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My Family Belongs to Me: A Child's Constitutional Right to Family Integrity

Shanta Trivedi

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Every day in the United States, the government separates children from their parents based on their parents' immigration status, incarceration, or involvement in the child welfare system—and the children have no say in the matter. The majority of these families are racial minorities and economically underprivileged.

Under current law, children's ability to assert a constitutional right to keep their families free from government intrusion is not always apparent. This is in part because a single piece of Supreme Court dicta has muddied an otherwise clear family integrity doctrine, and many federal circuits are silent on the issue. Further, many children's advocates fail to assert this argument in court, or children appear without advocates at all. Accordingly, the law remains stagnant.

Under Fourteenth Amendment due process jurisprudence, parents have a well-established fundamental liberty interest in their relationship with their children. Parents can therefore forcefully assert a constitutional violation when the state seeks to infringe on their familial relationship through the child welfare, criminal, and/or immigration systems. A child's assertion of the same right, however, has not been used with the same effect. As a result, the state is able to harm children without adequate constraints on its power. The recognition and assertion of a child's enforceable constitutional right to family integrity is necessary because, without it, courts may make decisions about what is in a child's best interest without hearing from the child herself, without considering and addressing any conflicting interests between the parent and the child, or on the basis of an incomplete record because the parents did not or could not assert their right to family integrity. As a result, children are often unintended victims of the legal systems targeting their parents. In these systems, children are frequently separated involuntarily from their families because of an allegation of neglect or abuse, a conviction or plea leading to incarceration, or a deportation proceeding against their parent. Without asserting her constitutional right to family integrity, a child has little power to stop her family's separation.

This Article is the first to argue that children should assert their right to family integrity in legal proceedings against their parents that could result in the destruction of their family units. It comprehensively examines the legal, theoretical, and international law principles that support such arguments.

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INTRODUCTION

Supreme Court jurisprudence is clear that parents have a fundamental liberty interest in the care, custody, and control of their children.[2] Over time, the Supreme Court expanded that interest to encompass the broader right to preservation of the family entity;[3] that is, the right of a family to make private decisions about what is best for the family unit,[4] free from unwarranted state intervention.[5] Thus, the law appreciates "the private realm of family life which the state cannot enter."[6] This is the right to family integrity.

Scholars such as Peggy Cooper Davis argue that this right to family integrity developed after slavery, in reaction to the routine destruction of

[2] *See infra* Section I.B and accompanying text.
[3] *See infra* Section I.A and accompanying text.
[4] Though the author believes that families take many forms, for the purposes of this Article, "family" is limited to immediate family members, which includes legal parents and children.
[5] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
[6] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

African American family units.[7] Destroying families was "a powerful vehicle of subjugation and dehumanization that could be inflicted on minority groups."[8] In response, familial rights were developed to require heightened constitutional protections, both procedurally and substantively.[9] Family destruction as a tool to control disfavored minorities is still visible in our culture today. Incarceration destroys millions of families across the country. In the immigration system, the government relentlessly separates children from their families with no plan or procedure for their return.[10] In the child welfare system, better described as the family regulation system,[11] minority children are historically and continually overrepresented in foster care.[12] It is well documented that family separation disproportionately affects indigent people and particularly indigent people of color.[13]

In these criminal, immigration, and family court proceedings—as well as others not explored in this Article—a parent could potentially preserve her family by citing the constitutional right to family integrity. The question is whether there is a reciprocal right for children; this Article answers in the affirmative and urges practitioners and legislators to utilize it more often.

Children's rights theories demonstrate the importance of recognizing this right. And while the Supreme Court has never explicitly held that a child

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[7] *See* Caitlin Mitchell, *Family Integrity and Incarcerated Parents: Bridging the Divide*, 24 YALE J.L. & FEMINISM 175, 181–82 (2012) (citing PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 9 (1997)).

[8] *Id.*

[9] *Id.*

[10] *See* Joel Rose, *Migrant Caregivers Separated from Children at Border, Sent Back to Mexico*, NPR (July 5, 2019), https://www.npr.org/2019/07/05/738860155/family-separations-under-remain-in-mexico-policy, *archived at* https://perma.cc/6GAJ-NTYL.

[11] *See* Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020), https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/444809, *archived at* https://perma.cc/9YCA-3X3M ("I am inspired by calls to defund the police. But I am concerned by recommendations to transfer money, resources and authority from the police to health and human services agencies that handle child protective services (CPS). These proposals ignore how the misnamed 'child welfare' system, like the misnamed 'criminal justice' system, is designed to regulate and punish black and other marginalized people. It could be more accurately referred to as the 'family regulation system.' "). The author agrees with Professor Roberts' analysis and will use the term "family regulation system" throughout this article instead of the more commonly used "child welfare system."

[12] Lynn F. Beller, *When in Doubt, Take Them Out: Removal of Children from Victims of Domestic Violence Ten Years After* Nicholson v. Williams, 22 DUKE J. GENDER L. & POL'Y 205, 212 (2015).

[13] *See, e.g.*, NAT'L COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN 79 (2012), https://ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf, *archived at* https://perma.cc/Z7PW-AVAP ("African American and American Indian children are more likely than other children to be reported, investigated, substantiated, and placed in foster care. Thirty-one percent of the children in foster care are African American, double the percentage of African American children in the national population. Children of color, especially African American children and often American Indian children, are more likely to have longer placements in out-of-home care, are less likely to receive comprehensive services, and are less likely to reunify with their families than white children.").

could assert a constitutional interest in her family against state intervention,[14] dicta has supported the argument that the this right in fact belongs to all family members.[15] And while many federal circuit courts have yet to rule on this issue, the majority has clearly found that such a right exists.[16] Finally, international conventions support the recognition and clear assertion of this right in legal proceedings.[17]

Despite this support for the existence of a child's independent right to family integrity, children rarely assert this right. As a result, children are virtually shut out of legal proceedings that affect their families and stability—usually based on allegations against their parents, not themselves. This may be due in part to the fact that the legal landscape is not clear. But it is also likely due to the confusing role of children's advocates in civil proceedings[18] and the fact that children in many of these proceedings have no advocate at all.[19] If a parent fails to assert her fundamental right to her children in those proceedings or is unable to do so because of a finding of unfitness, family integrity may never be considered—even though the implications for the child can be devastating. The Supreme Court has noted that "[d]irecting the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."[20] Yet the Court has not given this observation legal force by overtly recognizing a child's right to family integrity or clarifying its parameters.

The immigration, criminal, and family regulation systems separate thousands of families every day.[21] While these systems went unchallenged for decades, perspectives on them are shifting. Today, many call for the abolition of these systems altogether.[22] There is a movement to reduce mass incarceration, public outrage regarding immigration policy, and widespread recognition that the family regulation system regularly overreaches. In 2020, presidential candidates campaigned on these issues in an overt manner, the

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[14] Michael H. v. Gerald D., 491 U.S. 110, 130 (1989).

[15] *Id.* at 130–31.

[16] *See infra* Section I.D and accompanying text.

[17] *See infra* Section I.E and accompanying text.

[18] *See generally* Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399, 1401 (1996); Catherine J. Ross, From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation, 64 FORDHAM L. REV. 1571, 1615 (1996).

[19] *See e.g.*, Misyrlena Egkolfopoulou, *The Thousands of Children Who Go to Immigration Court Alone*, ATLANTIC (Aug. 21, 2018), https://www.theatlantic.com/politics/archive/2018/08/children-immigration-court/567490/, *archived at* https://perma.cc/Z3BX-J8SG.

[20] Plyler v. Doe, 457 U.S. 202, 220 (1982).

[21] *See, e.g.*, Shaila Dewan, *Family Separation: It's a Problem for U.S. Citizens, Too*, N.Y. TIMES (June 22, 2018), https://www.nytimes.com/2018/06/22/us/family-separation-americans-prison-jail.html, *archived at* https://perma.cc/B2BJ-H7B5.

[22] *See, e.g.*, Elaine Godfrey, *What 'Abolish ICE' Actually Means*, ATLANTIC (July 11, 2018), https://www.theatlantic.com/politics/archive/2018/07/what-abolish-ice-actually-means/564752/, *archived at* https://perma.cc/BG3V-598Z; Bill Keller, *What Do Abolitionists Really Want?*, MARSHALL PROJECT (June 13, 2019), https://www.themarshallproject.org/2019/06/13/what-do-abolitionists-really-want, *archived at* https://perma.cc/M7WY-V76L.

likes of which we had never seen before.[23] Scholars, activists, and politicians are devising creative reforms to effect change.[24]

This Article advocates that a key strategy for reforming these systems is to explicitly recognize and encourage the assertion of a child's independent constitutional right to family integrity. Wielding this right can save children and families who are devastated by the separation that these systems wreak.

To be clear, a constitutional right to family integrity will not prevent familial discord that tears families apart. It also may make no difference in cases where parents and children are at odds and their rights conflict. In such cases, a different standard would have to be applied.[25] As such, this Article does not examine the application of this right to private family law proceedings, only the many proceedings where the family's adversary is the state. And while recognizing a child's right to family integrity may not tip the scale toward family unity in every case of state intervention, in many instances it could be an extra weight in favor of preserving familial bonds. Acknowledging and strengthening this right would allow children's positions to be introduced into various proceedings to prevent destruction of their families.

Part I of the paper explores the historical, theoretical, international, and constitutional underpinnings of the child's right to family integrity and traces its development through Supreme Court and federal case law.[26]

Part II examines the current treatment of a child's right to constitutional integrity in the systems that separate children from their parents most frequently: the criminal, immigration, and family regulation systems. This Part highlights the problems that result from these legal systems' failures to recognize or correctly apply this right.[27] It explores how indigent families of

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[23] *See generally* Danielle Kurtzleben, *Immigration: Where 2020 Democratic Candidates Stand on Border Crossings and More*, NPR (Sept. 12, 2019), https://www.npr.org/2019/09/12/759442642/immigration-where-2020-democratic-candidates-stand-on-border-crossings-and-more, *archived at* https://perma.cc/U9FX-GG74; *2020 Candidates Views on Criminal Justice: A Voter's Guide*, POLITICO, https://www.politico.com/2020-election/candidates-views-on-the-issues/criminal-justice-reform/, *archived at* https://perma.cc/7E6B-ND5N (last updated Mar. 5, 2020); Julián Castro, *Children First Plan for Foster Care*, MEDIUM (Oct. 10, 2019), https://medium.com/castro2020/children-first-plan-for-foster-care-5ee30ae46987, *archived at* https://perma.cc/L5WJ-DA22.

[24] *See, e.g.*, THE MOVEMENT FOR BLACK LIVES, https://m4bl.org/defund-the-police; *Immigration Activists Call on President-Elect Biden to Enact Major Reforms After Helping Propel Him to Victory*, DEMOCRACY NOW (Dec. 16, 2020), https://www.democracynow.org/2020/12/16/headlines/immigration_activists_call_on_biden_to_enact_major_reforms_after_helping_propel_him_to_victory, *archived at* https://perma.cc/US3P-WMGM; Roberts, *supra* note 11.

[25] There are various standards that could be applied where rights are in conflict. For example, in custody cases where parents have equal constitutional rights, generally a "best interests" standard applies. The author takes no position on what standard is appropriate in a case of conflict between a parent and child as an analysis of what standard is appropriate is outside the scope of this Article and could likely be the topic of another article entirely.

[26] *See infra* Part I.

[27] *See infra* Part II.

color are particularly susceptible to state intervention and could therefore benefit most from the ability to wield a child's right to family integrity.

Part III provides recommendations for how advocates and legislators could better assert a child's constitutional right to her family in order to prevent state-sponsored family separation.[28] It then demonstrates how children's rights theories and international law support using a child's right to family integrity to prevent state-imposed family separation.

Part IV concludes.

I. Support for the Child's Right to Family Integrity

A. History and Theory Support a Child's Right to Family Integrity

How to conceptualize children's rights as a general matter has been an area of intense debate. This Article argues for recognition of the independent right to family integrity for children. The development of children's rights, through scholarship and activism during the second half of the twentieth century, demonstrates strong theoretical and normative support for a child's constitutional right to family integrity. Further, surveying the movement reveals how the traditional arguments against recognizing children's rights—which generally pit children's rights against their parents'—are inapplicable when analyzing a child's constitutional right to family integrity. Unlike with other rights and duties where there may be conflict, with this specific right, overt recognition of a child's right to protection of her family from state interference bolsters her parents' power rather than undermining it.

When one examines the historical development of children's rights, minors went from having no rights to speak of to an environment where advocates argue for the recognition of their independence and self-determination. In the early 1900s, the notion of "children's rights" was a laughable concept. Children were considered to be the property of their parents and therefore any rights that could possibly belong to a child really belonged to the parent.[29] And in reality, because women had so few legal rights themselves, children were the property of their fathers.[30] Children had no right to be protected from harm and their parents could require them to work in any type of environment.[31] Parents decided whether their children attended school or whether having their children in the workforce and contributing to the family income was more important.[32]

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[28] *See infra* Part III.

[29] Pamela Laufer-Ukeles, *The Case Against Separating the Care from the Caregiver: Reuniting Caregivers' Rights and Children's Rights*, 15 Nev. L.J. 236, 245 (2014).

[30] Barbara Bennett Woodhouse, *Children's Rights: The Destruction and Promise of Family*, 1993 BYU L. Rev. 497, 502 (1993).

[31] Martin Guggenheim, What's Wrong with Children's Rights 2 (2005).

[32] *Id.*

Over time, however, the law came to view children less as their parents' possessions and more as individuals who had their own particular needs and vulnerabilities that deserved greater protection.[33] In the Progressive Era, there was a shift in attitude to the notion that the state also shared the obligation to ensure that children were safe and their basic needs were met.[34] Reformers successfully championed laws to end child labor and instead make education a priority, even as opponents argued that such laws would infringe on parental rights.[35] By 1918, every state had compulsory education laws,[36] and, in 1941, the Supreme Court upheld the Fair Labor Standards Act, which implemented child labor standards.[37]

The modern children's rights movement came into being in the 1960s alongside the civil rights and feminist movements.[38] During this period, doctors were concerned about unexplained physical injuries on children that were presumably inflicted by their caregivers. They labeled this condition "battered child syndrome."[39] The thought of parents inflicting harm on their children allowed for the possibility that children had their own human rights, including a right to safety.[40] Additionally, the children's rights movement focused on securing greater autonomy for children and releasing them from state and parental control.[41]

Throughout history and into modern times, a paradox has run through the movement for children's rights. Under the umbrella of "children's rights," some argue that children are autonomous humans who need to be empowered, while others argue that children require heightened protection due to their vulnerability. In the words of Martha Minow, "it remained possible to argue that young people deserve the same treatment as adults" and also that "young people deserve special legal protections differing from the law of adults."[42]

Despite the range of theories, the position of academics on both sides of the debate support a right to family integrity for children. Those who call for greater independence for children—including generists who want recognition of children's ever-expanding capacity, empowerment rights theorists who aim to equalize power imbalances, and critics of the authorities framework who resent the subjugation of children's rights to their parents—can appreciate that children have the power to advocate for the protection of

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[33] Laufer-Ukeles, *supra* note 29, at 246.

