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TANGLED UP: RESTORING THE PARENTAL RIGHTS OF IMMIGRANTS CAUGHT BETWEEN IMMIGRATION COURT AND FAMILY COURT

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INTRODUCTION

"They stole my babies from me. They took them from me. . . . I don't know if I'll ever see them again," a woman detained in federal immigration custody exclaimed.[1] The woman unlawfully emigrated from Jamaica to the United States over twenty years ago.[2] After her arrival, she gave birth to U.S. citizen children.[3] When U.S. Immigration and Customs Enforcement (ICE) arrested her for immigration violations, she lost physical custody of them.[4] While in ICE detention, she only knew that a state agency had placed her children in foster care, but she did not know any other pertinent details about their status.[5] After she was detained, she had no contact with the caseworker who handled their subsequent placement.[6] This unfortunate woman faced the prospect of deportation, and

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1 SETH FREED WESSLER, APPLIED RESEARCH CTR., SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION AND THE CHILD WELFARE SYSTEM 22 (2011) [hereinafter SHATTERED FAMILIES], http://www.sph.sc.edu/cli/word_pdf/ARC_Report_Nov2011.pdf.

2 *Id.*

3 *See id.*

4 *See id.*

5 *See id.*

6 *Id.*

consequently feared that she may never see her children again.[7]

Sadly, this situation is not uncommon for an undocumented immigrant parent in ICE custody.[8] As of 2011, at least 5,100 children were in foster care due to either their parent's being placed in detention facilities, or because of their subsequent deportation.[9] How and why are otherwise functional families residing in the United States constantly being separated by the federal government?

Since federal statutes govern immigration law and state statutes govern family law, the two areas of law collide when immigrants are a party in a child custody case.[10] The example discussed above illustrates the usual result: ICE detains immigrants and separates them from their U.S. citizen children. The federal government controls immigration removal hearings, and state governments, via family court, handle child custody proceedings.[11] Instead of the federal and state governments smoothly intersecting, they stay on parallel tracks by separately enforcing two judicial proceedings.[12] Due to the separation, family courts terminate parental rights without taking into consideration a parent's immigration status or detention.[13] ICE is not ignorant to the injustice—demonstrated by an ICE issued August 2013 directive (ICE Directive).[14] The ICE Directive created policies to help detained immigrant parents become involved in family court proceedings.[15]

This Article argues that despite the recent ICE Directive detained and deported immigrant parents still face obstacles in maintaining legal custody of their U.S. citizen children. Part I of this Article discusses the legal basis for the separation between immigration law and family law. It also provides a legal summary of the development of the fundamental right to be a parent as established by the U.S. Supreme Court. Part II discusses the injustice undocumented immigrant parents confront in state court proceedings that terminate parental rights. Part III provides an

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7 *Id.*

8 *See id.* at 29.

9 *Id.* at 6.

10 *See* David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453, 454, 456 (2008) [hereinafter *Custody and Contradictions*].

11 *See id.* at 454, 456–57.

12 *See id.* at 456.

13 *See id.* at 468–69.

14 U.S. IMMIGRATION & CUSTOMS ENF'T, 11064.1: FACILITATING PARENTAL INTERESTS IN THE COURSE OF CIVIL IMMIGRATION ENFORCEMENT ACTIVITIES 1 (2013) [hereinafter ICE DIRECTIVE], http://www.ice.gov/doclib/detention-reform/pdf/parental_interest_directive_signed.pdf.

15 *See id.*

overview of the ICE Directive. Part IV analyzes problems with the ICE Directive. Part V introduces several proposals, which if followed, may help to protect the parental rights of immigrants, and ensure that the United States adheres to its public policy of keeping family units intact.

I. AN OVERVIEW OF FEDERAL AND STATE LEGAL AUTHORITY

A. Federal Immigration Authority

It is undisputed that the federal government governs immigration law, as the U.S. Supreme Court has consistently recognized. For example, in 1889, the Court stated that "[t]he government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy."[16] The Court more recently acknowledged the inherent federal power over immigration law when it analyzed the constitutionality of state legislation in *Arizona v. United States*.[17] The Court noted that the federal government has "undoubted power over the subject of immigration and the status of aliens."[18] The federal government derives its plenary authority to regulate immigration from several clauses of the U.S. Constitution.[19]

Exercising its authority, Congress enacted the Immigration and Nationality Act (INA), a comprehensive statute on immigration law.[20] The

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[16] Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889). *See also* Galvan v. Press, 347 U.S. 522, 531 (1954) (noting that "the formulation of [immigration] policies [being] entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.").

[17] Arizona v. United States, 132 S. Ct. 2492, 2497–98 (2012).

[18] *Id*. at 2498.

[19] U.S. CONST., art. I, § 8, cls. 3, 4, 11. *See* Stephanie M. Gomes, *Building Trust in Our Communities: States Encourage Their Residents to Speak Up in the Wake of the Federal Government's Silence*, 33 QUINNIPIAC L. REV. 715, 721 (2015) (noting that the previous clauses grant the federal government power over immigration). The plenary power includes both implicit and explicit constitutional authorities. The precise source of federal immigration power is debated. *See also* Evan C. Zoldan, *Strangers in a Strange Land: Domestic Subsidiaries of Foreign Corporations and the Ban on Political Contributions from Foreign Sources*, 34 LAW & POL'Y INT'L BUS. 573, 584 (2003) (noting that there are textual and non-textual sources for the plenary power over immigration); Allison Brownell Tirres, *Property Outliers: Non-Citizens, Property Rights and State Power*, 27 GEO. IMMIGR. L.J. 77, 86 (2012) (noting that the source of the constitutional basis for plenary power has been debated at length); Anne E. Pettit, *"One Manner of Law": The Supreme Court, Stare Decisis and the Immigration Law Plenary Power Doctrine*, 24 FORDHAM URB. L.J. 165, 172–73 (1996) (describing the U.S. Supreme Court's use of various sources to support the federal government's plenary power over immigration).

[20] *See* Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101–1537 (2012).

INA authorizes various agencies within the federal government to enforce national immigration laws.[21] The Department of Homeland Security, the Department of Justice, the Department of Labor, and the Department of State constitute the main government immigration enforcement agencies.[22] ICE is "the principal investigation arm of the U.S. Department of Homeland Security . . . ."[23] Within ICE is the Office of Enforcement and Removal Operations (ERO). [24] The ERO "identifies and apprehends removable aliens, detains these individuals when necessary and removes illegal aliens from the United States."[25] The INA gives federal agencies like ICE the authority to arrest and detain undocumented immigrants.[26] Since the federal legislature enacts immigration laws, and federal agencies enforce them, the federal government alone controls the procedures that lead to the removal of immigrant parents from the United States.[27]

B. State Family Law Authority

Conversely, while immigration law is under the purview of the federal government, state governments govern family law. The U.S. Supreme Court acknowledged the exclusive power of states over family law when it stated that "the whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."[28] Similarly, in *Mansell v. Mansell*, the Court noted that "domestic relations are preeminently matters of state law."[29] Family law regulates child custody cases, and therefore, state courts handle cases concerning the termination of parental rights. Thus, after ICE detains an immigrant parent, the local state court, usually a family court, will

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[21] *See id*. § 1103(a)(1) ("The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens.").

[22] *See* IMMIGRATION AND NATIONALITY LAW: PROBLEMS AND STRATEGIES 3 (Lenni B. Benson et al. eds., 2013).

[23] *ICE*, DEP'T OF HOMELAND SECURITY, https://www.dhs.gov/external/ice (last visited Oct. 22, 2015).

[24] *See Who We Are*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/about (last visited Oct. 22, 2015).

[25] *Enforcement and Removal Operations*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/ero (last visited Oct. 15, 2015).

[26] *See* Immigration and Nationality Act of 1952, 8 U.S.C. § 1357(a) (2012).

[27] *See* 3 TEX. JUR. 3D *Aliens' Rights* § 5 (2015).

[28] Rose v. Rose, 481 U.S. 619, 625 (1987) (quoting *In re* Burrus, 136 U.S. 586, 593–94 (1890)).

[29] Mansell v. Mansell, 490 U.S. 581, 587 (1989). *See also* Reno v. Flores, 507 U.S. 292, 310 (1993) (quoting Ankenbandt v. Richards, 504 U.S. 689, 704 (1992) (declaring that states "possess 'special proficiency' in the field of domestic relations, including child custody.").

determine the custody of his/her U.S. citizen children.[30]

Every state has statutes that set out the standards to terminate parental rights.[31] Although state statutes vary, family courts generally terminate parental rights if the court first determines that a parent is unfit, and then subsequently finds that the termination of parental rights is in the child's best interests.[32] Family courts consider several factors when determining a child's best interests.[33] The unfitness of a parent is typically shown if a parent abused, neglected, or willfully abandoned his/her child.[34] For a state court to terminate parental rights, the state generally must prove a parent's unfitness by clear and convincing evidence. [35] During termination proceedings in state courts, unlike removal hearings in federal immigration courts, state law usually provides a party with the right to counsel.[36] Thus, before a family court terminates the rights of an immigrant parent, it first should determine by clear and convincing evidence that such parent is unfit, and then

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[30] *See generally* ICE DIRECTIVE, *supra* note 14 (discussing custody, placement, parental rights, and family court proceedings).

[31] CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH AND HUMAN SERVS., GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 1 (2013), https://www.childwelfare.gov/pubPDFs/groundtermin.pdf.

[32] *Id.* at 2.

[33] For example, a New York family court considers a child's overall profile, needs, preferences, and a child's adjustment to home, school and community along with several other factors. No one factor is determinative. N.Y. FAM. CT. ACT § 1089 (Consol. 2015). *See also* CAL. FAM. CODE § 3011 (Deering 2015); FLA. STAT. ANN. § 39.806 (LexisNexis 2015); TEX. FAM. CODE ANN. § 161.001 (West 2015).

[34] *See* Richard Lewis Brown, *Undeserving Heirs?—The Case of the "Terminated" Parent*, 40 U. RICH. L. REV. 547, 549 (2006).

[35] Santosky v. Kramer, 455 U.S. 745, 769–70 (1982) ("A majority of the States have concluded that a 'clear and convincing evidence' standard of proof strikes a fair balance between the rights of the natural parents and the State's legitimate concerns. We hold that such a standard adequately conveys to the fact finder the level of subjective certainty about his factual conclusions necessary to satisfy due process. We further hold that determination of the precise burden equal to or greater than that standard is a matter of state law properly left to state legislatures and state courts.") (citation omitted).

