FAMMIGRATION WEB

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ABSTRACT

A growing body of scholarship examines the expansive nature of the criminal legal system. What remains overlooked are other parts of the carceral state with similarly punitive logics and impacts. To begin filling this gap, this Article focuses on the convergence of the family regulation and immigration systems. This Article examines how the cumulative effects of these two systems increase the risk of immigration detention, deportation, and permanent family separation for noncitizen and mixed-status families. It argues that system convergence produces feedback effects that bolster punitive interventions and outcomes in both systems, ultimately creating what I call a web. When referring to this phenomenon, I use the term "fammigration web," similar to the way other scholars refer to criminal legal and immigration system overlap as "crimmigration." Although the exact number of noncitizen families impacted by the family regulation system remains unclear, the existing literature suggests that thousands of families are adversely affected. While practitioners and advocates increasingly discuss the relationship between the family regulation and immigration systems, scholarship has not fully caught up.

This Article makes three central contributions. One, it provides the first theoretical account of family regulation system and immigration enforcement system interconnectedness. Two, it identifies how nodes in the fammigration web exacerbate the risk of family separation for noncitizen and mixed-status families by marking and subordinating them. Three, it situates efforts to shrink the fammigration web alongside other efforts to shrink the carceral state. To

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dismantle carceral logics, we must identify how they are produced across systems. While this requires long-term strategies, this Article offers a few immediate ways to sever threads and shrink the fammigration web.

CONTENTS

The more you consider all the ways the child welfare system parallels and intersects with the criminal punishment system, the more it looks like one integrated state apparatus . . . a giant carceral web.

—Dorothy Roberts[1]

INTRODUCTION

Professor Dorothy Roberts's observation brings to bear the expansive nature of the criminal legal system and the extension of its logic to other carceral systems.[2] Roberts argues that for marginalized parents, state intervention presents as "a giant carceral web."[3] Drawing on this framework, this Article provides the first theoretical account of family regulation system and immigration enforcement system interconnectedness.[4]

Outside of the family regulation system context, there is a robust literature on the overlaps of family law and the immigration system.[5] While there are many

[1] DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 162 (2022) [hereinafter ROBERTS, TORN APART].

[2] This Article uses the term "carceral state" to mean not only criminal law and its institutions but also other systems that intersect with and mirror the punitive logics of the criminal legal system. Alice Ristroph suggests that a broad definition of the carceral state can "exist alongside . . . other . . . government institutions and practices . . . such as 'the welfare state.'" *See* Alice Ristroph, *The Second Amendment in a Carceral State*, 116 NW. U. L. REV. 203, 208-15 (2021) (highlighting that the term "carceral state" may suggest "a misleading image of unity and coherence among criminal legal institutions").

[3] ROBERTS, TORN APART, *supra* note 1, at 162.

[4] This Article uses the term "family regulation system" to describe what is commonly known as the "child welfare system." *See* S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1102-03 (2022) [hereinafter Washington, *Survived & Coerced*]. Other scholars and advocates similarly use the terms "family regulation system" and "family policing system." *See* ROBERTS, TORN APART, *supra* note 1, at 24; Carla Laroche, *The New Jim and Jane Crow Intersect: Challenges to Defending the Parental Rights of Mothers During Incarceration*, 12 COLUM. J. RACE & L. 517, 518 (2022); Nancy D. Polikoff & Jane M. Spinak, *Foreword: Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being*, 11 COLUM. J. RACE & L. 427, 431-33 (2021); *Why We're Using the Term 'Family Policing System*,*'* RISE (May 7, 2021), https://www.risemagazine.org/2021/05/why-were-using-the-term-family-policing-system/ [https://perma.cc/6GWR-2UCX]; Emma Williams, Opinion, *'Family Regulation,' Not 'Child Welfare': Abolition Starts with Changing Our Language*, IMPRINT (July 28, 2020, 11:45 PM), https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language/45586.

[5] *See, e.g.*, Kerry Abrams, *What Makes the Family Special*, 80 U. CHI. L. REV. 7, 7-10 (2013); Kari E. Hong, *Famigration (Fam-Imm): The Next Frontier in Immigration Law*, 100 VA. L. REV. ONLINE 63, 63-64 (2014); Anita Ortiz Maddali, *Left Behind: The Dying Principle of Family Reunification Under Immigration Law*, 50 U. MICH. J.L. REFORM 107, 115-18 (2016); Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 AM. J. COMP. L. 511, 511-12 (1995); David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453, 458-59 (2008). *See generally* MARCIA A. ZUG, BUYING A

family court proceedings that deserve a deeper analysis of immigration system interconnectedness,[6] this Article focuses on one of the most coercive forms of state intervention into families: child neglect and abuse proceedings, which regularly include an investigation, family surveillance, and possibly family separation.[7]

In this Article, I use the term "fammigration" to describe how this interconnectedness produces feedback effects that bolster punitive interventions and outcomes in both the family regulation and immigration systems, ultimately creating what I call a web. The term "fammigration" borrows from the much-discussed intersections of the criminal legal and immigration systems known as "crimmigration."[8] Some scholars have discussed how criminal convictions exacerbate the risk of negative immigration outcomes.[9] Others have discussed the expansion of migration criminalization and the "hyperpolicing" of immigrant communities.[10] Some scholars discuss the integration of immigration

BRIDE: AN ENGAGING HISTORY OF MAIL-ORDER MATCHES (2016) (examining the immigration implications of "mail order marriages"). What is missing, however, is a comprehensive account of the family regulation system's impacts in the immigration enforcement sphere. This Article begins to fill that gap.

[6] For example, custody, guardianship, and juvenile delinquency proceedings.

[7] *See infra* Section I.A.

[8] Professor Juliet Stumpf is credited with coining the term "crimmigration." *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006) [hereinafter Stumpf, *Crimmigration Crisis*]; *see also* Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1708 (2011). The literature on crimmigration is extensive. *See, e.g.*, Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1574-75 (2010); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1288 (2010); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1467; Esther K. Hong, *Fixing Deference in Youth Crimmigration Cases*, 48 N.M. L. REV. 330, 331 (2018); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 108 (2012); Andrew Moore, *Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 667 (2008).

[9] *See, e.g.*, Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 555-56 (2013); Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 122 n.7 (2009); Stumpf, *Crimmigration Crisis*, *supra* note 8, at 379-86; Yolanda Vazquez, *Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answer for the Criminal Defense Lawyer, the Court, and the Sixth Amendment*, 20 BERKELEY LA RAZA L.J. 31, 37-39 (2010).

[10] *See, e.g.*, Jennifer M. Chacón, *Criminal Law & Migration Control: Recent History & Future Possibilities*, DAEDALUS, Winter 2022, at 121, 124-26 [hereinafter Chacón, *Criminal Law & Migration Control*]; *see also* Amy F. Kimpel, *Alienating Criminal Procedure*, 37 GEO. IMMIGR. L.J. (forthcoming 2023) (manuscript at 10-11) (on file with *Boston University Law Review*).

enforcement into state and local policing practices.[11] Many authors have highlighted defense attorneys' responsibility to advise their clients about potential immigration and other consequences of a criminal conviction.[12] In *Padilla v. Kentucky*,[13] the Supreme Court prominently acknowledged the interconnectedness of the criminal legal system and deportation proceedings.[14] As this Article will show, for noncitizens, the risks extend beyond criminal convictions, the criminal legal system, its tools, and its institutional structures.

Although the exact number of noncitizen families impacted by the family regulation system remains unclear,[15] the existing literature suggests that thousands of families are affected. About 5.5 million children in the United States, 8% of all children in the country, live with at least one undocumented parent.[16] While most children with noncitizen parents live in California, Texas, New York, Florida, Illinois, or New Jersey, the numbers have increased in all states since 1990.[17] A survey conducted by Professor Nina Rabin in the Arizona Pima County Juvenile Court System suggests that many noncitizen and mixed-status families are "caught in the intersecting systems of immigration and child

[11] *See, e.g.*, Chacón, *Criminal Law & Migration Control*, *supra* note 10, at 126 (discussing how the Obama Administration "tightened the linkage between criminal law enforcement and immigration enforcement" through state and local law enforcement).

[12] *See, e.g.*, IMMIGRANT DEF. PROJECT & N.Y. UNIV. SCH. OF L. IMMIGRANT RTS. CLINIC, JUDICIAL OBLIGATIONS AFTER *PADILLA V. KENTUCKY*: THE ROLE OF JUDGES IN UPHOLDING DEFENDANTS' RIGHTS TO ADVICE ABOUT THE IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS 15-25 (2011), https://www.immigrantdefenseproject.org/wp-content/uploads/2011/11/postpadillaFINALNov2011.pdf [https://perma.cc/P2MJ-ZWNS]; Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 718-19 (2002); Margaret Colgate Love, *Collateral Consequences After* Padilla v. Kentucky*: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87, 113-17 (2011); McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 810-15 (2011) [hereinafter Smyth, *From "Collateral" to "Integral"*]; *see also* Moore, *supra* note 8, at 667; Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1936-37, 1943-50 (2000); Stumpf, *Crimmigration Crisis*, *supra* note 8, at 376-77.

[13] 559 U.S. 356 (2010).

[14] *See id.* at 366.

[15] Federal law does not require child protection agencies to report families' immigration status. *See* CASEY FAM. PROGRAMS, STRATEGY BRIEF: STRONG FAMILIES 2 (2020), https://www.casey.org/media/20.07-QFF-SF-Immigration-and-child-protection.pdf [https://perma.cc/PA6K-KQWU].

[16] Prudence Beidler Carr, *Parental Detention and Deportation in Child Welfare Cases*, 96 CHILD WELFARE 81, 83 (2018).

[17] *See* KARINA FORTUNY, RANDY CAPPS, MARGARET SIMMS & AJAY CHAUDRY, THE URB. INST., CHILDREN OF IMMIGRANTS: NATIONAL AND STATE CHARACTERISTICS 2 (2009), https://www.urban.org/sites/default/files/publication/32986/411939-Children-of-Immigrants-National-and-State-Characteristics.PDF [https://perma.cc/XWG7-68RP] ("[T]he number of children with immigrant parents more than doubled in most states between 1990 and 2006.").

welfare."[18] Another study concludes that 8.6% of children in families under family regulation investigation had parents who were born outside of the United States.[19]

While practitioners and advocates are increasingly discussing the impacts of fammigration, scholarship has not fully caught up. Too often, siloed thinking prevents the identification of system interconnectedness. To be sure, a microscopic focus on one system can be appropriate. But it is equally important to uncover the ways systems intersect, converge, and create feedback effects. The interplay between the family regulation and immigration systems produces intersystemic harms through the marking and subordination of noncitizen and mixed-status families. Professor Kimberlé Crenshaw has long emphasized the importance of identifying how system overlaps subordinate women of color. For example, Crenshaw observed that "structural intersectionality" leaves immigrant women of color particularly vulnerable to "double subordination."[20]

As a public defender in New York City, I represented many parents who became ensnared in multiple systems. After 2017, the overlap of the family regulation and immigration systems became central to my practice. U.S. Immigration and Customs Enforcement ("ICE") arrests in courthouses, including in family court, increased dramatically.[21] Colleagues in our immigration practice made referrals to our family defense practice with questions about family court findings after learning that immigration officials and judges would use them to deny immigration relief. We learned that even temporary orders of protection issued in family court were accessible to federal immigration officers for up to five years.[22] In some instances, ICE targeted individuals who went to family court to obtain a temporary order of protection against an abusive partner.[23] At that time, Child Protective Services ("CPS") in New York claimed that they would not share case information with immigration officials, but family court records containing deeply private and detailed information remained accessible to the federal government and were used to deny immigration relief and facilitate the deportation of noncitizen parents.[24]

The interconnectedness of the family regulation and immigration systems is best described as a web. An action in one system may trigger movement in the other, creating feedback effects and facilitating deeper connections. These

[18] *See* Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 CONN. L. REV. 99, 115-16 (2011). The study includes fifty-two survey responses of child protective caseworkers, attorneys, judges, and social service providers, in addition to twenty interviews. *See id.*

[19] Alan J. Dettlaff, *Immigrant Children and Families and the Public Child Welfare System: Considerations for Legal Systems*, JUV. & FAM. CT. J., Winter 2012, at 19, 21.

[20] *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245-47 (1991).

[21] *See infra* Section II.A.

[22] *See infra* Section II.B.1.

[23] *See infra* Section II.A.

[24] *See infra* Section II.B.

impacts are not always intentional or obvious and may be difficult to foresee.[25] The mere existence of a family regulation case, charging document, or temporary order of protection creates *entry points* for the immigration system, while the substantive family court record—produced throughout the life of a case—is used to legitimize negative immigration *consequences*. By obtaining family regulation records, immigration officials make use of the family regulation system's coercive nature and ability to gather detailed information from parents. On the flip side, negative immigration outcomes can later impact a parent's ability to maintain their parental rights in family court.[26] In this way, the *fammigration web* subordinates and separates noncitizen and mixed-status families.[27]

Immigration and criminal legal scholars have paid close attention to the impact of criminal law on immigration proceedings.[28] But the fammigration web remains undertheorized, in part, because the family regulation system is

[25] Professor Jennifer Chacón observes that some of the most egregious harms of crimmigration are produced inadvertently. *See* Jennifer Chácon, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 761-62 (2015) [hereinafter Chácon, *Producing Liminal Legality*].

[26] Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C. J.L. & SOC. JUST. 63, 88-90 (2012).

[27] I use the term fammigration "web" instead of fammigration "system" to capture the ways different parts of the carceral state can become so integrated that they not only overlap with one another but also function as one large apparatus. A growing body of scholarship understands the carceral state to extend beyond the criminal system and its institutions. *See, e.g.*, Katherine Beckett & Naomi Murakawa, *Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment*, 16 THEORETICAL CRIMINOLOGY 221, 222 (2012) ("[C]riminal law and criminal justice institutions . . . represent only the most visible tentacles of penal power."); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 471-73, 499 (2007) (arguing that although criminal justice norms have been incorporated into immigration law, protections common in the criminal legal system have not been equally expanded); Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381, 1387 (2022) (arguing many core issues debated in the criminal legal system are not exceptional but rather extend to civil systems); *What Is the PIC? What Is Abolition?*, CRITICAL RESISTANCE, https://criticalresistance.org/mission-vision/not-so-common-language/ [https://perma.cc/YHB8-E9AB] (last visited Jan. 18, 2023) ("Abolition isn't just about getting rid of buildings full of cages. . . . Because the [prison industrial complex] is not an isolated system, abolition is a broad strategy.").

