

ARTICLES

LOVE IN THE TIME OF ICE: HOW PARENTS WITHOUT PAPERS ARE STRIPPED OF THE RIGHT TO RAISE THEIR CHILDREN IN A SAFE AND HEALTHY ENVIRONMENT

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ABSTRACT

This Article analyzes narratives around immigrant reproduction and traces the construction of immigrants as bad and unfit parents. It seeks to connect these perceptions, which are driven by nativist and racist beliefs, to the formulation of laws and policies that are designed to unleash violence and fear on undocumented people and their families. In particular, this Article focuses on the “right to raise one’s children in safe and healthy environments” which, per the Reproductive Justice (RJ) framework, is a human right that is guaranteed to all, regardless of their immigration status. It outlines the capacious vision of the RJ movement, which seeks to center marginalized communities and create conditions for them to live without oppression and fear. The Article goes on to note how undocumented immigrants are denied family unity, mental peace, government assistance, health care, and social and economic mobility, thereby preventing them from raising their children in safe, dignified, and healthy environments. It concludes by discussing certain legal, policy, and structural changes proposed by communities and grassroots organizers. If implemented, these changes may create conditions for immigrant parents, families, and communities to live empowered, self-determined, and healthy lives in alignment with the goals of the RJ movement.

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INTRODUCTION

For decades, vitriolic narratives, stemming from nativism, racism, and xenophobia, have driven anti-immigration policy. In his characterizations of immigrants, President Donald Trump likened immigrants to animals¹ and vermin,² rapists and criminals,³ and said they came from “shithole countries.”⁴ He, and many before him, have asked why immigrants become parents and invoked dehumanizing tropes of uncontrolled sexuality and hyper-fertility,⁵ as well as narratives of birth tourism, anchor-baby making, and chain migration,⁶ to spread fear of scarcity and cultural loss. This popular public discourse serves as the bedrock of law and policy geared to deter immigration, compels immigrants to “self-deport,” and instills fear⁷—forcing undocumented immigrants to “live in the shadows”⁸ and raise their children devoid of dignity in unsafe and toxic environments.

In 1994, a caucus of Black feminists coined the term “Reproductive Justice,” locating reproductive rights in their political context, and analyzed how intersecting identities of race, gender, class, ability, and immigration status, among others, impacted reproductive decision-making.⁹ This Article will use the Reproductive Justice (RJ) framework, which recognizes three foundational rights—the right to parent, the right to *not* have a child, and the right to raise one’s children with dignity—to analyze the right of undocumented immigrant parents to raise their children in a safe and healthy environment.

Part I of this Article briefly discusses the traditional reproductive rights movement and its limitations. It juxtaposes this movement against the RJ framework and broadly defines the right to raise one’s children in a safe and healthy environment. Part II of this Article selects and describes three dehumanizing tropes invoked in discussions around immigrant reproduction and parenthood. Part III discusses law and policy barriers that prevent undocumented immigrant parents from realizing their right to raise their children in safe and healthy environments. Part IV proposes recommendations that would allow immigrant parents to create environments that are safe and healthy for themselves and their children.

1. See Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants ‘Animals’ in Rant*, N.Y. TIMES (May 16, 2018), <https://perma.cc/S2Z3-NHT7>.

2. See David A. Graham, *Trump Says Democrats Want Immigrants to ‘Infest’ the U.S.*, ATLANTIC (June 19, 2018), <https://perma.cc/M5VQ-6UUY> (quoting Donald J. Trump (@realDonaldTrump), TWITTER (June 19, 2018, 6:52 AM)).

3. Donald Trump Transcript: ‘Our Country Needs a Truly Great Leader,’ WALL ST. J. (June 16, 2015, 2:29 PM), <https://perma.cc/KW3W-XJHF> [hereinafter *Donald Trump Transcript*].

4. Josh Dawsey, *Trump Derides Protections for Immigrants from ‘Shithole’ Countries*, WASH. POST (Jan. 12, 2018), <https://perma.cc/NDU2-RQX6>.

5. See *infra* notes 83–96 and accompanying text.

6. See *infra* notes 97–112 and accompanying text.

7. See *infra* notes 113–116 and accompanying text.

8. See *infra* notes 124–141 and accompanying text.

9. See *infra* notes 37–39 and accompanying text.

I. THE JOURNEY FROM “CHOICE” TO SOCIAL JUSTICE

Roe v. Wade was a momentous victory that secured the legal right to an abortion.¹⁰ The mainstream reproductive rights movement celebrated this decision as the cementation of a woman’s right to make reproductive choices autonomously.¹¹ Despite this win, low-income women and women of color were still unable to realize their right to choose—to have children or to *not* have children.¹² This part briefly examines the reproductive rights movement and highlights its goals and limitations. It goes on to describe the birth and purpose of the RJ movement, as well as its capacious vision. It also defines the right to raise one’s children in a safe and healthy environment, which is the main focus of this Article.

A. *Shortcomings of the Reproductive Rights Movement*

The mainstream movement for reproductive rights hinged on the principles of reproductive and sexual freedom for all women and championed freedom from state control.¹³ The movement focused on an individual’s choice of whether and when to bear a child and emphasized comprehensive family planning and legal abortion.¹⁴ In *Griswold v. Connecticut*, the Supreme Court found that a married couple had a fundamental right, arising out of the right to privacy, to decide whether or not to conceive.¹⁵ In *Roe v. Wade*, the Supreme Court went further and expanded the privacy right in *Griswold* to cover the right to abortion.¹⁶ This Article does not discuss these decisions but is concerned with the fact that both these cases conferred negative rights which prohibited the state from interfering in personal decisions when made under certain circumstances.¹⁷ Despite sustained opposition from the anti-abortion movement, these cases were celebrated as victories of a woman’s right to choose, but the benefits from these cases could only be realized by very few women who were predominantly white and middle class.

The goals of the mainstream reproductive rights movement received criticism from women of color, who found that their realities were excluded from the movement.¹⁸ The criticisms levied were not homogenous, and different leaders and women of color-led organizations demonstrated how racism uniquely impacted the reproductive rights and health of their respective

10. See *infra* notes 14–15 and accompanying text.

11. *Id.*

12. See *infra* notes 37–39 and accompanying text.

13. Rachael N. Pine & Sylvia A. Law, *Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real*, 27 HARV. C.R.-C.L.L. REV. 407, 414–18 (1992).

14. See *id.*

15. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

16. See *Roe v. Wade*, 410 U.S. 113 (1973).

17. LORETTA J. ROSS & RICKIE SOLINGER, *REPRODUCTIVE JUSTICE: AN INTRODUCTION* 47 (2017).

18. See generally JAE SILLIMAN, MARLENE GERBER FRIED, LORETTA ROSS & ELENA R. GUTIÉRREZ, *UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE*, at ch. 1 (2004).

communities.¹⁹ Due to the leadership of women of color, it became clear that the reproductive rights movement was limited in its demands—that it was hyper-focused on the choice to prevent conception and parenthood but overlooked other ways in which reproductive freedom was curtailed.²⁰

The social science concept of “stratified reproduction,” put forth by Shellee Colen, is based on the idea that physical and social reproductive tasks are performed while mirroring existing inequalities based on race, class, and migration status, among others.²¹ She argues that reproductive labor is not only differently experienced but also differently valued and rewarded.²² Consequently, certain groups of people are encouraged and empowered to reproduce, while others are considered unworthy of parenthood based on where they fall in intersecting hierarchies.²³ The determination of this worthiness or unworthiness entails an assessment of who an optimal parent is, and this subjective assessment is informed by dominant cultural norms and practices.²⁴ As Law Professor Annette Appell writes, a “good parent,” according to the dominant norm, is “an all-or-nothing mold in which mothers are middle-class, English-speaking, married, child-protectors who do not engage in such activities as illegal drug use, prostitution or property crimes, do not have too many children, are not grandmothers, and do not live in extended kin networks”²⁵ She also notes that any deviation from these dominant norms leads to state interference that is coercive and punitive.²⁶

The mainstream reproductive rights movement never grappled with this hierarchy of desirable reproduction. For example, it never addressed the rights of those who did want children and were being denied the right to parent due to their “unworthiness” to parent, which was the result of their deviation from dominant cultural norms.²⁷ Those who embodied this “unworthiness” were low-income women, women of color, women with disabilities, queer women, and immigrant women, who were and continue to be disproportionately targeted by discriminatory policies and practices, such as welfare caps, forced sterilization, coercive administration of contraception, and medical

19. See *id.* at 22.

20. ROSS & SOLINGER, *supra* note 17, at 47–48 (“In contrast, white advocates of legal and accessible contraception and abortion were often focused solely and fiercely on women’s right to prevent conception and unwanted births. They typically ignored the other side of the coin: the right to reproduce and to be a mother, a crucial concern of women whose reproductive capacity and maternity had been variously degraded across American history.”).

21. See Shellee Colen, “*Like a Mother to Them*”: *Stratified Reproduction and West Indian Childcare Workers and Employers in New York*, in *CONCEIVING THE NEW WORLD ORDER: THE GLOBAL POLITICS OF REPRODUCTION* 78 (Faye D. Ginsburg & Rayna Rapp eds., 1995).

22. *Id.*

23. *Id.*

24. See Emma S. Ketteringham, Sarah Cremer & Caitlin Becker, *Healthy Mothers, Healthy Babies: A Reproductive Justice Response to the “Womb-To-Foster-Care Pipeline,”* 20 CUNY L. REV. 77, 95–96 (2016).

25. Annette R. Appell, “*Bad Mothers*” and *Spanish-Speaking Caregivers*, 7 NEV. L.J. 759, 778 (2007).

26. *Id.* at 759.

27. ROSS & SOLINGER, *supra* note 17, at 48.

experimentation, all of which have the effect of denying individuals the chance to become parents when they want to.²⁸ The reproductive rights movement, in ignoring the right to parent, excluded these populations from its advocacy.

In addition to ignoring the right to parent, the mainstream movement failed to address the environments in which children are born and raised, which may impact one's decision to have children. For example, as Angela Y. Davis wrote, "[w]hen Black and Latina women resort to abortions in such large numbers, the stories they tell are not so much about their desire to be free of their pregnancy, but rather about the miserable social conditions which dissuade them from bringing new lives into the world."²⁹ The impacts of the lack of housing, income inequality, over-policing, mass incarceration, and so forth on individuals and their decisions to parent, *not* parent, and how they parent were ignored by pro-choice advocates.

In addition to the movement's limited focus, organizations led by women of color were in consensus about the need for an alternative to the concept of "choice" which was championed by mainstream feminists.³⁰ The emphasis on individual choice alienated people from their social contexts and "discount[ed] the ways in which the state regulates populations, disciplines individual bodies, and exercises control over sexuality, gender, and reproduction."³¹ The reality was that women of color and undocumented immigrants did not have an equal opportunity to participate in the marketplace of choices.³²

One place where the falsity of this notion was exposed was in the case of *Harris v. McRae*, in which the Supreme Court ruled that the Hyde Amendment, which blocked the use of Medicaid funding for abortions in most circumstances, was constitutional because it did not impinge on choice given that it was poverty, not state action, that impeded a woman from having an abortion.³³ Due to the high costs related to the abortion procedure, countless women, including those who were low-income and women of color, were denied or had to face significant hardship in order to access an abortion in the absence of government funding.³⁴

As made clear in *Harris v. McRae*, it was impossible for many women to attain reproductive autonomy or realize "the right to choose" without the assistance of the state.³⁵ This assistance could take many forms: health care,

28. See Dorothy Roberts, *Reproductive Justice, Not Just Rights*, DISSENT MAG. (Fall 2015), <https://perma.cc/QW8F-MTWE>.

