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Bridging the Gap Between Immigration Detainment and Parental Rights: A Constitutional Consideration of Migrant Children Separation

KELSEY BURGE*

Federal immigration law does not completely comport with state family law because some federal legislation, such as the Adoption and Safe Families Act (ASFA), requires states to initiate parental custody proceedings due to children being separated from their parents for a statutorily defined period, even when parents are detained in immigration centers with very uncertain timelines. Parental custody proceedings involve factors that each state has authority to enact evaluating parental fitness; however, the factors may be implicitly or explicitly biased toward migrant parents, resulting in migrant parental custody being terminated unfairly. While Trump's zero-tolerance policy enacted in 2018 sparked outrage because migrant families were separated at the border, the disconnect between federal and state law contributed to the family separations being rendered legal. Even though Trump issued an Executive Order to end family separations at the border, a remedy is still needed to prevent parental custody from being terminated when parents are in U.S. immigration detention centers because such separations and terminations could raise serious due process concerns. The United States can begin to decrease due process implications by creating and implementing a process to adequately handle migrants and refugees who present themselves at the border with children by utilizing the general framework of the European Union's refugee plan. Amending the current interplay between federal immigration law and state family law not only impacts the United States because due process is a central cornerstone of the U.S. justice system, but the United States also serves as a moral leader of the world and the reputation of the United States could be harmed by ignoring the human rights concerns that due process violations may raise when separating families.

* Third-year law student at Northern Illinois University College of Law. Thank you to the people who continue to challenge me in my thinking, analytical skills, and problem-solving abilities.

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I. INTRODUCTION

The United States detains approximately 380,000 to 442,000 persons each year, making it the largest immigration detention infrastructure in the world.¹ In total, during fiscal year 2018, more than 107,000 family members were taken into government custody, which drastically increased from

1. Natalie Lakosil, *The Flores Settlement: Ripping Families Apart Under the Law*, 48 GOLDEN GATE U. L. REV. 31, 32 (2018).

the high of 78,000 in fiscal year 2016.² In 2014, the Immigration and Customs Enforcement (ICE) agency altered its policy for removal proceedings, stating that families unlawfully in the United States would be detained and subject to expedited removal proceedings, rather than receiving Notices to Appear and being released until regular removal proceedings.³

In 2018, the Trump administration began cracking down with a zero-tolerance policy regarding noncitizens entering the country. Different perspectives on this policy flooded the news media, depicting the entrants as dangerous criminals to showcasing hundreds of children in government facilities, alone and separated from their families. The people detained in this crackdown included those who legally presented themselves at a port of entry seeking asylum, and those who entered the country outside of a port of entry, subjecting themselves to the repercussions contained within the Immigration and Nationality Act (INA).

While the zero-tolerance policy received national outrage, particularly due to the family separations, Trump's policy is not the only element that triggered the family separations. Under federal law, persons entering the country unlawfully may be detained and charged with a criminal offense, while some state laws require that children must be separated from parents detained on criminal charges. When combined with the uncertain nature of immigration proceedings, including indefinite timelines and isolation from legal counsel, state law requirements that parents relinquish parental rights after a certain amount of time, pursuant to the Adoption and Safe Families Act (ASFA), means that parents detained in immigration facilities may face losing custody of their children without full due process of law, which is a constitutional guarantee. Not only does current American policy regarding immigration clash with rights afforded by the Constitution, but the procedure of detaining all migrants at the border may conflict with domestic and international asylum-seeking laws. The disconnect between federal law, state law, and state-run child protection agencies has created many gaps, producing conditions needing a federal law to be enacted to preclude the termination of parental rights after a set period of time, absent a showing of unfit parenting or abandonment, and only once a parent is afforded due process.

The European Union's (EU) approach could provide the United States with a framework on how to deal with migrant children and families in a human-rights based manner, while protecting and securing the nation's bor-

2. David Nakamura et al., *Trump Threatens Drastic Action on Immigration in Bid to Energize GOP Voters*, WASH. POST (Oct. 18, 2018), https://www.washingtonpost.com/politics/trump-threatens-to-summon-military-to-close-us-mexico-border-in-response-to-migrant-caravan/2018/10/18/d427b1dc-d2bd-11e8-83d6-291fced2ab1_story.html?utm_term=.2dc538a0b2f5 [https://perma.cc/NC9M-GCPE].

3. Lakosil, *supra* note 1, at 39.

ders, by enacting policies that favor the best interests of the child and meaningfully considering the right of a parent to raise, care for, and make decisions for the child. A federal law regarding immigration should be all-encompassing, addressing the lawful entry into the country, repercussions for violating the statute by unlawfully entering the country, and identifying a definite plan to handle the families that present themselves at the border. Not only does the United States need to reform immigration policy to align with constitutional guarantees and adhere to international and domestic law regarding asylum seekers and refugees, the United States serves as a moral leader of the world and other countries will look toward U.S. policy as an example.

II. BACKGROUND AND HISTORY

Immigration policy in the United States is a complex issue, involving legislative power to create the laws and executive agencies, such as ICE, to enforce immigration regulations, as well as child-welfare agencies that may intervene when migrant parents are detained and separated from their children. Because federal immigration laws involve a variety of moving parts and implicate a multitude of state family laws, any issue regarding immigration is not a unique administration-specific issue, but rather any concerns created by immigration policy is an American issue, spanning before the Trump administration.

A. AGENCY INVOLVEMENT

The relationship between federal immigration enforcement authorities and state agencies creates a disconnect because the two systems do not communicate with each other, which causes huge differences in “timeframes, locations, court rules, and decision-makers [that] create Kafka-esque results in which immigrant parents are trapped between the two uncoordinated systems’ processes.”⁴ An individual in jail has more access to the outside world and a greater ability to telephonically participate in conferences pertaining to his children than when the individual is in ICE detainment.⁵ Therefore, many immigrants “are often better off in jail than in immigration detention.”⁶

Once a child is separated from his parents for immigration reasons, Child Protective Services (CPS) attempts to place the child with family

4. Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 CONN. L. REV. 99, 146-47 (2011).

5. *Id.* at 121.

6. *Id.* at 124.

before placing the child in foster care.⁷ Oftentimes, CPS cannot locate family to place the child with because family members may be unwilling to trust governmental agencies to undergo the necessary administrative procedures.⁸ While children may currently be placed with undocumented family members, this policy could be changed by future legislative or administrative action.⁹ The mandatory timeline to parental termination proceedings is a huge issue for individuals in ICE detention centers because individuals are not given a schedule regarding when their immigration hearing will be held, while individuals in jail have the advantage of knowing when their fates will be decided.¹⁰

In situations where the parent has been deported or will be deported, many CPS caseworkers do not want to initiate reunification proceedings to reunite the children and the deported parents.¹¹ Mexico's Desarrollo Integral de la Familia (DIF) is CPS's Mexican counterpart; however, CPS workers are reluctant to work with DIF due to a general distrust that the Mexican agency will not provide services as efficiently or effectively as CPS.¹² In addition, the English-Spanish language barrier and the bias against Mexico and its citizens, whether intentional or not, creates more hurdles that prevent cooperation between CPS and DIF.¹³ Even if CPS and DIF are committed to cooperating, judges may decide that reunification in Mexico is not in the child's best interest, based on a variety of factors, even where all of the other qualifications for reunification have been met.¹⁴ This creates a very inefficient system, where all of the moving parts have the potential to clash against each other, leaving families lost inside a complex administrative structure.

B. THE OBAMA ADMINISTRATION

Obama initially promised comprehensive immigration law reform at the start of his administration.¹⁵ The most prominent marks of Obama's administration regarding immigrants are the Deferred Action for Childhood

7. *Id.* at 125.

8. *Id.* at 127.

9. Rabin, *supra* note 4, at 128. A judge commented that if immigration crackdowns were to continue, it is fully possible to limit CPS's authority to place children with family members if such members are undocumented. *Id.*

10. *Id.* at 131.

11. *Id.* at 136.

12. *Id.*

13. Rabin, *supra* note 4, at 136-37.

14. *Id.* at 139.

15. Michael Kagan, *Binding the Enforcers: The Administrative Law Struggle Behind President Obama's Immigration Actions*, 50 U. RICH. L. REV. 665, 675 (2016).

Arrivals (DACA) and the Deferred Action for Parental Accountability (DAPA) programs.¹⁶

During Obama's presidency, the administration made certain efforts to remove from the United States noncitizens who have criminal convictions.¹⁷ While Trump received criticism for removing or attempting to remove lawful permanent residents (LPRs), the Obama administration also deported LPRs who had aggravated felony convictions, even if the individual was likely rehabilitated.¹⁸

Under Obama's Criminal Alien Removal Initiative (CARI), ICE would target convicted noncitizens who are deportable to be arrested; however, many other individuals would also be detained or arrested when ICE would target the convicted immigrant at work or home.¹⁹ Therefore, the CARI program resulted in "collateral arrests," where noncitizen immigrants could be in danger of deportation and arrest simply by being in the wrong place at the wrong time.²⁰ The issue of family separations due to deportation is not novel nor is it necessarily an administrative-specific issue, but rather family separations that may result in parental loss of custody after a statutory period of time is a problem rooted in American law.

C. THE TRUMP ADMINISTRATION

Trump's zero-tolerance policy caused individuals caught crossing the Mexico-U.S. border unlawfully to be charged with criminal violations and sent to an immigration detention center or a federal prison to face deportation proceedings.²¹ Under previous administrations, such individuals in the same situation encountered civil, instead of criminal, proceedings.²² Due to the criminal charges, the policy caused parents to be forcibly separated from their children while awaiting progress in their criminal cases because children cannot be detained for more than twenty days under a 1997 court settlement.²³ The zero-tolerance policy resulted from the belief that "more heroin and fentanyl pushed by Mexican cartels plaguing our communities, a

16. *Id.* at 665-66.

17. Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 74 (2015).

18. Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 270-71 (2018).

19. *Id.* at 271.

20. *Id.* at 271-72.