[28] *See, e.g.*, Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1146-56 (2013); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1858 (2011); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 201-02 (2012); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1090-94 (2004) [hereinafter Wishnie, *State and Local Police Enforcement*]; Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 524-25 (2001) [hereinafter Wishnie, *Laboratories of Bigotry*].

commonly perceived as substantially less damaging than criminal punishment.[29] Those not directly impacted by the family regulation system commonly understand it as a system geared towards rehabilitation and child safety.[30] State actors reject the notion that the family regulation system is punitive and facilitates the separation of immigrant families.[31] As a growing body of scholarship points out, the family regulation system not only intersects with but also mirrors the criminal legal system.[32] An even closer look reveals the deep connections between family regulation and immigration.

This Article maps the fammigration web by first identifying select nodes in the web. It argues that these nodes produce specific risks for noncitizen and mixed-status families in immigration proceedings and also create feedback effects in the family regulation system. From an immigration perspective, the family regulation system operates as a space of information gathering and distribution. For example, once records are produced and become part of the family court record, federal immigration authorities may request and obtain them—even when the record is sealed—to use against noncitizen families in immigration proceedings.[33] Orders of protection are important examples of family regulation and immigration system convergence.[34] When an order of protection is issued in family court, it is uploaded into a state database. From there, the information is sent to a Federal Bureau of Investigation database which federal immigration officials retain access to for five years—even if the order is ultimately vacated and the allegations underlying the order are never adjudicated.[35] Special Immigrant Juvenile Status ("SIJS")[36] findings are another

[29] *See* Heather Bergen & Salina Abji, *Facilitating the Carceral Pipeline: Social Work's Role in Funneling Newcomer Children from the Child Protective System to Jail and Deportation*, 35 J. WOMEN & SOC. WORK 34, 44 n.1 (2020) (observing that "scholars have been slow to consider the links between immigration and child protection systems").

[30] *See infra* Section I.B.

[31] *See infra* Section I.B.

[32] *See, e.g.*, ROBERTS, TORN APART, *supra* note 1, at 161 ("[T]he child welfare system operates surprisingly like its criminal counterpart."); Erin Cloud, Rebecca Oyama & Lauren Teichner, *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. REV. FOOTNOTE F. 68, 71-72 (2017) (arguing that linking the Black Lives Matter movement exclusively to criminal legal reform efforts "minimizes the impact this movement could have on similar systems of oppression of Black people, such as the child welfare system"); Laroche, *supra* note 4, at 524-32 (describing the interconnected nature of the criminal legal and family regulation systems and resulting effects on Black mothers); Venezia Michalsen, *Abolitionist Feminism as Prisons Close: Fighting the Racist and Misogynist Surveillance "Child Welfare" System*, 99 PRISON J. 504, 506 (2019) ("Black mothers in particular are surveilled . . . by systems such as 'child welfare' in ways that mirror the surveillance of Black and brown boys and men by the [criminal legal system].").

[33] *See infra* Section II.B.

[34] *See infra* Section II.B.1.

[35] *See infra* Section II.B.1.

[36] SIJS is a status exclusively created for noncitizen children. Noncitizens under twenty-one years of age are eligible if they are unmarried and a state court found that they were

central, but undertheorized, point of convergence. While scholarship has rightly focused on the discriminatory nature of, and the difficulty in obtaining, SIJS findings, it has not sufficiently problematized the ways SIJS findings, meant to protect vulnerable children, rely on a system that is coercive and punitive.

Professor Stephen Lee observes that the U.S. immigration system is "pervasively organized around principles of family separation."[37] This Article argues that the family regulation system facilitates this project, while championing the narrative that it aims to keep immigrant families together. In policy statements, child welfare agencies themselves frequently note the intersections of child welfare and immigration and purport to serve immigrant families.[38] The laws and policies of many states explicitly address the goal of keeping immigrant families together whenever possible.[39]

The interconnectedness of family regulation and immigration bolsters both systems and marks and subordinates immigrant families.[40] This Article argues that the labeling of parents by the family regulation system assists immigration officials with the selection of targets and the justification of such targeting.[41] Indeed, the labeling of parents as "bad" by the family regulation system both provides an organizing tool for immigration enforcement and helps legitimize harsh immigration enforcement against certain parents. In this way, the labeling of parents as neglectful can have long-lasting impacts for noncitizen parents' ability to get relief in immigration proceedings, even when the allegations are never adjudicated and ultimately dismissed in family court. The immigration system's reliance on discretion and subjective "good moral character" makes it particularly susceptible to biased family regulation determinations.[42] On the flip side, deportation and detention expand the family regulation system's opportunities to intervene in and separate families. Some courts compare deportation to incarceration to justify the termination of a noncitizen's parental rights.[43]

abandoned, neglected, or abused by a parent and that it is not in their best interest to return to their country of origin. *See infra* Section II.B.5.

[37] Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2322 (2019).

[38] *See, e.g.*, *Working with Immigrant and Refugee Families*, CHILD WELFARE INFO. GATEWAY, https://www.childwelfare.gov/topics/systemwide/diverse-populations/immigration/working/ [https://perma.cc/64PF-KBCJ] (last visited Jan. 18, 2023) (providing various resources authored by "[c]ulturally responsive welfare agencies").

[39] *See, e.g.*, N.Y. FAM. CT. ACT § 255 (McKinney 2022) ("The court is authorized to seek the cooperation of, and may use . . . the services of all societies or organizations, public or private, having for their object the protection or aid of children or families . . . to the end that the court may be assisted in every reasonable way to give the children and families within its jurisdiction such care, protection and assistance as will best enhance their welfare.").

[40] *See infra* Sections III.A, III.B.

[41] *See infra* Section III.A.1.b.

[42] *See infra* Section III.B.2.

[43] *See infra* Section III.B.1.

Scholarship has addressed aspects of overlap between family regulation and immigration.[44] This Article adds to this conversation by: *one*, providing the first theoretical account of family regulation and immigration enforcement interconnectedness; *two*, showing how this convergence produces or exacerbates marginalization; and *three*, situating fammigration in ongoing discussions about shrinking carceral systems and offering concrete ways to sever threads and shrink the fammigration web.[45] This Article also contributes to the growing body of scholarship criticizing "criminal law exceptionalism"[46] and "immigration exceptionalism."[47]

This Article proceeds in four parts. Part I introduces the concept of fammigration. It builds on the conceptualization of the relationship between the criminal legal and immigration systems as *crimmigration*. Part I then discusses how the mainstream narrative of the family regulation system as protector of child safety and family integrity is fundamentally at odds with the system's practice of racialized surveillance of marginalized families, including

[44] Professor Anita Ortiz Maddali discusses how racialized notions of belonging impact the termination of parental rights for noncitizen parents by the state. *See* Anita Ortiz Maddali, *The Immigrant "Other": Racialized Identity and the Devaluation of Immigrant Family Relations*, 89 IND. L.J. 643, 684-99 (2014). Marcia Yablon-Zug observes that the family regulation system creates barriers for noncitizen parents fighting to maintain their legal rights. *See* Yablon-Zug, *supra* note 26, at 66. Others have discussed some of the ways family regulation involvement impacts immigration proceedings. *See, e.g.*, ROBERTS, TORN APART, *supra* note 1, at 206; Carr, *supra* note 16, at 82-86; Tal D. Eisenzweig, *In the Shadow of Child Protective Services: Noncitizen Parents and the Child-Welfare System*, 128 YALE L.J.F. 482, 483-86 (2018); Theo Liebmann, *Family Court and the Unique Needs of Children and Families Who Lack Immigration Status*, 40 COLUM. J.L. & SOC. PROBS. 583, 583-84 (2007); Rabin, *supra* note 18, at 115-16; Washington, *Survived & Coerced*, *supra* note 4, at 1128-29.

[45] *See* Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1825-37 (2020) (discussing a range of campaigns designed to shrink the "material footprint of police and prisons"); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2147-49 (2017) (suggesting, among other reforms, "shrinking and refining" of the footprint of the police); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1633 (2019) (discussing how abolitionists "prefigure a world without prisons and police, shrinking the role of criminal law in their lives"); Dean Spade, *Intersectional Resistance and Law Reform*, 38 SIGNS 1031, 1047-49 (2013) (discussing tactics for system transformation that do not further enlarge harmful systems).

[46] *See, e.g.*, Levin, *supra* note 27, at 1387 (arguing for divestment from criminal law exceptionalism); Aaron Littman, *Jails, Sheriffs, and Carceral Policymaking*, 74 VAND. L. REV. 861, 930-32 (2021) (discussing continuing presence of "[j]ail exceptionalism" in state and local finance law); Alice Ristroph, *The Wages of Criminal Law Exceptionalism*, CRIM. L. & PHIL., Oct. 2021, at 1, 3 (critiquing criminal law exceptionalism "both as an effort to develop a more accurate descriptive account of criminal law, and as one step in an effort to reverse course and scale back criminal interventions").

[47] *See, e.g.*, David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 584-88 (2017) (rejecting legal immigration law doctrine that departs "from mainstream constitutional norms").

noncitizens.[48] Part II unearths some of the nodes in the fammigration web. The focus there is on five central ways family regulation proceedings impact current and future immigration proceedings: temporary orders of protection, background checks and fingerprinting, pretrial admissions, neglect and abuse findings, and SIJS findings. Part III identifies how the convergence discussed in Part II bolsters both the criminal legal and immigration systems and furthers marginalization by marking and subordinating parents. Part IV offers ways to expand knowledge of, sever threads of, and shrink the fammigration web. To dismantle carceral logics,[49] we must identify how they are produced across systems.[50] The fammigration web will not be disentangled easily. And yet—building on calls to shrink the criminal legal system—this Article proposes a starting point.

I. FAMMIGRATION

The term "fammigration" builds on the conceptualization of the relationship between the criminal legal and immigration systems as *crimmigration*.[51] A rich body of scholarship conceptualizes the immigration implications of convictions as "collateral consequences."[52] Immigration and criminal legal scholars have paid close attention to the profound impact of criminal law on immigration

[48] This Article focuses on undocumented, documented (noncitizens with legal status), and mixed-status families to reflect that legal status does not insulate noncitizens from immigration enforcement generally and more specifically from becoming ensnared in the fammigration web. *See* Asad L. Asad, *On the Radar: System Embeddedness and Latin American Immigrants' Perceived Risk of Deportation*, 54 LAW & SOC'Y REV. 133, 141-42 (2020) (examining how "embeddedness" in the U.S. immigration system through legal status creates "pathways to surveillance and punishment").

[49] For the definition and a discussion of carceral logics in the family regulation system, see *infra* Section I.A.

[50] *See* Patricia Hill Collins, *On Violence, Intersectionality and Transversal Politics*, 40 ETHNIC & RACIAL STUD. 1460, 1464 (2017) ("Different systems of power each rely on distinctive forms of violence . . . ."); *see also* Bergen & Abji, *supra* note 29, at 36-37 (explaining connection between child protection and crimmigration systems).

[51] *See* Stumpf, *Crimmigration Crisis*, *supra* note 8, at 379-86 (describing crimmigration as overlap of immigration and criminal laws, enforcement methods, and case procedures).

[52] *See, e.g.*, Teresa A. Miller, *The Impact of Mass Incarceration on Immigration Policy*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 214, 214-18 (Marc Mauer & Meda Chesney-Lind eds., 2002); Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 261 (2002); Chin & Holmes, *supra* note 12, at 700; Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1199 & n.5 (2016) (challenging existing literature's use of term "collateral consequence" to mean only "state-imposed decisions" that flow from the criminal legal system); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 490 n.181 (2010); Carlie Malone, Note, *Plea Bargaining and Collateral Consequences: An Experimental Analysis*, 73 VAND. L. REV. 1161, 1167-70 (2020).

proceedings.[53] The Supreme Court recognizes the interconnectedness of the criminal legal system and deportation proceedings in *Padilla v. Kentucky*.[54] However, system overlaps that are not directly related to the criminal legal system remain undertheorized. This Article introduces and maps fammigration as one such example.

This Article builds on burgeoning scholarship that challenges exceptionalism in criminal law and procedure.[55] Professor Benjamin Levin, for example, argues that many of the core issues debated in the criminal legal context are not exceptional to criminal law and, instead, apply to civil systems.[56] Professors Katherine Beckett and Naomi Murakawa observe that "criminal law and criminal justice institutions . . . represent only the most visible tentacles of penal power."[57] A number of immigration scholars have pointed to the carceral logics embedded in the immigration system.[58] This Article advances these arguments by disentangling the effects of the family regulation system on noncitizen and mixed-status families. While systems within the carceral state have different purported goals and are governed by separate underlying procedural and substantive rules, the same carceral logics bind them together. In prior work, I have framed the intersections of the family regulation and other systems as *enmeshed* rather than collateral to highlight that some forms of state intervention

[53] *See, e.g.*, Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594, 609 (2016) (arguing the term "collateral consequences" does not capture extent to which "immigration system has . . . been injected into the criminal system" and vice versa); Eagly, *supra* note 28, at 1146-56; Sklansky, *supra* note 28, at 201-02; Motomura, *supra* note 28, at 1858; Wishnie, *State and Local Police Enforcement*, *supra* note 28, at 1090-93; Wishnie, *Laboratories of Bigotry*, *supra* note 28, at 524-25.

[54] *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 364 (2010) ("[A]s a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.").

[55] *See, e.g.*, Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1012 (2006); Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 570-71 (2021); Levin, *supra* note 27, at 1387; Ristroph, *supra* note 46, at 3-4; Kate Weisburd, *Rights Violations as Punishment*, 111 CALIF. L. REV. (forthcoming 2023) (manuscript at 4-5) (on file with *Boston University Law Review*); Carol S. Steiker, *Capital Punishment and Contingency*, 125 HARV. L. REV. 760, 763-70 (2012) (reviewing DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION (2010)); Salil Dudani, Note, *Unconstitutional Incarceration: Applying Strict Scrutiny to Criminal Sentences*, 129 YALE L.J. 2112, 2132-33 (2020).

[56] *See* Levin, *supra* note 27, at 1387.

[57] Beckett & Murakawa, *supra* note 27, at 222.

[58] *See* Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1092-93, (2021) (discussing carceral logics embedded in immigration deportation); Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 CALIF. L. REV. 1597, 1610 (2022) (discussing immigration enforcement as part of the prison industrial complex); Rebecca Sharpless, "*Immigrants Are Not Criminals": Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 698, 731 (2016) (cautioning against distinguishing between "immigrants" and "criminals" to avoid further entrenching the carceral state).

do not necessarily relate to each other in hierarchical or chronological ways.[59] To lay the foundation for a theoretical account of the fammigration web, this Part discusses the carceral logics embedded in the family regulation system and the nature of both the family regulation and immigration systems. Understanding how they operate and are conceptualized separately helps illuminate their cumulative effects.