[34] GUGGENHEIM, *supra* note 31, at 1–2.

[35] *Id.* at 2–3.

[36] Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 586–87 (1992).

[37] United States v. Darby, 312 U.S. 100, 125–26 (1941).

[38] GUGGENHEIM, *supra* note 31, at 5.

[39] *Id.* at 183.

[40] *Id.*

[41] *Id.* at 6.

[42] *Id.* at 13 (citing Martha Minow, *Whatever Happened to Children's Rights?*, 80 MINN. L. REV. 267, 287 (1995)).

their family units. On the other hand, those who argue that children are vulnerable due to their immaturity recognize that children first and foremost rely on their parents to meet their needs. Thus, despite seemingly conflicting perspectives, one can find support in these various schools of thought for asserting a child's constitutional right to family integrity.

Barbara Bennett Woodhouse, a leading champion of the generist perspective, believes that the differences between children and adults are "exaggerated and distorted" so that adults can discredit children's autonomy and independent needs.[43] While she acknowledges that children aren't born with autonomy but rather grow to be autonomous,[44] she cautions against repeating the mistakes of viewing women as "adorable but incompetent" with children by recognizing that children's capacity is increasing at every moment of their development.[45] According to Bennett Woodhouse, the generist perspective "recognizes that meeting the needs of children is the primary concern of family law . . . in which power over children is conferred by the community, with children's interests and their emerging capacities the foremost consideration."[46] As a result, the task before adults is to "ask the child question," i.e., "how have children's experiences and values been left out of the law?"[47] This question helps advocates determine whether the law truly recognizes and incorporates children's experiences and attempts to bring children to the forefront of legal decision-making by "listening to children's authentic voices, and employing child-centered practical reasoning."[48] The generist perspective supports recognizing a child's independent right to family integrity because it would allow children's perspectives to be introduced into proceedings that threaten to divide their families. Under this approach, clearly recognizing a child's right to family integrity would value children's autonomy and independence by giving them a voice in legal decisions that affect them and by allowing their experiences to become part of the decision-making process.

After evaluating the experiences of women and people of color in their struggles for expanded rights, Katherine Federle concluded that, in those contexts, rights "evolve[d] from paternalistic notions of the need to protect the weak and ignorant to recognition of capacity and autonomy."[49] Therefore, defining rights this way, in Federle's opinion, simply highlights children's weaknesses instead of giving them strength.[50] As a result of this approach, she believes children are oppressed and subordinated, likening the

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[43] Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1829 (1993).
[44] *Id.* at 1756.
[45] *Id.* at 1829.
[46] *Id.* at 1814–15.
[47] *Id.* at 1838.
[48] *Id.* at 1838–40.
[49] Katherine Hunt Federle, *Children, Curfews, and the Constitution*, 73 WASH. U. L.Q. 1315, 1316 (1995).
[50] *Id.* at 1325.

treatment of children to the historical treatment of enslaved people.[51] By contrast, Federle proposes that empowerment rights are the lens through which we should view children's rights. Empowerment rights "are concerned with . . . equalizing power" and "enable the powerless to make claims, to command the respect of other powerful beings, and to be treated nonpaternalistically."[52] Acknowledging a child's constitutional right to family integrity empowers children in exactly the way that Federle suggests: it equalizes children's power in their familial relationships and enables them to participate in meaningful ways in the systems that threaten their well-being. It recognizes that children are not passive members of their family; they too contribute to and receive from their families in different ways. Children would be empowered to communicate the many losses that would befall them, were they to be separated from their families.

Professors Anne E. Dailey and Laura A. Rosenbury recently advocated for "The New Law of the Child," arguing that the existing authorities framework, i.e., that parents are the primary legal decisionmakers for their children, is insufficient.[53] They believe that under the authorities framework, children are always viewed as dependents on either their parents or the state until they are determined to be legally capable, which fails to "acknowledge and promote the richness of children's lives in the here and now."[54] Further, the current framework prioritizes parents' rights over children's and perpetuates a myth of nonintervention into families.[55] Finally, they criticize the "persistent reliance by legal actors on limited conceptions of both dependency and autonomy."[56] Clarifying and recognizing a child's right to family integrity would allow children and parents to be on equal footing to assert their constitutional rights to their family—or to powerfully choose to *not* assert such a right. Explicit recognition of a child's right to family integrity allocates equivalent power to children when faced with government involvement in their familial relationships.

In contrast with these approaches, Minow suggests that the "conventional conception of rights as implying an autonomous person who needs freedom from interference seems ill-suited to meeting the needs of most children."[57] Minow argues that the correct framework is one based in human rights rather than children's or adults' rights. She believes that this approach allows us to acknowledge the differences between adults and children "to meet children's needs in reaching their full potential."[58] The child's indepen-

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[51] *See* GUGGENHEIM, *supra* note 31, at 8 (citing Federle, *supra* note 49, at 1344).

[52] Federle, *supra* note 49, at 1326.

[53] *See generally* Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448 (2018).

[54] *Id.* at 1467.

[55] *Id.*

[56] *Id.*

[57] Martha Minow, *Whatever Happened to Children's Rights?*, 80 MINN. L. REV. 267, 298 (1995).

[58] *Id.* at 295–96.

dent constitutional right to family integrity also fits neatly into Minow's framework, as in our society and under our laws the responsibility for meeting children's needs is delegated to their parents. Consequently, allowing children to assert their right to be raised by and amongst their families acknowledges that parents are in the best position to meet their children's needs. Conversely, if a child believes that her parents are *not* in the best position to meet her needs, then that perspective too can be made a part of the calculus.

From an international perspective, the United Nations Convention on the Rights of the Child ("CRC") was specifically designed to apply to children. Notably, the right to family integrity is embedded throughout the CRC.[59] The Preamble states that family is "the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children."[60] Article Five requires the states to respect the "responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom . . . to provide . . . appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."[61]

Articles Seven through Nine more explicitly recognize a child's right to family integrity. Article Seven allows children "as far as possible, the right to know and be cared for by his or her parents."[62] Article Eight establishes that states will "respect the right of the child to preserve his or her identity, including nationality, name and family relations."[63] Finally, Article Nine identifies the right of a child to remain with her parents, and demands "that a child shall not be separated from his or her parents against their will" and that states "shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."[64] The CRC therefore prioritizes a child's right to family integrity as a fundamental one.

Therefore, regardless of which perspective one has on children's rights, a compelling argument can be made that employing and extolling a child's right to family integrity in various legal systems furthers that movement's objectives. Recognizing a child's right to family integrity and allowing participation in legal proceedings affecting their parents would let children's voices be heard, allow their needs to be met, give children more power, and honor the fact that children are affected by state intervention into families.

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[59] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

[60] *Id.* pmbl.

[61] *Id.* art. 5.

[62] *Id.* art. 7.

[63] *Id.* art. 8.

[64] *Id.* art. 9.

The primary objection to expanded rights for children is that more rights for children necessarily requires fewer rights for parents. While parental rights "were not initially developed to oppose children's rights . . . this is how they are commonly positioned in modern times."[65] In his seminal book *What's Wrong with Children's Rights*, Professor Martin Guggenheim correctly notes that as children's rights developed, so too did parental privacy rights. He states that the environment in which the children's rights movement developed "fueled, and was fueled by, a nascent societal consensus that children were independent persons with rights of their own, even when enforcement of those rights came at the expense of their parents."[66] As a result, in many cases, expanding rights for children could lead to conflict with the rights of parents, and ultimately fewer rights for parents.

But this objection does not apply when the right in question is the constitutional right to family integrity asserted against a government entity that is trying to separate a family. In that context, the child's right to family integrity strengthens the rights of both children and parents. It acknowledges that "the situation of the child is both unique to being a child and, at the same time, inseparable from the situation of the adult."[67] Unlike other conceptions of children's rights, where more autonomy for children often comes at the expense of parental rights, when children assert their rights to family integrity, they strengthen parental rights.

B. Supreme Court Jurisprudence Demonstrates the Recognition of the Child's Right to Family Integrity

Although the Supreme Court has never explicitly found a child's independent right to family integrity, the right is supported by the Court's dicta, as well as a broader examination of its jurisprudence with respect to family integrity.

The right for a fit parent to raise her children free from unjustified state intervention was first acknowledged in 1923, in *Meyer v. Nebraska*.[68] In *Meyer*, the Supreme Court reversed the conviction of a teacher who taught German in contravention of a post-World War I Nebraska statute prohibiting foreign language education.[69] The Court held that the Fourteenth Amendment Due Process Clause protected (among other things) the right "to establish a home and bring up children" and, consequently, the plaintiff's "right . . . to teach and the right of parents to engage him so to instruct their children."[70] While the case was framed primarily in terms of parents' right to

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[65] Laufer-Ukeles, *supra* note 29, at 252.
[66] GUGGENHEIM, *supra* note 31, at 183.
[67] Maria Grahn-Farley, *A Child Perspective on the Juvenile Justice System*, 6 J. GENDER, RACE & JUST. 297, 299 (2002).
[68] 262 U.S. 390 (1923).
[69] *Id.* at 403.
[70] *Id.*

control their children's upbringing,[71] there are hints that the Court was also concerned with *children's right* to receive a diverse education. For example, the Court stated that "[i]t is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child."[72]

Two years later, the Supreme Court solidified a parent's right to raise her children in *Pierce v. Society of Sisters*.[73] Oregon parents who wanted their children to attend religious school successfully challenged a statute requiring public schooling.[74] Relying on *Meyer*, the Court held that the law interfered with "the liberty of parents and guardians to direct the upbringing and education of children."[75]

Then, in *Prince v. Massachusetts*,[76] the Court stated that "[i]t is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[77] Although the Court ultimately held that this right is not beyond regulation in the public interest, this language planted the seeds for the idea that the constitutional interest in the familial relationship is owed in part because a child, and therefore society, ultimately benefits from her relationship with her parents.

Fifty-six years later, in *Troxel v. Granville*,[78] the Court held that, since there is a "presumption that fit parents act in their children's best interests, there is normally no reason for the State to inject itself into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children."[79] The fundamental liberty interest in raising one's children without unjustified government interference is therefore well-established and reflects recognition that the child's best interests are furthered by such liberty interest.[80]

The Court's first clear application of the principle of family integrity with respect to children, rather than their parents, was in *Stanley v. Illinois*[81] when the Court invalidated a statute that placed children of unwed mothers into foster care upon their mothers' death, regardless of their fathers' fitness or the children's relationship with them.[82] The Court noted that the state "spites its own articulated goals" of protecting "the moral, emotional,

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[71] *Id.* at 400.
[72] *Id.* at 403.
[73] 268 U.S. 510 (1925).
[74] *Id.* at 534.
[75] *Id.*
[76] 321 U.S. 158 (1944).
[77] *Id.* at 166.
[78] 530 U.S. 57 (2000).
[79] *Id.* at 58.
[80] *See id.*
[81] 405 U.S. 645 (1972).
[82] *Id.* at 658.

mental, and physical welfare of the minor and the best interests of the community" when it separates a child from her fit parent.[83] In doing so, the Court recognized that "[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment."[84] Although the right to family integrity is not enumerated, the Court identified its foundations in many of the protections of the U.S. Constitution.

The Court continued to develop this doctrine in *Smith v. Organization of Foster Families for Equality and Reform*,[85] where foster parents sought to challenge the procedure by which children were removed from their foster care placements.[86] In analyzing the rights of foster parents versus biological parents, the Court reiterated the *Meyer-Pierce* line of cases discussed above stating that the right to conceive and raise one's children is "essential."[87] But in discussing the special liberty interest belonging to biological parents, *Smith* acknowledged the rights of the larger family in stressing the "importance of the familial relationship, to the individuals involved . . . stems from the emotional attachments that derive from the intimacy of daily association."[88] Though not overtly, the Court suggested here that this right was not simply limited to parents, but also extends to children.

In concurrence, however, Justice Stewart (joined by Justices Burger and Rehnquist) wrote that:

> [I]f a State were to attempt to force the breakup of a natural family, over the objections of the parents *and their children*, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on the private realm of family life which the state cannot enter.[89]

The very next term, Justice Stewart's position was unanimously adopted by the Court in *Quilloin v. Walcott*.[90] In *Quilloin*, a biological father who had never previously sought custody of his daughter challenged her stepfather's adoption of the child.[91] The Court found that in this specific situation—where the child was already part of an existing family unit with her mother—the state had not acted improperly by finding that the adoption was

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[83] *Id.* at 652–53.
[84] *Id.* at 651 (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring)) (internal citations omitted).
[85] 431 U.S. 816 (1977).
[86] *Id.* at 818–19.
[87] *Id.* at 843.
[88] *Id.* at 844.
[89] *Id.* at 862–63 (emphasis added).
[90] 434 U.S. 246, 255 (1978).
[91] *Id.*

in the child's best interests.[92] The Court noted in dicta, however, that it had "little doubt that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children."[93] Four years after the Court decided *Quilloin*, it had the opportunity to build on this language. In *Santosky v. Kramer*,[94] the Court went even further,[95] explaining that "until the State proves parental unfitness, *the child and his parents* share a vital interest in preventing erroneous termination of their natural relationship."[96]

Once *Stanley* was decided and reaffirmed in *Smith* and *Quilloin*, this line of cases seemed to lay bare a clear recognition that the Court found family integrity to be equal and mutual between parents and children. Thus, by 1982, Supreme Court doctrine on this subject seemed settled, leading one scholar to write that family integrity was "reciprocal, running both from the child to the parent and the parent to the child . . . suggest[ing] that either party could invoke the right, not just the parent."[97]

C. Michael H. *Muddies the Waters*

Notwithstanding these seemingly clear pronouncements of the child's right to family integrity, a few years later the Court unnecessarily confused the legal landscape. In *Michael H. v. Gerald D.*,[98] a birth father brought a paternity suit to establish that he was the legal father of a child born to a woman who was then married to another man and, accordingly, that he was entitled to visit with his daughter.[99] Importantly, the daughter also sought visitation with Michael H.[100] The mother's husband invoked his statutory right to be recognized as the child's sole father.[101] The Court ruled against the birth father because California law, which created a presumption that a child born to a marriage is the legal child of the married couple, precluded such a claim.[102] However, Justice Scalia's plurality opinion included a single sentence, in dicta, noting the Court "ha[s] never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship."[103] This sentence arguably muddied pre-

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[92] *See id.*

[93] *Id.* (citing *Smith*, 431 U.S. at 862–63 (Stewart, J., concurring in the judgment)).

