NOTE

WHAT’S SO EXCEPTIONAL ABOUT IMMIGRATION AND FAMILY LAW EXCEPTIONALISM? AN ANALYSIS OF CANONICAL FAMILY AND IMMIGRATION LAW AS REFLECTIVE OF AMERICAN NATIONALISM

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INTRODUCTION

This story, this fight for a boy. It was about his mothers. It was about a law that
grew from the deepest roots of their being.¹

There isn’t much policy around this, Soli. Around getting children and parents
like you back together. There’s no you-must-do-this for the courts to follow. Do
you understand that? So, it’ll depend on the people who handle the court case.
On the judge. On how they see you.²

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1. SHANTHI SEKARAN, LUCKY BOY 435 (G.P. Putnam’s Sons 2017).
2. Id. at 269.
Lucky Boy tells the story of two mothers, Soli Valdez and Kavya Reddy. A fictionalized account of Encarnación Bail Romero’s struggle to retain custody of her son after she was caught up in an immigration raid, the novel exposes the stakes involved when immigrant parents are caught up in the child welfare and immigration systems. After giving birth to a son in the United States, Soli is detained by United States Immigration and Customs Enforcement (ICE) and separated from her infant child. Opposite Soli is Kavya, a liberal, married woman who could not conceive a child through Artificial Reproduction Technology (ART). She asks to foster a child with her husband and falls in love with Nacho, Soli’s biological child. After Soli miraculously escapes from immigration detention, she “kidnaps” Nacho and returns to her home country. Kavya remains in the U.S., childless. However, the real Soli—Encarnación Bail Romero—suffered a much worse fate. She lost her child to the child welfare system and was deported back to Guatemala without him.4

Soli attempts to protest the termination of her parental rights from detention but soon discovers that she is unable to comply with the terms of her reunification plan because she is detained.5 Child Protective Services (CPS) workers often have little insight into the immigration system.6 Child welfare courts and agencies often refuse to aid immigrant parents in accessing the very programs that they are required to complete to get their children back.7 ICE in turn creates severe obstacles, despite directives to the contrary,8 for parents who wish to attend family court proceedings.

That these systems remain so inextricably connected, and yet posture as if they are separate, speaks volumes about American nationalism. Both immigration and

3. Encarnación Bail Romero, a Guatemalan immigrant was arrested in Missouri in 2007 during an United States Immigration and Customs Enforcement (ICE) raid on her workplace. Encarnación Bail Romero’s son was placed in the custody of a sister and then a friend until ultimately, he was taken in by the Moser family. She fought for Carlos’ custody from immigration detention but lost because the court declared that she had abandoned her son while in detention. See Ginger Thompson, After Losing Freedom, Some Immigrants Face Loss of Custody of Their Children, N.Y. TIMES (Apr. 22, 2009), https://www.nytimes.com/2009/04/23/us/23children.html.


5. SEKARAN, supra note 1, at 267.


family law espouse family unity as a foremost priority. Yet, when immigrant parents are caught up in immigration and child welfare proceedings, these systems collaborate to deprive parents of their rights to their children.

I. IMMIGRATION AND FAMILY LAW CANON INTERSECT

Canonical accounts of family law (canon), which includes child welfare law, and immigration law fail to account for the experiences of immigrant families losing their children to the child welfare system in connection with deportation and immigration detention. Canonical family and immigration law, as expressed through Supreme Court doctrine, reveals assumptions about who should be subject to State scrutiny while holding out other forms of familial association as paradigmatic. The canon thus reveals a great deal about official visions of the American family, with all of its attendant implications for American nationalism.

I propose that family and immigration law exceptionalism are utilized to further substantive-ethnonationalist ambitions. These structures use the language of process by creating positive rights and entitlements (those to family privacy gesturing toward the essential value of all families) while deviating from the supposed norm for the marginalized, thus gilding insidious anti-family policies with a progressive veneer. In this Note, I examine how child welfare and immigration law intersect to deprive immigrant parents of their children through child removals and deportation proceedings. I utilize this intersection to demonstrate how hollow family unity and parental rights doctrines fail immigrant families. These failures demonstrate the true nature of American nationalism as captured by legal canon: one that favors and protects middle-class citizen families while punishing poor, immigrant ones for their failures to comply with the State’s demands.

II. SURVIVED AND PUNISHED: A CORRECTIVE LENS

Survived and Punished is a grassroots movement that promotes the liberation of women of color and femmes who are punished by the carceral State. It recognizes that the State, through child welfare, immigration, and criminal justice policies, deprives marginalized persons of their freedom and punishes their


10. The movement is explicitly inclusive of LGBTQ persons who identify as femme and perform gender in a manner traditionally ascribed to femininity.

11. See Analysis & Vision, SURVIVED & PUNISHED, https://survivedandpunished.org/analysis/ (last visited Dec. 12, 2018) (“The Survived And Punished Project demands the immediate release of survivors of domestic and sexual violence and other forms of gender violence who are imprisoned for survival actions, including: self-defense, ‘failure to protect,’ migration, removing children from abusive people, being coerced into acting as an ‘accomplice,’ and securing resources needed to live. Furthermore, we demand that these same survivors are swiftly reunited with their families. Our coalition of freedom campaigns and organizations believes that policing, immigration enforcement and the prison industrial complex are violent institutions that primarily target poor communities of color... All are threatened with being separated from their children and families.”).
responses to a neoliberal regime—often by threatened or actual separation from their children and families.

Survived and Punished brings attention to the criminalization of poverty and migration (itself a survival action), which intersect to demand individual compliance with envisioned norms of parenthood. Children are thus rendered a carrot and a stick in this neoliberal regime. Failure to conform to what a CPS officer or immigration official deems necessary may result in the loss of one’s children whether through deportation or child removal.

Survived and Punished also demands that the State immediately cease this infliction of harm. In the child welfare-immigration law context, the failure of CPS and immigration policies to allow parents to fight for custody of their removed children while in immigration detention is often described as a failure of coordination. According to this view, because child welfare law is predominantly local and immigration enforcement is federal, these actors are ill equipped to accommodate each other’s demands. However, punting to issues of federalism obscures the fact that the same State is often responsible for the failure of parents to fulfill the services demanded by child welfare because the parent is in immigration detention. Survived and Punished collapses these rhetorical and structural barriers and demands justice for those who have survived State-based violence and are punished.