21. Bill Theobald, *Federal Agencies Unprepared for Trump's Migrant Family Separation Policy*, USA TODAY (Oct. 24, 2018, 1:52 PM), <https://www.usatoday.com/story/news/politics/2018/10/24/trump-migrant-family-separation-policy-zero-tolerance-us-mexico-border/1749528002/> [http://perma.cc/CB6T-7J9G].

22. *Id.*

23. *Id.*

surge in MS-13 gang members and an increase in the number of human trafficking prosecutions” would result if the policy did not exist.²⁴

Following the forced separations, Judge Sabraw, a district judge in San Diego, ruled on June 26, 2018, that separating children from their parents may have violated due process rights.²⁵ As a result, Judge Sabraw ordered that the children must be reunited with their parents within thirty days.²⁶ Judge Sabraw’s ruling is a result of two women filing an anonymous lawsuit after being separated from their children.²⁷ The government failed to follow Judge Sabraw’s order, however, and, as of October 16, 2018, 245 children remained separated from their parents.²⁸ Additionally, Judge Sabraw issued a nationwide injunction to prohibit family separations in the future, unless the parent is “deemed unfit or does [not] want to be with the child.”²⁹ People detained for criminal and immigration proceedings typically have their property strictly accounted for and listed; however, children are not accounted for in the same way, which is a violation of due process rights.³⁰

The Office of Communications of the White House issued a statement on June 20, 2018, identifying that “the only legal way for an alien to enter this country is at a designated port of entry at an appropriate time.”³¹ Until Congress enacts legislation or gives further direction, the administration identified that it will enforce criminal provisions of the INA.³² The administration declared that Congress’s failure to act, as well as issued court orders, has given the administration no choice but to separate families at the

24. Doug Stanglin, *Immigrant Children: Federal Judge Orders Families Separated at Border Be Reunited Within 30 Days*, USA TODAY (June 27, 2018, 12:23 AM), <https://www.usatoday.com/story/news/politics/2018/06/27/judge-orders-families-separated-border-reunited-within-30-days/737194002/> [http://perma.cc/7JW5-LEX2]. The statement issued by the Department of Justice claimed that the zero-tolerance policy was required as a measure to decrease the “lawlessness” present at the Mexico-U.S. border. *Id.*

25. Theobald, *supra* note 21.

26. *Id.* At the time of Judge Sabraw’s initial decision, 2,654 children needed to be reunited with their parents. *Id.* Judge Sabraw’s order also included that children under five years of age must be reunited with their parents within fourteen days. Stanglin, *supra* note 24. See *Ms. L. v. U.S. Immigration & Customs Enf’t*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

27. Stanglin, *supra* note 24. *Ms. L.* later became a class action suit. *Ms. L. v. U.S. Immigration & Customs Enf’t*, 330 F.R.D. 284 (S.D. Cal. 2019).

28. Theobald, *supra* note 21.

29. Stanglin, *supra* note 24. Judge Sabraw is a President George W. Bush appointee. *Id.*

30. *Id.* Judge Sabraw wrote, “[t]he unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy as property. Certainly, that cannot satisfy the requirements of due process.” *Id.*

31. OFFICE OF COMMUNICATIONS, AFFORDING CONGRESS AN OPPORTUNITY TO ADDRESS FAMILY SEPARATION (2018), 2018 WL 3046068.

32. *Id.*

border in order to enforce the law.³³ The statement included the definitions of alien family and alien child, policies for temporary detention facilities, and directions for the Attorney General to detain families together.³⁴ However, the statement did not address instances of aliens being detained when they present themselves at a designated port of entry seeking asylum or refuge, which is a lawful action.

Under Trump's zero-tolerance policy, many parents and children faced separate immigration claims in court.³⁵ Some children agreed to leave the United States, foregoing pursuing their own immigration claims; however, the American Civil Liberties Union (ACLU) believed that such instances resulted from children missing their parents and families, and not due to children feeling safe in their homelands.³⁶ Parents have the ability to choose whether the children should also be deported or allowed to pursue their own claims in immigration court, and many parents chose to have their children proceed with individual immigration claims because of the belief that the children will be safer and have a better future in the United States as opposed to their homeland.³⁷ In the period between the issuance of the zero-tolerance policy and the Executive Order ending forced separations, immigration officials were barred from deporting children involved in cases regarding the separations.³⁸

As of January 2019, an official with the Department of Health and Human Services (HHS) Inspector General's Office stated that more children have been separated from their parents at the border, over a longer period of time, than previously described.³⁹ The separations began in 2017,

33. *Id.*

34. *Id.*

35. Maria Sacchetti, *Still Separated: Nearly 500 Migrant Children Taken from Their Parents Remain in U.S. Custody*, WASH. POST (Aug. 31, 2018), https://www.washingtonpost.com/local/immigration/still-separated-nearly-500-separated-migrant-children-remain-in-us-custody/2018/08/30/6dbd8278-aa09-11e8-8a0c-70b618c98d3c_story.html?noredirect=on&utm_term=.b17a2df295cf [https://perma.cc/JWB6-XYAZ].

36. *Id.*

37. *Id.* As of October 18, 2018, of the 175 children whose parents have been deported, 125 children decided to remain in the United States to pursue their own immigration and asylum claims. Arelis Hernandez, *Nearly 250 Migrant Children Still Separated from Parents*, ACLU Report Says, WASH. POST (Oct. 18, 2018), https://www.washingtonpost.com/local/immigration/nearly-250-migrant-children-still-separated-from-parents-aclu-report-says/2018/10/18/d3fc2fd0-d222-11e8-b2d2-f397227b43f0_story.html?utm_term=.4fedce7cea22 [https://perma.cc/2HRS-W7YS].

38. Sacchetti, *supra* note 35.

39. Nathaniel Weixel, *Watchdog: Thousands More Migrant Children Separated from Parents than Previously Known*, THE HILL (Jan. 17, 2019), <https://thehill.com/latino/425828-watchdog-thousands-more-migrant-children-separated-from-parents-than-previously-known> [https://perma.cc/34ZD-9AKX].

before Trump enacted the zero-tolerance policy, but the exact number of additional separations is unknown.⁴⁰ While the HHS has reunited children with parents or released most of the children accounted for who were separated after the zero-tolerance policy took effect, officials do not know how many children have been released or reunited with parents who were separated before the zero-tolerance policy.⁴¹ The uncertainty regarding the exact number of separated children stems from a lack of a centralized database to track children who have been separated.⁴² While the HHS now has an online database that allows the determination and status of a child in the care of the Office of Refugee Resettlement, that database was established after Judge Sabraw ordered reunification.⁴³

Even where immigrants follow legal pathways to enter the United States, the Trump administration made the asylum process more difficult by increasing the standard of “credible fear.”⁴⁴ Because of this, it is expected that the number of people who are allowed to apply for asylum will most likely decrease during Trump’s administration.⁴⁵ Under previous standards, if an asylum officer had reasonable doubt about an individual’s credibility, the officer should find credible fear and allow an immigration judge to determine credibility at a full hearing.⁴⁶ By removing the aforementioned provision, the new credibility standard allows asylum officers more discretion, which grants officers the ability to determine credibility to approve a person to apply for asylum.⁴⁷ This new provision makes it more difficult to enter the United States lawfully, and migrants who present themselves at a lawful port of entry may be forced to seek more drastic and unlawful measures in order to gain entry into the United States. Immigration reform to prevent further restrictive policies from being enacted is critical because the President and the federal government have fairly broad discretion in enacting immigration policies. Thus, there must be a statutory safeguard to ensure a repeat of Trump’s zero-tolerance policy, and the negative aftermath that followed, can never occur again.

Mexico has taken strides to decrease the number of migrants who cross the Mexico-U.S. border, detaining and deporting a significant number of Central Americans in recent years; however, the Mexico-Guatemala border is relatively easy to cross, giving Central Americans an easier access

40. *Id.*
 41. *Id.*
 42. *Id.*
 43. *Id.*
 44. Hing, *supra* note 18, at 282.
 45. *Id.* at 283.
 46. *Id.*
 47. *Id.*

point.⁴⁸ After Trump warned that the administration would once again take a more restrictive stance toward immigration policy, the Mexican government indicated that it would be more restrictive regarding the caravan of migrants that was set to enter the United States in 2018.⁴⁹ Andres Manuel Lopez Obrador, the Mexican president who took office in December 2018, based his campaign on taking a softer approach towards migrants, advocating for protecting migrant human rights and not treating such individuals as criminals.⁵⁰ However, despite Lopez Obrador's leftist views, the Mexican president has taken actions that are "eerily similar" to Trump.⁵¹

II. ANALYSIS OF CURRENT STRUCTURE OF IMMIGRATION REGULATIONS

A. FEDERAL REGULATIONS IMPACTING IMMIGRATION PROCEEDINGS

The INA, addressing improper entry into the United States by an alien, identifies that:

(a) Improper time or place; avoidance of examination or inspection; misrepresentation and concealment of facts

Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under Title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Improper time or place; civil penalties

Any alien who is apprehended while entering (or attempting to enter) the United States at a time or place other than as designated by immigration officers shall be subject to a civil penalty of—

48. Nakamura et al., *supra* note 2.

49. *Id.* Additionally, the Mexican Foreign Ministry requested that the U.N. Refugee Agency assist Mexico when processing Central American refugee claims. *Id.*

50. *Id.*

51. Cristina Antelo, *Why Won't Mexican President Lopez Obrador Stand up to Trump?*, THE HILL (June 11, 2019, 3:30 PM), <https://thehill.com/opinion/immigration/447914-why-wont-mexican-president-lopez-obrador-stand-up-to-trump> [<https://perma.cc/N9GL-2X6Y>]. Trump privately referred to Lopez Obrador as "Juan Trump." *Id.*

- (1) at least \$50 and not more than \$250 for each such entry (or attempted entry); or
 - (2) twice the amount specified in paragraph (1) in the case of an alien who has been previously subject to a civil penalty under this subsection.
- Civil penalties under this subsection are in addition to, and not in lieu of, any criminal or other civil penalties that may be imposed.⁵²

While issues relating to family law and custody are typically reserved for state legislation, the ASFA is a federal law that requires states to enact minimum child-welfare standards.⁵³ The ASFA provides that a state must begin termination proceedings of parental rights if a child is in an out-of-the-home placement for fifteen out of twenty-two months.⁵⁴ Arizona, a pertinent state along the U.S.-Mexico border, adopted ASFA's requirements, as well as created the condition that termination proceedings of parental rights may begin after a child is out-of-the-home for nine months if the parent "substantially neglected or willfully refused to create an in-home situation."⁵⁵ Due to such stringent standards, families can be legally and permanently separated while parents are held in immigration detention centers because such individuals cannot provide a home for the children for the proscribed statutory time.⁵⁶ Therefore, detaining *all* migrants crossing into the United States inherently infringes upon parental rights by requiring states to act pursuant to individual state laws, as mandated by ASFA.

