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"Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[1]

"We'll put the illegal parents in the van bound for Mexico and the American kids in the van bound for the social services agencies."[2]

INTRODUCTION

The intersection of deeply held beliefs regarding the sanctity of families and widespread assumptions about the effect of immigration law can produce jarring disconnects. The fear of immigrant parents that they will be deported and lose rights and relationships with their children is common, as is the assumption, both in and out of immigrant communities, that the deportation of parents inevitably results in legal separation of parents and children.

That fear is not without basis. Many immigrant parents are keenly aware of highly publicized instances in which foreign-born parents, even those with legal authorization to stay in the United States, face the prospect of losing their children through interaction

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1. Moore v. City of E. Cleveland, 431 U.S. 494, 503–04 (1977) (footnote omitted).

2. John Brummett, *Can't We All Meet at the Border?*, ARK. NEWS BUREAU, Apr. 3, 2006, http://www.arkansasnews.com/archive/2006/04/03/JohnBrummett/335382.html.

with unfamiliar judicial and child welfare systems.[3] When parents actually are deported, immigration concerns can and often do play a direct and critical role in the separation of parents and children, in ways that are appropriate and in ways that are not.[4] Parents who are susceptible to deportation, therefore, have understandable cause to worry that expanded enforcement of immigration laws may threaten their ability to maintain family integrity as a practical, and perhaps legal, matter.

In fact, the current immigration law enforcement strategy of raiding homes and workplaces relies on the worry and trauma that raids create among parents and children to maximize its impact. Immigration raids sow fear in hopes that immigrants will voluntarily leave the United States. With the current surge of immigration raids into homes and workplaces across the United States,[5] thousands of immigrant families are forced to reevaluate the tenuous accommodations that they have established in the communities where they live.

In response to increased immigration raids, immigrant families, communities, and advocates around the country have mobilized to develop outreach materials and response plans.[6] These actions are timely and important in minimizing the confusion and family separation that inevitably accompany immigration raids. Yet the immigration raids also call for additional and different sorts of examination. The role of child welfare and family courts in assisting children left behind by raids forces evaluation of the treatment of immigrant families when immigration law alters the ability of some family members to live in the United States. The impact on children and families also provides a perspective that must inform the ongoing debate over the future of immigration law and policy in the United States.

Part I of this Article explores the role of immigration laws and enforcement policies in the development of the large population of unauthorized immigrants in the United States. It reveals that immigrants are not isolated, but instead are deeply integrated into the fabric of the United States through families. As immigration enforcement policies shift, new tactics threaten to separate the very families that earlier policies and practices supported.

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3. *See, e.g.*, *In re* Pedro N., No. D048827, 2006 WL 3291916 (Cal. Ct. App. Nov. 14, 2006); *In re* Valle, No. 269461, 2006 WL 2987665 (Mich. Ct. App. Oct. 19, 2006); *In re* Adoption of A.M.H., 215 S.W.3d 793, 809–13 (Tenn. 2007).

4. *See, e.g.*, *infra* text accompanying notes 101–14.

5. *See infra* Part I.B.

6. *See, e.g.*, AM. IMMIGRATION LAWYERS ASS'N, WORKPLACE RAIDS ACTION PLAN, http://www.aila.org/content/default.aspx?docid=23249 (last visited Apr. 17, 2008).

In Part II of this Article, the immediate and long-term impacts of immigration raids on children are examined. Because immigrants are so thoroughly integrated into U.S. families, immigration raids impact many more people than those who are arrested and deported.

Part III of this Article considers the way in which assumptions and misconceptions about the interaction of immigration law with child custody issues by child welfare officials and family courts contribute to the fear among immigrant children and parents. These assumptions and misconceptions are analyzed through a widely publicized case in which an immigrant mother was deported and wrongfully lost custody of her children as a result of her interaction with the child welfare system.

Finally, Part IV of this Article suggests that the costs to children and families associated with the enforcement of current immigration laws prompt a rethinking of existing policies relating to enforcement and to the underlying immigration laws that have led us to the current situation.

Immigration laws have long stood in uneasy tension with family integrity. Sometimes the enforcement of U.S. immigration laws is not possible without compromising family integrity; conversely, the maintenance of family integrity in the United States often can be realized only in violation of immigration laws. Large scale immigration raids place this reality in stark relief and create situations where the impact of immigration law on child custody determinations cannot be ignored. As such, the raids prompt reconsideration of both the assumptions that we bring to child custody determinations and the attitudes we adopt regarding the substance and process of immigration law.

I. ENFORCEMENT OF IMMIGRATION LAWS AND THE SHAPING OF THE IMMIGRANT POPULATION

Immigration laws and policies shift over time, ebbing and flowing between extremes of openness to newcomers and nativist exclusion.[7] These shifts are reflected not only in substantive immigration laws, but also in the policies and practices related to the enforcement of such laws. These ever-shifting policies are of tremendous consequence to immigrant families.

7. *See* KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 45 (2007) ("The cyclical nature of immigration politics—and thus immigration law and policy—often has been directly linked to the overall state of the U.S. economy and the perceived social evils of the day.").

A. Border Enforcement, Harsh Laws, and the Creation of Mixed-Status Families

Despite the relentless media drumbeat of "Broken Borders," recent years have seen the pendulum of immigration policy and enforcement swing toward much more robust efforts to control U.S. borders.[8] Long established patterns of cross-border movement and migration have been disrupted as "administrations have drastically increased border enforcement . . . [and] made the act of entry more expensive and dangerous."[9] "Between 1986 and 2002 the number of Border Patrol officers tripled and the number of hours they spent patrolling the border grew by a factor of around eight."[10] Notably, efforts to secure the nation's borders were directed more prominently to the southern border rather than to the northern border.[11] Although uneven, the focus of immigration law enforcement has been decidedly at the border, with less emphasis on the enforcement of immigration laws in the interior of the country.[12]

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8. Douglas S. Massey, *Beyond the Border Buildup: Towards a New Approach to Mexico-U.S. Migration*, IMMIGR. POL'Y FOCUS, Sept. 2005, at 1, 2, *available at* http://immigration.server263.com/images/File/infocus/Beyond%20Border%20Buildup.pdf ("In 1986 the United States embarked on a determined effort to restrict Mexican immigration and tighten border enforcement.").

9. Beth Lyon, *Tipping the Balance: Why Courts Should Look to International and Foreign Law on Unauthorized Immigrant Worker Rights*, 29 U. PA. J. INT'L L. 169, 184–85 (2007); *accord* Massey, *supra* note 8, at 8 ("The net effect of U.S. policies . . . was to increase the quality and price of border-smuggling services.").

10. Massey, *supra* note 8, at 1.

11. Kevin Bohn, *Report: Security on U.S-Canada Border Fails Terror Test*, Sept. 27, 2007, http://www.cnn.com/2007/US/09/27/border.security/#cnnSTCText ("While the U.S.-Mexican border has received much of the national attention lately with the recent debate over illegal immigration, the report pointed out the dramatic disparity in the law enforcement presence at crossings there versus ones between the United States and Canada."); CBC News, *Man with Bloody Chainsaw Let into U.S.*, June 8, 2005, http://www.cbc.ca/world/story/2005/06/08/despres050608.html (discussing U.S. border officials' decision to permit entry to a man who "arrived at the U.S.-Canadian border at Calais, Maine, carrying a homemade sword, a hatchet, a knife, brass knuckles and a chainsaw stained with what appeared to be blood").