III. IMMIGRATION LAW EXCEPTIONALISM

Due to the executive and legislative branches’ innate power to determine immigration policy, the Supreme Court views immigration law as exceptional. It diverges from constitutional norms with alarming frequency, “inhabit[ing] the

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12. See id.
13. See id.
14. Falling Through the Cracks: The Impact of Immigration Enforcement on Children Caught Up in the Child Welfare System, AMERICAN IMMIGRATION COUNCIL (Dec. 2012), https://www.americanimmigrationcouncil.org/sites/default/files/research/falling_through_the_cracks_3.pdf (“In the face of continued immigration enforcement, preventing the unnecessary breaking apart of families requires a coordinated set of solutions across the different systems that interact with those families. DHS has introduced administrative reforms which have the potential to increase the chances for family reunification, including the Online Detainee Locator System, updated transfer policy, and pending risk classification system. But there is still more that can be done to protect a parent’s due process rights and the ability to make decisions with regards to a child’s care. State child welfare agencies can also implement reforms to promote child welfare practices that prioritize placing a child with a parent or relative caregiver whenever possible and to ensure that child welfare personnel (including frontline staff, lawyers, and judges) are trained on the immigration enforcement system.”).
15. Disappearing Parents: A Report on Immigration Enforcement and the Child Welfare System, THE UNIVERSITY OF ARIZONA SOUTHWEST INSTITUTE FOR RESEARCH ON WOMEN 13 (May 2011) live.uazlaw.pantheon.arizona.edu/sites/default/files/disappearing_parents_report_final.pdf. (Family court judges describing how they never successfully bring parents to hearings from federal immigration detention centers in contrast to more accessible state jails “because in federal facilities we have a terrible time because we have no authority”).
16. See id. at 2 (“Many personnel in the child welfare system noted that, because immigration detention facilities lack the programming or services available in some jails or prisons, these detained parents are actually worse off than incarcerated parents.”).
backwaters of constitutional jurisprudence.” 17 Beginning with *Chae Chan Ping*, Supreme Court deference to the political branches under the doctrine of plenary powers has permitted Congress and the Executive nearly unfettered discretion to regulate immigrant entry and deportation. 18

However, Rubenstein and Gulasekaram posit that narratives of immigration law exceptionalism (ILE) are unsatisfying when federalism, constitutional rights, and separation of powers doctrines are viewed holistically. 19 ILE is deployed selectively: “the Court sometimes—but not always—treats immigration exceptionally.” 20 Prescriptively, scholars and advocates sometimes—but not always—want immigration treated that way.” Rubenstein and Gulasekaram thus argue “immigration exceptionalism has exceptions.” 21

The plenary powers doctrine mandates near-complete judicial deference to executive and Congressional regulation of immigration. 22 Supreme Court “cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” 23 Because of the plenary powers doctrine, immigration regulations which may hinder substantive constitutional rights receive less scrutiny than federal regulations targeting citizens. 24 “[P]robably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system.” 25 Gesturing toward concern for foreign affairs, national security, sovereignty, and institutional competency, courts thus often decline to review whether immigration laws pass constitutional muster.

Immigration law exceptionalism thus permits constitutional rights that attach to citizen families envisioned by family law to be dismissed through reference to plenary powers in the immigration law context. Indeed, ILE contemplates that the plenary powers doctrine produces a “regulatory regime that, in the Court’s own words, ‘would be unacceptable if applied to citizens.’” 26

However, both pro- and anti-immigrant rights decisions inhere a nationalist narrative in relation to immigrant families. Following the Court’s decision in

18. 130 U.S. 581 (1889).
20. See id.
21. See id.
22. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990) (“The plenary power doctrine’s contours have changed over the years, but in general the doctrine declares that Congress and the executive branch have broad and often exclusive authority over immigration decisions.”).
26. See Rubenstein at 596 (quoting Mathews v. Diaz, 426 U.S. 67, 80 (1976)).
Washington v. Glucksberg,\textsuperscript{27} discerning constitutional rights requires an examination of whether the right is deeply rooted in U.S. history and tradition and if it is implicit in the concept of ordered liberty.\textsuperscript{28} Immigrants’ rights proponents thus must offer up a historical narrative framing familial privacy and family unity as foundational, whereas detractors must deploy another emphasizing intervention. Pro-immigrant decisions thus favor constitutional rights normalization for immigrant families while relying on inaccurate tropes of historical protections of the family. Anti-immigrant decisions decline to extend these canonical protections of the family while occasionally maintaining a more historically accurate depiction of the protections afforded to immigrants.\textsuperscript{29} Family unity narratives, as discussed below, thus present a fraught path for advancing immigrant family rights within the current constitutional framework.

A. FAMILY UNITY NARRATIVES

In Kerry v. Din, a U.S. citizen raised procedural and substantive due process concerns regarding denial of a consular visa for her husband on the grounds that he met the definition of a person engaging in terrorist activity under the Immigration and Nationality Act (INA).\textsuperscript{30} In a plurality opinion for the Court, Justice Scalia denied what he deemed Din’s “associational rights” adjacent to, but not protected by, the fundamental right to marriage.\textsuperscript{31}

However, the liberty interest sought to be protected in Din was one well known to family law. The dissenting opinion from Justice Breyer easily rattles off the line of cases from Meyer v. Nebraska\textsuperscript{32} to Smith v. Organization of Foster Families\textsuperscript{33} which makes evident that the liberty interest in “the institution of marriage, which encompasses the right of spouses to live together and to raise a family, is central to human life, requires and enjoys community support, and plays a

\textsuperscript{28} See id. at 721.
\textsuperscript{29} See Yuki Oda, Family Unity in U.S. Immigration Policy 1921-1978, 5-6 (Apr. 7, 2014) (Ph.D. dissertation, Columbia University) (discussing how the myth of longstanding pro-family immigration policy “entirely overlooks how exclusion of families was central to Asian exclusion that lasted until 1952, or how prevention of permanent settlement and family was central to labor recruitment from Mexico and the Caribbean since World War II, or how “family separation” was a constant complaint by Southern and Eastern European immigrants during the quotas era.”).
\textsuperscript{30} See Kerry v. Din, 135 S. Ct. 2128, 2131 (2018).
\textsuperscript{31} See id. at 2135 (“Nothing in the cases Din cites establishes a free-floating and categorical liberty interest in marriage (or any other formulation Din offers) sufficient to trigger constitutional protection whenever a regulation in any way touches upon an aspect of the marital relationship. Even if our cases could be construed so broadly, the relevant question is not whether the asserted interest ‘is consistent with this Court’s substantive-due-process line of cases,’ but whether it is supported by ‘this Nation’s history and practice.’”).
\textsuperscript{32} 262 U.S. 390 (1923).
\textsuperscript{33} 431 U.S. 816 (1977).
central role in most individuals’ “orderly pursuit of happiness.” These cases reflect family law canonical protections of parental rights and family unity while obscuring the historical neglect of the immigrant family.