A quickly growing body of legal and social science scholarship fundamentally challenges the surveillance and punishment of marginalized families by the family regulation system. Within this body of scholarship several central points emerge. *One*, the family regulation system cannot be understood separate and apart from the criminal legal system.[60] *Two*, the family regulation system does not target child neglect or abuse, but poverty, Blackness, and indigeneity.[61] In other words, despite purporting to keep children safe, it surveils already marginalized families in ways that further subordinate them. *Three*, despite its categorization as "civil" in nature, the family regulation system is punitive.[62] *Four*, in light of the system's history and current practice, reforms are insufficient. Accordingly, a meaningful intervention must include a fundamental rethinking of support for marginalized families.[63] The following Section further contextualizes these critiques as important prerequisites to understanding the fammigration web.

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[59] *See* Washington, *Survived & Coerced*, *supra* note 4, at 1128-29. This is not to say that a criminal case is never the central concern of an individual. Instead, I suggest that the assumption of hierarchy implied by the term "collateral" does not comprehensively capture the interconnectedness of punishment mechanisms. *See id.*; *see also* Smyth, *From "Collateral" to "Integral," supra* note 12, at 802 (using the term "enmeshed penalties" when referring to consequences stemming from the criminal legal system); McGregor Smyth, *"Collateral" No More: The Practical Imperative for Holistic Defense in a Post*-Padilla *World . . . or, How To Achieve Consistently Better Results for Clients*, 31 ST. LOUIS U. PUB. L. REV. 139, 148 (2011) (using the terms "'enmeshed penalties' or 'enmeshed consequences' . . . to encompass . . . 'collateral consequences' because the terms evoke the intimate relationship with criminal charges").

[60] *See, e.g.*, ROBERTS, TORN APART, *supra* note 1, at 162.

[61] *See, e.g.*, S. Lisa Washington, *Pathology Logics*, NW. U. L. REV. (forthcoming 2023) [hereinafter Washington, *Pathology Logics*] (manuscript at 14-25), file:///Users/lisamaryrichmond/Downloads/SSRN-id4068859.pdf [https://perma.cc/W48H-KML4].

[62] *See, e.g.*, Brianna Harvey, Josh Gupta-Kagan & Christopher Church, *Reimagining Schools' Role Outside the Family Regulation System*, 11 COLUM. J. RACE & L. 575, 592 (2021).

[63] *See, e.g.*, Caitlyn Garcia & Cynthia Godsoe, *Divest, Invest, & Mutual Aid*, 12 COLUM. J. RACE & L. 601, 615-28 (2022) (calling for divestment from the family regulation system and investment in community-led mutual aid); Lisa Kelly, *Abolition or Reform: Confronting the Symbiotic Relationship Between "Child Welfare" and the Carceral State*, 17 STAN. J. C.R. & C.L. 255, 292-319 (2021); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 120 (2019) (calling for a freedom constitutionalism "to dismantle systems beyond police and prisons, including foster care, regulation of pregnancy, and poverty").

A. *The Carceral Logics Embedded in Family Regulation*

Since Roberts published her groundbreaking work on the family regulation system, *Shattered Bonds*,[64] much has been written about the carceral logics driving the "child welfare system." In this Article, "carceral logics" refers to the ways the family regulation system not only intersects with the criminal legal system but mirrors the ways it subordinates marginalized groups to maintain social order. To be sure, the family regulation and criminal legal systems have different purported goals and are governed by separate procedural and substantive rules. Still, much like the criminal legal system, the family regulation system relies on surveillance, coercion, and punishment, instead of support, to achieve the purported goal of child safety. Carceral logics legitimize punitive interventions against marginalized groups to maintain social order while "obscuring the . . . retrenchment of the welfare state."[65]

The family regulation system has a wide range of punitive tools at its disposal to intervene in families and elicit compliance.[66] Arguably, the most punitive tool is the system's ability to temporarily and permanently separate children from their parents.[67] CPS caseworkers supervise families, conduct unannounced home visits, and mandate and monitor mental health treatment for parents and children.[68] To enforce supervision and separation, family regulation actors regularly rely on and work with law enforcement.[69]

Scholars have uncovered the parallels of the criminal legal and family regulation systems. Professor Tina Lee observes that CPS caseworkers operate akin to law enforcement.[70] Professors Heather Bergen and Salina Abji discuss

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[64] *See generally* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2001).

[65] Bergen & Abji, *supra* note 29, at 38.

[66] For an overview of the family regulation system's punitive tools, see Washington, *Survived & Coerced*, *supra* note 4, at 1124-33.

[67] *See id.* at 1124-25.

[68] *See id.* at 1100, 1102, 1125-26.

[69] *See, e.g.*, Turner v. Lowen, 823 F. App'x 311, 314 (6th Cir. 2020) (discussing how parents were told to go to sheriff's office to get family regulation caseworker assigned to their case); Frank Edwards, *Family Surveillance: Police and the Reporting of Child Abuse and Neglect*, RUSSELL SAGE FOUND. J. SOC. SCIS., Feb. 2019, at 50, 52 (describing police agencies' "deep institutional ties to child protection agencies"); Greer Film, *A Life Changing Visitor: When Children's Services Knocks*, VIMEO, at 03:47-04:07 (2013), https://vimeo.com/71127830 (featuring one mother who discusses CPS, backed up by law enforcement, coming to her home to remove her child).

[70] TINA LEE, CATCHING A CASE: INEQUALITY AND FEAR IN NEW YORK CITY'S CHILD WELFARE SYSTEM 89-90 (2016) (describing caseworkers' dual role in assisting clients and enforcing law). In fact, in the immigration system, CPS caseworkers have been interpreted to be law enforcement certifiers for the purposes of U Visas. *See* DEPT. OF HOMELAND SEC., U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT 7 (2022), https://www.dhs.gov/sites/default/files/2022-05/U-Visa-Law-Enforcement-Resource-Guide-2022_1.pdf [https://perma.cc/2Q26-5QKX].

CPS's role in facilitating a "carceral pipeline."[71] J. Khadijah Abdurahman argues that similar to "managerial justice"[72] in the criminal legal context, family regulation policing obscures the "less visible consequences" of state intervention into families.[73] Professor Frank Edwards observes that the family regulation and criminal legal systems are likely to impact similar communities.[74] Indeed, for Black and Brown families, the family regulation system functions much like the criminal legal system.[75] As Professor Venezia Michalsen argues, the family regulation system's surveillance of Black mothers "mirror[s] the surveillance of Black and brown boys and men by the police."[76] Roberts poignantly concludes that the family regulation and criminal legal systems are more akin to "one integrated state apparatus for controlling Black communities—a giant carceral web."[77]

Despite the many attempts at incremental reform, Black children continue to be overrepresented in the family regulation system.[78] Race and class

[71] Bergen & Abji, *supra* note 29, at 35.

[72] *See* ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 4-5 (2018) ("Under [the managerial] model, criminal court actors . . . are using the assorted tools of criminal law and procedure to sort, test, and monitor people over time.").

[73] J. Khadijah Abdurahman, Comment, *Calculating the Souls of Black Folk: Predictive Analytics in the New York City Administration for Children's Services*, 11 COLUM. J. RACE & L.F. 75, 90 (2021).

[74] Edwards, *supra* note 69, at 51.

[75] *See* ROBERTS, TORN APART, *supra* note 1, at 161 ("[T]he child welfare system operates surprisingly like its criminal counterpart."); Cloud et al., *supra* note 32, at 72-73 ("In the child welfare context, the fear of Blackness justifies child protective workers' use of so-called 'intervention' tools to displace Black children from their homes . . . ."); Laroche, *supra* note 4, at 531-32 ("In New York City in March 2021 . . . of the approximately 7,900 children the Administration for Children's Services . . . separated from their parents, eight-seven [sic] percent were Black or Latino."); Michalsen, *supra* note 32, at 506 (emphasizing family regulation system's surveillance of poor Black mothers); Collier Meyerson, *For Women of Color, the Child-Welfare System Functions Like the Criminal-Justice System*, NATION (May 24, 2018), https://www.thenation.com/article/archive/for-women-of-color-the-child-welfare-system-functions-like-the-criminal-justice-system/ ("Mothers of color are scrutinized by authority figures—and then punished.").

[76] Michalsen, *supra* note 32, at 506.

[77] ROBERTS, TORN APART, *supra* note 1, at 162.

[78] *See* CHILD WELFARE INFO. GATEWAY, CHILD.'S BUREAU, CHILD WELFARE PRACTICE TO ADDRESS RACIAL DISPROPORTIONALITY AND DISPARITY 5 (2021), https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf [https://perma.cc/8XZX-NTQJ]; MARIAN S. HARRIS, RACIAL DISPROPORTIONALITY IN CHILD WELFARE, at xv-xvi (2014); LISA SANGOI, MOVEMENT FOR FAM. POWER, "WHATEVER THEY DO, I'M HER COMFORT, I'M HER PROTECTOR." HOW THE FOSTER SYSTEM HAS BECOME GROUND ZERO FOR THE U.S. DRUG WAR 10-12 (2020), https://static1.squarespace.com/static/5be5ed0fd274cb7c8a5d0cba/t/5eead939ca509d4e36a89277/1592449422870/MFP+Drug+War+Foster+System+Report.pdf [https://perma.cc/43WF-GDMD]; Dana Hamilton, *Report of the Race, Class, Ethnicity, and Gender Working Group*, 70 FORDHAM L. REV. 411, 412-13 (2001).

disproportionality remains pervasive at all stages of family regulation cases.[79] Black families are more likely to be reported and investigated for child maltreatment.[80] When a report is made, it is more likely to be substantiated if the family is not white.[81] And finally, once children are separated from their families, Black children remain in foster care longer than white children, where they experience worse outcomes.[82]

B. *The False Notion of Support*

Although directly impacted parents recognize the carceral logics embedded in the family regulation system, the characterization of the system as child protective, not punitive, persists in popular discourse. In the summer of 2020, directly impacted parents called for the abolition of the family regulation system.[83] Their narratives linked "the fight against police brutality and criminal justice reform."[84] They compared CPS caseworkers with the police and termed the termination of parental rights the "civil death penalty."[85] Still, the language

[79] *See* DUNCAN LINDSEY, CHILD POVERTY AND INEQUALITY: SECURING A BETTER FUTURE FOR AMERICA'S CHILDREN 31 (2008); Andrea Charlow, *Race, Poverty, and Neglect*, 28 WM. MITCHELL L. REV. 763, 789 (2001); Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485, 1491 (2007); Jessica E. Marcus, *The Neglectful* Parens Patriae*: Using Child Protective Laws To Defend the Safety Net*, 30 N.Y.U. REV. L. & SOC. CHANGE 255, 257 (2006).

[80] *See* John D. Fluke, Ying-Ying T. Yuan, John Hedderson & Patrick A. Curtis, *Disproportionate Representation of Race and Ethnicity in Child Maltreatment: Investigation and Victimization*, 25 CHILD. & YOUTH SERVS. REV. 359, 361-62 (2003).

[81] *See* Emily Putnam-Hornstein, Barbara Needell, Bryn King & Michelle Johnson-Motoyama, *Racial and Ethnic Disparities: A Population-Based Examination of Risk Factors for Involvement with Child Protective Services*, 37 CHILD ABUSE & NEGLECT 33, 37-39 (2013).

[82] *See* Keva M. Miller, Katharine Cahn & E. Roberto Orellana, *Dynamics That Contribute to Racial Disproportionality and Disparity: Perspectives from Child Welfare Professionals, Community Partners, and Families*, 34 CHILD. & YOUTH SERVS. REV. 2201, 2201 (2012).

[83] *See* Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020, 5:26 AM), https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480 ("There is a small but growing movement to radically transform or abolish the family regulation system, ignited by [B]lack mothers who have been separated from their children and joined by former foster youth, social justice activists, legal services providers, nonprofit organizations, and scholars.").

[84] Cloud et al., *supra* note 32, at 72.

[85] Ashley Albert, Tiheba Bain, Elizabeth Brico, Bishop Marcia Dinkins, Kelis Houston, Joyce McMillan, Vonya Quarles, Lisa Sangoi, Erin Miles Cloud & Adina Marx-Arpadi, *Ending the Family Death Penalty and Building a World We Deserve*, 11 COLUM. J. RACE & L. 861, 867 (2021) (describing termination of parental rights as the "civil death penalty"); N.R. Kleinfield, *The Girls Who Haven't Come Home*, N.Y. TIMES (July 6, 2013), https://www.nytimes.com/2013/07/07/nyregion/the-girls-who-havent-come-home.html ("It is not for nothing that removing parental rights is called the civil death penalty.").

of treatment and support to describe family regulation proliferates.[86] The system purports to prioritize family reunification whenever possible and further rehabilitative goals for parents and their children, not punishment.[87] The popular narrative provides that when rehabilitation is not an option, the system saves children from their abusive parents.[88] While the system may be flawed, so the narrative, overall it helps families and keeps children safe. Entrenched narratives of the system and the parents it targets complicate efforts to think beyond punitive solutions to achieve safety.[89] A growing number of scholars, practitioners, and directly impacted families are drawing on lived experiences to intervene in the mainstream narrative that family safety requires coercive state intervention.[90]

[86] *See* Washington, *Pathology Logics*, *supra* note 61 (manuscript at 42-61) (describing the "dominant child safety narrative" that "suggests that the family regulation system is primarily focused on violence against children").

[87] A 2022 letter from Children's Rights and the Human Rights Institute at Columbia Law School to the United Nations provides: "Although the child welfare system purports to protect children's safety and well-being, decades of research, data, and lived experiences reveal that the system has a long history of subjecting families of color, particularly Black families, to unjust and racist practices and policies." Letter from Shereen A. White, Dir. of Advoc. & Pol'y, Child.'s Rts., and Anjli Parrin, Co-Exec. Dir., Hum. Rts. Inst., Columbia L. Sch., to UN Comm. on the Elimination of Racial Discrimination (May 16, 2022), https://www.childrensrights.org/wp-content/uploads/2022/05/2022.05.16-CERD-NGO-Submission-on-List-of-Themes-for-U.S.-.pdf [https://perma.cc/M5JQ-PEM3]; *see also* N.Y. SOC. SERV. LAW § 384-b(1)(a)(iii) (McKinney 2022) ("[T]he state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home . . . ."); Julie Odegard, *The Americans with Disabilities Act: Creating "Family Values" for Physically Disabled Parents*, 11 LAW & INEQ. 533, 558 (1993) ("[A]n essential goal of social services is family preservation . . . .").

[88] *See* Matthew I. Fraidin, *Changing the Narrative of Child Welfare*, 19 GEO. J. ON POVERTY L. & POL'Y 97, 98-100 (2012) (describing "grand narrative of child welfare" as "one of brutal, deviant, monstrous parents").

[89] *See* Brady T. Heiner & Sarah K. Tyson, *Feminism and the Carceral State: Gender Responsive Justice, Community Accountability, and the Epistemology of Antiviolence*, FEMINIST PHIL. Q., 2017, at 1, 2. Other scholars have discussed how "carceral humanism" in social work enables the expansion of the carceral state. *See, e.g.*, Sandra M. Leotti, *The Keepers and the Kept: Social Work and Criminalized Women, an Historical Review*, 33 J. PROGRESSIVE HUM. SERVS. 151, 152-53 (2022).