B. STATE LAWS PERTAINING TO IMMIGRATION PROCEEDINGS

The gaps in federal immigration law that are supplemented by state family law allow for migrant children to be placed with American families without the detained parents receiving notice.⁵⁷ In one instance, the government separated Araceli Ramos from her daughter, Alexa Ramos, for nearly fifteen months.⁵⁸ Araceli fled her home country due to abuse, and typically would be granted asylum; however, Araceli was denied such pro-

52. 8 U.S.C. § 1325 (2012).

53. Rabin, *supra* note 4, at 109.

54. *Id.*

55. *Id.*

56. *Id.* at 110-11.

57. Chris Mills Rodrigo, *AP: Migrant Children May Be Adopted After Parents are Deported*, THE HILL (Oct. 9, 2018, 6:19 PM), <https://thehill.com/policy/international/americas/410653-ap-migrant-children-may-be-adopted-after-parents-are-deported> [http://perma.cc/8K7A-4GUY].

58. *Id.*

tections because of criminal charges.⁵⁹ After Araceli's deportation, she requested that Alexa be sent back and reunited with her, but the American family that Bethany Christian Services placed Alexa with ignored all requests of reunification.⁶⁰ In December 2016, Alexa's foster family sued, claiming that Alexa would be abused if she returned to her home country.⁶¹ Based on this, a Michigan state judge granted the couple guardianship.⁶² The Department of Justice issued a statement, identifying that the guardianship order violated federal law, and that failing to give notice to Alexa or her mother also violated federal law and due process rights.⁶³ Even though guardianship orders in such instances violate federal law, many inconsistencies exist between state-run child-welfare systems and application of federal law at the state level, which allows for individual cases to slip through the cracks, amounting in injustice.⁶⁴

Unfortunately, not all situations in which migrant children are separated from their parents result in reunification.⁶⁵ In 2012, Encarnacion Bail-Romero lost custody of her five-year-old son, Baby Carlos, after she was jailed from an immigration raid in 2007⁶⁶ and charged with aggravated identity theft, where her consequence was to serve two years in prison and be deported immediately after her sentence.⁶⁷ Bail-Romero's son, who was only six-months old at the time, eventually came under the care of a Missouri couple.⁶⁸ The Missouri couple adopted Baby Carlos, but Bail-Romero claimed she never consented to the adoption and she had the right to have custody over her son.⁶⁹ When the Missouri Supreme Court determined Bail-Romero's parental rights were terminated unlawfully, the court ordered a retrial.⁷⁰ After the retrial, Missouri Circuit Court Judge David Jones ruled that Bail-Romero abandoned her son and the Missouri couple's adoption

59. *Id.*

60. *Id.*

61. *Id.*

62. Rodrigo, *supra* note 57.

63. *Id.* Araceli was lucky to have an agency intervene and declare the violating nature of the court order; however, this is not always the case.

64. *Id.*

65. Mariano Castillo, *Undocumented Immigrant Mother Loses Adoption Battle*, CNN (July 18, 2012, 1:26 PM), <https://www.cnn.com/2012/07/18/us/missouri-immigrant-child/index.html> [<http://perma.cc/F6NT-P7BB>].

66. *Id.*

67. Trang Bui, *Battle Scars from the Fight Between Family Law and Immigration Law: Incarcerated Immigrant Parents and Missouri's Response*, 81 UMKC L. REV. 183, 196 (2012).

68. *Id.*

69. *Id.*

70. *Id.*

should proceed.⁷¹ Therefore, federal law and case precedent that allows family separations may result in unjust adoptions and custody terminations once state family law is applied because all states have different standards in determining parental fitness. It appears courts are given wide discretion in applying such standards, as evidenced by Judge Jones' ruling in Bail-Romero's case, despite the Missouri Supreme Court ruling regarding the unlawful termination of Bail-Romero's parental rights.

C. MS. L. V. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT

Several lawsuits were filed when children began being separated at the border.⁷² In *Ms. L. v. U.S. Immigration & Customs Enforcement*, Judge Sabraw issued a nationwide injunction, preventing the separation of migrant children from their parents.⁷³ Initially, the court found the plaintiffs stated a claim that their substantive due process rights under the Fifth Amendment were violated because the government held the parents in an immigration detention center and separated them from their children, without first determining whether the parent was unfit or presented a danger to their children.⁷⁴

Ms. L., a citizen of the Democratic Republic of Congo, and Ms. C., a citizen of Brazil, fled their home countries with their daughter and son, respectively.⁷⁵ Ms. L. and her daughter "lawfully presented themselves at the San Ysidro Port of Entry seeking asylum based on religious persecution," while Ms. C. and her son entered the United States between ports of entry.⁷⁶ Immigration officials apprehended Ms. L. due to a belief that she was not the young girl's mother.⁷⁷ After a DNA saliva sample confirmed Ms. L. was biologically related to the young girl that accompanied her, Ms. L. was reu-

71. Castillo, *supra* note 65. The court declared Bail-Romero abandoned her son; however, Bail-Romero speaks Spanish, and, she claims, she did not have the ability nor opportunity to seek legal help. *Id.* Additionally, Bail-Romero did not immediately call her family after she was detained because she did not want to impose on her family the costs of collect calls. Anita Ortiz Maddali, *The Immigrant "Other": Racialized Identity and the Devaluation of Immigrant Family Relations*, 89 IND. L.J. 643, 690 (2014). Further, even when she did attempt to call, her family did not accept the charges. *Id.*

72. See *Ms. L. v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018); *Jacinto-Castanon de Nolasco v. U.S. Immigration and Customs Enf't*, 319 F. Supp. 3d 491 (D.D.C. 2018); *W.S.R. v. Sessions*, 318 F. Supp. 3d 1116, 1120 (N.D. Ill. 2018).

73. *Ms. L.*, 310 F. Supp. 3d at 1133.

74. *Id.* at 1137. See *Ms. L. v. U.S. Immigration & Customs Enf't*, 302 F. Supp. 3d 1149, 1160-67 (S.D. Cal. 2018).

75. *Ms. L.*, 310 F. Supp. 3d at 1137-38.

76. *Id.* at 1138.

77. *Id.*

nited with her daughter after five months.⁷⁸ U.S. Border Patrol officials apprehended Ms. C. and criminally charged her with entering the country illegally, which was within their full purview under federal law.⁷⁹ Ms. C. was convicted of misdemeanor illegal entry and spent twenty-five days in criminal custody, and afterwards was transferred to an immigration detention center for removal proceedings and to be furthered considered for asylum.⁸⁰ Ms. C.'s separation from her son lasted approximately eight months, despite the fact that no allegations or evidence was presented to indicate Ms. C.'s parental unfitness.⁸¹ The court granted the plaintiffs request for a nationwide injunction in *Ms. L.* after determining that plaintiffs had a likelihood of success, plaintiffs had a likelihood of suffering irreparable harm, the equities balanced in plaintiffs' favor, and an injunction was in the public's best interest.⁸²

First, the court determined that the plaintiffs had a likelihood of success on their due process claims because immigration officials separated families that entered the country unlawfully between a port of entry and that entered the country at a port of entry seeking asylum.⁸³ The process of separating families did not have a procedure to track the separated children, enable communication between the children and parents, or reunite the families.⁸⁴ Due to these reasons, and the inability for governmental agencies to handle the influx of migrant children efficiently and effectively, the court found that this practice was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience" as to create a likelihood that plaintiffs' due process claims will succeed.⁸⁵

Second, the court determined that the plaintiffs had a likelihood of suffering irreparable harm if the injunction was not granted because the deprivation of a constitutional right is unquestionably an irreparable harm.⁸⁶ After identifying that a parent being separated from his or her child is an irreparable harm, the court further described situations in which one asylum-seeker from El Salvador, who was separated from her sons, wrote about how incredibly difficult the separation had been, and another father committed suicide while in custody, after being separated from his wife and three-year-old child.⁸⁷ Several *amici* briefs and evidence submitted to the

78. *Id.*

79. *Id.*

80. *Ms. L.*, 310 F. Supp. 3d at 1138.

81. *Id.*

82. *Id.* at 1141 (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

83. *Id.* at 1143-44.

84. *Id.*

85. *Ms. L.*, 310 F. Supp. 3d at 1145-46.

86. *Id.* at 1146.

87. *Id.*

court outlined the emotional harms and development disruptions that children could face after experiencing a forced separation from their families.⁸⁸ The evidence of emotional and developmental harm the children became susceptible to due to forced separation and the well-established principle that parent-child separations are a constitutional violation were sufficient for plaintiffs to demonstrate a likelihood of suffering irreparable harm.⁸⁹

Third, the court determined that the balance of equities weighed in plaintiffs' favor as to grant a nationwide injunction.⁹⁰ Even though the government argued that issuing an injunction would impede its ability to enforce criminal and immigration laws, the court stated that preventing children from being separated from their parents would not impact the government's ability to enforce laws;⁹¹ the government would simply have to enforce the laws in a way that does not result in family separations.⁹² Therefore, the equities weighed in favor of issuing the injunction.⁹³

Fourth, and finally, the court determined that public interest called for the issuance of the injunction.⁹⁴ Typically, this factor weighs in favor of the plaintiff seeking the injunction when the action implicates a constitutional right.⁹⁵ Here, the public had an interest in enforcing criminal and immigration laws, and issuing an injunction would not interfere with the public's interest.⁹⁶ Second, the public interest would also be served in issuing the injunction because the public had an interest in upholding the constitutional right to family integrity.⁹⁷ Thus, the public interest factor also weighed in favor of issuing an injunction because the public interest in enforcing criminal and immigration laws was not impaired and the public had an interest in preserving the integrity of the family.⁹⁸

While the government agreed that the plaintiffs in *Ms. L.* were entitled to certain constitutional rights, the issue was whether the circumstances of separating children from their parents after detainment at the border violated the particular constitutional right to family integrity.⁹⁹ Even though the

88. *Id.* at 1146-47.