By contrast, the plurality declared that this substantive due process language at the core of family law canon to be mere “grandiloquence.” Scalia stated that the broad constitutional protections for family unity were to be found primarily in nonbinding dicta. He distinguished narrowly from the Meyer line of cases to find that there was no constitutional right to association with one’s spouse. Kennedy’s concurrence, joined by Justice Alito, stated that even if there was a protected liberty interest at stake, the procedural process afforded Din by the consulate was sufficient.

Despite the extensive debate about the existence of a constitutional right and its potential bounds, it was immigration exceptionalism that provided an easy method to deny Din’s claim:

Although Congress has tended to show “a continuing and kindly concern . . . for the unity and the happiness of the immigrant family,” this has been a matter of legislative grace rather than fundamental right. Even where Congress has provided special privileges to promote family immigration, it has also “written in careful checks and qualifications.” This Court has consistently recognized that these various distinctions are “policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress.”

Immigration exceptionalism thus allows the court to defer to Congressional decision-making while declaring the nonexistence of a constitutional right to immigrant family unity. By deploying the language of federalism concerns, institutional competence, and deviation from constitutional norms about the family, the Din court highlights how ILE permits the Supreme Court to deny the value of immigrant family unity.

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35. See Din, 135 S. Ct. at 2134.
36. Id.
37. Id. at 2135.
38. See id. at 2139 (Kennedy, J., concurring) (“the plurality is correct that the case must be vacated and remanded. But rather than deciding, as the plurality does, whether Din has a protected liberty interest, my view is that, even assuming she does, the notice she received regarding her husband’s visa denial satisfied due process.”).
39. Id. at 2136 (emphasis added).
B. A Blurred Line: Family and Immigration Law

In many ways, immigration exceptionalism obscures the parallels between family law and immigration law. In *Din*, Justice Scalia justifies the non-existence of a right for a U.S. citizen to live with their non-citizen spouse because the Nation’s history provides scant evidence of such a right—especially for wives seeking to bring husbands to the U.S.\(^{40}\) Despite recognizing the denial’s origins in coverture,\(^{41}\) Scalia declared that “this all-too-recent practice repudiates any contention that Din’s asserted liberty interest is ‘deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty’” under *Washington v. Glucksberg*.\(^{42}\) Scalia thus declines to find a right to association with one’s spouse on a historical tradition that he declares to be immoral, namely coverture, by looking to the sexist and racist origins of immigration law.\(^{43}\) Din had no right to be with her spouse in 2015 because no such right existed in American history and tradition dating back to the early 20\(^{th}\) century. Though he bemoans its origins, the result remains the same as if Din sought relief a century prior.

The *Glucksberg* test thus inheres a nationalist standard. If a right is rooted in American history and tradition, it ought to be protected. If not, there is no cognizable right. Because Congress maintained transparently racist and sexist standards for the admission of foreign husbands to the U.S. in early American history,\(^{44}\) and has continued to limit immigrant admissions, Din had no right to be protected. By classifying as dictum the substantive due process language promoting family unity as foundational to American tradition and narrowing the scope of analysis to the right to associate with a non-citizen spouse, Scalia promotes deviation from supposed constitutional norms at the intersections of immigration and family law.

The *Din* Court’s manipulation of American history and tradition thus demonstrates the fraught results-oriented nature of exceptionalism. The dissent invokes historical revisionism through progressive nationalist narratives about canonical

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\(^{40}\) See *Din*, 135 S. Ct. at 2135-36 (plurality opinion) (“Here, a long practice of regulating spousal immigration precludes Din’s claim that the denial of Berashk’s visa application has deprived her of a fundamental liberty interest. Although immigration was effectively unregulated prior to 1875, as soon as Congress began legislating in this area it enacted a complicated web of regulations that erected serious impediments to a person’s ability to bring a spouse into the United States... Most strikingly, perhaps, the Expatriation Act of 1907 provided that ‘any American woman who marries a foreigner shall take the nationality of her husband.’ Ch. 2534, 34 Stat. 1228. Thus, a woman in Din’s position not only lacked a liberty interest that might be affected by the Government’s disposition of her husband’s visa application, she lost her own rights as a citizen upon marriage.”).

\(^{41}\) Coverture was the historical legal regime that subsumed women’s citizenship, property and contractual rights into her husband’s identity upon marriage. See Mary Heen, *From Coverture to Contract: Engendering Insurance on Lives*, 23 YALE J. L. & FEMINISM 335 (2011).

\(^{42}\) See *Din*, 135 S. Ct. at 2136 (citing *Washington v. Glucksberg*, 521 U.S. 702, 723–24 (1997)).

\(^{43}\) See *id.* at 2135.

\(^{44}\) See *id.* at 2135-36.
family law cases that declare family unity to be essential to our nation’s ordered liberty.

Immigrant families are thus stuck between a rock and a hard place. As discussed in Part IV, reliance on family law canonical narratives of the inherent, foundational rights for families is fraught. It provides little aid in obtaining remedies and is subject to deviation by courts that would declare it dicta or would define the constitutional right differently (family unity/privacy versus the associational rights of citizen wives to be with their noncitizen husbands). This reliance also demands progressive nationalist revisionism which obscures how historically, the right to family unity was never contemplated to apply to the marginal, poor, or immigrant family.