12. H.G. Reza, *Border Patrol Faces New Limits in Inland Empire; After June Arrests Drew Protests, U.S. Officials Want the Agents to Restrict Enforcement.*, L.A. TIMES, Aug. 4, 2004, at B1. As H.G. Reza reported:

> Documents and interviews show that Department of Homeland Security officials want to concentrate Border Patrol agents at the borders and limit their inland activity to arresting illegal immigrants while they are traveling from the border and at transportation centers such as Los Angeles International Airport and highway checkpoints such as those in Temecula and San Clemente.

Ironically, this tightening of the border had the effect of encouraging some unauthorized immigrants to stay in the United States rather than risk future border crossings.[13]

Also over the past decade, the emphasis on border enforcement has been in the wake of a series of legal reforms[14] and the sunset of a widely utilized statutory provision,[15] which, taken together, resulted in greatly diminished prospects of attaining legal immigration status for persons who are present in the United States without legal authorization. These provisions both created new barriers to obtaining legal immigration status and eliminated existing pathways to legal immigration status for many immigrants who in the past would have reached legal immigration status on the basis of family relationships.[16]

Id. "One study found that between 1986 and 2002, about 60% of all appropriated enforcement resources went to border work, leaving only 10% for interior investigations and related enforcement." David A. Martin, *Eight Myths About Immigration Enforcement*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 525, 544 (2007). "The balance of enforcement spending went for detention and removal as well as intelligence." *Id.* at 544 n.84.

13. Douglas S. Massey, *Backfire at the Border: Why Enforcement Without Legalization Cannot Stop Illegal Immigration*, 29 CATO INST. CTR. FOR TRADE POL'Y STUD. 1, 1 (2005), *available at* http://www.freetrade.org/pubs/pas/tpa-029.pdf.

> Enforcement has driven up the cost of crossing the border illegally, but that has had the unintended consequence of encouraging illegal immigrants to stay longer in the United States to recoup the cost of entry. The result is that illegal immigrants are less likely to return to their home country, causing an increase in the number of illegal immigrants remaining in the United States.

Id.; *see also* Massey, *supra* note 8, at 1 ("The average probability of return migration among Mexican migrants to the United States declined from around 45 percent prior to 1986 to around 25 percent in 2002.").

14. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of U.S.C.) (enhancing enforcement of borders and adding grounds of inadmissibility); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 401–51, 110 Stat. 2105, 2260–77 (1996) (codified as amended in scattered sections of 8 U.S.C.) (placing restrictions on welfare and public benefits for noncitizens); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8 U.S.C.) (expanding the definition of an aggravated felony and limiting judicial review of immigration matters).

15. *See* 8 U.S.C. § 1255(i) (2000 & Supp. 2007) (providing the opportunity for an immigrant who entered the United States without inspection to adjust status upon payment of a fine, applicable to all immigrants in the 2000 edition, but only to those filing prior to April 30, 2001 in the most recent statute).

16. *See* David B. Thronson, *You Can't Get Here from Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL'Y & L. 58, 67 (2006) (discussing the myth that immigrants who wish to obtain legal immigration

As increased border controls disrupted settled patterns of circular migration and legal reforms blocked the regularization of immigration status for persons with close family ties in the United States, the unsurprising result was dramatic growth of the unauthorized immigrant population settled in the United States. This population, now estimated at approximately twelve million, continues to grow at a rate of about a half-million people per year.[17] Still, until recently, because enforcement generally was focused on the border, this growing unauthorized population experienced relative stability, and the chances that an unauthorized immigrant in the interior of the country would face arrest and removal were not particularly high.[18]

As the unauthorized population that is unable to obtain legal immigration status has produced children and entered into marriages, one result is the creation of millions of "mixed-status" families. A mixed-status family is one in which all family members do not share the same immigration status or citizenship. These families include "any combination of legal immigrants, undocumented immigrants, and naturalized citizens."[19] Because current immigration laws prevent many family members from changing their immigration or citizenship status, current mixed-status families often remain mixed-status families in perpetuity. So prevalent are such families today that at least one of every ten children living in the United States lives in a mixed-status family, and fifteen percent of poor children live in mixed-status families.[20]

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status need only wait in line). "Under modern immigration law significant barriers stand in the way of families which make it difficult or even impossible to get here (legally), especially when the family already is here (physically)." *Id.*

17. Aaron Terrazas et al., *Frequently Requested Statistics on Immigrants in the United States*, U.S. IN FOCUS (Migration Pol'y Inst., Wash., D.C.), Oct. 1, 2007, http://www.migrationinformation.org/USfocus/display.cfm?id=649#7. This unauthorized population is part of the larger foreign-born population of the United States which is approximately 37.5 million or 12.5% of the total population. *Id.* The current percentage of foreign-born individuals living in the United States remains below its historic peak, which was 14.8% of the total population in 1890. *Id.*

18. *See* David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45, 65–66 (2005) (calculating that it would take approximately ninety years to remove the unauthorized immigrant population other than those removed for criminal activity at the prevailing rate of removal for the non-criminal segment of the population).

19. MICHAEL E. FIX & WENDY ZIMMERMANN, ALL UNDER ONE ROOF: MIXED-STATUS FAMILIES IN AN ERA OF REFORM 1 (Urban Inst. 1999), *available at* http://www.urban.org/uploadedpdf/409100.pdf.

20. MICHAEL FIX ET AL., IMMIGRATION STUDIES: THE INTEGRATION OF IMMIGRANT FAMILIES IN THE UNITED STATES 15–16 (Urban Inst. 2001), *available*

Mixed-status families appear in many permutations, though some combinations are more common than others. Unsurprisingly, parents are more commonly immigrants than children. Approximately one in five children in the United States lives in a family in which at least one parent is an immigrant.[21] More specifically, "15 percent of all children in the [United States] were native-born children with immigrant parent(s)," and "4 percent of children were foreign-born children with at least one immigrant parent."[22] Children in immigrant families form "the fastest growing segment of the [United States] child population."[23] If current demographic trends persist, "children of immigrants will represent at least a quarter of all U.S. children by 2010."[24]

Some of these children are born not only to immigrant parents, but also to immigrant parents who lack authorization to stay in the United States. In the United States, "[t]here are over 5 million children living with unauthorized parents."[25] In the 6.6 million families with a parent who is not authorized to remain in the United States, approximately two-thirds of the children are U.S. citizens.[26] In fact, 1.5 million families with a parent who is not authorized to remain in the United States have exclusively U.S. born children.[27]

Although it is common to see families in which U.S. born citizen children have immigrant parents, children also immigrate to the United States. Nearly two million children in the United States themselves lack authorization to remain in the country.[28] Some of these children are unaccompanied, and many more live in the more than 700,000 families with children in which no person holds legal

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at http://www.urban.org/uploadedpdf/immig_integration.pdf. In families with children headed by a noncitizen, eighty-five percent are mixed-status families. *Id.*

21. FEDERAL INTERAGENCY FORUM ON CHILD AND FAMILY STATISTICS, AMERICA'S CHLDREN: KEY NATIONAL INDICATORS OF WELL-BEING 8 (2007), *available at* http://www.childstats.gov/pdf/ac2007/ac_07.pdf.

22. Valerie Leiter et al., *Challenges to Children's Independent Citizenship: Immigration, Family and the State*, 13 CHILDHOOD 11, 16 (2006) (citation omitted).

23. *Id.* at 11.

24. URBAN INST., CHILDREN OF IMMIGRANTS: FACTS AND FIGURES 1 (2006), *available at* http://www.urban.org/uploadedpdf/900955_children_of_immigrants.pdf.

25. *Id.* at 2.

26. JEFFREY S. PASSEL, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY, at ii (Pew Hispanic Ctr. 2006), *available at* http://pewhispanic.org/files/reports/61.pdf.

27. *Id.* at 8.