[90] *See, e.g.*, Julia Hernandez, *Lawyering Close to Home*, 27 CLINICAL L. REV. 131, 131-35 (2020) (explaining how her own traumatic experience with the family regulation system informs her teaching); Angela Olivia Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being*, 11 COLUM. J. RACE & L. 639, 651-53 (2021) (describing Angeline Montauban's five-year-long struggle to get her son out of the foster system and back into her care). Outside of the family regulation context, Critical Race scholars have long used storytelling to intervene in dominant narratives. *See, e.g.*, Monica Bell, *The Obligation Thesis: Understanding the Persistent "Black Voice" in Modern Legal Scholarship*, 68 U. PITT. L. REV. 643, 646-47 (2007); Paul Butler, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1876, 1917-18 (1999); I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 26-

The narrative of safety and family integrity is amplified where the family regulation system and the immigration systems overlap. Most family regulation agencies reject the notion that they exacerbate harms for immigrant families.[91] Family regulation agencies are organized differently in every state.[92] Their approaches and internal policy vary.[93] Some states and cities have adopted structures to specifically address immigration issues.[94] A few jurisdictions provide specialized training on immigration issues to family regulation caseworkers.[95] Against the background of potential immigration consequences, some family regulation agencies' policies caution against collecting or disclosing data about the immigration status of families.[96] To be sure, some jurisdictions have instituted some protections. However, these policies, guidelines, and executive orders do not provide comprehensive protection from federal immigration officials. In fact, they may create an expectation that the family regulation system is unable to fulfill. This Article argues that while these guidelines, policies, and executive orders superficially allow family regulation actors to distance themselves from the immigration apparatus, the family regulation and immigration systems are intertwined in ways that ultimately place noncitizen families at risk of permanent separation.[97] In other words, the claim that family regulation state actors try to keep families together and assist immigrant families is defensive, not descriptive.

While the focus of this Article is on the *structures* of the family regulation system that put noncitizen families at risk of immigration consequences—regardless of an individual state actor's intent—CPS has, in some instances, affirmatively facilitated deportations by reporting families to ICE. In a Michigan

27 (2019); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2437-38 (1989); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1710-13 (1993); Margaret E. Montoya, Mascaras, Trenzas, y Greñas*: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185, 185 (1994); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1103 (2008).

[91] *See, e.g.*, *Working with Immigrant and Refugee Families*, *supra* note 38 (listing "[c]ulturally responsive child welfare agencies").

[92] *See generally* MARK GREENBERG, RANDY CAPPS, ANDREW KALWEIT, JENNIFER GRISHKIN & ANN FLAGG, MIGRATION POL'Y INST., IMMIGRANT FAMILIES AND CHILD WELFARE SYSTEMS: EMERGING NEEDS AND PROMISING POLICIES (2019), https://www.migrationpolicy.org/sites/default/files/publications/ImmigrantFamiliesChildWelfare-FinalWeb.pdf [https://perma.cc/8H36-C72B] (reporting on various states' child welfare agencies' structures, approaches, and policies).

[93] *See id.* at 2-8.

[94] *See id.* at 23.

[95] *See id.* at 25-27 (detailing that Florida, New Mexico, and New Jersey provide training to all CPS caseworkers and supervisors).

[96] *Id.* at 7 (providing a summary of several state policies governing the collection and disclosure of immigration status).

[97] *See infra* Parts II, III.

case, CPS alerted ICE that it knew of an undocumented family.[98] The parents were deported.[99] At the time, the children were in the state foster system.[100] Shortly thereafter, CPS filed a petition in court seeking the termination of the parents' rights to their children, arguing that the parents abandoned them when they were deported.[101] Not only did CPS initiate ICE involvement, but the consequences of ICE involvement were later used as one basis for legal parent-child separation. There is at least some evidence that the Michigan case does not represent an isolated incident.[102]

C. *The Punitive Practice of Fammigration*

Although some scholars have described the family regulation and immigration systems as "quasi-criminal,"[103] both systems are commonly understood as civil in nature.[104] Beckett and Murakawa observe how the labeling of certain punishment mechanisms as "civil" or "administrative" has enlarged the carceral state's ability to punish through noncriminal avenues.[105] Professor Elizabeth Katz discusses how the jurisdiction shift from criminal to family court allowed judges to impose lower procedural standards while retaining criminal legal punishment mechanisms in child support and other domestic cases.[106]

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[98] *In re* B & J, 756 N.W.2d 234, 237 (Mich. Ct. App. 2008).

[99] *Id.* Note that ICE initiates removal proceedings by filing a "Notice to Appear," alleging that a noncitizen is removable pursuant to immigration law. *See* 8 U.S.C. § 1229.

[100] *In re B & J*, 756 N.W.2d at 237.

[101] *Id.* at 238.

[102] *See* ROBERTS, TORN APART, *supra* note 1, at 206 (citing public defense attorney's assertion that CPS in New York City has "inform[ed] law enforcement when they discover that a parent they are investigating is undocumented").

[103] *See* Tania N. Valdez, *Pleading the Fifth in Immigration Court: A Regulatory Proposal*, 98 WASH. U. L. REV. 1343, 1358 (2021) ("[A]lthough the immigration system is characterized as civil, it functions in a quasi-criminal manner in many important aspects."); Kendra Weber, *Life, Liberty, or Your Children: California Parents' Fifth Amendment Quandary Between Self-Incrimination and Family Preservation*, 12 CHAP. L. REV. 155, 158-60 (2008) ("[D]ependency proceedings are more accurately referred to as 'quasi-criminal.'").

[104] *See In re* Mary S., 230 Cal. Rptr. 726, 728 (Ct. App. 1986) ("Dependency proceedings are civil in nature."); Lois R. v. Superior Ct., 97 Cal. Rptr. 158, 162 (Ct. App. 1971) ("[D]ependency proceedings are civil and have been conducted without strict adherence to all the formalities of a criminal trial."); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909) (claiming criminal courts should only be involved in cases of juvenile delinquency or neglect rather than cases of poverty or misfortune).

[105] *See* Beckett & Murakawa, *supra* note 27, at 225-34.

[106] *See* Elizabeth D. Katz, *Criminal Law in a Civil Guise: The Evolution of Family Courts and Support Laws*, 86 U. CHI. L. REV. 1241, 1245 (2019) (discussing how states deliberately categorized child support proceedings as civil rather than criminal and concluding that this allowed states "to intervene more directly and coercively" in families' lives).

The labeling of the family regulation system as *civil* as opposed to *criminal* justifies limited procedural protections[107] and lower standards of proof.[108] Unlike the high burden of "beyond a reasonable doubt" in criminal court, the state must only prove neglect or abuse by a "preponderance of the evidence."[109] Only in termination of parental rights proceedings where the state seeks to "sever completely and irrevocably the rights of parents in their natural child" has the Supreme Court recognized a higher burden of "clear and convincing evidence."[110] In practice, even the relatively low burden of preponderance is flipped to the detriment of parents. As the American Bar Association ("ABA") guidelines for parent representation provide, "Although the burden of proof is on the child welfare agency, in practice the parent . . . generally must demonstrate that [they] can adequately care for the child."[111] More generally, compliance and informality are favored in family regulation proceedings. Parents are discouraged from insisting on an adversarial process and procedural protections.[112] Raising concerns about procedural protections and challenging the state's allegations might label them as an untrustworthy caregiver.[113]

Similarly, courts' categorization of immigration proceedings as civil results in fewer procedural protections.[114] Professor Tania Valdez argues that while

[107] In family regulation cases there is no absolute right to counsel for indigent parents. *See infra* Section IV.A. Moreover, while the Fifth Amendment applies in family court proceedings, family court judges can draw negative inferences from a failure to testify. *See infra* Section II.B.3.b. Anna Arons argues that the absence of procedural protections in the family regulation system is a deliberate choice. *See generally* Anna Arons, *The Empty Promise of the Fourth Amendment in the Family Regulation System*, 100 WASH. U. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4192039 [https://perma.cc/QF79-C8AU].

[108] *See infra* notes 109-10 and accompanying text (describing "preponderance of the evidence" and "clear and convincing evidence" standards in detail).

[109] *See* Candra Bullock, *Low-Income Parents Victimized by Child Protective Services*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1023, 1030-36 (2003) ("A fair preponderance of the evidence, which is a minimal standard of proof, is applied at [the temporary custody hearing] stage of child abuse and neglect proceedings." (footnote omitted)); *see also, e.g.*, N.Y. FAM. CT. ACT § 1046(b)(i) (McKinney 2022) ("[A]ny determination that the child is an abused or neglected child must be based on a preponderance of evidence . . . .").

[110] In termination of parental rights hearings, the Supreme Court mandates the higher standard of "clear and convincing evidence." *See* Santosky v. Kramer, 455 U.S. 745, 747-48 (1982). Note that both standards are significantly lower than the prosecution's burden to prove a criminal case beyond a reasonable doubt.

[111] AM. BAR ASS'N., STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES 9 (2006), https://www.americanbar.org/content/dam/aba/administrative/child_law/aba-parent-rep-stds.pdf [https://perma.cc/R4FS-MED2].

[112] *See* Amy Sinden, *"Why Won't Mom Cooperate?": A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 353-55 (1999).

[113] *See* Arons, *supra* note 107 (manuscript at 32).

[114] *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("The order of deportation is not a punishment for crime."); Immigr. & Naturalization Serv. v. Lopez-

many elements of the criminal legal system have been implemented into the immigration system, procedural protections have, to a large extent, not.[115] While courts have extended select procedural protections to deportation[116] and family regulation proceedings,[117] procedural due process remains the limited framework through which state intervention may be challenged.

Despite their formal categorization as civil,[118] the family regulation and immigration systems are punitive in practice. Scholars have relied on both the actual experience of detention and deportation and the role of the state in these systems to highlight the punitive nature of immigration proceedings.[119] Others have highlighted the growing criminalization of removal proceedings.[120] The effects of the family regulation system on marginalized communities highlights its punitive nature.[121] Every year, thousands of marginalized families are confronted with the removal of children from their homes, the use of children as

Mendoza, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action . . . .").

[115] *See* Valdez, *supra* note 103, at 1358.

[116] Courts have applied the exclusionary rule in limited circumstances. *See id.* at 1360-61 (explaining racial profiling was "egregious enough" to justify the use of the exclusionary rule in deportation proceedings).

[117] *See, e.g.*, Arons, *supra* note 107 (manuscript at 22-25) (discussing the application and limitation of the Fourth Amendment in family regulation searches).

[118] While this is overwhelmingly true, it is important to acknowledge scholarship that discusses or challenges the civil/criminal binary. Some scholars argue that the line between criminal and civil is blurry. *See, e.g.*, John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1875-77 (1992); Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 679-80 (1999); David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home*: *What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 683-85 (2006); Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 778-80 (1997). Others identify and more fundamentally challenge "criminal law exceptionalism." *See, e.g.*, Levin, *supra* note 27, at 1387; Littman, *supra* note 46, at 930-32; Ristroph, *supra* note 46, at 3-4.

[119] *See* Jennifer M. Chacón, *Immigration Detention: No Turning Back?*, 113 S. ATL. Q. 621, 623 (2014) ("[Immigration] [d]etention is punitive, and it is experienced as such by immigrants."); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1349-50 (2014) (noting the intertwined nature of immigration detention and penal incarceration).

[120] *See* Valdez, *supra* note 103, at 1364 ("[T]he seemingly ever-increasing immigration consequences of criminal convictions, increasing prosecution of federal criminal cases pertaining to immigration violations, and increasing use of detention are all indicative of the criminalization of civil removal proceedings.").

[121] *See* Harvey et al., *supra* note 62, at 592 ("[The] false perception of the family regulation system serving as a support to families is inconsistent with the historically documented harm, surveillance, punishment, and policing experienced by families entangled within the system.").

"bargaining chips" to obtain parental compliance, and the long-term economic effects of family regulation intervention.[122]

The fammigration web, this Article argues, bolsters two punitive systems that offer little procedural protection, heavily places burdens on individuals, and provides the government with wide discretion and far-reaching powers. Still, their characterization as civil rather than criminal systems justifies fewer procedural protections and lower burdens of proof for government intervention. While scholarship has extensively discussed the implications of criminal convictions in the civil sphere, this Article uncovers the interconnectedness of two systems that, although civil in nature, are experienced as punitive.

II. PRODUCING FAMMIGRATION RISKS

Part II examines how information gathered by and produced in the family regulation system exacerbates specific risks for noncitizen and mixed-status families. This Part uncovers select nodes of the fammigration web by discussing some of the most common ways family regulation intervention impacts deportation, detention, and immigration applications.[123] In doing so, this Part uncovers select nodes of the fammigration web.

As the web metaphor suggests, the relationship between the family regulation and immigration systems is neither linear nor intentional. Professor Jennifer Chacón observes in the crimmigration context that "some of the most egregious harms wrought by criminal justice actors in immigration courts are imposed inadvertently."[124] Some of the nodes in the fammigration web outlined in this Part are inadvertent connections, impacting both undocumented people and noncitizens with legal immigration status.[125]

The immigration system's investment in a racialized dichotomy of "deserving" and "undeserving" immigrants provides fertile ground for the use of information obtained or produced by the family regulation system—a system that pathologizes poor families of color.[126]

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[122] *See* Garcia & Godsoe, *supra* note 63, at 603-04.

[123] This Part further explores the assertion that "immigration judges have denied . . . relief from deportation relying explicitly on family court findings, family court petitions, and family court orders of protections." Eisenzweig, *supra* note 44, at 510.

[124] Chacón, *Producing Liminal Legality*, *supra* note 25, at 761.

[125] *See* Leisy J. Abrego & Sarah M. Lakhani, *Incomplete Inclusion: Legal Violence and Immigrants in Liminal Legal Statuses*, 37 LAW & POL'Y 265, 266 (2015) (discussing the vulnerability of noncitizens with legal status).

[126] *See* Angela M. Banks, *Respectability & the Quest for Citizenship*, 83 BROOK. L. REV. 1, 10-21 (2017).