[36] *See, e.g.*, CAL. FAM. CODE § 7862 (WestDeering 1994) ("If a parent appears without counsel and is unable to afford counsel, the court shall appoint counsel for the parent, unless that representation is knowingly and intelligently waived."); CONN. GEN. STAT. § 45(a)-717(b) (2011) ("If a respondent parent appears without counsel, the court shall inform such respondent parent of his or her right to counsel and upon request, if he or she is unable to pay for counsel, shall appoint counsel to represent such respondent parent. No respondent parent may waive counsel unless the court has first explained the nature and meaning of a petition for the termination of parental rights."); N.Y. FAM. CT. ACT § 262(a)(v) (2015) ("[T]he parent of any child seeking custody or contesting the substantial infringement of his or her right to custody of such child, in any proceeding before the court in which the court has jurisdiction to determine such custody."). *See also* Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 J. POVERTY L. & POL'Y 245, 245–46 (2006).

subsequently determine if the termination of parental rights is in the best interests of his/her child. Unfortunately, due to misinformation and bias, as discussed in more detail below, family courts tend not to follow these required standards when terminating the parental rights of detained and deported immigrant parents.[37]

C. Problems with the Separation of Family Law and Immigration Law

Due to the separate sources of legal authority for immigration and family law, problems arise when the two areas of law collide.[38] After immigrant parents are detained by ICE, they remain in federal custody waiting for not only an immigration hearing concerning removal, but also a family court hearing concerning child custody.[39] No formal system exists to facilitate clear communication between the two discrete courts, which precludes cooperation between an immigrant parent's removal case and his/her corresponding termination of parental rights case.[40] Consequently, detained immigrant parents often miss family court proceedings because federal detention prevents their attendance.[41] Also, immigration judges and family court judges oversee their respective cases without considering an immigrant parent's concurrent case in a separate court.[42]

ICE does not disclose the number of undocumented immigrant parents in detention.[43] However, as mentioned previously, a report by the Applied Research Center found that in 2011 at least 5,100 children resided in foster care due to ICE having detained or deported their immigrant parents.[44] Therefore, the negative outcomes caused by the separation of family law and immigration law greatly impact the lives of undocumented immigrant parents with U.S. citizen children.

D. The Fundamental Parental Rights of Immigrant Parents

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[37] *See* discussion *infra* Part II.

[38] *See Custody and Contradictions*, *supra* note 10, at 456 ("[I]mmigration law and family law traditionally are viewed as extreme opposites on the spectrum of state and federal power.").

[39] *See* Danielle Levy, *In the Courts: The Collision Between Family and Immigration Courts*, 28 CHILD. LEGAL RTS. J. 98, 98 (2008).

[40] *Id.*

[41] *See* SHATTERED FAMILIES, *supra* note 1, at 36. (As a state judge explained: "Parents [should] have an absolute right to be present in a court hearing. . . . We order that if they are in custody they appear, but these orders are not honored by the detention facilities. We don't have the authority over the federal center.") (alteration in original).

[42] *See* discussion *infra* Part II.

[43] Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 CONN. L. REV. 99, 114 (2011).

[44] SHATTERED FAMILIES, *supra* note 1, at 6.

The U.S. Supreme Court has frequently recognized the fundamental right to be a parent. In 1923, while acknowledging that a parent has the right to choose a child's education, the Court declared "the right of the individual to . . . establish a home and bring up children . . . [is] essential to the orderly pursuit of happiness by free men."[45] Twenty years later, the Court reaffirmed this fundamental right. In *Prince v. Massachusetts*, the Court stated that "[i]t is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder."[46] The Court later declared that "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."[47] Thus, the Court has firmly established that a parent has a fundamental right to a primary relationship with his/her child, which cannot be easily abrogated by state action.[48]

As with all liberty interests, the U.S. Constitution protects a parent's fundamental rights from deprivation without due process of law.[49] In *Santosky v. Kramer*, the Court established that to satisfy the requirements of due process, the state can terminate parental rights only after a showing of clear and convincing evidence.[50] The constitutional protection of the fundamental right to be a parent applies to both citizens and noncitizens. The Due Process Clause of the Fourteenth Amendment applies to "any person," and does not distinguish between citizens or noncitizens.[51] The U.S. Supreme Court has never divided Fourteenth Amendment due process protections between citizens and noncitizens.[52]

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[45] Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923). *See also* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The child is not the mere creation of the State; those who nurture [a child] and direct his destiny have the right . . . to recognize and prepare him for additional obligations.").

[46] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[47] Troxel v. Granville, 530 U.S. 57, 65 (2000).

[48] See 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, 59 (2005) [hereinafter *Of Borders and Best Interests*].

[49] U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property without due process of law."). *See also Troxel*, 530 U.S. at 66 ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

[50] Santosky v. Kramer, 455 U.S. 745, 747–48 (1982).

[51] U.S. CONST. amend. XIV, § 1.

[52] Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens."). *See* David Cole, *Are Foreign*

For example, in *Plyer v. Doe*, the Court explained that "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of the term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the . . . Fourteenth Amendment."[53]

It can be concluded, therefore, that the U.S. Constitution protects the fundamental right of immigrant parents to a primary relationship with their U.S. citizen children, regardless of whether detained or deported, and to the same extent as any other parent.[54] Thus, undocumented immigrant parents legally deserve all due process protections in family court child custody proceedings.[55]

II. THE UNJUST TERMINATION OF PARENTAL RIGHTS

The separation of child custody and immigration proceedings results in family courts making uninformed legal assumptions regarding immigration law.[56] For example, in *Rico v. Rodriguez*, the family court judge transferred custody from an undocumented immigrant mother to her children's father, a lawful permanent resident, because among other reasons, it thought the custody transfer necessary for the undocumented children to become U.S. citizens.[57] To the contrary, the father could have petitioned for the children's legal status even without having legal custody of them.[58]

Also, family courts throughout the United States have unfairly terminated the parental rights of undocumented immigrant parents by requiring them to meet impossible conditions.[59] A Georgia trial court terminated an undocumented immigrant father's parental rights because

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Nationals Entitled to the Same Constitutional Rights as Citizens?, 25 T. JEFFERSON L. R. 367, 370 (2003).

[53] Plyer v. Doe, 457 U.S. 202, 210 (1982).

[54] *See id*.

[55] *Cf. Santosky*, 455 U.S. at 747–48. That is, presuming undocumented immigrants are afforded due process Fourteenth Amendment protections, *Santosky* asserts that child custody proceedings may never preclude such protections.

[56] *See* David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1204 (2006) ("State family courts can be remarkably parochial and uninformed regarding issues of, and related to, immigration status and life in other countries.").

[57] *See* Rico v. Rodriguez, 120 P.3d 812, 816–17 (Nev. 2005).

[58] *Id.* at 816 ("In reality, Rodriguez, as a lawful permanent resident, would initially only have the ability to file the paperwork necessary to apply for legal permanent residency for the children *regardless of physical custody*.") (emphasis added) (citing 8 U.S.C. 1153(a)(2) (2000)).

[59] *See* EMILY BUTERA, TORN APART BY IMMIGRATION ENFORCEMENT: PARENTAL RIGHTS AND IMMIGRATION DETENTION 2 (2010).

it "had a 'problem with [the father's] INS situation,'"[60] and because "[he] had done nothing to legalize his residency in the United States."[61] However, despite his efforts, the father, an undocumented immigrant from Mexico, could not obtain legal status in the United States.[62] Thus, the court penalized him for failing to reach an impossible condition.

Likewise, a court of appeals in Utah affirmed a trial court's termination of an undocumented immigrant mother's parental rights when she could not legally satisfy the court's case plan requirements.[63] The case plan demanded that she be employed, but as an undocumented immigrant she could not work legally.[64] Thus, the dissent noted that "given [the m]other's immigration status, the [p]lan's requirement that [the m]other obtain employment and essentially procure independent housing is effectively designed for failure as it is legally impossible for [the m]other to comply with either of these requirements."[65]

The injustice that immigrants endure during termination proceedings becomes even more apparent when involving detained or previously deported immigrant parents.[66] For example, a family court in Delaware terminated the parental rights of an undocumented immigrant father in part because it found that he had abandoned his children; and based its decision on the belief that the father had been unable to fulfill his responsibilities as a parent simply as a consequence of having been

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[60] *In re* M.M., 587 S.E.2d 825, 831 (Ga. Ct. App. 2003) (alteration in original).

[61] *Id*. at 832. The Georgia Court of Appeals reversed the trial court's decision, stating that "[e]ssentially, the termination of the father's parental rights was based on the possibility that the father could someday be deported. . . . A court may not sever a parent-child relationship solely because it has determined that the child might enjoy certain advantages elsewhere." *Id.*

[62] *See Of Borders and Best Interests*, at 54 ("The record [of *In re* M.M.] reflects that the father did hire an immigration attorney to review his situation, but that no avenues for immigration relief were available."). *See also In re* Adoption of Hersel, No. 13-P-051, 2014 Mass. App. Unpub. LEXIS 643, at *7 (Mass. App. Ct. 2014) (upholding the decision to terminate a father's parental rights in part because he "failed to take any action to remedy his immigration status.").

[63] State *ex rel* K.J. v. T.M., 327 P.3d 1203, 1212–13 (Utah Ct. App. 2013).

[64] *See id*. at 1211–12.

[65] *Id.* at 1216 (Thorne, J., dissenting). The dissent illustrated further the Faustian dilemma: "[the m]other is faced with two unacceptable alternatives: work, and by so doing commit a crime, or not work and lose her child."). *Id*. at 1217.

[66] *See* Rabin, *supra* note 43, at 134 (noting the injustice immigrant parents face and the perception that is formed as a result of their detention). *See, e.g.*, SHATTERED FAMILIES, *supra* note 1, at 17–18 (concluding that in family court proceedings in particular, the undocumented immigrant status of a parent often creates insurmountable obstacles to regain custody).

detained in an ICE facility and later deported.[67] Throughout the opinion, the court frequently acknowledged that the Delaware Department for Children could not develop a case plan with the father because he was incarcerated and eventually deported.[68] However, the court still supported its decision to terminate the father's parental rights because there had not been "regular physical contact or communication between [the f]ather and the children."[69] The court expected the father to communicate with his children during his immigration detention and after his deportation despite the state's own agency having difficulty contacting him.[70] Also, in *In re J.B.*, a court of appeals in Iowa not only terminated father's parental rights due to his pending deportation, but also refused to allow his children to reside with the mother of his other children.[71] The court valued foster care placement over the father's own personal requests.

