

“ARE WE THERE YET?”

IMMIGRATION REFORM FOR CHILDREN LEFT BEHIND

By Keila E. Molina,** and Lynne Marie Kohm*

“Children are the world’s most valuable resource
and its best hope for the future.”¹

INTRODUCTION

Three children, ages six, one, and nine months old, were placed in foster care when their mothers were arrested, detained, and deported.² A teenage boy, age fifteen, wept as he spoke of his parents’ decision to leave him and his thirteen year-old sister behind when they were deported to Guatemala.³ A ten-year-old boy is caught in the middle of his father’s deportation and his parents’ custody battle.⁴ Federal intervention into family law happens every day in immigration enforcement. These are just a few examples of the thousands of children who have been left behind in the United States after their immigrant parents were deported. In 2009, there were more than four million children⁵ born in the United States to

** J.D. 2012, Regent University; B.A. 2005, Biola University.

* John Brown McCarty Professor of Family Law, Regent University School of Law; J.D. 1988, Syracuse; B.A. 1980, Albany. Both authors wish to thank Professor Kathleen A. McKee and the *Regent Journal of International Law* for their gracious assistance in sharing this article with the *Berkeley La Raza Law Journal*, the staff of the *Berkeley La Raza Law Journal* for working with the *Regent Journal of International Law*, accordingly, and for working with us to revise this article, Mary Schuler for her research, and Professor Joseph A. Kohm, Jr. for his thoughtful remarks.

1. President John Fitzgerald Kennedy, UNICEF Speech (July 25, 1963) (transcript available at the John F. Kennedy Presidential Library Museum).

2. Seth Freed Wessler, *Thousands of Kids Lost in U.S. Deportation System*, COLORLINES, (Nov. 2, 2011).

3. Dahleen Glanton, *Immigration Rights Advocates Focus on Families*, L.A. TIMES, Mar. 10, 2009, <http://articles.latimes.com/2009/mar/10/nation/na-immigration10>. Both children are American citizens and their parents left them behind in Georgia with church friends to continue their education. *Id.*

4. Anna Gorman, *Family Law. Immigration Law Collide: Deportation Would Deprive a Father of Custody and His Son of Support*, L.A. TIMES, Jun. 30, 2008. “Former Los Angeles immigration judge Bruce J. Einhorn said the state family court and the federal immigration court are completely different systems, run by two different governments. ‘What you really have is an occasional train wreck waiting to happen,’ he said. ‘You have two systems speeding along and, when they meet, it’s usually a head-on collision.’” *Id.*

5. WENDY CERVANTES & YALI LINCROFT, FIRST FOCUS, THE IMPACT OF IMMIGRATION ENFORCEMENT ON CHILD WELFARE 2 (2010) (“The exact overall number of children impacted by immigration enforcement, . . . is unknown since this information is currently not collected in a consistent

undocumented immigrant parents.⁶ Today, more than 5,000 children are living in foster care as a result of immigration enforcement procedures that separate immigrant families.⁷ While these children remain largely invisible in the affairs of state politics,⁸ they are the principal casualties of an immigration system that prioritizes detention and removal over family unification.⁹ These children may represent their parents' aspirations and hopes for a better life, yet, they have also become key actors¹⁰ in the struggle for comprehensive immigration reform.

The journey for immigration reform in the United States, while not equivalent to a family journey, is a dramatically strenuous and conflictive process for children who have been left behind by deported parents.¹¹ The important question is, are we there yet? This article argues that it may be possible to reach a much-needed solution to the immigration question through proposed changes in family immigration policy. A greater focus on children and their best interests within the context of immigration reform may offer necessary relief to immigrant families and a viable solution for state actors charged with enforcing immigration laws. The U.S. government must ensure that its immigration laws and policies recognize and protect the best interests of children living within its borders, and children are best served

way by the Department of Homeland Security, the Department of Health and Human Services, or by state and local child welfare agencies themselves.”)

6. That statistic is up from 2.7 million in 2003. Alan Gomez, *U.S. Sees Rise in Children Born to Illegal Immigrants*, USA TODAY, Aug. 12, 2010, http://usatoday30.usatoday.com/news/nation/2010-08-11-illegal-immigrant-children_n.htm (discussing the report's factual findings regarding the rise in the percentage of children born in the United States to undocumented parents).

7. SETH FREED WESSLER, APPLIED RESEARCH CENTER, Executive Summary, SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 4 (Nov. 2011) (indicating that the estimates of children currently in foster care with parents who are detained or deported are “based on data collected from six key states and an analysis of trends in 14 additional states with similarly high numbers of foster care and foreign-born populations”); see also Francisco Miraval, *Thousands of Children of Deported Parents Get Stuck in Foster Care*, THE DENVER POST, Jul. 5, 2012, http://www.denverpost.com/commented/ci_19350445 (placing the numbers of children in foster care closer to 7,000-9,000).

8. KARL-ERIC KNUSTEN, CHILDREN: NOBLE CAUSES OR WORTHY CITIZENS? (1997) (discussing the lack of development of children in security studies, and how children have been relegated to the margins of global affairs, even though they are often at the center of the consequences of global decisions).

9. See, e.g., Gorman, *supra* note 4 (where deportation would deprive a father of custody and his son of support).

10. See Charlotte Wagnsson, Maria Hellman & Arita Holmberg, *The Centrality of Non-traditional Groups for Security in the Globalized Era: The Case of Children*, 4 INT'L POL. SOCIOLOGY 1-14 (2010) (proffering that children should become a central focus of the security debate). Children are referred to as “actors” in the International Relations notions presented by Wagnsson et al., which implies that children are empowered, and enjoy some level of autonomy. Children do not possess any degree of power or authority in the immigration debate and would be more clearly denoted as beneficiaries or receivers, and that sentiment will be reflected in our different word choice hereafter.

11. See MARC R. ROSENBLUM, MIGRATION POLICY INSTITUTE, U.S. IMMIGRATION POLICY SINCE 9/11: UNDERSTANDING THE STALEMATE OVER COMPREHENSIVE IMMIGRATION REFORM 1 (Aug. 2011) (detailing the political controversy over comprehensive immigration reform); see also WALTER A. EWING, IMMIGRATION POLICY CENTER, OPPORTUNITY AND EXCLUSION: A BRIEF HISTORY OF U.S. IMMIGRATION POLICY 1 (2012) (describing how in the United States “public and political attitudes toward immigrants have always been ambivalent and contradictory, and sometimes hostile” and demonstrating how this has been reflected in U.S. immigration policy). We recognize that immigration reform and a family journey are not co-equivalent terms; the metaphor we use here is to lighten the severity of the problem while attracting attention to the predicaments and difficulties that children face when caught up in the immigration process. Readers may be rightly concerned whether we have even started on this journey, making “are we there yet?” a premature, if not beguiling metaphor.

when protected in a family setting.¹² Placing children and their best interests at the center of proposals for immigration reform will infuse the process with principled decision-making vis-à-vis children and reduce the number of children who are separated from their families as a result of immigration enforcement.

This article draws children to the center of these debates and also suggests that the realm of family law and the best interests of the child doctrine¹³ may provide possible solutions to some of the most vexing challenges that immigration enforcement presents. It also highlights the tension between federal immigration law and state family law, how this tension leads to the separation of families, and how the best interests of the child standard addresses this problem.

This article also illuminates some of the pressing issues concerning immigrant families and their children, and proposes potential remedies that federal and state governments can implement. Specifically, it offers policy proposals that protect the best interests of children whose families are involved in immigration proceedings. Part I considers the intersection of federal immigration law and state family law and its impact on the lives of children. It details the conflict between the two and the challenge local and state governments face in caring for children who have been left behind after their parents have been detained or deported. These children ultimately become part of overwhelmed state social services systems for abused, abandoned, and/or neglected children.¹⁴ State governments are expected to handle the fallout and devastation from the separation of these families without receiving recognition or assistance from the federal government. Part II explains and applies the best interests of the child standard to these challenges in immigration and deportation contexts. Part III offers policy changes in federal immigration enforcement that will protect the best interests of children and reduce the separation of immigrant families. This section offers solutions for federal-state cooperation, and makes recommendations for state family courts that determine the custody of children who are left behind. Ultimately, this article concludes that the protection of children through state and federal cooperation in family immigration proceedings is the best place to begin immigration reform. We are not there yet, but we could be.

Bringing children to the center of national debates on immigration reform within the best interests of the child framework reduces their victimization.¹⁵ This

12. See, e.g., June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 HOUS. L. REV. 359, 381 (1994–1995) (detailing children as the beneficiaries of the family community); see generally Maggie Gallagher and Joshua K. Baker, *Do Moms and Dads Matter—Evidence from the Social Sciences on Family Structure and the Best Interests of the Child*, 4 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 161 (2004) (examining the preference for intact family structure to achieve the best interests of the child).

13. See generally Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. FAM. STUD. 337 (2008) (examining the legal doctrine of the best interests of the child as a focus throughout the development of family law in the West).

14. See *infra* Part I.

15. While children are usually presented as victims in analyses of national and international affairs, some international relations (IR) scholars argue that bringing them to the center of political debates could enhance their role in problem solving and reduce their victimization. We see this international relations theory as instructive in immigration reform. See Wagnsson et al., *supra* note 10 (proffering that children should become a central focus of the security debate). According to Wagnsson, IR officials, politicians, and “[s]cholars have relegated children to the margins or, even more commonly, entirely excluded children as a political actor category.” *Id.* at 1. We seek to apply similar rationale to the immigration debate. The future of every society, including that of the United States of America, rests in the lives of its children. Children are in fact the next generation, and the wellbeing of the next generation

approach offers solutions to the problem of children left behind and separated from their families due to immigration enforcement; it might also make reform palatable, possible, and even preferred. As citizens and future political actors, these children are not only highly pertinent to the immigration debate,¹⁶ but they are of utmost importance to immigration reform. This is one journey of utmost importance to children, to families, and to the American experiment.

I. THE CONFLICT BETWEEN FEDERAL IMMIGRATION LAW AND STATE FAMILY LAW

As a model nation for immigration, the United States has continually proven itself to be a haven to many aspiring immigrants and their children.¹⁷ Formed as a “nation of immigrants,”¹⁸ the important and timeless American principles embodied in founding documents continue to provide an unwavering foundation for the nation and its new immigrants.¹⁹ The concept of achieving the “American dream”²⁰ has frequently been magnified, maligned, even misunderstood,²¹ and yet remains alive as a living, working, distinct reality through the lives of scores of immigrants and their children.²² For most, the decision to move to the United States

depends copiously on the actions of societies today.

16. See Gomez, *supra* note 6 (noting that some argue the immigration debate is political “fear mongering”).

17. See generally THE AMERICAN IMMIGRATION LAW FOUNDATION, *America’s Heritage: A History of U.S. Immigration*, http://www.aifl.org/exhibit/cx_americasheritage_traveling/traveling_exhibit.shtml (last visited Apr. 1, 2012); see also Press Release, New York City, Mayor Bloomberg Launches One NYC One Nation—A Multi-Pronged Civic Engagement Initiative for Immigrant New Yorkers to Kick Off Immigrant Heritage Week (Apr. 11, 2012), www.nyc.gov/html/om/html/2011a/pr119-11.html. We find this nation has been a haven for both our families; Kohm descended from Irish immigrants who legally immigrated to Ellis Island in the late 19th century, and Molina descended from Mexican immigrants who legally immigrated to California and Arizona in the 20th century.

18. See JOHN F. KENNEDY, *A NATION OF IMMIGRANTS* 18 (1964) (“There is no part of our nation that has not been touched by our immigrant background.”).

19. See, e.g., U.S. CONST. pmbl. (“We the People of the United States, in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity . . .”); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (asserting “that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness”); see also President George W. Bush, Inaugural Speech (Jan. 20, 2001), available at <http://www.pbs.org/newshour/inauguration/speech.html> (“America has never been united by blood or birth or soil. We are bound by ideals that move us beyond our backgrounds, lift us above our interests, and teach us what it means to be citizens. Every child must be taught these principles. Every citizen must uphold them. And every immigrant, by embracing these ideals, makes our country more, not less, American.”).

20. See, e.g., Ivan K. Fong, *Achieving the American Dream* (Feb. 5, 2012), <http://www.abanow.org/2012/02/achieving-the-american-dream/>.

21. See, e.g., David Kamp, *Rethinking the American Dream*, VANITY FAIR, April 2009, <http://www.vanityfair.com/culture/features/2009/04/american-dream200904>.

22. See Fong, *supra* note 19; Michael Martin, *Immigrants Hope Their “American Dream” Isn’t Fading*, NPR, Apr. 8, 2009, transcript available at <http://www.npr.org/templates/story/story.php?storyId=102866466>; Lucy Hood, *Our American Dream: From Migrant Farm Worker to Top Brain Surgeon*, FOX NEWS LATINO, Oct. 19, 2011, <http://latino.foxnews.com/latino/community/2011/10/19/our-american-dream-john-hopkins-top-brain-surgeon-was-once-undocumented-field/?intcmp=related>. It is precisely this belief that the United States is a land of opportunity which continues to attract thousands of immigrants to leave their home countries to

involves their families, as people migrate by households.²³ Societies with moral obligations wishing to adhere to the rule of law generally also desire to operate within the bounds of global justice and national sovereignty;²⁴ balancing the tension between these principles with security concerns, economic concerns, and legal policy concerns increases the challenges of the intersection of family law with immigration law, which, in turn, can unfortunately jeopardize the wellbeing of children in those families.²⁵

“Immigrant children” is a large demographic category of children falling into three groups: immigrant children who have an immigrant parent, U.S.-born children who have one immigrant parent, and U.S.-born children who have two immigrant parents.²⁶ This article focuses on U.S.-born children with undocumented or non-citizen immigrant parents who are deported, leaving their children behind. These children, who number in the millions,²⁷ are caught in the debate for immigration reform, and require significant attention.²⁸ They are often permanently separated from their undocumented immigrant parents with no visitation rights,²⁹ no means of support,³⁰ and inadequate (if any) access to family reunification services.³¹

move to a new land in search of a better life. See also Anna Maric Lux, *Immigrants Search for Better Life and Understanding*, GAZETTE EXTRA, Feb. 12, 2012, <http://gazetteextra.com/news/2012/feb/12/immigrants-search-better-life-and-understanding/>.