28. *Id.* at 7.

immigration status.[29] Unsurprisingly, adolescent children in families with unauthorized parents are more likely to be unauthorized themselves in comparison with younger children.[30] "Because a higher share of younger children were born here, there are many mixed-status families in which the younger children are citizens but the older children—like their parents—are noncitizens."[31]

To acknowledge the formation and relative stability of mixed-status immigrant families is not at all to imply that the deportation and marginalization of immigrant families does not happen and is without serious consequence. To the contrary, the reality of living without citizenship leaves many mixed-status families vulnerable to the ever present possibility that a family member might face deportation.[32] As efforts to enforce immigration laws move inward from the border, it is precisely this vulnerability and fear that immigration law enforcement policies target.

B. Immigration Raids in Homes and Workplaces

The last several years have seen significant efforts to enhance the enforcement of immigration laws in the nation's interior, signaling a major shift in enforcement strategy. The initial focus of these efforts was the deportation of noncitizens removable on the basis of unexecuted orders of removal.[33] U.S. Immigration and Customs Enforcement ("ICE"), the agency charged with the enforcement of immigration laws, publicly has asserted that it prioritizes the arrest of persons with outstanding removal orders or criminal convictions making them removable.[34]

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29. *Id.* at 9.

30. RANDY CAPPS ET AL., NAT'L COUNCIL OF LA RAZA, PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN 17 (Urban Inst. 2007), *available at* http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf.

31. URBAN INST., *supra* note 24, at 2.

32. *See* JOHNSON, *supra* note 7, at 46 ("The fear of deportation haunts many immigrants. They know that they can be torn away from established lives, family, friends, and community in an instant for lacking the proper immigration papers or for even something as minor as failing to file a change of address form with the U.S. government within ten days of moving.").

33. *See* OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., AN ASSESSMENT OF UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT'S FUGITIVE OPERATIONS TEAMS 1 (2007).

34. *See* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FACT SHEETS: ICE FUGITIVE OPERATIONS PROGRAM (Dec. 4, 2007), http://www.ice.gov/pi/news/factsheets/nfop_fs.htm ("ICE's Fugitive Operations Teams give top priority to cases involving aliens who pose a threat to national security and community safety, including members of transnational street gangs, child sex offenders,

The signature methodology of this enforcement effort has been an early morning raid at the recorded addresses of immigrants with criminal records or outstanding removal orders. The results have been large numbers of deportations. Since 1996, "more than 650,000 immigrants – both undocumented and legal noncitizens – have been deported as criminal aliens, many after serving substantial prison time."[35] In both 2004 and 2005, more than 90,000 individuals were removed as criminal aliens.[36]

At the same time, "[t]he conflation by ICE and others of 'illegal aliens,' 'criminal aliens,' and even 'terrorists' obscures the scope and function of the deportation system."[37] Home raids inevitably sweep up others in the home who are outside the targeted categories, such as family members or boarders.[38] Moreover, grave concerns about the particular tactics used to conduct these raids are widely reported:

> ICE teams appear to have developed a practice of raiding residential homes in the dead of night, without warrant, in search of persons believed to have an outstanding deportation order. In a typical raid, multiple immigration agents surround a house and pound on the front door, announcing themselves as "police." In the belief that there is an emergency, an occupant opens the door. The immigration agents (often armed) then enter the home, without a search warrant and without securing informed consent for their entry. They move through the home in an intimidating manner, wake all occupants including children, and make them gather in a central location. The agents often announce that they are looking for an individual who is unknown to the occupants of the home, and proceed to question the occupants and arrest anyone they suspect of having an unlawful presence in the

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and aliens with prior convictions for violent crimes."); U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, NEWS RELEASES: NEW JERSEY ICE FUGITIVE OPERATIONS TEAMS ARREST MORE THAN 2,000 IN ONE YEAR (Dec. 4, 2007), http://www.ice.gov/pi/news/newsreleases/articles/071204newark.htm (discussing "operations aimed at arresting criminal aliens and those who have defied the removal orders issued by immigration judges").

35. CAPPS ET AL., *supra* note 30, at 10.

36. *Id.*

37. Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?*, 3 STAN. J. C.R. & C.L. 195, 199 (2007).

38. *See* Tyche Hendricks, *The Human Face of Immigration Raids in Bay Area: Arrests of Parents Can Deeply Traumatize Children Caught in the Fray, Experts Argue*, S.F. CHRON., Apr. 27, 2007, at A1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/04/27/MNGJIPGO341.DTL ("The raids focus on illegal immigrants who have ignored deportation orders, but 37 percent of the 18,149 people arrested nationwide through Feb. 23 were not wanted fugitives.").

> United States. In many cases, the occupants subjected to these warrantless predawn raids include children and adults who are citizens or lawful permanent residents of the United States.[39]

These events are traumatic for those arrested and those not directly subject to deportation by the government, such as U.S. citizen children who witness the arrests of parents and other relatives.[40] Immigration raids into homes, therefore, reach deep into immigrant communities and contribute to a climate of fear on the part of immigrants who previously might not have felt targeted by immigration law enforcement.

In the past year, raids of individual homes have taken a backseat in the news to high profile workplace raids that have added further to the growing feeling of insecurity in immigrant families. ICE "has markedly increased the pace of worksite raids in the past few years to apprehend undocumented immigrants: the number of undocumented immigrants arrested at workplaces increased more than sevenfold."[41] ICE's move toward workplace enforcement across the country has included numerous large scale raids, such as the raids against Swift & Company meatpacking facilities across the Midwest, which involved more than a thousand law enforcement officers.[42] ICE reported the arrests on immigration charges of 1297 noncitizens from these raids on Swift properties.[43] A June 2007 workplace raid in Portland, Oregon resulted "in the arrest of more than 160 persons illegally present in the United States."[44] Other workplace raids have resulted in the arrest of 136 persons in Missouri, more than 300 in New Bedford, Massachusetts, and more than 1000 spread across forty locations of IFCO Systems North America.[45] These high profile and dramatic events have an enormous impact on affected immigrant communities.

One case study of three workplace raids described the general pattern of these events as follows:

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39. Complaint at 3, Seton Hall Sch. of Law Ctr. for Soc. Justice v. U.S. Dep't of Homeland Sec., No. 2:33-av-00001 (D.N.J. filed Jan. 28, 2008).

40. *See, e.g.*, Julia Preston, *Case of Mother Torn from Baby Reflects Immigration Quandary*, N.Y. TIMES, Nov. 17, 2007, at A1 (discussing issuance of government guidelines following a raid in which a nursing mother was separated from her infant daughter).

41. CAPPS ET AL., *supra* note 30, at 1.

42. *Id.* at 11 ("In December 2006, as part of 'Operation Wagon Train,' more than 1,000 ICE agents raided six Swift & Company meatpacking plants . . . .").

43. *Id.*

44. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FACT SHEETS: WORKSITE ENFORCEMENT (Aug. 14, 2007), http://www.ice.gov/pi/news/factsheets/worksite_operations.htm.

45. *Id.*

> In all three sites, ICE agents arrived at the plants early in the morning with a large number of vehicles – including several buses – to move arrested immigrants from the plants to processing facilities. To the general community, the movement of many buses and other ICE vehicles into town was the first sign that a raid was in progress. . . . [P]lant management shut down the assembly lines and instructed workers to assemble in central locations, where ICE agents separated them into groups by citizenship and legal status and requested to see their documentation. There were conflicting reports about the degree to which ICE agents were armed and had their guns drawn during the raids. . . . [M]any Guatemalans in all three locations spoke a Mayan dialect, not Spanish, as their first language; ICE certainly had difficulty communicating with this group.[46]

Given the massive scale of these raids, they impact not only the workers directly affected, but also entire communities.