[94] 455 U.S. 745 (1982).

[95] *See* Amy E. Halbrook, *Custody: Kids, Counsel and the Constitution*, 12 DUKE J. CONST. L. & PUB. POL'Y 179, 206 (2017).

[96] *Santosky*, 455 U.S. at 760 (emphasis added).

[97] Kevin B. Frankel, *The Fourteenth Amendment Due Process Right to Family Integrity Applied to Custody Cases Involving Extended Family Members*, 40 COLUM. J.L. & SOC. PROBS. 301, 319 (2007).

[98] 491 U.S. 110 (1989).

[99] *Id.* at 113–15.

[100] *Id.* at 114–15.

[101] *Id.* at 115.

[102] *Id.* at 124.

[103] *Id.* at 130.

viously clear waters, and threw into doubt a previously certain and well-developed right for children.

But a close reading of *Michael H.* demonstrates that the Court was not actually making a decision about the child's relationship with her parent. Since California law presumed that the child's legal father was her mother's husband, Michael was a legal stranger and had no parental claim whatsoever.[104] "The Supreme Court thus did not foreclose the possibility that a child had a constitutional right to a relationship with her actual parent; rather, the Court concluded that no parent-child relationship existed in that particular case."[105] Here, consistent with the established right to family integrity, the Court felt there was no need to rule on the issue, given that the child already had a father and had no right to maintain a relationship with multiple fathers.[106]

Further, Justice Scalia's view that the Court has never clearly decided whether a child has a "right symmetrical with that of her parent" has not been endorsed by a majority of the Court.[107]

In a notable dissent in *Troxel v. Granville*, Justice Stevens seemed to address this enigmatic part of *Michael H.*:

> While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.[108]

In a different and more recent context, in *Obergefell v. Hodges*,[109] which legalized same-sex marriage, the Court adopted Justice Stevens' position when addressing the positive effects of marriage on children.[110] The Court noted that "marriage offers recognition, stability, and predictability to

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[104] *Id.*

[105] Susan Hazeldean, *Anchoring More Than Babies: Children's Rights After* Obergefell v. Hodges, 38 CARDOZO L. REV. 1397, 1411 (2017).

[106] *Michael H.*, 491 U.S. at 131 ("Under California law, Victoria is not illegitimate, and she is treated in the same manner as all other legitimate children: she is entitled to maintain a filial relationship with her legal parents.").

[107] The plurality opinion in this case was written by Justice Scalia and joined fully only by Chief Justice Rehnquist. Justices O'Connor and Kennedy joined in all but one footnote of the opinion that analyzed societal traditions at the "most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." *Id.* at 127 n.6. O'Connor took issue with such a characterization, noting that it might be inconsistent with precedent that characterized relevant traditions protecting asserted rights at levels of generality that might not be "the most specific level." *Id.* at 132 (O'Connor, J., concurring) (citing Loving v. Virginia, 388 U.S. 1, 12 (1967); Turner v. Safley, 482 U.S. 78, 94 (1987); *cf.* United States v. Stanley, 483 U.S. 669, 709 (1987)).

[108] Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting).

[109] 576 U.S. 644 (2015).

[110] *See* Hazeldean, *supra* note 105, at 1415.

families, and when LGBT people are excluded, their children suffer the stigma of knowing their families are somehow lesser."[111] The Court stressed that if LGBT couples were not permitted to marry, their children would be "relegated through no fault of their own to a more difficult and uncertain family life."[112] As Susan Hazeldean argues, *Obergefell* implies that "a child's most important right is to live with her parents in families that are legally protected and secure."[113] That is, children have a right to family integrity.

D. Other Federal Law Recognizes the Child's Right to Family Integrity

Despite the confusion the Court caused in *Michael H.*, at this time the Second,[114] Fourth,[115] Fifth,[116] Seventh,[117] Ninth,[118] and Tenth[119] Circuits agree with Justice Stevens and have recognized that a child possesses an independent right to family integrity. The First, Third, and Eighth Circuits are silent on the issue. And while the Sixth and Eleventh Circuits are also silent, district courts in those circuits have recognized the right.[120] No federal court of appeals has explicitly held that this right does *not* exist. Arguably, then, the

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[111] *Obergefell*, 576 U.S. at 668 (internal quotations omitted).

[112] *Id.*

[113] Hazeldean, *supra* note 105, at 1407.

[114] Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977).

[115] Jordan *ex rel.* Jordan v. Jackson, 15 F.3d 333, 346 (4th Cir. 1994) (noting that delay in reunification of a family by child welfare actors "implicates the child's interests in his family's integrity and in the nurture and companionship of his parents").

[116] Wooley v. City of Baton Rouge, 211 F.3d 913, 923 (5th Cir. 2000).

[117] Berman v. Young, 291 F.3d 976, 983 (7th Cir. 2002), *as amended on denial of reh'g* (June 26, 2002) (stating that "[p]arents have a fundamental due process right to care for and raise their children, and children enjoy the corresponding familial right to be raised and nurtured by their parents"); Brokaw v. Mercer Cnty., 235 F.3d 1000, 1018 (7th Cir. 2000) (same).

[118] Smith v. City of Fontana, 818 F.2d 1411, 1418 (9th Cir. 1987), *overruled on other grounds by* Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999) (en banc) ("[The] constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents. The companionship and nurturing interests of parent and child in maintaining a tight familial bond are reciprocal, and we see no reason to accord less constitutional value to the child-parent relationship than we accord to the parent-child relationship.").

[119] J.B. v. Washington Cnty., 127 F.3d 919, 925 (10th Cir. 1997) (internal quotations omitted); *see also* de Robles v. Immigr. & Naturalization Serv., 485 F.2d 100, 102 (10th Cir. 1973) (acknowledging that a child has a right to family integrity but rejecting the argument that deportation violates that right).

[120] *See, e.g.*, Kovacic v. Cuyahoga Cnty. Dep't of Child. & Fam. Servs., 809 F. Supp. 2d 754, 776 (N.D. Ohio 2011), *aff'd and remanded*, 724 F.3d 687 (6th Cir. 2013) ("The Court finds, therefore, that the Kovacic children have met their burden of demonstrating a constitutionally protected interest in their family integrity."); Kenny A. *ex rel.* Winn v. Perdue, 218 F.R.D. 277, 297 (N.D. Ga. 2003) ("Similarly, this Court finds that once the state has removed a child from his or her family, it cannot deliberately and without justification deny that child the services necessary to facilitate reunification with his or her family, when safe and appropriate, without violating the child's right to family integrity."). *But see* LeFever v. Ferguson, 2013 WL 1324299 (S.D. Ohio Mar. 28, 2013) ("Based upon the briefs of the parties and the Court's own research, it does not appear that the Sixth Circuit has recognized a § 1983 claim based upon a minor child's Fourteenth Amendment right to family integrity, at least in the manner

majority rule in the United States is that children may invoke a due process right to family integrity to prevent the destruction of their families.

Even before *Michael H.* was decided, when adjudicating cases where the state removed children from their parents, several circuit courts explicitly stated that children have an independent right to family integrity, relying on *Stanley v. Illinois*[121] and *Smith v. Organization of Foster Families for Equality and Reform.*[122] In the first of these cases, *Duchesne v. Sugarman*,[123] a mother filed a civil rights lawsuit under § 1983 seeking damages against the family regulation administration who removed her children without her consent, a hearing, or a court order.[124] In finding that there was a constitutional violation, the Second Circuit stated:

> This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest of the parent in the companionship, care, custody and management of his or her children and of the children in not being dislocated from the emotional attachments that derive from the intimacy of daily association, with the parent.[125]

In a similar case, where parents brought a § 1983 action against children's services workers for removing their children without a court order, the Fifth Circuit cited *Duchesne* for the basic proposition that the right to family integrity exists.[126] It noted that "the right of the family to remain together without the coercive interference of the awesome power of the state" is the "most essential and basic aspect of familial privacy."[127] In 2000, the Fifth Circuit, again relying on *Duchesne*, more clearly stated in a custody case that "a child's right to family integrity is concomitant to that of a parent."[128] And even after *Michael H.*, the Second Circuit has repeatedly reiterated this finding that "children have a parallel constitutionally protected liberty interest in not being dislocated from the emotional attachments that derive from the intimacy of daily family association."[129]

In another § 1983 case seeking damages against a family regulation agency for an alleged unconstitutional removal, the Seventh Circuit unequivocally stated that just as "[p]arents have a fundamental due process right to

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that Alex would have this Court recognize it (i.e., a constitutional right to be raised by his natural mother).").

[121] 405 U.S. 645, 652 (1972).

[122] 431 U.S. 816, 840–41 (1977) (quoting Bd. of Regents v. Roth, 408 U.S. 564, 570–71 (1972)).

[123] 566 F.2d 817 (2d Cir. 1977).

[124] *Id.* at 825.

[125] *Id.* (internal quotations omitted).

[126] Hodorowski v. Ray, 844 F.2d 1210, 1216 (5th Cir. 1988) (quoting *Duchesne*, 566 F.2d at 825).

[127] *Id.* (internal quotations omitted).

[128] Wooley v. City of Baton Rouge, 211 F.3d 913, 923 (5th Cir. 2000).

[129] Southerland v. City of New York, 680 F.3d 127, 142 (2d Cir. 2011), *as amended* (May 14, 2012) (quoting Kia P. v. McIntyre, 235 F.3d 749, 759 (2d Cir. 2000)).

care for and raise their children, . . . children enjoy the corresponding familial right to be raised and nurtured by their parents."[130]

In the Fourth Circuit, in another case where the state unlawfully removed children from their parents for several days without judicial review, the court noted that procedural "delay implicates the child's interest in his family's integrity and in the nurture and companionship of his parents."[131] Relying on this language in another constitutional challenge to a child's removal, the Tenth Circuit stated that "[t]he forced separation of parent from child, even for a short time, represents a serious impingement upon both the parents' and child's rights."[132]

Accordingly, relying on Supreme Court dicta—and despite *Michael H.*—the majority of federal courts of appeals have determined that a child has a constitutional right to family integrity.

E. International Law Provides Additional Support for a Child's Right to Family Integrity

International law supports recognition and invocation of the child's right to family integrity. As a general methodology, when determining whether a right exists, "the [Supreme] Court has expanded its general substantive due process analysis by looking not only at whether the right is rooted in the nation's history and tradition, but by considering whether the right sought has been accepted as an integral part of human freedom in many other countries."[133] Thus, international law may be used to advocate for greater participation in these proceedings and larger recognition of the child's right to family integrity.

The international perspective on children's rights is best summarized by the CRC, given that every country in the world has ratified it other than the United States.[134] Though the United States has not ratified the CRC, it has signed it, which creates an obligation to avoid actions that would defeat the larger goals of the Convention.[135] The CRC treats children as "agents who

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[130] Berman v. Young, 291 F.3d 976, 983 (7th Cir. 2002), *as amended on denial of reh'g* (June 26, 2002); Brokaw v. Mercer Cnty., 235 F.3d 1000, 1018 (2000).

[131] Jordan *ex rel.* Jordan v. Jackson, 15 F.3d 333, 346 (4th Cir. 1994).

[132] J.B. v. Washington Cnty., 127 F.3d 919, 925 (10th Cir. 1997) (internal quotations omitted).

[133] Alison M. Osterberg, *Removing the Dead Hand on the Future: Recognizing Citizen Children's Rights Against Parental Deportation*, 13 LEWIS & CLARK L. REV. 751, 769 (2009) (internal quotations omitted). *But see* Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) ("The Court's discussion of these foreign views . . . is therefore meaningless dicta. Dangerous dicta, however, since this Court . . . should not impose foreign moods, fads, or fashions on Americans.") (internal quotations omitted).

[134] Sarah Mehta, *There's Only One Country that Hasn't Ratified the Convention on Children's Rights: US*, ACLU (Nov. 20, 2015), https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens, *archived at* https://perma.cc/6TCB-ULPU.

[135] Grahn-Farley, *supra* note 67, at 299–300.

share the power to shape their own lives" and fully and actively participate in society.[136] Article Twelve of the CRC gives children the right to express their views freely in any matter that affects them and the right to participate in any legal proceeding that affects them.[137] Further, under the same Article, children have a right to necessary information for them to determine what those views are, and also the right to withhold their views if they so choose.[138] A child's wishes are one factor to be considered when making decisions regarding that child.[139]

In South Africa, criminal courts must consider the effect of sentencing a parent on that parent's child, including the child's best interest and how the child will be taken care of.[140] Similarly, Article Eight of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedom includes a right to protection from interference "by a public authority with the exercise of" the right to private and family life.[141] When discussing sentencing for parents, the Court of Appeal Civil Division in England interpreted Article Eight to mean that children also have the right to family life, a right that is affected by the sentencing of their parents.[142] Further, as noted, Article Twelve of the CRC allows children the opportunity to be heard in situations that affect them.[143]

The African Charter on the Rights and Welfare of the Child ("AFCRWC") expressly addresses children of incarcerated mothers. The AFCRWC states that the law must "provide special treatment to expectant mothers and to mothers of infants and young children" and requires that "a non-custodial sentence will always be first considered when sentencing such mothers."[144] Further, it must "establish and promote measures alternative to institutional confinement for the treatment of such mothers," and prohibits the death penalty for mothers.[145]

Finally, the International Convention on the Elimination of All Forms of Racial Discrimination, to which the United States is a party, requires mea-

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[136] Soo Jee Lee, Note, *A Child's Voice vs. A Parent's Control: Resolving A Tension Between the Convention on the Rights of the Child and U.S. Law*, 117 COLUM. L. REV. 687, 692–93 (2017) (quoting Lotem Perry-Hazan, *Freedom of Speech in Schools and the Right to Participation: When the First Amendment Encounters the Convention on the Rights of the Child*, 2015 BYU EDUC. & L.J. 421, 422 (2015)).

[137] CRC, *supra* note 59, art. 12; *see* Lee, *supra* note 136, at 693–94.

[138] CRC, *supra* note 59, art. 12; *see* Lee, *supra* note 136, at 694.

[139] Lee, *supra* note 136, at 695.

[140] *M v. The State Ctr. for Child L.* 2008 (3) SA 232 (CC) at 245 para. 32 (S. Afr.).

[141] Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Sept. 3, 1953, E.T.S. No. 005; *see* Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77, 88 (2011).

[142] Boudin, *supra* note 141, at 89 (citing R v. Sec'y of State [2001] EWCA (Civ) 1151 [83] (Eng.)).

[143] CRC, *supra* note 59, art. 12; *see* Grahn-Farley, *supra* note 67, at 330.

[144] Boudin, *supra* note 141, at 86.