IV. FAMILY LAW EXCEPTIONALISM

Family law exceptionalism, the notion that the family and family law are often treated as “occupying a unique and autonomous domain,” informs the discussion on why it is used as a valorized site by nationalists. In contrast to other areas of law, family and family law “house intimate, private, emotional, and vulnerable relationships; they are unique because they preserve (against modernity and/or the global and foreign) the traditional, the national, the indigenous; they are unique because (as against the secular) they derive from sacred command.”

The Supreme Court has declared that family law is inherently local and preserves that localism through a judicial creation, the domestic relations exception to federal jurisdiction. Family law is described as emblematic of traditional American values, separate from the influence of market ideals, and promotes familial privacy. Family law canon excludes the purview of “welfare law,” which by its policies regulates the majority of family relations for the poor and are federally-based.

But these assertions all fail upon critical inquiry. Federal family law does exist, ranging from tax to immigration law. Family law shifts economic burdens and costs in accordance with market values. Family law often intervenes in the private sphere, especially for poor families. And welfare law is definitionally part

46. See id.
48. See JILL HASDAY, FAMILY LAW REIMAGINED 196, 202 (2014) (describing how welfare law is primarily federal in nature and acts as family law for the poor).
49. See id. at 46 (“Federal immigration law is replete with family law and family law policy choices”) (discussing how immigration law, separate from state family law, accords privileges and benefits in accordance with relationships and even decides which marriages are bona fide for the purpose of immigration); id. at 53 (“Federal tax law regulates the creation and dissolution of legally recognized family relationships in ways that build on, but differ from, state law in order to further Congress’s own goals.”).
50. See id. at 67-94.
51. See id. at 197.
of family law as it regulates the privileges and responsibilities of individuals on the basis of relationship ties. That family law canon purports to be exceptional is thus a declaration of normative intent rather than a claim to descriptive merit.

Family law canon gives the utmost value to the parent-child relationship and purports to channel an enormous amount of trust to parents to ensure children’s interests. Supreme Court case law is replete with language gesturing to the inherent nature of parental rights and the State’s reluctance to infringe thereupon. According to the Smith Court, “the liberty interest in family privacy has its source and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in this ‘Nation’s history and tradition.’”

Family law canon holds out the family and parental control over children as essential to “American tradition,” “the history and culture of Western civilization,” and “intrinsic human rights.” This illuminates the importance of the family as a site for paradigmatic nationalist narratives about a long-enduring American ethos. Parental rights have meaning for core American values about minimal state intrusion and the importance of kinship-based care. As “perhaps the oldest of fundamental liberty interests recognized” by the Supreme Court, parental rights are deemed canonically supreme.

Moreover, family law canon purportedly rejects the intrusion on parental authority because of the actions of a few bad actors. “[T]he statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.” Parenting inheres risks and sometimes-unpopular decision making, but that does not permit government intrusion into the private sphere.

52. See id. at 198.
54. See e.g., Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.”).
56. See Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”).
57. See id.
58. Smith, 431 U.S. at 845.
59. Troxel, 530 U.S. at 65 (“More than 75 years ago, in Meyer v. Nebraska, we held that the ‘liberty’ protected by the Due Process Clause includes the right of parents to ‘establish a home and bring up children’ and ‘to control the education of their own.’ Two years later, in Pierce v. Society of Sisters, we again held that the ‘liberty of parents and guardians’ includes the right ‘to direct the upbringing and education of children under their control.’”).
60. Id.
61. 442 U.S. 58.
The State only has the power to terminate parental rights over the custody and care of children where there has been a finding of parental unfitness by clear and convincing evidence. Only then may the State look to the child’s best interests in determining a child’s placement. However, the canon’s narrative regarding the importance of parental control over children fails when applied to cases regarding families rendered marginal to the canon.

A. THE FAILED PROMISE OF PARENTAL RIGHTS: FAMILY LAW EXCEPTIONALISM AND THE WELFARE-LAW BINARY

Terminations of parental rights demand a showing of parental unfitness by clear and convincing evidence, a higher burden than demanded in most civil proceedings. In *Santosky v. Kramer*, the Court declared this standard constitutionally mandated by due process in recognition of the parallels between Termination of Parental Rights (TPR) hearings and criminal proceedings. However, most states require only a preponderance of the evidence standard in proceedings to remove a child and substantiate claims against parents where a child welfare agency alleges abuse or neglect.

Family law canon displaces the lived experiences of women of color whose control and custody over their own children has always been a site of contestation against the State. Cases asserting the supremacy of parental rights inhere a binary wherein deference and privacy are granted to the envisioned white, middle-class American family and labeled “rights” while the marginal American family (racialized, gendered, and poor) is subject to welfare law. Welfare law presumes

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62. See Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (“We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. We have little doubt that the Due Process Clause would be offended ‘if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.’”; Santosky v. Kramer, 455 U.S. 745-746 (1982) (“Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence. A ‘clear and convincing evidence’ standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process.”).

63. See Santosky, 455 U.S. at 746 (“In parental rights termination proceedings, which bear many of the indicia of a criminal trial, numerous factors combine to magnify the risk of erroneous factfinding.”).

64. Ashley Provencher, et al., *The standard of proof at adjudication of abuse or neglect: Its influence on case outcomes at key junctures*, 17 SOCIAL WORK & SOCIAL SCIENCES REVIEW 22, 27 (The standard for adjudication of abuse or neglect is preponderance of the evidence in 32 states, while minority 18 states maintain a higher burden of clear and convincing evidence).

65. See, e.g., DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 10 (2011) (discussing the disproportionate level of state intervention in Black and minority families via the child welfare system) (“foster care system in the nation’s cities operates as an apartheid institution. It is a system designed to deal with the problems of minority families- primarily Black families- whereas the problems of white families are handled by separate and less disruptive mechanisms. That so many caseworkers, judges, and lawyers work every day in the belly of this system without speaking out shows just how accustomed we have become to racial separation in America. They routinely see nothing but Black parents and children in child welfare agencies and courts. But it seems normal to many Americans that Black families are more often split apart and supervised by the state.”).
parental ineptitude under a “moral construction of poverty” and subjects the poor family to immediate State scrutiny and intervention. The immigrant family is captured by both welfare and immigration law respectively.