29. ANGELA Y. DAVIS, 'Racism, Birth Control and Reproductive Rights,' in WOMEN, RACE, AND CLASS 355 (1982).

30. *Id.*

31. Jael Silliman & Anannya Bhattacharjee, *Introduction* to POLICING THE NATIONAL BODY: SEX, RACE, AND CRIMINALIZATION ix, xi (2002).

32. SILLIMAN, GERBER FRIED, ROSS & GUTIÉRREZ, *supra* note 18, at 36, 44.

33. See *Harris v. McRae*, 448 U.S. 297 (1980).

34. See ROSS & SOLINGER, *supra* note 17, at 53–54.

35. See *id.* at 80.

nutrition, housing, or providing the newborn with the conditions to thrive. However, the focal point of the mainstream movement was the freedom from government interference, and likewise, the bedrock of *Roe v. Wade* was the right to privacy. The concept of privacy assumes access to resources and a level of autonomy that many people and communities do not have, and this framing ignores the needs of those who rely on the government.³⁶ These individuals, and often communities, were excluded by the mainstream movement and left to fend for themselves.

B. *Analyzing Intersecting Oppressions Using the RJ Framework*

Kimberlé Crenshaw coined the term “intersectionality” to capture the various social forces, social identities, and ideological instruments through which power is expressed and legitimized.³⁷ This concept of intersectionality lies at the heart of the RJ movement, which was first conceptualized by Black women activists who met before the International Conference on Population and Development in 1994.³⁸ The RJ framework considered how individuals negotiate race, class, gender, sexuality, and immigration status to make reproductive decisions.³⁹ The reproductive rights movement dissociated reproductive freedom from structural violence and inequality, while the RJ framework sought to center unequal power relations and analyze how they, in turn, affect reproduction.⁴⁰

Achieving RJ requires having both negative rights, which restrain governments from unduly interfering with one’s personal autonomy, and also positive rights, which place an affirmative responsibility on the government to ensure that people have the resources required to enjoy these rights.⁴¹ These rights together are deemed to be human rights, revoking which is seen as a blow to one’s humanity.⁴² The point begs to be reinforced—these are rights that exist simply because we exist and cannot be granted or revoked by

36. See *id.*; see also Michele Goodwin & Erwin Chemerinsky, *Pregnancy, Poverty, and the State*, 127 YALE L.J. 1270, 1296–97 (2018) (reviewing KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017)) (“According to Bridges, however, the problem is that reproductive and family privacy rights often yield little value in the lives of poor women. Bridges stresses that the ‘family is not beyond regulation,’ ‘parental liberty is not absolute,’ and family privacy rights ‘[y]ield [n]o [v]alue’ in the lives of poor women. If it is true that all mothers suffer infringements on privacy, what makes the matter worse for poor women? The difference may be that for poor women, *it is not an infringement*, but rather two distinct privations in operation: dispossession—as in the sense that these are rights never had (or intended to be had) by poor women (Margaret Garner’s tragic life and Black women’s plights during chattel slavery more generally exemplify this) and perdition—as in the sense of punishing women simply because they are poor (eugenic sterilizations offer a stunning illustration.”).

37. See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

38. ROSS & SOLINGER, *supra* note 17, at 63.

39. *Id.* at 65–66.

40. *Id.* at 139.

41. *Id.* at 10.

42. *Id.*

nation-states, although the state must play a role in helping individuals realize them.⁴³

As previously noted, the RJ framework has three foundational principles—the right *not* to have a child; the right to have a child, and the right to parent children with dignity in a safe and healthy environment.⁴⁴ The right *not* to have a child under RJ focuses on access to contraceptives and abortion services.⁴⁵ RJ advocacy around the right to have a child has a more expansive scope and seeks to analyze how the reproduction of certain groups of individuals is stratified and often even criminalized.⁴⁶ In essence, it addresses the right to become a parent and touches on issues such as birthing equity, while also dealing with matters of reproductive technology and obstacles that one may face when one wishes to give birth.⁴⁷ Finally, the RJ movement addresses the need for a safe and healthy environment to live in and raise a family.⁴⁸ There is a demand for positive guarantees that contribute to a safe environment, and many issue areas are covered under this umbrella, including but not limited to “the quality of housing and neighborhood safety and the degree of access to adequate and nutritious food, transportation, social connections, quality educational resources, and health care.”⁴⁹ This Article is concerned with this third right—to raise one’s family in a safe and healthy environment—but there are significant overlaps between the realization of this right and the right to parent. Since there is no bright line distinction between these two rights, this Article tackles this distinction without rigidity.

In addition to other social groups, the RJ framework intentionally advocates for the human rights of all immigrants, regardless of their immigration status. Advocates argue that migrants should be able to enjoy their human rights and dignity and be free from violence—in their home countries and when they arrive in the United States.⁵⁰ They address the denial of their human rights in the United States, which includes the improper denial of asylum, removal of constitutional guarantees, and family separation.⁵¹ Finally, the RJ framework specifically acknowledges the harm caused to immigrants when they are denied public services such as health care, various kinds of public assistance, and education.⁵²

43. *Id.*

44. *Id.* at 9.

45. *See id.* at 117–67.

46. *See id.* at 168–237.

47. *See generally* LAURA BRIGGS, HOW ALL POLITICS BECAME REPRODUCTIVE POLITICS: FROM WELFARE REFORM TO FORECLOSURE TO TRUMP 101–49 (2017).

48. ROSS & SOLINGER, *supra* note 17, at 119.

49. *Id.* at 173.

50. *Id.* at 213.

51. *Id.* at 213–14.

52. *See id.* at 215.

II. NARRATIVES INFORMING THE DEVALUATION OF IMMIGRANT PARENTHOOD

The reproduction of undocumented immigrants has been deemed undesirable and actively discouraged by those in power. Since most migrant parents do not fall within the white, English-speaking, middle-class mold, they stray away from the perfect parent goalpost, which in turn prompts the state to regulate their reproductive behavior.⁵³ To understand the perverse justifications the state uses to regulate, one must first explore how immigrant parental unfitness is constructed.

Faye Ginsburg and Rayna Rapp posit that studying representations of certain groups can help enhance our understandings of how hierarchies are produced, contested, and revealed.⁵⁴ They also argue that discourse analysis itself can help analyze how reproduction is weaponized to acquire hegemonic control, such as through regulating abortion, performing sterilizations, and other reproductive policies.⁵⁵

The following sub-sections of Part II will analyze the discourse surrounding migrant parents and identify certain stereotypes and biases that are invoked in conversations about them.

Eventually, this Article seeks to understand how these narratives in turn impact laws and policies governing immigrants, which thereby impact families and parenthood.

A. *“They’re bringing drugs. They’re bringing crime. They’re rapists.”*⁵⁶—*Perceptions of Illegality and Criminality*

Scholars René D. Flores and Ariela Schachter have discussed how people use stereotypes to categorize individuals as “illegal” regardless of what their documentation status might be, in a condition they refer to as “social illegality.”⁵⁷ They discuss how undocumented status can be socially assigned to individuals based on certain ascribed or achieved characteristics, such as national origin or occupation—for example, being from Mexico may trigger perceptions of “illegality.”⁵⁸ Following this, it can be inferred that the narratives in this section would attach to anybody who appears undocumented, regardless of whether or not they are, with that burden falling more heavily on Black and Brown people.

The perception of immigrants as criminals is not a new one, and the narratives of immigrant criminality are plentiful in mainstream media—the Italian mafia, Colombian cartels, Chinese triads, and Central American gangs—

53. See Appell, *supra* note 25, at 778.

54. See Faye Ginsburg & Rayna Rapp, *The Politics of Reproduction*, 20 ANN. REV. ANTHROPOLOGY 311, 316–17 (1991).

55. See *id.* at 331.

56. *Donald Trump Transcript*, *supra* note 3.

57. René D. Flores & Ariela Schachter, *Who Are the “Illegals”? The Social Construction of Illegality in the United States*, 83 AM. SOCIO. REV. 839, 840 (2018).

58. *Id.*

mostly stemming from nativist anxieties.⁵⁹ A new wave of nativism engulfed the United States after 9/11, the aftermath of which saw the victimization of Arab and Asian immigrants, who were rounded up and deported in hoards.⁶⁰ The fact that the hijackers of the airplanes had overstayed their visas in the United States caused calls to “protect our borders” and exacerbated alarms about undocumented immigrants being criminals.⁶¹ This ultimately gave birth to U.S. Immigration and Customs Enforcement (ICE), an agency that continues to traumatize millions and separate families.⁶²

A part of immigrant criminality stems from “illegality,” which automatically attaches itself to immigrants the minute they cross the border without authorization or overstay their visa in the United States. Entering and re-entering the United States without authorization are both federal crimes, and in recent times have been invoked extensively to prosecute immigrants.⁶³ There has been a monumental rise in ICE’s spending, from \$3.3 billion in 2003, the year after its creation, to \$8.3 billion today.⁶⁴ During Donald Trump’s presidency, ICE’s infrastructure expanded significantly. For example, in 2018, the Trump administration prosecuted over 89,000 immigrants.⁶⁵ ICE and Customs and Border Patrol held an average of over 50,000 people in detention each day in FY 2019,⁶⁶ at one point detaining as many as 56,000 people across about 220 detention facilities in the United States.⁶⁷ Detention infrastructure was also increasingly outsourced to private prison companies, such as CoreCivic and GEO Group, giving these corporations another source of profit through the mass incarceration of immigrants.⁶⁸

ICE is not the only federal agency that imprisons immigrants. In addition to ICE, the Justice Department’s U.S. Marshals Service (USMS) and the Bureau of Prisons (BOP) also run immigration prisons where individuals who commit immigration crimes are incarcerated. Per 2020 estimates, 11,100 people were found to be in federal prisons for criminal convictions of

59. See Rubén G. Rumbaut & Walter A. Ewing, *The Myth of Immigrant Criminality*, SOC. SCI. RSCH. COUNCIL: ITEMS (May 23, 2007), <https://perma.cc/35SD-ZTF5>.

60. BRIGGS, *supra* note 47, at 89–90.

61. See *id.* at 91.

62. See *Honoring the History of ICE*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://perma.cc/9W8T-8XLH> (last updated Mar. 8, 2022).

63. See Jesse Franzblau, *Decriminalizing Migration: Ending Prosecutions for Border Crossing Violations*, NAT’L IMMIGRANT JUST. CTR. (July 30, 2019), <https://perma.cc/9NWL-ZM9W>.

64. *The Cost of Immigration Enforcement and Border Security*, AM. IMMIGR. COUNCIL (Jan. 20, 2021), <https://perma.cc/4VZP-P3T4>.

65. *Immigration Prosecutions for 2018*, TRAC REPORTS (Oct. 23, 2018), <https://perma.cc/5295-9HHT>.

66. *U.S. Immigration and Customs Enforcement Fiscal Year 2019 Enforcement and Removal Operations Report*, U.S. IMMIGR. & CUSTOMS ENF’T 5 (2019), <https://perma.cc/LV3K-DMXR>; *ERO FY 2019 Achievements*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://perma.cc/RR3S-59K2> (last updated Oct. 29, 2021).

67. Eunice Hyunhye Cho, Tara Tidwell Cullen & Clara Long, *Justice Free Zones: U.S. Immigration Detention Under the Trump Administration*, ACLU 18 (2020), <https://perma.cc/6DFT-FQ3P>.