A. *Surveillance*

Those with marginalized identities face heightened targeting and surveillance by the family regulation system, the immigration system, and their overlaps.[127] By illustrating *modes* and *sites* of surveillance convergence, this Section reveals the ways information produced or gathered in the family regulation system becomes part of immigration proceedings, ultimately bolstering both systems and subordinating those ensnared in them.[128]

Both the family regulation and immigration systems engage in modes of surveillance that implicate the most intimate parts of a family's life. Once a family regulation case commences, caseworkers regularly conduct announced and unannounced home visits, search (even intimate parts of) the family's home, and question children, landlords, neighbors, and teachers.[129] In some cases they quite literally have their "eyes in the home"[130] for months.[131] Similarly, when a removal case begins in immigration court, noncitizens are often detained in brick-and-mortar jails.[132] Those who are released, pending an open case, are subjected to monitoring, for example, via the Intensive Supervision Assistance Program ("ISAP").[133] ISAP utilizes surveillance technology, including ankle

[127] *See* SANGOI, *supra* note 78, at 25-28; Alan J. Dettlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done To Address Them?*, 692 ANNALS AM. ACAD. POL. & SOC. SCI. 253, 262 (2021); *Black Children Continue To Be Disproportionately Represented in Foster Care*, KIDS COUNT DATA CTR. (Apr. 13, 2020), https://datacenter.kidscount.org/updates/show/264-us-foster-care-population-by-race-and-ethnicity [https://perma.cc/C6FU-8NWL]. Professor Eisha Jain observes the centrality of racial construction in "immigration policing." *See* Eisha Jain, *Policing the Polity*, 131 YALE L.J. 1794, 1812-15 (2022); *see also* JULIANA MORGAN-TROSTLE & KEXIN ZHENG, THE STATE OF BLACK IMMIGRANTS PART II: BLACK IMMIGRANTS IN THE MASS CRIMINALIZATION SYSTEM 12-19 (2022), https://nyf.issuelab.org/resource/the-state-of-black-immigrants-part-ii-black-immigrants-in-the-mass-criminalization-system.html [https://perma.cc/BG34-62K6]; Jeremy Raff, *The 'Double Punishment' for Black Undocumented Immigrants*, ATLANTIC (Dec. 30, 2017), https://www.theatlantic.com/politics/archive/2017/12/the-double-punishment-for-black-immigrants/549425/.

[128] *See infra* Section III.A.

[129] *See* Michelle Burrell, *What Can the Child Welfare System Learn in the Wake of the* Floyd *Decision?: A Comparison of Stop-and-Frisk Policing and Child Welfare Investigations*, 22 CUNY L. REV. 124, 131 (2019); Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610, 611 (2020) [hereinafter Fong, *Getting Eyes in the Home*].

[130] *See* Fong, *Getting Eyes in the Home*, *supra* note 129, at 620.

[131] *See* Burrell, *supra* note 129, at 138.

[132] *See* T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, MARYELLEN FULLERTON, JULIET P. STUMPF & PRATHEEPAN GULASEKARAM, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 348-50 (9th ed. 2020).

[133] *See* ALY PANJWANI & HANNAH LUCAL, TRACKED & TRAPPED: EXPERIENCES FROM ICE DIGITAL PRISONS 4 (2022), https://notechforice.com/wp-content/uploads/2022/05/TrackedTrapped_final.pdf [https://perma.cc/734W-AJHP].

monitoring, causing physical and psychological harm.[134] A 2021 study found that Black immigrants are disproportionately subjected to surveillance monitoring.[135] The study concludes that "the disparities found in the collected data mirror the disparate detention and deportation of Black immigrants, well-rooted in the racist hierarchy that has shaped U.S. immigration policy from its inception."[136] As Professor Laila Hlass discusses, "[T]he immigration legal system is designed to construct and maintain racial hierarchies."[137]

ICE and ISAP supervision can include in-home "check-ins" by federal officers.[138] This means that a family might not only experience surveillance by family regulation caseworkers in their home, but also by ICE or ISAP—adding additional "eyes into their home." This also means that ICE can monitor family composition. A removal of a parent or child from the home due to a family regulation case can raise red flags during an ICE check.[139]

The fammigration system also expands sites of surveillance. Courthouses, including family courts, became sites of surveillance for noncitizen parents during the Trump Administration.[140] The Immigrant Defense Project referred to the arrest of noncitizens in criminal and civil courthouses as the "courthouse trap."[141] According to the Immigrant Defense Project's 2019 report, ICE arrests in New York increased 1700% from 2016 to 2018 and 17% from 2017 to

[134] *See id.* at 11-34 (documenting eleven stories of individuals surveilled by ICE and detailing the harms this surveillance inflicts on families).

[135] *See* TOSCA GIUSTINI, SARAH GREISMAN, PETER L. MARKOWITZ, ARIEL ROSEN, ZACHARY ROSS, ALISA WHITFIELD, CHRISTINA FIALHO, BRITTANY CASTLE & LEILA KANG, IMMIGRATION CYBER PRISONS: ENDING THE USE OF ELECTRONIC ANKLE SHACKLES 23-24 (2021), https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1002&context=faculty-online-pubs [https://perma.cc/LW36-DL54].

[136] *Id.* at 23.

[137] *See* Hlass, *supra* note 58, at 1610.

[138] GIUSTINI ET AL., *supra* note 135, at 7.

[139] In a 2022 training for public defenders, the Immigrant Defense Project and The Bronx Defenders discussed issues that may arise during ICE/ISAP check-ins when a family court order temporarily changes family composition. The slides are on file with the author.

[140] *See* Christopher N. Lasch, *A Common-Law Privilege To Protect State and Local Courts During the Crimmigration Crisis*, 127 YALE L.J.F. 410, 411-14, 422-23, 431-39 (2017) (providing an account of courthouse arrests during the Trump Administration and arguing that the common law "privilege from arrest" provides local courts authority to regulate courthouse arrests).

[141] *See generally* IMMIGRANT DEF. PROJECT, THE COURTHOUSE TRAP: HOW ICE OPERATIONS IMPACTED NEW YORK'S COURTS IN 2018 (2019) [hereinafter THE COURTHOUSE TRAP], https://www.immigrantdefenseproject.org/wp-content/uploads/TheCourthouse Trap.pdf [https://perma.cc/CGS3-ECBR].

2018.[142] Some of these arrests targeted survivors of domestic violence seeking state assistance in family court.[143]

Courthouses are certainly not the only sites of surveillance relevant to noncitizens ensnared in the family regulation system. ICE has been known to target private and public spaces, including treatment facilities. Families ensnared in the family regulation system are typically expected to engage in treatment or other services. Attending these programs and facilities can make them vulnerable to immigration enforcement. Against this background, noncitizen parents must weigh the risk of their physical presence in court and in treatment facilities against the risk of the family regulation system's punitive response to noncompliance. A recent study confirms that ICE surveillance deters noncitizens from accessing services, especially when this requires disclosing information to the government, as is often the case in the family regulation context.[144]

Once noncitizen parents become ensnared in the family regulation system, they not only experience surveillance by that system, but also become more vulnerable to immigration enforcement. Both systems intrude on families' lives through extensive surveillance.

B. *Mapping Nodes in the Fammigration Web*

This Section discusses the gathering and production of information about marginalized families in the family regulation sphere as nodes in the fammigration web. Immigration officials' access to data produced in the family regulation system negatively impacts deportation, detention, and immigration applications. Temporary orders of protection issued in family court and fingerprinting serve as important examples. Other family court records and their use in immigration proceedings are another node in the fammigration web. The combination of the immigration system's emphasis on subjective "good moral

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[142] *Id.* at 3, 6; *see also* David Brand, *Pregnant Mom Arrested by ICE in Queens Family Court May Be Deported Tuesday*, QUEENS DAILY EAGLE (June 24, 2019), https://queenseagle.com/all/alma-centeno-santiago-ice-deportation-court-queens [https://perma.cc/K7LR-G7LG]. These stories are not limited to New York. In 2017, ICE officers arrested a woman in an El Paso courthouse as she sought an order of protection against an abusive partner. *See* Katie Mettler, *'This Is Really Unprecedented': ICE Detains Woman Seeking Domestic Abuse Protection at Texas Courthouse*, WASH. POST (Feb. 16, 2017, 5:33 AM), https://www.washingtonpost.com/news/morning-mix/wp/2017/02/16/this-is-really-unprecedented-ice-detains-woman-seeking-domestic-abuse-protection-at-texas-courthouse/.

[143] *See* S. Lisa Washington, *How the Carceral State Punishes Survivors*, REGUL. REV. (Apr. 14, 2022), https://www.theregreview.org/2022/04/14/washington-carceral-state-punishes-survivors/ [https://perma.cc/TA6J-YHZ8] (discussing how survivors of domestic violence face risk of ICE arrest when they come to court); *see also* THE COURTHOUSE TRAP, *supra* note 141, at 10-11 (describing ICE's targeting of "vulnerable immigrants," including survivors of domestic abuse).

[144] *See* Nina Wang, Allison McDonald, Daniel Bateyko & Emily Tucker, *American Dragnet: Data-Driven Deportation in the 21st Century*, GEO. L.: CTR ON PRIV. & TECH. (May 10, 2022), https://www.americandragnet.org/ [https://perma.cc/4W74-QXTU].

character" assessments and wide judicial discretion creates fertile ground for the use of family regulation records.[145] The implications of pretrial admissions, neglect, and abuse findings, and, finally, SIJS findings are examples of this dynamic.

1. Temporary Orders of Protection

In family court, orders of protection are issued frequently, often without a factual hearing probing the allegations.[146] Some of these orders are issued or extended ex parte without the benefit of legal counsel or representation.[147] In fact, in some jurisdictions, the procedure for issuing orders of protection was specifically legislated with "a conscious effort to avoid procedural protections that might be used to justify a judge's refusal to issue a protective order."[148] Preliminary or temporary orders do not constitute a finding or evidence of

[145] The immigration system's reliance on "good moral character" assessments have long been criticized. *See, e.g.*, Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571, 1574 (2012).

[146] *See* Eisenzweig, *supra* note 44, at 509 (stating "family court judges routinely grant orders of protection"); Washington, *Survived & Coerced*, *supra* note 4, at 1129 ("[I]n neglect and abuse proceedings, courts frequently order temporary orders of protection at the initial stage of a case.").

[147] *See, e.g.*, COLO. REV. STAT. ANN. § 19-1-113(1) (West 2022) ("The juvenile court is authorized to issue an ex parte written or verbal emergency protection order for the protection of a child pursuant to this section."); N.Y. FAM. CT. ACT § 1029(c) (McKinney 2022) ("The court may issue or extend a temporary order of protection ex parte . . . ."); TEX. FAM. CODE ANN. § 261.503 (West 2021) ("If the court finds from the information contained in an application for a protective order that there is an immediate danger of abuse or neglect to the child, the court, without further notice to the respondent and without a hearing, may enter a temporary ex parte order for the protection of the child."); UTAH CODE ANN. § 78B-7-202(3)(a) (West 2022) ("If it appears from a petition for a protective order . . . that the child is being abused or is in imminent danger of being abused . . . the court may[,] . . . without notice, immediately issue an ex parte child protective order against the respondent if necessary to protect the child . . . ."); VA. CODE ANN. § 16.1-253(B) (West 2022) ("A preliminary protective order may be issued ex parte upon motion of any person or the court's own motion in any matter before the court, or upon petition. The motion or petition shall be supported by an affidavit or by sworn testimony in person before the judge or intake officer which establishes that the child would be subjected to an imminent threat to life or health to the extent that delay for the provision of an adversary hearing would be likely to result in serious or irremediable injury to the child's life or health."); *id.* § 16.1-253.4(A) ("Any judge of a circuit court, general district court, juvenile and domestic relations district court or magistrate may issue a written or oral ex parte emergency protective order pursuant to this section in order to protect the health or safety of any person.").

[148] David Michael Jaros*, Unfettered Discretion: Criminal Orders of Protection and Their Impact on Parent Defendants*, 85 IND. L.J. 1445, 1452-54 (2010) (discussing how the 1964 amendment of New York's Family Court Act allowed for family court judges to issue temporary orders of protection prior to adjudication "for good cause shown," lowering the standard from "probable cause," to better respond to domestic violence).

"wrongdoing."[149] The standard for the issuance of these orders varies from state to state. Some states simply provide the court with wide discretion.[150] Some require only a showing of good cause.[151] Others require the slightly higher standard of a preponderance of the evidence for temporary orders.[152] Although these orders are civil, some scholars have noted their quasi-criminal nature.[153]

Temporary orders of protection are uploaded into their state's respective database.[154] From there, the information is sent to a Federal Bureau of Investigation database.[155] Federal immigration authorities like ICE then gain access to the information for five years—even if the order is ultimately vacated and the alleged facts are never adjudicated.[156] The information accessible to federal agents includes the name, race, gender, and birth date of the party against whom the order is issued.[157] It also includes information regarding the protected person and whether they and the party against whom the order is issued have children in common.[158] In the family regulation context, protected parties are commonly alleged victims of domestic violence and children allegedly

[149] *See, e.g.*, COLO. REV. STAT. ANN. § 19-1-113(6) (West 2022) ("The issuance of an emergency protection order shall not be considered evidence of any wrongdoing."); N.Y. FAM. CT. ACT § 1029(b) (McKinney 2022) ("A temporary order of protection is not a finding of wrongdoing.").

[150] *See, e.g.*, WYO. STAT. ANN. § 14-3-430(a) (West 2022) ("On application of any party to the proceedings or on its own motion the court may make an order of protection in support of the decree and order of disposition, restraining or otherwise controlling the conduct of the child's parents, guardian or custodian or any party to the proceeding whom the court finds to be encouraging, causing or contributing to the acts or conditions which bring the child within the provisions of this act.").

[151] *See, e.g.*, N.Y. FAM. CT. ACT § 1029(a) (McKinney 2022) ("The family court, upon the application of any person who may originate a proceeding under this article, for good cause shown, may issue a temporary order of protection . . . .").

[152] *See, e.g.*, ME. REV. STAT. ANN. tit. 22, § 4034(1)-(2) (2022) (providing that court may grant temporary order of protection "[i]f the court finds by a preponderance of the evidence presented in the sworn summary or otherwise that there is an immediate risk of serious harm to the child").

[153] *See* Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1149 (2009).

[154] IMMIGRANT DEF. PROJECT, UNDERSTANDING IMMIGRATION & ORDERS OF PROTECTION (2019) [hereinafter UNDERSTANDING IMMIGRATION], https://www.immigrantdefenseproject.org/wp-content/uploads/Understanding-Immigration-Orders-of-Protection.pdf [https://perma.cc/8PY7-MKXU]; *see also* NAT'L IMMIGR. L. CTR., UNTANGLING THE IMMIGRATION ENFORCEMENT WEB: BASIC INFORMATION FOR ADVOCATES ABOUT DATABASES AND INFORMATION-SHARING AMONG FEDERAL, STATE, AND LOCAL AGENCIES 6 (2017), https://www.nilc.org/wp-content/uploads/2017/09/Untangling-Immigration-Enforcement-Web-2017-09.pdf [https://perma.cc/GAG4-Z9P8].

[155] UNDERSTANDING IMMIGRATION, *supra* note 154.

[156] *Id.*

[157] *Id.*

[158] *Id.*

neglected by their parents.[159] The database may also include the case's docket number and the judge's name, which allows federal agents to identify upcoming court dates and the specific court location.[160] It is not surprising, then, that they are able to plan and conduct arrests in family courts.

