "cultural differences." *Id.* at 79.

308. *Id.* at 86–91.

309. *Id.* at 97.

310. *See In re Doe*, 281 P.3d 95, 102 (Idaho 2012) (noting that the fact that undocumented father was deported to Mexico and would raise his children there was not a basis for terminating parental rights); WESSLER, *supra* note 15, at 46 (noting that one attorney in El Paso, Texas, explained that very few children are returned to Mexico because the common assumption is that life in the United States is in the best interest of the child).

311. WESSLER, *supra* note 15, at 46.

supervision, the judge refused to do so because the father said he wanted to go to Mexico. The lawyer for the department made the allusion that the kids couldn't be better off in Mexico, so why would we want them to go there? I argued that it was in the best interest of the children to let them be with their father, but the court did not see it that way.<sup>312</sup>

A juvenile court in Michigan terminated the parental rights of undocumented parents following their deportation, stating that it was in the U.S.-citizen children's best interests to live in the United States.<sup>313</sup> After unsubstantiated allegations of abuse, the Department of Child Welfare Services actually informed ICE of the parents' undocumented status, which led to their deportation.<sup>314</sup> Following the parents' deportation, the court determined that the children—three of whom were U.S. citizens—would have a “better and more prosperous life in the United States than in Guatemala.”<sup>315</sup> The decision was reversed on appeal.<sup>316</sup>

The belief that it is in children's best interests to remain in the United States without their parents than in a poorer country with their parents represents socioeconomic, racial, cultural, and global inequity that plays out in this context as a cultural clash. As the above cases and comments by attorneys illustrate, part of this clash has to do with the weight given to certain factors, like prosperity and educational opportunities, at the expense of others, such as the parent/child relationship and the language and culture of one's biological parents.<sup>317</sup> A statement by one attorney, in support of his department's unofficial policy of not reunifying deported parents with their children, exemplifies the emphasis placed on certain social goods. He states, “Most of our [Mexican] parents don't have education themselves; they are poor and they don't have the ability to pay for further education.”<sup>318</sup>

Decision makers also fear sending children to a country about which they may know very little. In some instances, neither the consulate nor child welfare services in the parent's country of origin were contacted.<sup>319</sup> Instead, assumptions were made about the country and what life would be like there for the children.<sup>320</sup> In another

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312. *Id.* at 47.

313. *In re B.*, 756 N.W.2d 234 (Mich. Ct. App. 2008).

314. *Id.* at 237.

315. *Id.* at 241.

316. *Id.* at 242.

317. For instance, one guardian ad litem, supporting the termination of an undocumented father who the Idaho Supreme Court found to be fit stated: “I think it's in the best interest of [the daughter] obviously to remain in the United States because there's no comparison between being in Mexico and being in the United States, being a United States citizen. She has all the luxuries or all the things that we can offer.” *In re Termination of Parental Rights of Doe*, 281 P.3d 95, 102 (Idaho 2012).

318. WESSLER, *supra* note 15, at 46.

319. *Id.* at 47–50 (noting that few child welfare departments contact foreign consulates).

320. See *In re B.*, 756 N.W.2d at 238 (indicating that a caseworker contacted the Guatemalan embassy and “performed an Internet search for possible services in Guatemala” but was not successful in obtaining services for Guatemalan parents); *State v. Maria L. (In re Interest of Angelica L.)*, 767 N.W.2d 74, 94 (Neb. 2009) (court noting on appeal that the

situation, discussed *supra*, though the Mexican consulate remained actively involved—providing homes studies and criminal background checks of relatives in Mexico—child welfare authorities were “skeptical” about placing children with relatives in Mexico while their parents were incarcerated in the United States. Instead, child welfare authorities placed the children with five different foster families in the United States.<sup>321</sup>

A parent’s poverty in the United States and every day restrictions attendant with life as an undocumented immigrant can also lead to state intervention. As legal scholar Dorothy Roberts notes, poverty continues to be used in the child welfare context as evidence of a parental deficit that justifies state intervention rather than a social deficit.<sup>322</sup> This is a chronic problem that leaves poor parents, and particularly poor parents of color, vulnerable to state intervention. It has a unique impact on the undocumented parent.

Undocumented persons are denied most public benefits.<sup>323</sup> Based on the percentage of undocumented immigrants living below the poverty line,<sup>324</sup> having

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Guatemalan government had the resources to monitor the children’s well-being and that the State initially failed to make greater efforts to involve the consulate to keep the family unified); Fairfax Cnty. Dep’t of Family Servs. v. Ibrahim, No. 0821-00-4, 2000 WL 1847638, at \*3 (Va. Ct. App. Dec. 19, 2000) (affirming trial court’s finding that the evidence in the child welfare department’s petition to terminate parental rights was insufficient and noting that the “trial court would have to speculate about the children’s future because the department offered no information about the situation in Ghana and made no efforts to determine the conditions there”).

321. *In re B.A.*, 705 N.W.2d 507 at \*2–3 (Iowa Ct. App. 2005) (unpublished table decision) (noting that the Mexican Consulate arranged for a home study of relatives who could care for children while parents were incarcerated in the United States). The consulate advised child protection workers in the United States that Mexico’s child protection agency would supervise the children to “assure their well-being.” *Id.* at \*2. In spite of the consulate’s detailed home study and criminal background checks of relatives, the Department “remained skeptical” and did not approve the placement. *Id.* at \*3.

322. See ROBERTS, *supra* note 69, at 33–35 (2002). “The child welfare system is designed to detect and punish neglect on the part of poor parents and to ignore most middle-class and wealthy parents’ failings. Although the meaning of child maltreatment shifted from a social to a medical model, it retained its focus on poor families. The system continues to concentrate on the effects of childhood poverty, but it treats the damages as a symptom of parental rather than societal deficits.” *Id.* at 33. Roberts describes how children are more likely to be removed from neglectful parents rather than physically abusive parents and how children whose parents cannot find decent housing that is affordable are more likely to be placed in foster care by child welfare workers. *Id.* at 35; see also Appell, *supra* note 69, at 584 (explaining that because poor families are more likely to rely on public transportation, receive public benefits, and are generally exposed in an array of other ways, their parenting practices receive more exposure than wealthier parents who can afford their own cars, hire nannies and hire attorneys if they find themselves in legal trouble, placing them more at risk of state intervention); Wallace & Pruitt, *supra* note 69, at 115 (noting that poor families who receive public benefits are four times more likely to be investigated by child protective services and to have their children removed).

323. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 400(3), (5), 110 Stat. 2105 (limiting the public benefits available to undocumented immigrants).

324. PASSEL & COHN, *supra* note 33, at iv (“A third of the children of unauthorized

no social aid poses enormous challenges and can lead to allegations of neglect.<sup>325</sup> Inability to obtain public benefits can also affect the services that are provided to the parent after the state has intervened. If an undocumented immigrant cannot show that she completed her case plan and received all necessary services, she may be denied reunification with her children.<sup>326</sup>

In a termination case mentioned above, child welfare services indicated that the child was malnourished.<sup>327</sup> Child welfare workers stated that his parents fed him milk, tortillas, sopas, eggs, and beans,<sup>328</sup> and indicated that this diet was too heavy in dairy and lacking in vegetables and meat.<sup>329</sup> Aside from cultural differences in diet, the parents' limited resources also influenced the food he was served. The dissent noted that the parents, undocumented immigrants from Mexico, were ineligible for food stamps and welfare benefits, and the only form of public assistance they were receiving were Women, Infants, and Children (WIC) benefits.<sup>330</sup> WIC provided milk, cheese, and cereal, so "[i]t naturally follows that the child's diet was heavy on milk and dairy products."<sup>331</sup>

Bail Romero's situation highlights the difficulties faced by undocumented immigrants because of restrictions placed on every day life and because of immigration enforcement. For instance, when a Parents as Teachers (PAT) worker visited Bail Romero in jail, following Bail Romero's arrest during a workplace raid, she stated that Bail Romero's son was weak because Bail Romero gave him whole milk rather than 2 percent.<sup>332</sup> Bail Romero explained that she did not have a ride to the city to pick up formula offered through the WIC program.<sup>333</sup> Davenport found Bail Romero's response dubious, noting that Bail Romero had previously obtained rides to go to work.<sup>334</sup> Bail Romero replied that people without documents are afraid to drive.<sup>335</sup>

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immigrants and a fifth of adult unauthorized immigrants lives in poverty. This is nearly double the poverty rate for children of U.S.-born parents (18%) or for U.S.-born adults (10%).").

325. See, e.g., *In re Interest of V.S.*, 548 S.E.2d 490, 493 (Ga. Ct. App. 2001) (reversing a juvenile court order that terminated an undocumented father's parental rights, in part, because of the father's failure to obtain basic child care items for his seven month old son and failure to find a place to live).

326. *Perez-Velasquez v. Culpeper Cnty. Dep't of Social Servs.*, No. 0360-09-4, 2009 WL 1851017, at \*1 (Va. Ct. App. June 30, 2009) (noting that though child welfare services worked with the mother after her children were removed from the home as a result of the mother leaving the children unsupervised while she went for a job interview, these services were limited "because mother was an illegal immigrant"); WESSLER, *supra* note 15, at 54-55 (explaining that child welfare authorities often do not place children with undocumented relatives because these relatives cannot access needed public benefits and cannot be provided with the resources to financially support these children).

327. *In re Interest of S.H.A.*, 728 S.W.2d 73, 75-76 (Tex. Ct. App. 1987).

328. *Id.* at 86.

329. *Id.* at 93.

330. *Id.*

331. *Id.*

332. Encarnación Interview, *supra* note 292, at 3.

333. *Id.* at 8.

334. *Id.*

335. *Id.*

Child welfare departments may deny reunification based on activities that most undocumented immigrants engage in—driving without a license and working without authorization. For example, some child welfare departments refuse to reunify an undocumented parent with her child if she drives without a license.<sup>336</sup> This refusal significantly disadvantages undocumented parents because, in virtually every state throughout the United States, undocumented immigrants are prohibited from obtaining drivers' licenses.<sup>337</sup> Therefore, they either rely on public transportation, or, if they live in areas where public transportation is unavailable, they must decide whether to drive—often to work—without a license.<sup>338</sup>

Similarly, in certain jurisdictions, a parent who is unable to show evidence of a lawful source of income—for instance, with pay stubs—cannot reunify with her child because she has no acceptable documentation to prove she has the means to provide for her child.<sup>339</sup>

Immigration detention can also thwart parents' efforts to communicate with their children. While visiting with Bail Romero in jail, Davenport told Bail Romero that she waited too long following her arrest to communicate with family to let them know what happened to her.<sup>340</sup> Bail Romero stated that she did not call because there was no telephone available.<sup>341</sup> She explained that once she learned that she could make calls, she worried that the collect calls would be too expensive for family members.<sup>342</sup> In fact, when she did try to call, her family members did not accept the calls because of the cost.<sup>343</sup> Nonetheless, Bail Romero noted, "Right now, I want to communicate with my son, but I don't want to cost anybody anything. I wish I could call where my son is."<sup>344</sup> Yet both the Missouri Supreme

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336. See WESSLER, *supra* note 15, at 20–21 (explaining that in Osceola County, Florida, and Maricopa and Pima counties in Arizona, lack of verifiable employment can prevent reunification with children, and that in Duplin County, North Carolina and Austin, Texas, driving without a license is used as evidence that the parent did not comply with the case plan).

337. As a result of the REAL ID Act, in order for driver's licenses to be used for federal identification purposes, the state must ensure that licenses are issued only to U.S. citizens or nationals and those with lawful immigration status. REAL ID Act of 2005, H.R. 418, 109th Cong. § 202(c)(2)(B). Most states adhere to this practice because not doing so would deny their residents the ability to use their licenses for federal identification purposes. See LEGOMSKY & RODRÍGUEZ, *supra* note 12, at 1225–28.

338. See *State v. Maria L. (In re Interest of Angelica L.)*, 767 N.W.2d 74, 85 (Neb. 2009) (involving one undocumented mother whose rights were terminated because she did not bring her sick child to the hospital even though she explained to child welfare authorities that she thought her child was better and that she did not have a car or a ride to get to the hospital).