68. *Id.* at 18.

immigration offenses, and about 13,600 more were held pretrial by the U.S. Marshals.⁶⁹

This imputed illegality in turn leads to headlines such as “*Noncitizens Account for 64 Percent of All Federal Arrests, Justice Department Says*”⁷⁰ which, although unrelated to violent crimes, are used to stoke frenzy and fear in the general public. In furtherance of this agenda, mainstream media is flooded with photographs and videos of undocumented immigrants being arrested and handcuffed by ICE and police personnel, taken to detention, or put on planes for deportation.⁷¹ Immigrants are painted as criminals even though evidence has shown that foreign-born individuals are significantly less likely to break non-immigration-related criminal laws compared to U.S. citizens.⁷²

Professor Ian Haney López writes about how “dog-whistle” politics rely on coded racial narratives which are deployed to bring race into the purview of political debate.⁷³ For example, this technique was used in the aftermath of the death of Ms. Kathryn Steinle, a young woman who was shot while visiting Pier 14, a tourist spot in San Francisco.⁷⁴ The man who shot her, Juan Francisco Lopez-Sanchez, was an undocumented immigrant who had been deported from the United States five times earlier, in addition to having seven felonies.⁷⁵ This incident set off a national debate on policies of sanctuary cities like San Francisco.⁷⁶ Within the context of this Article, it is interesting to note how this incident was manipulated to push an anti-immigrant policy agenda. Donald Trump said:

This senseless and totally preventable act of violence committed by an illegal immigrant is yet another example of why we must secure our border immediately. This is an absolutely disgraceful situation and I am the only one that can fix it. Nobody else has the guts to even talk about it. That won't happen if I become President. The American people deserve a wall to protect our jobs, economy, and our safety. I am

69. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://perma.cc/AAD9-NHQJ>.

70. Pete Williams, *Noncitizens Account for 64 Percent of All Federal Arrests, Justice Department Says*, NBC NEWS (Aug. 22, 2019, 1:00 PM), <https://perma.cc/SGP8-CBGZ>.

71. See Leisy J. Abrego, *Illegality as a Source of Solidarity and Tension in Latino Families*, 8 J. LATINO AM. STUD. 5, 7 (2016).

72. See Kristin F. Butcher & Anne Morrison Piehl, *Recent Immigrants: Unexpected Implications for Crime and Incarceration*, 51 INDUS. & LAB. RELS. REV. 654, 654–57, 677 (1998).

73. See generally IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM & WRECKED THE MIDDLE CLASS* (2014).

74. *Woman Fatally Shot at Pier 14 in San Francisco: Police*, NBC BAY AREA (July 2, 2015, 5:09 PM), <https://perma.cc/4JBN-GR3L>; see Christopher N. Lasch, *Sanctuary Cities and Dog-Whistle Politics*, 42 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 159, 165 (2016).

75. Louis Sahagún & Emily Alpert Reyes, *Fatal Shooting in San Francisco Ignites Immigration Policy Debate*, L.A. TIMES (July 4, 2015, 10:04 PM), <https://perma.cc/WD9V-LKU3>.

76. *Id.*

the only candidate who would build it. I will Make America Great Again!⁷⁷

Mr. Lopez-Sanchez was eventually found “not guilty” for murder and manslaughter when it was revealed that he had accidentally set off the gun, and the shot had ricocheted off the deck of the pier and struck the victim.⁷⁸ The publicization of this incident, however, had little to do with the heinousness of the crime itself. President Trump had already previously cast Mexican immigrants as criminals and said, “They’re bringing drugs. They’re bringing crime. They’re rapists.”⁷⁹ Professor Haney Lopez correctly points out that Trump’s avoidance of referencing race and instead focusing on immigration and criminality should not confuse us: “In fact, his basic message is a racial one: this is a white country, under threat from invading minorities.”⁸⁰ Professor Catherine Powell argues that in addition to race, immigrant “masculinity” is also weaponized to stoke fears that immigrant men are sexually active predators and gang members, and are characterized as aggressive, hyper-masculine, and subhuman (“animal-like”).⁸¹ These messages also trickle down to popular media; per a report by Opportunity Agenda, storylines about unlawful activities accounted for 25 percent of storylines involving immigrant characters, with 50 percent of Latino characters being depicted as committing unlawful acts.⁸²

B. *Myths of Hyper-Fertility and Hyper-Sexuality*

There is a lot of rhetoric to be found in the mainstream about immigrant hyper-fertility. Professor Elena Gutierrez explores the etymology of myths such as “Latinos are a population with their pants down”⁸³ or that they “breed like rabbits.”⁸⁴ The fixation with Latinx fertility was heightened when the Latinx population increased by 58 percent between 1990 and 2000, and there were reports of the higher than average birth rate of Mexican Americans.⁸⁵ On October 17, 2006, the population of the United States hit the 300 million mark, a milestone that was also used to drive home fears of burgeoning

77. Donald Trump Pledges to ‘Secure Our Border’ Following San Francisco Pier 14 Fatal Shooting, CBS SF BAY AREA (July 3, 2015, 3:19 PM), <https://perma.cc/7SG2-UEYV>.

78. See Matt Gonzalez, *The Garcia Zarate Verdict, 12 Reasons Why We Won*, MATT GONZALEZ READER (Mar. 5, 2019), <https://perma.cc/KYY3-BEUC>.

79. Donald Trump Transcript, *supra* note 3.

80. Stephen A. Nuño-Pérez, *Opinion: Trump Is Latest Pied Piper of Dog Whistle Politics*, NBC NEWS (July 23, 2015, 3:20 PM), <https://perma.cc/H5KS-WDBG>.

81. See Catherine Powell, *Race, Gender, and Nation in an Age of Shifting Borders: The Unstable Prisms of Motherhood and Masculinity*, 24 UCLA J. INT’L L. & FOREIGN AFFS. 133, 153 (2020).

82. *Power of POP: Media Analysis of Immigrant Representation in Popular TV Shows*, OPPORTUNITY AGENDA (2017), <https://perma.cc/R3W4-AMQH>.

83. ELENA R. GUTIÉRREZ, *FERTILE MATTERS: THE POLITICS OF MEXICAN-ORIGIN WOMEN’S REPRODUCTION* 109 (2008).

84. *See id.* at 35–55.

85. *See id.* at 2.

immigrant populations.⁸⁶ It raised alarm bells for nativists, who expressed the need to control Latinx reproduction in different ways and to different ends.⁸⁷

Political scientist Samuel Huntington, exemplifying nativist concerns, voiced that the most serious challenge to America's traditional identity came from the immense and continuing immigration from Latin America (especially Mexico) and the fertility rates of these immigrants compared to Black and white American 'natives.'⁸⁸ Nativists, as scholar Leo Chavez pointed out, used the hyper-fertile narrative to reinforce the characterization of whites as legitimate Americans who were being rapidly outnumbered by Latinx people, who were less legitimate.⁸⁹ Building on this anxiety, eugenicists expressed concern that this new population was not only intellectually inferior but also "fecund," and these anxieties explain the direct connection between narratives of hyper-fertility and calls for practices such as the forced sterilization of immigrant women.⁹⁰

In addition to Latinx women, Asian women are also hyper-sexualized. The historical precedent for this dates back to the 1875 Page Act, which prohibited the entrance of Chinese women into the United States under the pretext that they were prostitutes carrying germs and disease.⁹¹ Even though this legislation was repealed in 1943, Hollywood continued to perpetuate certain cinematic archetypes of Asian sexuality and femininity. One such example is visible in Stanley Kubrick's *Full Metal Jacket*, in which Papillon Soo is depicted as a Vietnamese prostitute who entices two American soldiers with the dialogue "Well, baby, me so horny, me so horny. Me love you long time."⁹²

On March 16, 2021, three massage businesses in Atlanta were targeted in a shooting spree by a white male who identified as a "sex addict," and said he killed to eliminate his temptation.⁹³ Eight women, six of whom were Asian, were killed in this incident.⁹⁴ Many activists, advocates, and scholars have connected the dots between Asian sexualization, fetishization, dehumanization, and the idea that Asian bodies are for white male pleasure.⁹⁵ The hyper-fertility narrative is also very commonly deployed as a rationale to actively

86. See LEO R. CHAVEZ, *THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION* 73 (2d ed. 2013).

87. See *id.* at 74.

88. See SAMUEL P. HUNTINGTON, *WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY* (2005).

89. See CHAVEZ, *supra* note 86, at 109.

90. See GUTIÉRREZ, *supra* note 83, at 10–11.

91. Maria Cecilia Hwang & Rhacel Salazar Parreñas, *The Gendered Racialization of Asian Women as Villainous Tempresses*, 35 *GENDER & SOC'Y* 567, 572 (2021).

92. *Id.* at 571.

93. *8 Dead in Atlanta Spa Shootings, with Fears of Anti-Asian Bias*, N.Y. TIMES (Mar. 26, 2021), <https://perma.cc/6RPK-L66M>.

94. *Id.*

95. See Ailsa Chang & Nancy Wang Yuen, *A Sociologist's View on the Hyper-Sexualization of Asian Women in American Society*, NPR (Mar. 19, 2021, 4:06 PM), <https://perma.cc/59SR-H6XL>; Tonya Mosley & Serena McMahon, *A Century of Objectifying Asian Women: How Race Played a Role in Atlanta Shootings*, WBUR (Mar. 22, 2021), <https://perma.cc/NHS2-WSWH>.

curb or control immigrant reproduction. As analyzed below, these narratives also serve as the bedrock for other anxieties—that immigrants are giving birth to a lot of children who eventually are reliant on welfare and drain state resources.⁹⁶

C. *Birthing Narratives—Birth Tourism, Anchor Baby Machines, and Welfare Queens*

The usage of the terms “birth tourism” and “anchor baby” can be tracked in juxtaposition to the Birthright Citizenship Act (BCA),⁹⁷ which was introduced in the House of Representatives in 2007. The BCA denies citizenship to children born in the United States unless one or both of the child’s parents was a U.S. citizen, permanent legal resident, or legal resident serving in the U.S. military.⁹⁸

Birth tourism refers to the “practice” where pregnant people enter the United States on tourist visas, give birth to their child on U.S. territory thereby securing the child American citizenship, and return to their country to raise their child.⁹⁹ Those accused of birth tourism are generally wealthier immigrant women, and popular media typically depicts Asian women engaging in it.¹⁰⁰ Treating Asian women as deceptive is also reminiscent of the 1986 Immigration Marriage Fraud amendment, enacted citing concerns over Asian women entering into sham or “mail-order” marriages to gain visa benefits¹⁰¹ Steve King, the chairman of the House Immigration Subcommittee and proponent of ending the “birth tourism industry,” said in his introduction of the BCA:

... [f]or example, pregnant women in China, can contract with a turn-key operation, to be smuggled in—pregnant and smuggled into the United States, have the baby, get the little footprint on the birth certificate and fly back to China and wait for that child to get old enough to start the family reunification plan.¹⁰²

Those accused of giving birth to “anchor babies” are a different set of immigrants. These women are generally depicted to be poor women who cross into the United States from the southern border and give birth to anchor babies, who provide economic benefits to the family and subsequently pathways to citizenship¹⁰³ Anchor baby mothers are attacked far more readily

96. See *id.*; see also *infra* notes 105–111 and accompanying text.

97. See Carly Hayden Foster, *Anchor Babies and Welfare Queens: An Essay on Political Rhetoric, Gendered Racism, and Marginalization*, 5 WOMEN GENDER FAMS. COLOR 50, 51 (2017).

98. Birthright Citizenship Act of 2019, H.R. 140, 116th Cong. (2019).

99. See Hayden Foster, *supra* note 97, at 51.

100. See *id.*

101. Hwang & Parreñas, *supra* note 91, at 572–73.

102. See Hayden Foster, *supra* note 97, at 61.

103. *Id.* at 51.

than birth tourist mothers—because they are poorer compared to the former and rely on their children for economic and material benefits.¹⁰⁴ President Donald Trump heavily invoked the theme of anchor babies in many of his speeches and once said:

But when a man has a problem, and he's got his wife or his girlfriend, and they move her over the border for one day, has the baby on the other side of the border—*our* side—now that baby is a citizen of our country for however long the baby lives. Hopefully, a long time. It's wrong. It's wrong. And by the way, by the way, the law doesn't call [it] that. That's not what the law says. And people are finding out now that I'm right. We didn't say that someone could be pregnant for nine months, come across the border, have the baby, and now it's ours and we have to take care of that baby forever. It doesn't say that. It does not say that.¹⁰⁵

Two important themes jump out from this quote which explain the attitude towards anchor babies. First, anchor babies are a solution to a “problem,” one that seems to be economic or social. The second is the assumption that the burden of bringing up this child will fall on the United States instead of the parents.

The issues of birth tourism and anchor babies are not limited to the immigration of one person. This American citizen child would eventually sponsor the entry and presence of other family members who in turn would sponsor more family members. This plays directly into the idea of chain migration, which is also popular in anti-immigrant rhetoric. For instance, President Trump said, “You look at what's going on where someone who comes in is bad and has 24 family members yet not one of them do you want in this country.”¹⁰⁶ The invocation of this influx of migrants was also infamously described by Trump as an “infestation,”¹⁰⁷ which not only reinforces immigrant sub-humanness but also creates a frenzy around the influx of immigrants coming into the United States.

The tentacles of the birth tourism and anchor babies rhetoric spread very quickly into the realms of economic and environmental scarcity.¹⁰⁸ Immigrant women are not just reproducing in the U.S. for citizenship itself, but for the benefits that accompany that citizenship. These benefits are made out to be material in nature, and the amassing of those resources is deemed

104. See *id.*

105. Amy Davidson Sorkin, *The Anchor-Baby Question at the G.O.P. Debate*, NEW YORKER (Sept. 15, 2015), <https://perma.cc/7D8S-XJXY>.

106. See Nick Gillespie, *Lies About Chain Migration Are Donald Trump's 'Welfare Queen,' a Tall Tale to Comfort the Base*, REASON (May 24, 2018, 12:20 PM), <https://perma.cc/4VGC-XP4X>.

107. Graham, *supra* note 2.

108. See Priscilla Huang, *Anchor Babies, Over-Breeders, and the Population Bomb: The Reemergence of Nativism and Population Control in Anti-Immigration Policies*, 2 HARV. L. & POL'Y REV. 385, 386 (2008).

exploitative or extractive.¹⁰⁹ Reproduction then becomes a means to gain economic and social mobility.

Similar tropes were deployed to target Black fertility in the United States. The story of Linda Taylor became prominent in 1974 when she was discovered to have committed elaborate welfare fraud by changing multiple identities.¹¹⁰ Ronald Reagan described her as the “welfare queen,” and used popular images of welfare recipients with derogatory racial, gender, and class subtexts.¹¹¹ Scholar Dorothy Roberts writes about how this idea of the welfare queen, the “lazy” mother on public assistance who deliberately breeds children at the expense of taxpayers to increase her monthly check, became one of the most readily accepted tropes about Black fertility.¹¹² This frame was later expanded to also address immigrant fertility, and had far-reaching consequences.

III. VIOLATIONS OF THE RIGHT TO RAISE ONE’S CHILDREN IN A SAFE AND HEALTHY ENVIRONMENT

Professor Lori A. Nessel posits that the unsettling of undocumented communities through the denial of employment, health care, housing, and education is not an unintended consequence of immigration laws, but is instead a method of social control to prevent immigrants from being able to embed themselves in society.¹¹³ She uses the example of self-deportation, a term coined by Senator Mitt Romney, to describe a process that intentionally makes life so difficult for immigrants in the United States that they themselves choose to go back to their countries of origin.¹¹⁴ This draconian tactic of self-deportation shows up in many ways in public discourse as well as in law and policy. White supremacist Jared Taylor, capitalizing on the discourse around immigrant criminality, proposed a method to induce self-deportation:

The key, however, would be a few well-publicized raids on non-criminal illegals. Television images of Mexican families dropped over the border with no more than they could carry would be very powerful. The vast majority of illegals would quickly decide to get their affairs in

109. See *id.* at 395–98.

110. See “Welfare Queen” Becomes Issue in Reagan Campaign, N.Y. TIMES (Feb. 15, 1976), <https://perma.cc/FZP3-NUVS>.

111. See LÓPEZ, *supra* note 73 at 176 (“Often, Reagan placed his mythical welfare queen behind the wheel of a Cadillac, tooling around in flashy splendor. Beyond propagating the stereotypical image of a lazy, larcenous black woman ripping off society’s generosity without remorse, Reagan also implied another stereotype, this one about whites: they were the workers, the tax payers, the persons playing by the rules and struggling to make ends meet while brazen minorities partied with their hard-earned tax dollars.”).

112. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 40 (1997).

113. See Lori A. Nessel, *Instilling Fear and Regulating Behavior: Immigration Law as Social Control*, 31 GEO. IMMIGR. L.J. 525, 540 (2017).

114. *Id.* at 538 (citing Lucy Madison, *Romney on Immigration: I’m for “Self-Deportation,”* CBS NEWS (Jan. 24, 2012, 12:44 AM), <https://perma.cc/J7A6-RVUV>).

order and choose their own day of departure rather than wait for ICE to choose it for them. The main thing would be to convince illegals that ICE was serious about kicking them out. Ironically, the more ICE was prepared to do, the less it would have to do.¹¹⁵

This is an instance where a xenophobia-driven practice would lead to the creation of a violent environment for immigrant parents and their children in order to create a level of fear, which would cause them to “self-deport” or flee the country.

Cruel immigration policies are not simply geared towards self-deportation but also towards deterring migration to the United States in the first place. This approach was adopted by President Donald Trump in his Zero Tolerance Policy.¹¹⁶ As a part of this policy, newly arriving migrants were forcefully separated from their children and placed in shelters, with no plans for family reunification.¹¹⁷ Due to this policy, there was significant overcrowding at detention facilities, and children were forced to live in squalid conditions¹¹⁸ in violation of the Flores Agreement.¹¹⁹ The Office of the Inspector General reported that “[t]housands of children have been held by Department of Homeland Security in cages in former warehouses, in buildings with little if any natural light, forced to sleep on cement floors in cold temperatures, with only aluminum blankets issued to cover them.”¹²⁰

According to a report written after the inquiry into Zero Tolerance Policy by the Justice Department, it was found that then-Attorney General Jeff Sessions had supported taking children away from parents in order to deter future immigration.¹²¹ He also claimed that if parents truly cared about their children, then they should not have brought them into the United States.¹²²

This Article aims to bring a strange contradiction in the treatment of immigrants to light. On one hand, the rhetoric described in the previous section

115. Jared Taylor, *Is Trump Our Last Chance*, AM. RENAISSANCE (Aug. 20, 2015), <https://perma.cc/A6M7-C7NT>.

116. See generally Jeffery R. Baker & Allyson McKinney Timm, *Zero-Tolerance: The Trump Administration's Human Rights Violations Against Migrants on the Southern Border*, 13 DREXEL L. REV. 581, 589 (2021).

117. See Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken from Parents at U.S. Border*, N.Y. TIMES (Apr. 20, 2018), <https://perma.cc/WZN9-AAYM>.

118. See Management Alert—DHS Needs to Address Dangerous Overcrowding and Prolonged Detention of Children and Adults in the Rio Grande Valley (Redacted), OFF. OF INSPECTOR GEN., DEP'T OF HOMELAND SEC. 2, 6 (2019), <https://perma.cc/X8XR-FZHH>.

119. See Prashasti Bhatnagar, *Children in Cages: A Legal and Public Health Crisis*, 34 GEO. IMMIGR. L.J. 181, 183–85 (2019); see also Stipulated Settlement Agreement, *Flores v. Reno*, No. CV-85-4544 (C.D. Cal. Jan. 17, 1997); Gina Starfield, A “Binary Choice” for Families in ICE Detention: Examining the Legitimation Costs of Litigating the Flores Settlement Agreement, 36 GEO. IMMIGR. L.J. 399 (2021).

120. *Trauma at the Border: The Human Cost of Inhumane Immigration Policies*, U.S. COMM'N ON C.R. 57 (2019), <https://perma.cc/4A2L-2E22>.

121. Michael D. Shear, Katie Benner & Michael S. Schmidt, ‘We Need to Take Away Children,’ *No Matter How Young, Justice Dept. Officials Said*, N.Y. TIMES (Oct. 6, 2020), <https://perma.cc/G5JW-DUYN>.

122. See *id.*

does not support looking at the immigrant parent-child bond as one of love, care, and nurture. Instead, the benefits of parenthood are described as material gains of citizenship and public benefits. This devaluation of families makes its way into laws and policies that undermine their familial bonds. On the other hand, there has been ample evidence that shows how family relationships are used and weaponized to deter immigration. Bonds of love are assumed and exploited. The common thread underlying both these approaches is the willingness to inflict violence on immigrant families and communities.

The following subsections of Part III will detail measures taken by the state that contribute to the marginalization of immigrants. The Migrant Justice Platform, which is a roadmap of executive and legislative actions that come from grassroots voices from across the United States, reminds us that anti-immigrant policies have predated Donald Trump's presidency and have been facilitated by both political parties.¹²³ This reminder is valuable because it helps to locate the roots of xenophobia outside the bipartisan political realm.

A. *Living in the Shadows—Fear of Immigration Enforcement and the Looming Threat of Family Separation*

The trifecta of detention, deportation, and family separation has significant social consequences and pervades all aspects of daily life for undocumented immigrants and their children. Negotiating life and its processes as “illegal” has several impacts on the environment immigrant children are raised in.

The experience of parenting is framed by a context of parents' own “illegality,” and the stressors they experience are compounded in the face of deportation risk.¹²⁴ Most immigrant parents noted experiencing the fear of being discovered and separated from their families and children, and particularly feared losing their children permanently in the foster care system.¹²⁵ This compels them to be more cautious with their actions and mobility by consciously relegating themselves “into the shadows” to prevent being apprehended by immigration enforcement.¹²⁶ Undocumented status leads to being fearful of carrying out mundane activities such as driving on highways, and this curtailment of mobility and ability to carry out tasks as parents causes them to feel “trapped.”¹²⁷

123. See *A Unity Blueprint for Action on Immigration*, MIGRANT JUST. PLATFORM (2019), <https://perma.cc/VEK3-KRZZ>.

124. See Jodi Berger Cardoso, Jennifer L. Scott, Monica Faulkner & Liza Barros Lane, *Parenting in the Context of Deportation Risk*, 80 J. MARRIAGE & FAM. 301, 303 (2018).

125. See *id.* at 309.

126. See *id.* at 308 (citing Carola Suárez-Orozco, Hirokazu Yoshikawa, Robert T. Teranishi & Marcelo M. Suárez-Orozco, *Growing Up in the Shadows: The Developmental Implications of Unauthorized Status*, 81 HARV. EDUC. REV. 438 (2011)).