This bifurcation between welfare and family law allows the State to condition the receipt of benefits (e.g. Temporary Aid for Needy Families and Women, Infants and Child supplemental nutrition plan) on a recipient’s relinquishment of the very privacy rights held out as canonical in family law. Jill Hasday and Khiara Bridges discuss this phenomenon in relation to cases such as Wyman v. James, wherein the Supreme Court, using rational basis review, found that the State could condition welfare benefits on child welfare investigations into the home. The Wyman Court found that such conditioning did not infringe on recipients’ Fourth Amendment rights because the recipient could refuse to allow child welfare services to enter the home, even though it conceded “the average beneficiary might feel she is in no position to refuse consent to the visit.”

In upholding New York’s conditioning of welfare benefits on CPS investigations, the Wyman Court thus implicitly assumed “that state regulation of parents receiving welfare can reasonably start with an assumption of bad parenting rather than parental fitness and can begin with inspection rather than privacy” in contrast to family law’s presumption of parental fitness. Indeed, the Wyman Court declared that whatever the mother’s privacy interests may be in refusing CPS entry into her home, “the dependent child’s needs are paramount, and only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims to be her rights.”

The very receipt of welfare benefits thus exposes poor families to intervention. If they permit CPS to enter their home, they accede to an intrusion on their familial privacy and cannot guarantee that CPS will not find something to start an investigation which may result in the removal of their child. But if that parent

66. See KHIARA BRIDGES, THE POVERTY OF PRIVACY RIGHTS 46-47 (2017) (arguing that if CPS interventions were based on an assumption that poor mothers committed child neglect or abuse because of their lack of material resources, that the reasonable policy response to that lack of resources by CPS would be the provision of food, social services, housing support. Instead, a “moral construction of poverty” guides such interventions. The presumption of neglect and “high risk” therein “has everything to do with… the idea that people are poor because they are lazy, irresponsible, averse to work, promiscuous, and so on… If personal failures are the presumptive cause of poverty, then poor mothers ought to be supervised closely, as their personal failures necessarily implicate children.”).


68. See id. at 317-18 (“the visitation in itself is not forced or compelled, and that the beneficiary’s denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and no search.”).

69. See id. at 318.

70. See HASDAY, supra note 48 at 196.

71. Wyman, 400 U.S. at 318.
refuses to permit CPS in the home, they stand to lose these welfare benefits and will likely be subject to investigation by CPS for parental neglect.\textsuperscript{72}

The bifurcation is maintained by family law’s canonical insistence on State governance and localism. Welfare law regulating the poor family, by contrast, is largely federal in nature.\textsuperscript{73} However, Jill Hasday posits that

there is another phenomenon at work, involving both federal and state law. Legislators and jurists routinely take family law and welfare law to be entirely separate categories. The exclusion of welfare law from the family law canon has helped obscure the sharp bifurcation in family law between the legal principles and presumptions governing poor families and the legal principles and presumptions governing other families . . . Family law for the poor is explicitly premised on scrutiny of family life, suspicion of parental judgement, and enthusiastic interference in family relations.\textsuperscript{74}

The bifurcation between welfare and family law canon thus allows the Supreme Court to promote nationalist narratives espousing the family as sacrosanct because “good parents” are regulated by family law while “bad parents” are regulated by welfare law. However, welfare law and immigration law also regulate the family. They may not fit into current canonical narratives about family law, but they shape the family’s bounds and accord benefits and obligations pursuant to kinship relations.

B. THE FAMILY-WELFARE LAW BINARY AND THE IMMIGRANT FAMILY

Immigrant families are especially burdened by this welfare-family law bifurcation. Khiara Bridges recognizes that “visibility can be radically disempowering. And indeed, poor mothers are radically disempowered by their ability to be seen by the state . . . [and as a result] are more likely to become the objects of child welfare investigations.”\textsuperscript{75} This visibility vis-\-à-\-vis receipt of welfare benefits and subsequent (or independent) child welfare investigations is especially troubling for immigrant parents.

Indeed, utilizing social services and public assistance has provided a pathway to removal of immigrant children in the past. Maria Luis, a Guatemalan mother living in Nebraska, took her daughter Angelica to Healthy Starts, a social services

\textsuperscript{72} See e.g. Emma Ketteringham, \textit{Live in a Poor Neighborhood? Better Be a Perfect Parent}, N.Y. TIMES (Aug. 22, 2017), https://www.nytimes.com/2017/08/22/opinion/poor-neighborhoods-black-parents-child-services.html (though many states provide by statute that poverty alone cannot be a ground for neglect, the difference between the two is often obscured in removals by child welfare) (“Child services charge parents them with ‘parental neglect,’ something of a catchall term that seems to cover poverty, substance abuse and untreated mental illness.”).

\textsuperscript{73} See HASDAY, supra note 48 at 196 (describing how welfare law is primarily federal in nature and acts as family law for the poor).

\textsuperscript{74} HASDAY, supra note 48 at 195-96.

\textsuperscript{75} KHIARA BRIDGES, THE POVERTY OF PRIVACY RIGHTS 86-87 (2017).
program providing parents with child care information and assistance. The Healthy Starts program reported Maria to Nebraska’s child welfare agency, triggering a CPS investigation, which ultimately determined her to be an unfit mother.\footnote{See In re Angelica L., 767 N.W.2d 74, 81-83 (Neb. 2009).}

Moreover, eligible immigrant families often depend on federal welfare benefits such as TANF (Temporary Assistance for Needy Families) and WIC (Special Supplemental Nutrition Program for Women, Infants, and Children) to provide for their children. For example, a New York City practitioner noted that lack of access to Medicaid makes family reunification all but impossible for undocumented parents whose ability to have their children returned is contingent on the parent’s mental healthcare.