The mere existence of an order of protection in the database has at least three direct implications for noncitizens on both sides of the protective order, including survivors whom the order names and ostensibly protects. *One*, a new upload into the state database puts named parties on ICE's radar, potentially triggering an ICE investigation and arrest.[161] *Two*, the parties' mere presence in court increases risk of ICE arrests.[162] *Three*, an active order of protection can jeopardize an immigration application by a protected party.[163] Protected parties with a pending immigration application that relies on their spousal relationship with the person against whom the order is issued face delays of their application.[164] Once issued, the order is not always easily vacated. Some courts have refused to vacate protective orders at the request of survivors.[165] It is unsurprising, then, that fear of deportation and other immigration consequences prevents undocumented people from seeking protection by the courts.[166]

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[159] *See, e.g.*, *Domestic Violence (Family Offense)*, N.Y. ST. UNIFIED CT. SYS., https://ww2.nycourts.gov/courts/5jd/family/domesticviolence.shtml#q1 [https://perma.cc/7E2L-28PE] (last visited Jan. 18, 2023).

[160] UNDERSTANDING IMMIGRATION, *supra* note 154.

[161] Memorandum from the Advisory Council on Immigr. Issues in Fam. Ct. to Chief Admin. J. Lawrence Marks 4-5 (Oct. 27, 2017) [hereinafter Advisory Memorandum #3], https://nycourts.gov/ip/Immigration-in-FamilyCourt/PDFs/AdvisoryMemorandum3.pdf [https://perma.cc/5DKF-8DES] ("[D]iscovery of an active or expired order of protection may prompt immigration officials to question noncitizens, request additional evidence (including family court records) from noncitizens, and cause adjudicators to deny a noncitizen's application for a benefit or relief from removal.").

[162] *Id.* at 2 n.6 (noting "judicial warnings of any type" might "call attention to a litigant's immigration status").

[163] *Id.* at 5.

[164] UNDERSTANDING IMMIGRATION, *supra* note 154.

[165] *See* Courtney Cross, *Criminalizing Battered Mothers*, 2018 UTAH L. REV. 259, 269 ("It is not uncommon for judges to push back on survivors' requests, or even deny them entirely, refusing to vacate the protection order."); Johnson, *supra* note 153, at 1149 (describing how judges presiding over civil protective orders more frequently deny applications to dismiss these orders and in so doing "end up controlling the woman through their official power"); Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 232-33 (2008) (discussing how psychosocial theories and antiviolence activism inform judicial decisions not to grant survivor's request to vacate civil order of protection); Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much Is Too Much?*, 22 BERKELEY J. GENDER L. & JUST. 2, 25 (2007) (arguing judges who hear protective order requests frequently develop biases and "may fear the potential consequences of making a mistake").

[166] *See* MARY ANN DUTTON, NAWAL AMMAR, LESLYE ORLOFF & DARCI TERRELL, USE AND OUTCOMES OF PROTECTION ORDERS BY BATTERED IMMIGRANT WOMEN 8 (2006), https://www.ojp.gov/pdffiles1/nij/grants/218255.pdf [https://perma.cc/Y3KH-QHBX]

For those whom the order is issued against, immigration consequences depend on whether a court has found a violation of the order. A finding that a noncitizen has violated a no-contact provision of a temporary or final order of protection, including those issued in family court,[167] triggers deportability.[168] The government can choose to initiate deportation proceedings at any point.[169] Further, the mere existence of an active, expired, or vacated order of protection may result in the denial of an immigration application by U.S. Citizenship and Immigration Services ("USCIS").[170]

2. Background Checks and Fingerprinting

Background checks conducted for the purposes of family regulation proceedings can adversely impact undocumented family members who come forward to help prevent the placement of a child with strangers. When the state removes children from their parents, federal law mandates that CPS explore kinship networks before placing them in the foster system.[171] All potential caregivers must undergo background checks.[172] In many states, this includes providing U.S.-government-issued identification such as driver's licenses, tax identification numbers, and social security numbers.[173] Undocumented

(discussing how fear of deportation keeps immigrants from seeking protection from domestic violence); Tamara L. Kuennen, *Recognizing the Right To Petition for Victims of Domestic Violence*, 81 FORDHAM L. REV. 837, 841-42 (2012) (stating Violence Against Women Act "amended immigration laws that deterred undocumented immigrant victims from calling the police for fear of being deported").

[167] Section 1227(a)(2)(E)(ii) of the Immigration and Nationality Act provides that the term "protection order" refers to "any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts." 8 U.S.C. § 1227(a)(2)(E)(ii).

[168] *Id.* (providing that any undocumented person "enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the . . . protection order . . . is deportable"); *see also In re* Obshatko, 27 I. & N. Dec. 173, 173-75 (B.I.A. 2017) (reinstating removal proceedings against a noncitizen alleged to have violated court order of protection); *In re* Strydom, 25 I. & N. Dec. 507, 507 (B.I.A. 2011) (determining that violation of no-contact provision of order of protection issued by Kansas state court was sufficient to fulfill deportability requirement under 8 U.S.C. § 1227(a)(2)(E)(ii)); UNDERSTANDING IMMIGRATION, *supra* note 154 (stating government may try to deport lawfully present individual, including green card holder, upon court determination that individual has violated order of protection).

[169] UNDERSTANDING IMMIGRATION, *supra* note 154.

[170] *Id.*

[171] 42 U.S.C. § 671(a)(19) (mandating states "consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child").

[172] *Id.* § 671(a)(20)(A) (requiring states to "provide[] procedures for criminal records checks . . . for any prospective foster or adoptive parent before the foster or adoptive parent may be finally approved for placement of a child").

[173] *See* CHILD WELFARE INFO. GATEWAY, CHILD.'S BUREAU, BACKGROUND CHECKS FOR PROSPECTIVE FOSTER, ADOPTIVE, AND KINSHIP CAREGIVERS 3 (2018), https://www.childwelfare.gov/pubPDFs/background.pdf [https://perma.cc/PW6H-XCHW].

individuals are not always able to produce those documents. Some states have modified their requirements to mitigate discriminatory effects for noncitizen and mixed-status families, as well as their kinship networks. For example, California explicitly accepts non-U.S. passports and identification for background checks.[174] Both California and Illinois explicitly provide that the immigration status of a relative is irrelevant to placement decisions.[175] However, many states still explicitly require that licensed caregivers have legal status or citizenship.[176] In those states, undocumented kin are unable to become licensed caregivers. Some of these states cite federal law to justify their requirements.[177]

Some states require fingerprinting as part of the background check, which is particularly risky for undocumented people. In New York, for example, fingerprints processed for background checks are submitted to the New York State Division of Criminal Justice Services ("DCJS").[178] DCJS has been known to contact ICE and engage in data sharing with the federal government.[179] In 2018, a senior ICE official provided testimony to Congress confirming that after

[174] CAL. WELF. & INST. CODE § 361.4(d) (West 2022) (providing that, for purposes of conducting background checks on potential foster parents, "[a]n identification card from a foreign consulate or foreign passport shall be considered a valid form of identification").

[175] CAL. WELF. & INST. CODE § 361.2(e)(1)-(2) (West 2022) (providing that upon court order of removal, a social worker may place the child in the "home of a noncustodial parent . . . regardless of the parent's immigration status," or in "approved home of a relative . . . regardless of the relative's immigration status"); ILL. DEP'T OF CHILD. & FAM. SERVS., LICENSING, PAYMENT AND PLACEMENT OF CHILDREN WITH UNDOCUMENTED RELATIVES 1 (2008) ("Immigration status of a relative caregiver should not hinder the placement of a relative child in the home as long as the requirements of [relevant statutes] are met.").

[176] *See, e.g.*, ARIZ. ADMIN. CODE § R21-6-301(A)(2) (2022); COLO. CODE REGS. § 2509-6:7.500.31(G) (2022); 922 KY. ADMIN. REGS. 1:350 § 2(2) (2022); MD. CODE REGS. 07.02.25.04(B) (2022); 110 MASS. CODE REGS. 7.104(6) (2022); MICH. ADMIN. CODE r. 400.9201(l) (2022); MO. CODE REGS. ANN. tit. 13, § 35-60.030(2) (2022); OKLA. ADMIN. CODE § 340:75-7-1-31(b) (2022); UTAH ADMIN. CODE r. 501-12-5(1)(f) (LexisNexis 2022); GA. DIV. OF FAM. & CHILD. SERVS., CHILD WELFARE POLICY MANUAL § 14.1 (2020); HAW. DEP'T OF HUM. SERVS., CHILD WELFARE SERVICES PROCEDURES MANUAL pt. IV, § 1.2.1(A) (2019); MISS. DIV. OF FAM. & CHILD.'S SERVS., MISSISSIPPI DFCS POLICY § F(II)(C)(1)(a) (2013); N.J. DEP'T OF CHILD. & FAMS., MANUAL OF REQUIREMENTS FOR RESOURCE FAMILY PARENTS 3A:51-5.3 (2019); N.C. DEP'T OF HEALTH & HUM. SERVS., FOSTER HOME LICENSING § VIII.I (2020); TENN. DEP'T OF CHILD.'S SERVS., ADMIN. POL'YS & PROCS. § 16.4(A)(1)(c) (2022).

[177] *See, e.g.*, Victoria Rocha*, Can Undocumented Immigrants Become Foster Parents in Your State? It Depends.*, IMPRINT (Sept. 21, 2017, 4:07 AM), https://imprintnews.org/analysis/undocumented-families-face-barriers-becoming-caregivers-many-states/28245 (noting that Tennessee Department of Children's Services cites federal law in justifying its "prohibition of licensing for undocumented foster parents").

[178] *See* N.Y. C.L. UNION & IMMIGRANT DEF. PROJECT, NEW YORK PRACTICE ADVISORY: WHEN DOES FINGERPRINTING PUT YOUR CLIENT AT RISK WITH ICE? 1 (2017), https://www.immigrantdefenseproject.org/wp-content/uploads/DCJS-advisory-7-27-17-6-PM-updated1.pdf [https://perma.cc/ZAE7-Q6FH].

[179] *Id.*

conducting background checks and fingerprinting, ICE arrested forty-one noncitizens who came forward as resources for undocumented children.[180]

3. Pretrial Admissions

The family regulation system structurally incentivizes admissions by parents. This Section discusses two ways admissions typically become part of the family court record: (a) admissions in treatment records and (b) admissions during family court testimony and how this impacts the immigration sphere.

a. *Admissions in Treatment Records*

To regain or retain custody of their children, parents often participate in services where they are expected to show "insight" into what triggered family regulation involvement.[181] Participation and compliance in this process are understood as indicative of parental fitness and child safety. In some cases, the more willing a parent is to admit to individual deficits and comport with the narrative that system intervention proved helpful, the easier it is to end or avoid separation from their children.[182] On the flip side, immigration officials can consider any of these admissions in a parent's family court record.[183] The family court record is often voluminous, detailed, and involves deeply private issues, including drug treatment records, mental health information, or a parent's own foster system record dating back to when they were a child.[184]

Many of these, often extensive, records include admissions to facts that can be harmful in immigration proceedings, including statements pertaining to immigration status.[185] Once information from any of these sources becomes part of the family court record, federal immigration authorities may request and obtain it.[186] Federal immigration authorities may use these records in

[180] *See* Tal Kopan, *ICE Arrested Undocumented Immigrants Who Came Forward To Take In Undocumented Children*, CNN: POL. (Sept. 20, 2018, 4:09 PM), https://www.cnn.com/2018/09/20/politics/ice-arrested-immigrants-sponsor-children/index.html [https://perma.cc/M3W2-SG8W].

[181] Washington, *Survived & Coerced*, *supra* note 4, at 1149-60 (discussing how the concept of "insight" is instrumentalized to coerce parents into compliance).

[182] *See* Sinden, *supra* note 112, at 353-55.

[183] *In re* K-, 7 I. & N. Dec. 594, 596 (B.I.A. 1957) (noting that the Immigration and Nationality Act "provides for the exclusion of . . . aliens who admit committing [a crime involving moral turpitude]"); U.S. CITIZENSHIP & IMMIGR. SERVS., 12 POLICY MANUAL pt. F, ch. 2(C) (2022), https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-2 [https://perma.cc/P22W-XDFY].

[184] *See* Liebmann, *supra* note 44, at 593 (discussing how admissions "frequently made in Family Court" can lead to deportation or inadmissibility).

[185] *See* Grace Kim, Uriel Sanchez Molina & Altaf Saadi, *Should Immigration Status Information Be Included in a Patient's Health Record?*, 21 AMA J. ETHICS 8, 11-12 (2019) (discussing importance of limiting immigration information in patient records).

[186] *See* Advisory Memorandum #3, *supra* note 161, at 3 ("[I]mmigration authorities discover family court information through data-sharing agreements between state, local and federal agencies.").

immigration proceedings. In deportation proceedings, the federal government has been known to subpoena family court records.[187] State sealing laws do not prevent the federal government from requesting, collecting, and introducing information about sealed cases.[188] USCIS's own policy provides:

> The officer may require the applicant to submit evidence of a conviction regardless of whether the record of the conviction has been expunged. It remains the applicant's responsibility to obtain his or her records regardless of whether they have been expunged or sealed by the court. USCIS may file a motion with the court to obtain a copy of the record in states where the applicant is unable to obtain the record.[189]

Drug treatment records can become particularly harmful. Immigration law renders a noncitizen "who is . . . a drug abuser or addict" deportable.[190] An admission to a drug offense can statutorily bar individuals from seeking immigration relief or be a factor for discretionary denials of immigration applications.[191] Studies show that some noncitizens avoid treatment programs out of fear that they will be reported to immigration officials.[192] In family regulation cases, engagement in treatment crucially impacts a parent's ability to remain or reunify with their child or children.[193] Consequently, noncitizen parents find themselves navigating the threat of family separation and the tension created by two arms of the carceral state.[194]

Mental health records are similarly harmful. In 2017, the American Psychiatry Association condemned the use of mental health records by the federal

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[187] *See, e.g.*, Rabin, *supra* note 18, at 107 (documenting deportation removal proceeding in which "the government subpoenaed all documents from the State of Arizona regarding the dependency proceedings for Ana's children" and "[t]he [immigration judge] granted the subpoena the same day").

[188] Advisory Memorandum #3, *supra* note 161, at 4.

[189] U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 183, pt. F, ch. 2(C)(8).

[190] 8 U.S.C. § 1227(a)(2)(B)(ii) ("Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.").

[191] 8 U.S.C. § 1182(a)(1)(A)(iv) (stating those statutorily barred from immigration relief include those "determined . . . to be a drug abuser or addict"); 8 C.F.R. § 316.10(b)(2) (2022) ("An applicant shall be found to lack good moral character if during the statutory period the applicant . . . [v]iolated any law of the United States, any State, or any foreign country relating to a controlled substance . . . .").