23. See generally Douglas H. Massey, *Social Structure, Household Strategies, and the Cumulative Causation of Migration Decision*, 56 POPULATION INDEX 3 (1990) (examining how migration is generally a household decision); Jennifer E. Glick, Frank D. Bean & Jennifer V. W. Van Hook, *Immigration and Changing Family Patterns of Extended Family Household Structure in the United States 1970–1990*, 59 J. MARRIAGE & FAM. 177 (1997) (discussing trends in extended family household migration).

24. See, e.g., KENNEDY, *supra* note 18, at 101 (“From the start, immigration policy has been a prominent subject of discussion in America. This is as it must be in a democracy, where every issue should be freely considered and debated.”).

25. See Ajay Chaudry, Randy Capps, Juan Manuel Pedroza, Rosa Maria Castenada, Robert Santos & Molly M. Scott, URBAN INST., FACING OUR FUTURE, CHILDREN IN THE AFTERMATH OF IMMIGRATION ENFORCEMENT vii (2010) (describing the tension between these concerns and the impact on children’s wellbeing).

26. George J. Borjas, *Poverty and Program Participation among Immigrant Children*, 21 FUTURE OF CHILDREN 247 (2011), available at http://www.princeton.edu/futureofchildren/publications/docs/21_01_FullJournal.pdf.

27. Gomez, *supra* note 6 (discussing the report’s factual findings revealing that children who are automatically granted U.S. citizenship represent 5.4% of all children under the age of 18 in the United States, compared to 3.7% six years earlier, according to data from the non-partisan Pew Hispanic Center, where about 8% of the children currently have immigrant parents, which will only continue to rise).

28. Two categories of immigrant children may end up in foster care: those left behind by deported parents, and unaccompanied children entering the United States from foreign countries. This article focuses only on the former, yet the latter are an important and vulnerable demographic group deserving of research and analysis, but beyond the scope of this paper. See *Immigrant Youth Shelters*, Program Highlights from 2007, Annual Report, Southwest Key Programs (2007), <http://www.swkey.org/programs/shelters.html/title/program-highlights-from-2007-annual-report-> (discussing unaccompanied minors, numbering anywhere from 1,000 to 1,600 per day, who enter the United States from El Salvador, Honduras and Guatemala in order to attend school or rejoin their families). See also *Youth Shelters*, Southwest Key Program (2007), <http://www.swkey.org/programs/shelters.html> (offering specific shelter contact information for various states that care for immigrant children).

29. WESSLER, *supra* note 7, at 6 (“Due to the isolation of detention centers and ICE [Immigration Customs and Enforcement] refusal to transport detainees to hearings, parents can neither communicate with [nor] visit their children nor participate in juvenile court proceedings.”).

30. Gorman, *supra* note 4. “Whether they are foreign-born or U.S.-born, children with two immigrant parents form the fastest-growing component of the population of persons under age eighteen in

Family law plays a major role in sorting out this entangled web. As a creature of state government, family law or domestic relations law is governed by state statutory code,³² and functions to stabilize and strengthen marriage, reorder broken families, and protect the best interests of children. Immigration law and policy, on the other hand, is federal law.³³ The United States Immigration and Nationality Act and Amendments of 1965 reflects two basic values: 1) to promote the reunification of families by issuing visas to close relatives of U.S. citizens and permanent residents; and 2) to admit skilled educated foreigners who would enrich the national community.³⁴ When family law and immigration law intersect, confusion and error can result.³⁵ Since they are “completely different systems, run by two different governments,” when they intersect, it is often a “train wreck waiting to happen.”³⁶ Even though family immigration is generally codified in the Immigration and Nationality Act (INA),³⁷ it never references state family law. The variety of complex family migration patterns therefore challenges the federal immigration law; more often than not, the one-size-fits-all approach of federal immigration policy does not adequately address the needs of these families and children.

Although the U.S. government attempted to reconcile these tensions within U.S. immigration enforcement through the passage of new laws and regulations, in the midst of increased mobilization to the United States, these measures only made matters worse. In 1986, Congress tried to reduce illegal entry by outlawing the employment of aliens who had not obtained work authorization,³⁸ and introduced

the United States. They are also much more likely to be exposed to poverty and public assistance than other children.” Borjas, *supra* note 26, at 5. In fact, public assistance program participation is highest among U.S. born immigrant children with two immigrant parents. *See id.* at Figure 3.

31. *See* Glanton, *supra* note 3 (detailing personal stories of family destruction over deportation). *See also* WESSLER, *supra* note 7, at 6 (“Once detained, ICE denies parents access to programs required to complete CPS case plans.”).

32. *See generally* Family Law-State Statutes, LEGAL INFO. INST., http://www.law.cornell.edu/wex/table_family (last visited Apr. 10, 2012) [hereinafter LII FAMILY LAW] (listing every state’s code pertaining to marital relations, divorce, and best interests of children issues). For a comprehensive overview of the development of family law as state code in the western traditions, see MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE (1989). Yet federal law and state law intersect where the federal government funds programs to assist families, such as Temporary Assistance for Needy Families (TANF), Food Stamps (SNAP), National School Lunch Program (NSLP), Women, Infants and Children (WIC), etc, resources which are offered to needy families without regard to citizenship or immigration status. *See* TRACY VERICKER, KARINE FORTUNY, KENNETH FINEGOLD & SEVGI BAYRAM OZDEMIR, URBAN INST., EFFECTS OF IMMIGRATION ON WIC AND NSLP CASELOADS (2010), *available at* <http://www.urban.org/publications/412214.html>.

33. *See generally* Immigration Law: An Overview, LEGAL INFO. INST., <http://www.law.cornell.edu/wex/Immigration> (last visited Apr. 10, 2012) [hereinafter LII IMMIGRATION LAW] (detailing the history of immigration policy in the United States and the federal authority to be “a gatekeeper for the nation’s border, determining who may enter, how long they may stay, and when they must leave.”).

34. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-239 (Oct. 1965) and Pub. L. No. 99-603, § 201, 100 Stat. 3359 (adding 8 U.S.C. § 1255a Sec. 245A).

35. Lynne Marie Kohm, *The Intersection of Family Law and Immigration: Virginia and the Big Picture*, 60 VIRGINIA LAWYER 34 (Feb. 2012).

36. Gorman, *supra* note 4 (quoting a former federal immigration judge describing the two different court systems).

37. *See generally* Immigration and Nationality Act (INA) §§ 201-203 (listing various requirements and quota for family-sponsored immigrants).

38. Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

procedures and penalties to reduce marriage fraud.³⁹ In 1990, major changes in the non-immigrant and immigrant visa classification system sharply increased the amount of immigration permitted,⁴⁰ with no limits on the number of immediate relatives permitted to enter, but it did subtract this number from the overall family-based limit of 480,000.⁴¹ In the face of growing global terrorism, however, Congress passed an antiterrorism law⁴² that was revised and sometimes superseded by the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*.⁴³ Both attempted to significantly limit illegal immigration by eliminating many forms of individual relief and formed the primary basis for the current law set forth in the INA.⁴⁴ These changes had their greatest impact in the realm of family immigration.⁴⁵ Subsequently, in the wake of the September 11, 2001 terror tragedy in the United States, security concerns began to dominate immigration policy and gave rise to the present political stalemate in reaching comprehensive immigration reform.⁴⁶ The emphasis on security essentially relegated family reunification objectives to the background. This development is most clearly in the 2006 federal proposals that endeavoured to increase security rather than encourage migration and the reunification of families.⁴⁷ Even though reform has been attempted at the federal level without success,⁴⁸ and because enforcement of current immigration law is deficient,⁴⁹ many states have taken their own measures to enforce law,⁵⁰ but not

39. Immigration Marriage Fraud Amendments Act of 1986, Pub. L. No. 99-639, 100 Stat. 3537.

40. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

41. INA § 101(b) (not to fall below 226,000).

42. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

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

44. The INA is codified at 8 U.S.C. § 1101 et seq.

45. See generally Chaudry, *supra* note 25.

46. See ROSENBLUM, *supra* note 11.

47. The House of Representatives passed the Border Protection, Antiterrorism, and Illegal Immigration Reform Act of 2005. See H.R. 4437. It contained harsh immigration reforms designed to secure the nation from the 12 million undocumented immigrants currently living in the United States. The bill's passage sparked widespread protests from Latin-American immigrants. The Senate also passed the Comprehensive Immigration Reform Act of 2006 (CIRA) in May 2006. See S. 2611. However, ironing out the differences between the two proposals has come to an impasse. As a result, states have recently enacted their own immigration enforcement measures. See also ROSENBLUM, *supra* note 11.

48. See ROSENBLUM, *supra* note 11.

49. See, e.g., Michael Volpe, Immigration Officials Lack Bed Space for 90 Percent of Apprehended Illegal Aliens; DHS Proposes More Cuts, THE DAILY CALLER, Mar. 31, 2012, <http://dailycaller.com/2012/03/31/immigration-officials-lack-bed-space-for-90-percent-of-apprehended-illegal-alien-dhs-proposes-more-cuts/> (noting the remarks of an anonymous ICE official that the agency "only has enough space to hold approximately one in ten suspected illegal aliens that it processes. The rest must be released because of a lack of beds in holding facilities."); *Immigration Enforcement Lacking at Work, Fines Can Be Less than a New York City Parking Ticket*, ASSOC. PRESS, available at <http://www.msnbc.msn.com/id/13424657/ns/politics/t/immigration-enforcement-lacking-work/> (explaining the lack of labor regulation enforcement on migrant workers); Katherine McIntire Peters, *IG: State and Local Government Enforcement Activities Lack Oversight*, GOV'T. EXECUTIVE, Apr. 6, 2010, <http://www.govexec.com/defencs/2010/04/ig-state-and-local-immigration-enforcement-activities-lack-oversight/31230/> (detailing the failings noted by the DHS inspector general of INA 287(g), which delegates federal immigration law enforcement authority to state and local law officers despite significant efforts to improve management of the program).

without federal challenge.⁵¹

The literature on immigration law and policy reveals many of the challenges immigrants face since these developments are largely in family contexts.⁵² Migration is generally a household decision,⁵³ yet U.S. immigration laws and policies seem to reveal a natural tendency to scrutinize and securitize immigration.⁵⁴ Marriage, as the basic establishment for a household, for example, is also the fastest method towards legal immigration, and ultimately to U.S. citizenship,⁵⁵ yet opposition to family immigration policies is often based in security concerns on claims of marriage fraud.⁵⁶ Further conflict arises in promoting the legal migration of families because there are some who believe that the total immigrant population in the United States needs to diminish, rather than increase.⁵⁷ Consequently, the notion that family reunification should serve as an underlying basis for U.S. immigration policy is not without its critics. Some scholars suggest national strength is weakened when particular ethnicities dominate immigrant populations.⁵⁸ Efforts to reduce family immigration are evident in legislative trends, such as the Nuclear Family Priority Act, proposed in Congress in 2007 and designed to amend family immigration and the INA, “to make changes related to family-sponsored immigrants and to reduce the number of such immigrants.”⁵⁹ Calling for a reduction in family-sponsored visas, the

50. See Seth Hoy, More States Introduce Costly Immigration Enforcement Bills in 2012, IMMIGRATION IMPACT, Feb. 3, 2012. Bills passed include Alabama’s HB 56, Arizona’s SB 1070, and Utah’s HB 497. Legislators in other states have introduced and passed similar enforcement bills, such as SB 2090 in Mississippi, SB 590 in Missouri, and HB 2191 in Tennessee. Virginia came close to passing SB 460 and HB 1060. *Id.*

51. See *Arizona v. United States*, 132 S. Ct. 2492 (2011).

52. See generally ROSENBLUM, *supra* note 11; Barbara Hines, *Overview of U.S. Immigration Law and Policy Since 9/11*, 12 TEX. HISP. J.L. & POL’Y 9 (2006); Adam Francoeur, *The Enemy Within, Constructions of U.S. Immigration Law and Policy and the Homoterrorist Threat*, 28 IMMIGR. & NAT’LITY L. REV. 55 (2007); Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625 (2007); Michael Scaperlanda, *Kulturkampf in the Backwaters: Homosexuality and Immigration Law*, 24 IMMIGR. & NAT’LITY L. REV. 213 (2003) (explaining marriage immigration policy to include marriages between a man and a woman); Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of Loving*, WIS. L. REV. 345 (2007) (arguing for marriage expansion in immigration policy); Marcia Yablong-Zug, *Separation, Deportation, Termination*, SOCIAL SCIENCE RESEARCH NETWORK (2010), <http://ssrn.com/abstract=164899> (“Immigrant parents also have the right to the care and custody of their children.”).