There are very few places that will offer free services. There are some places where you can get someone in on a sliding scale but even then it’s very hard and without Medicaid that can be too expensive. This is especially hard for mental health issues where they are told they simply cannot get their kids back without treatment. When your client is bipolar, say, and needs meds and you can’t get anyone to see them or prescribe them drugs or pay for them, that’s a problem. If you need services and you can’t get them then you can’t get your kids back.\footnote{Wessler, supra note 6, at 19.}

However, many immigrant families are ineligible for such public benefits or fear using them in light of an evolving “public charge” rule, which provides disincentives for immigrant families to use welfare benefits like TANF and WIC which provide for basic nutritional necessities for families and children.\footnote{See Jeanne Batalova, Michael Fix, & Mark Greenberg, Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families’ Public Benefits Use, MIGRATION POLICY INSTITUTE (June 2018).} The public charge rule demands that immigrants otherwise eligible for green cards (and most nonimmigrants seeking admission to the United States on a temporary basis) demonstrate that they are not “likely to become a public charge by showing that they will not become “primarily dependent” on “public cash assistance for income maintenance.”\footnote{LEGAL INFORMATION INSTITUTE, 8 U.S.C. §1182(a)(4), https://www.law.cornell.edu/uscode/text/8/1182.} Families who utilize benefits or are suspected to require them in the future thus face a bar from regularizing status. This allows the State to at once demonize the poor immigrant family while shifting the cost of providing for children and families onto those very families.

Family law similarly engages in such externalization. Maxine Eichner posits that the market-family binary obscures the reality that canonical family law operates as a privatized welfare regime providing incentives to distribute and

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76. See In re Angelica L., 767 N.W.2d 74, 81-83 (Neb. 2009).
77. Wessler, supra note 6, at 19.
78. See Jeanne Batalova, Michael Fix, & Mark Greenberg, Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families’ Public Benefits Use, MIGRATION POLICY INSTITUTE (June 2018).
internalize costs independent of the state. As in the false choice espoused by the Wyman Court, immigrant families who would otherwise depend on public benefits may also face the loss of their children through child welfare neglect proceedings if they are unable to provide adequate nutrition, medical care, or housing.

Immigrant families who rely upon welfare benefits are not only subject to this loss of privacy, but also face further enmeshed consequences at the intersection of their immigration status. Like welfare law, immigration law through the public charge rule expresses a nationalist preference for “good, non-dependent” immigrant families in contrast to the bad, dependent ones. Status is afforded only to those immigrant families who do not require or are suspected not to require State support.

C. The Impact of Non-Status on Parental Rights

“My job,” she said, “in cases like this, is to uphold the existing policies of California child welfare, and to allow the child welfare system to operate within the framework of existing law. The state will treat Ignacio Valdez as it treats all dependents, regardless of his mother’s status. My understanding is that the birth mother of Ignacio Valdez has not pursued any of the requirements of her reunification plan. I must also take into account that Miss Valdez is not present, either in person or via telephone. It’s unfortunately not my place to consider why Miss Valdez has not attended the stipulated courses or pursued recommended counseling. The simple fact is that she has not. It is not my place, either, to consider where Miss Valdez is now, or why she hasn’t been able to participate in today’s hearing.”

Lack of status itself has dire impacts on child welfare proceedings if a parent is detained and, as a result, their children are placed in State or kinship foster care. Several courts have even found that a parent’s detention in immigration facilities may amount to abandonment warranting a termination of parental rights under the Adoption and Safe Families Act.

As such, Professor Yablon-Zug argues that detained immigrant parents are de facto held to a rigorous “best interest of the child” standard in all circumstances:

Under the law, a parent’s undocumented status by itself, is not enough to support an unfitness determination . . . [but] such terminations occur nonetheless. These decisions indicate that in undocumented immigrant parental rights terminations cases, trial courts are discarding the parental rights standard and employing a best interest of the child standard instead.

82. SHANTHI SEKARAN, LUCKY BOY, 386-7 (2017).
83. supra note 5, at 88.
84. Marcia Yablon-Zug, supra note 7, at 86.
This replaces the standard that is constitutionally mandated: a showing of parental unfitness by clear and convincing evidence.\textsuperscript{85}

Family court judges in the delinquency or abuse/neglect docket have held that undocumented status does not excuse failure to comply with a child welfare service plan.\textsuperscript{86} Per one Nebraska juvenile court, “[b]eing in the status of an undocumented immigrant is, no doubt, fraught with peril and this [inability to satisfy the reunification plan] would appear to be an example of that fact.”\textsuperscript{87} Compliance with reunification plans amounts to currency in the child welfare system.\textsuperscript{88} It is often the best route for parents to complete all CPS demands to ensure the return of removed children.\textsuperscript{89} However, the services demanded by child welfare are completely inaccessible when a parent is detained by ICE\textsuperscript{90}.

In other cases, a parent’s detention pending immigration proceedings is treated as parental abandonment warranting a termination of parental rights.\textsuperscript{91} Encarnación Bail Romero famously lost custody of her son, Carlos (renamed Jamison by his white adoptive family, the Mosers) after a Missouri court found that she had made no efforts to sustain their relationship while she was detained in federal custody and thus abandoned him per Adoption and Safe Families Act (ASFA).\textsuperscript{92}

Other courts have found that criminal incarceration likely to result in deportation or detention facing deportation as sufficient to find parental abandonment and subsequently, termination of a parent’s rights. One court found that because an undocumented father was incarcerated and would soon be deported, he would not “have sufficient time to develop a relationship” with his child.\textsuperscript{93} Another father, Victor Perez-Velasquez, lost his child to the child welfare system because he had, “without good cause, failed to maintain continuing contact with and to provide or substantially plan for the future of the [children] for a period of six months after the child’s placement in foster care”\textsuperscript{94} while he was incarcerated.