[192] *See* Eva M. Moya & Michele G. Shedlin, *Policies and Laws Affecting Mexican-Origin Immigrant Access and Utilization of Substance Abuse Treatment: Obstacles to Recovery and Immigrant Health*, 43 SUBSTANCE USE & MISUSE 1747, 1749 (2008); Anna Pagano, *Barriers to Drug Abuse Treatment for Latino Migrants: Treatment Providers' Perspectives*, 13 J. ETHNICITY SUBSTANCE ABUSE 273, 279 (2014).

[193] *See* Jun Sung Hong, Joseph P. Ryan, Pedro M. Hernandez & Suzanne Brown, *Termination of Parental Rights for Parents with Substance Use Disorder: For Whom and Then What?*, 29 SOC. WORK PUB. HEALTH 503, 505 (2014) ("Treatment progress in relation to substance abuse . . . can especially determine whether a parent maintains or loses their custodial rights.").

[194] *See* Moya & Shedlin, *supra* note 192, at 1757-59.

government in immigration proceedings.[195] *The Washington Post* reported the story of a nineteen-year-old whose therapy notes were used by ICE to argue for his deportation.[196] Professor Theo Liebmann provides an illuminating example of how treatment records may be used in immigration proceedings.[197] In that case, the parents admitted to marijuana possession to qualify for a treatment program.[198] The parents engaged in treatment to get their children out of the foster system. Immigration officials, however, later discovered the admission provided in family court.[199] Liebmann concludes, "The [parents] will most likely be denied political asylum and ordered deported . . . . Their children remain in foster care in New York."[200]

b. *Admissions During Parent Testimony*

Parental testimony is an integral part of family regulation court proceedings. Parents may feel pressure to testify in family court to avoid family separation or regain custody of their child.[201] Indeed, through testimony, parents must regularly convince a judge that they can safely parent their child. The Fifth Amendment generally applies in family court and other civil proceedings.[202] A judge, however, is allowed to draw a negative inference from a parent's choice not to testify.[203]

Liebmann again provides an example of how family court testimony containing an admission can harm noncitizens.[204] This case involved a father's

[195] Katie O'Connor, *APA Condemns Use of Therapy Records in Immigration Cases*, PSYCHIATRY ONLINE: PSYCHIATRIC NEWS (Mar. 13, 2020), https://psychnews.psychiatryonline.org/doi/full/10.1176/appi.pn.2020.3b20 [https://perma.cc/TKB4-FVGF].

[196] Hannah Dreier, *Trust and Consequences*, WASH. POST (Feb. 15, 2020), https://www.washingtonpost.com/graphics/2020/national/immigration-therapy-reports-ice/.

[197] *See* Liebmann, *supra* note 44, at 596.

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *See* Washington, *Survived & Coerced*, *supra* note 4, at 1146-49 (detailing the coercive nature of testimony in family regulation cases).

[202] *See, e.g.*, Maness v. Meyers, 419 U.S. 449, 450, 468 (1975) (concluding attorney is not subject to contempt for advising their client to assert their Fifth Amendment privilege during civil case); Lefkowitz v. Turley, 414 U.S. 70, 77 (1973) (emphasizing the Fifth Amendment's applicability in both civil and criminal cases).

[203] *See, e.g.*, *In re* Ashley M.V., 966 N.Y.S.2d 406, 407 (App. Div. 2013) (affirming the lower court correctly drew negative inference against father for failing to testify); *In re* Nicole H., 783 N.Y.S.2d 575, 576 (App. Div. 2004) (finding court was entitled to draw strong inference against mother from her failure to testify). *But see* N.Y.C. Comm'r of Soc. Servs. *ex rel.* Jason C. v. Elminia E., 521 N.Y.S.2d 283, 285 (App. Div. 1987) ("[A] violation of the Fifth Amendment occurs when an automatic penalty follows the failure of a party or witness to testify."). Some states resolve this through statutory or judicial immunity. *See* Washington, *Survived & Coerced*, *supra* note 4, at 1144 n.295.

[204] *See* Liebmann, *supra* note 44, at 595-96.

admission to a violation of a family court order of protection.[205] During the pendency of the family regulation case, he applied for adjustment of his immigration status.[206] In this process, an immigration officer discovered the order of protection violation and admission in the family court record.[207] The application was denied—he was placed into removal proceedings, and he was separated from his daughter.[208]

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From an immigration perspective, admissions in the family regulation system are an opportunity for information gathering. By considering these admissions, immigration judges and officials consult and credit the outcome of a system that is just as discriminatory as the criminal legal system,[209] but equipped with considerably fewer procedural protections and much lower evidentiary standards. They also take advantage of the coercive nature of the family regulation system that produces admissions. Indeed, parents ensnared in the system are regularly presented with the choice between compliance and family separation.

4. Neglect and Abuse Findings

When the state files a "child welfare" case against a parent in family court, it alleges that the parent neglected or abused their child.[210] Parents who decide to contest the allegations face an uphill battle. Indeed, unlike criminal cases, the burden of proof in family court often shifts from the government to the parent.[211] While family court allegations will sometimes overlap with criminal charges, allegations in family court are not typically paralleled by a criminal court case.[212]

[205] *Id.* at 595.

[206] *Id.*

[207] *Id.* at 595-96.

[208] *Id.* at 596.

[209] *See* ROBERTS, TORN APART, *supra* note 1, at 36-39 (discussing that the family regulation system "is most intense in communities that exist at the intersection of structural racism and poverty"); Frank Edwards, Sara Wakefield, Kieran Healy & Christopher Wildeman, *Contact with Child Protective Services Is Pervasive but Unequally Distributed by Race and Ethnicity in Large US Counties*, PROCS. NAT'L ACAD. SCIS., July 27, 2021, at 1, 1-3 (highlighting racial and ethnic disparities in CPS contacts); Washington, *Survived & Coerced*, *supra* note 4, at 1103 ("It has long been established that the family regulation system, much like the criminal legal system, disproportionately impacts poor parents and parents of color.").

[210] Most family regulation cases involve neglect allegations, not abuse. *See* CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2020, at xi (2022), https://www.acf.hhs.gov/sites/default/files/documents/cb/child-maltreatment-report-2020_0.pdf [https://perma.cc/8HW6-NEB9] (reporting that 76.1% of victims are neglected, while 16.5% are physically abused and 9.4% are sexually abused).

[211] *See* AM. BAR ASS'N, *supra* note 111, at 9.

[212] *See* Josh Gupta-Kagan, *Beyond Law Enforcement:* Camreta v. Greene*, Child Protection Investigations, and the Need to Reform the Fourth Amendment Special Needs*

Even when there is a parallel criminal case, it may be dismissed without a conviction long before the family court matter resolves.[213] Once a finding is issued, it becomes part of the parent's family court record and remains there for many years—at least until the child turns eighteen years old in most states.[214]

Doctrine, 87 TUL. L. REV. 353, 358 (2012) ("Many, perhaps most, child protection searches and seizures do not involve law enforcement and do not threaten or result in law enforcement consequences.").

[213] *See, e.g.*, ABIGAIL KRAMER, BACKFIRE: WHEN REPORTING DOMESTIC VIOLENCE MEANS YOU GET INVESTIGATED FOR CHILD ABUSE 1 (2020), https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5e8415953033ef109af7172c/1585714582539/AbigailKramer_Mar312020_v1.pdf [https://perma.cc/L38R-LMRU] ("Child welfare cases . . . often last long after criminal charges disappear—and intervention doesn't depend on a conviction.").

[214] *See* CHILD WELFARE INFO. GATEWAY, CHILD.'S BUREAU, REVIEW AND EXPUNCTION OF CENTRAL REGISTRIES AND REPORTING RECORDS 2 (2018), https://www.childwelfare.gov/pubPDFs/registry.pdf [https://perma.cc/SD3U-5SLL] (explaining that substantiated reports are generally retained until the child reaches adulthood).

To be sure, unlike certain criminal convictions,[215] a finding of child abuse or neglect in family court is not alone grounds for removal.[216] However, a family court finding of neglect or abuse against a noncitizen parent can determine the likelihood of success in one, putting forth a defense to deportation before an immigration judge and in two, seeking affirmative relief before USCIS.[217]

[215] Whether *penal* state statutes encompassing child negligent endangerment offenses fall within the definition of a crime of child abuse or neglect is highly contentious. The expansive criminalization of child endangerment includes conduct that causes no actual harm or injury to a child. Some scholars criticize that these statutes punish survivors of domestic violence and marginalized parents. *See* Cross, *supra* note 165, at 262; Kari Hong & Philip L. Torrey, *What* Matter of Soram *Got Wrong: "Child Abuse" Crimes That May Trigger Deportation Are Constantly Evolving and Even Target Good Parents*, HARV. C.R.-C.L. L. REV. AMICUS BLOG (Oct. 15, 2019), https://harvardcrcl.org/what-matter-of-soram-got-wrong-child-abuse-crimes-that-may-trigger-deportation-are-constantly-evolving-and-even-target-good-parents/ [https://perma.cc/VU2B-8HMV]. Section 1227(a)(2)(E)(i) addresses the deportation of noncitizens who are *criminally* convicted of child abuse and child neglect. The Board of Immigration Appeals ("BIA") interprets section 1227(a)(2)(E)(i) to be "sufficiently broad to encompass . . . endangerment-type crime[s] . . . where there is no actual injury, but rather only a threat of injury." *In re* Soram, 25 I. & N. Dec. 378, 380 (B.I.A. 2010) (citing *In re* Velazquez-Herrera, 24 I. & N. Dec. 503, 512 (B.I.A. 2008)).

The federal appellate circuits are split on the question of whether BIA's interpretation in *In re Soram* is entitled to deference pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). The Second Circuit in *Matthews v. Barr*, 927 F.3d 606 (2d Cir. 2019), affirmed the BIA's interpretation that child endangerment offenses fall within section 1227(a)(2)(E)(i). *Id.* at 616. The Ninth Circuit originally elected to defer to the broad interpretation of the BIA, but that decision was ultimately vacated. Martinez-Cedillo v. Sessions, 896 F.3d 979, 988 (9th Cir. 2018), *vacated as moot sub nom.* Martinez-Cedillo v. Barr, 923 F.3d 1162 (9th Cir. 2019). The Ninth Circuit later held that the BIA's decision in *In re Soram* is not entitled to deference because "the text of 8 U.S.C. § 1227(a)(2)(E)(i) unambiguously forecloses the BIA's interpretation of 'a crime of child abuse, child neglect, or child abandonment' as encompassing negligent child endangerment offenses." Diaz-Rodriguez v. Garland, 12 F.4th 1126, 1135 (9th Cir. 2021), *reh'g en banc granted*, 29 F.4th 1018 (9th Cir.), *and rev'd on reh'g en banc*, 55 F.4th 697 (9th Cir. 2022). But upon en banc review, the Ninth Circuit reversed its decision and most recently held that the BIA's interpretation is entitled to *Chevron* deference. Diaz-Rodriguez v. Garland, 55 F.4th 697, 731-35 (9th Cir. 2022). The Tenth Circuit in *Ibarra v. Holder*, 736 F.3d 903 (10th Cir. 2013), interpreted section 1227(a)(2)(E)(i) narrowly and held that "criminally negligent conduct with no resulting injury to a child cannot serve as the generic federal definition for the 'crime of child abuse, child neglect, or child abandonment.'" *Id.* at 915-16.

[216] *See Martinez-Cedillo*, 896 F.3d at 988-89 (concluding that, while it would be unreasonable for the BIA to consider "a purely civil action, such as child neglect proceedings brought by a state's child protective services," it was not unreasonable to consult civil definitions in interpreting what constitutes a criminal conviction).

[217] The potential implications of family court findings are not limited to these categories. Another potential area of impact not discussed in this Article is USCIS determinations of custody.

a. *Removal Defense Before the Immigration Judge*

Wide discretion and subjective assessment standards built into immigration determinations provide entryways for the consideration of family court findings in immigration proceedings independent of a criminal conviction. For example, immigration judges have wide discretion in granting relief in removal proceedings.[218] One such example is the cancellation of removal for nonlawful permanent residents.[219] When establishing eligibility for relief, the burden is with the noncitizen. Eligibility requires a showing that the noncitizen (1) has been physically present in the United States for at least ten years, (2) has been "a person of good moral character during such period," (3) has not been convicted of certain offenses, and (4) has established that their removal from the United States would result in exceptional and extremely unusual hardship to a U.S. permanent resident or U.S. lawful citizen spouse, parent or child.[220] Family regulation proceedings are most relevant for the requirements in (2) and (4). The government may invoke family regulation findings or proceedings to question a parent's "good moral character" and/or the assertion that deportation would adversely affect their children. Rabin describes how the government aggressively questioned Ana, a former client of the Immigration Clinic at the University of Arizona Law School, about her open family regulation case.[221] On cross-examination, Ana was confronted with questions about "the cleanliness of her apartment, the paternity of her children, the gossip of her neighbors, and the fact that her children were in foster care."[222] Ana's cancelation of removal application was not granted—in part due to the neglect finding.[223] The federal government ultimately deported her.[224] While the neglect finding in family court did not alone provide grounds for deportation in her case, it was certainly an important factor in denying her cancellation of removal request.

b. *Affirmative and Defensive Applications Before USCIS*

Findings of neglect can be important factors in discretionary USCIS determinations. This is true for both affirmative and defensive applications for

[218] Immigration judges are not part of the judicial branch. They are employees of the Executive Office for Immigration Review. *See* 8 U.S.C. § 1101(b)(4). Professor Angélica Cházaro observes that judicial assignment significantly impacts removal proceeding outcomes, leading to stark "judge-to-judge disparities." Angélica Cházaro, *Due Process Deportations*, 98 N.Y.U. L. REV. (forthcoming 2023) (manuscript at 31), https://papers.ssrn.com/sol3 /papers.cfm?abstract_id=4085100 [https://perma.cc/5KWH-H3UU].

[219] *See* 8 U.S.C. § 1229b(b).

[220] *Id.*

[221] Rabin, *supra* note 18, at 104-14 (documenting Ana's immigration, family regulation, and criminal cases).

[222] *Id.* at 107.

[223] *Id.* at 112-14.

[224] *Id.* at 158.

adjustment of immigration status.[225] Many adjustment of status applications are granted at the discretion of USCIS.[226] The applicant carries the burden of proving that they "warrant[] a favorable exercise of discretion."[227] An applicant's "good moral character" is one factor that informs USCIS's exercise of discretion.[228] For example, under the federal Violence Against Women Act ("VAWA"), a survivor of domestic violence may be eligible for adjustment of immigration status.[229] To be eligible, the applicant must "merit the favorable exercise of USCIS' discretion."[230] In making that determination, USCIS can consider family court findings. For someone already in deportation proceedings, the denial or approval of discretionary adjustment of status, ultimately decides whether they are subject to removal.