339. See WESSLER, *supra* note 15, at 20; see also *In re Interest of V.S.*, 548 S.E.2d 490, 493 (Ga. Ct. App. 2001) (noting that the juvenile court found father's inability to obtain permanent employment with benefits constituted a reason for terminating his parental rights).

340. Encarnación Interview, *supra* note 292, at 10.

341. *Id.*

342. *Id.*

343. *Id.* at 11.

344. *Id.*



Court and Juvenile Court faulted Bail Romero for not maintaining sufficient contact with her son nor expressing a personal interest in his welfare.<sup>345</sup>

#### 4. Denial of Legal Protection

When undocumented families are subjected to exclusion, they are increasingly denied legal protection. This becomes justifiable because the parent is undocumented and, by extension, neglectful. The denial of legal protection can and does subvert the fundamental rights of undocumented parents.<sup>346</sup> Bail Romero's situation most vividly illustrates this point.

In Bail Romero's case, assistance from an employee of a well-respected state-funded organization, Parents as Teachers, whose mission is to support and strengthen families, determined that Bail Romero's family was not worth saving.<sup>347</sup> Laura Davenport, a PAT employee, assisted Bail Romero after her son Carlos was born. After Bail Romero's arrest, when it appeared that her relatives were struggling to care for Carlos, Davenport stepped in.<sup>348</sup> She was concerned about

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345. See *S.M. v. E.M.B.R. (In re Adoption of C.M.B.R.)*, 332 S.W.3d 793, 817 (Mo. 2011).

346. The Southern Poverty Law Center filed a complaint on behalf of an immigrant Mexican mother whose daughter was taken from her in the hospital two days after her daughter's birth by officials with the Mississippi Department of Human Services. Complaint at 2, *Cruz v. Miss. Dep't Human Servs.*, No. 3:10cv446HTW-LRA (S.D. Miss. Aug. 12, 2010), available at <http://www.splcenter.org/get-informed/case-docket/cruz>. Someone from the social services department and a Spanish-speaking patient advocate questioned the mother in the hospital, in Spanish, despite the fact that the mother only spoke an indigenous language, Chatino. *Id.* at 6. Department officials claimed that the mother admitted to trading sex for housing and that she wanted to give her child up for adoption. *Id.* at 7. The child was removed from the hospital and given to a white attorney couple in Mississippi, who regularly practiced before the judge that approved the adoption. *Id.* at 1. The daughter was eventually returned to the mother after the U.S. Department of Health and Human Services Office for Civil Rights and the Administration for Children and Families conducted an investigation into the matter. *Id.* at 20–21.

347. *In re Adoption of Romero*, No. 07AO-JU00477, at \*12, \*15–16 (Mo. Cir. Ct. July 18, 2012) (on file with author). For more information about the Parents as Teachers program, see *About Us*, PARENTS AS TEACHERS, <http://www.parentsasteachers.org>.

348. See *In re Adoption of Romero*, No. 07AO-JU00477, at \*15–16. This raises interesting questions about the dependent relationship that may form between a person providing assistance and the parent. The parent may come to rely on this person, but this reliance and vulnerability may expose the parent in ways that can be detrimental to the parent. This represents a difficult situation because a mandated reporter is required to inform authorities when a child's well-being is in danger. At the same time, the provision of services allows a parent to learn and improve upon parenting skills, which can create dependency on the child welfare workers. In the termination of parental rights case *In re Interest of S.H.A.*, the parents did not immediately take their child to the doctor because they did not have the money or transportation to do so. 728 S.W.2d 73, 95 (Tex. Ct. App. 1987) (McClung, J., dissenting). Instead, they contacted the social worker who had been providing assistance to the family. *Id.* They believed the social worker could take the child to the doctor the following day. *Id.* Because the parents did not take the child immediately, he was removed from the home. *Id.* Yet the dissent noted:

Carlos's welfare.<sup>349</sup> Yet even though she was a mandated reporter,<sup>350</sup> based on the record, it does not appear that Child Protective Services was ever contacted.

Instead, she asked one couple to help take care of Carlos and then later, knowing of a local couple that was interested in adopting a Latino child, Davenport visited Bail Romero in jail in order to solicit Carlos's adoption.<sup>351</sup> During her visit, she told Bail Romero not to "think of adoption as something ugly."<sup>352</sup> When Bail Romero told her that she wanted to return to Guatemala with Carlos, Davenport replied:

But this is a pretty story that you are thinking so you don't have to [go] back alone. You're not thinking about the well-being of your son. You're only thinking about yourself. It is true you are the mother. You did give birth to him. But that is not true love when you're not thinking about the best for your child. Because the future of your child in Guatemala is not good. You have two children already there who your sister takes care of. You don't have another sister to take care of another child[.]<sup>353</sup>

She later told Bail Romero that if she raised him in Guatemala, Carlos would not have an education, and "[h]e'll just be a factory worker."<sup>354</sup> She also stated that it was "a blessing from the Lord that they picked you up."<sup>355</sup>

Davenport also asked questions of Bail Romero relating to sexual/reproductive matters. She asked Bail Romero whether there were men in the prison, and Bail Romero replied that there were but the men and women were separated.<sup>356</sup> Immediately after, Davenport asked Bail Romero whether her tubes were tied.<sup>357</sup> At the very end of the conversation, Davenport questioned Bail Romero about what she was doing in Guatemala before coming to the United States.<sup>358</sup> Bail Romero responded that she was working, trying to come to the United States and "wasn't doing other things."<sup>359</sup> Davenport stated, "[w]ell, you were doing 'other things,'

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While these workers' substantial efforts to assist the family in whatever way possible are to be applauded and encouraged, it is cruel and unfair to allow these parents to become dependent on the Child Welfare Department and then have the department use acts of the parents caused by this dependency as a basis for terminating their parental rights.

*Id.*

349. *In re Adoption of Romero*, No. 07AO-JU00477, at \*15–16 (noting that the child was being fed whole milk, had not received proper immunizations, was slow both to sit up and crawl, had poor muscle development, and it is unclear whether Carlos was examined by any medical staff during this time period).

350. *Carthage R-IX Sch. Dist. v. Homa*, at \*10 (Bd. of Educ. of Carthage R-IX Sch. Dist. Aug. 31, 2009) (on file with author) (providing that Davenport's boss, Lynda Homa, admitted during a hearing before the Board that she was a mandated reporter).