\textsuperscript{87} In re Angelica L., 767 N.W.2d 74, 88 (Neb. 2009).
\textsuperscript{88} See Adoption and Safe Families Act 42 U.S.C.A. § 675 (West 2018) (“the status of each child is reviewed periodically...in order to determine the safety of the child, the continuing necessity for and appropriateness of the placement, [and] the extent of compliance with the case plan.”).
\textsuperscript{89} Amy C. D’Andrade & Huong Nguyen, The Relationship Between Use of Specific Services, Parental Problems, and Reunification With Children Placed in Foster Care, 8 J. OF PUB. CHILD WELFARE 51, 62 (2014) (compliance with services is heavily weighted in reunification decision making).
\textsuperscript{90} WOMEN’S REFUGEE COMMISSION, TORN APART BY IMMIGRATION ENFORCEMENT: PARENTAL RIGHTS AND IMMIGRATION DETENTION 9 (2010).
\textsuperscript{91} See Marcia Yablon-Zug, supra note 7, at 88.
Per Yablon-Zug, while “the court noted that incarceration by itself does not justify termination of parental rights, the court held that termination is permissible when incarceration is ‘combined with other evidence concerning the parent/child relationship.’” That “other evidence” in Perez-Velasquez “included the father’s immigration status.” Though the failure to make contact was beyond the father’s control while he was incarcerated by the State, the court declared that it was the “father’s own actions that led to the situation.” Because he was incarcerated and deported, his “own actions”

eliminated any chance that he could maintain contact with the children and be involved in the foster care plan during the time period after the children’s placement in foster care, or that he could participate in remedying, within a reasonable time, the conditions resulting in the placement and continuation of the children in foster care.

Courts also emphasize in TPR decisions that once deported, a parent is unable to return for their children legally. Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), an undocumented parent who attempts illegal reentry risks arrest and their reasons for reentry receive no consideration even if they intend to reunite with their child or contest a TPR proceeding. Indeed, Encarnación Bail Romero’s case remains anomalous because she received a temporary suspension of her deportation order to contest her termination of parental rights. Because family court judges see that deportable immigrant parents have little chance of legal reentry to reunite with their children, their decisions to terminate parental rights are easier. Neoliberal restrictionist immigration laws thus play a substantive role in enabling the State to terminate an immigrant parent’s rights to their child.

Immigrant families thus face obstacles at every turn. Imagine one possible family. Fearing the consequences for later regularization of immigration status under the public charge rule, they choose to not seek out public assistance. Refusing public assistance results in a child’s malnourishment or other medical issues, which triggers CPS involvement. The child is removed and ultimately the parents are adjudicated neglectful. Should the parents try to obtain immigration relief later, an immigration judge may utilize the neglect adjudication to deny relief pursuant to their broad discretion. If the child was returned to the home

97. See id.
98. See id.
100. See United States v. Hernandez-Baide, 392 F.3d 1153, 1158 (10th Cir. 2004).
101. Thompson, supra note 92.
102. ADVISORY MEMORANDUM RE: ADVERSE CONSEQUENCES TO FAMILY COURT DISPOSITIONS FROM ADVISORY COUNCIL ON IMMIGRATION ISSUES IN FAMILY COURT TO CHIEF ADMINISTRATIVE JUDGE
following the neglect finding and the parent is deported, a child welfare court may permit a TPR because the parent has “abandoned” their child.

D. CHILDREN’S RIGHTS PROGRESS NARRATIVES AND THE TERMINATION OF IMMIGRANT PARENT’S PARENTAL RIGHTS

Canonical family law essentializes the importance of parental rights while progress narratives within the canon herald the advent of the age of children’s rights. The children’s rights movement, often working in conjunction with pro-adoption activists, criticize what they conceive as parental rights supremacy over children’s best interests. Scholar activists such as James Dwyer and Elizabeth Bartholet declare that protecting parental rights is often at the expense of children’s rights and decry the creation of parental rights at birth that may survive abuse and neglect adjudications.103 According to their accounts, the emphasis on family preservation narratives within child welfare policy has been misguided.104 Others who engage in a reproductive justice framework criticize the child welfare system’s disproportionate impact on families of color.105 They denounce child welfare removals as forcible family separation, often drawing connections to the immigration context itself.106

Both children’s rights and reproductive justice advocates position themselves as progressive deviations from family law canon.107 The children’s rights movement positions itself as a rebuttal to the family law canonical presumption that parents operate in the best interests of their children.108 The reproductive justice movement surrounding child welfare may agree with this account of canon but

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106. Chris Gottlieb, Child Separations, Here at Home: We Remove Far, Far Too Many Kids from Their Families in the Name of Saving Them, N.Y. DAILY NEWS (Dec. 2, 2018) (“The Trump administration shocked the nation’s conscience last spring when it purposely separated immigrant children from their parents. The outcry was loud and clear and spanned the political spectrum. As well it should have; taking children from their parents when not absolutely necessary is cruel. Unfortunately, it is not unusual. At a City Council hearing last week, witness after witness testified that New York City officials routinely inflict the trauma of family separation on families right here at home. The border policy separated an estimated 2,342 children from their families. New York City’s Administration for Children’s Services took 4,097 children from their parents last year alone.”).

107. Compare ELIZABETH BARTHOLET, supra note 103 (defining the majority liberal stance as one that promotes family unity because of racial disparities against her liberal camp which promotes children’s rights against ‘bad parents’) with MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS (2005) (arguing that the children’s rights camp’s emphasis on the best interest of the child often masks that the interest of families—namely, parents and children alike—are often concurrent).

108. See HASDAY, supra note 48, at 133.
contends that historical assumptions of parental fitness were only accorded to predominantly white, non-poor parents. They view the disproportionate targeting of parents of color by the child welfare system as an extension of this interventionist history with the State. The actualization of real, robust parental rights in this vein may shield families and parents of color from unwarranted state intervention and promote the interests of children who are traumatized by said removals.

Yet these insights from family law scholarship and activism often do not reach immigration advocacy denouncing forcible family separation at the border or even through the child welfare system. Immigration advocates who reject the efforts to separate families at the border may be ignorant of the same forcible separation that occurs in the child welfare context or view it as a lesser violation. For example, while exhorting the need for communication between CPS and immigration detention officials in cases involving detained immigrant parents who might lose their children to the child welfare system, the American Bar Association (ABA) still promotes a vision of reform - rather than abolition of punitive systems.

Yablon-Zug argues that the frameworks facilitating TPRs against immigrant parents are due in large part to the “success and substantial influence of the Children’s Rights Movements” and its emphasis on the best interest framework. Indeed she posits that these TPRs hold immigrant parents to a higher best-interest standard in deciding whether they should retain rights over their children because of the belief that living in the United States with foster or adoptive non-biological citizen families is preferable to a child returning to a parent’s home country following deportation. Without the parental fitness standard tethering children to their biological parents, a simple child’s best interest standard thus enables judges and CPS to find against immigrant parents so that children remain in the U.S. This reflects a “progressive realization” of a nationalist imaginary.