Further, affirmative immigration applications for naturalization or permanent residency status are "common trigger[s] of adverse immigration consequences."[231] Noncitizens who apply for naturalization carry "the burden of establishing by a preponderance of the evidence that he or she meets all the requirements for naturalization."[232] One of the requirements is proof of current "good moral character" as well as "good moral character" for the five-year period preceding the application.[233] However, conduct prior to the five-year period may also be considered.[234] Unless an applicant is statutorily barred from establishing "good moral character," their character is considered on a case-by-case basis.[235] Here, again, findings of neglect may not be preclusive but are certainly relevant. Applicants may be asked to produce and answer questions about their family court record, including findings of neglect, to establish "good moral character." This includes sealed records.[236]

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[225] An applicant makes an affirmative immigration application before USCIS before being placed in deportation proceedings. Defensive applications arise after the applicant has been placed into removal proceedings.

[226] *See* 8 U.S.C. § 1255.

[227] U.S. CITIZENSHIP & IMMIGR. SERVS., 7 POLICY MANUAL pt. A, ch. 10 (2022), https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-10 [https://perma.cc/E4AU-2CN6].

[228] *Id.*

[229] *Green Card for VAWA Self-Petitioner*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/green-card/green-card-eligibility/green-card-for-vawa-self-petitioner [https://perma.cc/F8W8-XNLG] (last updated Dec. 10, 2020).

[230] *Id.*

[231] Advisory Memorandum #3, *supra* note 161, at 3.

[232] 8 C.F.R. § 316.2(b) (2022); *see also* Berenyi v. Dist. Dir., Immigr. & Naturalization Serv., 385 U.S. 630, 637 (1967) (noting that the movant carried the burden "to show his eligibility for citizenship in every respect").

[233] 8 C.F.R. § 316.10(a)(1) (2022).

[234] 8 C.F.R. § 316.10(a)(2).

[235] *Id.*

[236] *See* Advisory Memorandum #3, *supra* note 161, at 3-4.

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Wide discretion, the burden shift away from the government, and vague notions of "good moral character" render family regulation findings pertinent to deportation relief and affirmative immigration applications.

5. Special Immigrant Juvenile Status Findings

In some instances, family regulation intervention can produce conflicts for the relationship of noncitizen children with their parents. One such example is the SIJS.

SIJS is a status exclusively created for noncitizen children.[237] Noncitizens under twenty-one years of age are eligible if they are unmarried and a state court has found that they are dependent on the court; that they have been abandoned, neglected, or abused by a parent; and that it is not in their best interest to return to their country of origin.[238]

Juvenile or family regulation courts make these findings.[239] The court must find that the child is unable to reunify with one or both parents and that the child was abused, neglected, or abandoned by their parent or parents before an SIJS petition can be filed with USCIS.[240] This is where the family regulation and immigration systems directly intersect. USCIS expects a detailed finding that does not merely reference the statutory language of immigration law.[241] Numerous accounts provide that USCIS frequently attempts to compel immigrant children to submit underlying family court orders and inquires extensively into the family regulation proceeding beyond what is statutorily required.[242] Indeed, in practice, USCIS looks at the family court record, including detailed pleadings and orders.[243]

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[237] *Special Immigrant Juveniles*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/working-in-US/eb4/SIJ [https://perma.cc/VW5V-8TBQ] (last updated Nov. 2, 2022).

[238] *Id.*

[239] "Juvenile courts" means all courts that have jurisdiction over dependency cases. 8 C.F.R. § 204.11(a) (2022). The name of the court is not determinative.

[240] 8 U.S.C. § 1101(a)(27)(J)(i). In 2008, the Wilberforce Trafficking Victims Protection Reauthorization Act expanded eligibility by no longer requiring that the child must be unable to reunify with *both* parents and prove their eligibility for "long-term foster care." *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044, 5074-81.

[241] *See* U.S. CITIZENSHIP & IMMIGR. SERVS., 6 POLICY MANUAL pt. J, ch. 2 (2022), https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-2 [https://perma.cc/55LW-89SC].

[242] *See, e.g.*, Amy Joseph, Amy Pont & Cristina Romero, *Consent Is Not Discretion: The Evolution of SIJS and the Consent Function*, 34 GEO. IMMIGR. L.J. 263, 291-94, 298 (2020).

[243] HILLARY RICHARDSON, MARIA BLUMENFELD & KATHLEEN M. VANNUCCI, USCIS POLICY UPDATES FOR SPECIAL IMMIGRANT JUVENILES: A PRACTICE ADVISORY FOR STATE COURT PRACTITIONERS 2-3 (2017), https://immigrantjustice.org/sites/default/files/content-

Notably, if only one parent is found to have abandoned, neglected, or abused their child, and the child remains with the other parent, that parent will not be able to seek status through their child at any point in the future.[244] Children applying for SIJS may simultaneously apply for an adjustment of status to permanent residency.[245] While SIJS promises a path to permanent residency in the United States, many children never actually obtain an adjustment of status. Recent scholarship discusses how the "visa backlog" racializes this process.[246]

Discussions of SIJS rarely contemplate a parent battling to regain custody of their child or a parent facing their own immigration issues. The presumption is that the parent is uninvolved, somewhere in another country. As a public defender, I experienced multiple instances in which potential immigration relief through SIJS and the preservation of family bonds were at odds. This conflict typically arose when both the parent and child were undocumented and the child resided with the other parent or another family member in the United States.[247] The parent accused of neglect or abuse had complied with all services asked of them. There had been no additional safety concerns for the child pending the case. Still, the state or the child's attorneys would not settle the case in a way that would ultimately dismiss the allegations against the accused parent. Instead, they sought a finding of neglect against the parent. They did not believe there was an ongoing need for state intervention or that the parent had failed to cooperate with CPS. Instead, a finding of neglect was sought to allow for the child to pursue an SIJS finding. The impact of SIJS findings on family relations are rarely discussed with a critical view of the system tasked with producing neglect and abuse findings. Scholarship focuses on the difficulty of obtaining and the racialized nature of permanent status through SIJS. Less attention has been paid to the troubling fact that the SIJS process relies on findings produced by the family regulation system—a system that harms marginalized families.[248]

type/resource/documents/2017-01/USCIS%20Policy%20Updates%20SIJS%20Practice%20Advisory.1.12.17.pdf [https://perma.cc/JBQ8-6G9R].

[244] 8 U.S.C. § 1101(a)(27)(J)(iii)(II).

[245] *See Special Immigrant Juveniles*, *supra* note 237 ("If you have been granted SIJ[S] classification . . . you may be eligible to apply for a Green Card . . . also known as applying for lawful permanent residence (LPR) status or adjustment of status.").

[246] Children from El Salvador, Honduras, Guatemala, and Mexico may find themselves in backlogs several years long in which they are unable to obtain permanent status. *See* Dalia Castillo-Granados, Rachel Leya Davidson, Laila L. Hlass & Rebecca Scholtz, *The Racial Justice Imperative To Reimagine Immigrant Children's Rights: Special Immigrant Juveniles as a Case Study*, 71 AM. U. L. REV. 1779, 1784 (2022).

[247] To protect identities here, I am using the typical shared features of these cases, not specifics.

[248] *But see* Liebmann, *supra* note 44, at 587-98 (discussing SIJS findings and negative consequences of other family regulation findings but without emphasizing their harmful intersections); Castillo-Granados et al., *supra* note 246, at 1804 n.143 (discussing Dorothy Robert's critique of the family regulation system "for targeting and disproportionately criminalizing Black, brown, and Indigenous parents").

The erasure of the parent-child relationship is regularly viewed as a prerequisite to the pathway to citizenship for undocumented children. Although an SIJS finding does not necessarily include a formal finding of neglect,[249] advocates for children seek such findings to preserve the best possible chances for their client in the immigration process. These concerns are not without merit. State courts vary widely in their interpretation of the requirements for SIJS. Some courts have declined to find SIJS status absent a formal finding of neglect or abuse.[250] Even when a state court does make an SIJS finding, USCIS can decline to consent to the finding.[251] USCIS may even request transcripts of the SIJS proceeding in family court.[252] This increases the pressure to present the strongest case possible in family court, which may include seeking and using formal neglect and abuse findings in family regulation cases. In addition, the application itself, if unsuccessful, puts the child at increased risk of deportation—further increasing pressure on advocates to present a strong case.[253] The Applied Research Center ("ARC") observes that several CPS caseworkers reported having to decide between focusing on reunification of undocumented children with their parents or seeking to terminate parental rights and assist the child with obtaining SIJS.[254] The heavy reliance on the family regulation system—a system that puts parents at increased risk of deportation and further perpetuates permanent separation—is problematic, even in the SIJS context.

The SIJS process illustrates the conflicts that arise when marginalized individuals seek relief via a system that addresses conflicts with carceral logics instead of comprehensive support for children and their families. The punitive instincts of both systems produce conflicts for families that long outlive state involvement.

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[249] 8 U.S.C. § 1101(a)(27)(J)(i) (requiring that "reunification with 1 or both of the immigrant's parents is not viable due to *abuse, neglect, abandonment, or a similar basis found under State law*" for SIJS finding) (emphasis added). *But see* Elizabeth Keyes, *Evolving Contours of Immigration Federalism: The Case of Migrant Children*, 19 HARV. LATINO L. REV. 33, 78-79 (2016) (discussing the necessity of terminating parental rights before requesting SIJS in a particular state).

[250] *See, e.g.*, *In re* Erick M., 820 N.W.2d. 639, 647-48 (Neb. 2012) (affirming lower court opinion that Erick failed to show that reunification with his mother was not viable because of abuse, neglect, or abandonment).

[251] *See* GUIDE FOR STATE COURTS INVOLVING UNACCOMPANIED IMMIGRANT CHILDREN 7 (2015), https://www.sji.gov/wp/wp-content/uploads/15-167_NCSC_UICGuide_FULL-web1.pdf [https://perma.cc/LWE6-BRER].

[252] *See* U.S. CITIZENSHIP & IMMIGR. SERVS., 6 POLICY MANUAL pt. J, ch. 4 (2022), https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-4 [https://perma.cc/56R9-D6C7].

[253] *See* GREENBERG ET AL., *supra* note 92, at 45-46.

[254] *See* SETH FREED WESSLER, APPLIED RSCH. CTR., SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 26 (2011), https://www.immigrationresearch.org/system/files/Applied_Research_Center---Shattered_Families.pdf [https://perma.cc/83EP-WM7J].

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With the constant changes in immigration law and policy, the ways fammigration impacts families are always in flux. And yet, families are expected to navigate the many pitfalls, triggers, and connections of fammigration outlined in Part II—often without legal counseling.

III. PRODUCING MARGINALIZATION

While Part II introduced select nodes of the fammigration web and their impact on marginalized families, Part III argues that the interconnectedness of the family regulation and immigration systems one, bolsters two systems that already target marginalized people and two, produces distinct intersystemic harms through the marking and subordination of impacted families.[255]

A. *Dual System Implications*

The interconnectedness of the family regulation and immigration systems produces feedback effects that bolster punitive interventions and outcomes in both systems.[256] While these feedback effects are typically produced inadvertently, they are no less devastating for impacted families.

This Section first discusses how the immigration system can exploit the family regulation system's confidentiality principle. This Section then turns to what I call a "pre-labeling practice." Finally, this Section discusses how the immigration system creates feedback effects that in turn implicate parents' ability to get their children back into their care.

1. Bolstering the Immigration System

a. *Exploiting Confidentiality*

The accessibility of protective orders in federal databases can provide immigration enforcement officers with a breadth of information, including the parties named in the order, the next court date, and courtroom.[257] In this way, information produced by the family regulation system expands monitoring, tracking, and enforcement opportunities for immigration officials. The family regulation system provides ICE officers with the information necessary to locate and arrest noncitizens inside and outside of courthouses. Further, immigration officials can require the production of family court records, and in immigration hearings, the federal government can subpoena sealed and unsealed records.[258]

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[255] *See generally* LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009).

[256] Jain discusses how arrests in the criminal legal system have feedback effects that can expand enforcement powers in multiple systems. *See* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 844 (2015).

[257] *See supra* notes 155-60 and accompanying text.

[258] *See supra* notes 187-88 and accompanying text.

As discussed, this record can then be used to legitimize negative immigration consequences. Again, this family court record is produced by a system with very few procedural protections and relatively low evidentiary standards.

Immigration officials' access to family regulation data and records is in tension with and exploits the purported confidential nature of family court proceedings. In many states, family regulation court proceedings are closed to the public and press.[259] In some states, those permitted to attend closed hearings are prohibited from sharing their observations with anyone outside of the proceedings.[260] The files and documents produced by the system are also confidential in many states.[261] Michael Kresser observes that, to date, "[d]ependency court remains a secretive, insular place."[262] Confidentiality purportedly protects children and encourages parents to cooperate with and disclose information to CPS.[263] A closer look reveals that for noncitizen and mixed-status parents and their children, confidentiality is not a shield. Instead, the principle of confidentiality allows immigration officials to exploit those who believe what the principle of confidentiality implies: that what they share with CPS or in family court will remain in that forum. When family regulation actors promote the principle of confidentiality to elicit information from parents and

[259] *See, e.g.*, ALASKA STAT. ANN. § 47.10.070(c) (West 2022); CAL. WELF. & INST. CODE § 346 (West 2022); N.H. REV. STAT. ANN. § 169-C:14 (2022); OHIO REV. CODE ANN. § 2151.24(A) (West 2022); TEX. FAM. CODE ANN. § 58.106 (West 2022).

[260] *See, e.g.*, ALA. CODE § 12-15-129 (2022); ALASKA STAT. ANN. § 47.10.070(f) (West 2022); D.C. CODE ANN. § 16-2316(e)(3) (West 2022); IDAHO CODE ANN. § 16-2009 (West 2022).

[261] *See, e.g.*, FLA. CTS., A PARENT'S GUIDE TO JUVENILE DEPENDENCY COURT 2 (2006), https://www.flcourts.org/content/download/218184/file/dependencybooklet.pdf [https://perma.cc/5KRY-USJW].

[262] Richard Wexler, *Civil Liberties Without Exception: NCCPR's Due Process Agenda for Children and Families*, NAT'L COAL. FOR CHILD PROT. REFORM, https://nccpr.org/solutions-due-process/ [https://perma.cc/8KKT-EWQK] (last updated May 2022).

[263] *See* Nat. Parents of J.B. v. Fla. Dep't of Child. & Fam. Servs., 780 So. 2d 6, 9 (Fla. 2001) ("[T]he history of the juvenile justice system indicates . . . that it is in the best interest of the child to protect the child from publicity in certain proceedings and that this protection outweighs the public's right to access."); San Bernardino Cnty. Dep't of Pub. Soc. