

History Repeats Itself: Parallels Between Current-day Threats to Immigrant Parental Rights and Native American Parental Rights in the Twentieth Century

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ABSTRACT

Immigrant parents are currently burdened with unique risks to their parental rights, risks that bear little relation to their ability to care for their children. Recent developments in family and immigration law, historical cultural prejudices against non-Western parenting traditions, and poor immigrants' limited access to the U.S. legal system are largely to blame.

This Note explores the inadequacies in our legal system contributing to the struggles of immigrant parents to maintain family unity and connects the current situation to the disproportionate number of terminations of parental rights within the Native American community in the mid-twentieth century. It suggests that a federal statute modeled on the Indian Child Welfare Act may be able to comprehensively address the issues identified herein.

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I. INTRODUCTION

Cirila Baltazar Cruz, a Mexican woman of Chatino descent, gave birth to a baby girl in a Pascagoula, Mississippi hospital in 2008.¹ Ms. Balthazar Cruz, who speaks limited Spanish and very little English, was questioned about her living situation by a representative of the hospital's social services department and a Spanish-speaking "patient advocate."² The hospital concluded erroneously that Ms. Baltazar Cruz was trading sex for housing, filed a report with the Mississippi Department of Human Services (MDHS) against Ms. Baltazar Cruz alleging parental abuse and neglect, and contacted federal immigration authorities to investigate Ms. Baltazar Cruz's immigration status.³ MDHS obtained a custody order for her baby, placed the baby placed in foster care with an unlicensed white couple,⁴ and began the process of initiating termination of parental rights (TPR) proceedings against Ms. Baltazar Cruz.⁵ MDHS did not provide Chatino interpretation for Ms. Baltazar Cruz while investigating the claims against her, and instead requested the mother learn English in order to be reunited with her daughter.⁶ Ms. Baltazar Cruz did not regain physical custody of her child until November 2009, one year after giving birth;⁷ she did not recover permanent physical custody until early 2010.⁸

While Ms. Baltazar Cruz's parental rights were not ultimately terminated and she regained custody of her child, her case is a particularly dramatic example of the trials many immigrant parents in the United States face in maintaining custody of their children. Data suggests the U.S. government removed⁹ approximately 46,000

¹ Complaint at 5–6, *Cirila Baltazar Cruz v. Miss. Dep't of Human Serv.*, No. 3:10cv446HTN-LRA (S.D. Miss. 2010). Chatinos are an indigenous community in Mexico. *Id.* at 5.

² *Id.* at 6, 10.

³ *Id.* at 7–10.

⁴ *Id.* at 6, 10.

⁵ *Id.* at 20.

⁶ *Id.* at 19–20.

⁷ *Id.* at 21.

⁸ *Id.*

⁹ See Diana R. Podgorny, Comment, *Rethinking the Increased Focus on Penal Measures in Immigration Law as Reflected in the Expansion of the "Aggravated Felony" Concept*, 99 J. CRIM. L. & CRIMINOLOGY 287, 295 (2009) (noting that, in 1996, "removal" replaced "deportation" in immigration law parlance.).

immigrant parents of U.S. citizen children in the first six months of 2011 alone and there are currently at least 5,100 children in foster care whose parents have either been detained or removed.¹⁰ The numbers represent a dramatic increase in rates of removal: the U.S. government reported removing 108,000 parents of U.S. citizen children between 1998 and 2007.¹¹

Despite these statistics, it is difficult to determine exactly how many immigrant parents have had their parental rights terminated for reasons related to their status as immigrants. Immigrant parents rarely appeal family court decisions for financial and logistical reasons, especially if the parents are deported and living in a foreign country from which it is difficult to contest a termination of parental rights (TPR) decision in a U.S. court.¹² Further, since many child custody case records are sealed, it is impossible to estimate the rate of parental rights terminations with a high degree of certainty.¹³ However, in spite of these difficulties, a few courts have recently considered a few such termination appeals, giving scholars a glimpse into the legal standards used to terminate immigrants' parental rights.¹⁴ Further, recent

¹⁰ APPLIED RESEARCH CENTER, SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 5–6 (2011), available at <http://arc.org/shatteredfamilies>. This data was collected despite the fact that the U.S. government does not keep records on whether deported parents leave the country with their children or if the state transfers their children to foster care even though most children of immigrants are U.S. citizens. See Francisco Miraval, *Thousands of Children of Deported Parents Get Stuck in Foster Care*, THE DENVER POST, Nov. 17, 2011. See generally Jacqueline Hagan et al., *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799, 1809 (2010) (the statistics bely the U.S. government's contention that it mainly targets immigrants who have committed serious violent crimes).

¹¹ OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF HOMELAND SECURITY, REMOVALS INVOLVING ILLEGAL ALIEN PARENTS OF UNITED STATES CITIZEN CHILDREN 4 (2009), available at http://www.oig.dhs.gov/assets/Mgmt/OIG_09-15_Jan09.pdf.

¹² C. Elizabeth Hall, Comment, *Where are My Children . . . And My Rights? Parental Rights Termination as a Consequence of Deportation*, 60 DUKE L.J. 1459, 1462 (2011).

¹³ See, e.g., S.C. CODE ANN. § 63-7-2600 (2010); KY. REV. STAT. ANN. § 625.108(2) (West 2011); N.H. REV. STAT. ANN. § 170-C:14 (2011) (state statutes that require all court records pertaining to the termination of parental rights to be kept confidential).

¹⁴ See *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 815 (Mo. 2011) (en banc) (reversing the lower court's termination of an undocumented immigrant mother's parental rights after she was picked up in an immigration raid and held

scholarship has compiled anecdotal data suggesting that substantial numbers of immigrant parents are struggling to maintain their parental rights.¹⁵ Even if courts ultimately restore custody to the parent upon a child's removal from the parent's custody, as was the case for Ms. Baltazar Cruz, the months of separation, fear, and insecurity felt by both parents and children as a function of our nation's flawed immigration and family law coordination system is itself a problem that deserves correction.¹⁶

For parents who are undocumented, not fluent in English, poor, and embrace parenting traditions considered uncommon by American standards, threats to parental rights are especially acute. In dealing with these threats, such parents face cultural prejudice, language barriers, and lack of financial access to an attorney.¹⁷ Moreover, if they are simultaneously detained by immigration officials, they also face difficulty in adequately defending themselves while in immigration

in detention for many months); *In re Interest of Angelica L.*, 767 N.W.2d 74, 91–92 (Neb. 2009) (reversing the lower court's termination of an undocumented immigrant mother's parental rights after removal proceedings were initiated against her); *Perez-Velazquez v. Culpeper Cnty. Dep't of Soc. Servs.*, No. 0360-09-4, 2009 WL 1851017 (Va. Ct. App. 2009) (upholding the lower court's termination of parental rights of an undocumented immigrant who had been deported); *State Dep't of Children's Servs. v. Ahmad*, No. M2004-02604-COA-R3-PT, 2005 WL 975339 (Tenn. Ct. App. 2005) (affirming the lower court's decision not to terminate the parental rights of an undocumented father who had been deported).