Persons arrested in workplace raids are often quickly relocated to distant detention centers. In one raid in Grand Island, Nebraska, those arrested were moved to a National Guard camp in Iowa for processing.[47] By the day following the workplace raid in New Bedford, Massachusetts, 206 arrestees had been flown to Texas.[48] Following such isolation, "a large number of arrestees signed papers agreeing to be deported without appeal. In many cases they also agreed to leave the United States before they had any access to a lawyer or an official from their consulate."[49] In one case, "[l]awyers seeking to represent the arrestees were denied access during the first seven to ten days."[50]

For already challenged communities, large immigration raids create "crisis scenarios in terms of the care arrangements for the hundreds of children who temporarily los[e] their parents . . . [and lead] to a general sense of chaos and fear."[51] In some instances, the "situation deteriorate[s] further toward outright panic."[52] For example, following large raids there have been numerous reports that families have hidden "in their basements or closets for days."[53] The tremendous emotional impact of such large scale raids is not unintentional.

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46. CAPPS ET AL., *supra* note 30, at 22.

47. *Id.* at 23.

48. Aguilar v. U.S. Immigration & Customs Enforcement Div. of Dep't of Homeland Sec., 510 F.3d 1, 6 (1st Cir. 2007).

49. CAPPS ET AL., *supra* note 30, at 24.

50. *Id.*

51. *Id.* at 34.

52. *Id.*

53. *See id.*

C. *Attrition—Reducing Twelve Million People to a "Manageable Nuisance"*

While the federal government officially proclaims that the "ultimate goal is to develop the capacity to remove all removable aliens,"[54] even the most adamant proponents of reducing the immigrant population acknowledge that the "deportation of all illegal immigrants . . . is not a choice at all because we do not have the capacity to do so even if we wanted."[55] One enforcement strategy that is commonly advanced as an alternative to mass deportation is "attrition."[56]

The basic idea of attrition advocates is that "[b]y deterring the settlement of new illegals, by increasing deportations to the extent possible, and, most importantly, by increasing the number of illegals already here who give up and deport themselves . . . [t]he result would be a shrinking of the illegal population to a manageable nuisance."[57] The predicted "self-deportations" are to come as "an increase in conventional enforcement – arrests, prosecutions, deportations, asset seizures, etc. – with expanded use of verification of legal status at a variety of important points . . . make it as difficult and unpleasant as possible to live here illegally."[58] Advocates of attrition note that under this approach it is "true that random raids at workplaces and elsewhere will always be needed as an enforcement tool (like speed traps or random tax audits, in other contexts), because every illegal alien must understand that he may

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54. BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003-2012: DETENTION AND REMOVAL STRATEGY FOR A SECURE HOMELAND 4-3 (2003).

55. The Honorable Asa Hutchinson, Former Undersecretary for Border and Transp. Sec., U.S. Dep't Homeland Sec., Keynote Address at the American University Washington College of Law Symposium: Holes in the Fence: Immigration Reform and Border Security in the United States (Mar. 20, 2007), *available at* http://www.podcastdirectory.com/podshows/1234768 (quoting remarks of Mark Krikorian, Executive Director of the Center for Immigration Studies). Moreover, immigration restrictionists concede that "the economic disruption from such an abrupt change would make the transition more painful than it needs to be for those businesses that have become addicted to illegal labor." Mark Krikorian, *Downsizing Illegal Immigration: A Strategy of Attrition Through Enforcement*, BACKGROUNDER (Ctr. for Immigration Studies, Wash., D.C.), May 2005, at 2, *available at* http://www.cis.org/articles/2005/back605.pdf.

56. Jessica M. Vaughan, *Attrition Through Enforcement: A Cost-Effective Strategy to Shrink the Illegal Population*, BACKGROUNDER (Ctr. for Immigration Studies, Wash., D.C.), Apr. 2006, at 1, *available at* http://www.cis.org/articles/2006/back406.pdf.

57. Krikorian, *supra* note 55, at 1.

58. *Id.* at 5.

be detained at any time."[59]

Immigration raids produce precisely the sense of unease and fear that attrition advocates seek. The unsettling effect that they have had on immigrant communities far exceeds the actual numbers of immigrants who are arrested. The sevenfold increase in arrests during the first ten months of 2007 still resulted in only 3600 arrests.[60] Relative to the overall unauthorized immigrant population or even to the overall population of persons deported, this is not a spectacularly high number. However, before declaring the raids a vindication of the theory that making life "difficult and unpleasant" for unauthorized immigrants is an effective enforcement technique, it is important to look at where the impacts of the raids actually fall and what types of fears the raids actually exploit.

II. THE IMPACT OF IMMIGRATION RAIDS ON CHILDREN

Even without the fear of immigration raids, immigrant children and families struggle to overcome barriers not faced by nonimmigrant families. Mixed-status families "are more likely to be poor than other families."[61] "[C]hildren of immigrants are substantially more likely than children with U.S.-born parents to be poor, have food-related problems, live in crowded housing, lack health insurance, and be in fair or poor health."[62] They are "significantly less likely to be in any regular nonparental child care arrangement."[63] Also, "[c]hildren in low-income working immigrant families were more than twice as likely as those in comparable native families to lack health insurance coverage in 2002."[64]

Undermining the common misperception that immigrants in the United States have children in order to access public benefits, citizen children of citizens access public benefits at a higher rate than citizen children of immigrants.[65] Moreover, social benefits laws

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59. *Id.* at 2.

60. CAPPS ET AL., *supra* note 30, at 10. This number serves to underscore the minimal risk that unauthorized immigrants faced in their workplaces in the past.

61. FIX & ZIMMERMANN, *supra* note 19, at 2.

62. Randy Capps et al., *A Profile of Low-Income Working Immigrant Families*, NEW FEDERALISM: NAT'L SURV. AM. FAMILIES (Urban Inst., Wash., D.C.), June 2005, at 1, 1 (citation omitted), *available at* http://www.urban.org/UploadedPDF/311206_B-67.pdf.

63. *Id.* at 5.

64. *Id.* at 4.

65. Michael E. Fix & Jeffrey S. Passel, Lessons of Welfare Reform for Immigrant Integration (Mar. 8, 2002), *available at* http://www.urban.org/url.cfm?ID=900497 (summarizing a presentation given on Feb. 1, 2002 to the

now include major distinctions in the availability of public benefits between citizens and noncitizens, even those noncitizens with legal immigration status.[66] Due to the prevalence of mixed-status families, "most policies that advantage or disadvantage noncitizens are likely to have broad spillover effects on the citizen children who live in the great majority of immigrant families."[67] The result is that while some citizen children live "in households with noncitizens and suffer[] the disadvantage of losing benefits and the reduced overall household resources that may result[,] a second class of citizen children lives in households with only citizens and suffers no comparable disadvantage."[68] Children in immigrant families were a vulnerable population before immigration raids in the interior of the country increased. The current pattern of raids creates new crises for these children and their families to navigate.

Immigration raids have a pronounced impact on immigrant families in general and on children in immigrant families in particular. ICE does not collect data on the number of arrestees who have children.[69] However, statistical estimates, confirmed in several case studies, predict that the number of children affected by the arrest of parents in workplace raids "would be equal to about half the number of adults arrested."[70] By one account, "at least 13,000 American children have seen one or both parents deported in the past two years after round-ups in factories and neighborhoods."[71] When extended families are considered, the count of families that have been separated increases.[72] Moreover, "[t]he children of undocumented immigrants are predominantly young children, and many are infants, toddlers, and preschoolers."[73] Workplace raids, therefore, are likely to have direct impact on the most vulnerable

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National Immigration Forum).

66. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 412, 110 Stat. 2105, 2269–70 (granting authority to states to determine eligibility of aliens for public benefits); *see also* Leiter et al., *supra* note 22, at 17 (noting that 1996 legal reforms "'target' social benefits to a more restricted scope of beneficiaries, and citizenship status is now one of the screens that is now used to determine eligibility" (citation omitted)).

67. FIX & ZIMMERMANN, *supra* note 19, at 2.

68. *Id.*

69. CAPPS ET AL., *supra* note 30, at 15.

70. *Id.* at 16. There is, of course, variation. In one case study of a raid in Greeley, Colorado, for every four adults arrested there were three children in their households. *Id.* at 18.

71. Preston, *supra* note 40.

72. *See* CAPPS ET AL., *supra* note 30, at 17.

73. *Id.* In a case study of a raid in Grand Island, Nebraska, "44% of children were under six years old, and another 35% were age six to ten." *Id.* at 19.

populations. One case study found that sixty-six percent of children with a parent arrested in a workplace raid were U.S. citizens.[74]

The workplace raids presented particular difficulties for parents who were detained and not able to go home to their children. Discussing the New Bedford raid, the First Circuit noted "that ICE gave social welfare agencies insufficient notice of the raid, that caseworkers were denied access to detainees until after the first group had been transferred, and . . . [a]s a result, a substantial number of the detainees' minor children were left for varying periods of time without adult supervision."[75] Persons arrested who contested removability "were detained for significant amounts of time in locations far from their homes and families."[76] Limitations on phone access complicated communication with families.[77]

"[M]any children face[] traumatic circumstances and insecure care . . . in the period after the raids."[78] According to "[c]hild psychology experts . . . children suffer most from the disruption of armed agents coming into their homes and taking away their parents – and sometimes themselves. Children can experience stress, depression and anxiety disorders . . . ."[79] "The most destabilizing impact on the children of arrestees following worksite enforcement actions came from the separation and fragmentation of families."[80] For children, "emotional trauma . . . followed separation from one or both parents."[81] For young children who do not understand the concept of immigration law, "sudden separation was considered personal abandonment."[82] Moreover, "children who witness their parents being taken into custody lose trust in their parents' ability to keep them safe and begin to see danger everywhere."[83]

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74. *Id.* at 18.

75. Aguilar v. U.S. Immigration & Customs Enforcement Div. of the Dep't of Homeland Sec., 510 F.3d 1, 6 (1st Cir. 2007).

76. CAPPS ET AL., *supra* note 30, at 27.

77. *Id.*

78. *Id.* at 37.

79. Hendricks, *supra* note 38.

80. CAPPS ET AL., *supra* note 30, at 42.

81. *Id.* at 50.

82. *Id.* at 51.

83. Hendricks, *supra* note 38. The deep impact on the parent-child relationship that flows from forced separation is not a new phenomena and is not confined to the context of immigration. For example, "messages of parental vulnerability and subordination were repeatedly burned into the consciousness of slave parents and children, undermining their sense of worth, diminishing the sense of family security and authority, eroding the parents' function as a model of adult agency and independence." PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 98 (1997).

Longer term, the deportation or detention of a parent through a workplace raid removes the parent's earnings from the household which "creates a more unstable home environment and removes one of the main strengths in immigrant families—the presence of two parents."[84] In one raid, about seventeen percent of affected children saw two parents arrested.[85] Obviously, arrests of single parents had great impact as well. Often, the parent arrested was the person most integrated into U.S. society, meaning that the family lost its strongest connection with broader society.[86] Moreover, "[e]xtended family members and others who took in the children of arrested parents also experienced increased economic hardship."[87]

Children were affected in other ways, such as increased absenteeism in schools.[88] Further, immigration raids result in "some degree of polarization between Latino immigrants and other community residents."[89] Subsequent to raids, some children experience social isolation "when they were harassed by other children or branded as criminals because their parents were arrested."[90] At school, "[m]any children exhibited outward signs of stress . . . [and] lost their appetites, ate less, and lost weight."[91]

The toll of immigration raids is felt not only by the person facing possible deportation, but also by the families and children left behind. Indeed, it is precisely these "collateral" effects that make the raids such a powerful enforcement tool.

III. PRESERVING THE PARENT-CHILD RELATIONSHIP

As a practical matter, the arrest and deportation of a parent can lead to the immediate separation of parents from their children. During the raids discussed above, in some instances ICE ultimately did release arrested parents "based on their roles as primary or sole caregivers for children, or because of family health issues."[92] The process of identifying such caregivers, however, was complicated by the fact that "many arrested immigrants did not disclose to ICE that they had children in the United States for fear that their children

84. CAPPS ET AL., *supra* note 30, at 41.
85. *Id.* at 42.
86. *Id.*
87. *Id.* at 44.
88. *School Enrollment Down Following Swift Raids*, WCCO.com, Feb. 12, 2007, http://wcco.com/local/Swift.Co.meatpacker.2.365145.html (last visited Mar. 16, 2008).
89. CAPPS ET AL., *supra* note 30, at 51.
90. *Id.* at 52.
91. *Id.*
92. *Id.* at 28.

would be arrested and detained or taken into foster care."[93] This was especially true in the workplace raid in Grand Island, Nebraska where "immigrants . . . were fearful of losing their children to foster care based on a high-profile case in which an undocumented Guatemalan mother had been separated from one of her children for many months following a child abuse report."[94]

This prior child welfare case in Grand Island merits closer scrutiny because immigration raids do not occur on a blank slate. Immigrant parents' perceptions about their rights related to their children in the face of deportation are understandably influenced by their knowledge or perceptions of past practice when child custody and immigration systems collide. These perceptions, in turn, have bearing on the impact that immigration raids produce.

A. *The Struggle of Mercedes Santiago-Felipe*

Mercedes Santiago-Felipe, an immigrant from Guatemala, lived in Grand Island, Nebraska with her two U.S. citizen children. She speaks "a Mayan Indian dialect . . . and speaks no English and very little Spanish."[95] She was arrested in March 2001 for slapping her six-year-old son.[96] Her children were taken into protective custody, and the "record indicates that after Mercedes was arrested and incarcerated for 'child abuse,' the then Immigration and Naturalization Service (INS) placed a hold on her through the Hall County jail because she was an illegal alien."[97] Misdemeanor charges of abuse ultimately were dismissed.[98] Nebraska's Foster Care Review Board later "found that the children were inappropriately removed from the home" given that "a 'slap on the face' was insufficient evidence to support a finding that [her son] was in imminent danger and that no evidence supported a finding that [her daughter] was at risk."[99] The Review Board noted that

> [t]here were NO services offered to prevent removal, such as parenting class, family support worker, or therapy. The Board wonders how a slap on the face can be defined as a situation where the child is in imminent danger. . . . We are confused why the mother was arrested and jailed for a slap on the face,

93. *Id.*
94. *Id.* at 35.
95. *In re* Mainor T., 674 N.W.2d 442, 449 (Neb. 2004).
96. *Id.*
97. *Id.*
98. Brief of Petitioner-Appellant at 14, *In re* Mainor T., 674 N.W.2d 442 (Neb. 2004) (No. S-02-1229) (brief filed in the Nebraska Court of Appeals as Case No. A-02-001229 on Mar. 14, 2003).
99. *In re* Mainor T., 674 N.W.2d at 451.

> when in other cases reviewed for much [more] severe instances, there is no arrest.[100]

The Board's conclusion, however, came far too late to prevent years of family separation.