53. See KENNEDY, *supra* note 18, at 21; Massey, *supra* note 23; Glick, *supra* note 23.

54. See ROSENBLUM, *supra* note 11.

55. See David Seminara, CENTER FOR IMMIGRATION STUDIES, HELLO, I LOVE YOU, WON’T YOU TELL ME YOUR NAME: INSIDE THE GREEN CARD MARRIAGE PHENOMENON (Nov. 2008), available at <http://www.cis.org/marriagefraud> (discussing the fact that marriage to an American citizen remains the most common path to U.S. residency and/or citizenship for foreign nationals, with more than 2.3 million foreign nationals gaining lawful permanent resident (LPR) status in this manner between 1998 and 2007).

56. See *id.* (detailing the security complications for marriage immigration).

57. See, e.g., Steve King, U.S. Congressman for Iowa’s 5th Congressional District, Immigration Issue Statement, http://stcveking.house.gov/index.cfm?FuseAction=IssueStatements.View&Issuc_id=63ed9657-7c9c-9af9-78b4-b101aff780a9 (“I am concerned about recent rise in the level of immigration in this country, as well as the enforcement of immigration laws within our borders.”) (emphasis added).

58. See BILL ONG HING, DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY 119 (2006) (noting that “[o]nce Asian and Latin immigrants began to dominate the family immigration categories, the kinship system was attacked”).

59. Nuclear Family Priority Act, H.R. 938, 110th Cong. (2007) (proposing to amend 8 U.S.C. § 1151(c)(1)(A) and the current law, at INA § 101(b), which currently allows for 480,000 immigrants to

Nuclear Family Priority Act would greatly reduce the preference allocation for spouses and children of permanent legal resident aliens to a worldwide level of 88,000 family-sponsored immigrants.⁶⁰ Such a change would reduce family-based immigration to less than one fifth of the current (almost) half-million permitted per year, should this legislation become law, further separating and deconstructing families. Though euphemistically titled, the Nuclear Family Priority Act would drastically reduce family-based immigration, while also negatively affecting the family fibre of American immigration; yet it reflects the policy direction some want the United States to take.⁶¹

These perspectives toward immigration in general are key factors that tend to complicate legal immigration and very likely contribute to illegal immigration.⁶² Adding to this sense of over-regulation of family immigration is a dysfunctional history of federal enforcement of immigration laws.⁶³ Mix in the ingredient of states stepping in to attempt enforcement of immigration laws to regain order and safety in their jurisdictions,⁶⁴ and the future of a strong nation (regulated federally) and dependent on strong families (generally regulated by state code) is jeopardized.⁶⁵ University of Virginia Professor Kerry Abrams, a scholar in immigration and family issues, suggests that courts and scholars ought to theorize about and construct the plenary power doctrine regarding any given piece of immigration law concerning families in order to determine “whether the immigration provision in question is advancing core immigration policy goals or instead has ventured outside these goals into an area that has traditionally been within the province of the states.”⁶⁶ Doing so would allow for more integrated applications of family law, and would likely operate to better protect children.

When family law and immigration law intersect, disorder, mistake, and harm can result—and often much of that confusion and error leads to unfortunate situations in which children are separated from their families.⁶⁷ Federal immigration

receive their visas through family sponsorship).

60. *Id.*

61. *See, e.g.,* King, *supra* note 57.

62. *See, e.g.,* Chaudry, *supra* note 25, at viii (stating the impact of enforcement on Haitian families when “[a]bout 30,000 of the more than 500,000 immigrants on ICE’s fugitive list are Haitian; many . . . applied for asylum and were rejected, or overstayed a valid visa.”).

63. *See* ROSENBLUM, *supra* note 11, at 9–11.

64. *See* Kris Kobach, *Fact or Fiction?: Setting the Record Straight on S.B. 170*, 23 REGENT U. L. REV. 353 (2011) (outlining the state’s rationale for enacting that immigration law). *But c.f.* National Immigration Law Center, *State Immigration-Related Legislation* (Jan. 2012), <http://www.nilc.org/states-wrapup-2011.html> (summarizing the different state legislation “inspired by Arizona’s S.B. 1070, the contentious bill passed in 2009”).

65. Although the divide over federal government versus state government enforcement of immigration law has caused much controversy, no legal compromise has been reached yet. *See, e.g.,* Leslie Berestain Rojas, *S.B. 1070 in the Supreme Court: Three Views of What May Happen and What It Would Mean*, MULTI-AMERICAN (Apr. 16, 2012), <http://multiamerican.scp.org/2012/04/sb-1070-in-the-supreme-court-three-views-of-may-happen-and-what-it-would-mean/> (reporting on the case before the U.S. Supreme Court to determine the constitutionality of Arizona S.B. 1070).

66. Abrams, *supra* note 52, at 1708 (“The plenary power doctrine has been . . . modified, criticized, and debated by courts, scholars, and lawyers for over a hundred years, but its tension with state control over family law has never before been explored.”); *see also* Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origin of the Federal Immigration Powers*, 45 HARVARD C.R.-C.L.L. REV. 1, 3 (2010) (“Congress—and by delegation, the Executive—is buffered against judicially enforceable constitutional constraints.”).

67. *See id.*

procedure is not grounded in family law, yet it routinely impacts immigrants as family units in significant ways, and is one of the primary causes of family separation. Moreover, in a statutory context, immigration jurisprudence as functional federal law is significantly more regulatory than state family law.⁶⁸ Because federal immigration jurisprudence often entails the application of strict legal codes, while family law allows for equitable judicial discretion, scholars suggest that one objective for immigration policymakers could be to adopt the approach that “least intrude[s] on state family law’s policy objectives while still fulfilling the goals of federal immigration policy.”⁶⁹ This would enable immigration officials to account for individuals, especially children in immigration procedures. Such an approach would minimize the damage done to state law constructs of marriage and family structure that might occur as a result of judicial interpretations of immigration regulations in state family courts.⁷⁰ The objective of policymakers should be to use family law and immigration policy to protect children whose parents have been detained or deported. Too often, however, the best interests of children are ignored and they are negatively affected by immigration law and policy. When immigration officials carry out an order to detain or deport an immigrant they usually do not consider the impact that this will have on the children of the accused immigrant.

Immigration law as it is currently enforced does not take family law and family circumstances into account, even though similar circumstances, in a non-immigration context, would be considered in state family court proceedings. Yet examples of immigration law impacting families within the context of family law are abundant. For example, federal immigration statutes sometimes control and supersede state statutes in questions of parentage, even though such questions are usually controlled by the latter. Under the INA, a child’s relationship with a father legitimizes that child for immigration purposes, while state statutes generally identify both parents as having the right to determine a child’s movement.⁷¹ Furthermore, under the INA, adults with a record of crimes against children are prohibited from filing for residency status on behalf of a child.⁷² While this policy is designed to protect children from sexual exploitation, it can also deprive them of a path to residency and citizenship. The INA seeks to prevent child abduction by requiring a traveling parent to provide proper documentation of the written consent of the other parent; if such consent is not provided, the traveling parent cannot leave or re-enter the United States until the child is returned to the custodial party.⁷³ Family court judges, however, generally require notice whenever a child travels interstate or

68. See, e.g., 8 U.S.C. §§ 1101, 1151-54 (defining children in several different ways depending on their family context with unique rules for parentage, and highly regulatory of contexts involving fiancés).

69. See generally Nicole Lawrence Ezer, *The Intersection of Family Law and Immigration Law*, 40 FAM. L. Q. 339, 371 (2006).

70. This solution is expounded upon *infra* Section II.

71. See Ezer, *supra* note 69, at 360.

72. Adam Walsh Child Protection and Safety Act of 2006 § 1, 42 U.S.C.A. § 16901 (2006) (amending INA § 204).

73. INA § 212(a)(10)(C). When this rule is not followed and a child is not returned to a custodial parent and the traveling parent refuses to return to the United States, immigration officials must follow certain procedures in order to gain international assistance under the Hague Convention. For a thorough review of how to proceed on such a matter, see Kathleen A. McKee, *A Primer on International Parental Abduction*, 6 REGENT U. J. INT’L L. 37 (2008).

internationally with a parent.⁷⁴ Adoption procedures require the application of the best interests of child standard under state family law statutes.⁷⁵ Under federal immigration law, however, children acquire automatic citizenship if they have one U.S. citizen parent.⁷⁶ Orphans adopted from their home country by U.S. citizens must also be adopted in the state where they will reside, but the child obtains automatic citizenship once the Department of Homeland Security is notified of the adoption.⁷⁷ Immigration policy also relies on specific definitions for children.⁷⁸ However, without considering the best interests of the child standard these definitions may offer a child no legal right and/or opportunity for family reunification.⁷⁹ These tensions are significant because they undermine the first of two basic premises that underlie immigration policy under the INA—that of family unity.⁸⁰ This objective also reflects national values in “the promotion of reunification of families.”⁸¹ “Congress’ general purpose in enacting [8 U.S.C. § 1153(a) (4) on sibling immigration] was to keep families intact”⁸² Furthermore, the INA “establishes that congressional concern was directed at ‘the problem of keeping families of United States citizens and immigrants united.’”⁸³ Thus, one of Congress’s primary objectives in formulating immigration law and policy is to keep families together.

This stated objective of family strength and family unity is multi-faceted; family law and immigration law both acknowledge the significance of family reunification.⁸⁴ Stable nations and societies are largely based on stable family law

74. See Ruth Zafran, *Children’s Rights as Relational Rights: The Case of Relocation*, 18 AM. U. J. GENDER SOC. POL’Y & L. 163 (2010); David V. Chipman and Mindy M. Rush, *The Necessity of “Right to Travel” Analysis in Custodial Parent Relocation Cases*, 10 WYO. L. REV. 267 (2010); Rosenthal v. Mancy, 745 N.E.2d 350, 361 (2010).

75. Adoption is a statutory creature of state law in every state jurisdiction in the United States, with all codes requiring an application of the best interests of the child. See generally Kohm, *supra* note 13; see also Lynn Marie Kohm, *Moral Realism and the Adoption of Children by Homosexuals*, 38 NEW ENG. L. REV. 643 (2004) (discussing how these best interests requirements are applied).

76. Child Citizenship Act § 320, 8 U.S.C.A. § 1431 (2000).

77. 8 C.F.R. § 204.2(d)(2)(vii)(C); INA § 1101(b)(1)(D). Furthermore, if the child is not an orphan, a two year custody or residence with the U.S. parent(s) is required. *Id.* See also *In re Repuyan*, 19 I. & N. Dec. 119 (B.I.A. 1984) (indicating that orphans must also be under the age of 16 and unmarried at the time of the adoption).

78. INA § 101(a)(15)(V); 8 C.F.R. § 214.15. A “child” is defined in Title I and II of the INA as a person who is unmarried and under age 21, including some adopted, illegitimate, or step-children and orphans. See INA § 101(b).

79. CERVANTES, *supra* note 5, at 7.

80. The Immigration and Nationality Act Amendments of 1965, Pub. L. No. 99-603, § 201, 100 Stat.

81. Immigration and Nationality Act (INA), 8 U.S.C. § 1101. The two basic methods to accomplish legal immigration as contained in Title 8 of the INA in the United States Code that reflect national values are (1) the promotion of reunification of families, and (2) the admission of skilled educated foreigners to enrich the national community.

82. *Young v. Reno*, 114 F.3d 879, 881 (9th Cir. 1997).

83. *Fiallo v. Bell*, 430 U.S. 787, 795 (1977).

84. See, e.g., NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES—IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 10, 12-13 (1995) [hereinafter RESOURCE GUIDELINES] (The Guidelines indicate that the best situation in a child abuse or neglect case allows the opportunity for families to work towards reunification for the child’s wellbeing: “[C]hildren need the security of having parents committed to their care. The lack of parents who provide unconditional love and care can profoundly insult a child’s self image.”); see also CHILD WELFARE INFORMATION GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., REASONABLE EFFORTS TO

and policy.⁸⁵ When those laws work toward family separation and breakdown, however, the lives and well-being of immigrant families and their children are jeopardized. These questions of preservation and stability concerning immigrant families present new dimensions of legal intervention. The long and complicated path to legal immigration can present invasive challenges to families, and sometimes forces immigrants, waiting for years for authorized admission, to resort to unauthorized or illegal immigration in order to preserve or reunite with their families.⁸⁶ Although family reunification is one of the primary policy objectives of the INA, the rules themselves often challenge, or thwart, the very goal they seek by preventing family reunification.⁸⁷

In an unprecedented trend, family court judges have ruled that parents who entered the country illegally have engaged in criminal behavior, and, on that sole basis, determined that the parents were unfit to raise their children and terminated their parental rights placing their children in the care of (American) adoptive parents.⁸⁸ The intervention of state family courts as *parens patriae*⁸⁹ in an innovative, yet problematic, development⁹⁰ will determine the future of numerous children

PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN: SUMMARY OF STATE LAWS (July 2009), http://www.childwelfare.gov/systemwide/laws_policies/statutes/rcunifyall.pdf [hereinafter REASONABLE EFFORTS] (discussing how reasonable efforts refer to activities of State social services agencies that aim to provide the assistance and services needed to preserve and reunify families and noting that laws in all States, the District of Columbia, Guam, and Puerto Rico require the provision of services that will help families remedy the conditions that brought the child and family into the child welfare system). *Id.* at 1.

85. See, e.g., Dale G. Ahlquist, *G.K. Chesterton's Uncommonly Sensible View on the Law*, 3 AVE MARIA L. REV. 685-700 (2005) (discussing that family policy issues are extremely important because their consequences can be far-reaching, generational, economic, social, moral, etc. and family structure and relations have tremendous impact upon and are reflective of basic values and aspirations of individuals and society). We would also argue that building strong families presents the best opportunity for building strong nations. These ideas are increasingly subject to reformative notions, but nonetheless shape society. See, e.g., LYNN D. WARDLE & LAWRENCE C. NOLAN, FUNDAMENTAL PRINCIPLES OF FAMILY LAW 20-21 (2d ed. 2006) (discussing family law issues as defining and shaping society and revealing a nation's vision for the future).