[145] *Id.*

sures to eradicate state-sponsored racial bias.[146] In ratifying this convention, the U.N. Committee noted that "[t]he majority of federal, state and local prison and jail inmates in the United States are members of ethnic or national minorities, and that the incarceration rate is particularly high with regard to African-Americans and Hispanics."[147] The same is true of children in foster care.[148] The Committee also noted that the Convention requires member countries "to prohibit and to eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect."[149] If the child's constitutional right to family integrity is recognized in legal systems, it would be a pathway to reducing the disparate impact of these systems on children of color.

Legal precedent, children's rights theories, and international conventions demonstrate that the right to family integrity is an individual right that belongs to all members of the family[150] and that children have the right to be "raised[,] nurtured, and sheltered by their parents and [possess the] legal status and standing to assert constitutional, tort and other claims against the state for all wrongs that are caused by separation from parental care."[151]

Asserting this right as described could lend legal support to the millions of families facing destruction of their family units due to state involvement. Strengthening the right to family integrity "will combine the rights of parents and children, and it will ensure that a family will be free from unjustified interference by the State."[152]

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[146] Grahn-Farley, *supra* note 67, at 326.

[147] *Id.* at 327.

[148] Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. Rev. L. & Soc. Change 523, 534–41 (2019).

[149] Grahn-Farley, *supra* note 67, at 326 n.165.

[150] *See, e.g.*, Joan C. Bohl, *Family Autonomy vs. Grandparent Visitation: How Precedent Fell Prey to Sentiment in* Herndon v. Tuhey, 62 Mo. L. Rev. 755, 764 (1997) ("The resulting conception of the family is of a self-contained unit, independent of state control and so wholly reciprocal that parents and children 'may maintain the suits of each other, and justify the defense of each other's person.'"); Pamela McAvay, *Families, Child Removal Hearings, and Due Process: A Look at Connecticut's Law*, 19 QLR 125, 137 (2000) ("Besides the interest in family integrity that children reciprocally share with their parents . . . children have a protected interest in remaining with their parents."); Jacinta Patterson, *The Massachusetts Care and Protection System: Is A Low Tolerance for Risk Really in the Best Interest of Children?*, 22 B.U. Pub. Int. L.J. 165, 167 (2013) ("[T]he state's overuse of the foster care system coupled with its lack of oversight has resulted in the systematic violation of children's constitutional rights to safety and family integrity"); Orly Rachmilovitz, *Achieving Due Process Through Comprehensive Care for Mentally Disabled Parents: A Less Restrictive Alternative to Family Separation*, 12 U. Pa. J. Const. L. 785, 814 (2010) ("This ruling is highly under-protective of both parents' rights to the custody of their children and their interest in receiving mental health services, as well as children's right to family integrity.").

[151] Lawrence G. Albrecht, *Human Rights Paradigms for Remedying Governmental Child Abuse*, 40 Washburn L.J. 447, 448 (2001).

[152] John C. Duncan, Jr., *The Ultimate Best Interest of the Child Enures from Parental Reinforcement: The Journey to Family Integrity*, 83 Neb. L. Rev. 1240, 1287 (2005).

II. The Child's Right to Family Integrity in the Family Regulation, Criminal, and Immigration Systems

As established above, while the Supreme Court has not ruled on the specific issue of whether a child has an independent right to family integrity, dicta in multiple cases supports the argument that such a right should be recognized.[153] Relying on this dicta, many courts of appeals have accordingly ruled that children have an independent right to their families because their interest in remaining with their families is equal to their parents' interest. If this right were recognized as fundamental, the state would be required to have a compelling interest and use narrowly tailored means when it seeks to intervene in a family in a way that infringes upon it.[154]

This section analyzes how courts currently treat (or fail to treat) a child's right to family integrity in the legal systems that are primarily responsible for state disruption of the family unit—the family regulation, immigration, and criminal legal systems—and describes the disparate impact these systems have on marginalized communities. In so doing, it demonstrates that, while the state interests may be compelling in some of these cases, the means are not always narrowly tailored. This is due to the unnecessary harm that family separation inflicts on children. Asserting a child's right to family integrity in these proceedings reminds the court that there are multiple constitutional rights at issue and may therefore prevent the infliction of unnecessary harm.

A. Family Regulation

Family regulation law is perhaps the most fertile ground to explore the right to family integrity. Nowhere else in the law is there such a direct battle between the right of a parent to direct the care, custody, and control of her child[155] and the state's role as *parens patriae*.[156] The asserted justification for such an adversarial posture is the safety and well-being of the child. This section will interrogate that assumption.

In *Stanley v. Illinois*, the Supreme Court held that the state cannot presume parental unfitness—it must prove it.[157] The Supreme Court has also articulated a presumption that fit parents act in the best interest of their children.[158] Further, the Court has made clear that, until and unless there is a finding of unfitness, parents and children both share an interest in preserving

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[153] Michael H. v. Gerald D., 491 U.S. 110, 130–31 (1989).

[154] *See* Natalie Lakosil, *The* Flores *Settlement: Ripping Families Apart Under the Law*, 48 Golden Gate U. L. Rev. 31, 48–49 (2018).

[155] *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972).

[156] Jeanne M. Kaiser, *Finding a Reasonable Way to Enforce the Reasonable Efforts Requirement in Child Protection Cases*, 7 Rutgers J.L. & Pub. Pol'y 100, 106–07 (2009).

[157] *Stanley*, 405 U.S. at 658.

[158] Troxel v. Granville, 530 U.S. 57, 68–69 (2000) (citing Parham v. J.R., 442 U.S. 584, 602 (1979)).

their familial relationship.[159] Consequently, prior to any unfitness finding, all family members hold the right to family integrity and can assert it.[160] However, once a parent has been adjudicated unfit, "the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge."[161] At this point, parents no longer hold the power to assert their rights to care, custody, and control of their children or their right to family integrity. In many cases, after a finding of unfitness, the parents' rights to their children will be terminated permanently and, in most cases, irreversibly.

Under the Adoption and Safe Families Act ("ASFA"), if a child has been in foster care for fifteen out of the preceding twenty-two months, the state must begin the process of terminating her parent's rights.[162] This is true regardless of the relevance of the required services (such as parenting classes in a case involving allegations of domestic violence) to the allegations against the parent[163] or the parents' actual ability to fulfill the conditions that the state has placed on her in order to reunite with her children.[164] As a result, there are over 400,000 children in foster care,[165] 124,000 of whom are awaiting adoption.[166] Over half of the children who are awaiting adoption are legal orphans,[167] meaning that their parents' rights to them have been terminated, yet they have no prospects for adoption.[168] Therefore, many children have not only lost their family of origin, they have also lost family altogether.

This is true despite the fact that these family regulation proceedings are one of the only civil matters where children are generally provided with advocates.[169] However, as Martin Guggenheim has pointed out, the right to

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[159] Santosky v. Kramer, 455 U.S. 745, 760 (1982).

[160] *See, e.g.*, *Troxel*, 530 U.S. at 68–69.

[161] *Santosky*, 455 U.S. at 760 (emphasis in original).

[162] LaShanda Taylor Adams, *Backward Progress Toward Reinstating Parental Rights*, 41 N.Y.U. Rev. L. & Soc. Change 507, 512 (2017).

[163] *See* Esme Noelle DeVault, *Reasonable Efforts Not So Reasonable: The Termination of the Parental Rights of A Developmentally Disabled Mother*, 10 Roger Williams U. L. Rev. 763, 775 (2005).

[164] *See, e.g.*, *id.* at 787 (noting that services are not tailored for parents with disabilities); Stephanie Sherry, *When Jail Fails: Amending the ASFA to Reduce Its Negative Impact on Children of Incarcerated Parents*, 48 Fam. Ct. Rev. 380, 385 (2010) ("Incarceration makes it difficult to complete the case plan created to help families reunify since they cannot participate in many of the services required.").

[165] *Foster Care*, Child.'s Rts., https://www.childrensrights.org/newsroom/fact-sheets/foster-care/, *archived at* https://perma.cc/KW5T-QMWL.

[166] Exec. Order No. 13,930, 85 Fed. Reg. 38,741 (June 24, 2020).

[167] *Id.*

[168] *See* Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 Fam. L.Q. 121, 137 (1995).

[169] Amy Mulzer & Tara Urs, *However Kindly Intentioned: Structural Racism and Volunteer CASA Programs*, 20 CUNY L. Rev. 23, 35–36 (2016).

be represented does not mean the right to be heard.[170] Further, it "does not mean that all children are actually represented by counsel in these proceedings, nor does it mean that when counsel are appointed that they are well trained, adequately compensated, or highly motivated"[171] in all cases, although many are dedicated and highly-skilled. As Guggenheim,[172] Jean Koh Peters,[173] and others[174] have argued, children should direct their representation, and their lawyers should advocate the child's position in court unless those children are non-verbal or incompetent due to disability.

In family regulation proceedings, most children want to stay connected to their parents, even parents who have perhaps transgressed.[175] If a child expresses a desire to maintain her family integrity, children's advocates have a responsibility to raise this constitutional argument—particularly at the stage of family regulation proceedings where parents have been adjudicated unfit and the family is on a path to permanent destruction. Such an approach would be constitutionally sound, allowing consideration of more narrowly tailored means to achieve safety of the child.

B. Immigration

Nowhere has the importance of family integrity been more visible recently than in immigration law due to the ongoing family separation crisis.[176] Immigration and Customs Enforcement ("ICE") has separated over 5,500

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[170] *See generally* Martin Guggenheim, *The Right to Be Represented but not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. Rev. 76 (1984).

[171] David R. Katner, *Coming to Praise, Not to Bury, the New ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 14 Geo. J. Legal Ethics 103, 105–06 (2000).

[172] Guggenheim, *supra* note 170, at 78.

[173] Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 Fordham L. Rev. 1505, 1508 (1996) ("[T]he advocacy default—the lawyer should initially attempt to advocate for the position expressed by his client. The lawyer may deviate from these default positions only when independent evidence, that is, evidence not arising exclusively within the lawyer-client relationship, such as psychological, educational, and psychiatric evaluations, demonstrate that the default position is erroneous . . . .").

[174] *See, e.g.*, Bruce A. Green & Bernardine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 Fordham L. Rev. 1281, 1295 (1996) ("If the child can direct the representation, however, the lawyer has the same ethical obligations as the lawyer would have when representing an adult.").

[175] *See* Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 Stan. L. Rev. 623, 639–40 (1976).

[176] *See* Miriam Jordan & Caitlin Dickerson, *U.S. Continues to Separate Migrant Families Despite Rollback of Policy*, N.Y. Times (Mar. 9, 2019), https://www.nytimes.com/2019/03/09/us/migrant-family-separations-border.html, *archived at* https://perma.cc/QWL2-6LXR; Priscilla Alvarez, *ACLU Says over 900 Children Separated from Families at US Border Since Last Summer*, CNN (July 30, 2019), https://www.cnn.com/2019/07/30/politics/900-children-separated-border/index.html, *archived at* https://perma.cc/AW8C-A4XQ; *see also* Nathaniel Weixel, *Government Watchdog Details Severe Trauma Suffered by Separated Children*, Hill (Sept. 4, 2019), https://thehill.com/policy/healthcare/459899-government-watchdog-details-severe-trauma-suffered-by-separated-children, *archived at* https://perma.cc/MP5D-72BJ.

children from their families at the United States-Mexico border since the spring of 2018.[177] Over 1,000 of these children were under the age of ten at the time of separation.[178]

"Protecting children and their interests is not a priority of immigration law,"[179] nor does the immigration system aspire to protect the integrity of families.[180] Due process guarantees, however, apply to all persons on U.S. soil, regardless of their immigration status.[181] Therefore, both those who have legal status and those who do not can and should invoke fundamental rights like the right to family integrity.[182] Despite the state's compelling interest in enforcing immigration laws, the state's means must be narrowly tailored to achieve that end.

Importantly, under immigration law, the only relationship that is generally recognized for purposes of trying to obtain legal status is the parent-child relationship, not the child-parent one. That is, a parent with legal status may be able to confer legal status on her child, but the child does not have a similar ability to create legal status for her parent.[183] This is because the system's goal is to "assimilate children's status to that of their parents, not the other way around."[184] In this way, children's rights are extremely limited, and this has major effects on their ability to maintain their family units if they want to do so on U.S. soil.

In a high-profile case challenging the Trump administration's zero-tolerance family separation policy, the ACLU's complaint stated that "[p]laintiffs, their children, and all class members have liberty interests under the Due Process Clause in remaining together as families."[185] The plaintiffs framed the issue as a right to family integrity that belonged to both parents and children. In its decision analyzing the substantive due process interest, however, the district court only framed the right as belonging to the parents.[186] The court cited *Troxel v. Granville* for the proposition that a par-

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[177] *See* John Washington, *Family Separations at the Border Constitute Torture, New Report Claims*, INTERCEPT (Feb. 25, 2020), https://theintercept.com/2020/02/25/family-separations-border-torture-report/, *archived at* https://perma.cc/4PM6-EABJ.

[178] *Family Separation: By the Numbers*, ACLU (Oct. 2, 2018), https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/family-separation, *archived at* https://perma.cc/ZZ2A-AW78.

[179] David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1180 (2006).

[180] *See* Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward A Functional Definition of Family That Protects Children's Fundamental Human Rights*, 41 COLUM. HUM. RTS. L. REV. 509, 509 (2010).

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

[182] *Id.*

[183] Thronson, *supra* note 179, at 1181.

[184] *Id.* at 1182.

[185] Third Amended Complaint for Declaratory & Injunctive Relief at 14, Ms. L. v. U.S. Immigr. & Customs Enf't, 302 F. Supp. 3d 1149 (S.D. Cal. 2018) (No. 18-cv-00428-DMS-MDD).

[186] *See Ms. L.*, 302 F. Supp. 3d at 1161–65.

ent's right to care, custody, and control of her children was a well-established fundamental liberty interest and did not analyze a right to family integrity belonging to the children.[187]

The court stated that the inquiry was: "(1) whether the substantive due process right to family integrity applies not to Plaintiffs, generally, but in the particular circumstances alleged; and (2) if so, whether the conduct attributed to the Government violates that right."[188] In finding that the right to family integrity applied to the facts at issue, the court noted that the plaintiffs asserted that they were separated from their children without any finding that they were unfit or unable to safely care for their children.[189] Thus, the court found that the right to family integrity limited the enforcement of immigration laws in this case because parents were separated from their children, and not necessarily the other way around.[190] Although the plaintiffs posed the right to family integrity as one belonging to all members of the family, the court's constitutional analysis was based exclusively on the parents' rights. Many subsequent decisions followed suit, conducting constitutional analysis based solely on parental rights, rather than children's rights.[191]

In the First Circuit case of *Payne-Barahona v. Gonzáles*,[192] the court stated that "deportations of parents are routine and do not of themselves dictate family separation," in part because children could be relocated to live with their families in their home countries.[193] In *Payne-Barahona*, the court surveyed other circuits that confronted this issue, finding that all uniformly held that deportation did not violate any constitutional rights belonging to children.[194] Some of these decisions did not explicitly refer to the right to family integrity, but all referred to constitutional rights.[195] But at least one

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[187] *Id.* at 1161.