The immigration service deported Santiago-Felipe approximately two months after her arrest on the basis of a default order of removal stemming from her failure to appear at a hearing years earlier on her asylum application.[101] While detained, she received "no legal counsel or legal advice . . . that she could contest her removal and remain in the United States to seek reunification with her children, and that she had valid claims to legal status in the United States."[102] During her two months of detention in a building next door to the county courthouse, "although the children had asked to see Mercedes[,] . . . [she] had no visitation with them."[103] Also, despite knowledge of the social workers, the guardian ad litem, and ultimately the judge, that Santiago-Felipe was held next door by immigration officials, the county court proceeded in her absence with hearings to adjudicate the fate of the children.[104]

As the matter unfolded, the case plan that was developed contained "no goals or tasks related to reunification, including attempts to establish contact with Mercedes."[105] Later on appeal, the state argued that "at the time of the removal of the children from the Appellant she could not care for them. . . . The Appellant was deported out of the country."[106] The guardian ad litem in the case argued on appeal that Santiago-Felipe could not "rehabilitate herself . . . due to her immigration status and deportation."[107]

Santiago-Felipe's "cousin made a request of state officials to have custody of the children. The record is silent, though, about how [state officials] addressed the cousin's request."[108] Social

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100. Brief of Petitioner-Appellant at 18, *In re* Mainor T., 674 N.W.2d 442 (No. S-02-1229) (quotation marks omitted).

101. *Id.* at 9.

102. *Id.* at 13.

103. *In re* Mainor T., 674 N.W.2d at 449–50 (footnote omitted).

104. *See id.* at 450.

105. *Id.* at 451.

106. Brief of Respondent-Appellee at 16, *In re* Mainor T., 674 N.W.2d 442 (No. S-02-1229) (brief filed in the Nebraska Court of Appeals as Case No. A-02-001229 on Mar. 13, 2003).

107. Brief of Appellee-Guardian ad Litem at 13, *In re* Mainor T., 674 N.W.2d 442 (No. S-02-1229) (brief filed in the Nebraska Court of Appeals as Case No. A-02-001229 on Mar. 15, 2003).

108. Brief of Petitioner-Appellant at 13, *In re* Mainor T., 674 N.W.2d 442 (No. S-02-1229).

workers did conduct a study of the home of Santiago-Felipe's brother in Alabama and recommended placement of the children with him, noting that he was "in the country legally, however, his wife [who does not work] applied for her papers in March and has not gotten a reply to date."[109] A day after receiving notice that the children might be placed with their uncle in Alabama and his then unauthorized wife, "the guardian ad litem and deputy county attorney motioned 'the Court for an order preventing contact between the minor children and the natural mother' . . . [and] 'preventing the removal of the minor children from the State of Nebraska.'"[110] There is no record of the court hearing or ruling on these requests.[111] What is clear is that no placement with the uncle took place, and the case plan "continued to omit rehabilitative goals or tasks related to reunification or to contacting Mercedes."[112]

In May 2002, "the State filed a motion to terminate Mercedes' parental rights to her children, alleging as its sole basis for termination of those rights that the children had been in out-of-home placement for 15 or more months of the most recent 22 months."[113] The next month, the court entered an order terminating Santiago-Felipe's parental rights, with an added "finding that the children had been abandoned."[114]

On appeal, the Nebraska Supreme Court determined that "plain error permeate[d] the entire proceedings and that such error denied fundamental fairness to Mercedes."[115] The termination of parental rights "was fundamentally unfair, denied Mercedes due process in these proceedings, and is plain error."[116] "The State cannot prove that termination of parental rights is in a child's best interests by implementing a case plan that precludes a parent's compliance."[117] Further, the court found there was "nothing in the record to show that Mercedes left the United States voluntarily and, by so doing, intentionally withheld from her children her presence, care, love, protection, or maintenance."[118] In the wake of this appellate decision and resolution of immigration issues, and more than three years after her separation from her children, Santiago-Felipe was reunited

109. *Id.* at 17 (quotation marks omitted).
110. *Id.* at 20.
111. *In re* Mainor T., 674 N.W.2d at 451.
112. *Id.* at 452.
113. *Id.* at 453.
114. *Id.*
115. *Id.* at 456.
116. *Id.* at 462.
117. *Id.* at 464 (footnote omitted).
118. *Id.* at 462–63.

with her children in Grand Island, Nebraska.[119]

B. *Bias and Misperceptions in the Child Welfare System*

As the reaction to the workplace raids in Grand Island indicates, the message that immigrant parents took away from the case of Mercedes Santiago-Felipe and her children was not that they should have faith in the system and all will work out in the end. To the contrary, this case and others like it across the country[120] send a strong message to immigrant parents that however unassailable their parental rights may be, as a practical matter they are not secure in their relationships with their children in the face of immigration law. Indeed, this conclusion follows the general pattern that "[w]omen who are compliant, English-speaking, not ethnically diverse, White, and middle class are most successful in the child welfare system; those who diverge from these norms are most likely to lose their motherhood."[121] Mercedes Santiago-Felipe and other immigrant parents, therefore, would be justified in having low expectations of positive outcomes in the child welfare system.

Reversing that message will require more than a handful of appellate decisions that reverse harsh agency actions and trial court decisions. It will require that agencies and family courts alter practices and get it right in the first instance. With that in mind, it is worth exploring a few of the many lessons that may be culled from the misconceptions and biases that plagued Mercedes Santiago-Felipe's case.

1. *Out of Sight, Out of Rights? Rights in the Parent-Child Relationship Are Not Diminished by Deportation*

While Mercedes Santiago-Felipe was detained by immigration authorities, and after she was deported, the child welfare system and trial court proceeded virtually as if she did not exist. The stated rationales on appeal for the failure to attempt reunification related solely to immigration status and were completely devoid of any factual inquiry into the actual conditions of Santiago-Felipe's life.[122]

The few appellate courts that have directly discussed whether immigration status per se should impact child custody have rejected the notion outright. Among the "fundamental interests [that] apply

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119. Kevin O'Hanlon, Associated Press, *Guatemalan Woman Regains Custody of Kids*, AP ONLINE, Dec. 2, 2004, *available at* http://www.highbeam.com/doc/1P1-103029692.html.

120. *See, e.g.*, *In re* M.M., 587 S.E.2d 825 (Ga. Ct. App. 2003).

121. Annette R. Appell, *"Bad" Mothers and Spanish-Speaking Caregivers*, 7 NEV. L.J. 759, 760 (2007).

122. *In re* Mainor T., 674 N.W.2d at 460–64.

to individuals regardless of their immigration status" is "the interest of parents in the care, custody, and control of their children."[123] As such, without regard to their immigration status, parents stand "on equal footing . . . when asserting their right to custody of their children."[124] In rejecting the argument that a father "should be denied custody solely because of his immigration status," a court in Washington observed that the "due process and equal protection provisions prevent denying an illegal immigrant custody based on that ground."[125] The commonly adopted notion that parents without authorized immigration status have diminished rights in the parent-child relationship is flatly without basis.

Both parents and children have strong interests in maintaining the parent-child relationship. To protect these interests, parents generally have "the *affirmative* right to determine the country, city, and precise location where the child will live. This is one of the primary rights of . . . parent[s]."[126] Even in the context of deportation, parents retain this constitutional role in determining where their children will live. For example, a U.S. citizen child argued that her parents' deportation would "operate . . . to deny to her the right which she has as an American citizen to continue to reside in the United States."[127] The court rejected this argument,

123. Rico v. Rodriguez, 120 P.3d 812, 818 (Nev. 2005) (quoting Troxel v. Granville, 530 U.S. 57, 65 (2000) (quotation marks omitted)); *see also Troxel*, 530 U.S. at 65 ("[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests . . ."); Lassiter v. Dep't of Soc. Servs. of Durham County, North Carolina, 452 U.S. 18, 27 (1981) ("This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference . . . .'" (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972))).