¹⁵ See, e.g., Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 CONN. L. REV. 99, 103 (2011) (concluding after helping an undocumented mother in Arizona reunify with her child and conducting surveys and interviews around the state that “her client's case is not an anomaly”); Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C. J.L. & SOC. JUST. 63, 82 (2012) (“In undocumented immigrant termination cases, courts and welfare agencies frequently conclude that a parent's undocumented status alone demonstrates unfitness”); Hall, *supra* note 12 at 1461–62 (“Despite the relatively small number of cases that have come before appellate courts and the relatively high percentage of those cases that have had parent-friendly outcomes, there is reason to suspect that parent-friendly outcomes are the exception, not the rule.”); see also *A Family Ripped Apart: Mother of Four Fighting for Return of Children Put in Foster Care After Judge Ruled She Abandoned Them While Detained for Illegal Immigration*, DAILY MAIL (Feb. 3, 2012), <http://www.dailymail.co.uk/news/article-2095743/Amelia-Reyes-Jimenez-Immigrant-mother-fighting-return-children-foster-care.html>.

¹⁶ Rabin, *supra* note 15, at 102; Hall, *supra* note 12, at 1462.

¹⁷ Marcia Yablon-Zug, *supra* note 15, at 83.

detention or having been deported.¹⁸ Lack of coordination between state child protective services agencies and federal immigration enforcement officials compound the problems of immigrant parents ensnared in concurrent family law and immigration proceedings.¹⁹

These problems recall the obstacles faced by Native American parents in maintaining custody over their children. Prior to the Indian Child Welfare Act (ICWA) of 1978, an alarming number of Native American children were separated from their parents, sent to foster homes, and put up for adoption in white, Christian families.²⁰ This process was largely due to cultural prejudices against Native American family traditions and Native Americans' difficulty in successfully navigating the American family court system.²¹ Similarly, Ms. Baltazar Cruz was unable to rely on any special legal protections to assist her in navigating an unfamiliar legal system—that viewed her ethno-linguistic background and immigration status with suspicion—and prevent her newborn baby from being placed with a white family against her express wishes.

The striking parallels between the difficulties Native American families faced in the mid-twentieth century and what immigrant parents are facing today, discussed in the pages below, brings me to suggest that the ICWA can serve as a useful legislative model for advocates of immigrant family unity. As history repeats itself in making it difficult for marginalized communities to maintain family unity in the United States, we should learn from the past and enact protections similar to those in the ICWA for immigrant parents.

Parts II and III of this Note dissect the question of why immigrant parents are threatened with losing their parental rights. Part II explores the relevant family law background, emphasizing recent developments that make it more likely for immigrant parents to face termination of their parental rights. Part III examines the relevant immigration law background, particularly recently passed legislation that threatens more immigrants with deportation. It analyzes the “coordination concerns” between the bodies of law, suggesting that lack of coordination between immigration enforcement officials and child

¹⁸ Hall, *supra* note 12, at 1462.

¹⁹ See Rabin, *supra* note 15, at 102.

²⁰ See Catherine Brooks, *The Indian Child Welfare Act in Nebraska: Fifteen Years, A Foundation for the Future*, 27 CREIGHTON L. REV. 661, 662 (1994); Mary Charlotte McMullen, *Preserving the Indian Family*, 2 CHILD. LEGAL RTS J. 32, 33 (1981).

²¹ *Id.*

protective services officials is an important factor leading to immigrant parents unnecessarily facing termination of their parental rights. Part III suggests coordination issues between family and international law also place the United States in violation of customary international law.

Part IV discusses the history of other minority families in this country, particularly Native American families, to suggest that the current problem may also be a function of historically-rooted cultural prejudice against non-white and non-traditional families in the United States. This Part goes on to discuss the federal response to the alarming rates of the termination of parental rights in Native Americans: the Indian Child Welfare Act. Lastly, this Note concludes with a proposal that the ICWA should serve as a model for a solution to alleviate the threats to immigrant family unity today.

II. FAMILY LAW: INCONSISTENT APPLICATION OF CONSTITUTIONAL, STATE, AND FEDERAL PRINCIPLES

This Part briefly examines family law at the constitutional, state, and federal levels and how it relates to immigrant parents. Laws defining parental unfitness and grounds for the termination of parental rights vary from state to state. However, the federal Adoption and Safe Families Act (ASFA) virtually compels states to initiate TPR proceedings when a child has been separated from her parent for 15 of the preceding 22 months.²² Part II concludes that the ASFA trigger mechanism, combined with the propensity of some family courts to 1) consider immigration status in parental fitness determinations and 2) devalue non-Western parenting traditions, has led to unnecessary initiations of TPR proceedings and, in some cases, unnecessary terminations of parental rights.

A. Federal Constitutional Protections Animating State Family Law

The states have traditionally exercised discretion over matters of family law.²³ However, the U.S. Supreme Court has imposed federal constitutional safeguards to protect the due process rights of parents subject to termination of their parental rights. The Court has found that

²² 42 U.S.C. § 671(a)(15)(E)–(F) (2006).

²³ *Ex parte Burrus*, 136 U.S. 586, 593 (1890) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States.”).

a natural parent's right to raise his child is a fundamental liberty interest.²⁴ And as the Court in *Santosky v. Kramer* noted, "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."²⁵ Terminating a parent's parental rights "work[s] a unique kind of deprivation" that does not merely infringe on but rather extinguishes the liberty interest identified above.²⁶

Thus, states must provide a hearing for the parent²⁷ and prove, by at least clear and convincing evidence, that the parent is unfit before terminating his or her parental rights.²⁸ As the Fourteenth Amendment applies to undocumented as well as documented persons in the United States,²⁹ by implication, the clear and convincing evidentiary standard applies to undocumented immigrant parents as well as documented ones.³⁰ The Court has also found that the United States' Constitution does not guarantee parents the appointment of counsel in TPR proceedings.³¹ However, the majority of states provide for that right.³²

²⁴ *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("[F]reedom of personal choice in matters of family life is a fundamental interest protected under the Fourteenth Amendment."); *see also* *Stanley v. Illinois*, 405 U.S. 605, 651 (1972) ("The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference, and, absent a powerful countervailing interest, protection.").