351. *Id.* at \*6.

352. Encarnación Interview, *supra* note 292, at 11.

353. *Id.* at 3.

354. *Id.* at 4.

355. *Id.* at 3.

356. *Id.* at 10.

357. *Id.*

358. *Id.* at 13.

359. *Id.*

because you had Carlos. So, you weren't just working. You were doing 'other things.'"<sup>360</sup>

The school board later terminated Davenport's boss from her position, finding that she engaged in "immoral conduct" as a result of approving Davenport's jail visit.<sup>361</sup>

Less than a month after this visit, one local couple, the Velazcos, who Davenport identified to help care for Carlos and who for a few months had assisted Bail Romero's relatives in caring for him, gave Carlos to another couple, the Mosers, who were interested in adopting a child.<sup>362</sup> Two days after their first overnight visit with Carlos, the Mosers moved to terminate Bail Romero's rights and adopt Carlos.<sup>363</sup>

The denial of legal protection continued. Bail Romero was not listed on the notice for a hearing to transfer custody, nor was it sent to her.<sup>364</sup> The summons and petition that were served to her were in English, even though she did not read or speak English.<sup>365</sup> She lacked counsel for months.<sup>366</sup> Approximately eight months after the initial petition was served, the Mosers, the couple interested in adopting Carlos, hired an attorney for her.<sup>367</sup> When the juvenile court held the termination hearing, Bail Romero was not present.<sup>368</sup> The only people who offered testimony were the Mosers, the Velazcos, and Davenport.<sup>369</sup> The juvenile court terminated Bail Romero's parental rights and approved the adoption.<sup>370</sup>

Missouri law is meant to protect parents from transfers prior to the filing of a court petition in order "to prohibit the indiscriminate transfer of children, the concept that a parent could pass them on like chattel to a new owner."<sup>371</sup> Those who are authorized to place a child for adoption in Missouri include: the family services division of the Department of Social Services, a licensed child placing agency, the child's parents, or an intermediary, which the statute states may be a licensed attorney, licensed physician, or clergy *of the parents*.<sup>372</sup> The Velazcos asserted that they were clergy, though they were never Bail Romero's clergy, and,

360. *Id.*

361. Carthage R-IX Sch. Dist. v. Homa at \*18 (Bd. of Educ. of Carthage R-IX Sch. Dist. Aug. 31, 2009) (on file with author).

362. *See In re Adoption of Romero*, No. 07AO-JU00477, at \*21 (Mo. Cir. Ct. July 18, 2012) (on file with author).

363. *S.M. v. E.M.B.R. (In re Adoption of C.M.B.R.)*, 332 S.W.3d 793, 802 (Mo. 2011) (noting that the Velazco's first overnight visit with Carlos was on October 3, 2007 and a petition was filed October 5, 2007).

364. *Id.* at 803.

365. *Id.*; *In re Adoption of Romero*, No. 07AO-JU00477, at \*23.

366. *In re Adoption of C.M.B.R.*, 332 S.W.3d, at 803.

367. *Id.*

368. *Id.*

369. *See id.*

370. *See id.* at 804.

371. *Peggy v. Michael (In re Baby Girl)*, 850 S.W.2d 64, 68 (Mo. 1993).

372. MO. ANN. STAT. § 453.14 (West 2003 & Supp. 2013) (emphasis added).

therefore, not authorized to place Carlos with the Mosers.<sup>373</sup> On appeal the Missouri Supreme Court found no manifest injustice and justified the actions, noting that Carlos needed immediate care.<sup>374</sup>

Child welfare services did not intervene until nearly five years after the first termination hearing, which prevented Bail Romero from receiving services to facilitate reunification with her son.<sup>375</sup> Under the Adoption Assistance and Child Welfare Act (AFSA), child welfare agencies are required to show that they made reasonable efforts to provide assistance and services to families to prevent the removal of a child from the home, and, if the child has been removed, to achieve reunification with the parent.<sup>376</sup> While some states specify certain circumstances in which reasonable efforts need not be provided, none under Missouri law applied to Bail Romero's situation.<sup>377</sup> Instead, Bail Romero was faulted for not availing herself of services like a public defender who would have been able to provide her with contact information for child welfare authorities,<sup>378</sup> or utilizing volunteers in jail to translate documents for her.<sup>379</sup>

Additionally, most of the information provided to the juvenile court about Bail Romero came from Davenport. Though Davenport undoubtedly wanted to help, and believed she was acting in Carlos's best interests, her own cultural and racial biases about Bail Romero framed how the juvenile court viewed Bail Romero. It was Davenport's testimony that characterized Bail Romero as a neglectful mother who fed her son two-percent milk instead of formula, lived with too many people in one apartment, and co-slept with her son on a pallet on the floor.<sup>380</sup> This testimony continued to be relied upon even in the second termination opinion to support the court's conclusion that Bail Romero neglected her son.<sup>381</sup>

To be sure, it is possible that Bail Romero might have been subjected to similar biases by child welfare workers, which could have hindered her ability to reunify

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373. See Appellant's Substitute Reply Brief at 14–15, *S.M. v. E.M.B.R. (In re Adoption of C.M.B.R.)*, 332 S.W.3d 793 (Mo. 2011) (No. SC 91141) (on file with author) (noting that the Velazcos were not clergy of Bail Romero).

374. *In re Adoption of C.M.B.R.*, 332 S.W.3d at 803.

375. See *In re Adoption of Romero*, No. 07AO-JU00477, at \*51–52 (Mo. Cir. Ct. July 18, 2012) (on file with author) (“In this matter, the minor child was never under the care of the Children's Division and the termination of parental rights action was brought by the Mosers instead of the State in connection with their adoption petition as allowed by law.”).

376. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500.

377. See MO. ANN. STAT. § 211.183 (West 2010 & Supp. 2013) (providing that reasonable efforts need not be made when the parent has murdered a child of the parent; committed voluntary manslaughter of a child of parent; aided or abetted, conspired or solicited to commit such murder or manslaughter; committed a felony assault that seriously injured child or another child of parent; or subjected child to severe or recurrent acts of physical, emotional, or sexual abuse).