86. See EWING, *supra* note 11.

87. For example, the Obama Administration has announced its support for changing one of the rules of the INA in order to allow U.S. citizens to more effectively petition for legal residency for their family members, even if they entered the country illegally. See Julia Preston, *Tweak in Rule to Ease Path in Green Card*, N.Y. TIMES, Jan. 6, 2012, http://www.nytimes.com/2012/01/07/us/path-to-green-card-for-illegal-immigrant-family-members-of-americans.html?_r=0.

88. WESSLER, *supra* note 7, at 3 (stating that children often "lose the opportunity to ever see their parents again when a juvenile dependency court terminates parental rights."); see also Lauren Gilger, et al., *Adoption over 5-Year Old Boy Pits Missouri Couple vs. Illegal Immigrant*, ABC NEWS, Feb. 1, 2012, <http://abcnews.go.com/Blotter/adoption-battle-year-boy-pits-missouri-couple-illegal/story?id=15484447#.Tywz1M126ZA> (story discussed *infra* Part II). No parent wants to lose their parental rights to their child, and generally no parent would leave their child behind. Termination of parental rights may be a process that results from forced separation, but these two areas of concern deserve further study, though they are beyond the scope of this article.

89. This legal term's literal meaning in Latin is "parent of his or her country" and it is defined as "the state in its capacity as provider of protection to those unable to care for themselves." BLACK'S LAW DICTIONARY 1221 (9th ed. 2009). For a comprehensive review of the doctrine of *parens patriae*, particularly as it relates to children and achieving their best interests, see Natalic Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare*, 6 MICH. J. GENDER & L. 381 (1999-2000).

90. See generally Carola Suárez-Orozco, *In the Best Interest of Our Children: Examining Our Immigration Enforcement Policy: Ad Hoc Hearing on Immigration Before the House of Representatives*, 111th Cong. (2010) (Written Statement on Behalf of the American Psychological Association), available

whose families are at the center of the immigration debate.⁹¹ As a result, the deconstruction of immigrant families,⁹² will lead to the rise of additional child welfare, healthcare, and educational problems. Perhaps what is most distressing for immigrant families is that their forcible separation is due neither to abuse nor neglect or other forms of unfit parenting, but, rather, to the parents' undocumented status and their subsequent detention and removal.⁹³ There are at least "22 states where these cases have emerged in the last two years. This is a growing national problem, not one confined to border jurisdictions or states."⁹⁴ The negative impact this type of family separation has on the children involved is particularly regrettable. Not because this impact is worse than an abuse or neglect situation, but rather because the harm the children experience as a result of parental deportation is irreparable,⁹⁵ even though this is avertable by implementing immigration policies that avoid shattering family unity.⁹⁶

In these kinds of circumstances, federal immigration law functions as family policy, and often results in the separation of immigrant families.⁹⁷ These enforcement priorities and procedures are often based on the assumption that, once the parents are deported, their children will eventually repatriate and reunite with their parent in the latter's country of origin.⁹⁸ Unfortunately, the reality is that children are often permanently left behind in the United States when their parents are deported.⁹⁹ The lack of a more tailored policy that takes these children's best interests into account places their lives and well-being in jeopardy.¹⁰⁰ The conflict

at <http://www.apa.org/about/gr/issues/cyfl/immigration-enforcement.aspx> (discussing concerns about current U.S. immigration policy and enforcement processes and the psychological impact on children).

91. See Christine James-Brown, *Children Pay for Crackdown on Illegal Immigrants*, HUFFINGTON POST (Nov. 22, 2011), http://www.huffingtonpost.com/christine-jamesbrown/children-pay-for-crack-do_b_1105708.html. James-Brown is the CEO of the Child Welfare League of America. *Id.*

92. See Wessler, *supra* note 2; Glanton, *supra* note 3; Gorman, *supra* note 4.

93. See WESSLER, *supra* note 7, at 4.

94. *Id.*

95. See Chaudry, *supra* note 25, at ix-x; see also Hirokazu Yoshikawa & Carola Suárez-Orozco, *Deporting Parents Hurts Kids*, N.Y. TIMES, Apr. 20, 2012, http://schd.ucdenver.edu/schoolcounseling/files/2012/04/Deporting-Parents-Hurts-Kids-NYTimes.com_1.pdf (Various sources of research "reveal[] the deep and irreversible harm that parental deportation causes in the lives of their children. Having a parent ripped away permanently, without warning, is one of the most devastating and traumatic experiences in human development.").

96. See James-Brown, *supra* note 91; see also Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 AM. J. COMPARATIVE L. 511 (1995) (analyzing the role of the family in immigration law, finding the family as the key element for effective immigration policy in promoting child welfare); see also Jacqueline Hagan, Karl Eschbach & Nestor Rodriguez, *U.S. Deportation Policy, Family Separation, and Circular Migration*, 42 INT'L MIGRATION REV. 64 (providing insight and analysis on deportation drawn from findings resulting from interviews with a random sample of 300 El Salvadoran deportees, examining how family relations, ties, remittance behavior, and settlement experiences are disrupted by deportation, and how these ties influence future migration intentions); see also Lavanya Sithanandam, *Failing Families: Immigration Enforcement Policies Unfairly Hurt Many Children Who Are Citizens*, BALTIMORE SUN, Mar. 11, 2009.

97. See James-Brown, *supra* note 91. For scholarly treatment of this problem in U.S. immigration, see generally Zug, *supra* note 52; Ezcer, *supra* note 69; Abrams, *supra* note 52; Hagan et al., *supra* note 96.

98. See generally Hagan et al., *supra* note 96; WESSLER, *supra* note 7, at 4.

99. See Yoshikawa, *supra* note 95. See, e.g., *The Matter of IGE in Deportation Proceedings*, Interim Dec. #3230 (Sept. 16, 1994) <http://www.uscis.gov/ilink/docView/INT/HTML/INT/0-0-0-7314/0-0-0-14444.html> (stating deported parents were held to be fully responsible for leaving their child behind).

100. See, e.g., Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement*

between family law and restrictive immigration policies within the federal law is conspicuous, for example, “although federal law requires child welfare departments to make diligent efforts toward family reunification, when parents are detained [or deported] that’s basically impossible.”¹⁰¹ The deportation of parents itself contradicts the objective of the INA to reunite families.

Since this problem primarily affects undocumented immigrants and their families, providing more opportunities for immigrants to enter legally is the obvious and preferred method for protecting U.S.-born children from being separated from their parents by deportation. Critics of this approach contend that these U.S. born children are “anchor babies” who enable their parents to remain in the U.S. legally, ahead of other applicants.¹⁰² Opposition to birthright citizenship, however, directly conflicts with the mandates of the United States Constitution.¹⁰³ Furthermore, the citizenship status of these children does not enhance their parents’ citizenship path; rather, according to the INA, the U.S.-born children of an immigrant must wait until they are 21 years old in order to initiate the process of filing for their parents’ legal residency, and even then, can only do so if the parents are not residing in the United States.¹⁰⁴ Thus, the U.S.-born children of undocumented immigrants enjoy the full benefits of U.S. citizenship, which are guaranteed by the Citizenship Clause of the

Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011) <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> (listing different factors that Field Office Directors, Special Agents, and Chief Counsel should consider, but notably lacking any reference to a consideration of the best interests of children of deported parents).

101. WESSLER, *supra* note 7; *see also* REASONABLE EFFORTS, *supra* note 84, at 2. Federal law has long required state agencies to demonstrate that reasonable efforts have been made to provide assistance and services to prevent the removal of children from their homes and to make it possible for a child who has been placed in out-of-home care to be reunited with his or her family. *Id.*

102. *See* Yoshikawa, *supra* note 95 (indicating that “[b]irth tourism’ is a xenophobic myth”); *see also* Alan Gomez, *Immigration Report: No rush across border to give birth*, USA TODAY, Feb. 2, 2011.

103. Some argue that the Citizenship Clause excludes granting citizenship to children born to immigrants not lawfully present in the U.S. *See, e.g., Legislation Denying Citizenship at Birth to Certain Children Born in the United States: Hearing Before the Subcomm. on Immigration and Claims and on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. (1995) (Statement of Walter Dellinger, Asst. Att’y Gen.), available at <http://www.justice.gov/olc/deny.tes.31.htm>. However, for a concise explanation of the well-established history detailing the inaccuracy of that position, *see Societal and Legal Issues Surrounding Children Born in the United States to Illegal Alien Parents: Hearing before Subcomm. on Immigration and Claims and Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 105-09 (1995) (Statement of Prof. Gerald L. Neuman, J.), reprinted in THOMAS ALEXANDER ALEINIKOFF, ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 36-38 (Thomson West 6th ed. 2008). The legislative history of the Fourteenth Amendment provides strong confirmation that birth in the United States would suffice to confer citizenship on children of aliens of any race, as it had earlier done for children of unnaturalized European immigrants. . . . Nor is there anything in the language, legislative history, or traditional interpretation of the Citizenship Clause that would exclude children born in the United States to aliens who are not lawfully present here.

Id.;

see also Margaret Mikyung Lee, *Birthright Citizenship Under the Fourteenth Amendment of Persons Born in the United States to Alien Parents*, CONG. RES. SERV., Aug. 10, 2010, at <http://www.fas.org/sgp/crs/misc/RL33079.pdf> (tracing the history of the birth citizenship constitutional principle and its proposed amendments); *see also* Gomez, *supra* note 6 (noting that polling “conducted by the Pew Research Center for the People & the Press found that 56% of Americans did not want to bar the children of illegal immigrants born in the U.S. from becoming citizens”).

104. *See* INA § 201(b)(2)(A)(i); *see also* Gomez, *supra* note 99 (quoting Frank Sharry from America’s Voice).

Fourteenth Amendment,¹⁰⁵ but their parents must wait a minimum of 21 years, and sometimes much longer, to qualify for legal residency in the United States.¹⁰⁶ A recent Congressional proposal in the House and Senate, however, works to exclude the children of undocumented immigrants from obtaining citizenship.¹⁰⁷ These types of proposals place children squarely at the center of immigration reform, but the experiences of these children and their families are often overlooked by the proponents of these kinds of measures. Undocumented immigration is never a U.S. born child's decision, or responsibility, or choice. Still, the lack of federal planning for the best interests of children left behind from their parents' deportation for lack of documentation is apparent; federal intervention in families happens every day via immigration enforcement.¹⁰⁸

The deportation of undocumented parents of U.S.-born children is high and USCIS has reported that more than 46,000 parents were deported in 2011.¹⁰⁹ Their children were left behind as wards of their state of residence.¹¹⁰ Currently, more than 5,000 children are in foster care,¹¹¹ and their numbers will only rise as the overall rate of deportations continues to increase.¹¹² In the wake of their parents' deportation, these children are forced to rely on already overwhelmed state child

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

106. See INA § 201(b)(2)(A)(i). Sadly, questioning the constitutionality of birthright citizenship for children of immigrant families sheds light retroactively on a shameful moment of U.S. history in the *Dred Scott* decision. We suggest that those regrettable mistakes repeated in family immigration would again threaten the future of a prosperous nation. See Neuman, *infra* note 107, at 36 (The “historical purpose of [the Citizenship] Clause” was “to overrule the most infamous decision in U.S. constitutional history, the *Dred Scott* decision. . . . [O]ne of the holdings of that case was that the *ius soli* rule of citizenship applied only to whites: free persons of African descent could not be citizens of the United States, even if they were born in the United States.”).

107. Birthright Citizenship Act of 2011, H.R. 140, 112th Cong. (2011) and S. 723, 112th Cong. (2011). Expressing his concern about such legislation, Professor Gerald Neuman argues that “[i]t is one thing for academics to propose a speculative new theory [questioning birthright citizenship] and submit it to professional refutation, but quite another thing to experiment with the rights of U.S. citizen children.” Neuman, *supra* note 103, at 40. For further journalistic and pop culture discussion see Marc Lacey, *Birthright Citizenship Looms as Next Immigration Battle*, N.Y. TIMES Jan. 5, 2011; Cindy Simpson, *Rubio and Birthright Citizenship*, AMERICAN THINKER (May 4, 2012). For a scholarly review of the historical notions of the concept of birthright citizenship, see Charles Wood, *Losing Control of America's Future—The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J. L. & PUB. POL'Y 465 (1998–1999).

108. See Yoshikawa, *supra* note 95 (“From January to June 2011, [ICE] removed 46,486 undocumented parents who claimed to have at least one child who is an American citizen. In contrast, in the entire decade between 1998 and 2007, about 100,000 such parents were removed.”).

109. DEP'T OF HOMELAND SEC., DEPORTATION OF PARENTS OF U.S. BORN CITIZENS, FISCAL YEAR 2011, (Mar. 26, 2012) (“ICE sought orders of deportation, exclusion, or removal in the cases of 39,918 aliens who claimed to have at least 1 [U.S. Citizen] child. ICE removed 46,486 aliens who claimed at least 1 USC child.”). This data is only now being gathered for the first time, reported by districts according to new tracking procedures implemented by ICE. *Id.*

110. See WESSLER, *supra* note 7 (detailing that the children left behind are placed in foster care and showing that states are left with responsibility and expenses associated with caring for those children).