²⁵ *Santosky*, 455 U.S. at 753.

²⁶ *Lassiter v. Dep't of Social Services of Durham Cty.*, 452 U.S. 18, 27 (1981).

²⁷ *Stanley*, 405 U.S. at 658.

²⁸ *Santosky*, 455 U.S. at 769–70. The "best interests of the child" standard that permeates the courts' approach to family law issues involving children, cannot be considered until a parent has been held as unfit by the clear and convincing evidentiary standard. *Id.* at 760.

²⁹ *See Plyler v. Doe*, 457 U.S. 202, 212 (1982) (holding that both the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment "were fashioned . . . to reach every exercise of state authority" and extend to those who entered the United States unlawfully).

³⁰ *See, e.g., In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 815 (Mo. 2011) (en banc) (held, in a case involving an illegal immigrant parent, that the court must apply the clear and convincing standard in terminating parental rights); *see also* Hall, *supra* note 12, at 1465.

³¹ *Lassiter*, 452 U.S. at 32.

³² Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 15 TEMP. POL. & CIV. RTS. L. REV. 635, 638–39 (2006).

While states are not constitutionally required to provide an appeals process for termination decisions,³³ indigent parents do have equal protection and due process rights to receive trial transcripts in order to prepare an appeal of a court's termination decision if and when an appeal is available.³⁴

B. Family Law Procedures: Parental Fitness Determinations and Terminations of Parental Rights

There is significant variation among each states' procedures for initiating the termination of parental rights and their definitions of the grounds justifying TPR.³⁵ However, a general pattern may be identified. Once a child has been taken into temporary custody by the state or a foster family, child protective services agencies have an obligation to make "reasonable efforts" to implement a reunification plan between parent and child and assist the parent in complying with the plan before initiating TPR proceedings.³⁶ Once the "reasonable efforts" test has been satisfied, courts often terminate parental rights on, among other grounds, the following bases: 1) abandonment, 2) abuse or neglect, 3) failure to support or maintain contact with the child, 4) failure to adhere to a reunification or rehabilitation plan, 5) failure to remedy a persistent condition that caused the removal of a child, 6) mental illness or deficiency, 7) drug- or alcohol-induced incapacity, or 8) the prior termination of parental rights in another child.³⁷

In several recent cases, state courts have considered a parent's illegal entry into the United States and a parent's immigrant detainee status as negative factors in determining parental fitness.³⁸ *In re*

³³ See *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) ("[A] State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all.").

³⁴ *M.L.B v. S.L.J.*, 519 U.S. 102, 107 (1996).

³⁵ S. Adam Ferguson, Comment, *Not Without My Daughter: Deportation and the Termination of Parental Rights*, 22 GEO. IMMIGR. L.J. 85, 94 (2007).

³⁶ 42 U.S.C. § 671(a)(15)(B) (2006).

³⁷ *Grounds for Involuntary Termination of Parental Rights*, U.S. DEP'T OF HEALTH AND HUMAN SERV. 2, available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/groundtermin.cfm; see, e.g., N.H. REV. STAT. ANN. § 170-C:5 (2011).

³⁸ See, e.g., *In re B and J Minors*, 279 Mich. App. 12 (2009) (reviewing a lower court's holding that the deported parents in question "were . . . unable to provide proper care and custody for the children"); *In re Adoption of C.M.B.R.*, No. SD 30342, 2010 WL 2841486, at *5 (Mo. Ct. App. 2010), *rev'd by* 332 S.W.3d 793

Angelica L. is one such example. The juvenile court found the parent unfit and terminated her parental rights in part because she “either A) embarked on an unauthorized trip to the United States with a newborn premature infant or B) [after entering illegally,] gave birth to a premature infant in the United States.”³⁹ This is profoundly problematic because a parent’s immigration status has virtually no bearing on her intrinsic ability to provide the minimum of care for her child that is considered adequate for parental fitness.⁴⁰ This trend of family courts conflating parental fitness with immigration status is jeopardizing the parental rights of immigrant parents⁴¹ and courts must immediately correct this erroneous interpretation of fitness.

Finally, child protective agency determinations to seek the termination of immigrant parental rights and state court decisions on the issue may be influenced by cultural bias against some immigrant parents. Marcia Yablon-Zug and others have highlighted the contention that the fitness of undocumented parents is easily called into question.⁴² They have found that when an immigrant parent is to be deported, courts and child protective agency officials may: 1) shy away from sending U.S. citizen children to live with their deported parents in foreign countries where economic opportunities are lacking and the children may not be familiar with the language or customs; 2) consider life in the United States to be more desirable and in the children’s best interests; and 3) favorably consider the situation in which an American family, usually in current custody of the child, petitions to adopt the child.⁴³

Officials may also assume undocumented immigrant parents are unable to financially provide for their children, especially if they cannot verify that the parents are legally employed.⁴⁴ Since employers are legally prohibited from hiring undocumented workers, proving a source of legal income is difficult for many undocumented parents.⁴⁵

(Mo. 2011) (finding that the parent’s “lifestyle, that of smuggling herself into a country illegally . . . is not a lifestyle . . . for a child.”).

³⁹ *In re Angelica L.*, 767 N.W.2d 74, 87–88 (Neb. 2009) (quoting the juvenile court decision, which it reversed).

⁴⁰ See Yablon-Zug, *supra* note 15, at 87.

⁴¹ Hall, *supra* note 12, at 1484–85.

⁴² Yablon-Zug, *supra* note 15, at 65.

⁴³ Hall, *supra* note 12, at 1481–82.

⁴⁴ APPLIED RESEARCH CENTER, *supra* note 10, at 20.

⁴⁵ *Id.*

Additionally, child protective agency officials may be more willing to recommend that a court remove a child from his or her parent's custody or terminate parental rights because, as in the case of Ms. Baltazar Cruz, they view some immigrant parenting traditions such as breastfeeding, co-sleeping, or shared parenting by an extended family as undesirable by traditional Western standards.⁴⁶ These biases disadvantage immigrant parents in the struggle to maintain their parental rights.⁴⁷

C. The Adoption and Safe Families Act of 1997 (ASFA) and the Termination “Trigger”

Congress has also occasionally regulated child custody matters despite state law typically governing family law. For example, the Adoption Assistance and Child Welfare Act of 1980 conditioned state receipt of federal funds on states making “reasonable efforts” to reunify children with their parents before placing the children in foster care.⁴⁸ Congress' most relevant contribution to this body of law is the Adoption and Safe Families Act of 1997 (“ASFA”).⁴⁹ Here, Congress attempted to achieve permanence for children in the foster care system⁵⁰ by requiring states that receive federal funds for child protective services to commence procedures to begin TPR proceedings for children who have lived in foster care for fifteen of the preceding twenty-two months.⁵¹

Under ASFA, twelve months after a child has entered foster care, the state must schedule a “permanency hearing” to determine whether the child should be: “(1) returned to the parent; (2) placed for adoption, in which case the state will petition to terminate parental rights; (3) referred for legal guardianship; or (4) placed in another planned living arrangement.”⁵² A state court may accept a child protective agency's conclusion that reunification between the child and

⁴⁶ See Complaint *supra* note 1, at 19–20; see also Annette R. Appell, *Bad Mothers and Spanish-Speaking Caregivers*, 7 NEV. L.J. 759, 776–77 (2007).