[188] *Id.*

[189] *Id.* at 1165.

[190] *See id.*

[191] *See, e.g.*, M.G.U. v. Nielsen, 325 F. Supp. 3d 111, 120 (D.D.C. 2018) ("There is no question that defendants have directly and substantially burdened Ms. E.F.'s [parental] right to family integrity."); Jacinto-Castanon de Nolasco v. U.S. Immigr. & Customs Enf't, 319 F. Supp. 3d 491, 501 (D.D.C. 2018) ("The separation imposed by defendants absolutely precludes Ms. Jacinto-Castanon's involvement in any aspect of her sons' care, custody, and control, from religion to education. And the forced separation prevents her from expressing love for, and comfort to, her sons—comfort that they surely need as they endure the bewildering experience of detention.").

[192] 474 F.3d 1 (1st Cir. 2007).

[193] *Id.* at 2–3.

[194] *Id.* at 2–4.

[195] *See, e.g.*, Gallanosa *ex rel.* Gallanosa v. United States, 785 F.2d 116, 120 (4th Cir. 1986) ("We agree with the reasoning of these courts and, accordingly, conclude that the Gallanosas' deportation could violate no constitutional rights enjoyed by Kathryn by virtue of her United States citizenship."); Cortez-Flores v. Immigr. & Naturalization Serv., 500 F.2d 178, 180 (5th Cir. 1974) ("[D]eportation of a parent does not deprive the child of any constitutional rights."); Gonzalez-Cuevas v. Immigr. & Naturalization Serv., 515 F.2d 1222, 1224 (5th Cir. 1975) ("Legal orders of deportation to their parents do not violate any constitutional right of citizen children.").

rejected the explicit argument that deportation violated a child's right to family integrity.[196]

In another case, the Fifth Circuit rejected the argument that deportation could trigger a violation of a child's constitutional rights, explaining that those who "illegally remained in the United States for the occasion of the birth of their citizen children, cannot thus gain favored status over those aliens who comply with the immigration laws of this nation. Any ruling which had this effect would stand those statutes on their heads."[197]

Further, in a challenge to the law preventing those under twenty-one from giving immigration privileges to their parents under the Immigration and Nationality Act, the Fifth Circuit reasoned that children are not in a position to determine the location of their family home, as Congress recognized by limiting the ability to confer immigration benefits to those over the age of twenty-one.[198] Under current law, therefore, minors have no right to sponsor their parents for legal immigration.[199] And although unaccompanied minors might be able to petition for legal status for themselves, if they are able to obtain it, it is unlikely that they would then be able to petition for their families to join them in the United States.[200]

Even in the few cases where a court found a constitutional right to family integrity for children, this right was deemed insufficient to prevent negative immigration consequences. For example, the Northern District of California stated that "[i]t is well-settled that children have a liberty interest in living with their parents."[201] That court cited a Ninth Circuit decision that found that the right to live with one's family is "a right that ranks high among the interests of the individual and that cannot be taken away without procedural due process."[202] Yet the court found no support for the notion that this interest could overcome legitimate immigration enforcement measures that resulted in a family member's removal from the United States.[203]

Based on the rationale that, as a minor, a child cannot make decisions on behalf of her family, immigration law gives children fewer rights than their parents. This approach suggests that, under immigration law related to deportation, children's opinions should not be a consideration in determining where to live—even in cases where the children were born in the United States. As discussed, international conventions like the CRC require that

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[196] de Robles v. Immigr. & Naturalization Serv., 485 F.2d 100, 102 (10th Cir. 1973).

[197] *Gonzalez-Cuevas*, 515 F.2d at 1224. This is a direct quote. The author does not endorse the use of the term "alien" to describe those without legal immigration status unless necessary because it reflects language from a statute, opinion, or other authority.

[198] Perdido v. Immigr. & Naturalization Serv., 420 F.2d 1179, 1181 (5th Cir. 1969).

[199] *See* Thronson, *supra* note 179, at 1185.

[200] *Id.* at 1187.

[201] Ramos v. Nielsen, 321 F. Supp. 3d 1083, 1117 (N.D. Cal. 2018).

[202] *Id.* at 1117–18 (quoting Ching v. Mayorkas, 725 F.3d 1149, 1157 (9th Cir. 2013)).

[203] *See id.* at 1118.

children have the right to participate and be heard in legal proceedings that affect them.[204] The U.S. approach to immigration must therefore be wrong.

C. Criminal Law

In the criminal setting, the right to family integrity often clashes with the state's police powers. As we can see from the millions of families separated by incarceration, the state usually wins.[205]

Approximately five million children living today—7% of the American child population—have had a parent incarcerated in state or federal prison.[206] So many children in the United States have incarcerated caregivers that Sesame Street created content to help children deal with the consequences.[207] And unlike in the family regulation system, where courts still have a mandate to maintain relationships between children and parents who have struggled, criminal courts may separate children from even excellent parents without ever considering the consequences to those children.[208]

In some cases, the status of being a parent is actually used *against* a defendant. Criminal courts routinely issue orders of protection against parents in cases of domestic violence and child endangerment so that parents are denied contact with their children—all before criminal guilt is established.[209] Given the reputational (and, in most states, electoral) risks for a judge who fails to issue an order of protection if harm later befalls a child, when prosecutors request such an order—and prosecutors usually will—judges grant them.[210] Judges are understandably terrified of receiving negative attention in the press or, in the worst case scenario, being blamed for a child's death.[211] As David Jaros argues, "[w]hile the state's interest in protecting children from harm is compelling, order of protection statutes that grant judges limitless discretion to separate parents from their children are simply too broad to withstand strict scrutiny."[212] Yet, orders of protection continue to separate parents from their children in criminal courts across the country.

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[204] *See* Lee, *supra* note 136, at 693–94.

[205] *See* Sarah Abramowicz, *A Family Law Perspective on Parental Incarceration*, 50 FAM. CT. REV. 228, 230–31 (2012).

[206] Teresa Wiltz, *Having a Parent Behind Bars Costs Children, States*, PEW STATELINE (May 24, 2016), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/05/24/having-a-parent-behind-bars-costs-children-states#:~:text=staggering%20Numbers,according%20to%20the%20Casey%20Foundation, *archived at* https://perma.cc/KL3Z-7DP8.

[207] Serena Larkin, *Sesame Workshop Materials Help Families Affected by Incarceration*, U. WIS.-MADISON NEWS (June 12, 2020), https://news.wisc.edu/sesame-workshop-materials-help-families-affected-by-incarceration/, *archived at* https://perma.cc/Z5Y6-AMHF.

[208] Abramowicz, *supra* note 205, at 231.

[209] David Michael Jaros, *Unfettered Discretion: Criminal Orders of Protection and their Impact on Parent Defendants*, 85 IND. L.J. 1445, 1447–49 (2010).

[210] *Id.* at 1457–58.

[211] *Id.* at 1458–59, 1458 n.77.

[212] *Id.* at 1466.

And even before adjudication, parental status is generally not a consideration in determining whether pre-trial detention is required, or whether or how high to set bail.[213] Parenthood is also not a required consideration in sentencing or parole.[214] Courts often want to hear from and are typically most swayed by the victim and the victim's family, not the family of the accused.[215] In determining whether a person should be paroled, the parole board makes that decision without hearing about the effect that separation has had on the family and children in particular.[216] Thus, a parent could be condemned to incarceration without the court receiving any information about the effects it would have on a blameless child.

Children suffer the stigma of having an incarcerated parent, which can cause shame and social isolation.[217] Further, if the parent is the only caregiver, the child could be placed into foster care, which can lead to extremely poor long-term outcomes including a higher likelihood of becoming involved in the criminal legal system herself.[218] Additionally, once a parent is incarcerated, opportunities for continued contact are limited. Correctional facilities may be located far from the incarcerated person's family and home, and visitation hours may be infrequent or inconvenient.[219] Women sentenced under federal law are particularly vulnerable to these problems because there are fewer federal facilities for women.[220] Visitation may therefore be impossible due to expense or limited transportation options, resulting in many children being unable to see their parents regularly, if at all.[221]

If a child is in foster care, given strict federal time limits regarding termination of parental rights, termination is a near certainty for many parents. Under federal law, if a child is in foster care for fifteen out of twenty-two months, the state must move towards termination proceedings.[222] And while the law does require the states to make "reasonable efforts" towards reunification, what is considered "reasonable" is generally a very low bar.[223] Incarcerated parents are rarely in a position to complete the plans designed by family regulation agencies, providing the state with an excuse for deny-

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[213] Zina Makar, *Unnecessary Incarceration*, 98 Or. L. Rev. 607, 646–47 (2020); Tamar Lerer, *Sentencing the Family: Recognizing the Needs of Dependent Children in the Administration of the Criminal Justice System*, 9 Nw. J.L. & Soc. Pol'y 24, 28–29 (2013).

[214] Boudin, *supra* note 141, at 82.

[215] *See* 3 Charles Alan Wright et al., Federal Practice and Procedure § 533 (4th ed. 2021).

[216] *See* Mary West-Smith et al., *Denial of Parole: An Inmate Perspective*, 64 Fed. Prob. 3, 7–8 (2000).

[217] Deseriee A. Kennedy, *Children, Parents & the State: The Construction of a New Family Ideology*, 26 Berkeley J. Gender L. & Just. 78, 93 (2011).

[218] Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 Am. Econ. Rev. 1583, 1599 (2007).

[219] Abramowicz, *supra* note 205, at 231.

[220] *Id.*

[221] *Id.*

[222] 42 U.S.C. § 675(5)(E).

[223] Kennedy, *supra* note 217, at 104–07.

ing reunification.[224] Further, in many jurisdictions, incarceration is a factor that that weighs in favor of termination.[225]

Thus, at any stage of the criminal system where parents are detained, there is rarely consideration of the fact that the defendant is a parent, and that incarceration of that parent necessarily will have negative impacts on her children. In fact, in our current system, many courts will never even hear from or about these children. If children were able to employ their constitutional right to family integrity in these cases, judges might reconsider pretrial detention, diversion, or even an ultimate sentence.

D. Impact on Marginalized Communities

Our legal systems disproportionately impact low-income communities of color.[226] Professor Lenese Herbert draws parallels between today's governmental intrusions into African American families and the invasions during slavery.[227] She states that "African American parents did not bargain for this minimal slice of citizenry; yet, their fundamental ability to parent successful Americans and healthy citizens of the world becomes, at best, compromised if not destroyed."[228]

Marginalized communities wield the least power in these systems as they face significant barriers based on language,[229] limited access to counsel,[230] fewer and lower quality educational[231] and job opportunities, less access to mental health and drug treatment services,[232] race-based policing,[233] and systemic bias at every phase of adjudication.[234]

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[224] Deseriee A. Kennedy, *"The Good Mother": Mothering, Feminism, and Incarceration*, 18 WM. & MARY J. WOMEN & L. 161, 175 (2012).

[225] *Id.* at 175–76.

[226] *See generally* ELISA MINOFF, CTR. FOR STUD. SOC. POL'Y, ENTANGLED ROOTS: THE ROLE OF RACE IN POLICIES THAT SEPARATE FAMILIES 11 (2018), https://cssp.org/wp-content/uploads/2018/11/CSSP-Entangled-Roots.pdf, *archived at* https://perma.cc/4FVE-5GHG.

[227] Lenese Herbert, *Plantation Lullabies: How Fourth Amendment Policing Violates the Fourteenth Amendment Right of African Americans to Parent*, 19 ST. JOHN'S J. LEGAL COMMENT. 197, 232 (2005).

[228] *Id.*

[229] Doris Correa Capello, *Recruiting Hispanic Foster Parents: Issues of Culture, Language, and Social Policy*, 87 FAM. SOC'Y: J. CONTEMP. SOC. SERV. 529, 529–35 (2006).

[230] *See* Peter A. Joy, *Unequal Assistance of Counsel*, 24 KAN. J.L. & PUB. POL'Y 518, 519–24 (2015).

[231] MINOFF, *supra* note 226, at 11 ("[H]alf of black children with parents who have lower educational achievement experienced parental imprisonment by the age of fourteen.").

[232] *Id.* at 16; Nora Volkow, *Access to Addiction Services Differs by Race and Gender*, NAT'L INST. ON DRUG ABUSE (July 16, 2019), https://www.drugabuse.gov/about-nida/noras-blog/2019/07/access-to-addiction-services-differs-by-race-gender, *archived at* https://perma.cc/697X-E982.

[233] Herbert, *supra* note 227, at 200.

[234] *See* MINOFF, *supra* note 226, at 16; Kennedy, *supra* note 217, at 87; Jessica Dixon, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 109, 110 (2008).

For example, in the family regulation system, Black, Latinx, and Native American children are disproportionately represented.[235] For Native American children, this is true even after the introduction of heightened protections for that population.[236] Families of color are more likely to become involved with the family regulation system, more likely to have their children removed, and, once removed, less likely to be reunified.[237]

At the border, over 6,000 children have been separated from their parents.[238] As of November 2020, the government could not locate the parents of over 650 of these children.[239] These children are primarily from Latin American countries.[240] The former president referred to immigrants as "animals"[241] and "rapists."[242] In determining immigration policy, he referred to their native countries as "shitholes."[243]

And in the criminal system in 2008, one in nine African American children and one in twenty-eight Latinx children had an incarcerated parent, versus one in fifty-seven white children.[244] Forty percent of incarcerated parents are Black fathers.[245] And "[i]f we consider the full continuum of the criminal [legal] process—arrest, pre-trial detention, conviction, jail, probation, imprisonment, and parole—the number of children affected is significantly larger."[246]

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[235] Trivedi, *supra* note 148, at 534–41.

[236] Virginia Drywater-Whitekiller, *Family Group Conferencing: An Indigenous Practice Approach to Compliance with the Indian Child Welfare Act*, 8 J. PUB. CHILD WELFARE 260, 260 (2014).

[237] Trivedi, *supra* note 148, at 538–39.

[238] *See* Washington, *supra* note 177.

[239] Jacob Soboroff & Julia Ainsley, *Lawyers Can't Find the Parents of 666 Migrant Kids, a Higher Number than Previously Reported*, NBC NEWS (Nov. 9, 2020), https://www.nbcnews.com/politics/immigration/lawyers-can-t-find-parents-666-migrant-kids-higher-number-n1247144, *archived at* https://perma.cc/YYX3-VBJR; Caitlin Dickerson, *Parents of 545 Children Separated at the Border Cannot Be Found*, N.Y. TIMES (Oct. 21, 2020), https://www.nytimes.com/2020/10/21/us/migrant-children-separated.html, *archived at* https://perma.cc/JP4X-S73F.