Immigrant parents clearly confront prejudice in family court due to their immigration status.[72] Their detention by ICE further complicates compliance with family court case plans.[73]

III. AN OVERVIEW OF THE ICE DIRECTIVE

In response to the unjust termination of parental rights discussed above, on August 23, 2013, ICE issued a directive entitled *Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities*.[74] Overall, the ICE Directive aims to establish "ICE policy and procedures to address the placement, monitoring, accommodation, and removal of certain alien parents." [75] The ICE Directive focuses on immigration enforcement activities concerning immigrant parents who are primary caretakers, who have a direct interest in either a family court or a child welfare proceeding, and whose minor children are physically

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[67] Dep't. of Servs. for Children, Youth & Their Families v. Garcias, 92 A.3d 1072, 1082, 1092–93 (Del. Fam. Ct. 2013).

[68] *Id.* at 1075, 1082, 1087–88.

[69] *Id.* at 1087. *See also* Anita Ortiz Maddali, *The Immigrant "Other": Radicalized Identity and the Devaluation of Immigrant Family Relations*, 89 IND. L.J. 643, 690–91 (2014) (discussing how the Missouri Supreme Court "faulted [a detained mother] for not maintaining sufficient contact with her son nor expressing a personal interest in his welfare" when the mother had no telephone available to her while in ICE custody).

[70] *See Garcias*, 92 A.3d at 1082, 1092. *See also In re* E.N.C., 384 S.W.3d 796, 798–800 (Tex. 2012) (reversing the trial court's decision to terminate the parental rights of a father who was deported, and noting the difficulties he had in communicating with his children).

[71] *In re* J.B., No. 12-2253, 2013 WL 541863, at *1–2 (Iowa Ct. App. Feb. 13, 2013).

[72] SHATTERED FAMILIES, *supra* note 1, at 17–18.

[73] BUTERA, *supra* note 59, at 2.

[74] *See* ICE DIRECTIVE, *supra* note 14, § 1.

[75] *Id.*

present in the United States.[76] The ICE Directive acknowledges parental rights as fundamental.[77] This illustrates that ICE understands the importance of respecting the legal rights of immigrant parents.[78] The ICE Directive also advocates prosecutorial discretion when ICE encounters undocumented immigrant parents, or primary caretakers of minors.[79]

Additionally, the ICE Directive sets forth procedures that will allow detained immigrant parents to become involved in family court proceedings.[80] For example, the ICE Directive requests that ICE detain immigrant parents "as close as practicable to the alien's child(ren) and/or to the location of the alien's family court or child welfare proceeding."[81] It also requires the transportation of such parents to family court proceedings if practical, and encourages enabling parent-child visitation.[82] The ICE Directive also states that ICE may grant parole to a deported immigrant parent for the sole purpose of facilitating participation in a termination of parental rights proceeding.[83] Lastly, the ICE Directive states that ICE must train its members so that they understand how to implement the ICE Directive.[84] The ICE Directive concludes by stating that it does not create a private right of action.[85]

IV. AN ANALYSIS OF THE ICE DIRECTIVE

Advocates for immigrant parents welcomed the ICE Directive because they hoped it would lead to less separation between detained and deported immigrant parents and their children.[86] It also seemed to make it more difficult for state courts to terminate parental rights since ICE would facilitate in-person appearances in family court.[87] As discussed in Part III above, on the surface the ICE Directive appeared to encourage ICE to respect immigrants' parental rights by facilitating their greater

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[76] *Id.* § 2.

[77] *Id.* § 3.3 (defining parental rights as "[t]he fundamental rights of parents to make decisions concerning the care, custody, and control of their minor children without regard to the child's citizenship, as provided for and limited by applicable law.").

[78] *See id.* § 2.

[79] *Id.* § 5.2.1.

[80] *Id.* §§ 5.1.2, 5.4, 5.5.

[81] *Id.* § 5.3.2.

[82] *Id.* §§ 5.4.1, 5.5.

[83] *Id.* § 5.7.1.

[84] *Id.* § 5.10.1.

[85] *Id.* § 9.

[86] Jacquellena Carrero, *New ICE Policy Limits Separation of Parents and Children*, NBC LATINO (Aug. 24, 2013, 11:43 AM), http://nbclatino.com/2013/08/24/new-ice-policy-limits-separation-of-parents-and-children/.

[87] *See* ICE DIRECTIVE, *supra* note 14, § 5.4.

involvement in family court, and by using discretion when deciding whom to detain.[88] However, a deeper analysis of the ICE Directive and its impact reveals that it has not created the positive effects it proposed.[89] Significant problems with the ICE Directive and its implementation permit the injustice against immigrant parents to persist especially as regards the termination of parental rights.[90]

A. Vague Terms and Absent Incentives

First, vague terms in the ICE Directive make it difficult to interpret what actions ICE will take to preserve the parental rights of immigrant parents.[91] The ICE Directive states that "ICE personnel should ensure that the agency's immigration enforcement activities do not *unnecessarily disrupt* the parental rights of both alien parents or legal guardians of minor children."[92] However, it fails to define how ICE personnel should interpret this "unnecessarily disrupt" standard. On one end of the spectrum, the phrase could indicate that ICE personnel should always provide an immigrant parent with the ability to communication with his/her children, and should always provide information to the detained immigrant parent concerning any family court child custody proceeding.[93] Conversely, the phrase could simply require ICE personnel to note in a file that an immigrant parent has a U.S. citizen child without requiring any further action.[94]

The ICE Directive also requests that ICE personnel initially place a detained undocumented immigrant parent "as close as practicable to the alien's child(ren)" and/or to the location of the family court where the child custody proceedings will take place.[95] However, the ICE Directive does not indicate what distance is practicable. For example, there are thirteen immigration detention facilities in Texas.[96] If practicable means in the same state, immigrant parents could be detained hours away from their

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[88] *See id*. §§ 5.2.1, 5.4.

[89] *See* Madison Burga & Angelina Lerma, *The Use of Prosecutorial Discretion in the Immigration Context after the 2013 ICE Directive: Families Are Still Being Torn Apart*, 42 W. ST. L. REV. 25, 37, 44–46 (2014) (discussing how rarely prosecutorial discretion is currently used).

[90] *See* discussion *infra* Part IV.A–C.

[91] *See* discussion *infra* notes 92–121.

[92] ICE DIRECTIVE, *supra* note 14, § 2 (emphasis added).

[93] *See, e.g.*, *id.* §§ 2, 3.3, 3.4, 5.1.1–2, 5.4.1.

[94] *See id.* § 9 (prescribing that ICE has sole discretion as to the extent to which it chooses to implement the ICE Directive).

[95] *Id*. § 5.3.2.

[96] *Detention Facility Locator*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/detention-facilities?state=TX&title= (last visited Oct. 22, 2015).

children.[97] The ICE Directive repeats the ambiguous term "practicable" concerning its provisions facilitating in-person appearances at family court proceedings, and when discussing child visitation procedures.[98] Thus, in these areas, it is also difficult to discern the specific measures that will satisfy the ICE Directive.

The ICE Directive requires that ICE personnel arrange for the in-person appearance of detained immigrant parents at family court proceedings if the transportation and cost of escort would not be "unduly burdensome."[99] The ICE Directive, however, provides no indication of how ICE personnel should interpret unduly burdensome. Should ICE personnel allow the transportation of an immigrant parent to family court if it would cost $10? $100? $1,000? Without a clear standard, it is impossible to know when ICE personnel would facilitate the in-person transportation of a detained immigrant parent to family court.[100] If an in-person appearance is not possible, the ICE Directive suggests participation by video or standard teleconferencing.[101] However, video conferencing is difficult to arrange with family courts, so it is not an effective alternative.[102]

Another problem with the ICE Directive is that it states that ICE "*may,* on a case-by-case basis . . . facilitate the return of the alien to the United States by grant of parole for the sole purpose of participating in the termination of parental rights proceedings."[103] The discretion given to ICE means that they have no obligation to facilitate such return.[104] Also, although ICE acknowledges that it may facilitate a return, it does not provide any statistics of ever actually facilitating one.[105] Considering that immigrant parents will have to pay for their own travel, it is unlikely

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[97] *See id*.

[98] ICE DIRECTIVE, *supra* note 14, §§ 5.4.1, 5.5.1.

[99] *Id.* § 5.4.1.

[100] *See* Burga & Lerma, *supra* note 89, at 33–36, 45–46 (showing that when ICE is permitted to apply prosecutorial discretion, but not held accountable to do so effectively, ICE consistently has been reluctant to apply such prosecutorial discretion).

[101] ICE DIRECTIVE, *supra* note 14, § 5.4.2.

[102] Phone calls are a challenge to organize, so it is inevitable that video conferencing is even more difficult. *See* Rabin, *supra* note 43, at 120–21 (discussing "the difficulty of [lawyers] communicating with parents once detention or deportation occurred.").

[103] ICE DIRECTIVE, *supra* note 14, § 5.7.1 (emphasis added).

[104] *See* Sarah Rogerson, *Lack of Detained Parents' Access to the Family Justice System and the Unjust Severance of the Parent-Child Relationship*, 47 FAM. L.Q. 141, 151 (2013).

[105] *See generally FY 2014 ICE Immigration Removals*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/removal-statistics#wcm-survey-target-id (last visited Oct. 22, 2015). ICE's report is exhaustive; however, conspicuously absent is any record of ICE facilitating returns for the purposes stated in the ICE Directive.

these returns will actually occur.[106] For example, in the summer of 2012, before the ICE Directive was issued, ICE granted an undocumented immigrant father humanitarian parole, or permission to reenter the United States post-deportation.[107] The Mexican Consulate admitted it had never previously seen someone who had been deported from the United States being allowed to return.[108]

Additionally, the ICE Directive fails to explain if it applies to local jails, where many undocumented immigrant parents are detained.[109] In 2008, ICE initiated a program entitled Secure Communities, which permitted local law enforcement to identify and detain undocumented immigrants.[110] Secure Communities authorized local law enforcement to check the immigration status of anyone booked in a local jail.[111] Although the federal government did not originally implement the program in every jurisdiction, it had implemented the program in all fifty states by January 2013.[112] Consequently, significant numbers of immigrants were detained in local jails instead of ICE facilities.[113] Between 2008 and June of 2011, the Secure Communities program resulted in the detention of over 275,000 immigrants.[114] Although Secure Communities is no longer in effect, ICE is still permitted to detain immigrants in local jails through

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[106] *See* ICE DIRECTIVE, *supra* note 14, § 5.7.3.

[107] *See* Stacy Byrd, *Learning from the Past: Why Termination of a Non-Citizen Parent's Rights Should Not Be Based on the Child's Best Interest*, 68 U. MIAMI L. REV. 323, 325 (2013); Seth Freed Wessler, *Deported Father Returns to Fight for His Children in Exceptional Case*, COLORLINES (Aug. 3, 2012, 9:57 AM) [hereinafter *Deported Father Returns*], http://www.colorlines.com/articles/deported-father-returns-fight-his-children-exceptional-case.

[108] *Deported Father Returns*, *supra* note 107 (noting "[t]he humanitarian parole, as it's called, is a grant nearly unheard of in immigration law").

[109] *See generally* ICE DIRECTIVE, *supra* note 14 (lacking any language indicating that it applies to local jails). *See also* Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV., 1346, 1386 (2014) (noting that it is commonplace for ICE to detain immigrants in county jails); *Detention Management*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Nov. 10, 2011), https://www.ice.gov/factsheets/ detention-management (affirming that almost 67% of ICE's detainees are kept in state or local facilities).

[110] SHATTERED FAMILIES, *supra* note 1, at 11–12. Secure Communities ran until 2014, and was replaced by the Priority Enforcement Program in 2015. *Secure Communities: Archived Information*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/secure-communities (last visited Oct. 22, 2015). The Priority Enforcement Program continues to use local law enforcement to achieve its removal objectives, albeit more narrowly than the previous program. *Priority Enforcement Program: PEP Brochure*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/pep (last visited Oct. 22, 2015).

[111] *See id.* at 28.

[112] Lindsey J. Gill, *Secure Communities: Burdening Local Law Enforcement and Undermining the U Visa*, 54 WM. & MARY L. REV. 2055, 2063 (2013).

[113] *See* SHATTERED FAMILIES, *supra* note 1, at 11 ("ICE relies increasingly on local jails and police to detain noncitizens.").

[114] *See id.* at 28.

the Priority Enforcement Program.[115] The ICE Directive's failure to mention detention in local jails creates uncertainty as to whether it applies to the detention of undocumented immigrant parents in local jails or just to their detention in federal facilities.

Lastly, the ICE Directive carries no penalties for failing to follow its procedures[116] Thus, ICE personnel lack an incentive to adhere to the ICE Directive because failure to do so will not result in punishment.[117] In addition to not having any penalties, the ICE Directive has a disclaimer that provides legal protection to ICE personnel if they fail to follow its procedures.[118] More specifically, the last section of the ICE Directive states that "[n]otwithstanding the provisions of this Directive, ICE retains its discretion to remove or detain any alien to the extent permitted by law, irrespective of an aliens' pending family court or child welfare proceeding."[119] This disclaimer permits ICE personnel to ignore the ICE Directive as long as they are acting pursuant to federal immigration law.[120] Thus, ICE personnel have no legal obligation to follow the ICE Directive.

B. Continuation of Deportations

Deportations of immigrant parents with U.S.citizen children have continued after the ICE Directive was issued.[121] ICE's own data confirm this.[122] In an annual report produced prior to the issuance of the ICE Directive, ICE reported to Congress statistics pursuant to deportations for the first half of 2013.[123] During this period, "ICE sought orders of deportation, exclusions, or removal" for "29,417 aliens who claimed to

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[115] *See* discussion *supra* note 110.

[116] *See generally* ICE DIRECTIVE, *supra* note 14 (lacking any language indicating the type of penalties for failure to follow the ICE Directive).

[117] *See* Adam B. Cox & Eric Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1291–1292 (2012) (discussing the way rational agents respond to punishments and rewards).

[118] ICE DIRECTIVE, *supra* note 14, § 9.

[119] *Id.*

[120] *See* Immigration and Nationality Act of 1952, 8 U.S.C. § 1103 (2012) (giving broad authority to ICE to deport or detain aliens).

[121] *See* DEP'T OF HOMELAND SEC., DEPORTATION OF ALIENS CLAIMING U.S.-BORN CHILDREN: SECOND HALF, CALENDAR YEAR 2013, REPORT TO CONGRESS 4 (2014) [hereinafter DEPORTATION REPORT SECOND HALF OF 2013], http://big.assets.huffingtonpost.com/2013report2.pdf.

[122] *Id.*

[123] DEP'T OF HOMELAND SEC., DEPORTATION OF ALIENS CLAIMING U.S.-BORN CHILDREN: FIRST SEMI-ANNUAL, CALENDAR YEAR 2013, FISCAL YEAR 2013 REPORT TO CONGRESS 4 (2014) [hereinafter DEPORTATION REPORT FIRST HALF OF 2013], http://big.assets.huffingtonpost.com/2013report1.pdf.

have at least one U.S.-born child."[124] Additionally, during this period, "ICE removed 39,410 aliens who claimed to have at least one U.S.-born child."[125]

ICE prepared another report for the second half of 2013 (July 1, 2013–December 31, 2013).[126] Thus, the data mostly covered the period after ICE issued the ICE Directive (August 23, 2013). According to this second report, "ICE sought orders of deportation, exclusion, or removal in the cases of 31,801 aliens who claimed to have at least one U.S.-born child."[127] Additionally, "ICE removed 33,000 aliens who claimed [to have] at least one U.S.-born child."[128]

Therefore, between the first and second half of 2013, ICE *increased* the number of orders of deportation, exclusion, or removal in cases of immigrant parents who claimed at least one U.S. citizen child.[129] Although ICE deported fewer of them in the second half of the year, ICE still removed *tens of thousands* of immigrant parents.[130] Both reports briefly referred to the ICE Directive, but failed to explain how ICE had implemented its policies and procedures.[131]

Due to ICE's continued removal of immigrant parents, state courts continue to terminate their parental rights.[132] The data discussed above contradicts the goals of the ICE Directive, and shows that ICE has not been successful in preserving family unity. It likewise demonstrates that the ICE Directive has not prevented the unjust termination of parental rights from continuing to occur.[133]

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[124] *Id.* at 4.

[125] *Id.*

[126] DEPORTATION REPORT SECOND HALF OF 2013, *supra* note 121, at 4.

[127] *Id.*

[128] *Id.*

[129] *Id.*; DEPORTATION REPORT FIRST HALF OF 2013, *supra* note 123, at 4 (showing that the number of orders for deportation, exclusion, or removal that ICE sought increased from 29,417 to 31,801 between the first and second half of 2013).

[130] DEPORTATION REPORT SECOND HALF OF 2013, *supra* note 121, at 4.

[131] *Id.* at 3; DEPORTATION REPORT FIRST HALF OF 2013, *supra* note 123, at 3.

[132] Marcia Zug, *Undocumented Parenting: Immigration Status as a Proxy for Parental Fitness,* A.B.A., (July 14, 2014), http://apps.americanbar.org/litigation/committees/childrights/content/articles/summer2014-0714-undocumented-parenting-immigration-status-proxy-parental-fitness.html.

[133] ICE recently published statistics for the fiscal year 2014, but did not indicate specifically how many parents of U.S. citizen children were deported. The total number of individuals deported was 315,943. The release focused on the change in trends in immigration. For example, it described the rise of unaccompanied minors and families arriving in the U.S. in the time leading up to the report. *See* DEP'T OF HOMELAND SEC., ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT, FISCAL YEAR 2014 1–3 (2014), https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf. The problems associated with the surge in immigration by unaccompanied minors and family members are beyond the scope of this Article and will not be addressed.

C. Further Examples of the ICE Directive's Ineffectiveness

The ICE Directive can only be useful if it is effective. Unfortunately, in addition to the statistics analyzed above, it remains difficult to measure the ICE Directive's success.[134] One way to ensure its effectiveness is if both immigration and family court judges throughout the United States know about it.[135] Unfortunately, the legal community may not even be aware of the ICE Directive, or may have received the information only recently.[136] For example, the Michigan Supreme Court sent a memorandum to all family court judges informing them of the ICE Directive.[137] However, the court administrator sent the memorandum on January 16, 2014—almost five months after the ICE Directive was issued.[138] Likewise, although a memorandum in California from the California Department of Social Services briefly referenced the ICE Directive, it was not sent to judges but to social service agents.[139] Additionally, it was sent in March 2014—eight months after the ICE Directive was issued.[140] Lastly, virtually no record exists of lawyers citing to the ICE Directive in their court filings.[141] If judges and lawyers do not know about the ICE Directive, they lack the ability to enforce it.

However, even knowledge of the ICE Directive will not guarantee its

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[134] *See* Griselda Nevarez, *What Happens to Children When Parents are Detained or Deported?*, EL DIARIO (May 5, 2014, 10:00 AM), http://www.eldiariony.com/what-happens-to-children-when-parents-are-detained-or-deported.

[135] *Cf.* Rodriguez v. Robbins, 715 F.3d 1127, 1146 (9th Cir. 2013) (upholding an injunction against ICE preventing the detention of undocumented immigrants for longer than six months without a bond hearing, and showing that judges are willing to counter ICE practices if judges are equipped with an understanding of the relevant legal authority that supports such a result).

[136] *See* discussion *infra* notes 137–141.

[137] Memorandum from John A. Hohman, Jr., State Court Adm'r, Mich. Supreme Court, to Chief Circuit Court Judges, U. S. Immigration and Customs Enforcement (ICE) Family Court Directive, 1 (Jan. 16, 2014) (on file with the Michigan Supreme Court), http://courts.mi.gov/Administration/SCAO/OfficesPrograms/TCS/Documents/TCS%20Memoranda/TCS-2014-01.pdf.

[138] *Id.*

[139] Letter from Gregory E. Rose, Deputy Dir., Children and Family Servs. Div., Dep't of Soc. Servs., to Cty. Welfare Dirs. et al., Immigration and the Child Welfare System (Mar. 19, 2014) (on file with the California Department of Social Services), http://www.dss.cahwnet.gov/lettersnotices/EntRes/getinfo/acl/2014/14-21.pdf.

[140] *Id.*

[141] A search for the ICE Directive in legal memoranda resulted in documents pertaining only to one case (last verified Oct. 22, 2015). *See* Defendant's Opposition to Plaintiffs' Motion to Alter or Amend Judgment at 14 n.8, Crane v. Beers, No. 3:12-CV-3247-O, 2013 U.S. Dist. LEXIS 11481 (N.D. Tex. Sept. 25, 2013).

effectiveness.[142] As discussed above, the ICE Directive does not provide any penalties if ICE personnel fail to follow it, and it does not impose any legal obligations on ICE.[143] Therefore, judges and lawyers may not have a legal mechanism to enforce the ICE Directive even if they are aware of it.

V. PROPOSED SOLUTIONS

A. Codify the ICE Directive

The ICE Directive contains important policies and procedures that could help preserve the parental rights of immigrant parents.[144] If ICE personnel followed the ICE Directive by placing detained immigrant parents near the location of their children, by organizing in-person appearances during family court proceedings, and by generally enhancing communication between ICE and local state child welfare agencies, detained and deported immigrant parents would have more involvement in their children's lives.[145] Consequently, family courts would be more reluctant to terminate parental rights.[146]

To ensure that ICE personnel follow the ICE Directive, the federal government should codify it by issuing formal regulations. Codifying the ICE Directive would help guarantee that ICE personnel follow its procedures, and would secure the attendance of detained and deported immigrant parents in family court.[147] However, before codifying the ICE Directive, ICE should resolve the problems discussed in Part IV above by clarifying vague terms, and by detailing the specific procedures ICE personnel are required to follow.[148]

In addition to these improvements, ICE should make several other changes to enhance the effectiveness of the ICE Directive. First, the codified regulations should eliminate the current directive's discretionary language regarding its applicability.[149] Instead, the new regulations should impose a legal obligation on all ICE personnel to follow them[150];

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[142] *See, e.g.,* ORG. FOR ECON. CO-OPERATION AND DEV., REDUCING THE RISK OF POLICY FAILURE: CHALLENGES FOR REGULATORY COMPLIANCE 19 (2000), http://www.oecd.org/gov/regulatory-policy/46466287.pdf (noting that a rule on the books is unlikely to be complied with if not monitored).

[143] *See* discussion *supra* Part IV.A.

[144] ICE DIRECTIVE, *supra* note 14, §§ 5.2–5.7.

[145] *See* discussion *supra* Part I.C.

[146] *See* discussion *supra* Part II.

[147] *See* discussion *supra* Part IV.A.

[148] *See* discussion *supra* Part IV.A.

[149] *See* discussion *supra* Part IV.A.

[150] *See* discussion *supra* Part IV.A.

and they should clearly state that such legal obligation is binding.[151] By clearly stating this binding effect, ICE personnel will follow the new regulations because if they do not, as discussed below, they will violate proper procedural due process requirements.[152]

Second, the new regulations should include penalties if ICE personnel fail to follow them.[153] A substantial fine could serve as a sufficient penalty.[154] The penalties would further create incentives for ICE personnel to follow the new regulations.

Lastly, the new regulations should require ICE personnel to use their prosecutorial discretion, especially in cases where undocumented immigrant parents have been detained.[155] The new regulations should prioritize not detaining undocumented immigrant parents, and should clearly explain in which specific circumstances ICE may exercise its prosecutorial discretion.[156] Congress has authorized ICE to exercise prosecutorial discretion in immigration matters[157]; and federal authorities have defined prosecutorial discretion as "the authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual."[158] More specifically, prosecutorial discretion permits a federal agency "not to assert the full scope of the enforcement authority available to the agency in a given case."[159] Prosecutorial discretion applies when "deciding whom to stop, question,

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[151] For example, the regulations should eliminate the phrase "to the extent practicable" and should remove § 9, which states that there is no private right of action. ICE DIRECTIVE, *supra* note 14, §§ 5.1, 5.5, 9.

[152] *See* discussion *infra* notes 203–220.

[153] *See* discussion *supra* Part IV.A.

[154] Other penalties can be established. However, whichever penalty is included in the regulations, it must serve as an incentive for ICE to follow the ICE Directive. *See* Cox & Posner, *supra* note 117, at 1291–92.

[155] *See* discussion *infra* notes 156–199.

[156] Even with a prosecutorial discretion directive, it is barely used by ICE. *See* Burga & Lerma, *supra* note 89, at 44–46, 50.

[157] Memorandum Opinion from Karl R. Thompson, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, to Sec'y of Homeland Sec. and Counsel to the President, The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others 2, 4–5 (Nov. 19, 2014) (on file with the U.S. Department of Justice), http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf.

[158] Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf't, to Field Officer Dirs. et al., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 2 (June 17, 2011) (on file with U.S. Immigration and Customs Enforcement), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

[159] *Id.*

or arrest for an administrative violation."[160] It also applies in the later stages of a court proceeding when "deciding whom to detain or to release on bond, supervision, personal recognizance, or other condition."[161]

ICE personnel should use their prosecutorial discretion by making the detention and deportation of undocumented immigrant parents a low priority.[162] On June 17, 2011, John Morton, the former ICE Director, sent to ICE personnel a memorandum entitled *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*.[163] The memorandum provided "guidance on the exercise of prosecutorial discretion to ensure that the agency's immigration enforcement resources are focused on the agency's enforcement priorities."[164] The ICE Directive refers to this memorandum as authoritative, which demonstrates that it adheres to its policies on prosecutorial discretion.[165] By including the memorandum in the same section that lists immigration statutory references, the ICE Directive gives it more legal weight.[166] The ICE Directive could have simply included the memorandum's policies without listing it as a statutory reference. Instead, it specifically lists the memorandum as an authority, which emphasizes the memorandum, and demonstrates to ICE personnel that its policies must to be followed in a similar manner as federal statutes.[167]

In the memorandum, Morton explained that due to ICE's limited resources, ICE personnel could not remove every undocumented immigrant in the United States.[168] He explained further that ICE needed to create deportation priorities.[169] The memorandum provides a list of relevant factors that ICE personnel should weigh in considering when to exercise prosecutorial discretion.[170] The list includes considering whether an undocumented immigrant parent has a U.S. citizen child, or whether

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[160] *Id.*

[161] *Id.* Note that prosecutorial discretion is not limited to these decisions, but they are the ones most relevant to this Article. The memorandum provides a complete list of the discretionary enforcement decisions. *Id.* at 2–3.

[162] *See* discussion *infra* notes 168–194.

[163] Morton, *supra* note 158, at 1.

[164] *Id.*

[165] *See* ICE DIRECTIVE, *supra* note 14, § 7.3.

[166] *See id.* §§ 7.1, 7.3.

[167] *See id.*

[168] Morton, *supra* note 158, at 2.

[169] *Id.* ("ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the aliens it removes represent, as much as reasonably possible, the agency's enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system.").

[170] *Id.* at 4.

an undocumented immigrant is the primary caretaker of a minor.[171] However, the memorandum explicitly states that "no one factor is determinative."[172] This is misguided: ICE should give more consideration to the fact that an undocumented immigrant parent has U.S. citizen children, or is the primary caretaker of a minor, over various other factors in the list—such as an immigrant's ties to and the political conditions in his/her home country.[173] More consideration should be given to this particular factor because ICE should give preference to family relations over other non-familial factors.[174] This preference will help ensure that fewer families will be separated. Thus, ICE should categorize undocumented immigrant parents as a low priority for detention and removal, absent other compelling circumstances. For example, if an undocumented immigrant parent committed a serious crime, such as murder, then a family priority factor should not outweigh the negative weight of the serious crime. .[175] Thus, ICE personnel should always give more consideration to whether an undocumented immigrant parent will be separated from his/her child; however, ICE personnel also should have the discretion to decide if another legal factor outbalances family priority.[176]

Additionally, the memorandum explains that eight "positive factors should prompt particular care and consideration," but fails to include within the list of eight whether the immigrant parent is the primary caretaker of a minor or whether an undocumented immigrant parent has a U.S. citizen child.[177] These two characteristics should be added as positive factors that prompt particular care and consideration.[178] By

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[171] *Id.*

[172] *Id.*

[173] It should not be presumed that no other factor may be considered. Rather, what is advocated is that ICE prioritize certain factors, including if an immigrant is a parent of U.S. citizen children and/or a primary caretaker of minors. *See* Morton, *supra* note 158, at 4.

[174] *Cf.* Burga & Lerma, *supra* note 89, at 50–54 (discussing the negative social, psychological, and economic impact of detention on children and communities when family factors are ignored); SHATTERED FAMILIES, *supra* note 1, at 42–43 (discussing the trauma children experience from separation).

[175] A serious crime could be defined as one involving moral turpitude. *See, e.g.*, Immigration and Nationality Act of 1952, 8 U.S.C. § 1182 (a)(2)(A)(I) (2012) (discussing a crime of moral turpitude).

[176] ICE should not weigh a negative factor against an immigrant with a U.S. citizen child unless he believes it absolutely necessary. This discretion should be used on a limited basis. *See* discussion *infra* notes 179–183.

[177] *See* Morton, *supra* note 158, at 5.

[178] *Cf.* Burga & Lerma, *supra* note 89, at 50–54 (discussing the social cost of failing to account for familial characteristics in prosecutorial discretion); SHATTERED FAMILIES, *supra* note 1, at 42–43.

adding them to the list, and by increasing their consideration, ICE personnel will effectively use their prosecutorial discretion to make undocumented immigrant parents a low priority in immigration enforcement.

On November 20, 2014, Jeh Charles Johnson, the Secretary of the Department of Homeland Security, wrote a memorandum entitled *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*.[179] The memorandum reaffirms the prosecutorial discretion given to ICE personnel that the Morton memorandum addressed.[180] The Johnson memorandum creates three civil immigration enforcement priorities: priority one—"threats to national security, border security, and public safety"; priority two—"misdemeanants and new immigration violators"; and priority three—"aliens who have been issued a final order of removal on or after January 1, 2014."[181] The memorandum also includes a discussion of the groups of undocumented immigrants that ICE should avoid detaining, which includes primary caretakers of minors.[182] More specifically, the memorandum states that "[a]bsent extraordinary circumstances or the requirement of mandatory detention, field office directors should not expend detention resources on aliens . . . who demonstrate that they are primary caretakers of children."[183] Similar to the Morton memorandum, the Johnson memorandum does not adequately prioritize the use of prosecutorial discretion as it pertains to undocumented immigrant parents.[184] Like the Morton memorandum, the Johnson memorandum does not allow ICE to give special consideration to undocumented immigrant parents of U.S. citizen children or primary caretakers of minors.[185] While it does address having young children as a factor to take into account, it does not specifically address undocumented immigrant parents of U.S. citizen children.[186] Undocumented immigrant parents are not always the primary caretakers of their children, so ICE needs to specifically list undocumented immigrant parents of U.S. citizen

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[179] Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't et al., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014) (on file with the Department of Homeland Security), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

[180] *Id.* at 2.

[181] *Id.* at 3–4.

[182] *Id.* at 5.

[183] *Id.*

[184] *See* discussion *infra* notes 185–189.

[185] *See* Johnson, *supra* note 179, at 6 (listing factors to take into consideration, but giving no special exception to immigrant parents of U.S. citizen children).

[186] *See id.*

children as a low priority.[187] Additionally, the Johnson memorandum does not explain what discretion should be used if an undocumented immigrant parent is detained despite the memorandum's policy preference of discouraging detentions.[188] Although the recent memorandum adds new priority groups on which to focus its enforcement resources, it fails to make specifically undocumented immigrant parents a low priority.[189]

Even after making undocumented immigrant parents a low priority, the new regulations need to explain clearly at what point during a removal proceeding ICE personnel may exercise prosecutorial discretion. [190] Although the ICE Directive states that "it is generally preferable to exercise such discretion as early in the case or proceeding as possible," it fails specifically to explain when ICE personnel should exercise discretion.[191] To the contrary, the ICE Directive seems to imply that prosecutorial discretion does not occur prior to the beginning of a family court proceeding because in order for a undocumented immigrant parent to receive the benefit of attending a family court proceeding in-person, he or she must be first be detained.[192] Ironically, this means perhaps that ICE personnel in all instances must use their prosecutorial discretion only when there is a family court proceeding in order for the ICE Directive to be in effect—essentially negating the purpose of the ICE Directive per se.[193] In this way, ICE's current use of prosecutorial discretion hinders rather than helps undocumented immigrant parents.[194]

The new regulations should clearly insist that ICE exercise prosecutorial discretion when deciding whom to arrest[195]; and explain that ICE may use prosecutorial discretion only at later stages in the

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[187] *See* Soraya Fata et al., *Custody of Children in Mixed-Status Families: Preventing the Misunderstanding and Misuse of Immigration Status in State-Court Custody Proceedings*, 47 FAM. L.Q. 191, 194–195 (2013) (describing one instance when an immigrant parent may not be deemed a primary caregiver).

[188] *See* Johnson, *supra* note 179, at 5–6.

[189] *See id.* at 3–4.

[190] *See* Erin B. Corcoran, *Seek Justice, Not Just Deportation: How to Improve Prosecutorial Discretion in Immigration Law*, 48 Loy. L.A. L. Rev. 119, 142–43 (2014).

[191] ICE DIRECTIVE, *supra* note 14, § 5.2.1.

[192] The ICE Directive only mentions prosecutorial discretion when discussing the transfer of detained immigrants to family court. *See id.* § 5.4.1.

[193] *See* Stephanie Pinsky, *ICE's New Policy on Protecting Parental Rights*, SOC. WORK HELPER (May 12, 2014), www.socialworkhelper.com/2014/05/12/ices-new-policy-protecting-parental-rights/.

[194] *See id.*

[195] *See* Shoba Sivaprasad Wadhia, *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases*, *in* CITIZENSHIP AND IMMIGRATION IN THE AMERICAS 148 (Ediberto Román ed., 2015).

proceeding.[196] If the new regulations explicitly state that ICE should exercise its prosecutorial discretion when deciding whom to arrest, the regulations would prevent detention of undocumented immigrant parents from occurring, and likewise would help stop the separation of families due to immigration detention.[197] However, if ICE personnel elect to use their prosecutorial discretion at the earliest stage of a removal proceeding, and parents are detained, ICE personnel should use their prosecutorial discretion to release undocumented immigrant parents from federal custody pending the outcome of the removal case, and permit such detention only if an undocumented immigrant parent has committed a serious crime.[198] Following these models, prosecutorial discretion would be used to keep families intact instead of tearing them apart.[199]

By codifying the ICE Directive, albeit with the proposed changes discussed above, lawyers will have more incentive to cite the procedures of the ICE Directive in court filings because the codified and clarified ICE Directive would have legal authority.[200] Currently, if lawyers cite the ICE Directive, a court does not need to adhere to it because it is not mandatory.[201] Its lack of authority has made lawyers reluctant to cite it.[202]

Not only should ICE issue such new regulations to give greater authority to the ICE Directive, but ICE must issue these regulations to ensure that the fundamental rights of immigrant parents are not systemically violated. Such a violation occurs when immigrant parents are deprived of their constitutionally protected parental rights without proper procedural due process.[203] As discussed in Part I, the U.S. Supreme

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[196] *See* ICE DIRECTIVE, *supra* note 14, § 5.2.1 (explaining that discretion should be exercised early in the proceeding but failing to emphasize the importance of it in later stages). However, prosecutorial discretion should be used only in ways that will help undocumented immigrant parents. Using discretion to prevent them from attending family court proceedings is not a beneficial use of prosecutorial discretion and should be avoided. *See* Pinsky, *supra* note 193.

[197] *See* Wadhia, *supra* note 195, at 148.

[198] *See* ICE DIRECTIVE, *supra* note 14, § 5.2.1.

[199] *See* SHATTERED FAMILIES, *supra* note 1, at 29 ("While ICE officials hold broad discretion in determining who to continue detaining and who to release, many parents remain behind bars for extended periods while their families move closer and closer to permanent severance.").

[200] *Cf. ICE Parental Interests Directive*, ICE, www.ice.gov/parental-interest (last visited Oct. 23, 2015). Since the ICE Directive does not create any legal rights, litigants may be less likely to cite to it in a court of law.

[201] *Id.*

[202] *Cf. id.* As the ICE Directive applies only to ICE, and does not create any enforceable, private rights, judges need not follow it, making litigants reluctant to cite to it.

[203] *See* SHATTERED FAMILIES, *supra* note 1, at 36 (noting that detention hinders parents from advocating for their parental rights and from being present in family court proceedings).

Court has recognized the fundamental right to be a parent.[204] By detaining immigrant parents and preventing them from attending family court proceedings in-person—a family court judge could terminate their parental rights—ICE violates the fundamental rights of immigrant parents.[205] The Fifth Amendment restricts the government from depriving an individual of "life, liberty, or property" without the due process of the law.[206] Detained immigrant parents have a strong liberty interest in maintaining their fundamental right to be a parent. Thus, the Fifth Amendment protects them from losing their parental rights without proper procedural due process.[207] In *Mathews v. Eldridge,* the U.S. Supreme Court recognized that "the fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[208] To measure the extent of proper procedural due process an individual should receive prior to the government depriving him/her of a liberty interest, the U.S. Supreme Court created a test.[209] More specifically, the Court stated:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[210]

This balancing test would require ICE to follow the procedures in the proposed new regulations to ensure that the fundamental rights of immigrant parents are not violated.[211] First, the private interest—parents maintain their right to be parents free of state action—remains substantial as it is a distinguished fundamental right.[212] Second, the risk

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[204] *See* discussion *supra* Part I.D.

[205] SHATTERED FAMILIES, *supra* note 1, at 36–38.

[206] U.S. CONST. amend. V. *See also* Mathews v. Eldridge, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.").

[207] *See* Troxel v. Granville, 530 U.S. 57, 65 (2000).

[208] *Mathews*, 424 U.S. at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

[209] *Id.* at 334–35.

[210] *Id.*

[211] *See* discussion *supra* Part V.A.

[212] *Troxel*, 530 U.S. at 65.

of erroneous deprivation of such interest through the use of the current directive, and the probable value of the proposed new regulations are significant.[213] To date, the ICE Directive has not prevented detained immigrant parents from consistently missing family court proceedings, and consequently, has not fostered a consistent opportunity for immigrant parents to be heard in a family court.[214] As shown by the unjust termination of parental rights discussed in Part II above, an opportunity to be heard remains essential for detained immigrant parents. Without being present in family court, detained immigrant parents lose their chance to argue why they deserve to keep their parental rights despite their immigration status.[215] The additional protections of the proposed new regulations will help guarantee that detained immigrant parents will be present for all family court proceedings.[216] Although there will be an increased fiscal and administrative burden to ICE, the additional funding and effort does not outweigh the importance of the private interest and risk of erroneous deprivation.[217] Additionally, the decreased use of prosecutorial discretion to not detain immigrant parents will decrease the overall costs of immigration detention.[218] This decrease in costs due to fewer immigrant parents being detained will help offset the increase in funding needed to transport detained immigrant parents to family court proceedings as required by the proposed new regulations.[219] Proper procedural due process requires that ICE issue the proposed new regulations; and should ICE fail to do so, continued violations of the fundamental rights of detained immigrant parents will persist.[220]

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[213] *See* Pinsky, *supra* note 193.

[214] *See id.* ("[D]etainment and deportation *significantly* impairs their ability to participate in . . . custody hearings.") (emphasis added).

[215] *See* SHATTERED FAMILIES, *supra* note 1, at 36–37. *See also* discussion *supra* Part II.

[216] *See* discussion *supra* Part IV.A. (detailing the reasons the ICE Directive has not yet successfully been enforced).

[217] *See* Susan B. Hershkowitz, *Due Process and the Termination of Parental Rights*, 19 FAM. L.Q. 245, 265 (1985) (discussing how the costs of improving termination proceedings—in this case through providing attorneys for indigent immigrants—are outweighed by the parent's interest in having the risks of an erroneous termination minimized).

[218] *See* NAT'L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES 7 (2013), https://immigrationforum.org/wp-content/uploads/2014/10/Math-of-Immigation-Detention- August-2013-FINAL.pdf.

[219] *Cf. id.* at 1 (suggesting that a reduction in the number of detained immigrants would save the government billions of dollars—money that could then be used for transportation expenses).

[220] *See* discussion *supra* Part IV.B. (discussing how the current ICE Directive is not stemming the tide of deportations).

B. Consolidate Immigration and Child Custody Proceedings

Part II illustrated the injustice that undocumented immigrant parents endure when family courts terminate their parental rights without understanding the implications and consequences of their immigration cases or immigration law generally. To prevent this manifest injustice, barriers between family courts and immigration courts must be eliminated.