127. See *id.* (“Nearly all of the parents we interviewed described feeling trapped in this way, limited in mobility because of legal constraints and fear of the police. This narrative did not appear to vary by demographic factors, such as gender and family status. Ultimately, the participants described their fear of police as related to their overwhelming anxiety about being separated from their children”).

Similarly, the risk of detention and deportation also weighed heavily on children. In some cases, parents chose not to tell their children about their status in order to “protect them,” but in most cases, children were aware of their parents’ status and what it meant.¹²⁸ In fact, research has shown that early on, children began making associations between authority figures like police officers, sheriffs, firefighters, and politicians with the deportation of their parents.¹²⁹ The undocumented status itself is associated with higher levels of child-reported anxiety and depression.¹³⁰ As stated earlier, a common response of immigrant children is to feel responsible for their parent’s immigration status and to want their parents to enjoy the same rights as U.S. citizens.¹³¹ The constant burden of their parents’ or their own undocumented status is carried by immigrant children.

Parents also reported feeling disempowered due to their immigration status since they became reliant on their children for language and cultural brokering as well as protecting them from deportation by assuming responsibility for regularizing their immigrant status.¹³² This shift in power, coupled with the risk of detention and deportation, impacted the way parents raised and disciplined their children.¹³³ These examples illustrate the pressure immigrant parents face of losing their children and being unable to raise them in safe and healthy environments with love and care.

Living with the risk of deportation is still different from living the reality of family separation—both for parents and their children. Since ICE targets mostly men for deportation, women become “suddenly single mothers” who are the sole providers for their children.¹³⁴ Since many of these mothers were reliant on their husbands for money, this causes significant financial hardship, including housing insecurity.¹³⁵ The deported parent may struggle to maintain ties with the rest of the family in the United States and may disappear from the child’s life if not reunited.¹³⁶ Since the deported parent (often the father) may not be earning enough in his home country to sustain his family in the United States, he may also feel disarmed or emasculated given his inability to provide for his family.¹³⁷ In essence, his right to raise his children and provide for his family is taken away from him. The deportation or detention of a parent may have significant impacts on children as well. A report by the

128. Sandy P. Rubio Hernandez & Cecilia Ayón, *Pobrecitos los Niños: The Emotional Impact of Anti-Immigration Policies on Latino Children*, 60 CHILD. & YOUTH SERVS. REV. 20, 23 (2016).

129. *Id.* at 29.

130. *See id.* at 8.

131. *See* Cardoso, Scott, Faulkner & Lane, *supra* note 124, at 303.

132. *See id.* at 309–11.

133. *Id.* (“One parent heard a neighbor’s child threaten, ‘If you spank or scold me I am going to call the police, and they are going to deport you.’ This mother said, as a result, ‘Psychologically, there are parents that don’t want to correct their children’”).

134. JOANNA DREBY, *EVERYDAY ILLEGAL: WHEN POLICIES UNDERMINE IMMIGRANT FAMILIES* 31 (2015).

135. *See id.* at 32.

136. *See id.* at 34.

137. *See id.* at 36.

Urban Institute found that children whose parents were detained or deported showed an increased frequency of crying, loss of appetite, sleeplessness, clingy behavior, an increase in fear and anxiety, and generic fears of law enforcement officials.¹³⁸

In cases where children are also detained, these harms may be even worse. For example, when the Zero Tolerance Policy was instated by President Trump, thousands of children were separated from their parents at the border and kept in inhumane conditions¹³⁹—including harsh and substandard living conditions. In addition to other horrifying occurrences, there have been reports of sexual violence against children in immigrant shelters.¹⁴⁰ As of June 2021, over 2,000 children were yet to be reunified with their parents and were temporarily or permanently orphaned.¹⁴¹

B. *The Weaponization of the Family Welfare System and the Devaluation of Immigrants' Cultural Norms*

According to the most recent estimates available, there are 4.1 million U.S. citizen children under the age of eighteen who have at least one undocumented parent.¹⁴² Per 2011 numbers, more than 5,100 U.S. citizen children were in foster care as a result of their undocumented parents' detention or deportation.¹⁴³ This number was projected to increase by 15,000 by the year 2016.¹⁴⁴ The impact of immigration enforcement on child welfare is undeniable, although both are meant to operate with the same underlying assumption—that when possible, parents and children should be reunited. That said, in practice, undocumented immigrant families are unfairly denied togetherness.

The right to parent for all, including undocumented immigrants,¹⁴⁵ is a fundamental liberty interest recognized by the Supreme Court and guaranteed by the Fourteenth Amendment of the Constitution.¹⁴⁶ Generally, the rights of a “fit” parent may not be terminated by courts, and a showing of parental unfitness requires clear and convincing evidence for termination.¹⁴⁷ States have

138. Ajay Chaudry, Randy Capps, Juan Manuel Pedroza, Rosa Maria Castañeda, Robert Santos & Molly M. Scott, *Facing Our Future: Children in the Aftermath of Immigration Enforcement*, URB. INST. 43–47 (Feb. 2010), <https://perma.cc/XF72-DBRQ>.

139. See *supra* notes 116–120 and accompanying text.

140. See Richard Gonzales, *Sexual Assault of Detained Migrant Children Reported in the Thousands Since 2015*, NPR (Feb. 26, 2019, 7:40 PM), <https://perma.cc/DQT3-83WR>; Lomi Kriel, *ICE Guards “Systematically” Sexually Assault Detainees in an El Paso Detention Center, Lawyers Say*, PROPUBLICA (Aug. 14, 2020, 12:00 PM), <https://perma.cc/X7V7-PD9G>.

141. See Jacob Soboroff, *More Than 2,100 Children Separated at Border ‘Have Not Yet Been Reunified,’ Biden Task Force Says*, NBC NEWS (Jun. 8, 2021, 6:00 AM), <https://perma.cc/WUE9-WQ8G>.

142. Randy Capps, Michael Fix & Jie Zong, *A Profile of U.S. Children with Unauthorized Immigrant Parents*, MIGRATION POL’Y INST. (Jan. 2016), <https://perma.cc/S5QG-N64N>.

143. Seth Freed Wessler, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, APPLIED RSCH. CTR. 22–23 (Nov. 2011), <https://perma.cc/GZ6V-W4E2>.

144. *Id.* at 23.

145. See *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

146. See *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion).

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

varying definitions of what constitutes “unfitness,” but typically, it includes abandonment, abuse, neglect, and non-support.¹⁴⁸ It has been found that when it comes to the cases of undocumented immigrants, state courts fail to either properly apply the clear and convincing evidentiary standard or remain faithful to the statutory requirements.¹⁴⁹ Instead, the rights of undocumented immigrant parents are increasingly being terminated when the courts believe that doing so is in the “best interests of the child.”¹⁵⁰

The analyses of fitness and what constitutes the best interests of the child are highly subjective and informed by stereotypes and biases which privilege dominant cultural norms over others.¹⁵¹ The Supreme Court recognized the creep of these stereotypes into parental fitness evaluations—“[b]ecause parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias.”¹⁵² Despite this cautioning, courts are not always mindful of this guidance. In fact, this creep is explicitly visible in proceedings against undocumented parents.

Child welfare proceedings may be initiated because the department suspects that children are being neglected. In 2017, seven per 1000 children were reported victims of neglect.¹⁵³ However, the effects of such neglect are often indistinguishable from the effects of poverty.¹⁵⁴ Undocumented immigrants who are segregated in low-paying jobs and sectors and are unable to rely on public programs like Medicaid and Temporary Assistance for Needy Families (TANF) are likely to be impoverished.¹⁵⁵ Poverty-related problems such as malnutrition may often be the reason why undocumented immigrant parents are reported to Child Protective Services in the first place. At that point, if parents whose children are placed in foster services are unable to improve their conditions of poverty, they cannot regain custody of their children.¹⁵⁶ For example, if an immigrant parent is ordered to obtain a psychiatric evaluation and is unable to pay the out-of-pocket cost for it, they may lose custody of their child.¹⁵⁷ This is a vicious cycle that immigrants often find themselves in, where they are impeded from gaining wealth, and at the same time, are blamed for their poverty and deemed bad parents when they cannot escape it.

148. JOHN DE WITT GREGORY, PETER N. SWISHER & SHERYL L. WOLF, UNDERSTANDING FAMILY LAW 210 (4th ed. 2001).

149. See C. Elizabeth Hall, *Where Are My Children . . . and My Rights? Parental Rights Termination as a Consequence of Deportation*, 60 DUKE L.J. 1459, 1473–81 (2011).

150. See *id.* at 1496.

151. See *supra* notes 21–28 and accompanying text.

152. *Kramer*, 455 U.S. at 763.

153. *Child Maltreatment*, CHILD TRENDS (May 7, 2019), <https://perma.cc/JNN9-Y3ZK>.

154. See Wessler, *supra* note 143, at 18–19.

155. *Id.*

156. *Id.*

157. *Id.*

Professor Anita Madalli discusses how courts perceive undocumented status and use it to draw inferences about unfitness.¹⁵⁸ In the case of Encarnacion Maria Bail Romero, whose parental rights were terminated, the juvenile court extensively invoked the illegality of her employment and presence in the United States as an undocumented woman and made her out to be committing “criminal activity.”¹⁵⁹ The fact that she decided to remain at risk of deportation in the United States instead of returning to her home country was construed as her voluntarily exposing her child to this risk, thus making her unfit.¹⁶⁰ If this approach were legitimized, no undocumented immigrant parent could ever be deemed to be a fit parent. Being at risk of deportation or arrest and consciously deciding to stay on in the United States would inherently lead to separation from one’s children.

In cases where parents of U.S. citizen children are facing deportation, the Bureau of Immigration Appeals has held that a parent, upon deportation, can decide whether to take their minor child along or leave the child in the United States.¹⁶¹ However, in many cases, courts have overruled a parent’s decision to take the child back to the parent’s home country, and held that it is in the best interests of the child to remain in the United States.¹⁶² Courts here consider whether returning to the home country may lead to fewer educational opportunities, less wealth, more risk of violence, or a different environment than the one the child has grown up in, and can conclude that life in the United States is better for the child.¹⁶³ They often express that life with American adoptive parents will necessarily be superior to the life that a child could have with their birth parent in the parent’s home country.¹⁶⁴ In their analysis, courts give certain factors—influenced by dominant cultural norms (for instance regarding opportunity)—more weight than they would give the parent-child relationship and being brought up in one’s own culture.¹⁶⁵ *Prima facie*, it may seem that the court is deprioritizing the transmission of cultural values in its consideration, but in fact, it seems to be prioritizing *American* cultural values, such as that of opportunity.

A 2020 study showed that the detention or deportation of a family member was associated with significantly higher rates of suicidal thought, alcohol use, and aggression among Latinx adolescents.¹⁶⁶ These circumstances have

158. See Anita Ortiz Maddali, *The Immigrant “Other”: Racialized Identity and the Devaluation of Immigrant Family Relations*, 89 IND. L.J. 643, 683 (2014).

159. See *In re Adoption of C.M.B.R.*, 332 S.W.3d 793 (Mo. 2011).

160. See Madalli, *supra* note 158, at 682 (citing *In re Adoption of Romero*, No. 07AO-JU00477 (Mo. Cir. Ct. July 18, 2012)).

161. See *In re B & J*, 756 N.W.2d 234 (Mich. Ct. App. 2008) (citing *Liu v. United States Department of Justice*, 13 F.3d 1175, 1177 (8th Cir. 1994)).