109. See, e.g., Dorothy Roberts, Foster Care and Reproductive Justice, THE PRO-CHOICE PUBLIC EDUCATION PROJECT, https://www.protectchoice.org/article.php?id=141 (last visited Mar. 12, 2019) (“We should extend our struggle for reproductive justice to challenge the foster care system because it violates thousands of women’s right to parent their children... Foster care is a political institution reflecting social inequities, including race, class, and gender hierarchies, and serving powerful ideologies and interests.”).

110. See Roberts, supra note 65, at 7-13.

111. Immigrants in the Child Welfare System: Case Studies, ABA CENTER ON CHILDREN AND THE LAW at 1 (May 2018) (prioritizing reform within child welfare agencies and recommending that they “develop procedures for appropriate eligibility screening of immigrant clients for relief, [and hire] immigration law experts on staff or develop agreements with immigration legal services providers to refer parents, youth, children, and caregivers when immigration relief is needed.”).

112. Marcia Yablon-Zug, supra note 7, at 66.

113. See id, at 102-3.
Even Yablon-Zug contends that this best interest standard is often best for citizen children of immigrants. The State in its parens patriae capacity is entitled to keep children over the protests of their parents on the grounds that an American upbringing is appropriate for children under the protective custody of the State. The “improved life chances narratives” reflect a belief in the “superiority of upper- and middle-class parents to poor birth parents.” The citizen child’s interests are thus framed against their parents. Assimilated via citizenship, the child’s rights to an American way of life trump ties to their parents. Citizen parents under family law canon act presumptively in a child’s best interests; non-citizen parents by virtue of their status become an obstacle to a better life for their children. Family unity thus becomes inconsistent with the citizen child’s best interests because she is an American, biological and affective ties be damned.

CONCLUSION: THE DIVIDE RE-EXAMINED

I’m an immigration lawyer, Soli. I don’t do family court.

“Of course it would be better if the mother stayed,” the state lawyer said... “In an ideal world, Your Honor, the mother would stay, the child would stay, we’d have housing support for everyone. But we’re not going to turn immigration policy on its head here, are we? This is a dependency court.”

As Soli quickly learns when she asks her immigration lawyer in Lucky Boy how he can help her in her family court case, the law and its practitioners remain siloed. Family law’s supposed inherent localism and immigration law’s canonical federalism often mean that practitioners specialize in one or the other.


115. Parens patriae is the doctrine that refers to the power of the state to usurp the legal rights of the natural parent and to serve as the parent of any child who is in need of protection. See Marvin Ventrell, The History of Child Welfare Law, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 113, 126-27 (Marvin Ventrell & Donald N. Duquette eds., 2005).

116. Shani King, Challenging Monohumanism: An Argument for Changing the Way We Think About Intercountry Adoption, 30 MICH. J. INT’L L. 413, 439–40 (2009) (denouncing a child’s rights framework espousing the “improved life chances” narrative in which “children are not seen in the context of their family, community, and culture, but instead, narrowly as the potential children of Western adults.”).


118. Id. at 386.

119. Tal D. Eisenzweig, In the Shadow of Child Protective Services: Noncitizen Parents and the Child-Welfare System, YALE L.J. FORUM 482, 483 (2018) (“The confluence of these two legal regimes—and the fact that each field’s practitioners traditionally are siloed—creates problems for noncitizens in both areas of the law.”).
welfare and immigration agencies rarely work together. Family court judges do not compel ICE to cooperate with their orders and may use federalism as an excuse.

Yet immigration status plays a substantive role in terminating parental rights. Indirectly, it provides incentives for immigrant families to refuse essential medical and nutritional benefits, which exposes immigrant families to allegations of parental neglect. Directly, family court judges and child welfare services often utilize immigration detention and deportation as grounds for terminating parental rights.

Punitive immigration policies also make it difficult for parents to fight family court battles. Humanitarian parole granted to parents to stay in the U.S. to contest TPRs is contingent on judicial benevolence rather any claim to a right to custody and control over one’s children. Indeed, immigration law exceptionalism permits the immigrant family to be regulated by federal entities with little constitutional oversight. Immigrant family unity is denied with a swift deference to the political bodies that ignore the implications for family members’ liberty interests. These enmeshed systems thus combine to deprive immigrant families of any right to fight for their families in any meaningful way. This is how the State “steals children.”

But on a theoretical level, immigration and family law exceptionalism promote a strange confluence wherein pro-immigrant and pro-parental rights narratives are forced to rely on historical obfuscation. In the current binary promoted by both canons, promoting parental rights or immigrant rights often inheres historical revisionism that ignores an ugly history of non-protection of poor families of color. But the immigrant family cannot rely on a test that demands adherence to the Nation’s tradition and history. That basis never existed for the marginal family.

Federalism and constitutional exceptionalism thus provide expedient mechanisms to deny immigrant families the same rights to family unity as the canonical family. However, Survived and Punished collapses this maneuvering. It is the same state that denies immigrant parents meaningful opportunities to sustain their families and simultaneously, through the language of personal responsibility, destroys them for lack of adherence to an impossible standard. Immigrant families are trying to survive. And for that, the neoliberal state will punish them.

Survived and Punished provides a liberatory framework demanding justice for immigrant families facing family separation vis-à-vis deportation and child removals. If family and immigration law canons hold out family unity as a


121. See supra note 15 (discussing the lack of authority for state level family court judges to compel ICE to bring parents in federal immigration detention to hearings).

foremost goal, they cannot ignore the violence to families that the intersections of child welfare and immigration enforcement perpetuate. Further coordination between agencies, as suggested by the ABA model of reform, is insufficient.\(^{123}\) Instead, the criminalization of poverty through the limitation of public benefits must cease. Immigrant parents can no longer face the loss of their children on the basis of status. Findings of abuse and neglect should no longer provide the basis for deportation. Until then, immigration and family law canon gesturing to the value of family unity will provide hollow comfort for immigrant families facing intervention by the State.

\(^{123}\) Immigrants in the Child Welfare System: Case Studies, ABA CENTER ON CHILDREN AND THE LAW at 1 (May 2018), available at https://www.americanbar.org/groups/child_law/project-areas/immigration/resources/.