89. *Id.* at 1147.

90. *Ms. L.*, 310 F. Supp. 3d at 1147.

91. *Id.* at 1148.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Ms. L.*, 310 F. Supp. 3d at 1148.

96. *Id.*

97. *Id.*

98. *Id.*

99. Faith E. Alvarez, *The Intersection of Civil Rights and Immigration Law*, RES GESTAE, July-Aug. 2018, at 19.

*Aguilar*¹⁰⁰ court held that family integrity and due process rights were not implicated when ICE agents raided a workplace, taking more than 300 undocumented immigrants, which left many minor children alone for extended time periods, the factors surrounding *Ms. L.* are distinguishable because the parents and children in *Ms. L.* were initially detained together and then separated at a later date.¹⁰¹ Additionally, the plaintiffs in *Ms. L.* were seeking asylum, which the United States has federal law and has agreed to follow international law that govern the issue of asylum.¹⁰² Because both *Ms. L.* and *Ms. C.* sought asylum, and both were eligible pursuant to U.S. and international law, the district court found that substantive due process rights were implicated by separating the parents and children.¹⁰³

D. HARMS MIGRANT CHILDREN MAY SUFFER FROM ADOPTION AND SEPARATIONS

Psychology experts predict that separating children from their parents, without telephonic or visual contact, can cause children “permanent emotional harm.”¹⁰⁴ On average, the 245 children left in government custody after the reunification order, according to the ACLU, spent approximately 154 days in custody.¹⁰⁵ One of the *amici* briefs filed by the Children’s Defense Fund in *Ms. L. v. U.S. Immigration & Customs Enforcement* identified that forced separation disrupts the parent-child relationship to the extent that the child can suffer psychological distress, anxiety, and depression, even after the parent and child are reunited.¹⁰⁶ Other evidence presented to the court stated that “separating children from parents is a highly destabilizing, traumatic experience that has long term consequences on child well-being, safety, and development.”¹⁰⁷ Additionally, such traumatic experience and stress the child may face from forced separations could cause the child to have disruption of brain and other organ systems development, as well as poor future behavioral skills and educational difficulties.¹⁰⁸

100. *Aguilar v. U.S. Immigration & Customs Enf’t Div. of the Dep’t of Homeland Sec.*, 510 F.3d 1 (1st Cir. 2007).

101. *Alvarez*, *supra* note 99.

102. *Id.* A person may be eligible for asylum if the individual (1) is outside of his or her country of nationality; (2) has fled the country and cannot return home due to risk of persecution; and (3) may be persecuted due to political opinion, race religion, nationality, or membership in a particular social group. *Id.* See also 8 U.S.C. §1101(a)(42) (2012).

103. *Alvarez*, *supra* note 99.

104. *Sacchetti*, *supra* note 35.

105. *Hernandez*, *supra* note 37. One hundred and fifty-four days approximates to five months, and some children have waited nearly a year in government custody. *Id.*

106. *Ms. L. v. U.S. Immigration & Customs Enf’t*, 310 F. Supp. 3d 1133, 1146-47 (S.D. Cal. 2018).

107. *Id.* at 1147.

108. *Id.*

Further, forced separations can cause the child's identity to be disrupted.¹⁰⁹ A child's identity includes their biological parents.¹¹⁰ Therefore, when an undocumented parent is treated as less than similarly situated American parents, the child is also marginalized, and not afforded the same protections as a similarly situated American child.¹¹¹ This allows the inference that an undocumented family's ties and bonds do not deserve the same protections as a citizen family's ties and bonds.¹¹²

IV. DUE PROCESS RIGHTS

The Supreme Court has consistently held that the right to parent and control a child's upbringing is a fundamental right that is protected by the Constitution.¹¹³ In *Stanley v. Illinois*, the U.S. Supreme Court determined that presuming that a parent is unfit or neglectful based on the fact the parent is unwed violates the individual's due process rights.¹¹⁴ Specifically, the Supreme Court noted that parents' entitlement to a hearing to determine the parent's fitness is protected under the Fourteenth Amendment.¹¹⁵ The First Circuit held that immigrants who are lawfully detained in ICE facilities do not have a claim of violating the right of family integrity;¹¹⁶ however, when a similar claim came before the U.S. District Court of the Eastern District of California, the court recognized that "the government has not interfered permanently with [parent's] custodial rights" in past cases.¹¹⁷ Further, "[p]arents have a fundamental interest in raising their biological children and this interest 'does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.'"¹¹⁸ Therefore, a valid claim may exist when there is a permanent interference with custodial rights, as is the case when an immigrant parent loses custody of a child after lengthy immigration detention periods due to the ASFA provision that requires initiation of proceedings to terminate parental rights after a statutory period of time.

109. Maddali, *supra* note 71, at 701.

110. *Id.*

111. *Id.*

112. *Id.*

113. Rabin, *supra* note 4, at 143.

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

115. *Id.* at 649.

116. *Aguilar v. U.S. Immigration & Customs Enf't Div. of the Dep't of Homeland Sec.*, 510 F.3d 1 (1st Cir. 2007).

117. *Milan-Rodriguez v. Sessions*, No. 1:16-cv-01578-AWI-SAB-HC, 2018 WL 400317, *9 (E.D. Cal. Jan. 12, 2018) (citing *Stanley v. Illinois*, 405 U.S. 645, 649 (1972)).

118. Maddali, *supra* note 71, at 695.

The Fourteenth Amendment applies to and protects any individual who is subject to the jurisdiction of the United States.¹¹⁹ Even though parents who may be deported are not U.S. citizens, that does not render all constitutional protections void because there are certain rights that are afforded to all individuals who are on U.S. land.¹²⁰ All aliens have the right to be equally protected from governmental discrimination.¹²¹ The Fourteenth Amendment provides that no “State [shall] deprive any person of life, liberty, or property, without due process of law.”¹²² The Due Process Clause applies to persons within the United States, regardless of whether the presence is lawful or permanent.¹²³ In *Plyler v. Doe*, the Supreme Court held that an alien is a person who is guaranteed due process rights under the Fifth and Fourteenth Amendments.¹²⁴ Therefore, an American citizen parent being separated from their child without due process of law would not pass constitutional muster,¹²⁵ and it should not be acceptable to permanently separate immigrant parents from their children without due process.

Even though parents have a fundamental right in controlling the upbringing of their child, the Supreme Court has long recognized that a state has an interest in the child’s well-being when a parent proves to be unfit.¹²⁶ The Supreme Court has held that parental unfitness to terminate parental rights must be demonstrated by clear and convincing evidence.¹²⁷ Where states are allowed to intervene in a parent’s fundamental right of custody, the Supreme Court noted that state laws must align with the requirements of the Due Process Clause.¹²⁸ A state that terminates a parent’s custody rights without a hearing and without showing clear and convincing evidence does not comport with the established legal standards.¹²⁹ Clear and convincing evidence requires balancing parental rights with legitimate state interests.¹³⁰ In order to meet the standard of proof of clear and convincing evidence, the fact finder must be subjectively certain that his factual conclusions satisfy due process concerns.¹³¹ Based on this, implicit or explicit biases endanger the integrity of both family and immigration law systems because a fact

119. See U.S. CONST. amend. XIV, § 1.

120. Rabin, *supra* note 4, at 144.

121. *Id.*

122. U.S. CONST. amend. XIV, § 1.

123. Maddali, *supra* note 71, at 679.

124. S. Adam Ferguson, *Not Without My Daughter: Deportation and the Termination of Parental Rights*, 22 GEO. IMMIGR. L.J. 85, 92 (2007).

125. Rabin, *supra* note 4, at 144.

126. Ferguson, *supra* note 124, at 92.

127. *Id.* at 93.

128. *Id.* at 96.

129. *Id.*

130. *Santosky v. Kramer*, 455 U.S. 745, 769 (1982).

131. *Id.*

finder who is subconsciously biased against undocumented immigrants may conclude that the delicate balance between parental rights and state interests weighs in favor of termination because the undocumented parent is detained for an indefinite period of time.

While states have autonomy to enact various factors to trigger proceedings to terminate parental rights, such grounds typically include abandonment, noncompliance with permanency plans, severe child abuse, and/or two or more years of incarceration,¹³² ASFA requires termination proceedings to be commenced after any of the state-established factors are satisfied for a statutory period.¹³³ For example, a court may find a parent abandoned a child where the identity or whereabouts of the parent is unknown, the child is left in an environment which could cause harm, or the parent does not contact or provide financial support to the child for a statutorily defined period of time.¹³⁴ States will differ on the definition of abandonment and in which situations a parent will be found to have abandoned a child.¹³⁵ Some states will require a showing that the parent intended permanent severance of a parental relationship with the child,¹³⁶ but not all states require such a showing.¹³⁷ Jurisdictions that require a higher standard to show child abandonment typically will not find abandonment solely where the parent is incarcerated; however, some jurisdictions will find incarceration constitutes abandonment.¹³⁸ Therefore, where a parent is detained or incarcerated from immigration charges, a state may find that the parent abandoned the child and a state court may terminate the parent's parental rights.