124. *Rico*, 120 P.3d at 818.

125. *In re* Parentage of Florentino, No. 25966-4-II, 2002 WL 1825422, at *5 n.11 (Wash. Ct. App. Aug. 9, 2002); *see also* Plyler v. Doe, 457 U.S. 202, 210 (1982) ("[E]ven aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." (citing Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953))); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

126. Gonzalez v. Gutierrez, 311 F.3d 942, 949 (9th Cir. 2002); *see also* Kelson v. City of Springfield, 767 F.2d 651, 654 (9th Cir. 1985) ("[P]arents have a fundamental liberty interest in maintaining a relationship with their children which is protected by the Fourteenth Amendment."); *In re* Marriage of Burgess, 913 P.2d 473, 480 (Cal. 1996) (noting the "presumptive right of a custodial parent to change the residence of . . . child[ren]").

127. Acosta v. Gaffney, 558 F.2d 1153, 1157 (3d Cir. 1977).

noting that the parents could simply take the child with them.[128] On the other hand, the court noted, the parents could "decide that it would be best for her to remain . . . with foster parents, if such arrangements could be made. But this would be their decision involving the custody and care of their child, taken in their capacity as her parents . . . ."[129] In virtually every federal circuit, similar claims, across a wide spectrum of procedural variations and articulations of the rights at stake, consistently have reaffirmed the continued vitality of the parents' role in making decisions for and about their children even as they face deportation.[130] Certainly, as children gain in maturity and autonomy their own voices become important, but the impact of the child's voice is not determined by the parent's immigration status.

While U.S. citizens do hold some rights that unauthorized immigrants cannot claim,

> [t]he contemporary concern with and opprobrium towards undocumented aliens does not lead us to the conclusion that those who violate the laws to enter the United States can be subject without protest to any procedure or legislation, no matter how violative of the rights to which those persons would normally be entitled as persons in the United States.[131]

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128. *Id.* (asserting that the child "must remain with her parents and go with them wherever they go").

129. *Id.* at 1158; *see also* Newton v. INS, 736 F.2d 336, 343 (6th Cir. 1984) ("[T]he deportation order against Dr. and Mrs. Newton does not compel them to take the children with them. . . . So if the parents consider it more important for their children to grow up in America and attend American schools, they could conceivably make arrangements for the children to stay . . . ."); Ayala-Flores v. INS, 662 F.2d 444, 446 (6th Cir. 1981) ("[W]e presume [the parents] wish [the child] to reside with them, in Mexico or elsewhere.").

130. *See, e.g.*, Gallanosa v. United States, 785 F.2d 116, 117 (4th Cir. 1986) (claiming violation of constitutional rights of a child in need of medical care); *Acosta*, 558 F.2d at 1157–58 (claiming violation of the fundamental right of an American citizen to live in the United States); Cervantes v. INS, 510 F.2d 89, 91 (10th Cir. 1975) (claiming violation of Ninth Amendment "right to continue to have the love and affection of his parents in the United States"); Enciso-Cardozo v. INS, 504 F.2d 1252 (2d Cir. 1974) (claiming denial of procedural due process where a child was not permitted to intervene in the deportation proceedings brought against his mother); Lopez de Robles v. INS, 485 F.2d 100, 102 (10th Cir. 1973) (claiming violation of the "constitutional right to a continuation of the family unit"); Kruer *ex rel.* S.K. v. Gonzales, No. Civ. A. 05-120-DLB, 2005 WL 1529987, at *5 (E.D. Ky. June 28, 2005) (claiming deprivation of "rights incident of citizenship"); *In re* Amoury, 307 F. Supp. 213, 216 (S.D.N.Y. 1969) (asserting denial of the equal protection of the laws because the child would be deprived of the standard of living and education afforded to other United States citizens of his age and status who continue to reside here).

131. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 498–99 n.19 (M.D. Pa.

In fact, even immigration law itself does not adopt a tone of opprobrium towards those who lack authorized immigration status. One form of relief from deportation available in immigration court, cancellation of removal,[132] is available only to persons who can establish that they have "been physically present in the United States for a continuous period of not less than 10 years"[133] and have "been a person of good moral character during [that] period."[134] Pursuant to immigration law, therefore, it is entirely possible to be both a person of good moral character and an unauthorized immigrant simultaneously. Indeed, the immigration system can be so arcane and difficult to navigate that one-third of those who become legal permanent residents lived at some point without immigration authorization in the United States.[135]

Certainly specific facts related to the condition of parents and children may arise in the aftermath of deportation such that they have relevance to issues of child custody. But neither children nor parents have diminished rights in preserving the parent-child relationship simply because immigration law is involved.

2. *Exploring All Options*

The child welfare system that Mercedes Santiago-Felipe encountered noticeably failed to consider possibilities for her children to maintain relationships with her and other family members in the United States. It also failed to consider the possibility that Santiago-Felipe's children might be reunited with her in Guatemala. Taking this option off the table further marginalized Santiago-Felipe and reduced the possibility that she could reconnect with her children.

When family members, social workers, and courts assume that U.S. citizen children must remain in the United States, they have essentially decided that a parent forced by immigration law to leave the country can no longer care for that child.[136] This assumption is

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132. 8 U.S.C. § 1229b(b) (2000).

133. *Id.* § 1229b(b)(1)(A).

134. *Id.* § 1229b(b)(1)(B).

135. *See* MICHAEL FIX & JEFFREY S. PASSEL, IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT 40 (Urban Inst. 1994); *see also* Lenni B. Benson, *The Invisible Worker*, 27 N.C. J. INT'L L. & COM. REG. 483, 484 (2002) (noting that, given the complexities of immigration law, it is not unusual that even the immigrant herself does not fully understand her immigration status and applicable protections from removal).

136. *See In re* D.R., Nos. CP01002554A, CP01002555A, CP01002556A, 2004 WL 423993, at *8 (Conn. Super. Ct. Feb. 9, 2004) (stating that a mother's "return to Honduras renders her effectively unable to serve as a responsible

distinct from that discussed in the previous section in that it sets parameters on decisions about children's custody without regard to parental involvement in the decision process. In limited individual cases this conclusion may turn out to be true, but the general proposition that parents cannot raise their children in other lands is plainly unsustainable, even without regard to the immigration or citizenship status of the children involved.

Immigration and citizenship laws may determine who is legally permitted to remain in the United States, but they do not determine who is permitted to leave. Generally, "[e]veryone has the right to leave any country, including his own, and to return to his country."[137] Children who are not citizens of the United States, even those with permanent permission to reside in the United States, can hardly be thought unable to return to their country of citizenship. Moreover, U.S. citizens have a constitutionally mandated right to leave the United States. "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. . . . Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage."[138] Travel within the United States and "[t]ravel abroad . . . may be as close to the heart of the individual as the choice of what he eats, or wears, or reads."[139]

When family courts have been asked to review the possibility of assigning the custody of a child in a manner that might result in the child leaving the United States, they have not balked at ordering children to leave the country. Well over one hundred years ago, writing for the Kansas Supreme Court, future Supreme Court Justice Brewer wrote:

> I cannot agree with counsel that it is never the province of the court to expatriate a citizen. In some cases I think the duty so to do is clear and absolute. As, for instance, where parents moving to a foreign country, and leaving their little child here for awhile, come back to claim it, and are hindered by those who have it in possession.[140]

The U.S. citizenship or legal immigration status of children is no

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parent").

137. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, 74, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc A/RES/271(III) (Dec. 10, 1948), *available at* http://www.un.org/documents/instruments/docs_en.asp?year=1969 (follow "A/RES/217 (III)" hyperlink).

138. Kent v. Dulles, 357 U.S. 116, 125, 126 (1958).

139. *Id.* at 126.

140. *In re* Bullen, 28 Kan. 781, 786 (1882).

impediment to their leaving the United States.[141]

The real issue, then, is not whether children may leave the United States, but rather who makes the determination that they leave or stay, especially when children are too young to exercise agency in influencing this decision. As discussed above, in the immigration context courts have overwhelmingly turned to parents to make this difficult decision.

In fact, the Board of Immigration Appeals explicitly expects that parents deported from the United States will reunite with their children outside the United States. "The claim that the child will remain in the United States can easily be made for purposes of litigation, but most parents would not carry out such an alleged plan in reality."[142] "In order to economize on its limited resources, the INS usually does not bother to institute a formal deportation proceeding against an alien who is likely to depart anyway, such as the minor child of parents who are being deported."[143]

Parents facing deportation may adamantly resist the de facto deportation of their children to join them outside the United States, and, if so, their wishes deserve great deference.[144] Similarly, children's wishes are important as they grow in autonomy. But a desire that a child remain in the United States cannot be confused with the misperception that the child must remain due to her citizenship or immigration status. Thoughtful consideration of the family's situation and the full range of possibilities for family

141. *See* Blackwell v. Blackwell, 12 Cal. Rptr. 201, 205 (Cal. Ct. App. 1961) (finding no error in trial judge's decision allowing parent to move with children outside United States); Tamari v. Turko-Tamari, 599 So. 2d 680 (Fla. Dist. Ct. App. 1992) (granting permission for parent to relocate with child to Israel); Viltz v. Viltz, 384 So. 2d 1348 (Fla. Dist. Ct. App. 1980) (allowing parent to take children to Venezuela); Byers v. Byers, 370 S.W.2d 193 (Ky. 1963) (permitting parent to permanently relocate to South Africa with children); Lane v. Lane, 186 S.W.2d 47, 50 (Mo. Ct. App. 1945) (finding no obstacle to mother's decision "to take the child out of the state and to a foreign country" (Mexico)); State *ex rel.* Graveley v. Dist. Court, 174 P.2d 565, 572 (Mont. 1946) ("[T]he court may properly permit a parent . . . to take [a child] to another state, or even to a foreign country."); Church v. Church-Corbett, 625 N.Y.S.2d 367, 367–68 (N.Y. App. Div. 1995) (permitting parent to take child to Italy during three year Naval assignment abroad).

142. *In re* Ige, 20 I. & N. Dec. 880, 885 (B.I.A. 1994) (interim decision). Where parents claim that a child will stay behind, the Board of Immigration Appeals "will require, at a minimum, an affidavit from the parent or parents stating that it is their intention that the child remain in this country, accompanied by evidence demonstrating that reasonable provisions will be made for the child's care and support (such as staying with a relative or in a boarding school)." *Id.*

143. Salameda v. INS, 70 F.3d 447, 451 (7th Cir. 1995).

144. *See supra* text accompanying notes 127–29.

reunification forces child welfare systems to engage with parents and children as persons and not stereotypes.

3. Family Rights Do Not Give Way to Logistical Difficulties

Communicating and evaluating options across linguistic, cultural, and geographic borders is difficult. In the case of Santiago-Felipe, the inability to communicate well in either English or Spanish created special hurdles to overcome.[145] Unfamiliarity with Guatemalan life and culture no doubt impacted the decision of social workers not to explore options for reuniting the children with their mother in Guatemala or in the United States.

A parent's "location abroad presents many challenges for any child welfare agency assigned by the state to oversee the welfare of the child."[146] "There are many unavoidable obstacles, including information disadvantages, financial limitations, cultural differences, communication barriers, and the involvement of multiple judicial systems."[147] When immigration law prohibits a parent from returning to the United States, these cross-border difficulties are compounded. Yet these barriers are not insurmountable, and certainly the imperative to preserve the parent-child relationship requires efforts to overcome them.

Working to keep immigrant families together within the United States likewise can present new challenges for child welfare advocates. In any determination of child custody issues, vigilance against discrimination on the basis of immigration status is crucial, but "[a] strict prohibition on raising immigration status issues in child custody matters would be difficult to maintain because immigration status does have an impact on the experiences of many immigrants and their families."[148] Rather than sweeping issues related to immigration under the table, it is important that when such considerations are at play they are "acknowledged, understood, and, when appropriate, affirmatively addressed in legal representation."[149]

Appellate level vindication of family rights will not counteract perceptions that immigrants are disadvantaged in child custody matters until frontline practices align with appellate articulations of

145. *See supra* text accompanying notes 45–104.

146. Amity R. Boye, Note, *Making Sure Children Find Their Way Home: Obligating States Under International Law to Return Dependent Children to Family Members Abroad*, 69 BROOK. L. REV. 1515, 1517 (2004).

147. *Id.*

148. David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453, 468 (2008).

149. *Id.* at 472 (citation omitted).

the rights of immigrant children and parents. This alignment will require social service agencies and family courts to commit resources and question existing routines, but the preservation of fundamental family rights requires no less.

IV. RETHINKING IMMIGRATION POLICIES

Perhaps on reading of the profound impact of immigration raids on children and parents in immigrant families, there are some who are ready to hail them as a success. Certainly, they are efficient in creating fear across immigrant communities and contribute to the pervasive sense of unease that attrition advocates seek to foster. In such thinking, "[u]nfortunately, the heartless side of U.S. immigration policy is on full display."[150]

Even putting aside questions regarding the legality of specific aspects of immigration raids,[151] their impact on children makes them suspect as a matter of policy. "[D]irecting the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."[152] While immigration raids formally are targeted at adults, it is the ripple effects of the raids for children and families that give them impact, as an unmistakable message of loss and fear is communicated to immigrant families. This is not to say that immigration laws cannot and should not be enforced.

At the same time, in an environment in which the enforcement of immigration laws is highly selective, the decision to devote scarce enforcement resources in a manner that profoundly harms children is questionable at best. Practices that create crisis and discord in families place the enforcement of immigration laws in direct opposition to widespread policies and significant government resources that are devoted to maintaining families and protecting children. Exploiting the fear of family separation should not be the lynchpin of modern immigration enforcement.

Moreover, immigration enforcement targeting families without meaningful immigration law reform is shortsighted. If the logical result of the enforcement of existing immigration laws is that thousands of children are traumatized, families are separated, and social service agencies are strained beyond capacity, then the underlying laws that have constructed our current notions of

150. BILL ONG HING, DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY 2 (2006).

151. *See generally* Raquel Aldana, *Of* Katz *and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081 (2008) (analyzing the protection of the Fourth Amendment in the immigration raid context).

152. Plyler v. Doe, 457 U.S. 202, 220 (1982).

"illegality" warrant reexamination.[153] Immigration law has never been constructed around the interests of children, but the current policy and practice of immigration raids highlights the extent to which immigration law can embody outright hostility to children's interests.[154] Immigration raids highlight the true nature and impact of immigration laws, and the insights garnered from examining the impact of the raids must inform the ongoing debate about immigration law.

153. *See* Ulysses S. Grant, First Inaugural Address (Mar. 4, 1869), *available at* http://www.yale.edu/lawweb/avalon/presiden/inaug/grant1.htm ("I know no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution.").

154. *See* Thronson, *supra* note 16, at 67–72 (discussing the devaluation of the interests of children in immigration law).