[240] *See* Soboroff & Ainsley, *supra* note 239.

[241] Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants 'Animals' in Rant*, N.Y. TIMES (Mar. 16, 2018), https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html, *archived at* https://perma.cc/VR7J-E56S.

[242] Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime, *archived at* https://perma.cc/WYN8-AA2U.

[243] Josh Dawsey, *Trump Derides Protections for Immigrants from 'Shithole' Countries*, WASH. POST (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html, *archived at* https://perma.cc/7AJ6-9YB5.

[244] Wiltz, *supra* note 206.

[245] THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 18 (2010), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf, *archived at* https://perma.cc/Y8J8-AXE9.

[246] Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, NAT'L INST. JUST. J., Mar. 2017, at 2, https://www.ojp.gov/pdffiles1/nij/250349.pdf, *archived at* https://perma.cc/L3NP-H35Q.

Parents of color must fight against societal stereotypes about them, particularly with respect to race, poverty, and class.[247] Due to perceptions that these parents are less than "ideal," they have an even harder task of convincing caseworkers and judges that they are "good" or even appropriate parents.[248] When faced with incarceration or involvement in the family regulation or immigration system, these biased perceptions can be fatal.

In addition to the effects of being separated from their caregivers, the damage the criminal legal system inflicts on their communities also harms children.[249] For example, arrest and deportation of immigrants leads to fear in immigrant and particularly Latinx communities, causing pervasive stress that can threaten children's health and well-being.[250] Since minority men are more likely to be stopped by the police, arrested, and incarcerated, their children are more likely to be shackled with the trauma of these experiences.[251]

It is clearly not a coincidence that minorities are overrepresented in all of these systems. Data supports the contention that people of color are victims of racism in our legal systems.[252] Weaponizing the child's constitutional right to family integrity for marginalized children would be one powerful way to fight the racism that is inherent in these systems and that causes destruction of their families.

III. Using a Child's Independent Right to Family Integrity to Effect Change

Relying on the foundation in constitutional and international law outlined above, many courts have explicitly recognized that children have an autonomous right to their familial relationships. The Ninth Circuit best summarized this view:

> [T]his constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents. The companionship and nurturing interests of parent and child in maintaining a tight familial bond are reciprocal, and we see no reason to

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[247] Kennedy, *supra* note 224, at 185.

[248] *Id.* at 185–86.

[249] *See* Grahn-Farley, *supra* note 67, at 326–28.

[250] Minoff, *supra* note 226, at 9.

[251] Akiva M. Liberman & Jocelyn Fontaine, Urb. Inst., Reducing Harms to Boys and Young Men of Color from Criminal Justice System Involvement 2 (2015), https://www.urban.org/sites/default/files/publication/39551/2000095-Reducing-Harms-to-Boys-and-Young-Men-of-Color-from-Criminal-Justice-System-Involvement.pdf, *archived at* https://perma.cc/885D-PP9Y.

[252] Liyah Kaprice Brown, *Officer or Overseer?: Why Police Desegregation Fails as an Adequate Solution to Racist, Oppressive, and Violent Policing in Black Communities*, 29 N.Y.U. Rev. L. & Soc. Change 757, 761–64 (2005).

> accord less constitutional value to the child-parent relationship than we accord to the parent-child relationship.[253]

However, while many jurisdictions have explicated the child's right to family integrity, the right is still underutilized. This Part explores how advocates and scholars could better employ this right to support families in different legal systems to minimize family separation.

A. The Family Regulation System

In the family regulation system, ASFA contains many provisions that violate a child's constitutional right to family integrity. While the state interest in protecting children is likely compelling, the means—presumptive family separation—are not narrowly tailored to achieve the result as constitutionally required.[254] These provisions should be challenged on constitutional grounds and should be stricken or substantially modified.

For example, ASFA contains multiple provisions promoting "permanency," which is one of the law's major goals.[255] Proponents argue that these provisions are necessary to ensure that children are not left in foster care indefinitely with no path to a stable family life.[256] It is clear, however, that permanency *with foster parents* (who have no constitutional right to family integrity) is the priority, rather than maintaining unity with the biological family.[257] ASFA also makes clear that, in addition to permanency, "health and safety" are primary goals.[258] While these are laudable aspirations, constitutionally, as applied in the statute, they are not narrowly tailored to meet the goals of safety and permanency with respect to each child as an individual.

Another ASFA provision offers the states financial incentives for adoption, but does not contain similar incentives for reunification.[259] While ASFA requires "reasonable efforts" towards reunification once a child is removed from her home, "reasonable efforts" has never been clearly defined, leading to poor implementation and little effect in practice.[260] Further, the state can have concurrent goals of reunification and adoption.[261] But only one of these

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[253] Smith v. City of Fontana, 818 F.2d 1411, 1418 (9th Cir. 1987).

[254] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) ("[T]he Fourteenth Amendment 'forbids the government to infringe . . . "fundamental" liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'") (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

[255] Trivedi, *supra* note 148, at 559.

[256] *See id.*

[257] *Id.*

[258] 42 U.S.C. § 671(a)(15)(A).

[259] *See* EMILIE STOLTZFUS, CONG. RSCH. SERV., R43025, CHILD WELFARE: STRUCTURE AND FUNDING OF THE ADOPTION INCENTIVES PROGRAM ALONG WITH REAUTHORIZATION ISSUES 5 (2013).

[260] Trivedi, *supra* note 148, at 558–59.

[261] Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 843 (1977).

has financial incentives: adoption. A legal approach that prioritizes pushing families towards termination as opposed to strengthening family bonds violates the child's right to family integrity.

To comply with the right, Congress should amend ASFA to create similar if not greater incentives for reunification as it currently does for adoption.[262] In cases where the state cannot identify an adoptive family, ASFA should permit termination proceedings to be delayed so there is no scenario where a child is left without legal parents. Further, in that scenario, ASFA should require the state to continue reasonable efforts towards reunification, rather than proceeding with termination.

ASFA also contains several exceptions where the state is not required to make reasonable efforts whatsoever.[263] When "aggravated circumstances" or other enumerated criteria exist, the government need not make any efforts to preserve the child's relationship with her current family.[264] Such circumstances include murder, sexual abuse of another child of the parent, and prior termination of the parent's right to another child.[265] Congress made clear, however, that the examples of aggravated circumstances listed in ASFA were simply that—examples—and that states were free to decide the types "of adult behavior that makes it unnecessary . . . unwise . . . [or] simply wrong for the Government to make continued efforts to send children back to their care."[266]

In many states, the term "aggravated circumstances" is not defined in a way that gives courts guidance as to when reasonable efforts should be excused.[267] Children's advocates warned that another vaguely defined term would create a volatile environment that would be harmful for children.[268] They were concerned that if no reasonable efforts are required from the state, there will be no support for the family's efforts to address the underlying issues that lead to the child's removal.[269] Further, "vagueness of the aggravated circumstances exception contributes to the likelihood that life-altering decisions will be arbitrary, capricious, and discriminatory."[270] But above all else, an approach that determines the steps a state must take with respect to one child based on conduct related to another child is not narrowly tailored and therefore violates this child's constitutional right to her family integrity. These exceptions should therefore be stricken from ASFA.

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[262] *See* H. Elenore Wade, Note, *Preserving the Families of Homeless and Housing-Insecure Parents*, 86 GEO. WASH. L. REV. 869, 891–93 (2018).

[263] Trivedi, *supra* note 148, at 558–59; 42 U.S.C. § 671(a)(15)(D).

[264] Trivedi, *supra* note 148, at 559.

[265] *Id.* at 558–59; 42 U.S.C. § 671(a)(15)(D)(i)–(iii).

[266] Kathleen S. Bean, *Aggravated Circumstances, Reasonable Efforts, and ASFA*, 29 B.C. THIRD WORLD L.J. 223, 237 (2009).

[267] *Id.* at 225–27.

[268] *Id.*

[269] *Id.* at 226.

[270] *Id.* at 226–27.

In addition to challenges to ASFA and the state laws promulgated under it, asserting a child's constitutional right to family integrity in family regulation proceedings can also be effective in reducing the harm to children. This is particularly true in Termination of Parental Rights ("TPR") cases at a stage where a parent has already been adjudicated unfit. As noted, the presence of children in foster care for fifteen out of twenty-two months requires TPR proceedings.[271] TPR has been called "the family law equivalent of the death penalty"[272] due to the finality and severity of the decision.

While children's attorneys participate in TPR proceedings, they should recognize and assert their position of strength in advocating for their client's position since at the point of a TPR, there has already been a finding of unfitness against the parent.[273] Therefore, the presumption that a parent is acting in a child's best interest no longer applies, and parents no longer have the ability to assert their constitutional interest in raising their children. Children, however, do retain that ability and it is their last chance to protect their family unity. And while children already have the right to participate in these proceedings, and in most jurisdictions are appointed an advocate who will speak on their behalf in court,[274] there is "tension between parental rights and the best interests of minor children, primarily because of the conflict between the policy goals of child protection and the sharply defined rights of parents."[275] That is, the stated goal of the "child welfare" system is to protect children from harm, which may involve the state attempting to remove children from their parents. This state action conflicts with a parent's fundamental right to care, custody, and control of her child. Averring a child's right to family integrity puts the child and parent's interests in their family on equal footing against the state's intervention, instead of pitting the parent's right against the child's, thereby undermining them both.[276]

Powerfully asserting children's constitutional rights to their relationships with their parents would strengthen children's litigation positions in these proceedings, no matter what they are. Children could raise objections to termination as a violation of their constitutional rights. Alternatively, a child could choose to waive her constitutional right in support of an adoption, if that is what the child wants. Clarifying the fact that this right has constitutional weight equal to the right the parent held prior to termination would make these arguments more forceful rather than framing these arguments solely in terms of a child's desire or best interests. If a child were to support termination and desired the freedom to be adopted, the waiver of the

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[271] 42 U.S.C. § 675(5)(E).

[272] *In re* Smith, 601 N.E.2d 45, 55 (Ohio Ct. App. 1991).

[273] Guggenheim, *supra* note 168, at 135.

[274] Mulzer & Urs, *supra* note 169, at 33–38.

[275] John Thomas Halloran, *Families First: Reframing Parental Rights As Familial Rights in Termination of Parental Rights Proceedings*, 18 U.C. DAVIS J. JUV. L. & POL'Y 51, 77 (2014).

[276] *Id.*

right to family integrity could speak volumes to the court and could weigh heavily against the parent.

If there is successful termination, and the legal relationship between parent and child is severed, ordinarily there is no post-termination contact because the parent no longer has a right to a relationship with her child. While termination may be thought of as representing "a child's newfound freedom from her past and her readiness for a rebirth of sorts, through adoption, in a new family," in reality, even for very young children, their connections to their birth families do not magically evaporate once parental rights are legally severed.[277] Using their own constitutional right to family integrity, children could advocate for post-termination contact on the basis that their parent's constitutional rights to family integrity may have been terminated, but not the child's. Many states have statutes that permit judicial discretion to allow parents and children to have contact even after termination; other states recognize a right to petition for such contact.[278]

These laws recognize that post-termination contact is often in a child's best interest.[279] This contact may help ease the grief that could follow from termination and make the experience more positive.[280] Practically, it would also allow birth parents and foster or adoptive parents to exchange medical information, family history, and other useful information about the child.[281] Additionally, depending on the child's placement, continued contact with the parent could provide a source of "racial, cultural, ethnic, or religious knowledge and experiences" that may otherwise be lacking.[282] Overall, "the continuing bond with a biological parent, as long as it is not harmful, can be important for providing continuity, identity and security."[283] Termination of a parent's rights does not necessarily mean that the parent and child cannot have a positive relationship.[284] And regardless of termination, many children continue to see their parents once they are adults.[285] Children's advocates should use their clients' constitutional right to family integrity to argue that even if the child no longer has a legal relationship with her family, she could benefit from the emotional attachments[286] to her biological family, as well as the benefit of "our most cherished values, moral and cultural."[287] This is

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[277] Alexis T. Williams, *Rethinking Social Severance: Post-Termination Contact Between Birth Parents and Children*, 41 Conn. L. Rev. 609, 613 (2008).

[278] *Id.* at 626–27.

[279] *See* Laufer-Ukeles, *supra* note 29, at 268.

[280] *See* Williams, *supra* note 277, at 618.

[281] *Id.*

[282] *Id.*

[283] Laufer-Ukeles, *supra* note 29, at 267.

[284] Williams, *supra* note 277, at 618.

[285] Clare Huntington, Failure to Flourish: How Law Undermines Family Relationships 85 (2014).

[286] *Id.* at 18, 85.

[287] Moore v. City of East Cleveland, 431 U.S. 494, 503–04 (1977).

particularly true for children who are "legal orphans," whose parents' rights to them have been terminated, but who are also not on a path to adoption.[288]

Further, in many states, children are able to petition for reinstatement of their parents' rights.[289] Given the reality that many children are not adopted after their parents' rights are terminated and are instead left as legal orphans with no real plan for stability,[290] when permanency is not achieved through adoption, it is only logical that children and parents should have another opportunity to reunify.[291] This approach recognizes that children have a right to family integrity and should have the ability to request that the right be respected. Thus, to be constitutionally compliant, all states should allow children to petition for reinstatement of their parents' rights, post-termination.[292]

B. Immigration Law

While a child's right to family integrity might be recognized in the immigration context, a "family unity" theory of due process seems "implausible" because "no authority has been identified to suggest that the Constitution provides alien petitioners with a fundamental right to reside in the United States simply because other members of their family are citizens or lawful permanent residents."[293] Meanwhile, there are scores of cases that say the opposite, i.e., that immigration decisions that result in a family being separated by deportation do not violate any constitutional rights.[294] Immigra-

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[288] *See* Guggenheim, *supra* note 168, at 134.

[289] CHILD WELFARE INFO. GATEWAY, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 11–12, 18, 20, 23, 28, 40, 46, 50, 64, 66–67 (2016), https://www.childwelfare.gov/pubPDFs/groundtermin.pdf, *archived at* https://perma.cc/BHW2-TXGL (summarizing statutes from California, Colorado, Georgia, Hawaii, Illinois, Louisiana, Nevada, North Carolina, Oklahoma, Washington, West Virginia, and Wisconsin that allow children to petition for reinstatement of their parents' rights under certain circumstances).

[290] Adams, *supra* note 162, at 515.

[291] *Id.* at 516.

[292] The author believes that parents should also be able to petition for reinstatement of their parental rights. This article is simply arguing for reforms which could be supported by a child's right to family integrity.

[293] Ramos v. Nielsen, 321 F. Supp. 3d 1083, 1118 (N.D. Cal. 2018) (quoting De Mercado v. Mukasey, 566 F.3d 810, 816 n.5 (9th Cir. 2009)).

[294] *Id.* (citing Gebhardt v. Nielsen, 879 F.3d 980, 988 (9th Cir. 2018) (holding that a U.S. citizen's due process rights were not violated by the denial of non-citizen wife and her children's visa petitions based on his own sex offense because "the generic right to live with family is 'far removed' from the specific right to reside in the United States with non-citizen family members," and holding that "a fundamental right to reside in the United States with [one's] non-citizen relatives" would "run[ ] headlong into Congress' plenary power over immigration")); *see* Morales-Izquierdo v. Dep't of Homeland Sec., 600 F.3d 1076, 1091 (9th Cir. 2010) (holding that "lawfully denying Morales adjustment of status does not violate any of his or his family's substantive rights protected by the Due Process Clause" even "when the impact of our immigration laws is to scatter a family or to require some United States citizen children to move to another country with their parent"), *overruled in part on other grounds by* Garfias-Rodriguez v. Holder, 702 F.3d 504 (9th Cir. 2012) (en banc); *cf.* De Mercado v. Mukasey, 566 F.3d 810, 816 n.5 (9th Cir. 2009) (stating, in dicta, that the "family unity" theory of due

tion courts should prioritize a child's constitutional right to her family and acknowledge that deportation of a parent, in most situations, will mean deportation of the child as well.

Law professor Bridgette A. Carr has argued that the "best interests" standard of child custody should be applied to immigration law.[295] Given that most international and domestic court proceedings involving children use this standard, a "best interests" approach is well-supported[296] and more consistent with the idea of family integrity. What is most important is an approach that at a fundamental level "prioritizes the child's safety, permanency, and well-being."[297] The best interests approach incorporates a child's right to family integrity because the law generally recognizes that it is in a child's best interest to remain with her parents unless the parent is unfit.[298] And deportability does not necessarily indicate unfitness.[299]

The only area of immigration law that already recognizes the best-interests standard is Special Immigrant Juvenile Status ("SIJS") cases.[300] SIJS is an immigration classification available to undocumented children under twenty-one who have been neglected, abused, or abandoned by a parent. In order for the child to acquire Lawful Permanent Resident status in a SIJS case, the child must be eligible for foster care, and the court must determine that it is not in the child's best interests to return to her home country.[301] Thus, in applying this standard in SIJS cases, because the child would necessarily be separated from one or both parents, the court must make a determination that reunification with one or both of them is not in the child's best interest.[302]

Canadian immigration law could serve as a model for how a best interests analysis could be applied in the United States in other immigration contexts. Canada integrates a best interests analysis when a parent is facing removal and the child has legal status.[303] Although Canadian law only allows the parent to apply for permanent residency through a humanitarian and compassionate relief process, when considering such a request, part of the

process in the immigration context is "implausible" because "no authority [has been identified] to suggest that the Constitution provides [alien petitioners] with a fundamental right to reside in the United States simply because other members of their family are citizens or lawful permanent residents").

[295] Bridgette A. Carr, *Incorporating a "Best Interests of the Child" Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 124 (2009).

[296] *Id.*

[297] *Id.* at 127.

[298] Troxel v. Granville, 530 U.S. 57, 68–69 (2000).

[299] *See* C. Elizabeth Hall, *Where are My Children . . . and My Rights? Parental Rights Termination as a Consequence of Deportation*, 60 DUKE L.J. 1459, 1464–66 (2011).

[300] Sarah Rogerson, *Lack of Detained Parents' Access to the Family Justice System and the Unjust Severance of the Parent-Child Relationship*, 47 FAM. L.Q. 141, 157 (2013).

[301] Carr, *supra* note 295, at 136; *see also* 8 U.S.C. § 1101(a)(27)(J).

[302] 8 U.S.C. § 1101(a)(27)(J).

[303] Carr, *supra* note 295, at 147–48.

required analysis is "the best interests of the child directly affected."[304] Once the parent becomes a permanent resident, there is a pathway to citizenship.[305]

In offering guidance for how to analyze these cases, the Canadian Federal Court of Appeal stated that the determination requires consideration of the benefits that would flow to the child if her parent remained in Canada and the hardship the child would suffer if her parents were deported or she were forced to leave in order to live with her parents.[306] A child's right to her family recognizes that "[s]uch benefits and hardship are two sides of the same coin, the coin being the best interest of the child."[307]

In these proceedings in Canada, the child is appointed a best interests representative. Such a representative "must be over eighteen years old, be able to appreciate the nature of the proceedings, be willing and readily able to represent the child, and not have a conflict of interest with the child."[308] Importantly, for accompanied children, the representative is usually her parent, but if there is a conflict or the parent is otherwise unable to serve as a representative, another adult may be appointed.[309] An even better approach to allow the child to assert her right to family integrity would be to appoint the child an attorney. Many have documented the absurdity of children, including toddlers, appearing in court without representation.[310] Children have a "statutory right to a reasonable opportunity to present their case"[311] and a constitutional right to family integrity. Children cannot realistically exercise these rights without advocates.[312]

Additionally, in those American cases where a parent is granted relief and the child is allowed to stay based on the parent's relief, there is no individual determination of the merits of the child's case. Children's claims should be considered individually because usually by the time the parent learns that her case is denied, the deadline has passed for discovery and submitting evidence to the court on the child's case. Carr's proposed solution is to stay the parent's removal order until the child brings a new proceeding on her own behalf,[313] which is made possible by the fact that Canadian law requires a separate determination for children, even if the claim is heard in conjunction with the parent's.[314]

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[304] *Id.*

[305] Understand Permanent Resident Status, GOV'T OF CAN. (Sept. 17, 2019), https://www.canada.ca/en/immigration-refugees-citizenship/services/new-immigrants/pr-card/understand-pr-status.html, *archived at* https://perma.cc/D46A-LGD8.

[306] Carr, *supra* note 295, at 147–48.

[307] *Id.*

[308] *Id.* at 150.

[309] *Id.* at 146–47.

[310] Carr, *supra* note 295, at 147–48; Egkolfopoulou, *supra* note 19.

[311] McKayla M. Smith, *Scared, But No Longer Alone: Using Louisiana to Build A Nationwide System of Representation for Unaccompanied Children*, 63 LOY. L. REV. 111, 115–16 (2017).

[312] *Id.* at 116.

[313] Carr, *supra* note 295, at 151.

[314] *Id.* at 147.

The approach used in Canada integrates consideration of a child's right to family integrity. It allows a court to consider that, if a parent is deported, a child is also de facto deported.[315] And while Canada's system does not guarantee that a parent will not be deported or even that the children's best interests will prevail, it does allow flexibility so that deserving cases not otherwise anticipated by other immigration legislation may be approved.[316] This gives decisionmakers the ability and opportunity to acknowledge that it is difficult to find a one-size-fits-all approach in these complicated scenarios. As the Canadian system recognizes, "consideration of both the benefit to the child if the parent were not removed and the hardship the child would suffer if only the parent were removed or if the child accompanied the parent"[317] is fundamental to an examination of the child's best interests.[318] Given that family integrity is generally in a child's best interests, the United States should approach removal decisions in a way that "prioritizes the child's safety, permanency, and well-being," as Carr suggests.[319]

Another major barrier to family unity under immigration law is that, with limited exceptions, people under twenty-one cannot sponsor a relative for immigration status.[320] Thus, U.S. citizens are unable to get legal process for their relatives who are seeking immigration status in this country. The current approach is based on the idea that parents determine migration but "in a growing number of cases, it is children who provide or have the potential to provide the migration stability—children who would, but for the asymmetry just mentioned, have the right to establish family unity around them."[321] Thus, young American citizens are forced to choose between their families and the benefits of living in the United States. Citizen children, DREAMers, and children granted asylum should be able to sponsor their parents and immediate family members, with the assistance of an attorney.[322] And children who are granted SIJS should be able to sponsor the non-offending parent. While opponents may argue that this does not comport with the goals of the immigration system, one asserted goal is, in fact, family integrity.[323] As Justice Douglas once noted in dissent:

> The citizen is a five-year-old boy who was born here and who, therefore, is entitled to all the rights, privileges, and immunities which the Fourteenth Amendment bestows on every citizen. A

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[315] Lori A. Nessel, *Deporting America's Children: The Demise of Discretion and Family Values in Immigration Law*, 61 Ariz. L. Rev. 605, 609–12 (2019).

[316] Carr, *supra* note 295, at 148.

[317] *Id.* at 152.

[318] Becky Wolozin, *Doing What's Best: Determining Best Interests for Children Impacted by Immigration Proceedings*, 64 Drake L. Rev. 141, 152 (2016).

[319] Carr, *supra* note 295, at 127.

[320] Anita Ortiz Maddali, *Left Behind: The Dying Principle of Family Reunification Under Immigration Law*, 50 U. Mich. J.L. Reform 107, 170 (2016).

[321] *Id.* at 138.

[322] *Id.* at 170–71.

[323] Osterberg, *supra* note 133, at 783.

> five-year-old boy cannot enjoy the educational, spiritual, and economic benefits which our society affords unless he is with his parents.[324]

Some may argue that policies such as those suggested incentivize parents to violate immigration law and come to this country illegally and then have children in an attempt to stay here. The derogatory "anchor baby"[325] narrative that dominates anti-immigration rhetoric[326] is simply a myth. For example, one study showed that more than half of the children born in 2009 to parents without legal immigration status were born to families who had lived in America for at least five years.[327] Their mothers therefore did not cross the border dragging their pregnant bellies, or move here to immediately have children who could ease their path to citizenship.[328] Having a child in the desired country does not even guarantee immigration status to the parent. Between 1998 and 2007, 108,434 parents of American citizen children were deported.[329] And in Canada, even with the best interests approach, many courts determine that what is in the best interest of the child is to return to the home country with the parent.[330]

Further, at a fundamental level, "visiting . . . condemnation on the head of an infant is illogical and unjust . . . [and] contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."[331] Punishing a child for her parent's alleged offense is antithetical to our core values. In a country that values immigration and recognizes the value that immigrants bring to our community, it is important to acknowledge that a smoother transition for all family members means that immigrants are able to adapt faster and succeed. When we create barriers such as family separation, even if there is eventual reunification, problems and disruptions are inevitable—and, as noted above, create lasting harm.[332]

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[324] *Id.* at 760 (citing Hintopoulos v. Shaughnessy, 353 U.S. 72, 79 (1957) (Douglas, J., dissenting)).

[325] Mariana E. Ormonde, *Debunking the Myth of the "Anchor Baby": Why Proposed Legislation Limiting Birthright Citizenship Is Not A Means of Controlling Unauthorized Immigration*, 17 ROGER WILLIAMS U. L. REV. 861, 863 (2012) ("The term 'anchor baby' is often used to describe a child born in the United States to unauthorized immigrant parents, conveying the notion that through the child's birth the immigrant birth parents can 'anchor' themselves to the United States and reap the benefits of American citizenship.")

[326] *See* Louis Jacobson, *Fact-Checking the Claims about 'Anchor Babies' and Whether Illegal Immigrants 'Drop and Leave*,*'* POLITIFACT (Aug. 6, 2010), http://www.politifact.com/truth-o-meter/statements/2010/aug/06/lindsey-graham/illegal-immigrants-anchor-babies-birthright, *archived at* https://perma.cc/2T9Y-PSVX.

[327] Ormonde, *supra* note 325, at 877.

[328] *Id.*

[329] *Id.* at 879.

[330] *See* Carr, *supra* note 295, at 157–58.

[331] Osterberg, *supra* note 133, at 783–84 (citing Plyler v. Doe, 457 U.S. 202, 220 (1982)).

[332] *See* Maddali, *supra* note 319, at 163.

C. The Criminal Legal System

Millions of parents are incarcerated in America, leaving their children with relatives, friends, in foster care, or worse.[333] In the words of Professor Maria Grahn-Farley:

> Two million adult people deprived of their liberty means two million fewer adult people available to function as parents, caretakers, and support systems in the lives and the communities of the children of the United States. It is not only punishment of the adults; it is also punishment of the children in the mostly black [sic] communities from which the adults are taken.[334]

In many of these cases, people are incarcerated pre-trial and are presumed innocent.[335] Further, many have pled guilty to crimes because of the pressures inherent in our legal system.[336] In these cases, although the children themselves are not accused of any crime, their constitutional right to family integrity has been implicated by their parents' incarceration. Thus, the child should be heard, or at least treated in the same manner as other children whose familial bonds have not been disrupted by the state.[337] While some courts do take caregiving responsibilities into account, others do not, and there is no uniformity across jurisdictions.[338] Additionally, courts tend to consider what the parent did, rather than what a child might need.[339] The constitutional right to family integrity requires that a child's rights to her parents be considered at every stage of criminal proceedings that could result in family separation.

The strongest argument against incorporating consideration of family ties in the criminal system is that the state is simply punishing the parent for a choice that that parent made, and there should be no consideration of third parties. But the system already considers many third-party interests, most notably those of victims and their families.[340] Moreover, prosecutors proudly proclaim that they represent "the people."[341] Children—even children of the accused—are a necessary part of that constituency.

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[333] *See* Grahn-Farley, *supra* note 67, at 307.

[334] *Id.*

[335] *See* Zina Makar, *Displacing Due Process*, 67 DePaul L. Rev. 425, 430 (2018) (noting significant amount of pre-trial arrestees).

[336] *Id.* at 443; *see also* Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. Rev. 895, 915–16 (2020).

[337] Note, *On Prisoners and Parenting: Preserving the Tie That Binds*, 87 Yale L.J. 1408, 1418 (1978).

[338] Lerer, *supra* note 213, at 44.

[339] *Id.* at 26.

[340] *Id.* at 27.

[341] Abbe Smith, *Can You Be A Good Person and A Good Prosecutor?*, 14 Geo. J. Legal Ethics 355, 356 (2001).