Bail-Romero and her loss of Baby Carlos, as described previously, is but one example of wrongful termination of parental rights; however, the exact number of such occurrences is unknown due to undocumented immigrants not being able to afford to challenge terminations, not being able to speak English, or not understanding the interplay between parents' rights and their constitutional rights.¹³⁹ Additionally, it is impossible to know how many undocumented parents lose their parental rights because juvenile court decisions are typically sealed, and most decisions are not appealed.¹⁴⁰

132. Bui, *supra* note 67, at 191.

133. Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

134. Bui, *supra* note 67, at 191.

135. *Id.* at 194.

136. *Id.*

137. *Contra id.*

138. *Id.* at 194-95.

139. Rabin, *supra* note 4, at 198. In many cases, when termination of parental rights is appealed, the decision is often reversed; however, the resources to appeal a decision, such as monetary funds, are not available to most undocumented immigrants. Maddali, *supra* note 71, at 644.

140. Maddali, *supra* note 71, at 696.

In 2014, the Applied Research Center (ARC) estimated that 5,100 children in foster care had a parent detained by ICE or a parent who was deported, which represented approximately 1.25 percent of the foster care population.¹⁴¹ This is a serious issue in instances where a family lawfully presents themselves at a port of entry, and yet the parents are still detained and separated from their children, because it potentially places individuals who have legally done nothing wrong in a position where their children could be permanently taken from them.

As previously mentioned, ASFA provides that states must enact certain legislation to initiate proceedings to terminate parental rights after a proscribed period of time.¹⁴² Because Congress enacted ASFA, Congress can address the difficulties that arise when immigrant parents are detained in ICE custody or imprisoned.¹⁴³ If states do not comply with ASFA requirements, the state will not receive federal funds for foster care or adoption incentives.¹⁴⁴ Congress should enact a provision that does not require the state to initiate termination proceedings after a set period of time under ASFA when the immigrant parent is in ICE detention and does not have access to the outside world.¹⁴⁵

Aside from the ASFA requirements, states have substantial discretion in deciding what factors may warrant termination of parental rights, thus states also need to reform procedures in order to coordinate with federal law.¹⁴⁶ ASFA does not allow an automatic finding of parental unfitness because the parent has left the child in foster care for the statutory period, but ASFA merely requires such proceedings to be initiated after the set time period.¹⁴⁷ The guidelines of ASFA are meant to be procedural rather than substantive provisions; however, many state courts have interpreted the language to parental unfitness by considering the statutory period fulfillment as a factor that weighs in favor of terminating parental rights.¹⁴⁸ The detained status of an immigrant parent should not weigh heavily in determining parental unfitness or whether the parent has abandoned the child.¹⁴⁹ Courts should decide whether to terminate parental rights not by looking to the uncertainty of immigration proceedings, but rather by determining what

141. *Id.*

142. Bui, *supra* note 67, at 202.

143. *Id.*

144. C. Elizabeth Hall, *Where Are My Children...And My Rights? Parental Rights Termination as a Consequence of Deportation*, 60 DUKE L.J. 1459, 1467 (2011).

145. Bui, *supra* note 67, at 202.

146. *Id.* at 203.

147. Hall, *supra* note 144, at 1469.

148. *Id.* at 1469-70.

149. Sarah Rogerson, *Lack of Detained Parents' Access to the Family Justice System and the Unjust Severance of the Parent-Child Relationship*, 47 FAM. L.Q. 141, 160 (2013).

is in the best interest of the child.¹⁵⁰ Even if an immigrant parent will be deported back to his or her home state, and allowing the child to stay in custody with that parent will result in the child also returning to the parent's home state, this should not create an automatic presumption that terminating parental rights will be in the child's best interest.¹⁵¹ Therefore, states should not allow parental rights termination when the parent is detained or incarcerated solely on the basis of immigration infractions because doing so could potentially implicate due process concerns by terminating parental rights without a hearing or an opportunity to be heard.¹⁵²

Individuals in ICE detention do not have an established timeline of their immigration proceedings, and there is no requirement for immigration proceedings to be commenced or finished within a certain amount of time, which leads to very uncertain conditions for the children.¹⁵³ Even violent felons are given due process before parental rights are terminated, including transportation from the prison to family court to participate in the hearings.¹⁵⁴ While it is necessary that legislation must protect children's best interests, the Constitution protects the right of parents to maintain custody unless a hearing, administered in accordance with due process, shows that the parent is unfit for a statutorily prescribed reason that warrants termination of parental rights.¹⁵⁵ When in ICE detention, an individual does not have the opportunity to be heard in the hearing to terminate parental rights, thus violating due process.¹⁵⁶ While cases have held that the lawful detention of immigrants does not impact the right to family integrity, such cases do not address the question of asylum seekers, who are protected under both national and federal law, who have been separated from their children,¹⁵⁷ nor do such cases discuss the permanent severing of the parent-child relationship.

Arguably, the current political climate requires that changes need to be made to detention, removal, and immigration proceedings now more than ever due to the seemingly increasing hostility towards immigrants.¹⁵⁸ Over

150. *Id.* at 156.

151. *See Id.*

152. Bui, *supra* note 67, 203-04.

153. *Id.* at 147-48.

154. *Id.* at 148.

155. *See Stanley v. Illinois*, 405 U.S. 645 (1972).

156. *See Rogerson, supra* note 149, at 148.

157. *See id.*

158. *See Rogerson, supra* note 149; Rabin, *supra* note 4. This Note does not argue that immigrants should never be subject to removal or termination of parental rights proceedings, but rather identifies the constitutional implications that arise when an immigrant's parental rights are terminated without the parent being given adequate notice and an opportunity to be heard. The current conditions of ICE detention do not allow detainees to com-

the past ten years, thousands of bills and resolutions regarding immigration have been introduced by state legislatures.¹⁵⁹ Additionally, Congress has expanded the list of criminal offenses that may lead to deportation.¹⁶⁰ Such legislation has resulted, in part, from negative stereotypes regarding the Hispanic population, including either unconscious or conscious biases, that all Hispanics are dangerous criminals.¹⁶¹

A. BIASES AGAINST MIGRANTS IMPACTING DUE PROCESS RIGHTS

Some jurisdictions discriminate against undocumented immigrants by considering their undocumented status as abuse or neglect.¹⁶² Jurisdictions that use the unlawful status of an immigrant to terminate parental rights do so based on the logic that the parent is law-breaking and can be arrested at any point.¹⁶³ Congress and state legislation have moved towards criminalizing immigration infractions rather than keeping the same offenses as civil violations.¹⁶⁴ This leads to an assumption that immigration violators who face criminal charges are unfit parents who cannot provide stable homes to children.¹⁶⁵ While it is true that living undocumented in the United States may create a precarious and uncertain environment for children, this fact alone should not create the presumption that staying with undocumented parents is not in the child's best interest.¹⁶⁶

Courts have terminated parental rights based on the idea that the values or culture of a parent's home state create an unfit environment for the child.¹⁶⁷ In one case, an Iowa district court terminated a mother's parental

municate with the outside world, nor are detainees allowed to participate effectively in proceedings that impact both their and their children's futures.

159. Maddali, *supra* note 71, at 676. While some of this legislation regarded anti-human trafficking measures, offering in-state tuition to lawful immigrants, and providing services to undocumented immigrants, most of the legislation could be construed as anti-immigrant, relating to driver's licenses, employment, and cooperation between local and federal immigration enforcement agencies. *Id.*

160. *Id.* at 677.

161. *Id.* President Trump is infamous for regarding Mexicans as drug dealers, criminals, and rapists. Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), , [https://perma.cc/5EVA-MSYP].

162. Maddali, *supra* note 71, at 680.

163. *Id.* at 682-83.

164. *Id.* at 683.

165. *Id.*

166. *Id.* This is not to say that immigration status should never be considered in child custody hearings because immigration status may be important in deciding who the child should be placed with if one parent remains in the United States and one parent is being deported; however, immigration status should not be used as an automatic presumption that the parent is unworthy, unfit, abusive, or neglectful. Maddali, *supra* note 71, at 683.

167. *Id.* at 685.

rights because she faced a twenty-one-month sentence, and the court refused to place the children with relatives in Mexico and placed the children with five foster families over an eighteen-month period.¹⁶⁸ Even though the Iowa Court of Appeals eventually reversed the termination, it is still an issue that the district court gave greater weight to English-speaking culture than the mother's constitutional rights.¹⁶⁹ Another court upheld the decision to terminate parental rights after a jury found the child's welfare was endangered, even though social workers testified that the parents made great progress to improve their parenting skills; however, the dissent noted that the child would be placed with an American family and that it cannot be said to be in the child's best interest to sever the ties between the child, the parents, and extended family based on cultural biases.¹⁷⁰

Similar to the court's terminating parental rights based on cultural biases, parents face hardships in maintaining custody when their home state is a poorer country.¹⁷¹ A child-welfare attorney remarked that parents rarely have the opportunity to bring their child back to Mexico due to the belief that the child would be "better off" in the United States.¹⁷² This demonstrates a culture clash, based on socioeconomic, racial, and cultural differences, that leads to the presumption that parents are unfit, and, thus, their parental rights should be terminated.¹⁷³ In some instances, child-welfare services did not even contact the equivalent body or the consulate of the parent's home state in order to conduct the necessary home and background checks to determine where the child should be placed, but rather it was assumed the child would be better in the United States.¹⁷⁴ Even though it is not unusual for a court to place emphasis on poverty in determining custody rights, an undocumented parent has greater struggles because they do not receive many public benefits.¹⁷⁵ Even where undocumented immigrants have an income and can provide for their children, some jurisdictions require a showing of paystubs; however, undocumented immigrants who cannot adequately show their lawful source of income may face termination of parental rights.¹⁷⁶

168. *Id.*

169. *Id.*

170. *Id.* at 686.

171. Maddali, *supra* note 71, at 686.

172. *Id.*

173. *Id.* at 687.

174. *Id.* at 687-688.

175. *Id.* at 688.