⁴⁷ Yablon-Zug, *supra* note 15, at 113–14 (“Courts and child welfare agencies routinely express concerns regarding the language, values and lifestyle of undocumented immigrants in immigrant parent termination cases.”).

⁴⁸ 42 U.S.C. § 671(a)(15) (2006).

⁴⁹ Adoption and Safe Families Act, 42 U.S.C. §§ 601–679c (1997).

⁵⁰ Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 37 HARV. J. ON LEGIS. 1, 1 (2001).

⁵¹ 42 U.S.C. § 671(a)(15)(E)–(F) (2006).

⁵² Adler, *supra* note 50, at 8.

his parent is unreasonable as sufficient grounds for terminating parental rights.⁵³

While the ASFA does not consider a parent unfit by virtue of his child living in foster care for twelve of the preceding twenty-two months period, some state courts have attached a presumption of unfitness to that arrangement.⁵⁴ Further, it is too easy for immigrant detainee parents, who are often bounced around our nation's patchwork of immigration detention facilities for many months and then scheduled for deportation, to meet the twelve-month or fifteen-month mark of being separated from their children. Agency officials may determine that reunification is unreasonable, especially if the parent has been deported. Or, a state court may determine the child as abandoned, and parental rights terminations may sometimes proceed over the parent's objections without a proper fitness determination.⁵⁵

III. IMMIGRATION POLICY, NON-COORDINATION WITH FAMILY LAW, AND INTERNATIONAL CONCERNS

As state and federal family law facilitates the initiation of TPR proceedings against immigrant detainee parents, recent federal immigration legislation has increased the likelihood that parents may be placed in immigration detention in the first place. This Part describes the basic immigration policy framework and recent legislation that expands the categories of immigrants subject to detention and deportation. It notes that while the Obama administration has increased prosecutorial discretion of immigration enforcement officials to limit deportations of otherwise law-abiding immigrants, subsequent administrations may not be as flexible. Further, this Part concludes that the recent anti-immigrant development in immigration law has exacerbated coordination problems between immigration and family law and has increased the number of immigrant parents simultaneously seeking to avoid losing their children and being removed from this country. Finally, this Part observes that our nation's failure to take steps to prevent unnecessary breakups of immigrant parents seems to violate customary international law on family unity and the rights of the child.

⁵³ *Id.* at 7.

⁵⁴ Hall, *supra* note 12, at 1469–70.

⁵⁵ *Id.* at 1472.

A. Immigration Policy Background

In contrast to family law, immigration law has generally been under exclusive federal control.⁵⁶ The elected branches of our federal government set our nation's immigration policy, and shifting American sentiments over immigration have periodically led to both stricter and more relaxed immigration laws. The Court has recognized "plenary power" in the executive and legislative branches of the federal government to set immigration policy, with minimal judicial review.⁵⁷ The seminal piece of federal immigration legislation is the Immigration and Nationality Act of 1952, which Congress has periodically amended in the decades since its enactment.⁵⁸ Presidential administrations also affect immigration policy. For example, the president may direct administrative officials to use their discretion in enforcing removal laws or allowing for cancellation of deportation in given situations.⁵⁹

Moreover, the American citizenry's alternately friendly and hostile sentiments towards immigrants have also shaped our nation's immigration policies.⁶⁰ The turn of the 20th century was an era in which the United States had a fairly exclusionary immigration policy, while the 1960s through the 1990s marked a more inclusionary time.⁶¹

⁵⁶ *E.g.*, *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one."). *But see* Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749, 1751, 1754 (2011) (examining the "expanding landscape of immigration enforcement" at the state and local level "under the auspices of regulating crime").

⁵⁷ *See* Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 347 (2008).

⁵⁸ Hagan et al., *supra* note 10, at 1803 ("[T]he Immigration and Nationality Act . . . remains the statutory framework for federal immigration law.").

⁵⁹ Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 611 (2006) ("The executive enjoys its customary authority not to pursue enforcement, and Congress has authorized the executive to formally exempt deportable aliens from removal for sympathetic or compelling reasons.").

⁶⁰ Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 2 (1984).

⁶¹ Hagan et al., *supra* note 10, at 1802–03.

B. Recent Legislation: Immigrants at Increasing Risk of Detention and Removal

In 1996, the pendulum swung again. Congress passed two laws making it easier to detain non-citizens: the Antiterrorism and Effective Death Penalty Act (“AEDPA”) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”).⁶² The AEDPA scaled back the discretionary authority of administrative officials to cancel removal for certain classes of immigrants by changing the standard of discretion from “exceptional” hardship to the immigrant and his family to “exceptional and extremely unusual hardship.”⁶³ The AEDPA also limited judicial review of removal decisions.⁶⁴

Meanwhile, the IIRIRA expanded the aggravated felony definition to include all convictions that resulted in a prison sentence of one year or more.⁶⁵ Given that immigrants who have committed an aggravated felony are not eligible for cancellation of removal,⁶⁶ the IIRIRA further reduced administrative discretion to cancel removal and expanded the universe of immigrants who cannot successfully appeal their removal to include those convicted for crimes classified under the criminal justice system as misdemeanors.⁶⁷

Thus, the AEDPA and the IIRIRA increased the likelihood that U.S. citizen children would be separated from their immigrant parents by increasing the likelihood that immigrant parents would be removed. An immigrant parent who has been detained and who has been convicted of an act for which he was sentenced to a year or more in

⁶² Lee Gelernt, *The 1996 Immigration Legislation and the Assault on the Courts*, 67 BROOK. L. REV. 455, 455 (2001).

⁶³ 8 U.S.C. § 1229b(b)(1)(D) (2006); *see also* Hagan et. al., *supra* note 10, at 1804–05; Podgorny, *supra* note 9, at 295 (noting that the AEDPA also changed the language of turning out immigrants from our borders from “deportation” or “exclusion” to “removal”).