More importantly, the child too is punished. As *parens patriae*, the state has a responsibility to consider reducing harm to the child, regardless of how the harm has occurred.[342] As scholars like Sarah Abramowicz have noted, because "[t]he state has made a decision to delegate childrearing to individual parents, an arrangement that children have no choice over[, t]he state therefore shares responsibility for harms to children that follow from its treatment of their parents."[343]

This is true at all stages of the criminal process where judges determine whether a person should be incarcerated: pre-trial, sentencing, and parole. One illustrative study in Connecticut found that almost 60% of the people who were arrested and detained in 2017 were parents, which is consistent with the national average.[344] Further, over half of these parents provided the financial support for their children and 64% of mothers and 43% of fathers lived with their children.[345] Three-quarters of the mothers were single parents.[346]

At bail hearings, the court must determine whether to release a defendant pre-trial and if so, under what conditions.[347] If the judge decides that pre-trial detention is necessary, the court often also determines how high to set bail or denies it altogether.[348] At these bail hearings prosecutors tend to argue the "nature and circumstances of the charges, the weight of the evidence, the history and characteristics of the defendant, and the nature and seriousness of any threat the defendant's release may pose to the community."[349] The defense focuses its arguments on factors such as the "accused's personal character" and "ties to the community."[350] Given the astronomical rates of pre-trial detention in America, judges are clearly finding these defense arguments less persuasive.[351]

Given that pre-trial detention infringes on a child's constitutional right to family integrity, courts should be required to analyze the impact of pre-

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[342] *See* United States v. Cox, 271 F. Supp. 3d 1085, 1089–90 (S.D. Iowa 2018) ("To that end, this Court concludes that, in fashioning a sentence . . . the welfare of a defendant's children must be fully considered. Whether that consideration is mitigating or aggravating depends entirely upon the factual circumstances of each case. But courts cannot simply ignore the best interests of a defendant's family and the defendant's responsibilities to his or her family. Children of defendants are as much stakeholders in a sentence as the victims, the public, and the defendants themselves.").

[343] Abramowicz, *supra* note 205, at 236.

[344] *See* CONN. SENT'G COMM'N, REPORT TO THE GOVERNOR AND THE GENERAL ASSEMBLY ON PRETRIAL RELEASE AND DETENTION IN CONNECTICUT 54 (Feb. 2017), https://www.ct.gov/ctsc/lib/ctsc/Pretrial_Release_and_Detention_in_CT_2.14.2017.pdf, *archived at* https://perma.cc/466Y-M8KE.

[345] *Id.*

[346] *Id.*

[347] Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1960 (2005).

[348] *Id.*

[349] *Id.* at 1961.

[350] *Id.*

[351] Makar, *supra* note 335, at 427.

trial detention on any children of the accused. And while, arguably, courts may consider family relationships in their analysis of "ties to the jurisdiction" in determining whether the defendant is a flight risk or how high to set bail, this does not frame the analysis from the point of view of the child and the impacts on her.

Chesa Boudin, the son of incarcerated parents who was recently elected District Attorney of San Francisco,[352] attempts to "reframe the problem of third-party harm to children from current sentencing law and prison visitation policy through the lens of children's rights, rather than the traditional frame of prisoners' rights."[353] He suggests that children should be able to participate in their parents' sentencing.[354] And within days of his election, Boudin announced a diversion program for parents charged with certain crimes who are primary caregivers to minor children.[355]

Guidance on the federal sentencing guidelines notes that "family ties and responsibilities" are "not ordinarily relevant" to warrant a potential departure from the recommended sentencing range.[356] Generally, "downward departure based on family ties and responsibilities should be the exception rather than the rule."[357] Despite this, some circuits have taken extraordinary family circumstances into account in sentencing. For example, in *United States v. Johnson*,[358] the Second Circuit considered the defendant's status as a single mother to several young children as well as the caregiver to the child of her daughter with special needs.[359] The court reasoned that:

> The rationale for a downward departure here is not that [the defendant's] family circumstances decrease her culpability, but that we are reluctant to wreak extraordinary destruction on dependents who rely solely on the defendant for their upbringing. [The trial court judge] made it clear that the departure was not on behalf of the defendant herself, but on behalf of her family.[360]

The *Johnson* court noted that courts had consistently held that family circumstances did not generally warrant a departure from sentencing guide-

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[352] *See* Evan Sernoffsky, *Chesa Boudin, reformer public defender, wins election as San Francisco's new DA*, S.F. Chron. (Nov. 9, 2019), https://www.sfchronicle.com/bayarea/article/Chesa-Boudin-reformer-public-defender-wins-14823166.php, *archived at* https://perma.cc/GE3V-78HJ; Tim Arango, *Dad's in Prison, Mom Was on Parole. Their Son Is Now Running for D.A.*, N.Y. Times (May 24, 2019), https://www.nytimes.com/2019/05/24/us/chesa-boudin-san-francisco-da.html, *archived at* https://perma.cc/X8ME-92R8.

[353] Boudin, *supra* note 141, at 79.

[354] *Id.*

[355] Evan Sernoffsky, *SF District Attorney Chesa Boudin Launches Diversion Program for Parents Facing Criminal Charges*, S.F. Chron. (Jan. 14, 2020), https://www.sfchronicle.com/crime/article/SF-District-Attorney-Chesa-Boudin-launches-14975839.php, *archived at* https://perma.cc/NB2X-AXZ7.

[356] Koon v. United States, 518 U.S. 81, 95 (1996).

[357] United States v. Sweeting, 213 F.3d 95, 100 (3d Cir. 2000).

[358] 964 F.2d 124 (2d Cir. 1992).

[359] *Id.* at 129.

[360] *Id.*

lines, citing the Eleventh Circuit, which held that "[h]ere [defendant] has shown nothing more than that which innumerable defendants could no doubt establish: namely, that the imposition of prison sentences normally disrupts . . . parental relationships."[361] Yet the court felt that family circumstances could be extraordinary, constituting proper grounds for reducing a sentence.[362] To a child, the removal of her parent from her life under any circumstances is extraordinary. Thus, to honor a child's right to family integrity, courts must consider that the defendant is a parent in all situations, not just in cases that are particularly sympathetic. Previously, many courts believed that the mandatory sentencing guidelines prevented judges from taking familial relationships and responsibilities into account when making sentencing determinations. But *United States v. Booker*,[363] where the Supreme Court found mandatory sentencing guidelines unconstitutional,[364] suggests that there is room for taking children's wishes into account.[365]

Given public defenders' already colossal caseloads and the issues related to children's counsel discussed above, one way to incorporate this approach is to use San Francisco's Adult Probation Department ("APD") model, which conducts family impact assessments and shares its findings with the court for sentencing.[366] Importantly, this family impact statement is prepared for every defendant, regardless of her alleged crime.[367] The statement "includes the number of the defendant's minor children, whether the defendant provides financial support to his or her children, whether the defendant is the primary caregiver, and whether the defendant lives with his or her children."[368] As a result of these "family-focused policies and procedures," the APD caseload dropped 43% in six years and the City of San Francisco saw a 40% decrease in its jail population during the same period.[369]

Alternatively, family impact assessments could be used the way that victim impact statements are used in courtrooms across the country. Under federal law, victims have the "right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding."[370] They are also allowed in criminal proceedings in all fifty states subject to specific rules in each jurisdiction.[371]

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[361] *Id.* at 128 (citing United States v. Cacho, 951 F.2d 308, 311 (11th Cir. 1992)).
[362] *Id.*
[363] 543 U.S. 220 (2005).
[364] *Id.* at 245.
[365] *See* Boudin, *supra* note 141, at 97.
[366] Emily W. Andersen, *"Not Ordinarily Relevant": Bringing Family Responsibilities to the Federal Sentencing Table*, 56 B.C. L. Rev. 1501, 1526 (2015).
[367] *Id.* at 1527.
[368] *Id.*
[369] *Id.* at 1527–28.
[370] Madison H. Kemph, *Reconsidering the Use of Victim Impact Evidence*, 31 Geo. J. Legal Ethics 673, 673–74 (2018) (citing 18 U.S.C. § 3771).
[371] *Id.* at 673.

Victim impact statements highlight "a crime's medical, psychological, social, and financial impact on a victim."[372] To counterbalance this information, and to respect the child's right to family integrity, family impact assessments would allow the court to recognize the effects on the defendant's children and other family members in the course of performing traditional sentencing analysis.[373] This could incentivize carceral alternatives, probation, or deferred sentencing.[374] Indeed, courts can make this assessment far earlier than sentencing.

Even if a family impact assessment is not available, to preserve a child's right to family integrity, courts should first consider whether incarceration is necessary at all. They should determine whether "non-incarcerative alternatives such as halfway houses, home detention, intensive probation supervision, day prisons, [or] community service"[375] would be appropriate. Some factors that children could raise, if allowed to participate in the process, include "the number of dependent children, their ages, and whether those children have special needs such as physical, emotional, or mental disabilities."[376] Additionally, children (ideally with attorneys) should press courts to consider "the likelihood of the defendant losing custody permanently rather than temporarily" and particularly whether termination of parental rights is likely, due to the detrimental effects on children.[377] The court should also consider the nature of the crime and the child's relationship with her parents in determining whether the state's purported interest in incarceration could be outweighed by the potential harms to the child. And, at the very least, the court should consider the best interests of the child.[378] These factors could allow for some uniformity when determining whether to take parenthood into account during the criminal process.

Critics, including the late Dan Markel and his colleagues Jennifer Collins and Ethan Leib, argue that such a system would be unfair, as people who commit similar crimes could be treated differently due to their status as a parent.[379] They suggest that another option might be deferred sentencing, but only in the case of "irreplaceable caregivers."[380] In these instances where the defendant is the "sole and irreplaceable" caregiver, Markel et al. suggest that, for example, a parent could be incarcerated after the child has reached the age of majority and is able to care for herself.[381] But this approach lacks

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[372] Andersen, *supra* note 366, at 1513.

[373] *Id.* at 1515.

[374] *Id.*

[375] Susan E. Ellingstad, *The Sentencing Guidelines: Downward Departures Based on a Defendant's Extraordinary Family Ties and Responsibilities*, 76 MINN. L. REV. 957, 984 (1992).

[376] *Id.* at 983.

[377] *Id.*

[378] Lerer, *supra* note 213, at 46.

[379] Dan Markel et al., *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147, 1214 (2007).

[380] *Id.* at 1221.

[381] *Id.* at 1221–22 (internal citations omitted).

recognition of the fact that children do best when they maintain contact with both parents and that all caregivers are irreplaceable to the child in question.[382] Deferred sentencing should be considered in all cases where the accused is a parent, not just those where the caregiver is "irreplaceable." And, once again, prosecutors and judges treat similar defendants differently all the time for all manner of reasons.[383] To do so in service of family integrity would be a welcome progression.

As a last resort, if incarceration is deemed necessary, some states have programs that allow children to be placed with their mothers while incarcerated.[384] Thus, in some cases, parents, particularly those of infants, could be sentenced to a facility that is specially designed to allow for continued bonding between the parent and child. While some argue that prison is no place for a child, what is sometimes lost is that when parents are sentenced, their children are often sentenced, too—to foster care. Many foster children face a high risk of abuse and grave long-term outcomes.[385] Also, given that these programs are new, there is little data to determine which scenario is more beneficial for a child: separation from one's parent or remaining with one's parent in a correctional facility.[386] Finally, if no such option is available, to give families the best chance at preserving their familial relationships, courts should be required to sentence the parent to the facility that is closest to the accused's home and family. This may seem intuitive, but it is far from reality.[387]

If a parent is ultimately incarcerated but becomes eligible for parole, a child's right to family integrity should be respected at this stage as well. Parole hearings are notoriously shrouded in secrecy.[388] In some states, the incarcerated person herself is not even allowed to participate.[389] As a result, "parole boards can make decisions on almost any basis: hearsay, rumor, and

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[382] *See* Abramowicz, *supra* note 205, at 231.

[383] *See* U.S. Sent'g Comm'n, Demographic Differences in Sentencing: An Update to the 2012 *Booker* Report 2 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf, *archived at* https://perma.cc/AYH2-QHEN.

[384] Laufer-Ukeles, *supra* note 29, at 269–70.

[385] *See* Trivedi, *supra* note 148, at 541–52.

[386] Abramowicz, *supra* note 205, at 234–35; Elizabeth Chuck, *Prison nurseries give incarcerated mothers a chance to raise their babies – behind bars*, NBC News (Aug. 4, 2018), https://www.nbcnews.com/news/us-news/prison-nurseries-give-incarcerated-mothers-chance-raise-their-babies-behind-n894171, *archived at* https://perma.cc/VL5T-U7DE.

[387] Anna Iskikian, *The Sentencing Judge's Role in Safeguarding the Parental Rights of Incarcerated Individuals*, 53 Colum. J.L. & Soc. Probs. 133, 158 (2019) ("One . . . obstacle is the physical distance between incarcerated parents and their children; the vast majority of state and federal prisons are located more than one hundred miles away from the inmate's home. Because fewer female prisons exist as compared to the number of all-male prisons, mothers are even more likely to be imprisoned a substantial distance away from their families.") (internal citations omitted).

[388] Beth Schwartzapfel, *Parole Boards: Problems And Promise*, 28 Fed. Sent'g Rep. 79, 79 (2015).

[389] *Id.* ("Because Alabama inmates are not allowed to attend their own parole hearings, Curry's mother traveled to Montgomery to speak on his behalf.").

instinct are all fair game" with some states even allowing consideration of "the inmate's culture, language, values, mores, judgments, communicative ability and other unique qualities."[390] And in most of the country, parole boards are required to hear from the victim before deciding whether to grant parole and many boards will not grant parole if opposed by the victim.[391]

When the incarcerated are separated from their families, it may lead to permanent damage to their family relationships, which does not serve the goals of the criminal legal system, including the goal of rehabilitation. If released into a world with no family support, formerly incarcerated people are more likely to return to prison and as such, "strong family ties have always been a critical positive factor in parole decisions."[392] Ensuring that a child's perspective is raised in parole hearings acknowledges the child's right to her family. Not only allowing information about the devastating impacts of incarceration on a child but making them a necessary consideration will allow the state to comport with its duty to use narrowly tailored means to achieve its goals. Allowing children to be heard at these hearings, or at the very least, allowing family impact statements to be used as they are being used in sentencing, would allow these effects to be considered.

These proposals show respect for family integrity and particularly that children have a right to their families. Integrating these concepts into criminal adjudications and sentencing shows that a balance between the competing interests of public safety and family preservation are possible.

IV. Conclusion

If family integrity means nothing else, it should mean that all family members have constitutional rights to their relationships with each other. While any asserted liberty interest will have to be balanced against competing state interests, it is vital that we recognize the liberty interests in the first place. And, more importantly, lawyers and advocates should deploy these interests in proceedings where real families are at stake. Practitioners in immigration, criminal, and family regulation proceedings staring down state-sanctioned family destruction should argue a child's independent, constitutional right to family integrity. Doing so would amplify children's voices, and in so doing, empower them and acknowledge their self-determination. This is particularly true for marginalized children whose voices are usually ignored the most. If those in positions of power assert this right, perhaps children will be more successful than their parents have been in preserving their shared family bonds.

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[390] *Id.*

[391] *Id.* at 81–82 ("More than 60 percent of the nation's parole boards are required to hear victim input before they make a decision, according to a 2008 survey, and 40 percent said that victim input is 'very influential' to their decision-making process.").

[392] Justin Brooks & Kimberly Bahna, "*It's A Family Affair"—The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. Rev. 271, 275 (1994).