176. Maddali, *supra* note 71, at 690. Child-welfare services may also terminate parental rights based on the fact that the parents drive without a driver's license, which almost every state does not allow undocumented immigrants to obtain a driver's license. *Id.*

Typically, an undocumented parent flees his or her home state in order to provide a better life for his or her family.¹⁷⁷ While it is true that undocumented individuals are in the United States unlawfully, the same conditions that an undocumented parent chose to flee are often held against him when courts are determining whether to terminate parental rights.¹⁷⁸ States, or the federal legislature, should adopt certain legislation that prohibits considering the illegal entry to the country as a factor in parental fitness, especially considering that parents make the decision to come to the United States for the benefit of the child.¹⁷⁹ A parent's decision to flee a poverty-stricken, perhaps dangerous, environment in order to come to the United States to pursue an abundance of opportunities should not be used as a determinative factor in deciding parental unfitness because the decision to come to the United States, whether lawfully or unlawfully, is evidence that the parent believes he or she is acting in the child's best interest.¹⁸⁰

B. RECOMMENDATIONS TO ENSURE THE PROTECTION OF MIGRANTS' CONSTITUTIONAL DUE PROCESS RIGHTS

Professor Nina Rabin outlined various recommendations that could close the disconnect between the state family law system and the federal immigration framework, including establishing procedures to allow parents to appear in court regarding their family law cases, providing liaisons to allow detainees to communicate more effectively with the outside world, and requiring training programs to judges, attorneys, and family caseworkers to be more knowledgeable about the intricacies of immigration detention and deportation proceedings.¹⁸¹ These recommendations would be relatively easy to implement, considering that U.S. citizens who have been convicted and are serving prison sentences are afforded similar opportunities to communicate with and participate in any proceedings that may impact their parental rights.¹⁸²

Congress introduced the Humane Enforcement and Legal Protections (HELP) Separated Children Act to adequately deal with children who have a detained or deported parent or legal guardian.¹⁸³ If the law were to be adopted, children and parents would require a case manager or interpreter who speaks the native language, which would hopefully recognize cultural

177. *Id.* at 701.

178. *Id.*

179. Hall, *supra* note 144, at 1499. *See In re Angelica*, 767 N.W.2d 74 (Neb. 2009).

180. Maddali, *supra* note 71, at 701-02.

181. Rogerson, *supra* note 149, at 169.

182. *Id.* at 149.

183. Humane Enforcement & Legal Protections (HELP) Separated Children Act, H.R. 3451, 116th Cong. (2019) [hereinafter HELP Separated Children Act]. *See also* Hall, *supra* note 144, at 1494.

sensitivity and respect for illegal immigrant’s parental rights.¹⁸⁴ Further, the HELP Separated Children Act would require the implementation of procedures to allow detained parents access to children, state and local courts, child-welfare agencies, and consular officials.¹⁸⁵ While such provisions would help to remedy due process rights concerns regarding the right to be heard, the provision of ASFA requiring termination proceedings to be initiated after a statutory period of time would still be problematic because of the uncertainty of immigration detention lengths. Additionally, the HELP Separated Children Act does not offer definitions or guidance regarding what is the “best interest” of the child and when it may be appropriate to permanently terminate parental rights, which does not quell state-level or judge-specific biases within state law or family court that may lead to unfair and unjust separations.¹⁸⁶

Additional proposed legislation, the Stop Cruelty to Migrant Children Act, provides that a child shall not be separated from his parent or legal guardian unless a state court, authorized under state law, terminates the rights of the parent or legal guardian or determines that removing the child from his parent or legal guardian is in the child’s best interest under ASFA.¹⁸⁷ However, as previously discussed, state laws regarding when a child should be separated from his parent or legal guardian or when a parent’s rights should be permanently terminated vary widely across states, especially in light of ASFA’s mainly procedural framework.¹⁸⁸ If passed, the proposed Act may prove to be ineffective for ending family separations because states that have more stringent standards of finding that parental rights should be terminated may remain unaffected by the Act because states with such standards would be authorized under state law to proceed in that fashion,¹⁸⁹ continuing to leave migrant children and migrant parents vulnerable to permanent family separations and due process violations. Therefore, federal legislation that still allows states discretion in determining when to separate parents from migrant children may accomplish nothing if federal legislation does not specifically identify a standard to be applied when evaluating whether a child and a parent should be separated as a means of mitigating due process concerns raised by the termination of migrants’ parental rights.

184. Hall, *supra* note 144, at 1494.

185. H.R. 3451, § 4.

186. *But cf. id.*

187. Stop Cruelty to Migrant Children Act, S. 2113, 116th Cong. § 3(A) (2019). The ASFA does not explicitly define what “best interests” of the child entails. *See* Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

188. *See* Bui, *supra* note 67, at 203; Hall, *supra* note 144, at 1469-70.

189. *See* S. 2113, § 3(A).

V. BRIDGING THE GAP BETWEEN FEDERAL IMMIGRATION LAW AND STATE PARENTAL RIGHTS

Due to immigration legislation and policies being federal law, state law should not impact the ability for an immigrant parent to enforce his own parental rights to maintain custody over his children. A uniform federal law should be enacted to prohibit parents from losing parental rights due to detainment in immigration detention centers, where they do not have the ability to interact beneficially and effectively with attorneys in their children's custody proceedings and they are not always afforded an impartial determination regarding their parental fitness due to implicit or explicit biases. The district court in *Ms. L. v. U.S. Immigration & Customs Enforcement* issued a nationwide injunction after finding that the forced separations violated a constitutional right and the class members would suffer irreparable harm if the separation policy continued.¹⁹⁰ Therefore, it is legally established that the forced separation policy cannot be upheld, maintained, or employed in future uses.

Both lawfully and unlawfully present immigrants endured immigration detainment and being separated from their children after being arrested at the border during Trump's zero-tolerance immigration policy.¹⁹¹ The Due Process Clause of the Fourteenth Amendment protects both citizens and immigrants on U.S. soil, which means that parents' custody rights cannot be interfered with unless they are given notice and a chance to be heard.¹⁹² A parent's custody rights should not be terminated, or otherwise interfered with, solely on the basis of being an immigrant from a poverty-stricken country, regardless of whether the parent is present in the United States lawfully or unlawfully. A parent in an immigration detention center should be able to participate in any hearings relating to his or her children, should not have his or her custody rights terminated without a proper and impartial hearing, and should be able to place the child with family members while in the immigration detention facility. This can be accomplished in two ways. First, eliminating the portion of ASFA that requires a state to initiate parental rights termination after a proscribed statutory period has passed or creating an exception of that provision for immigrants in immigration detention centers will help ensure that custody rights are not terminated without the knowledge of the parent. Second, the way that other governments have chosen to handle migration issues, such as the EU, could be telling in identify-

190. *Ms. L. v. U.S. Immigration & Customs Enft*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

191. *Id.*

192. Ferguson, *supra* note 124, at 92.

ing the weaknesses and strengths of current U.S. immigration policy, and implementing successful foreign procedures into existing domestic policy could prove to balance the interests of border protection and human rights protection. The United States' handling of this issue will be watched across the globe. Thus, it is important to take appropriate steps.

While the United States undoubtedly faces an influx of immigration from the south, the numbers are less significant than the number of immigrants that other countries face around the world.¹⁹³ Trump declared his zero-tolerance policy at a time when unlawful border crossings were at a record-low.¹⁹⁴ The zero-tolerance policy was characterized as a crackdown on unlawful immigration; however, many of the detained immigrants were those who presented themselves at a port of entry and requested asylum, which is not an illegal entry.¹⁹⁵ The Refugee Rights Program Director for Human Rights Watch, Bill Frelick, suggested that the Trump administration “drummed up” the situation at the U.S. southern border, distorting the actual facts and “abdicat[ing] ... responsibility.”¹⁹⁶ Frelick identifies that the United States has the capacity and resources to deal with migrants in a humane way, “without taking draconian measures” and “building walls.”¹⁹⁷

A. LEGISLATION REFORM

Congress can enact an amendment to ASFA or initiate separate legislation that allows for an exception when an immigrant parent is detained in an immigration detention center. Even though Trump signed an Executive Order that ended family separations and the district court issued the injunction to prevent family separations, there is still a disconnect between the resources migrants have access to in immigration detention centers and state law. At this time, family separations may not occur at the border;

193. Paul D. Shinkman, *Comparing the Policies and Practices of Detaining Children*, U.S. NEWS (June 25, 2018, 4:14 PM), <https://www.usnews.com/news/best-countries/articles/2018-06-25/how-other-countries-treatment-of-detained-migrant-children-compare-to-the-us> [<https://perma.cc/7HMA-5XQV>]. Many commentators believe that the United States is geographically lucky because other countries, like Bangladesh or Thailand, are geographically situated in a way that more migrants pour into the country than the United States. *Id.*

194. *Id.* While the political climate might have individuals believing unlawful immigration is ever-increasing, there is a suspicious lack of discussion regarding immigrants and asylum-seekers who present themselves at a port of entry, wishing to enter the United States in a lawful manner.

195. Nick Cumming-Bruce, *Taking Migrant Children from Parents is Illegal*, U.N. TELLS U.S., N.Y. TIMES (June 5, 2018), <https://www.nytimes.com/2018/06/05/world/americas/us-un-migrant-children-families.html> [<https://perma.cc/CL57-JS3H>].

196. Shinkman, *supra* note 193.

197. *Id.*

however, the issue of whether family separations will occur once an immigrant is present in the United States, then arrested and detained was not addressed. In Bail-Romero's situation, her son was separated from her after she was arrested in an immigration raid. Therefore, the problem of potentially denying due process rights to immigrant parents does not end because family separations at the border are ordered to end.

Immigration reform and bridging the gap between federal law and state law is imperative to further prevent denying immigrants due process. As detailed previously, the HELP Separated Children Act¹⁹⁸ or the Stop Cruelty to Migrant Children Act¹⁹⁹ does not address the provision of ASFA that triggers the initiation of termination of custody proceedings. In actuality, the Stop Cruelty to Migrant Children Act explicitly would allow for states to act under state law and would authorize states to proceed under ASFA to terminate parental rights.²⁰⁰ Similarly, the HELP Separated Children Act would grant parents access to participate in termination proceedings, helping to mitigate due process concerns;²⁰¹ however, issues still exist regarding factors that state courts may consider when evaluating whether a parent and child should be permanently separated.²⁰² Consequently, federal legislation should be enacted to address migrant families as a unit, including presentation at the border, detainment in immigration facilities, initiation of custody proceedings, and appropriate, uniform factors in determining migrant parent fitness.