111. Marjorie Valbrum, *Foster Care: Uncertain Futures Loom for Thousands of Immigrant Children*, America's Wire, (Jan. 7, 2013), <http://americaswire.org/drupal7/?q=content/foster-care-uncertain-futures-loom-thousands-immigrant-children-2>.

112. See *id.* (indicating that a “Freedom of Information Act request shows that almost one in four people deported in the last year was the mother or father of a United States citizen.”).

welfare agencies,¹¹³ placed “into systems that have proven that they too often exacerbate the problems [these] children face.”¹¹⁴ Recently, the Missouri Supreme Court found that the forced separation and termination of parental rights of an undocumented mother and her child based on the mother’s immigration status led to a “travesty of justice.”¹¹⁵ The case involved a custody battle between adoptive parents and the birth parent over a five-year old little boy.¹¹⁶ Cases of children trapped in a tug of war between undocumented birth parents whose parental rights are terminated and adoptive parents who have been promised a child are not uncommon.¹¹⁷ Increasingly, courts have to resolve cases concerning “vulnerable children who are caught in the clash of laws, culture, and parental rights that occur when their parents cross international boundaries.”¹¹⁸ These complex decisions shed light on the tribulations children unjustly bear as a result of immigration enforcement

113. Child Protective Services (CPS) is a government service agency to benefit children under siege. One small piece of evidence for this fact is the recent case brought on behalf of several foster children in the Nevada system by the National Center for Youth Law, *Henry A. v. Willden*, 9th Cir., No. 10-17680 (May 14, 2012), where the foster children’s claims for systemic failures by the system for abuse, endangerment, neglect and various failures to provide protection and medical attention to them were allowed to go forward based on the “special relationship” doctrine (citing to *Tamas v. Dep’t of Soc. Servs.*, 9th Cir., No. 08-35862 (Dec. 22, 2010)) created by the children’s reliance on that system, among other legal rationale, and denying immunity to State and County officials and CPS case workers. The case noted that the state’s decision to place the children in state custody and, thus, into the foster care system created the requisite state action. See also Danielle Dellerson, *County, State Officials Aren’t Immune to Claims over Troubled Foster Care System*, U.S. LAW WEEK (May 15, 2012) (revealing that such poor care was taken with one child’s medical records that he was “given a dangerous combination of psychotropic medications” placing him on “the brink of organ failure”); see also Brian Haynes, *Appeals Court Reinstates Child Welfare Suit*, LAS VEGAS REV. J. (May 4, 2012) (for a local perspective on the trouble facing the overloaded and overburdened foster care system in Nevada highlighted by the case). “The lawsuit says the agencies consistently failed to provide stability, appropriate medical and mental health care and even a minimal level of safety for the 3,600 children in their custody at any given time.” *Id.*

114. James-Brown, *supra* note 91; see also RICHARD WEISSBOURD, *THE VULNERABLE CHILD: WHAT REALLY HURTS AMERICA’S CHILDREN AND WHAT WE CAN DO ABOUT IT* 130 (1996) (The web of care is not “governed by any coherent philosophy about the nature of child and family troubles, about the basic needs of all children, or about how to promote healthy child and family development. As a result, the system fails many different kinds of children and families in many different ways.”).

115. Gilger, *supra* note 88, at 1-3 (stating there is a “growing trend in which immigrants are being deemed unfit parents because they crossed the border illegally.”). The lower state court placed the child for adoption without the birth mother’s consent. See *S.M. v. E.M.B.R.*, 332 S.W.3d 793 (Mo. 2011). The court reversed and remanded since the trial court had plainly erred in terminating the mother’s parental rights without having complied with statutory requirements for the best interests of the child. *Id.* We find it interesting, if not disturbing, that a trial court would trivialize illegal immigration as a “life style” choice and presume that an undocumented parent was not acting in her child’s best interests by virtue of her decision to migrate.

116. Gilger, *supra* note 88, at 1 (discussing the details of seven-month-old Carlos’ removal to foster care when his mother was arrested at the poultry plant where she worked in Missouri, charged, sentenced and deported).

117. These cases have occurred in Nebraska, see *In re Angelica L. & Daniel L. v. Maria L.*, 767 N.W.2d 74 (Neb. 2009) (reversing an order for termination of parental rights for a mother who was deported because the state did not present clear and convincing evidence that termination of parental rights was in the children’s best interests), Washington, see *In re Dependency of M.R.*, 270 P.3d 607 (Wash. Ct. App. 2012) (reversing a trial court’s removal of a child from grandparent caregivers solely due to their immigration status), Alabama, see *J.B. v. DeKalb County Dep’t of Human Res.*, 12 So. 3d 100 (Ala. Civ. App. 2008) (reversing an order for termination of parental rights for a father who was deported), and Arizona, see *Marina P. v. Ariz. Dep’t of Econ. Sec.*, 152 P.3d 1209 (Ariz. Ct. App. 2007) (termination of parental rights order for undocumented mother is reversed and remanded).

118. Gilger, *supra* note 88, at 1. Sadly, these cases have not received a lot of scholarly attention.

processes, and the conflict between federal and state family law. As these cases show, children can lose parental relationships, contact with their siblings and extended family and kin, knowledge of their medical history, their cultural heritage, among other losses. The need for immigration reform that maintains and reunites families and prevents their separation is urgent.

Compelled state participation through its provision of foster care (or adoptive homes) for children left behind as a result of federal immigration enforcement procedures is categorically problematic, which further depletes the resources of under-funded state child welfare resources.¹¹⁹ The federal government rarely, if ever, acknowledges or addresses the burden placed on states when it deports the parents of young American citizens.¹²⁰ State family courts and social services are unreasonably expected to identify and care for an increasing number of children left behind with very limited resources in addition to an even more limited ability to reunify those children after their parents are deported.¹²¹ For example, state authorities must deal with food shortages, housing issues, and sometimes placements for these children in foster care or adoptive homes.¹²² In addition, they must attend to the emotional needs of children who have been traumatized by the deportation of their parents. Adverse behavior changes such as increased crying and anxiety was apparent in two-thirds of one group of children six months after they were separated by their parents.¹²³ States are charged with the duties of child protection, however, federal authorities tend to overlook, or worse yet, ignore, the serious problem of children left behind.

Another important concern in immigration policy involves juvenile matters which also reveal a federal-state conflict. Children who are legal immigrants can endanger their legal status and become subject to deportation when they are convicted of juvenile delinquency,¹²⁴ thereby resulting in a separation of that child from his or her family. Although the Attorney General of the United States may “cancel removal of an alien who is . . . deportable from the United States” under certain conditions,¹²⁵ immigration authorities may still deport an adolescent if any

119. See CERVANTES, *supra* note 5, at 4-6; see also CHILDREN'S DEFENSE FUND, CHILD WELFARE IN THE UNITED STATES FACTSHEET (Jan. 2010), <http://www.childrensdefense.org/child-research-data-publications/data/state-data-repository/cwf/2010/child-welfare-financing-united-states-2010.pdf> (listing the total amount of children in foster care and the total amounts of federal and state expenditures for child welfare nationwide). For a list of fact sheets that detail the child welfare costs for every state, see CHILDREN'S DEFENSE FUND, CHILD WELFARE FINANCING STATE FACTSHEETS 2010 (2010), <http://www.childrensdefense.org/policy-priorities/child-welfare/child-welfare-financing/child-welfare-financing-state-factsheets-2010.html>.

120. Our research has not revealed a clear recognition by the federal government of the burden on the states of increased immigration enforcement procedures that separate families.

121. See CERVANTES, *supra* note 5, at 4-6.

122. AJAY CHAUDRY & RANDOLPH CAPPAS ET AL., URBAN INSTITUTE, FACING OUR FUTURE: CHILDREN IN THE AFTERMATH OF IMMIGRATION ENFORCEMENT (2010).

123. *Id.*

124. INA §237 (a)(2)(A)-(B). Criminal grounds for deportation include domestic violence convictions, controlled substance convictions, firearms convictions, and conviction for crimes of moral turpitude. *Id.*

125. Those conditions are threefold: 1) the child has resided lawfully in the United States as a permanent resident for at least five years, 2) has continuously resided in the United States for seven years, and 3) has not been convicted of any aggravated felony. *Id.* Aggravated felony offenses are listed at INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).

one of those conditions is not met.¹²⁶ Moreover, the Ninth Circuit found that the Board of Immigration Appeals' refusal to impute a parent's residency to their child was unreasonable,¹²⁷ however, the Supreme Court held that the Board of Immigration Appeals is not required to impute a parent's resident status to his or her child for the purpose of satisfying the statutory criteria necessary for the cancellation of the child's removal.¹²⁸ Despite the fact that the general philosophy of state juvenile family law is based on rehabilitation, immigrant children charged or convicted of juvenile delinquency may be subject to far harsher consequences, such as deportation and permanent separation from their families.¹²⁹

Children who are left behind in the wake of their parent's deportation are only recently being described as "the new face" of calls for immigration reform.¹³⁰ Exacerbating the situation, even after they are deported and the family is separated, the deported parents of children who are left behind are often denied the ability to communicate with their children who remain behind in foster care in the U.S.¹³¹ Some deported parents face the dilemma of either risking further prosecution for reentry into the U.S. to be present at juvenile court hearings or losing their parental rights altogether.¹³² The risk of potentially permanent family breakdown increases for parents attempting to return to the United States to attempt to reunify with their children; if apprehended again, they may be charged with illegal reentry, a federal criminal offense that carries a lengthy sentence and now accounts for nearly half of all federal criminal prosecutions.¹³³

These separations are traumatic for immigrant families. University of South Carolina law professor Marcia Yablom-Zug has suggested that when immigration

126. 8 U.S.C. § 1229b(a) (2006). Though a child may enter the country lawfully, or may gain legal permanent residence status after one of his or her parents does, the child's circumstances are considered independently of his or her parents. Children must meet the requirements of § 1229b(a) on their own, apart from any parental imputation of time residing in the country. *Holder v. Martinez Gutierrez*, 566 U.S. ____ (2012) (No. 10-1542). In *In re Escobar*, 24 I. & N. Dec. 231, the Board of Immigration Affairs (BIA) concluded that a child immigrant must meet the requirements of INA, 66 Stat. 187, 8 U.S.C. § 1229b(a) (2006) on their own.

127. The Ninth Circuit relied on its previous holdings in *Mercado-Zazueta v. Holder*, 580 F.3d 1102 (2009), and *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (2005), both of which imputed parental residency to the child, sparing the child from deportation and family separation.

128. *Martinez Gutierrez*, 566 U.S. at *13. The High Court seemed to understand that strict application of the rule would require the child be deported, and potentially separated from his family. The Court ruled that the BIA's rejection of imputation is based on a permissible construction of the statute, and noted that simply because the statute is silent on imputation does not allow it to be read as imputation merely because that would make the rule family-friendly. *Id.* at 7-10.

129. See generally MARTIN R. GARDNER, UNDERSTANDING JUVENILE LAW (2003) (offering a comprehensive perspective on juvenile laws issues).

130. Glanton, *supra* note 3 (detailing personal stories of family destruction over parental deportation, and highlighting that the child left behind is "the new face" of the immigration debate). Unaccompanied immigrant children are another face of immigration enforcement beyond the scope of this article, but for a fairly thorough overview of the grave concerns in that area of law as they affect children and their best interests, see Alejandra Lopez, Seeking "Alternatives to Detention": Unaccompanied Immigrant Children in the U.S. Immigration System (2010) (unpublished Honors College Theses, Pace U., Paper 97), available at http://digitalcommons.pace.edu/honorscollege_theses/97.

131. Glanton, *supra* note 3; see also generally Bill Piatt, *Born As Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35 (1988) (urging that public policy makers consider the aggregate effect of the breakup of close family ties, taking into account the cumulative effect of the adverse consequences of deportation on children).

132. Wessler, *supra* note 2.

133. Piatt, *supra* note 131.

law separates families, even unintentionally, that severance is a deprivation of liberty, as the “constitutional rights of parents are not confined to citizens.”¹³⁴ Despite the weakening of parental rights in the child welfare system,¹³⁵ parents’ rights are constitutionally protected in the United States.¹³⁶ Accordingly, immigrant parents also have a right to the care and custody of their own children.¹³⁷ This article argues that incorporating the best interests of the child doctrine into current immigration law and enforcement practices can help resolve this problem.¹³⁸

Some critics argue that while unfortunate, the separation of families resulting from deportation could be prevented if immigrant families stayed put or simply returned to their home countries on their own.¹³⁹ Others argue that, to prevent family separation, U.S.-born children should be deported with their immigrant parents,¹⁴⁰ while others contend that, despite how undesirable the consequences of

134. See Yabloug-Zug, *supra* note 52 (“Immigrant parents also have the right to the care and custody of their children.”).

135. *Id.* at 35-37 (noting the weakening of parental rights in the child welfare system).

136. See, e.g., *Ex parte Sullivan*, 407 So. 2d 559, 563-64 (Ala. 1981) (“The law recognizes that a higher authority ordains natural parenthood, and a fallible judge should disturb the relationship thus established only where circumstances compel human intervention.”); *Santosky v. Kramer*, 455 U.S. 745, 747 (1982) (“Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.”); *In re Victoria M. v. Carmen S.*, 255 Cal. Rptr. 498, 503 (Cal. App. 3d 1989) (where the court discussed the rights of parents to raise their own children as fundamental, requiring any curtailment of that right be subject to clear and convincing evidence).

137. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that constitutional protections are “universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of . . . nationality”).

138. See *infra* Part II. Professor Yabloug-Zug has developed her position with a children’s rights perspective in *Should I Stay or Should I Go? Why Immigrant Reunification Decisions Should Be Based on the Best Interests of the Child*, B.Y.U. L. REV. 1139 (2011). We agree with Professor Yabloug-Zug’s analysis of the application of the best interest doctrine, but not necessarily on the children’s rights framework as the appropriate mechanism for reaching that standard. Other scholars also seem to disagree that children’s rights is the best approach, observing that it has not necessarily helped children’s best interests. See, e.g., MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS (2005) (examining the harm done to children by children’s rights from a child advocacy perspective). Professor Guggenheim, a clinical professor who self-identifies as a child advocate is very concerned over the falsity and manipulation of children’s rights, noting that the more he identifies with child advocacy the less he identifies with children’s rights. *Id.* See also Lynn Marie Kohm & Maria Lawrence, *Sex at Six: The Victimization of Innocence and Other Concerns over Children’s “Rights,”* 36 BRANDEIS J. FAM. L. 361 (1997) [hereinafter Kohm, *Sex at Six*] (exploring the unwitting manipulation of a child’s innocence in pursuit of rights for children). Still other scholars disagree heartily with that perspective arguing in favor of a strong children’s rights socio-legal structure. One of the foremost scholars on these ideas is Professor James G. Dwyer, who argues for a children’s rights framework in *THE RELATIONSHIP RIGHTS OF CHILDREN* (2006). The rise in a children’s rights perspective is largely due to the United Nations Convention on the Rights of the Child, raising the issue of children’s needs in a rights framework that is ineffective at best. See Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT’L L. J. 449 (1996) (also summarized and reiterated at Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to their Rights*, First Things (Aug.-Sept. 1995), <http://www.firstthings.com/article/2008/09/001-abandoning-children-to-their-rights-18>); see also Lynn Marie Kohm, *Suffer the Children: How the United Nations Convention on the Rights of the Child Has Not Supported Children*, 22 N.Y. INT’L L. REV. 1 (2009) (demonstrating the failure of the Convention on the Rights of the Child in protecting children from harm in signatory nations).

139. See, e.g., Gilger, *supra* note 88, at 3 (“When parents break the law, they undertake a certain amount of risk that there are going to be consequences.” (quoting Federation for American Immigration Reform in the context of termination of a parent’s rights solely due to immigration status)).

140. See Edward Sifuentes, *Region: Hunter: U.S.-Born Kids of Illegal Immigrants Should Be*

immigration enforcement may be, illegal immigration is criminal activity that cannot go unpunished.¹⁴¹ However, these arguments ignore the social and demographic reality of U.S. immigration and studies have shown that multiple factors influence the migration of families to the United States.¹⁴² The argument that enforcement alone will resolve the question of undocumented migration is not a viable solution;¹⁴³ the realities of household demographics undermine such overly simplistic solutions. Many families are “mixed-status families” in which, “some family members are [U.S.] citizens, legal residents, or [are] in the process of regularizing their status, while others remain undocumented.”¹⁴⁴ The problems are far too complicated for an enforcement-only approach to resolve.

Awareness of the regulatory impact of immigration law on families and their children is a critical starting point. Minimizing that impact is the best course of action to prevent immigration law from regulating the family unintentionally, or from weakening the nation which can be strengthened by strong families and improved immigration policy. Protecting the best interests of children belonging to families caught up in immigration enforcement procedures is vital. Placing children in the center may or may not engage and empower them,¹⁴⁵ but will importantly not only allow for, but also encourage political transformation with a forward-looking focus on long-term stability in immigration reform.¹⁴⁶ While immigration involves issues of sovereignty, the best interests of a child standard should be an overarching principle that governs and dictates the exercise of that sovereignty whenever a child is involved.

II: APPLYING THE “BEST INTERESTS OF THE CHILD” STANDARD TO FAMILY IMMIGRATION

Courts and state and federal entities are required to adhere to the best interests of the child doctrine,¹⁴⁷ which is a doctrine that is “central to American family law.”¹⁴⁸ It is also essential that immigration laws and policies follow this legal

Deported, U-T SAN DIEGO, Apr. 27, 2010, <http://www.utsandiego.com/news/2010/apr/27/rcgion-hunter-us-born-kids-of-illegal-immigrants/> (discussing that claim).

141. See STEVEN A. CAMAROTA & JESSICA VAUGHAN, CENTER FOR IMMIGRATION STUDIES, IMMIGRATION AND CRIME: ASSESSING A CONFLICTED ISSUE (2009), available at <http://cis.org/ImmigrantCrime> (discussing the problem of immigrant crime).

142. See generally David Bartram, *International Migration, Open Borders Debates, and Happiness*, 12 INT’L STUDIES REV. 339 (2010) (describing throughout the multiple factors that contribute to a family’s decision to migrate, and as a result either contribute to or deter happiness).

143. See Rosenblum, *supra* note 11, at 10-15.

144. Suárez-Orozco, *supra* note 90.

145. *Id.* at 8, 10. Though a comprehensive discussion of children’s rights is beyond the scope of this piece, for a more in-depth discussion of the empowerment of children, see *infra* Section II.

146. International relations scholars are implementing this focus in their research to solve matters of global politics. See Alison Watson, *Children and Post-Conflict Security Governance, in EUROPEAN SECURITY GOVERNANCE: THE EUROPEAN UNION IN A WESTPHALIAN WORLD* (Charlotte Wagnsson., J. Sperling, & J. Hallenberg, eds. 2009), and cited in Wagnsson et al., *supra* note 10, at 11; see also HELEN BROCKLEHURST, WHO’S AFRAID OF CHILDREN? CHILDREN, CONFLICT AND INTERNATIONAL RELATIONS (2006).

147. See generally Kohm, *supra* note 13; see also MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 121-26 (1994) (discussing the theoretical framework of the best interests of the child doctrine).

148. Kohm, *supra* note 13, at 337 (outlining the development of the doctrine, how the best

standard in processes which directly impact children, who even USCIS officials recognize are “the most vulnerable members of society.”¹⁴⁹ This American concept of protecting a child’s best interests is based on the recognition of the dignity bestowed on all human beings (regardless of their age), coupled with a recognition that children are naturally weaker, and therefore more vulnerable, than adults.¹⁵⁰ Grounded in the belief of helping and benefitting children for whom the law identifies a requisite level of protection, this standard requires more than lip service. The best interests of the child doctrine demands that policymakers and federal officials actively protect children.

As a fundamental predicate for allowing state courts to establish parent custody, child placement, and other important decisions that significantly affect children, the best interests of the child standard “is heralded because it espouses the best and highest standard; it is derided because it is necessarily subjective; and it is relied upon because there is nothing better.”¹⁵¹ Although no express customary definition exists across the United States for the best interests of the child, every state has specific statutes listing factors that courts must consider prior to making a determination of outcomes to promote the best interests of a child in specific circumstances.¹⁵² In every court determination, the factors considered include “the child’s ultimate safety and well-being as the paramount concern.”¹⁵³

The problem of myriad children experiencing a disruption of family relationships as a consequence of immigration enforcement procedures makes the need to implement this doctrine urgent.¹⁵⁴ Under this doctrine, children are special

interests of children are served by family preservation, and encouraging judicial protection of that application).

149. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, NEWS RELEASE: ICE PROTECTS CHILDREN, ARRESTS CRIMINALS (June 22, 2011), *available at* <http://www.ice.gov/news/releases/1106/110622washingtondc.htm> (reporting that “children deserve to be protected and allowed to grow in a safe environment”).

150. Kohm, *Sex at Six*, *supra* note 138, at 372-75 (also noting that this human dignity is based in the Christian ethic foundation to the nation’s beginnings). The importance of protecting vulnerable children is well-known and acknowledged by every U.S. government agency. *Id.*; *see also* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *supra* note 149.

151. Kohm, *supra* note 13, at 337.

152. For a nationwide summary of the laws requiring a consideration of the best interests of children prior to making any court decision, *see* U.S. DEP’T OF HEALTH & HUMAN SERVS., DETERMINING THE BEST INTERESTS OF THE CHILD: SUMMARY OF STATE LAWS 1, 2 (2010), http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf [hereinafter BEST INTERESTS]. *See also* Kohm, *supra* note 13, at 345-47, 441; Mason, *supra* note 147, at 125; U.S. COMM. ON CHILD AND FAMILY WELFARE, PARENTING OUR CHILDREN: IN THE BEST INTEREST OF THE NATION (1996) (Most states include factors for judicial decision-making, while others specify these factors by statute, using Title 722.23 § 3 of the Michigan Child Custody Act of 1970 as illustrative of a state standard that lists a large number (10) of factors to direct judicial discretion). The problem of judicial discretion has been discussed in terms of “the least detrimental alternative.” *See, e.g.*, JOSEPH GOLDSTEIN, THE BEST INTEREST OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE (1996); Elizabeth S. Scott, *Pluralism, Parental Preference in Child Custody*, 80 CAL. L. REV. 615 (1992).

153. BEST INTERESTS, *supra* note 152, at 2. The earliest recorded ruling using the best interests of the child as the standard for review was Solomon’s wise decision in 1 Kings 3:23-28 where King Solomon was confronted with two women fighting over the motherhood of a child. When the King threatened to cut the child in two, he recognized that the real mother would give up her own claim to the child to prevent harm from coming to that child. For further discussion of this parallel, *see* Marsha B. Liss and Marcia J. McKinley-Pace, *Best Interests of the Child: New Twists on an Old Theme*, 10 PERSPECTIVES IN LAW AND PSYCHOLOGY 339 (1999); Henry H. Foster, *Adoption and Child Custody: Best Interests of the Child*, 22 BUFF. L. REV. 1 (1973).

154. *See* WESSLER, *supra* note 7, at 4 (Currently, children of immigrants who are deported or

members of society that require unique treatment due to their age and vulnerability,¹⁵⁵ relying on adults to protect their best interests. At a minimum, all children should live in environments that provide some order and meet their basic physical and material needs.¹⁵⁶ Children should have a continuous relationship with a consistently attentive and caring adult who treats them like they are special, stimulates and engages them, provides them with appropriate responsibilities and challenges, and passes on important social and moral expectations.¹⁵⁷ Every state in the United States reflects this legal standard in its family law code.¹⁵⁸ Barring neglect and abuse, children thrive when they are with their own family.¹⁵⁹

In 2011, there were “at least 5,000 children in foster care because their parents were deported or [] arrested due to irregular immigration status,” and these figures are likely to triple under current immigration laws.¹⁶⁰ In Colorado, for example, there are 1,700 children in foster care in Denver alone¹⁶¹ and there is evidence that this amount includes children of immigrant parents who were deported or detained.¹⁶² Neither Immigration and Customs Enforcement (ICE) nor state social service agencies are required to compile this information,¹⁶³ thus, the statistics are scant. Regardless, what remains clear is that states are paying to care for those children without any recourse to federal assistance for that burden. Furthermore, these numbers are not inclusive of children who are not detained in foster care, but are left behind by their parents in the care of others.¹⁶⁴ These numbers and facts reveal that current immigration enforcement processes are outrageously harmful to children, separating them from their families in a manner that is largely indifferent to their best interests. State governments need support, cooperation, and recognition from the federal government for the burden imposed on states and directly caused by families separated due to detention and deportation of parents. Placing these

detained are “approximately 1.25 percent of the total children in foster care. If the same rate holds true for new cases, in the next five years, at least 15,000 *more* children will face these threats to reunification with their detained and deported mothers and fathers.”); *see also* Yoshikawa, *supra* note 95 (describing parental deportations during President Obama’s administration).

155. WEISSBOURD, *supra* note 114, at 138.

156. *Id.*

157. *Id.*

158. *See* BEST INTERESTS, *supra* note 152; *see also* Kohm, *supra* note 13, at 441; Mason, *supra* note 147, at 125.

159. *See, e.g.*, RESOURCE GUIDELINES, *supra* note 84, at 12-13 (“[C]hildren need the security of having parents committed to their care. The lack of parents who provide unconditional love and care can profoundly insult a child’s self image.”).

160. Miraval, *supra* note 7 (citing a report from New York’s Applied Research Center discussing numbers of immigrants and trends in Florida, New York, California, Utah, and Texas).

161. *Id.* (“For privacy reasons and to protect the children the Denver Department of Human Services does not keep statistics about the immigration status of the parents of children in foster care.”).

162. According to the report, that means there are potentially 136 children who are in Colorado’s foster care system because their parents have been detained or deported. *Id.*

163. *Id.* (“Part of the problem in estimating how many children of deported immigrants are transferred to foster families is that national data simply do not exist . . . because neither ICE nor social services departments are required to compile the information.”). For comprehensive data on numbers of children in foster care by state, *see* U.S. DEP’T OF HEALTH AND HUMAN SERVICES, THE AFCARS REPORT, ADMINISTRATION FOR CHILDREN & FAMILIES (2009), *available at* <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport16.pdf>.

164. *See supra* notes 2-4. There are no statistics on children left behind in these private situations, but they are likely as numerous as those left behind in foster care, compounding the problem this article seeks to address.

vulnerable children at the center of the immigration reform debate by making their case in light of the family law implications together with the application of immigration law, could be accomplished with an implementation of the best interests of the child standard.

The best interests of the child standard is contained in, and described in detail, in every state's family law statutes.¹⁶⁵ It is the primary consideration of family law courts and gives primacy to the stability of the parent-child relationship.¹⁶⁶ State family courts must consider numerous factors in their judicial discretion, including the health, safety and welfare of the child,¹⁶⁷ the relationship between the parent and child, the age of the child, the physical and mental condition of the child, the child's developmental needs, the parents' involvement in the child's life, the needs of the child, and the child's relationships with siblings and extended family members. In addition, other factors that must be considered include, the child's primary caregiver, the relationships the child will need in the future for proper care and upbringing, reasonable preferences of the child based on intelligence, understanding and maturity,¹⁶⁸ the stability of the child's environment, the child's cultural background,¹⁶⁹ and any other factors a court may deem necessary to secure the best interests of the child.¹⁷⁰

There are various ways to interpret what is in the best interests of a child, and it is generally left up to the discretion of the judicial decision-maker.¹⁷¹ Though these notions and considerations are routinely used in a family court, they can easily be implemented by any judge or administrative hearing officer whenever a child is involved in any proceeding, including an immigration proceeding, just as they have generally become the accepted standard for juvenile criminal law proceedings.¹⁷² This standard, however, could be used to separate a family as well, particularly in cases revealing a history of family abuse.¹⁷³ We realize, therefore, that the standard can also work to separate a child from his or her family. For example, an ICE official or immigration judge could use the best interest standard and determine that undocumented parents are unfit to care for their children¹⁷⁴ and separate a family on that basis. At least in that scenario, however, the immigration officials would have taken the child's best interest into consideration in making their decision. As immigration law and policy is currently executed, immigration officials do not take children's needs into consideration. For example, if in applying the best interest

165. See, e.g., *infra* notes 167-174.

166. See, e.g., Va. Code § 20-124.2 & 124.3; Ga. Code § 19-9-3.

167. See, e.g., Cal. Fam. Code § 3011.

168. See, e.g., Va. Code § 20-124.2 & 124.3; D.C. Code § 16-914; 750 ILCS 5/602; ORS § 107.137.

169. See, e.g., CONN. GEN. STAT. 46b-56(c). Regarding the need for child stability, see also Ruth Zafran, *Children's Rights as Relational Rights: The Case of Relocation*, 18 AM. U. J. GENDER SOC. POL'Y & L. 163 (2010).

170. See, e.g., VA. CODE § 20-124.3.

171. See generally Kohm, *supra* note 13 (discussing the double-edged usage of judicial discretion in best interest determinations); Rebecca M. Lopez, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635 (2012).

172. See generally Gardner, *supra* note 129.

173. See, e.g., ORS § 107.137.

174. "Unfit" generally entails abuse or neglect. See generally Tracey B. Harding, *Involuntary Termination of Parental Rights: Reform Is Needed*, 39 BRANDEIS L.J. 895, 969-97 (2001) (discussing the state interest and authority in protecting children from parental abuse or neglect).

standard, an immigration court determined that a child who would otherwise be left behind should also be deported along with his or her parents against both the wishes of the family and the child, at least what is best for that child would be part of the equation. For children who are U.S. citizens, the best interests standard would also involve assessing their best interests using the factors mentioned previously, which might indicate that children would be best reunited with their deported parents or that the children should remain in the United States based on their needs.¹⁷⁵ Ultimately if a child is indeed left behind, any judge or officer of the court should immediately consider what is in the best interests of that child, applying the appropriate factors. In cases where the child is of sufficient age and maturity that would allow for consideration of the desires and wishes of the child left behind.

If immigration officials and judges employed and applied the best interests standard from the state family law statutes where the immigration proceedings take place, then they would have a basis from which to pursue the best outcome for children and families involved. Because family law generally advances a child's benefit when that child's family is preserved and stabilized,¹⁷⁶ it is also critical that immigration policies attempt to protect children's interests and encourage family stability. This pressing issue requires the recognition that immigration law is effectively displacing and functioning as family law and policy as revealed by the effect it is having on immigrant families.¹⁷⁷ Simply stating that immigration courts and authorities should apply the best interest standard, without providing specific policy proposals, may provide those same state actors with a rationale for curtailing the rights of immigrant families rather than limiting the kinds of intrusions and separations that this article seeks to eliminate. Understanding this fact is critical to addressing these challenges for families and children both at the federal and state levels, and for finding solutions to protect the best interests of children left behind in the wake of those policies.

III: SPECIFIC POLICY PROPOSALS FOR THE BEST INTERESTS OF CHILDREN LEFT BEHIND

One of the basic principles of the best interests of the child doctrine is that a judge will base his or her ruling "not on the judge's own values, nor on the values of the adults [involved in] the case, but authentically on the foundations of the best interests of those children inherently and intrinsically vested with value and worth

175. The authors realize that deportation of U.S. citizen children is never ideal, however, when immigration law functions principally by separating families, we argue that children are better when raised by their own family instead of lingering in foster care with no connection to their families as is happening under the status quo. *See, e.g.*, RESOURCE GUIDELINES, *supra* note 84, at 12-13.

176. *See* REASONABLE EFFORTS, *supra* note 84, at 1. This effort for family reunification is both express and implicit throughout statutory family law code and required by federal law. *See* U.S. DEP'T HEALTH & HUMAN SERVICES, REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN (2012), *available at* https://www.childwelfare.gov/systemwide/laws_policies/statutes/reunify.pdf (noting that reasonable efforts refers to the activities of state social services agencies which aim to provide the assistance and services needed to preserve and reunify families, and that laws in all states, the District of Columbia, Guam, and Puerto Rico require the provision of services that will help families remedy the conditions that brought the child and family into the child welfare system).

177. *See generally* Ezcr, *supra* note 69.

apart from the law.”¹⁷⁸ Parental deportation proceedings must require an assessment of what is best for the children involved. Some parents may make the decision that leaving their U.S.-born children with family or friends is in the best interests of those children. Deciding what is in the best interests of children who are in placed in state foster care because their parents are detained or deported is unmistakably challenging. Though what is truly best for that child is not always straightforward and discernible, family reunification should be a primary concern. A parent’s lack of authorized immigration status alone should not be the basis for determining parental unfitness.¹⁷⁹ Parental unfitness generally requires clear evidence of neglect, abuse, or abandonment.¹⁸⁰ The lack of legal immigration status of parents should not constitute maltreatment of their children. Applying the best interests of the child doctrine enables judges to be “better prepared to make truly good, ideally even the best, decisions for children whose fate they hold in their hands, pens, opinions and courtrooms.”¹⁸¹

One of the greatest problems in the context of immigration policy enforcement of immigrant families is that of children being left behind by parents who are either detained and/or deported.¹⁸² Federal and state officials can begin taking steps towards implementing the best interest of the child standard in immigration contexts by taking the following steps:

A. Congress should pass the Child Citizen Protection Act

First, the federal government must amend the INA so that it prioritizes the best interests and well-being of children. In particular, Congress should provide that ICE and immigration courts should be authorized to proceed with all measures that are reasonable and possible to prevent the separation of children from parents who are in removal proceedings.¹⁸³ Congress’ primary concern is to keep families intact.¹⁸⁴ This objective can be better institutionalized by implementing regulations and guidelines (starting at the time of apprehension and continuing until deportation procedures) that take into account the best interests of children whose families are

178. Kohm, *Sex at Six*, *supra* note 138, at 339.

179. See Wessler, *supra* note 2 (Deportation too often leads to the “seamless termination of parental rights. In jurisdictions around the country, child welfare departments and children’s attorneys have successfully argued that it is in a child’s best interest to remain in the U.S. rather than join their parents in another country.”).

180. See *generally* Harding, *supra* note 174. Though the Supreme Court has not ruled on minimum circumstances to justify the termination of parental rights, it has held that the importance of the interests at stake mandate clear and convincing evidence as a basis for parental rights termination. See *Santosky v. Kramer*, 455 U.S. 745, 769 (1982). An act of illegally immigrating does not rise to clear and convincing evidence of harm to the child to warrant termination of parental rights.

181. Kohm, *supra* note 13, at 372.

182. See WESSLER, *supra* note 7, at 3-6.

183. Congress has proposed bills in both the House and Senate which would provide a good start for addressing these needs and allow protections for detained parents, including the ability to comply with child welfare case plans and the provision for family unity during deportation procedures so that parents could leave the country with their children. See *The Humane Enforcement and Legal Protections (HELP) for Separated Children Act*, H.R. 2607, 112th Cong. (2011); S. 1399, 112th Cong. (2011).

184. See *Karen Yuen Fong Young v. Reno*, 114 F.3d 879, 881 (9th Cir. 1997) (“Congress’ general purpose in enacting [8 U.S.C. § 1153(a)(4) on sibling immigration] was to keep families intact . . .”).

detained or deported.¹⁸⁵ Therefore, the INA should be amended to provide for minimal family separation in deportation proceedings where children are involved. The 112th Congress had a bill proposed titled the Child Citizen Protection Act, which would amend the INA to allow immigration judges to consider the best interests of a U.S. citizen child when his or her parent was in deportation proceedings.¹⁸⁶ The Act did not require that Congress draft new federal standards for the best interests of the child. Instead, the Act merely sought to provide immigration judges with the discretion to use that standard in cases potentially involving family separation. Federal immigration courts could therefore consider the best interests of the child and secure more favourable outcomes in deportation decisions without much difficulty.¹⁸⁷

B. Require federal immigration authorities to apply the host state's best interests of the child standard.

Requiring immigration officials to apply the host state's best interest of the child statutes in federal immigration proceedings is a realistic policy proposal immigration advocates should strive to achieve. Again, immigration judges could use their judicial discretion to apply the local state's best interests of the child standard. One way to achieve this would be for immigration judges to consult the judges and official of local family courts in order to ensure they apply the standard correctly.

C. Make family separations least detrimental to the child

It is critical that ICE officials incorporate well-designed, updated guidelines to apply in enforcement procedures whenever families with children are the focus of a case.¹⁸⁸ Using methods such as house arrest or ankle bracelet detention would allow for a parent in violation of immigration laws to be available to continue to provide care for their children during their hearing process. Although not preferred methods, since critics would argue that these criminalize immigration, these alternatives would permit parents to remain with their children instead of being automatically separated and detained. If detention was necessary, parents involved in those detention or removal proceedings, for example, could reasonably be afforded access to visitation and phone calls with their child, communication with the local child welfare agency regarding court hearings involving their children, and basic transportation to any hearings concerning their children.¹⁸⁹ Detained parents should be able to communicate and visit with their children. Even in the most extreme detention contexts, visitation with children is generally restricted, rather than

185. See, e.g., WESSLER, *supra* note 7, at 6 (“Once detained, ICE denies parents access to programs required to complete CPS case plans.”).

186. Child Citizen Protection Act, H.R. 250, 112th Cong. (2011).

187. See BEST INTERESTS, *supra* note 152 (The INA could also enact a federal best interest of the child standard that would be required in all immigration enforcement proceedings involving families with children).

188. See Cervantes, *supra* note 5, at 3-4 (noting ICE guidelines and their need to be updated for current enforcement processes); see also WESSLER, *supra* note 7, at 6 (indicating that “[e]xisting ICE guidelines are largely outdated and insufficient for the current immigration enforcement context . . .”).

189. See WESSLER, *supra* note 7, at 6 (expanding on how detention centers are isolated and lack of transportation for parents detained leads to no participation in any court hearings involving their children).

completely eliminated, because the right to raise one's children is held in the highest constitutional scrutiny by U.S. federal law.¹⁹⁰ Allowing for better communication between detained parents and their children is a key measure that would reduce the negative impact of family separation on the children involved. Such a measure would also entail eliminating any language barriers that may exist in facilitating the communication between the parents and children.¹⁹¹ Improved communication and access for detained parents would be simple remedies to promote children's best interest more effectively than current enforcement proceedings, and would make family separations less detrimental to children.

D. Implement federal-state cooperation in immigration proceedings

Too often conflict, rivalry, and competition characterize the federal posture toward state governments in immigration conflicts.¹⁹² Cooperation between ICE, state child welfare services agencies, and state family courts¹⁹³ would strongly serve the best interests of the children whose families are involved in immigration proceedings. Such measures would allow for state child welfare agencies to facilitate more effective family reunification processes, which would reduce a portion of the burden on both federal and state child welfare funds.¹⁹⁴

E. Require state authorities to apply best interest of the child standard in family immigration conflicts

Within the state context, local law enforcement, child welfare agencies, state courts, and last but not least, state legislatures, should accord the best interests of children the utmost importance in immigration enforcement processes involving families. All these state parties can prevent imposing greater harm on these children with minimal effort by relying on reasonable policies, already enacted in their state statutes,¹⁹⁵ as tools to assist in determining what is the best interest of children in

190. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (holding that parents have an inalienable right to direct the upbringing of their children).

191. Language barriers are among the chief concerns in such cases. See Roxana Tirico, National Association of Social Workers, *MEETING THE NEEDS OF IMMIGRANT CHILDREN AND YOUTH IN CHILD WELFARE*, 4 (2010), available at <http://www.socialworkers.org/asscts/secured/documents/practice/clinical/WKF-MISC-45510.ChildrenPU.pdf>.

192. See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 183 L. Ed. 2d 351, 115 FEP Cases 353 (2012).

193. See, e.g., Wessler, *supra* note 2 (sharing the opinion of an anonymous juvenile court judge in Arizona who indicated that "[p]arents [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 centers.").

194. The funds could instead be utilized for the protection and wellbeing of children lingering in foster care. See, e.g., Children's Defense Fund, *supra* note 119.