378. See *In re Adoption of Romero*, No. 07AO-JU00477, at \*20.

379. See *id.* at \*25.

380. *Id.* at \*12–13.

381. See *id.*; see also *S.M. v. E.M.B.R. (In re Adoption of C.M.B.R.)*, 332 S.W.3d 793, 801–02 (Mo. 2011) (noting that Bail Romero fed Carlos whole milk, slept on a the floor with him, and that the living conditions were “poor”).

with Carlos. Additionally, Bail Romero made mistakes and likely needed additional support.<sup>382</sup> Yet the actions taken against her evidence the sheer vulnerability undocumented parents face. Parents have a fundamental interest in raising their biological children and this interest “does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”<sup>383</sup>

The biases toward undocumented Latino parents impact how they are treated in juvenile court when assessments are made concerning their parental fitness and the best interests of their children. Ultimately, these decisions become value assessments that afford greater weight to certain social goods—such as wealth, Anglo-American cultural values, and the English language—and diminish the social and cultural goods of their parents, and by doing so afford less protection to their constitutional right to raise their children. Undocumented parents cannot change the resources available in their country of origin, most cannot legalize their status, and they cannot change their native language and culture. Yet it does not follow that they should also lose their children.

### C. The Prevalence of the Problem

Undocumented parents are losing their parental rights. The exact number of cases is difficult to determine because juvenile court decisions are frequently sealed.<sup>384</sup> Moreover, most family court decisions are not appealed.<sup>385</sup> Studies such as the one conducted by the Applied Research Center, however, reveal that these cases are not rare.<sup>386</sup> As one judge in Southwest Florida commented:

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382. For instance, during the second termination proceeding, it was revealed through hospital records from Carlos’s birth that Bail Romero had left the hospital while Carlos was still in the nursery. Bail Romero did not notify anyone that she was leaving. She did return to bring Carlos home with her. See *In re Adoption of Romero*, No. 07AO-JU00477, at \*34–35.

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

384. See WESSLER, *supra* note 15, at 22–25; see also UNIV. OF ARIZ., *supra* note 16, at 2 (stating that through its research, attorneys, judges, and case workers all reported experience with cases involving parents in immigration detention or deportation proceedings); Rabin, *supra* note 16, at 114–18 (2011) (noting that because the child welfare system and ICE do not collect this information, it is difficult to determine the number of the families affected). The Department of Human Services Inspector General reported that from 1998 to 2007, 108,434 parents of U.S.-citizen children were deported. Rabin, *supra* note 16, at 114. Additionally, Rabin conducted surveys and interviews of personnel in the Pima County Juvenile System to determine the frequency with which children are involved with the child welfare system as a result of a parent’s deportation. Based on the information she gathered, Rabin concluded that “the numbers of such cases in the system suggest that immigration status arises frequently enough for it to be an issue about which personnel in the child welfare system are aware, but not so frequently that they are accustomed to dealing with such cases in a prescribed, uniform manner.” *Id.* at 118.

385. See Thronson, *supra* note 40, at 54 (noting that few family court decisions are appealed).

386. See, e.g., *In re M.M.*, 587 S.E.2d 825 (Ga. Ct. App. 2003); *In re Termination of the Parental Rights of Doe*, 281 P.3d 95 (Idaho 2012); *In re B.*, 756 N.W.2d 234 (Mich. Ct. App. 2008); *In re Adoption of C.M.B.R.*, 332 S.W.3d 793 (Mo. 2011); *State v. Maria L.* (*In re*

Our child protection system has had very little, almost non-existent success at reunifying children, whether born in the USA or in a foreign country, with parents who come to the USA (1) undocumented, (2) poor, (3) uneducated/illiterate, (4) unable to communicate in English, (5) culturally segregated. . . . If children of these parents come into care, they are virtually doomed by these five factors and the probability of permanent loss of these children is overwhelmingly high.<sup>387</sup>

There are 5.5 million children in the United States with at least one undocumented parent.<sup>388</sup> Three quarters of these children are U.S. citizens.<sup>389</sup> With increased immigration enforcement, parents and children living in mixed status households face the threat of separation. For example, from approximately 2000 to 2009, the government deported over 100,000 parents who had U.S.-citizen children.<sup>390</sup> The Applied Research Center (ARC) conservatively estimates that there are currently 5,100 children in foster care that have either a parent detained by ICE or a parent that has been deported, representing 1.25 percent of the total foster care population.<sup>391</sup> According to the ARC, “If these rates continue through the next five years, at least 15,000 additional children will face threats to reunification with their detained and deported mothers and fathers.”<sup>392</sup>

There are various ways that children of undocumented parents come into contact with the child welfare system. When an undocumented parent is arrested by ICE—for instance, during a workplace raid—and later detained, it can cause family separation, which then may result in state intervention.<sup>393</sup> In other instances, an undocumented parent is investigated for or charged with abuse or neglect.<sup>394</sup> ICE

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Interest of Angelica L.), 767 N.W.2d 74 (Neb. 2009); *State v. Mercedes S. (In re Interest of Mainor T.)*, 674 N.W.2d 442 (Neb. 2004); *In re Interest of E.N.C.*, 384 S.W.3d 796 (Tex. 2012); see also Complaint at 2, *Cruz v. Miss. Dep’t Human Servs.*, No. 3:10cv446HTW-LRA (S.D. Miss. Aug. 12, 2010), available at <http://www.splcenter.org/get-informed/case-docket/cruz>; WESSLER, *supra* note 15, at 22–24.

387. WESSLER, *supra* note 15, at 18.

388. PASSEL & COHN, *supra* note 33, at 7.

389. *Id.*

390. AJAY CHAUDRY, RANDY CAPPS, JUAN MANUEL PEDROZA, ROSE MARIA CASTANEDA, ROBERT SANTOS & MOLLY M. SCOTT, URBAN INST., *FACING OUR FUTURE: CHILDREN IN THE AFTERMATH OF IMMIGRATION ENFORCEMENT 1* (2009), available at [http://www.urban.org/UploadedPDF/412020\\_FacingOurFuture\\_final.pdf](http://www.urban.org/UploadedPDF/412020_FacingOurFuture_final.pdf).