162. See *generally* Hall, *supra* note 149.

163. See *id.* at 1481–86.

164. *Id.*

165. *Id.*

166. Kathleen M. Roche, Rebecca M. B. White, Sharon F. Lambert, John Schulenberg, Esther J. Calzada, Gabriel P. Kuperminc & Todd D. Little, *Association of Family Member Detention or*

also previously been associated with depression, poor self-concept, diminished happiness, and more anxiety.¹⁶⁷

In addition to health-related consequences, the detention or deportation of parents leaves children vulnerable to economic instability, since families and households lose a lot of their income and may be unable to afford housing.¹⁶⁸

Overall, immigrants are heavily disadvantaged in the child welfare system. Their “illegality” at all stages informs the welfare system’s understanding of their capacity to be good parents. What is worse is that orders of separation are often potentially colored by obvious cultural biases, and these may be inspected on appeal, but undocumented parents often do not have the money, resources, or command over the American legal system to fight their case or appeal it. It also may be impossible to do so when they have already been deported.¹⁶⁹

1. *The Systematic Denial of Access to Health Care*

The World Health Organization (WHO) defines health as a “state of complete physical, mental and social well-being and not merely the absence of disease or infirmity” and finds that “[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.”¹⁷⁰ As discussed below, immigrants are denied opportunities to realize complete wellbeing. Law Professor Wendy E. Parmet argues that immigration law itself is a social determinant of health.¹⁷¹ The following evidence will support this conclusion.

The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 significantly altered the welfare benefits landscape and prohibited most immigrants from availing themselves of cash assistance and Medicaid.¹⁷²

Deportation with Latino or Latina Adolescents’ Later Risks of Suicidal Ideation, Alcohol Use, and Externalizing Problems, 174 JAMA PEDIATRICS 478 (2020).

167. Luis H. Zayas, Sergio Aguilar-Gaxiola, Hyunwoo Yoon & Guillermina Natera Rey, *The Distress of Citizen-Children with Detained and Deported Parents*, 24 J. CHILD FAM. STUD. 3213, 3221 (2015).

168. See U.S.-Citizen Children Impacted by Immigration Enforcement, AM. IMMIGR. COUNCIL (June 24, 2021), <https://perma.cc/KX2N-FU3L>.

169. See Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C. J.L. & SOC. JUST. 63, 98 (2012) (“It should also be noted, however, that appeals in undocumented immigrant parental rights termination cases are unlikely. When poor immigrant parents with no proficiency in English or even Spanish are deported to their home countries, their ability to pursue appeals is severely curtailed. Most cases that have been appealed involve parents lucky enough to have acquired exceptional legal assistance prior to deportation.”).

170. Constitution of the World Health Organization, World Health Organization, Apr. 7, 1948, 14 U.N.T.S. 221.

171. Wendy E. Parmet, *Immigration Law as a Social Determinant of Health*, 92 TEMP. L. REV. 931 (2020).

172. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.); see *Welfare Reform: Many States Continue Some Federal or State Benefits for Immigrants*, U.S. GEN. ACCT. OFF. 27 (July 1998) (highlighting that prior to passage of the legislation, low-income and disabled individuals, regardless of

This policy was framed as race-neutral.¹⁷³ Scholar Grace Yoo analyzed the six congressional hearings that preceded the passage of PRWORA and summarized that all of the hearings upheld the belief that immigrants fraudulently obtained federal cash assistance, which made them unworthy of welfare benefits.¹⁷⁴ This was reminiscent of Proposition 187 in California, which preceded PRWORA and was passed after a group of angry citizens started the “Save Our State” movement to deny immigrants federal benefits they were eligible for.¹⁷⁵ Proponents argued that, since “illegal aliens” had violated U.S. immigration laws, they were deserving of punishment in the form of denial of welfare benefits.¹⁷⁶ A similar “unworthiness” had been previously evoked to advocate for welfare caps for Black women—with the story of Linda Taylor being regurgitated.¹⁷⁷ For immigrants, it was even more strongly justified, since at least “the [B]lack population is not growing,”¹⁷⁸ citing alleged Hispanic hyper-fertility as a reason for urgent action.

Currently, undocumented immigrants are not eligible for coverage under Medicaid, Medicare, or Children’s Health Insurance Program (CHIP), and may not purchase coverage from Affordable Care Act (ACA) marketplaces.¹⁷⁹ As a result, almost half of all undocumented immigrants are uninsured—particularly since they are segregated in low-wage jobs that do not provide employer-sponsored insurance.¹⁸⁰ While they may be able to access care in emergency situations under certain state emergency Medicaid provisions or the Emergency Medical Treatment and Labor Act (EMTALA), neither of these programs go beyond the stabilization of an emergency, and neither can be used as a substitute for holistic health care.¹⁸¹

In some states, state-level CHIP has been expanded to provide prenatal care to undocumented immigrants.¹⁸² This is not a benefit provided to

their citizenship status, would receive a monthly check of about \$530 per month through the SSI program).

173. See KENNETH J. NEUBECK & NOEL A. CAZENAVE, *WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA’S POOR* 204–07 (2001).

174. See Grace J. Yoo, *Immigrants and Welfare: Policy Constructions of Deservingness*, 6 J. IMMIGRANT & REFUGEE STUD. 490 (2008).

175. See Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 118 (1995).

176. See *id.* at 132.

177. See LÓPEZ, *supra* note 73 (citing ‘Welfare Queen’ Becomes Issue in Reagan Campaign, *supra* note 110).

178. See HEATHER MAC DONALD, VICTOR DAVIS HANSON & STEVEN MALANGA, *THE IMMIGRATION SOLUTION: A BETTER PLAN THAN TODAY’S* 104 (2007).

179. Samantha Artiga & Maria Diaz, *Health Coverage and Care of Undocumented Immigrants*, KFF (July 15, 2019), <https://perma.cc/XC9R-UP2C>.

180. *Id.*

181. Medha D. Makhoul, *Health Justice for Immigrants*, 4 U. PA. J.L. & PUB. AFFS. 235, 255 (2019).

182. See *State Initiatives to Expand Coverage and Access to Care for Undocumented Immigrants*, CMTY. CATALYST 2 (Apr. 2021), <https://perma.cc/22EQ-ZYQK> (“Sixteen states (Arkansas, California, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Washington and Wisconsin) have taken the Immigrant Children’s Health Improvement Act (ICHIA) option leveraging federal funds to provide prenatal care to undocumented pregnant immigrant people.”).

undocumented immigrants, but rather to their unborn child: a birthright citizen who is eligible for CHIP benefits.¹⁸³ Women's rights organizations have been very critical of this policy because it creates another precedent establishing fetal personhood, which undermines *Roe v. Wade*.¹⁸⁴ Furthermore, *Planned Parenthood v. Casey* reaffirmed that the interests of the fetus could not "override" that of the mother's pre-viability, but under current CHIP provisions, the interests of an unborn fetus do hold more weight than that of an undocumented mother.¹⁸⁵ The CHIP expansion thus attacks the bedrock on which the right to choice is built on, and advocates have argued against this expansion.¹⁸⁶ Despite these criticisms, it is important to acknowledge that, in the current climate, CHIP expansions may be the only manner in which undocumented mothers may gain access to prenatal care.¹⁸⁷

In the absence of coverage, immigrants must rely on federally qualified health centers (FQHCs), which do not require insurance for treatment and have historically treated medically underserved populations by accepting payment for services on a sliding scale depending on the patient's income.¹⁸⁸ Despite such safety nets, immigrants face other barriers in accessing health care. Many find the American health care system too difficult to navigate.¹⁸⁹ Others are unable to communicate with health care providers due to language barriers.¹⁹⁰ Finally, the fear of being reported and deported underlies the health-seeking behavior of immigrants and deters them from obtaining care—a fear that was exacerbated during Donald Trump's presidency.¹⁹¹

The lack of access to health care compromises the health of immigrants of all ages. Not only are immigrants precluded from accessing care for certain conditions such as strokes, hypertension, and diabetes which they may be vulnerable to,¹⁹² but the threat of immigration enforcement leads to worsened health outcomes. For example, in Iowa, infants born to Latina mothers after

183. *Id.*

184. See Hailey Cleek, *Borders Across Bodies: Assessing the Balance of Expanding CHIP Coverage at the Expense of Advancing Fetal Personhood*, 34 BERKELEY J. GENDER L. & JUST. 1, 20 (2019).

185. *Id.* at 21.

186. See *id.*; Angela Hooton, *A Broader Vision of the Reproductive Rights Movement: Fusing Mainstream and Latina Feminism*, 13 AM. U. J. GENDER SOC. POL'Y & L. 59, 81 (2005).

187. See *id.*

188. *Undocumented Immigrants in the United States: U.S. Health Policy and Access to Care*, HASTINGS CTR., <https://perma.cc/9V8D-P34Z> (last visited May 1, 2022).

189. See Karen Hacker, Maria Anies, Barbara L. Folb & Leah Zallman, *Barriers of Health Care for Undocumented Immigrants: A Literature Review*, 8 RISK MGMT. HEALTH CARE POL'Y 175 (2015).

190. See Heide Castañeda, Seth M. Holmes, Daniel S. Madrigal, Maria-Elena DeTrinidad Young, Naomi Beyeler & James Quesada, *Immigration as a Social Determinant of Health*, 36 ANN. REV. PUB. HEALTH 375, 285 (2015).

191. See Joseph Nwadiuko, Jashalynn German, Kavita Chapla, Frances Wang, Maya Venkataramani, Dhananjay Vaidya & Sarah Polk, *Changes in Health Care Use Among Undocumented Patients, 2014–2018*, JAMA NETWORK OPEN (2021) (concluding there was a significant decrease in primary care use among undocumented patients during a period of increased anti-immigrant rhetoric associated with the 2016 presidential campaign).

192. See Makhoul, *supra* note 181, at 244.

an immigration raid were at a 24 percent greater risk of low birth weight.¹⁹³ Studies have also shown that living in the United States leads to deteriorating perinatal outcomes over generations, partly due to the lack of access to care.¹⁹⁴

In addition to the above, conditions of confinement in immigration detention facilities significantly harm the health of immigrants. During COVID-19, horrific reports of immigrant mistreatment came to light, in addition to over-crowding, lack of sanitation, and lack of medical care at detention facilities. Officers were told to “freeze out” ICE detainees so they could pass temperature checks,¹⁹⁵ and protesting detainees were transferred from facilities with no COVID-19 cases to jails with multiple active cases.¹⁹⁶ Such conditions gave rise to a high number of infections. As of January 2022, ICE had reported that more than 32,000 immigrants had tested positive for COVID-19 since the start of the pandemic, which resulted in eleven deaths.¹⁹⁷ With the arrival of the Omicron variant, news reports found that the number of COVID cases in immigration detention facilities had surged by 520 percent since the start of 2022.¹⁹⁸ While these numbers are very high, researchers at Vera Justice explained that “there is no scenario in which the data ICE has reported to the public reflects the true scope of the spread of COVID-19 in detention,” using an epidemiological model which estimated that the actual number of positive cases as of mid-May 2020 may have been as much as fifteen times higher than what was reported by ICE.¹⁹⁹

C. *Economic Choking—Limitations on Employment Opportunity and Exploitative Labor Conditions*

As per 2016 estimates, there were a total of 7.8 million unauthorized immigrants ages eighteen and older in the labor force.²⁰⁰ This is contrary to what policymakers (supposedly) intended. Congress passed the Immigration Reform and Control Act (IRCA) in 1986, in a bid to reduce and control

193. See Nicole L. Novak, Arline T. Geronimus & Aresha M. Martinez-Cardoso, *Change in Birth Outcomes Among Infants Born to Latina Mothers After a Major Immigration Raid*, 46 INT’L J. EPIDEMIOLOGY 839 (2017).