B. THE EU'S APPROACH TO PROTECTING THE BEST INTERESTS OF MIGRANT CHILDREN

The United States may find guidance from the approach that the EU has taken in handling migrant families. The EU has taken steps to create and implement a plan that effectively protects the rights of children and provides procedures to handle unaccompanied and accompanied migrant minors.²⁰³ The European Commission established standards relating to chil-

198. HELP Separated Children Act, H.R. 3451, 116th Cong. (2019).

199. Stop Cruelty to Migrant Children Act, S. 2113, 116th Cong. (2019).

200. *Id.* at § 3(A) (authorizing states to “determine[] that it is in the best interests of the child to be removed from the parent or legal guardian, in accordance with the [ASFA]”).

201. H.R. 3451.

202. *But see id.*

203. *See Communication from the Commission to the European Parliament and the Council, Action Plan on Unaccompanied Minors (2010-2014)*, at 2, COM (2010) 213 final (June 5, 2010), <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0213:FIN:en:PDF>

[<https://perma.cc/YR5V-59RB>] [hereinafter *Action Plan on Unaccompanied Minors*]; *Communication from the Commission to the European Parliament and the Council, The Protection of Children in Migration*, COM (2017) 211 final (Dec. 4, 2017), <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2017:0211:FIN:en:PDF>

dren as prescribed by the United Nations Convention on the Rights of the Child (UNCRC).²⁰⁴ While the United States remains the only country to not ratify the UNCRC, separating families and detaining children allegedly violates obligations under other various international human rights conventions in which the United States is a party.²⁰⁵ Article 9(1) of the 1989 UNCRC states that, “Parties shall ensure that a child shall not be separated from his or her parents against their will.”²⁰⁶ Under international law, family reunification has been understood as a right.²⁰⁷ Therefore, adopting an approach that may mirror EU’s plan to humanely and justly address migrant families will align with international law overall.

Even though children may be crossing into the EU unaccompanied and/or unlawfully, the EU still approaches the situation ensuring that children receive protection, regardless of migration status, citizenship status, or the country of origin.²⁰⁸ To provide this protection to children, the Commission identified three main areas that could be improved or created in order to shield the rights of children: “prevention, regional protection program[[]s, and reception and identification of durable solutions.”²⁰⁹ The Action Plan on Unaccompanied Minors identifies four main solutions to respecting the rights of migrant children: exchanging information and data between all agencies that deal with unaccompanied minors and children as a means of improving resources that are available to children;²¹⁰ involving countries of origin, as well as civil society organizations and international organizations, to provide international protection to the children, regardless of the child’s background;²¹¹ appointing a representative to each child before any pro-

lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0211&from=DE [https://perma.cc/76QW-NCEA] [hereinafter *Protection of Children*].

204. *Action Plan on Unaccompanied Minors*, *supra* note 203. The UNCRC establishes that countries should not separate children from their parents unless authorities determine that the best interests of the child require separation. Lena Masri & Kaelyn Forde, *How European Countries Deal with the Detention of Migrant Children*, ABC NEWS (June 20, 2018, 5:09 PM), <https://abcnews.go.com/International/european-countries-deal-detention-migrant-children/story?id=56001879> [https://perma.cc/UYD4-9UWJ]. Additionally, Article 11 of the UNCRC provides that minors should not be detained unless there are no other options or better alternatives. *Id.* The United States is not a party to the UNCRC. *Status of Ratification Interactive Dashboard*, U.N. HUM. RTS OFF. THE HIGH COMMISSIONER, <http://indicators.ohchr.org/> (last visited Oct. 4, 2019). However, the United States should not disregard a Convention that 196 other countries have agreed to uphold.

205. Cumming-Bruce, *supra* note 195.

206. Lori A. Nessel, *Families at Risk: How Errant Enforcement and Restrictionist Integration Policies Threaten the Immigrant Family in the European Union and the United States*, 36 HOFSTRA L. REV. 1271, 1278.

207. *Id.* at 1277.

208. *Action Plan on Unaccompanied Minors*, *supra* note 203, at 2.

209. *Id.* at 3.

210. *Id.* at 5.

211. *Id.* at 6.

ceedings, immigration or otherwise, are initiated,²¹² and allowing parents to be present during all aspects of any proceedings.²¹³ Overall, the Commission believes that the implementation of the aforementioned factors will contribute to the best interests of the child.²¹⁴ In the same vein, the Commission recognizes that the best interests of the child may be to return to his or her family to be raised and grow up in that social and cultural environment.²¹⁵

C. IMPLEMENTING AN INTERCONNECTED STATE AND FEDERAL FRAMEWORK TO PREVENT MIGRANT PARENT DUE PROCESS VIOLATIONS

In order to effectively reform immigration legislation, the United States must create and implement a plan that addresses the issue of how immigration policies interact with human rights policies and due process rights. The United States should: 1) expend more effort in coordinating communication between ICE officials and detainment facilities, child-welfare agencies, and foreign social-welfare counterparts; 2) further coordinate with the country of origin of migrant families to locate additional family members, especially in contexts where the parent is returned to the country of origin; 3) ensure that all children are represented²¹⁶ during immigration proceedings at least by confirming children understand their options and the impacts of their decisions to the extent reasonably expected based on the child's age, experience, and expertise; and 4) allow parents the ability to participate in or be present, either physically or telephonically, at any proceedings that relate to their child's immigration status or custody hearings.

First, ICE, child-welfare agencies, and foreign social-welfare agencies need a platform in which all agencies can effectively communicate regarding the immigration status of a parent and the immigration status and/or custody status of a child. Even federal agencies, such as ICE, and state-run child-welfare agencies have difficulty communicating within the United States, so it is imperative that this gap be closed to provide children with the best possible outcomes and protect the constitutional rights of parents

212. *Id.* at 9. Specifically, “unaccompanied minors should be informed of their rights and have access to complaint and monitoring mechanisms.” *Action Plan on Unaccompanied Minors*, *supra* note 203, at 9.

213. *Id.* at 11. The EU identified the importance of allowing parents to be present during proceedings because an appeal is not always guaranteed. *Id.*

214. *Id.* at 12.

215. *Id.*

216. This Note does not advocate for the representation of persons in the legal sense, but rather a representative person can help the child navigate the complex immigration and family law systems.

by preventing unnecessary and unjust parent-child separations. Further, training programs should exist to help eliminate biases that CPS workers hold against their foreign counterparts by educating CPS workers about the standards of child protection in other countries and by facilitating communication between CPS and foreign agencies. As part of an all-encompassing communication infrastructure, a greater effort must be made to transcend language barriers that may exist between Spanish-speaking agencies or migrants and English-speaking agencies. The issue of migration into the United States is not a uniquely American problem that can be adequately handled within America's borders, but rather human migration is an international issue, which requires international communication to arrive at solutions that protect individual rights and the right of the United States to secure its borders and its people. Requiring communication between all involved agencies and organizations will ensure a greater protection to parents' constitutional rights, while also providing protection to children, by allowing involved parties access to all information necessary to make decisions or determinations moving forward.

Second, in protecting migrants' constitutional and human rights, the United States may be required to facilitate communication with the migrant family's country of origin when necessary. American jurisprudence relating to due process rights, such as *Stanley v. Illinois*,²¹⁷ historically stresses the importance of preserving the family unit. To accomplish this goal, the United States may need to communicate with foreign countries in order to locate additional family members because additional family members may be required for hearing and evidentiary purposes. While the United States obviously would not reunite a child with additional family members residing in a foreign country in the United States, communicating with additional persons could shed light onto whether the child has additional family members already in the United States or whether the migrant family qualifies as having credible fear to qualify for asylum and be protected under the laws of the United States. While unlawful and lawful migrants may currently live in fear of being detained or deported after coming forward to assist a child or his parents in immigration or custody proceedings, communicating with foreign countries to locate appropriate persons may allow the United States to more efficiently provide for the best interests of the child, preserve the familial unit as guaranteed by the Constitution, and lessen costs associated with immigration detention and child foster care.

Third, the United States should allow children an opportunity to learn their rights before they are expected to appear in court and represent their interests. News outlets flooded with stories of children, as young as three years old, sitting before a judge in immigration court, swinging their legs

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

because their feet were inches away from touching the floor.²¹⁸ While there is no right to court-appointed counsel in immigration court due to the fact that such proceedings fall outside the protection of the Sixth Amendment,²¹⁹ children should not be expected to appear in court without understanding the purpose for their appearance and any consequences that may occur at the conclusion of such proceedings. Children at different ages will have different abilities of comprehension, but when CPS intervenes, by either finding a sponsor to care for the child or otherwise, a social worker could explain the situation in terms reasonably understandable for that particular child because a social worker already undergoes training to facilitate communication with children of different ages and from different backgrounds. Although American resources may not support the appointment of a representative to migrant children in the same way that the EU plans to implement, minimal resources would need to be expended for a social worker to explain the proceedings in non-technical terms to the child when the social worker is already engaging in his or her typical duties of describing the next steps to the child. Not only will providing children with more information pertaining to custody or immigration proceedings protect the child's best interests, but allowing children more resources to participate meaningfully in proceedings will protect parents' due process rights by ensuring that parental rights are not terminated prematurely or unfairly since the child may have a better opportunity to provide evidence if that child better understands the proceedings.