391. WESSLER, *supra* note 15, at 23.

392. *Id.*

393. See CHAUDRY ET AL., *supra* note 390, at 13–26 (describing family separations as a result of immigration enforcement); see also *S.M. v. E.M.B.R. (In re Adoption of C.M.B.R.)*, 332 S.W.3d 793 (Mo. 2011) (undocumented mother arrested during a workplace raid).

394. See, e.g., *Anita C. v. Superior Court*, No. B213283, 2009 WL 2859068 (Cal. Ct. App. Sept. 8, 2009) (finding that mom, who plead guilty to child cruelty for leaving children alone while she worked, and who lived in unhygienic living conditions, supported termination of her parental rights); *In re B.*, 756 N.W.2d 234 (Mich. Ct. App. 2008) (reversing termination involving undocumented parents whose rights had been terminated by the juvenile court following their deportation); *State v. Maria L. (In re Interest of Angelica L.)*, 767 N.W.2d 74 (Neb. 2009) (reversing termination of mother’s rights in which mom who identified herself to police as the babysitter was arrested for obstructing a government

may be notified in these circumstances, resulting in the parent's apprehension by ICE and subsequent removal from the United States.<sup>395</sup> Even if these reports are unsubstantiated at a later date, the parent's deportation may become the justification for termination of parental rights.<sup>396</sup> Some cases involve an undocumented parent who is incarcerated because of a criminal conviction, resulting in separation from his or her child.<sup>397</sup> After completion of the criminal sentence, the parent may be deported.<sup>398</sup>

Because of family separations due to immigration enforcement, as well as reports indicating that undocumented parents are losing their parental rights, Congress recently introduced legislation aimed at protecting immigrant children

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operation, her children were taken into protective custody, and she was later taken into custody by ICE, deported, and had her parental rights terminated); *State v. Mercedes S. (In re Interest of Mainor T.)*, 674 N.W.2d 442 (Neb. 2004) (reversing termination of mother's parental rights in case where mom's striking of child led to incarceration, ICE placing an immigration hold on her, and her deportation); *State v. Lopez-Navor*, 951 A.2d 508 (R.I. 2008) (upholding termination of mother's rights where mom did not report her husband's abuse of her children to the police, arguing that her status as an undocumented immigrant made her afraid to report husband to the police, which the Rhode Island Supreme Court said was not a defense); *In re Interest of S.H.A.*, 728 S.W.2d 73 (Tex. Ct. App. 1987) (upholding termination of parental rights of undocumented parents accused of neglecting their sixteen-month-old son).

395. See, e.g., *In re B.*, 756 N.W.2d at 237; *In re Interest of Angelica L.*, 767 N.W.2d at 82; *In re Interest of Mainor T.*, 674 N.W.2d at 449.

396. During investigation by child welfare workers, one mom was arrested and placed in removal proceedings. As a result of her deportation, a petition for termination of her parental rights was filed because of her failure to comply with the case plan and because her children had spent more than fifteen months of the most recent twenty-two months in foster care. See *In re Interest of Angelica L.*, 767 N.W.2d at 84. In another case, child welfare authorities reported the parents to ICE and then used their deportation to construct a claim of abandonment. See *In re B.*, 756 N.W.2d at 237. In Texas, a mom with six U.S.-citizen children was charged with neglectful supervision and child endangerment after someone reported seeing the mother's three-year-old playing near a highway. WESSLER, *supra* note 15, at 32. Border Patrol checked her criminal record, and she was charged with illegal reentry because she had been deported previously. *Id.* Because she faced a minimum of two years of incarceration and then deportation, her parental rights were terminated. According to her attorney, "If she were a citizen, she would have been bonded out in 24 hours. She would not have lost her kids." *Id.*

397. See, e.g., *In re Interest of C.T.*, 544 S.E.2d 203 (Ga. Ct. App. 2001) (upholding termination of father's parental rights, which had been terminated while he was incarcerated because of a felony conviction); *In re RH*, 524 S.E.2d 257 (Ga. Ct. App. 1999) (upholding termination of undocumented father's parental rights who was incarcerated for cocaine distribution); *In re B.A.*, 705 N.W.2d 507 (Iowa Ct. App. 2005) (unpublished table decision) (reversing the termination of mother's parental rights where father pled guilty to conspiracy to distribute methamphetamine and mother pled guilty to misprision of felony); *Dep't of Children's Servs. v. Ahmad*, No. M2004-02604-COA-R3-PT, 2005 WL 975339 (Tenn. Ct. App. April 26, 2005) (upholding termination of mother's rights after she had been arrested on felony theft charges, served her criminal sentence, was transferred to ICE custody, and then deported); *Fairfax Cnty. Dep't of Family Servs. v. Ibrahim*, No. 0821-00-4, 2000 WL 1847638 (Va. Ct. App. Dec. 19, 2000) (declining to terminate parental rights of Ghanaian father who had been arrested, incarcerated for importing drugs, and deported).

398. See, e.g., *Ahmad*, 2005 WL 975339, at \*1; *Ibrahim*, 2000 WL 1847638, at \*1.

and parents impacted by immigration enforcement. The Humane Enforcement and Legal Protections for Separated Children Act introduced in the Senate would require child welfare authorities, the Governor of the state, and relevant state and local law enforcement officials to be notified before or, if that is not possible, immediately after the commencement of immigration enforcement.<sup>399</sup> The bill provides that parents should be screened by social workers or case workers to determine whether they have children and allow such individuals to make free, confidential telephone calls to arrange for the care of their children.<sup>400</sup> Moreover, the bill also provides that parents detained as a result of immigration enforcement should have access to their children, courts, child welfare agencies, and consular officials.<sup>401</sup> It would also require state child welfare agencies to develop policies and trainings for handling cases involving children separated from undocumented parents.<sup>402</sup> A similar bill introduced in the House states that all decisions relating to the care, custody, and placement of children should be in the best interest of the child, “including the best outcome for the family of the child” and that such decisions be “based on clearly articulated factors that do not include predictions or conclusions about immigration status or pending Federal immigration proceedings.”<sup>403</sup> A companion bill introduced in the House, the Help Separated Families Act of 2012, would prohibit a state from terminating parental rights of a fit parent who has been deported unless the state has (a) made reasonable efforts to identify, locate, and contact the parent of the child; (b) notified them of the intent of the State to file the petition; (c) attempted to reunify the child with the parent, and (d) it is determined that the parent is unfit or unwilling to parent the child.<sup>404</sup> Additionally, the Border Security, Economic Opportunity, and Immigration Modernization Act would allow deported parents with U.S.-citizen children to return to the United States and apply for the Registered Provisional Immigrant Visa, which would facilitate family reunification.<sup>405</sup> This legislation contains provisions that instruct against the termination of parental rights of undocumented parents because of deportation and/or detention, and would prohibit child welfare departments from refusing to place children with undocumented family members.<sup>406</sup> Another provision would require child welfare workers to

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399. Humane Enforcement and Legal Protections for Separated Children Act, S. 1399, 112th Cong. § 3(a)(1) (2011).