194. See Dawn M. Richardson, Sarah B. Andrea, Amber Ziring, Cassandra Robinson & Lynne C. Messer, *Pregnancy Outcomes and Documentation Status Among Latina Women: A Systematic Review*, 4 HEALTH EQUITY 158 (2020).

195. See Noah Lanard, *Whistleblowers Say an ICE Detention Center Used Deceptive Tricks to Conceal COVID Outbreak*, MOTHER JONES (July 21, 2020), <https://perma.cc/6DB5-7GC7>.

196. *Immigration Detention and Covid-19*, BRENNAN CTR. FOR JUST. (Jan. 7, 2022), <https://perma.cc/C3JZ-65UU>.

197. See Noah Lanard, *Whistleblowers Say an ICE Detention Center Used Deceptive Tricks to Conceal COVID Outbreak*, MOTHER JONES (July 21, 2020), <https://perma.cc/6DB5-7GC7>.

198. See *id.*

199. Noelle Smart & Adam Garcia, *Tracking COVID-19 in Immigration Detention*, VERA INST. (Nov. 18, 2020), <https://perma.cc/G7Z7-8JZV>.

200. Jeffrey S. Passel & D’Vera Cohn, *Unauthorized Immigrant Workforce Is Smaller, but with More Women*, PEW RSCH. CTR. (Nov. 27, 2018), <https://perma.cc/JHD4-9VXG>.

undocumented immigration,²⁰¹ and for the first time, made the employment of undocumented immigrants unlawful.²⁰² IRCA prohibits employers from “knowingly” hiring or employing undocumented workers and created paperwork requirements to examine an employee’s authorization.²⁰³ IRCA also established civil²⁰⁴ and criminal penalties²⁰⁵ for violations of the substantive prohibition on employment or the paperwork requirements.

Despite the passage of IRCA, unauthorized immigration, as well as the employment of undocumented immigrants, increased.²⁰⁶ Employers, under IRCA, for the sake of cross-checking immigrant status, are permitted to accept documents that appear to be genuine and to relate to the individual named.²⁰⁷ If one’s documents appear suspect, employers are still free to overlook their suspicions.²⁰⁸ This provision leaves employers’ hiring decisions minimally scrutinized, and government enforcement of employer sanctions is rare—partly because it is difficult to prove that they “knowingly hired” an undocumented immigrant.²⁰⁹ As a result, employers continued hiring undocumented immigrants and IRCA did not achieve the result it had set out to.

Before IRCA, courts and executive branch agencies generally enforced labor and employment laws without regard for the immigration status of the employee, but the legal landscape was significantly altered in *Hoffman Plastic Compounds, Inc v. NLRB*.²¹⁰ In *Hoffman*, the employee Castro had presented a falsified birth certificate to demonstrate his legal right to work and was subsequently fired for union-related activity.²¹¹ The Supreme Court, relying on IRCA, held that Castro was not eligible for back pay, and nor was he eligible for reimbursement under the NLRA, because he was undocumented and thereby ineligible to work.²¹² The impact of this decision was to deprive undocumented immigrants of the most effective, and only monetary remedy, in the NLRA scheme²¹³ as well as rendering employers exempt from ordinary labor and employment liability in most cases.²¹⁴

Currently, undocumented immigrants, given their status and treatment under IRCA, are highly susceptible to wage violations. A 2009 study found

201. See Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 198–205 (2007) (discussing the origins and legislative history of IRCA).

202. Immigration Reform and Control Act, 8 U.S.C. § 1324a.

203. *Id.*

204. § 1324a(e)(5).

205. § 1324a(f)(1).

206. See Wishnie, *supra* note 201, at 205–07.

207. § 1324a(b)(1)(A).

208. § 1324a(b)(6)(A).

209. See Wishnie, *supra* note 201, at 209–12.

210. *Hoffman Plastic Compounds, Inc v. NLRB*, 535 U.S. 137 (2002).

211. *Id.*

212. *Id.*

213. Rebecca Smith, Amy Sugimori, Ana Avendaño & Marielena Hincapié, *Undocumented Workers: Preserving Rights and Remedies after Hoffman Plastic Compounds v. NLRB*, NAT’L EMP. L. PROJECT, <https://perma.cc/S8YQ-R2LQ> (last visited Apr. 13, 2022).

214. See Wishnie, *supra* note 201, at 211–12.

that 84.9 percent of unauthorized immigrants were not paid the overtime wages they worked for.²¹⁵ They are also overrepresented in hazardous environments like the poultry and meatpacking processing industries.²¹⁶ The workers are expected to work at high speeds in freezing conditions, repeating the same work over and over, with few breaks.²¹⁷ The work is very dangerous, and despite a reduction in worker injuries, 2019 data showed that 4 percent of workers continue to get injured.²¹⁸ Immigrants also account for about 73 percent of the agricultural labor force, where they are exposed to respiratory irritants like dust and pesticides.²¹⁹

Workers are also fearful that reporting labor violations and asserting themselves can lead to retaliation from their employers.²²⁰ There have been reports of employers who were confronted by their employees and proceeded to report them to ICE.²²¹ Undocumented workers also face the additional challenge of being unapprised of their rights and being unable to afford to retain an attorney, thereby making them additionally vulnerable to unscrupulous employers.²²²

The impact of the current legal and political landscape is that undocumented immigrants are systematically segregated into lower-paying, minimum-wage industries²²³ and denied opportunities for economic mobility. In the United States, the annual earnings of a full-time minimum-wage employee are \$15,080 (earning the federal minimum wage amount).²²⁴ A single immigrant parent with two children would have to work over fifty hours a

215. Annette Bernhardt, Ruth Milkman, Nik Theodore, Douglas D. Heckathorn, Mirabai Auer, James DeFilippis, Ana Luz González, Victor Narro, Jason Perelshteyn, Diana Polson & Michael Spiller, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, NAT'L EMP. L. PROJECT 44 (2009), <https://perma.cc/6WYH-49GZ>.

216. Angela Stuesse & Nathan T. Dollar, *Who Are America's Meat and Poultry Workers?*, ECON. POL'Y INST.: WORKING ECON. BLOG (Sept. 4, 2020, 10:00 AM), <https://perma.cc/JU6X-U3SL>.

217. Peggy Lowe, *Working 'The Chain' Slaughterhouse Workers Face Lifelong Injuries*, NPR: THE SALT (Aug. 11, 2016, 8:00 AM), <https://perma.cc/V9U8-8UFC>.

218. *Employer-Reported Workplace Injuries and Illnesses—2019*, U.S. DEP'T OF LABOR, BUREAU OF LAB. STATS., (2020), <https://perma.cc/999J-JU74>.

219. *See Farm Labor*, U.S. DEP'T OF AGRICULTURE, ECON. RSCH. SERV., <https://perma.cc/VF38-XY84> (last updated Mar. 15, 2022); *see, e.g.*, Sarah Goldman, Anna Aspenson, Prashasti Bhatnagar & Robert Martin, *Essential and in Crisis: A Review of Public Health Threats Facing Farmworkers in the US*, CTR. FOR A LIVABLE FUTURE 29–41 (2021), <https://perma.cc/L5BJ-MWR7>.

220. *See* Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 CORNELL INT'L L.J. 27, 47 (2008) (“Although anti-retaliation provisions still prevent employers from contacting immigration officials in reprisal for workplace complaints, an employer can now accurately remind a prospective plaintiff of the employer’s ability to inquire into the employee’s immigration status should she decide to commence litigation. The threat to call immigration officials is illegal, but the threat to depose a worker about her status is permissible.”).

221. *See* Paul Harris, *Undocumented Workers' Grim Reality: Speak Out on Abuse and Risk Deportation*, GUARDIAN (Mar. 28, 2013, 11:03 AM), <https://perma.cc/9QHM-Y48T>.

222. Richard A. Johnson, *Twenty Years of the IRCA: The Urgent Need for an Updated Legislative Response to the Current Undocumented Immigrant Situation in the United States*, 21 GEO. IMMIGR. L.J. 239, 268 (2007).

223. *See* Bernhardt, Milkman, Theodore, Heckathorn, Auer, DeFilippis, González, Narro, Perelshteyn, Polson & Spiller, *supra* note 215, at 53–54.

224. *What Are the Annual Earnings for a Full-Time Minimum Wage Worker?*, CTR. FOR POVERTY & INEQ. RSCH. (Jan. 12, 2018), <https://perma.cc/94Q6-LF9Q>.

week to keep the family out of poverty²²⁵ and would have no help from the state in the form of public benefits.

The exploitation of immigrant workers was stark during the COVID-19 pandemic. On one hand, many of them were deemed “essential” or “front-line” workers in the food and agricultural sectors, as caregivers and as health care providers.²²⁶ As a result, many worked in-person and had to commute via public transportation, making them extremely susceptible to COVID-19.²²⁷ In such circumstances, they were more likely to have less access to paid sick leave.²²⁸ Immigrant workers who were laid off during the pandemic were excluded from unemployment insurance benefits provided under the CARES Act.²²⁹

As the above evidence makes clear, the system economically chokes immigrants and puts less money in their pockets which could be spent on affording better education, health care, housing, transportation, and a better-quality life for themselves and their children. It also excludes them from relying on public benefits for support, which leaves them without money or means, often leading them to be trapped in exploitative work environments.

IV. ENVISIONING REPRODUCTIVE JUSTICE FOR UNDOCUMENTED IMMIGRANTS

One of the crucial pillars of the RJ framework is the right to bring up one’s children in safe, sustainable, and healthy communities. The vision is a broad and bold one, that “aims to build a world in which all children are wanted and cared for, in which supports exist for families of all sizes and configurations, and in which societies give priority to creating the conditions for people to be healthy and thrive in the United States and globally.”²³⁰ As the previous sections of this Article show, this vision is far from being realized for immigrant parents and their children, who are limited by rhetoric and law that give rise to fear and scarcity.

The RJ movement is not fixated on using the law as a tool for social change.²³¹ Instead, it is wary of how liberal feminists sought to address gender-based inequalities through legal reform instead of by questioning structural oppression.²³² The RJ movement recognizes that the legal arena is not accessible to most movement actors—those who have been historically

225. *Id.*

226. Xavier Roberts & Christian Burks, *Immigrant Essential Workers and COVID-19*, NAT’L CONF. OF STATE LEGISLATURES (July 27, 2021), <https://perma.cc/EC3G-GUVG>.

227. *COVID-19 Policy Brief: Disparities Among Immigrant Populations in the United States*, INFECTIOUS DISEASES SOC’Y OF AM. (Sept. 10, 2020), <https://perma.cc/7LTC-MK7D>.

228. Connor Maxwell & Danyelle Solomon, *The Economic Fallout of the Coronavirus for People of Color*, CTR. FOR AM. PROGRESS (Apr. 14, 2020), <https://perma.cc/39PB-KMEE>.

229. See BEN HARRINGTON, CONG. RSCH. SERV., LSB10442, RECOVERY REBATES AND UNEMPLOYMENT COMPENSATION UNDER THE CARES ACT: IMMIGRATION-RELATED ELIGIBILITY CRITERIA 3 (2020).

230. ROSS & SOLINGER, *supra* note 17, at 168.

231. See generally *id.* at 238–66.

232. See SILLIMAN, GERBER FRIED, ROSS & GUTIÉRREZ, *supra* note 18, at 125–28.

marginalized.²³³ Additionally, scholars have noted that the issue with over-relying on litigation as a tool is that goals of social movements cannot be neatly translated into legal claims for judicially available remedies, and litigation affords cognizability only to individual claims while ignoring broader justice claims.²³⁴ Finally, the prioritization of legal tactics has proven to “crowd out” non-legal tactics and drive resources away from grassroots and community-based strategies.²³⁵

This Article does not discuss the role lawyers can assume in supporting movements such as the RJ movement.²³⁶ That said, having acknowledged the limitations of the law as a transformative tool, the following sections will discuss legal, policy, and social changes demanded by Migrant Justice and RJ movement actors to create better living conditions for undocumented immigrants in the United States.

A. *Law and Policy Change*

Laws prohibiting “unlawful entry” and “unlawful re-entry” are weaponized to incarcerate immigrants and separate families. Prosecutions for violations of these laws have also contributed to perceptions of immigrant criminality and illegality.²³⁷ Activists have advocated for Congress to repeal 8 U.S.C. § 1325 and 8 U.S.C. § 1326, laws that criminalize migration and contribute to mass incarceration.²³⁸ As Catherine Dauvergne argues, “Illegal migration is a product of migration law. Without legal prohibition, there is no illegality.”²³⁹

Advocates have also recognized the harm faced by immigrant workers due to employment laws that discriminate against them based on their citizenship status. They have supported the repeal of IRCA.²⁴⁰ They have acknowledged the vulnerability of immigrant workers in hostile workplaces, and their inability to collectively organize for fear of worker retaliation.²⁴¹ Consequently, it has been proposed that statutory provisions should be enacted to enforce labor and civil rights protections for migrant labor.²⁴²

Access to health care and the right to affordable coverage has also been one of the demands made by immigrant justice advocates. At the federal

233. Gemma Donofrio, *Exploring the Role of Lawyers in Supporting the Reproductive Justice Movement*, 42 N.Y.U. REV. L. & SOC. CHANGE 221, 250 (2018).

234. See Sarah London, *Reproductive Justice: Developing A Lawyering Model*, 13 BERKELEY J. AFR.-AM. L. & POL’Y 71, 86 (2011).

235. See *id.*

236. See Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 844 (2021).

237. See *supra* notes 63–69 and accompanying text.

238. *Free Our Future: An Immigration Policy Platform for Beyond the Trump Era*, MIJENTE 3 (June 2018), <https://perma.cc/STS9-QKP5> [hereinafter *Free Our Future*].

239. CATHERINE DAUVERGNE, *THE NEW POLITICS OF IMMIGRATION AND THE END OF SETTLER SOCIETIES* 135 (2016).

240. *A Unity Blueprint for Action on Immigration*, *supra* note 123.

241. *Id.* at 15.

242. *Id.* at 18.

level, the HEAL for Immigrant Families Act would, if passed, remove the five-year ban applicable to lawfully present immigrants to use Medicaid and CHIP.²⁴³ If passed, it would also remove the exclusion of undocumented immigrants from getting coverage from the ACA's Health Insurance Exchanges and make undocumented immigrants eligible to purchase qualified health insurance coverage.²⁴⁴ The benefits from such legislation are clearly evidenced by states that have adopted similar legislation. For example, when Oregon extended health insurance coverage to undocumented mothers, it was found that they made an average of seven more doctor visits, the rate of screening for gestational diabetes increased by 61 percent, and the number who received at least one fetal ultrasound increased by 74 percent.²⁴⁵ This enhanced standard of care led to a decrease in rates of low birth weight and child mortality.²⁴⁶

RJ advocates have used the human rights framework to make the case for sexual rights and sexual citizenship, in which they have demanded public support for private actions—a stark departure from the privacy framework.²⁴⁷ They have acknowledged that immigrants should have full access to human rights that are guaranteed in many international legal instruments.²⁴⁸ For example, acknowledging the importance of family, the Human Rights Committee stated that states must take appropriate measures “to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.”²⁴⁹ Advocates have brought attention to the fact that the present immigration enforcement policy in the United States pays no heed to such guidance, as is demonstrated by the treatment of migrant children by the child welfare system, family separation policies, and the readiness with which undocumented immigrants are detained, deported, and displaced. At present, the United States is the only country in the world that has not ratified the Convention on the Rights of the Child, which is the most widely and rapidly ratified human rights treaty in existence.²⁵⁰ The United States has also not ratified other crucial documents, such as the International Covenant on Economic, Social, and Cultural Rights,

243. Health Equity and Access under the Law for Immigrant Families Act of 2021, S. 1660, 117th Cong. (2021).

244. *Id.*

245. See Jonas J. Swartz, Jens Hainmueller, Duncan Lawrence & Maria I. Rodriguez, *Oregon's Expansion of Prenatal Care Improved Utilization Among Immigrant Women*, 23 MATERNAL & CHILD HEALTH J. 173 (2019).

246. *See id.*

247. ROSS & SOLINGER, *supra* note 17, at 180.

248. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 16(3) (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 17, Dec. 16, 1966, 999 U.N.T.S. 171; Convention on the Rights of the Child, Preamble, Nov. 20, 1989, 1577 U.N.T.S. 3.

249. U.N. Human Rights Committee, *General Comment No. 19*, ¶ 5, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994).

250. See generally Convention on the Rights of the Child, *supra* note 248; see also Sarah Mehta, *There's Only One Country That Hasn't Ratified the Convention on Children's Rights: US*, ACLU (Nov. 20, 2015, 1:30 PM), <https://perma.cc/YC7W-WXBS>.

which would require the government to promote and protect rights such as health, education, social protection, and an adequate standard of living for all people,²⁵¹ as well as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.²⁵² Advocates, therefore, have been calling for the United States to ratify all major human rights treaties as well as their optional protocols to demonstrate its commitment to human rights and provide individuals and other states the mechanisms to hold it accountable in case of violations.

B. *Radical Visions*

It would be naïve to assume that merely accepting some of the recommendations above will sustainably complete the creation of safe and health environments. Some of the proposals may lead to positive health outcomes, better employment conditions, or less violence and stigma—the importance of which cannot be understated—but this would still happen within the current immigration regime. This section discusses some ideas put forth by movements, communities, and activists over the decades which implore us to reimagine immigration law.

There are various abolitionist movements in the United States. Scholar Allegra McLeod writes: “[a]bolitionist organizers understand their work to be related to the historical struggles against slavery and its afterlives, against imperialism and its legacies in more recent practices of racial capitalism, and against immigration enforcement and border fortification.”²⁵³ Scholar César Cuauhtémoc García Hernández draws the link between historical racial subordination within the United States and abolitionist movements, and argues that abolition of institutions, rather than reform, is premised on the impossibility of distinguishing such institutions from their racist projects.²⁵⁴ A decarceral and abolitionist ethic was exemplified in the law reform project that is the Movement for Black Lives, which called for the abolition of police and other punitive systems of social control and the replacement of these systems with alternative systems in the aftermath of the killing of George Floyd.²⁵⁵ The prison abolition movement has encouraged activists to examine abolition in the context of immigration policing.

The Abolish ICE movement vision, as clearly articulated by Mijente, a digital and grassroots hub for Latinx and Chicanx movement building, entails the disbanding of ICE.²⁵⁶ Disbanding ICE requires the erasure of its vision

251. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

252. See generally International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 3.

253. Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1617 (2019).

254. César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 262 (2017).

255. See Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018).

256. See *Free Our Future*, *supra* note 238.

and means, not merely its reorganization.²⁵⁷ Activists have argued that abolishing ICE in its entirety should be accompanied by a moratorium on deportations, the ending of all forms of immigration detention, and the restructuring of the Border Patrol as a humanitarian force that rescues migrants and is staffed by emergency service experts instead of police.²⁵⁸ They have cautioned against merely replacing ICE with a system that, in essence, retains its vision. For example, the Establishing a Humane Immigration Enforcement System Act,²⁵⁹ a bill introduced by Democratic lawmakers, would abolish ICE within a year but retain “any essential functions carried out by ICE that do not violate fundamental due process and human rights”²⁶⁰—thereby changing the form of immigration enforcement but not its substance.

In her piece analyzing deportation abolition, Angélica Cházaro challenges the idea that deportation is an inevitable and necessary practice within U.S. immigration enforcement and highlights the normative commitments that would form part of a deportation abolitionist ethic. The deportation abolitionist movements’

... end goal is to target one or more of the conditions producing deportability. Their demands are collective, rather than individual (even as they engage in fights on individual cases). They understand state power (and thus, the power to deport) as an ensemble of structures, rather than something held by one group to be seized by another, and engage accordingly with public actors at all levels of governance, as well as private actors. Finally, the politics underlying deportation abolition efforts are based on the refusal of social value (the refusal to assign value to a person’s life based on their potential social contributions in any sphere).²⁶¹

Cházaro’s piece argues that deportation is incorrectly and arbitrarily made out to be incident to sovereignty. On the other hand, in *Border and Rule*, Harsha Walia dissects the creation of western sovereignty and how it is employed. She traces the existence of immigration enforcement, detention centers, and migration control to the “rule of racist, nationalist borders”²⁶² and seeks to expose the power of border regimes. She encourages us to think about “no borders” politics—one that calls on us to transform the underlying conditions that give rise to the migration crisis. She traces dispossession, exploitation, incarceration, and border imperialism to forces such as racial-

257. *See id.*

258. *Id.* at 8.

259. *See generally* Establishing a Humane Immigration Enforcement System Act, H.R. 6361, 115th Cong. (2018).

260. Allison Crennan-Dunlap, *Abolishing the Iceberg*, 96 DENV. L. REV. ONLINE 148, 156 (2019) (quoting H.R. 6361).

261. Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1115 (2021).

262. HARSHA WALIA, *BORDER & RULE: GLOBAL MIGRATION, CAPITALISM, AND THE RISE OF RACIST NATIONALISM* 213 (2021).

capitalism and settler-colonialism. In articulating a revolutionary politics of repair, she stresses the need to “weave solidarities through the lens of abundance rather than scarcity and celebrate the interdependence of the particularities of our humanities.”²⁶³

Both Cházaro and Walia center the equality, safety, well-being, and dignity of people and their communities in their writing. Any movement towards realizing an RJ vision would preserve this understanding. In a similar vein, scholar César Cuauhtémoc García Hernández notes that ending immigration incarceration must be accompanied by the crafting of an alternative moral framing of migrants, because without this reimagination, casting doubt on the legitimacy of state violence is unlikely.²⁶⁴ One way to do so, he proposed, was to highlight the United States’ role in producing migrants—for profit through violence.²⁶⁵

CONCLUSION

In conceptualizing the broad right to raise one’s children in a safe and healthy environment, the RJ framework creates the capacity to look at all the different ways in which this right can be undermined, and it advocates against each one of them. In particular, it is a robust framework to analyze the marginalization of undocumented immigrants, since being undocumented is not simply a legal status, but influences where one drives, when one sees a doctor, and how one disciplines their child. This Article was inspired by the RJ framework to look beyond conventional “immigration law” and resist the urge to draw causal relationships between laws and their impacts on certain aspects of people’s lives. Instead, it muddies the distinctions between past and present and rhetoric and policy to better understand the environment in which immigrant parents raise their children, and, in turn, how they are penalized for it.

263. *Id.* at 215.

264. Hernández, *supra* note 254, at 292.

265. *Id.* at 298 (reiterating that the greatest potential to achieving migrant justice does not lie with the branches of government, but rather within the power of storytelling: “Paired with a transformative justice ethic of collective community healing and accountability, sharing stories of one’s life helps humanize the storyteller and identify common bonds between speaker and listener”).