195. See BEST INTERESTS, *supra* note 152. For a good overview of these types of state statutory schemes to protect a child's reasonable best interests, see David S. Rosettenstein, *Trans-Racial Adoption and the Statutory Preference Schemes: Before the Best Interests and After the Melting Pot*, 68 ST. JOHN'S L. REV. 137 (1994). Some might suggest that cities which provide sanctuary for illegal immigrants or have safe haven ordinances are a suitable solution. See, e.g., Mathew Parlow, *A Localist's Case for Decentralizing Immigration Policy*, 84 DENV. U. L. REV. 1061 (2006-2007) (offering a comprehensive overview of the conflicts between federal and state authorities in immigration enforcement and arguments for local government authority intervention in conjunction with federal authorization); Rose Cuisson Villazor, *"Sanctuary Cities" and Local Citizenship*, 37 FORDHAM URBAN L. REV. 573 (Apr.

particular immigration contexts. Since ICE has extended federal immigration enforcement authority to local law enforcement in every state,¹⁹⁶ it is absolutely crucial for local law enforcement officials to make every effort to be prudent and humane in their treatment of immigrant parents and children¹⁹⁷ whose lives are dramatically affected when they are separated from one another.¹⁹⁸ Such measures could also include family detention locations, rather than splitting up parents and children¹⁹⁹ into three different detention areas for men, women, and juveniles.

F. Child welfare agency liaison with foreign consulates

Child welfare agencies are key players. As the essential guardians of all children who may unfortunately find themselves in situations of abuse, neglect, and/or abandonment,²⁰⁰ social workers, child advocates, attorneys, and other representatives of child welfare agencies ought to employ courses of action to routinely contact foreign consulates to legally facilitate reunification of children with their deported parents.²⁰¹ Making this consular communication routine is a part of adoption law,²⁰² and can be a valuable missing piece to handling complex family

2010) (discussing the complex legal and policy concerns and their interplay with city, state and federal government in immigration). Safe havens have also proved to be problematic in some contexts. *See, e.g.*, Maria Pabo Lopcz, *The Phoenix Rises from El Cenizo: A Community Creates and Affirms a Latinola Border Cultural Citizenship through Its Language Safe Haven Ordinances*, 78 DENV. U. L. REV. (2001) (examining one border city's Safe Haven Ordinance as presenting conflict with security measures and legal language requirements).

196. *See* INA § 287(g), 8 U.S.C. § 1357(g) (200); U.S. IMMIGRATION & CUSTOMS, FACT SHEET: DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION AND NATIONALITY ACT (1986), available at <http://www.ice.gov/news/library/factsheets/287g.htm> (explaining the § 287(g) program and the requirements for participation); Cervantes, *supra* note 5, at 2 (describing the increase in § 287(g) agreements as "formal collaborations between ICE and local officials which allow local police to be deputized to enforce immigration laws"). States are not automatically authorized to enforce immigration on the local level but may opt in to do so. *Id.*

197. For more scholarly treatment of protection of immigrant children, see generally Lopez, *supra* note 130.

198. *See, e.g.*, WESSLER, *supra* note 7, at 6 (explaining that "arresting police officers too often refuse to allow parents to make arrangements for their children" when detaining them). It is not unreasonable to question whether implementing these policies and procedures would slow down the time frame for deporting parents. It would likely slow down the process, but it also would give immigration officials time to determine the best resolution for a child caught in the middle of the immigration enforcement process.

199. The children we are discussing here are not criminals, but are often treated as if they are, which causes severe damage to their emotional, physical, and mental well-being. For a discussion of the ill effects of juvenile detention for immigrant youth, see Elizabeth M. Frankel, *Detention and Deportation with Inadequate Due Process: The Devastating Consequences of Juvenile Involvement with Law Enforcement for Immigrant Youth*, 3 DUKE FORUM FOR L. & SOC. CHANGE 63 (2010).

200. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., HOW THE CHILD WELFARE SYSTEM WORKS 2 (May 2011), available at <http://www.childwelfare.gov/pubs/factsheets/cpswork.pdf> ("The Children's Bureau works with State and local agencies to develop programs that focus on preventing the abuse of children in troubled families, protecting children from abuse, and finding permanent families for children who cannot safely return to their parents.").

201. Contact with a foreign consulate can be a vital remedy for family reunification. Unfortunately, that seldom occurs because of immigration officials' and social workers' lack of knowledge and understanding of the role consulates play. *See* WESSLER, *supra* note 7, at 6. We realize that consulates may or may not have the personnel and capacity to do this, but the suggestion is worthy of discussion, particularly if those resources are available.

202. International adoption law is always an area of innovation that can be looked to in developing new standards for treatment of children across international borders. *See, e.g.*, Richard

immigration enforcement processes.

G. Allow states to be reimbursed by federal government for child welfare services

Federal knowledge and support for what state child welfare agencies are doing would not only be extremely helpful, but would encourage appropriate sharing of resources between federal and state entities. The lack of federal reimbursement of child welfare services for immigrant children is a serious problem that states now carry, often requiring local child welfare systems to rely on scarce funding to provide necessary services.²⁰³ Federal resources allotted for immigration enforcement should be used to reimburse states for child welfare services.

H. State courts should adopt a statutory presumption against allowing the termination of parental rights based on a parent being in removal proceedings or deported

State family court judges play an important role in determining the best interests of children and play a critical role in helping to reunify children with their parents. State legislators ought to consider incorporating a statutory presumption that deportation alone does not equate to parenting unfitness. Legislators should also amend state law to extend the statutory time requirement for termination of parental rights for deported parents.²⁰⁴ Granting this additional time could provide valuable leeway for children to be reunified with their parents who are in removal proceedings or have been deported. Such measures would keep children with their families, and reduce the number of children left behind. California has recently proposed such a remedy, which would allow for extended review hearing periods when a parent's circumstances include an immigration hold or detention.²⁰⁵

I. State courts should adopt enhanced best interests of the child standard procedures for children of immigrants

In order to effectively allow state courts to consider unfortunate family situations that threaten the future of the children involved, state legislatures should also enact statutes that facilitate enhanced procedures for the best interests of children of detained or deported parents. California's bill to protect parents in deportation proceedings from the termination of their parental rights also proposes additional procedures to promote the best interests of children involved in those

Carlson, *Seeking the Better Interests of Children with a New International Law of Adoption*, 55 N.Y.L. SCH. L. REV. 733 (2011).

203. Tirico, *supra* note 191, at 5 (citing Lincroft & Lesner, 2006).

204. See U.S. DEP'T OF HEALTH & HUMAN SERVS., GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 2 (Feb. 2010), *available at* http://www.childwelfare.gov/systemwide/laws_policies/statutes/groundtermin.pdf (describing the statutory limitations on the maximum amount of time a child can be in foster care prior to commencing termination of parental rights proceedings).

205. See S.B. 1064, 2011-2012 Sess. (Cal. 2012), proposed Feb. 13, 2012, *available at* <http://legiscan.com/gaits/text/629659> ("This authorization is only possible if the court finds that the parent has made reasonable efforts to regain custody of the child or that termination of parental rights would be detrimental to the child.").

cases. Such enhanced procedures could allow local officials to place the child of a deported parent with a family member with a valid foreign ID regardless of immigration status.²⁰⁶

J. Authorities should refuse to foster a systemic bias against innocent children

Most significantly, federal, state, legislative, judicial, and administrative actors can make a considerable difference by eliminating “systemic biases” against children of immigrant families.²⁰⁷ Impartial and fair application of the best interests of the child standard to all children promotes family stability. The sheer numbers of children lingering in foster care would very likely be reduced with a reasonable application of the best interests of the child doctrine in immigration enforcement proceedings involving the parents of the child. Even if parents determined that separation from their U.S. citizen children was in the best interests of the children, local authorities would remain available to provide oversight in application of that standard to all situations. For example, if a set of parents that was detained or deported entered into an agreement to have friends or family take care of their children, then the local family court would utilize the best interests of the child standard to review any breach of that agreement and the custody and care of those children.

States charged with caring for children left behind after their parents are deported should consider these proposals. Immigration policy should strive to develop national strength by promoting family stability. Whether socially liberal or conservative, policymakers should emphasize and support policies that prevent family separation²⁰⁸ and protect children.²⁰⁹ Both approaches—family unity and child protection—are needed. While attempts to reform immigration law at the federal level have been unsuccessful,²¹⁰ a missing resolution works to disrupt families to the callous and cruel detriment of children.²¹¹ Policies that seek to reunite and help maintain families together, in turn, serve to strengthen the nation by

206. *Id.* Similar arguments are made in the context of immigration of unaccompanied minors by Joyce Koo Dalrymple in *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 B.C. THIRD WORLD L.J. 131 (2006) (discussing the most effective way to insure safety for unaccompanied minors facing deportation is an application of the best interests doctrine). This approach is also taken by Christopher Nugent in *Whose Children Are These—Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT’L L.J. 219 (2005-2006).

207. WESSLER, *supra* note 7, at 6.

208. See William W. Chip & Michael A. Scaperlanda, *The Ethics of Immigration: An Exchange*, FIRST THINGS (May 2008) <http://www.firstthings.com/article/2008/04/005-the-ethics-of-immigration-an-exchange-5> (discussing the notion of family unity in social conservatism immigration policy). These terms are not designed to affront, but rather to draw together ideals and notions to show their congruity for achieving the best outcomes for children in the immigration enforcement process.

209. See John Attarian, *Liberalism and America’s Social Immigration Policy*, 10 SOC. CONTRACT PRESS (2000) (explaining social liberalism in immigration policy). It is not the case that liberals do not want to protect families, and that conservatives do not want to protect children, though each side may make those accusations. Rather, we use these references here to illustrate that both ends of the political spectrum in American government can coexist, and work toward the best interests of children caught up in or left behind as a result of immigration enforcement.

210. See ROSENBLUM, *supra* note 11.

211. See Yoshikawa, *supra* note 95 (“The United States should not be in the business of causing untold hardship by separating children from the love and care of their hard-working parents.”).

ensuring the wellbeing of children as participants in the future of that nation.

CONCLUSION – “WE AREN’T THERE YET”

Recognizing that immigration policy functions as family law is a critical first step in addressing the challenges many immigrant families currently face. Too often, children are caught in the middle of their family’s immigration problems. Placing children at the center of the debates²¹² for immigration reform can make real improvement possible. Bringing children to the heart of a discussion enhances their role in problem-solving and simultaneously reduces their victimization. The standard approach for dealing with children in the family law context requires an application of the best interests of the child standard. Applying the best interests of the child standard to children left behind after their parents are deported may provide solutions to this growing problem.

A reasonable application of the best interests of the child standard can serve as a new basis for a more flexible immigration policy that meets the needs and restores families instead of maintaining an inflexible application of federal rules. More effective immigration law and family law policies in conjunction with improvement of immigration enforcement processes can be successful if both realms of law, state and federal, work together to make it happen. This requires mutual recognition of the need to work in concert, and a clear understanding of the vulnerability of children caught in the immigration enforcement process.

Difficulties in obtaining hard data on children left behind by deported parents makes it challenging to draw a reliable conclusion without examination of all procedures pertaining to the interface between ICE and Child Protective Services (CPS) and foster care in each state. A review of each agency’s procedures toward this end would be an important study. From the problem of the U.S. citizen child who does not want to be separated from his or her family, to the mother that does not want to leave behind her U.S. citizen children when deported, the dilemma of children and families caught in the midst of a struggle for immigration reform deserves attention.

Immigrants are generally vulnerable individuals. Children are vulnerable individuals. Children of immigrants, therefore, can be doubly vulnerable. United States citizens who embrace a moral duty to protect vulnerable individuals victimized by government policy and family circumstances²¹³ undoubtedly will look to protect children of immigrants. Good immigration policy which guards the value and strength of families accordingly protects the best interests of children belonging

212. See Wagnsson et al., *supra* note 10.

213. See, e.g., Michelle A. Vu, *Evangelicals Make Case for Welcoming Immigrants*, CHRISTIAN POST, Apr. 19, 2009, (indicating that basic immigration policy should hold the ancient moral tradition of “welcoming the stranger”). See also the Prophet Jeremiah’s charge to the Hebrews in Jeremiah 7:6 to “not oppress the alien, the fatherless, or the widow.” For a comprehensive discussion of the biblical record in light of immigration challenges, see JAMES K. HOFFMEIER, *The Immigration Crisis: Immigrants, Aliens, and the Bible* (2009). One example of this is the Houston Coalition for Immigration Reform, a faith community of professionals who wish to serve and protect immigrating families and children based on their foundational belief in the sanctity of the family. See Houston Coalition for Immigration Reform, *Shared Principles* (2009), available at <http://www.houstonimmigrationreform.org/sharedprinciples.php>.

to those families, and hence promotes a stronger nation.²¹⁴ Considering children as central participants in the immigration process rather than simply victims in their family's migration may serve to move them as a non-traditional group from irrelevancy to significance in the political process of immigration reform.²¹⁵ Focusing on the immigrant child allows for a comprehensive approach to these challenges of family law policy and immigration regulation; it is indispensable to protect children in the United States of all nationalities. Providing for the successful formulation of strong families by looking to the best interests of the child standard promotes greater national stability in the face of global mobilization of families.

This is a worthwhile journey which paves the way for the future of a strong and stable nation. Reassuring that the best interests of all children within the United States are paramount within its laws is essential for the protection and edification of the next generation of Americans. No, we are not there yet; but immigration reform focused on the best interests of children provides the preeminent starting point for arriving at a better destination.

214. See generally KENNEDY, *supra* note 18, at 121 ("Immigration policy should be generous; it should be fair; it should be flexible. With such a policy we can turn to the world, and to our own past, with clean hands and a clear conscience."); see also, ROSENBLUM, *supra* note 11, at 3 (quoting George W. Bush, *Renewing America's Purpose: The Policy Addresses of George W. Bush, 1999-2000* 195-97 (Republican National Committee 2000)) ("[I]mmigration is not a problem to be solved; it is the sign of a successful nation.").

215. See Wagnsson et al., *supra* note 10, at 7-8.