400. *Id.* § 3(b)(1)–(2).

401. *Id.* § 4.

402. *Id.* § 6.

403. Humane Enforcement and Legal Protections for Separated Children Act, H.R. 2607, 112th Cong. § 6 (2011).

404. Help Separated Families Act of 2012, H.R. 6128, 112th Cong. § 6 (2012).

405. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2101(b)(3)(B) (2013); *see also* Seth Freed Wessler, *Immigration Bill Includes Protections for Families Separated by Deportation*, COLOR LINES (Apr. 17, 2013, 10:06 AM), [http://colorlines.com/archives/2013/04/immigration\\_bill\\_allows\\_some\\_deportees\\_with\\_family\\_to\\_return\\_helps\\_unite\\_separated\\_families.html](http://colorlines.com/archives/2013/04/immigration_bill_allows_some_deportees_with_family_to_return_helps_unite_separated_families.html).

406. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2107(b)–(c) (2013) (noting, for instance, at § 2107(b) that “[a] compelling reason for a State not to file (or to join in the filing of) a petition to terminate parental rights . . . shall include: (A) the removal of the parent from the United States . . . or



communicate with families in their primary language.<sup>407</sup> Finally, in addition to this legislation, ICE released a new policy aimed at protecting parental interests during immigration enforcement, noting that it "will maintain a comprehensive process for identifying, placing, monitoring, accommodating, and removing alien parents or legal guardians of minor children while safeguarding their parental rights."<sup>408</sup>

#### IV. THE HARMFUL EFFECTS OF CULTIVATING A NATIONAL IDENTITY UNDER FAMILY LAW

Legal scholar Marcia Yablon-Zug proposed that "[i]n reunification cases involving parents facing deportation, the rights of children who are American citizens should outweigh the rights of their noncitizen parents."<sup>409</sup> She argued that in these circumstances a best interest approach should be followed, which would allow for a fit undocumented parent's rights to be terminated, if it is in the citizen child's best interests.<sup>410</sup> According to Zug, the State has an interest in protecting

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(B) the involvement of the parent in (including detention pursuant to) an immigration proceeding, unless the parent is unfit or unwilling to be a parent of the child" and providing at § 2107(c)(1)(B) that the "immigration status alone of a parent, legal guardian, or relative shall not disqualify the parent, legal guardian, or relative from being a placement for a child").

407. *Id.* § 2107(c)(34); *see also* Wessler, *supra* note 405.

408. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FACILITATING PARENTAL INTERESTS IN THE COURSE OF CIVIL IMMIGRATION ENFORCEMENT ACTIVITIES 1 (2013), *available at* [http://www.ice.gov/doclib/detention-reform/pdf/parental\\_interest\\_directive\\_signed.pdf](http://www.ice.gov/doclib/detention-reform/pdf/parental_interest_directive_signed.pdf) (providing that a Parental Rights Coordinator and Field Parental Rights Coordinators will assist parents who are separated from their children as a result of immigration enforcement). Among other things, the policy states that, when practicable, ICE will not transfer parents who are in child welfare proceedings to a detention facility outside of the family court's jurisdiction. *Id.* at 4. The policy also directs ICE officials to detain parents in a location that is accessible to the parent's children and will facilitate parent/child visitation when required by family court or child welfare proceedings. *Id.* The policy notes that, when practicable, parents will be allowed to make in-court appearances when they are involved with child welfare proceedings, or participate via video or teleconference. *Id.* at 4–5. The Field Parental Rights Coordinators are directed to help make provisions for the child's travel and reunification with a parent who will be removed. If a parent has been removed and a family court requires the parent's in person presence, ICE, on a case-by-case basis, will determine whether to facilitate the parent's temporary return for these purposes. *Id.*

409. Zug, *supra* note 58, at 1172–79. In discussing the problems with a parental rights approach in the context of immigrant children facing separation due to immigration enforcement, Zug discusses the following issues that arise: (1) a state has an interest in keeping U.S.-citizen children in America; (2) reunification to a country that is poorer and where conditions may be dangerous may not be in a child's best interests; (3) the differing statuses of parent and child can create situations in which a parent does not act in the child's best interests; (4) in situations of abuse and/or neglect, after a parent has been deported, child protective services no longer has oversight over the parents and child, and services for parents may be limited in countries with fewer resources; and (5) reunification with a deported parent may not provide stability and security for a child who has formed attachments with foster parents.

410. *Id.* *But see* Sarah Rogerson, *Unintended and Unavoidable: The Failure to Protect Rule and Its Consequences for Undocumented Parents and Their Children*, 50 FAM. CT.