⁶⁴ ANNA O. LAW, *THE IMMIGRATION BATTLE IN AMERICAN COURTS* 222 (2010).

⁶⁵ Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, Div. C, § 671, 110 Stat. 3009-546, 3009-720–22 (codified as amended at 8 U.S.C. § 1101(a)(43) (2006)); *see also* Hagan et. al., *supra* note 10, at 1804.

⁶⁶ 8 U.S.C. § 1229b(a)(3) (2006).

⁶⁷ Podgorny, *supra* note 9, at 296. “The definition of aggravated felony for the purpose of removing individuals from the United States has been expanded so that now an aggravated felony need no longer be either aggravated or a felony.” *Id.* at 289.

prison is no longer eligible for cancellation of removal.⁶⁸ Further, because family separation is not viewed as “extraordinary and extremely unusual,”⁶⁹ the AEDPA’s stricter standard of discretion means that immigrant parents are foreclosed from arguing that being separated from their U.S. citizen children is a hardship that merits cancellation of removal. The sole remaining argument immigrant parents may advance to seek cancellation due to family hardship is to claim that if their children depart the country with them, they will face extraordinary and extremely unusual hardship in the country to which they depart.⁷⁰

Moreover, following the September 11th terrorist attacks, Congress passed the PATRIOT Act.⁷¹ This Act further increased the likelihood that immigrants would be detained and separated from their families for months at a time as it “further expanded the categories of immigrants eligible for deportation . . . who are perceived as threats to national security or seen as opposing U.S. foreign policy.”⁷²

As a result of the AEDPA, IIRIRA, and the PATRIOT Act, the number of immigrants in immigration detention has dramatically risen in the last ten years.⁷³ For example, the number of immigrant detainees doubled between 2003 and 2008.⁷⁴ In the fiscal year 2010, the U.S. government detained approximately 363,000 immigrants.⁷⁵

⁶⁸ See *supra* note 65.

⁶⁹ David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1171 (2006) (“[S]eparation from family members is “simply one of the ‘common results of deportation or exclusion [that] are insufficient to prove extreme hardship.’” (quoting *Jimenez v. Immig. Naturalization Serv.*, No. 96-70169 (9th Cir. 1997))).

⁷⁰ *Id.*

⁷¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. 107-56 § 412(a), 115 Stat. 272, 351 (2001).

⁷² Hagan et al., *supra* note 10, at 1804. See also Michael T. McCarthy, *USA Patriot Act*, 39 HARV. J. ON LEGIS. 435, 449 (2002) (“The effect of the USA Patriot Act . . . is to allow the Attorney General to detain indefinitely not only those convicted of crimes or immigration offenses, as under old law, but also any person the Attorney General has reasonable grounds to believe is a terrorist or ‘is engaged in any other activity that endangers the national security of the United States.’” (quoting 8 U.S.C. § 1226a(a)(3)(B) (2001))).

⁷³ See *infra* footnotes 85–86 and accompanying text.

⁷⁴ Nina Bernstein, *Immigration Detention System Lapses Detailed*, N.Y. TIMES (Dec. 2, 2009), <http://www.nytimes.com/2009/12/03/us/03immig.html>.

⁷⁵ APPLIED RESEARCH CENTER, *supra* note 10, at 7.

C. The Obama Administration's Prosecutorial Approach

The Obama administration has taken a somewhat more tolerant approach to immigration policy. While legislation like the proposed Dream Act has failed in Congress,⁷⁶ the administration has relied on its prosecutorial discretion to craft a new policy in mid-2011 that targets its immigration enforcement resources at national security risks, serious felons, known gang members, and those who have repeatedly flouted the nation's immigration laws.⁷⁷ Last spring, the administration also created an administrative workaround to functionally implement many of the Dream Act's provisions.⁷⁸ Finally, President Obama has made comprehensive immigration reform a legislative priority of his second term in office.⁷⁹ At the same time, the immigration officials are deemphasizing enforcement against undocumented immigrants who do not pose a threat to public safety and explicitly consider an immigrant's family ties in the country and whether he or she has U.S. citizen children as weighing against enforcement.⁸⁰ The administration is also focusing on sanctioning employers of illegal immigrant labor as opposed to raiding workplaces to punish the immigrants who are hired to perform the labor⁸¹ and centralizing our nation's immigration detention system.⁸²

⁷⁶ David M. Herszenhorn, *Senate Blocks Bill for Young Illegal Immigrants*, N.Y. TIMES (Dec. 18, 2010), <http://www.nytimes.com/2010/12/19/us/politics/19immig.html>.

⁷⁷ Memorandum from John Morton, Director, Immigration and Customs Enforcement, U.S. Dep't of Homeland Sec., 5 (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

⁷⁸ Julia Preston and John H. Cushman, Jr., *Obama to Permit Young Migrants to Remain in the U.S.*, N.Y. TIMES (Jun. 15, 2012), http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html?pagewanted=all&_r=0.

⁷⁹ Jennifer Epstein, *Obama Renews Push on Immigration Reform*, POLITICO (Mar. 27, 2013), <http://www.politico.com/politico44/2013/03/obama-renews-push-on-immigration-reform-160372.html>.

⁸⁰ See Memorandum from John Morton, *supra* note 77, at 4; see also Charlie Savage, *2901 Arrested in Crackdown on Criminal Immigrants*, N.Y. TIMES (Sept. 28, 2011), <http://www.nytimes.com/2011/09/29/us/crackdown-on-criminal-immigrants-operation-cross-check-brings-2901-arrests.html>.

⁸¹ Julia Preston, *U.S. Shifts Strategy on Illicit Work by Immigrants*, N.Y. TIMES (Jul. 3, 2009), <http://www.nytimes.com/2009/07/03/us/03immig.html>.

⁸² Nina Bernstein, *U.S. to Reform Policy on Detention for Immigrants*, N.Y. TIMES (Aug. 6, 2009), <http://www.nytimes.com/2009/08/06/us/politics/06detain.html>.

Advocates for immigrants are optimistic that, in the short run, these policy changes may help preserve immigrant family unity by decreasing the number of immigrant parents targeted for removal.⁸³ However, it is too soon to fully evaluate the effect of these administrative policies on immigrant parents.⁸⁴ Further, these policies are subject to change upon the election of a new administration, emphasizing the need for statutory, not administrative, remedies to protect immigrant parents.