Fourth, the United States must allow parents to either be present at or participate during proceedings relating to their children. The HELP Separated Children Act will remedy this issue, bringing the United States one step closer to meeting the ideals of international norms, as evidenced by the EU's approach to dealing with migrant families. Systems already exist to allow imprisoned individuals access to custody proceedings, as detailed above, so allowing detained migrants the ability to participate telephonically in custody proceedings would most likely not apply very much pressure to detainment facilities. Not only must the United States be concerned about separating migrant families because of due process concerns, but the United States must be mindful of the interplay between the international community, human rights, and the best interests of the child. By allowing parents the

218. See Christina Jewett & Shefali Luthra, *Immigrant Toddlers Ordered to Appear in Court Alone*, USA TODAY (June 27, 2018, 3:34 PM), <https://www.usatoday.com/story/news/nation/2018/06/27/immigrant-children-deportation-court/739205002/> [<https://perma.cc/J492-8ZPT>].

219. Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL 1, 1 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [<https://perma.cc/FQ7K-BDA9>].

ability to participate in custody proceedings, the United States mitigates due process concerns outlined by the Constitution, as well as protects the best interests of the child and heightens the image of the United States in the international community.

Overall, the United States must identify solutions to deal with problems that arise when immigration policies clash with human rights policies and constitutional guarantees, such as where migrants are detained and separated from their children. Such solutions may include legislation, administrative policies, and training and awareness programs required for ICE officers and social workers regarding cultural biases.²²⁰ The United States must recognize that current policies allow for the potential for due process violations to occur and must take appropriate actions to remedy this issue. The HELP Separated Children Act could mitigate issues that derive from a detained parent's inability to participate in custody proceedings; however, the Act does not address how cultural biases should be alleviated or how the provision of ASFA triggering separations should be amended.²²¹ Arguably, separating children from their parents will not be in the best interest of the child due to the physical and mental impacts the separation may have on the child, as previously discussed. Thus, the United States can remedy instances of potential due process violations by enacting policies to provide for the best interests of the child, similar to the EU's approach, because doing so will allow a more effective hearing regarding custody to occur.

D. INTERNATIONAL IMPACT OF AMERICAN IMMIGRATION POLICY

As previously noted, the right to preserve family integrity is a constitutional right, and even international treaties and covenants have acknowledged the value of preserving the family unit.²²² In regards to international treaties that the United States has ratified, such treaties are not self-executing, thus, the United States contends that the provisions contained within are not legally enforceable without legislation implementing the provisions into the United States Code.²²³ The Universal Declaration of Human Rights, as well as the 1969 American Convention on Human Rights and the International Convention on Civil and Political Rights, declares that “[t]he family is the natural and fundamental group unit of society and is

220. See Rogerson, *supra* note 149, at 144 (establishing that training programs for cultural biases may help to ensure that social workers and ICE officers are not making recommendations based solely on the belief that a migrant's home state is less than the United States).

221. *But cf.* HELP Separated Children Act, H.R. 3451, 116th Cong. (2019) (failing to address how ASFA provisions impact immigration proceedings).

222. Nessel, *supra* note 206.

223. *Id.* at 1275.

entitled to protection by society and the State.”²²⁴ The United Nations condemned Trump’s zero-tolerance policy, stipulating that separating families violates their rights and international law.²²⁵ A spokeswoman for the Office of the United Nations High Commissioner for Human Rights stated that separating families is an “arbitrary and unlawful interference in family life, and is a serious violation of the rights of the child.”²²⁶ The United Nations urged the United States to end family separations, as well as return to the policy of handling immigration offenses as civil violations and not criminal offenses.²²⁷ Even though the United States may not be a party to certain treaties decrying the value of the family unit, or such treaties are not self-executing and therefore the United States is not legally bound by the treaty, the United States should be mindful of the value the international community, as a whole, places on the integrity of the family unit, especially considering preserving the familial unit has been declared a fundamental right in U.S. jurisprudence.²²⁸

United Kingdom’s Prime Minister publicly condemned the United States’ procedure of detaining children, stating that “[t]his is wrong. This is not something that we agree with. This is not the United Kingdom’s approach.”²²⁹ The Prime Minister’s statement further shows that the United States is not making the best decisions when it comes to handling migrant children, and there are other methods that can be utilized to not only secure the borders, but also not belittle an individual’s basic rights. Even though some EU countries may detain children, families who present at entry points are not separated, unless there is a strong reason to do so.²³⁰ Activists contend that no other country separates families that are seeking asylum.²³¹ Susan Fratzke, a policy analyst and program coordinator for the Migration Policy Institute’s International Program, also expressed that no other countries in Europe separate children from their families.²³² In most nations,

224. *Id.* at 1276 (brackets in the original).

225. Cumming-Bruce, *supra* note 195.

226. *Id.*

227. *Id.*

228. This is not to say that international treaties and covenants are binding upon the United States and can be used to challenge immigration policies; however, this Note argues that the trend in international affairs and the approaches that different nations, such as the EU, have taken to resolve immigration detention issues can be used as a model to remedy current United States immigration policies as to prevent questions of constitutional violations, such as potential due process implications.

229. Masri & Forde, *supra* note 204.

230. *Id.*

231. Hugo Bachega, *Separation of Migrant Families: What Other Countries Do*, BBC NEWS (June 7, 2018), <https://www.bbc.com/news/world-us-canada-44374756> [<https://perma.cc/RJ7E-UZHF>].

232. Shinkman, *supra* note 193. Fratzke details that migrants are typically detained less in Europe than in the United States and children are only detained if special facilities

asylum seekers are held in reception centers until their asylum application is processed and either accepted or denied.²³³ Even Australia, which has some of the most restrictive immigration policies in the world, does not separate parents from children.²³⁴ Michael Flynn, the Executive Director of the Geneva-based Global Detention Project, claims “there is no equivalent” to what the United States is doing in separating migrant children from parents.²³⁵

While the United States has every legal right to protect its borders and detaining unlawful migrants who do not present themselves at the port of entry is within the rights of ICE officers, the United States must consider its actions in light of its place as a moral leader of the world. In 2012, former President Jimmy Carter expressed his worry that “America is abandoning its role as a leading advocate for human rights.”²³⁶ This comment, which was made nearly six years ago by a former leader of the United States, coupled with the public condemnation of the zero-tolerance policy from various leaders and international organizations, demonstrates the position that the United States has held as a world leader, both morally and politically, and falling from that leading role sets a dangerous precedent. Currently, U.S. moral authority is threatened by its leaders and the way that such individuals have approached human-rights based problems.²³⁷ It is common for countries to look towards the U.S. legal system as a model to aid in establishing developing legal systems because American tenets of fairness and independence typically serve to protect justice.²³⁸ Due to this, it is even more imperative how the rest of the world views current immigration policies and a “hardline immigration policy...may stain [America’s] global reputation for a generation.”²³⁹ While no one is seriously advocating for completely open borders and no one is suggesting that immigration laws should not be enforced, leaders must weigh the benefits that a zero-tolerance policy and prosecuting unlawful migrants will bring to America against the damage that such “barbaric actions and images will have on

already exist, no other alternative is feasible, and separation is in the best interests of the child. *Id.*

233. Bacheaga, *supra* note 231.

234. *Id.*

235. *Id.* The Global Detention Project is a non-profit organization that focuses on detained immigrant rights. *Id.*

236. Michael Barnett, *Is America the Moral Leader in the World?*, CNN (July 4, 2012, 4:31 PM), <https://www.cnn.com/2012/07/04/opinion/barnett-human-rights/index.html> [<http://perma.cc/CA6V-DFHS>].

237. Josh Campbell, *America’s Shredded Moral Authority*, CNN (June 21, 2018, 10:53 AM), <https://www.cnn.com/2018/06/20/opinions/united-states-moral-credibility-is-badly-tarnished-campbell/index.html> [<https://perma.cc/W8G6-5CQA>].

238. *Id.*

239. *Id.*

America's moral authority abroad."²⁴⁰ There is no question that the United States is a global superpower; however, to retain such a status, America's policies cannot trample on the rights of others,²⁴¹ especially if such policies violate, or have the potential to violate, constitutional rights.

While the United States must find a balance between enforcing its laws, protecting its borders, and upholding constitutional rights, the United States must also consider how its actions appear to the rest of the world. Clearly, the U.S. policy on family separations received public condemnation, which harms the overall reputation the United States has in the international community. This, in turn, hurts the moral authority the United States has and, thus, hinders the United States' ability to be an international leader because the violations of due process, which is protected by the Constitution, creates a sense of hypocrisy. If the United States, a political giant in the international community, does not even follow and uphold its own Constitution, then the United States advocating for changes in other countries or within international relations itself holds little weight. Therefore, the United States' future actions in addressing issues dealing with migrant families may prove to have consequences or rewards that transcend American territory.

VI. CONCLUSION

Separating migrant children from their parents is not a new phenomenon—such actions occurred well before the Trump administration began; however, the Trump administration's zero-tolerance policy led to thousands of family separations and a nationwide injunction that prohibited the separations. While family separations at the border is not a new or novel issue, the emergence of policies that could lead to a drastic number of separations and immediate detainment calls for reform because federal law that requires initiation of proceedings to terminate parental rights does not accommodate the indefinite timelines of immigration detention facilities. This could be a violation of parents' due process rights because, while being detained, parents do not have the opportunity to attend termination proceedings—thus, parents do not receive notice and the chance to be heard. Due process rights extend to all individuals on American soil and are not limited to American citizens. Even though current proposed legislation may mitigate the effects of migrant family separations, the HELP Separated Children Act or the Stop Cruelty to Migrant Children Act do not address provisions of ASFA that may necessarily trigger such separations and subsequent custody proceedings.

240. *Id.*

241. *Id.*

In order to remedy potential due process concerns that may arise from family separations, the United States could look to the EU's policies regarding migrant families; however, the United States must first reform the ASFA provision that requires the initiation of proceedings to terminate parental rights because this puts parents in a difficult position when they are held indefinitely in an immigration detention center and do not have access to representation and the ability to participate in the proceedings.

Finally, it is important for the United States to reform its immigration policies and bridge the gap between federal law and state law because countries look to the United States as a moral leader. If the United States circumvents the constitutional guarantees of allowing migrants due process, as well as ignores tenets of international law and international treaties, other countries may either look to that action as downplaying human rights protections or other countries may condemn the actions—as has already occurred from various national leaders—and create tension in the relationships between the United States and foreign countries.