U.S.-citizen children of undocumented parents because when a child follows a parent after deportation, American democratic ideals and values cannot be passed on to children who are not only outside of the country but who also do not have citizen parents to transmit them.<sup>411</sup> Zug acknowledges that this solution is not perfect and that there are other solutions to prevent such separations, but that these other solutions “seem infeasible given the current political climate.”<sup>412</sup> To be clear, she does not argue that parents of different cultures are bad parents, only that the State has an interest in keeping U.S.-citizen children in the United States when they do not have citizen parents to transmit those democratic values to them. She qualified her proposal by noting, “immigrant parents will only have their rights terminated when termination is in their child’s best interests, and most of the time termination will not be. Rarely will better resources or opportunities be enough, by themselves, to overcome the benefits of remaining with a loving and caring parent.”<sup>413</sup>

This Part argues against changing the standard for undocumented parents of U.S.-citizen children and maintains that the same standard that is used in all termination proceedings—first proof of parental unfitness and then an assessment of the best interests of the child—should be applied. A state’s interest in terminating parental rights does not begin until after a parent has been proven unfit.<sup>414</sup> As the Supreme Court recognized, “the State registers no gain towards its declared goals when it separates children from the custody of fit parents.”<sup>415</sup> Because of this, the State must first prove parental unfitness before assessing best interests.<sup>416</sup>

The problem with shifting the standard only when a case involves an undocumented parent of a U.S.-citizen child, is that it has greater potential, because the best interest standard is subjective and value-laden, to use the family as an arena for cultivating a preferred identity. The history involving early immigrants, as well as Native Americans, combined with contemporary termination cases described in Part III, demonstrate the dangers of using the law to change family composition in order to cultivate identity. When identity is cultivated under the law, the culture and values of the dominant culture will likely prevail, leaving members of a subordinate group—such as undocumented parents—excluded and denied legal protection.

Removing the fitness threshold would further perpetuate the exclusion of undocumented immigrants by suggesting that undocumented parents do not have a fundamental interest in raising their children. When parents, and more specifically a *subset* of parents, are denied this most basic and fundamental right, the value ascribed to these family relationships is diminished, and it does not necessarily protect children.<sup>417</sup> Instead, the denial of rights to undocumented parents infers that

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REV. 580, 585 n.79 (2012) (cautioning against Zug’s suggested approach).

411. Zug, *supra* note 58, at 1151–52.

412. *Id.* at 1152–53.

413. *Id.* at 1181.

414. *Santosky v. Kramer*, 455 U.S. 745, 766–67 (1982).

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

416. *Santosky*, 455 U.S. at 766–67.

417. Martin Guggenheim, *The Best Interests of the Child: Much Ado about Nothing?*, in *CHILD, PARENT, & STATE: LAW AND POLICY READER* 27, 29 (S. Randall Humm, Beate Anna

their family bonds are somehow different and unworthy of protection. This *does* hurt children because their biological parents are a part of their identity, even after termination. When their parents are marginalized and excluded, by extension so too are they.

Shifting to a best interest approach is likely to continue the comparison of resources in the United States with those in the parent's country of origin. This will raise the question, would this child be better off in a village with no running water, or in a home in the United States with a middle-class family?<sup>418</sup> Such questions will place undocumented parents in a quandary. Many, like Bail Romero, made the decision to come unlawfully to the United States to provide for their children in ways that they could not in their home country. In fact, "poverty and the promise of opportunity are undeniably key drivers of migration."<sup>419</sup> Once the state intervenes, the conditions from which they fled become the very conditions supporting their separation from their children. Considering current practices that equate poverty with neglect, it is difficult to imagine terminations not increasing if the standard is shifted.<sup>420</sup>

Zug's concern that a child may return to a dangerous situation is an important one.<sup>421</sup> There may be circumstances where a child will indeed face serious harm because of conditions in the parent's home country, and the parent desires reunification. While the parent may not be responsible for these conditions, the choice to bring her child into a dangerous environment—which, of course, may be a "choiceless choice"<sup>422</sup>—warrants a careful and thoughtful analysis of the appropriateness of such a decision.<sup>423</sup> But such an assessment should be based on

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Ort, Martin Mazen Anbari, Wendy S. Lader & William Scott Biel eds., 1994) (arguing that child custody cases are not really about the child's best interests but are about the interests of competing adults).

418. ROBERTS, *supra* note 69, at 121 (stating that when adoptive parents are able to intervene in fitness hearings, "[d]eciding the best interests of children in this setting might conjure up the question, Would this child be better off in the comfortable home of this white, well-to-do couple or struggling on public assistance with that neglectful Black mother?").

419. AARON TERRAZAS, MIGRATION POL'Y INST., MIGRATION AND DEVELOPMENT: POLICY PERSPECTIVES FROM THE UNITED STATES 5 (2011) (emphasis omitted); *see also* Brief of the Young Center for Immigrant Children's Rights at the University of Chicago et al. as Amici Curiae in Support of Appellant at 13, S.M. v. E.M.B.R. (*In re* Adoption of C.M.B.R.), 332 S.W.3d 793 (Mo. 2011).

420. *See In re B.A.*, 705 N.W.2d 507, \*5 (Iowa Ct. App. 2005) (unpublished table decision) (finding the department's argument that termination of parental rights was in the children's best interests because they had never lived in Mexico insufficient because, previously, the children had also never lived in Iowa but adjusted to their new environment nonetheless).

421. Zug, *supra* note 58, at 1177.

422. Thronson, *supra* note 67, at 1211 (arguing that parents may be forced to make arguments in immigration court that their U.S. citizen or lawful permanent resident children will face harm if their parents are deported in order to obtain immigration relief, or parents may legitimately be concerned about their child's welfare but equally concerned about separation as a result of deportation).

423. *Id.* ("While other countries with different risks and opportunities provide challenging factual inquiries and may take much more research than domestic cases, the core of the inquiry and the process is the same. Just as the federal forum should not presume

the premise that a parent does act in her child's best interests unless clear and convincing evidence suggests otherwise.

#### CONCLUSION

Undocumented parents are losing their parental rights. Some of these cases are legitimately about abuse, abandonment, and/or neglect. But many of these cases represent tensions around identity and how to cultivate that identity. Early child welfare practices removed immigrant children from their parents so that they could be raised in a more wholesome American setting. Similarly, Native American children were taken from their families and shuttered off to boarding schools for the purpose of assimilation into the Anglo culture. Recent termination of parental rights may not be so far removed from this history. Biases toward undocumented Latino immigrants affect assessments concerning their fitness as parents and their children's best interests. To characterize these assessments as strictly legal inquiries ignores the underlying biases that taint such "objective" assessments. Ultimately, when the law is used to cultivate identity, the rights of those who are racially and/or culturally different from the dominant group are threatened.

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capacity and authority to make custody determinations, the family court should not assume the role of asylum adjudicator. Major challenges will lie with advocates and participants in such proceedings to educate family courts to make reasoned decisions about the parent-child relationship when possible removal to other countries is involved.”).