D. Lack of Coordination between Family and Immigration Law

As this review of family law and immigration law principles suggests, a tension exists between the at-times contradictory goals of our nation's immigration and family law systems. This is both unfortunate and ironic considering that, in the words of one commentator, "[f]amily unity is a foundation of contemporary United States immigration law and policy."⁸⁵ Further, when an immigrant parent must simultaneously navigate both our immigration and family law systems, usually as an immigrant detainee at risk of losing his parental rights, unintentional coordination failures between the two systems of law creates setbacks that further jeopardize an immigrant's parental rights.

Three primary coordination concerns can be identified. First, as mentioned above, the ASFA trigger mechanism for a state initiating TPR proceedings against a parent can be pulled by immigration officials placing a parent in immigration detention, thereby separating him from his child for what can end up being months or even years.⁸⁶ Second, practical problems with communication and legal representation arise when an immigrant parent is held in immigration detention while an involuntary child custody proceeding is initiated against him.⁸⁷ For example, 1.4 million detainees were transferred

⁸³ Julia Preston, *In Test of Deportation Policy, 1 in 6 Get a Fresh Look and a Reprieve*, N.Y. TIMES (Jan. 19, 2012), <http://www.nytimes.com/2012/01/20/us/in-test-of-deportation-policy-1-in-6-offered-reprieve.html>.

⁸⁴ Preliminary data, however, do reveal that immigrant parents are benefiting from this administrative policy shift. *See id.*

⁸⁵ Maria Pabón López, *A Tale of Two Systems: Analyzing the Treatment of Noncitizen Families in State Family Law Systems and Under the Immigration Law System*, 11 HARV. LATINO L. REV. 229, 229 (2008).

⁸⁶ *See supra* notes 52–53.

⁸⁷ *See Hall, supra* note 12, at 1472.

between 1999 and 2008, often to locations hundreds of miles away from their homes and families in the United States.⁸⁸ Consequently, a parent may easily be shifted across the country from one detention facility to another with little or no warning.⁸⁹ His ability to receive notice of this move and defend himself in the proceedings is also diminished, especially if he lacks representation.⁹⁰ Third, the court is likely to consider the parent's restricted movement and inability to contact his or her child during the time in detention as a negative factor in the court's parental fitness determination—construing the parent's failure to communicate as constituting abandonment or neglect.⁹¹

Even when immigrant parents face deportation without the threat of TPR proceedings, such parents must still make the wrenching decision of whether to uproot their children from the United States and bring them to the often unfamiliar and economically underdeveloped nations of their origin or leave their children with family members or friends to grow up without them.⁹² The failure of coordination between federal immigration and state child protective agencies, however, means that state courts sometimes strip that decision making authority from the parents, a troubling development in the intersection between family and immigration law.⁹³

E. Coordination Failures as Flouting Customary International Norms Regarding Family Unity

In addition to the problematic domestic implications of separating children from their parents, these separations also arguably violate customary international law.⁹⁴ Unnecessarily removing children from

⁸⁸ Bernstein, *supra* note 74.

⁸⁹ See Rabin, *supra* note 15, at 119–21 (describing the difficulties child protective agencies, courts, and attorneys had in tracking down and communicating with immigrant detainees).

⁹⁰ *Id.*

⁹¹ See Hall, *supra* note 12, at 1472.

⁹² See Erica Stief, Comment, *Impractical Relief and the Innocent Victims: How United States Immigration Law Ignores the Rights of Citizen Children*, 79 UMKC L. REV. 477, 478 (2011) (quoting a father whose immigrant wife was recently removed as explaining, “It’s unbelievable if you think about our little boy, what his choices are . . . to be able to be in a good environment in his country or to be able to hug his mom.”).

⁹³ Rabin, *supra* note 15, at 102.

⁹⁴ Stief, *supra* note 92, at 492 (“[I]nternational customary law . . . does not permit the unnecessary separation of families.”). *But see* Sonja Starr & Lea Brilmayer,

the custody of immigrant parents or terminating parental rights would seem to violate international norms that elevate family unity to a human right.⁹⁵

The United Nations Convention on the Rights of the Child, which codifies the right of a child to live with her natural parents, affirms the international community's commitment to family unity⁹⁶ in conjunction with other conventions and international principles such as the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, and the International Covenant on Economic, Social, and Cultural Rights.⁹⁷

As a concept ripens into customary international law when it has been widely practiced by the international community,⁹⁸ the various treaties and practices of other nations seem to have, at the very least, created an international norm supporting family unity.⁹⁹ As a member and purported leader of the international community, the United States

Family Separation as a Violation of International Law, 21 BERKELEY J. INT'L L. 213, 230 (2003) ("It is probably too early to argue that a general norm against family separation has achieved the status of customary international law.").

⁹⁵ A related problem is the failure of U.S. immigration law to consider the "best interests of the child" when a child is affected by an immigration proceeding. A parent who is scheduled for removal may be forced to leave his child behind in the United States. Absent proving "exceptional and extremely unusual hardship," he will be unable to cancel removal to be with his child. Bridgette A. Carr, *Incorporating a "Best Interests of the Child" Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 123 (2009) ("Under current United States immigration law, accompanied children who are directly affected by immigration proceedings have no opportunity for their best interests to be considered."); see also *supra* note 65 and accompanying text. However, addressing this important problem is beyond the scope of this Note.

⁹⁶ The treaty was subsequently ratified by all United Nations member nations with the exception of the United States and Somalia. Stief, *supra* note 92, at 477. The United States frequently refuses to ratify international agreements, including human rights treaties, because of concerns about maintaining sovereignty. Lainie Rutkow & Joshua T. Lozman, *Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 166–67 (2006).

⁹⁷ Anna-Liisa Jacobson, *Dividing Lives: How Deporting Legal and Illegal Immigrants with United States-born Children is Separating Families and Why United States and International Laws are Failing Families*, 12 RICH. J.L. & PUB. INT. 191, 208–11 (2011).

⁹⁸ See, e.g., *The Paquete Habana*, 175 U.S. 677, 686 (1900) (declaring that the world creates custom "[b]y an ancient usage among civilized nations . . . gradually ripening into a rule of international law . . .").

⁹⁹ Starr and Brilmayer, *supra* note 94, at 230.

has a moral and legal obligation to conform to customary international norms. However, allowing U.S. family law and immigration law to result in unnecessary separations of immigrant parents and their children and terminations of immigrant parental rights appears to fly in the face of this norm. While enforcement of this norm against the United States by the international community or by U.S. citizen children seems unlikely, there have been instances in which international courts have found claims against the United States alleging violations of international human rights laws to be justiciable.¹⁰⁰

IV. HISTORY REPEATS ITSELF: FINDING ECHOES OF THE CURRENT SITUATION IN THE PLIGHTS OF NATIVE AMERICAN FAMILIES

The situation facing immigrant parents and their U.S. citizen children is analogous to the problems faced by Native American—and to a lesser extent, Irish and African-American—parents and children in decades past. In all three instances, bias against the mentioned minorities, borne of cultural differences and socioeconomic stratification, was built into the U.S. child welfare system, resulting in disproportionately high levels of separation between parents and children for the groups in question.¹⁰¹ Part IV examines how and why Native American families faced disproportionately high levels of separation and terminations of parental rights, parallels to the situation facing immigrant families today, and the genesis of the Indian Child Welfare Act, setting up this Note's conclusion that a similar legislative act on behalf of immigrant parents may solve many of the current-day threats to immigrant family unity.

¹⁰⁰ See Caroline Bettinger-Lopez, *Jessica Gonzales v. United States: An Emerging Model for Domestic Violence & Human Rights Advocacy in the United States*, 21 HARV. HUM. RTS. J. 184 (2008) (tracing the 2007 decision by the Inter-American Commission on Human Rights that declared the organization had judicial competence to examine the human rights claims of a U.S. citizen and domestic violence victim who had unsuccessfully sought redress in the U.S. courts).

¹⁰¹ Yablon-Zug, *supra* note 15, at 109 (“The current removals of minority immigrant children from their homes may be a repetition of . . . history.”).

A. Challenges to Family Unity for Native Americans and Parallels to Challenges Facing Immigrant Parents Today

This Note primarily focuses on the parallels between Native American and immigrant families because they are the most apt. However, it is important to note that in the nineteenth century, before the rise of the nation's child welfare system, hundreds of thousands of Irish and free African-American children were separated from their families and sent to work and to be adopted out West.¹⁰² One commentator describes this movement as an attempt by overzealous social reformers to instill “[w]hite, middle-class values and work ethic” in immigrant and black children.¹⁰³

Our nation's long history of institutional disrespect for Native American autonomy extended to the Native American family unit. Native American children were often permanently separated from their parents throughout the 1800s. Social reformers, known as the Friends of the Indian, pushed for Native American children to be educated in federal boarding schools and assimilate to the ways of white Christian Americans.¹⁰⁴ In the twentieth century, separations continued to occur, this time within the developing governmental child welfare system. Child protective officials often perceived Native American parents as unfit and placed the children in foster care or up for adoption.¹⁰⁵ Consequently, an estimated 25% of Native American children were separated from their parents during the 1960s and 1970s.¹⁰⁶

¹⁰² Appell, *supra* note 46, at 763–64 (explaining the efforts of the “child saver” reform movement to send poor Catholic and free African-American children separated from their parents and who were often not orphans on “orphan trains bound for adoption and work.”).

¹⁰³ Appell, *supra* note 46, at 763–64.

¹⁰⁴ Linda Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 ARK. L. REV. 327, 356 & 359 (1986–1987).

¹⁰⁵ *Id.*, at 375–76. Research shows that child protective officials removed the vast majority of Native American children for reasons that did not include physical abuse. *Indian Child Welfare Program: Before the Subcomm. on Indian Affairs, of the Comm. on Interior and Insular Affairs*, 93d Cong. 4 (1974) (statement of William Byler, Exec. Dir., Ass'n on Am. Indian Affairs). Rather, officials based their removal decisions on factors such as deprivation, neglect, and poverty, often making (negative) normative assumptions about the Native American way of life. *Id.*

¹⁰⁶ *Indian Child Welfare Program: Before the Subcomm. on Indian Affairs, of the Comm. on Interior and Insular Affairs*, 93d Cong. 3 (1974) (statement of William Byler, Exec. Dir., Ass'n on Am. Indian Affairs).

There are multiple similarities between the challenges faced by twentieth-century Native American parents and those confronting immigrant parents of today. For one, similar to how immigrant parents in detention can fail to learn or understand of custody or TPR proceedings initiated against them, Native American parents would often unknowingly relinquish their parental rights when social services agencies provided them with parental rights waivers in conjunction with welfare receipt forms.¹⁰⁷ Second, just as child protective services officials view some immigrant parenting traditions with suspicion, child protective services officials perceived Native American traditions such as communal parenting as a form of neglect or abandonment.¹⁰⁸ Third, both groups frequently lacked access to the family courts, preventing parents from appealing terminations decisions.¹⁰⁹

Fourth, courts and child services officials used parental alcoholism as a reason for terminating parental rights much the same way they use a parent's immigration status today.¹¹⁰ One commentator notes:

Because of the pervasiveness of addiction diseases in native peoples, members of Congress and those who testified on behalf of ICWA's passage were concerned that the occurrence of alcoholism in American Indian families was being used by non-Indian social work professionals to intervene and remove children . . . without proper inquiry into the child's circumstances in the larger or extended family.¹¹¹

Finally, it is interesting to note that many of the immigrant parents who have the greatest difficulty in communicating with child

¹⁰⁷ See *supra* note 87 and accompanying text; *Preserving the Indian Family*, 2 CHILD. LEGAL RTS J. 32, 33 (1981). Native American parents would often unknowingly relinquish their parental rights when social services agencies provided them with parental rights waivers in conjunction with welfare receipt forms. *Id.*

¹⁰⁸ Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 603 (2002).

¹⁰⁹ See *supra* note 21 and accompanying text; see also Jose Monsivais, *A Glimmer of Hope: A Proposal to Keep the Indian Child Welfare Act of 1978 Intact*, 22 AM. INDIAN L. REV. 1, 5–6 (1997).

¹¹⁰ See Brooks, *supra* note 20, at 686.

¹¹¹ *Id.* To affirm this point, data suggests that in non-Native American communities that had comparable rates of alcoholism, adjudications of parental neglect were much lower. *Preserving the Indian Family*, 2 CHILD. LEGAL RTS J. 32, 33 (1981).

protective services officials are indigenous Mexican, Central, and South American immigrants who, like Ms. Baltazar Cruz, do not speak fluent Spanish.¹¹² These indigenous immigrants are underserved by child protective services agencies unused to interacting with non-Spanish or Portuguese-speaking Latin American immigrants.¹¹³

There are also, of course, differences between the two situations. Unlike immigrant families, Native American communities also feared extinction if their children continued to be taken into the foster care system and adopted by non-Native American families at such high rates. Further, Native Americans were concerned about maintaining tribal sovereignty in the face of U.S. government interference in their family structures.¹¹⁴ The similarities, however, allow us to examine how the federal government tried to solve the issues affecting Native American parents once it became aware of the extent of the problem.