When an immigrant parent has a removal proceeding pending in immigration court and a child custody proceeding pending in family court, the courts should consolidate the two cases.[221] Not only should the two cases be consolidated, but also, as discussed above, proper procedural due process requires a consolidation to ensure that immigrant parents attend all family court proceedings regarding the termination of their parental rights.[222] Combining the cases removes the risk that a family court judge, unaware of the circumstances of the immigration case, wrongly terminates the parental rights of a detained immigrant parent.[223] In an ideal situation, immigration judges would educate themselves on the relevant aspects of family law, and would decide both the immigration and child custody cases. Therefore, immigration judges, understanding both the immigration situation and child custody issue, would decide whether to order the removal of immigrant parents from the United States, and would determine if their children should join them.[224] Immigration judges, as opposed to family court judges, should preside over the combined cases because, unlike in family court proceedings, ICE facilitates the presence of detained undocumented immigrant parents in immigration proceedings.[225] As discussed above, many detained immigrant parents unwillingly miss family court proceedings because they rely on ICE to transport them.[226] Thus, if an immigration judge decides both the immigration and child custody cases, undocumented immigrant parents would attend the proceedings at a higher rate.[227] Also, the complexity of immigration law makes immigration judges better equipped to make

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[221] Levy, *supra* note 39, at 99.

[222] *See* discussion *supra* Part I.C., V.A. (discussing how detained immigrants are prevented from attending parental right termination proceedings because immigration and family courts fail to communicate, which violates their proper procedural due process rights).

[223] *See* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 27–29 (1999). *See also* Levy, *supra* note 39, at 99.

[224] *See* discussion *infra* Part V.B.

[225] U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL § 9.1(c) (2009), http://www.justice.gov/eoir/pages/attachments/2015/02/02/practice_manual_review.pdf.

[226] *See* discussion *supra* Part I.C.

[227] *See* IMMIGRATION COURT PRACTICE MANUAL, *supra* note 225, § 9.1(c).

residency decisions.[228] An immigration judge could probably learn the relevant family law provisions for the termination of parental rights with less difficulty than a family court judge could learn the relevant immigration law.[229]

The integrated domestic violence (IDV) courts in several states are an excellent example of the benefits of conjoining cases; and may serve as an equally excellent model for the combining of immigration and child custody cases. Often referred to as a "one family, one judge" model, the IDV court system combines criminal domestic violence cases with related family court cases so that litigants appear in one court.[230] IDV courts work well because they provide consistency in court orders, allow judges to make more informed decisions, and reduce the number of court appearances.[231]

An integrated court system for immigrant parents who have pending removal and child custody proceedings would potentially lead to the same positive results. Since the termination of parental rights often depends on the parent's immigration case, the two areas of law would easily intersect.[232] IDV courts also collaborate with local state child welfare agencies.[233] This collaboration would be just as essential in an integrated family law and immigration court system because detained immigrant parents would be better informed about the status of their U.S. citizen children placed in foster care.[234] The creation of an integrated court system would take time and training, but it would help dissipate the

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[228] *See* Arizona v. United States, 132 S. Ct. 2492, 2506 (2012) ("There are *significant complexities* involved in enforcing federal immigration law, including the determination whether a person is removable.") (emphasis added).

[229] *Cf. id.* (noting that the distinct challenges of enforcing immigration law make that area of law more cumbersome to master than its family law counterpart.).

[230] *See* Epstein, *supra* note 223, at 29; Corey Shdaimah & Alicia Summers, *Baltimore City's Model Court: Professional Stakeholders' Experience with Baltimore City's One Family, One Judge Docketing*, 51 FAM. CT. REV. 286, 286 (2013).

[231] *See Integrated Domestic Violence Court (IDV)*, NYCOURTS.GOV (Jan. 14, 2013), http://www.nycourts.gov/courts/problem_solving/idv/mission_goals.shtml.

[232] *See Of Borders and Best Interests*, *supra* note 48, at 71–72 ("Even this initial examination of available family court decisions makes evident the exaggerated role that immigration status often plays in many family court outcomes. Moreover, the patterns that emerge from reviewing family court decisions indicate that the impact of immigration status in family court is not an irregular occurrence. Whether family courts are discriminating, manipulating, obfuscating or accommodating, immigration status influences, sometimes determinatively, the outcome of cases.").

[233] *See Integrated Domestic Violence Court*, *supra* note 231.

[234] *Cf.* SHATTERED FAMILIES, *supra* note 1, at 22 (discussing the plight of a woman in detention who had little knowledge about the status of her children). Once in detention, immigrant parents often do not know the location of their children and struggle to stay in contact with them. *See id.* at 8, 37.

current problems caused by having two separate court systems.[235]

If it is not feasible to combine the two cases, immigration judges and family court judges should be required to consult with each other.[236] Communication between the judges will allow them to stay informed about the status of the respective immigration and child custody cases.[237] For example, if the Delaware family court judge in *Department of Services for Children, Youth, & Their Families v. Garcias* knew that the father could not satisfy a case plan because he was detained in ICE custody and eventually deported, the judge might not have terminated the father's parental rights under the premise that the father abandoned his son.[238] With better communication, family courts would not set impossible conditions that detained and undocumented immigrant parents are unable to meet.[239] By communicating, the immigration judges could inform the family court judges about what legal standards a detained or undocumented immigrant parent must meet to normalize their immigration status.[240]

Not only should family court and immigration judges consult with one another about specific cases, but they also should learn the different areas of law. Without an understanding of immigration law, family court judges will continue to make uninformed decisions.[241] Better communication between the judges will ensure that family court judges will know exactly where detained immigrant parents are being held,

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[235] *See* Epstein, *supra* note 223, at 29.

[236] *See* Levy, *supra* note 39, at 99.

[237] *See* Rabin, *supra* note 43, at 119–20 ("A [family court] judge described cases where parents are in detention facilities as 'a big mystery to everyone involved in the case.' He explained: Where the parent is, what their status is, what is going on with them, [it's a] complete mystery; let alone how to reach them and how to get them to participate in the case. It's just a mystery. I'll get reports that say 'we believe Dad is being held, we don't know where, we don't know what is going on.'") (alteration in the original).

[238] Dept. of Servs. for Children, Youth, and Their Families v. Garcias, 92 A.3d 1072, 1082–83, 1086–88 (Del. Fam. Ct. 2013).

[239] *See In re* M.M., 587 S.E.2d 825, 831 (Ga. Ct. App. 2003) (requiring the father to "show that he is taking positive steps towards correcting legal status while in the United States."). *See also Of Borders and Best Interests*, *supra* note 48, at 67 ("Family courts routinely set conditions that parties must meet before the court makes decisions regarding child custody. . . . Occasionally, however, courts illegitimately use this routine device to mask the impact of immigration status on decisions by attaching consequences to conditions that are based on wildly inaccurate assumptions about immigration law and are impossible to meet.").

[240] *See* Levy, *supra* note 39, at 99.

[241] *Custody and Contradictions*, *supra* note 10, at 456 ("Regardless of the motivation for the consideration of immigration issues in child custody matters, its execution by family court judges unversed in immigration law can be misdirected and mistaken.").

which will mitigate the constant confusion about the their location.[242]

In addition to a dialogue between the two judges, family court attorneys should attend every proceeding concerning their client.[243] Although detained immigrant parents do not have a right to counsel for immigration proceedings, state law usually provides parents with the right to counsel for family court proceedings concerning the termination of parental rights.[244] The family court lawyer can further facilitate communication between the immigration and family courts, and reduce confusion about the two distinct cases. If an in-person appearance proves too difficult, lawyers can assist with setting-up phone conferences. In combined cases, a family court lawyer also should become familiar with immigration law to understand a client's immigration proceeding.[245]

Besides having family court attorneys attend a client's immigration proceeding, family court judges should appoint an immigration lawyer in all cases involving an immigrant parent to advise the court on immigration law issues.[246] If assigning only one lawyer to immigration law cases proves to be too burdensome, the family court judge could create a schedule for immigration lawyers to rotate attendance in family court.[247] Each immigration attorney would address any immigration law issues that arise that day. The presence and involvement of immigration lawyers in family court will further reduce the confusion at the intersection of family law and immigration law.[248]

C. Eliminate Family Court Bias

As discussed in Part I, the standard for terminating parental rights first requires clear and convincing evidence of a parent's unfitness, which is typically shown if a parent abused, neglected, or willfully abandoned

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[242] *See* Levy, *supra* note 39, at 99. *See also* SHATTERED FAMILIES, *supra* note 1, at 36.

[243] Mimi Laver, *Promoting Quality Parent Representation Through Standards of Practice*, CHILD L. PRAC., Mar. 2007, at 6–7.

[244] KATE M. MANUEL, CONG. RESEARCH SERV., ALIENS' RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS: IN BRIEF 6 (2014), http://fas.org/sgp/crs/homesec/R43613.pdf; Abel & Rettig, *supra* note 36, at 246.

[245] *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 1983).

[246] *See* CODE OF JUDICIAL CONDUCT Canon 3(A)(4) (AM. BAR ASS'N 1972).

[247] Judges often rotate in highly contested custody cases; as such, lawyers also could serve on a rotating basis in family court. *See* Laurence C. Nolan, *Identifying Parents Who May Kill Their Children in Highly Contested Custody Cases: Can Mental Health Providers Help Judges Avoid the Deadly Game of Russian Roulette*, 9 WHITTIER J. CHILD & FAM. ADVOC. 227, 240 (2010) (noting that it is not uncommon for multiple judges to hear highly contested cases).

[248] *See* Nicole Lawrence Ezer, *The Intersection of Immigration Law and Family Law*, 40 Fam. L.Q. 339, 339 (2006) (noting the advisability of involving immigration lawyers in related family law cases).

his/her children.[249] After a finding of unfitness, a court will then determine if the termination of parental rights is in a child's best interests.[250] The standard for the termination of parental rights differs from the standard family courts apply in a contested custody proceeding when determining which parent should have custody of a child.[251] When deciding a dispute between two parents over the custody of their child, a family court only decides what is in the child's best interests.[252] Due to a cultural bias, when family courts decide whether to terminate the parental rights of an undocumented immigrant parent, they apply the wrong standard.[253] Instead of first determining whether there is clear and convincing evidence of a parent's unfitness as shown through abuse, neglect, or willful abandonment, the courts only consider what is in the child's best interests.[254] For example, a district court in Iowa terminated the parental rights an undocumented immigrant mother and left her two young children in foster care in the United States despite the fact that to show her fitness she arranged with the Mexican Consulate for her sister to provide for her children until ICE deported her.[255] Likewise, a juvenile court in Nebraska terminated the parental rights of an undocumented immigrant mother deported to Guatemala even though she verified she would provide her children with a suitable life in Guatemala.[256]

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[249] *See* discussion *supra* Part I.B.