B. The Indian Child Welfare Act

Congress responded to the crisis by enacting the Indian Child Welfare Act of 1978.¹¹⁵ The ICWA strengthened the procedural safeguards against the unnecessary termination of Native American parental rights. For one, the ICWA grants Native American tribes jurisdiction in child custody proceedings involving an “Indian child who resides or is domiciled” in an Indian reservation and allows Native American parents, custodians, or tribes to request transfer of venue to tribal jurisdiction in a state court custody proceeding if an Indian child is not subject to exclusive tribal jurisdiction.¹¹⁶

The statute also contains special notice requirements when Indian children are involved in an involuntary child custody proceedings, provides for right to counsel for Native American parents in a child

¹¹² See, e.g., *supra* note 1 and accompanying text; Aaron Nelsen, *Torn Apart: How the Government Separates Parents and Children*, IN THESE TIMES (Dec. 20, 2011), http://www.inthesetimes.com/article/torn_apart_how_the_federal_government_separates_parents_and_children/.

¹¹³ See Claudia Torrens, *Some N.Y. Immigrants Cite Lack of Spanish as a Barrier*, ASSOCIATED PRESS (May 28, 2011), available at <http://cnsnews.com/news/articles/some-ny-immigrants-cite-lack-spanish-barrier>.

¹¹⁴ Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585, 600 (1993–1994).

¹¹⁵ Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901–1963 (2006).

¹¹⁶ Michael C. Snyder, *An Overview of the Indian Child Welfare Act*, 7 ST. THOMAS L. REV. 815, 826–27 (1995).

custody proceeding, heightens the standard of proof required for termination of parental rights to “beyond a reasonable doubt,” and requires child protective officials exert “active efforts” to provide remedial and rehabilitative programming to Native American families before initiating the foster care placement process.¹¹⁷

Further, the ICWA creates a placement preference system for Native American parents to voluntarily consent for their children to be adopted or placed into foster care by family members, other Native American families from their communities, or families licensed to care for Indian children “absent good cause to the contrary.”¹¹⁸ Finally, the ICWA provides a process for parents to recover their parental rights (or tribes to recover their children) if a court fails to follow ICWA requirements¹¹⁹ as a way for parents to petition to recover custody of their children even after they have voluntarily consented for their child to be adopted.¹²⁰

While some have questioned the effectiveness of the ICWA in the decades after its passage,¹²¹ the Act has undoubtedly reduced the amount of abuse in the child welfare system as it pertains to Native American families.¹²² Indeed, Native American parents are still using

¹¹⁷ 25 U.S.C. § 1912 (2006); *see also* Snyder, *supra* note 116, at 831–32.

¹¹⁸ 25 U.S.C. § 1913(a) (2006).

¹¹⁹ 25 U.S.C. § 1914 (2006) (“Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child’s tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.”).

¹²⁰ 25 U.S.C. § 1913(b-d) (2006).

¹²¹ Sloan Philips, *The Indian Child Welfare Act in the Face of Extinction*, 21 AM. INDIAN L. REV. 351, 355 (1997) (“For many, the purposes of the ICWA have not been realized; Indian children are not being protected.”); Atwood, *supra* note 108, at 588 (“By some accounts the Act has been the victim of entrenched state court hostility ever since its enactment”); *see also* Lara Sullivan and Amy Walters, *Incentives and Cultural Bias Fuel Foster System*, NPR (Oct. 25, 2011), <http://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system> (examining the disproportionately high number of Native American children being placed into state foster care systems today in spite of the Indian Child Welfare Act).

¹²² Atwood, *supra* note 108, at 621 (2002) (“The ICWA has achieved considerable success in stemming unwarranted removals by state officials of Indian children from their families and communities.”).

the statute to enforce their rights in court today.¹²³ Admittedly, some of the reasons for the ICWA, including the potential extinction of several Native American communities if removal and assimilation of Native American children continued at pre-1978 rates, do not exist here.¹²⁴ However, both Native American and immigrant parents have faced and continue to face a child welfare system that undervalues their ability to parent due in part to cultural bias and a system which too often terminates their parental rights.¹²⁵ As a result, enacting a statute modeled on the Indian Child Welfare Act on behalf of immigrant parents and their U.S. citizen children may help protect the rights of the families to avoid being unnecessarily divided under the auspices of American family law.

V. CONCLUSION

Returning to Cirila Baltazar Cruz's story, if legislation akin to the Indian Child Welfare Act had been in place when Ms. Baltazar Cruz had her baby taken from her, Ms. Baltazar Cruz would have had far more resources at her disposal in order to reunify with her child. For example, if she had been appointed assistance of counsel, an attorney would have been able to help her regain custody more quickly. If the Mississippi Department of Health Services had been required to make "active efforts" to provide remedial and rehabilitative resources to Ms. Baltazar Cruz before initiating TPR proceedings, MDHS would have likely never pursued TPR proceedings at all. If MDHS had pursued TPR but a heightened burden of proof had been in place, Ms. Baltazar Cruz would have never seriously feared losing her parental rights given the scarcity of evidence against her.

¹²³ Robert Barnes, *Baby Veronica's Loved Ones Wait for the Supreme Court to Weigh In*, WASH. POST (Apr. 14, 2013), http://www.washingtonpost.com/politics/baby-veronicas-loved-ones-wait-for-the-supreme-court-to-weigh-in/2013/04/14/7138b5f0-a526-11e2-a8e2-5b98cb59187f_story.html.

¹²⁴ *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 (1989) ("While much of the [Congressional] testimony [preceding the enactment of the ICWA] . . . focused on the harm to Indian parents and their children who were involuntarily separated by decisions of local welfare authorities, there was also considerable emphasis on the impact on the tribes themselves of the massive removal of their children."); *see also* Philips, *supra* note 121, at 352.

¹²⁵ *See* Appell, *supra* note 46, at 777–78 (highlighting "aspects of the child welfare system that are most solipsistic, dominant norm-driven, and, thus so disrespectful" to non-white, non-English speaking parents such as Native Americans and Latinos).

Of course, child protective services agencies and family courts will need to undertake additional, more specific steps to prevent stories like those of Ms. Baltazar Cruz from happening in the future. For example, child protective services agencies should exhibit greater cultural sensitivity to different parenting traditions and provide language access for parents they are investigating. Further, state courts should take care to separate a parent's immigration status from their fitness as a parent. Perhaps additional federal legislation on these issues is necessary as well, given their import. However, the Indian Child Welfare Act can serve as a starting point for addressing the threats to parental rights facing immigrants in our country. History repeated itself in how we are treating immigrant families today; perhaps we can repeat history in a positive way by enacting an ICWA equivalent to correct our mistakes.