[250] *See* discussion *supra* Part I.B.

[251] *See, e.g.*, Watkins v. Nelson, 748 A.2d 558, 568 (N.J. 2000). *See* CHILD WELFARE INFO. GATEWAY, *supra* note 31, at 2.

[252] *See, e.g.*, *Watkins*, 748 A.2d, at 568.

[253] *See, e.g.*, Maddali, *supra* note 69, at 678 ("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."). *See also* Seth Freed Wessler, *How the 'Best Interest' Bias of Family Court Threatens Immigrant Parents* (Aug. 8, 2012, 9:27 AM), http://colorlines.com/archives/2012/08/felipe_bautista_montes_encarnacion_bail_romero_and_the_biases_of_best_interest.html.

[254] *See* C. Elizabeth Hall, *Where Are My Children . . . and My Rights? Parental Rights Termination as a Consequence of Deportation*, 60 DUKE L.J. 1459, 1472, 1481 (2011).

[255] *See In re* B.A., No. 5-622, 2005 Iowa App. LEXIS 1148, at *5–6 (Iowa Ct. App. Sept. 14, 2005). Fortunately, the Iowa Court of Appeals reversed the decision because it found that "there was a practical alternative to foster home placements in Iowa," which the Mexican consulate sufficiently explored. *Id.* at *9, *23.

[256] State v. Maria L. (*In re* Angelica L.), 767 N.W.2d 74, 86 (Neb. 2009). The case was reversed on appeal. The Nebraska Supreme Court noted the implications of its reversal concluding, "[w]e are mindful that the children will be uprooted. But we are not free to ignore Maria's constitutional right to raise her children in her own culture and with the children's siblings. That the foster parents in this country might provide a higher standard of living does not defeat that right." *Id.* at 96.

Additionally, a Connecticut superior court demonstrated its bias when it stated that an undocumented immigrant father did "not consider the effect on the son, an American citizen, if the child were required to reside in Columbia [sic] when he has an opportunity to reside here, *a priceless right*, many risk much for."[257]

These cases demonstrate that in regards to immigrant parents, family courts focus on what they believe is better for the child instead of determining the fitness of the parent first.[258] The cultural bias of judges manifests itself as a preference for keeping a child in the United States even after their parents have been deported.[259] This must end. Family courts need to apply the correct standard for the termination of parental rights by first determining a parent's unfitness, and only thereafter considering the best interests of the child.[260]

Educating family law judges about such cultural bias can help eliminate its continued practice.[261] Since judges may not even realize that a cultural bias exists, educators can inform them of the reality of such bias. [262] More specifically, family court judges and lawyers should participate in training where experienced family court lawyers explain the errors that judges apply when terminating the parental rights of immigrant parents.[263] Training could provide an opportunity for court personnel to communicate the problems that occur when an immigrant parent remains in ICE detention. The training also will allow family court lawyers and judges to collaborate for solutions. As David Thronson has written, "[c]ourts must develop sensitivity and awareness to these issues [concerning immigration status in family court], together with a willingness to engage in them thoughtfully."[264] The training does not need to be expensive, as various states could simply hold agency-wide meetings.

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[257] Velez v. Velez, No. 10 41 81, 1994 WL 700418, at *2 (Conn. Super. Ct. Dec. 7, 1994) (emphasis added).

[258] *See* discussion *supra* Part V.C.

[259] *See* SHATTERED FAMILIES, *supra* note 1, at 8.

[260] *See* discussion *supra* Part I.B.

[261] *See* GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE WITH COMMENTARY § 5-2.7 (AM. BAR ASS'N 2005) [hereinafter JUDICIAL PERFORMANCE GUIDELINES], http://www.americanbar.org/content/dam/aba/publications/judicial_division/aba_blackletterguidelines_jpe_wcom.authcheckdam.pdf (noting that judges must be aware of "perceived and actual biases" in order to avoid judging according to them).

[262] *See* SHATTERED FAMILIES, *supra* note 1, at 17.

[263] *Cf.* The Honorable Patrick R. Tamilia, *A Response to Elimination of the Reasonable Efforts Required Prior to Termination of Parental Rights Status*, 54 U. PITT. L. REV. 211, 224–25 (1992) (discussing the possibility of training judges in family law matters, including termination proceedings).

[264] *Of Borders and Best Interests*, *supra* note 48, at 72.

The trainings could satisfy CLE requirements[265] so that lawyers will be incentivized to attend the meetings. However, the more money that is available, the more opportunity there will be for judges and lawyers to discuss the problems associated with assisting undocumented immigrant parents in family court, which in-turn will allow for more time to collaborate on solutions.

Additionally, to help eliminate cultural bias, local state child welfare agencies should facilitate more contact with foreign childcare agencies.[266] By communicating with foreign childcare agencies, local state child welfare agencies will learn important information that they can report to a family court, which then will help a family court judge to make an informed decision on the fitness of a parent.[267] For example, a foreign childcare agency can inform the local state child welfare agency whether a soon-to-be-deported parent will have the proper facilities to provide for his/her child in his/her home country.[268] Currently, some local state child welfare agencies fail to contact foreign consulates to gain access to such information.[269] Any increase in communication between family courts, local state child welfare agencies and foreign childcare agencies will ideally lead to better educated decisions by family court judges. The more facts available, the more likely family court judges will not be tempted to follow cultural biases.[270]

D. Change the Timelines of Family Court Proceedings

Timelines of custody cases for detained immigrant parents should be changed so that family courts cannot terminate their parental rights until after their immigration case is concluded.[271] Consequently, detained immigrant parents will not be presumed to have abandoned their children, or to have failed to meet their case plan requirements. Currently, although family court judges often have discretion to delay deciding a

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[265] ABA MODEL RULE FOR CONTINUING LEGAL EDUC. WITH COMMENTS § 7 (AM. BAR ASS'N 1986), http://www.americanbar.org/content/dam/aba/migrated/2011_build/cle/mcle/aba_model_rule_cle.authcheckdam.pdf.

[266] *See* SHATTERED FAMILIES, *supra* note 1, at 46.

[267] *See, e.g.*, *In re* B.A., No. 5-622, 2005 Iowa App. LEXIS 1148, at *6 (Iowa Ct. App. Sept. 14, 2005).

[268] *Id.*

[269] *See* Rabin, *supra* note 43, at 155 ("At present, the [Mexican] consulate is generally involved when they are contacted directly by the family; 'it is rare that a call comes from CPS.'").

[270] *See* JUDICIAL PERFORMANCE GUIDELINES, *supra* note 261, § 5-2.7.

[271] *See* SHATTERED FAMILIES, *supra* note 1, at 36.

child custody case, they cannot delay the proceeding indefinitely.[272] The elimination of deadlines will allow family court judges to postpone a final determination regarding the termination of parental rights when an immigrant parent is ICE custody.[273]

Some states already provide statutory exemptions to the termination of parental rights when citizen parents are incarcerated.[274] As proposed by the Shattered Families report, these initiatives should also apply to parents who are in immigration detention.[275] Immigrant parents would not have as much difficulty satisfying their family court case plan requirements if they were no longer in detention. By changing the timelines, detained immigrant parents will also not have to worry about being unable to attend family court proceedings.[276] However, if family unity is to be maintained, family court judges and state agencies must eliminate any cultural bias about returning a child to his/her parent's home country as a result of ICE having deported his/her parent.[277] If the cultural bias persists, immigrant parents will continue to lose custody of their U.S. citizen children.[278] Unfortunately, family courts today still continue to favor placement in the United States after ICE deports an immigrant parent to his/her home country.[279]

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[272] *See* Rabin, *supra* note 43, at 141–42 ("[J]udges agreed that their ability to avoid severance can only be pushed so far. One judge stated, 'I think there'll be a point in which you can't [avoid it] anymore. Nobody wants an infant growing up in foster care. So at that point . . . the bottom line is, they can't parent and you've got a six month old.'") (alteration in original).

[273] *See id.* at 140–42.

[274] U.S. GOV'T ACCOUNTABILITY OFFICE, CHILD WELFARE: MORE INFORMATION AND COLLABORATION COULD PROMOTE TIES BETWEEN FOSTER CARE CHILDREN AND THEIR INCARCERATED PARENTS 20–21 (2011), http://www.gao.gov/assets/590/585386.pdf.

[275] SHATTERED FAMILIES, *supra* note 1, at 58.

[276] *Cf.* Lopez v. Clark, No. C07-1409-MJP-JPD, 2007 WL 3223221, at *1 (W.D. Wash. Oct. 26, 2007) (denying a father's release from ICE detention to attend a termination of parental rights proceeding). The change in timelines and/or codification of the ICE Directive will prevent parents from having to petition ICE for a release from custody to attend family court proceedings.

[277] *See* Satya Grace Kaskade, *Mothers Without Borders: Undocumented Immigrant Mothers Facing Deportation and the Best Interests of Their U.S. Citizen Children*, 15 WM. & MARY J. WOMEN & L. 447, 459 (2009) ("Social workers may place children of deported immigrants in foster care or put them up for adoption, as the social workers are *often unable or simply unwilling to arrange placement with family abroad*.") (emphasis added).

[278] *See* Vinita Andrapalliyal, *The CPS Took My Baby Away: Threats to Immigrant Parental Rights and a Proposed Federal Solution*, 7 HARV. L. & POL'Y REV. 173, 175 (2013).

[279] *See, e.g.*, State v. Maria L. (*In re* Angelica L.), 767 N.W.2d 74, 80, 85–86 (Neb. 2009). *See* Kaskade, *supra* note 277, at 459.

CONCLUSION

Since federal statutes govern immigration law and state statutes governs family law, complications arise when an immigrant parent confronts both a removal proceeding and a proceeding concerning the termination of his/her parental rights. The ICE Directive aimed to create policies and procedures to facilitate more involvement by undocumented immigrant parents in termination proceedings.[280] ICE needs to clarify ambiguities in the ICE Directive to ensure that specific procedures will be followed, and to ensure that all ICE personnel understand its role in both immigration and termination proceedings.[281]

This Article has proposed various ideas to eliminate the pervasive practice of separating immigrant parents from their children, including codifying the ICE Directive with proposed new regulations. Although such proposed changes may be difficult to attain, steps need to be taken to ensure immigrant parents do not continue to lose their fundamental right to be a parent.

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[280] ICE DIRECTIVE, *supra* note 14, § 1.

[281] *See* discussion *supra* Part IV.A.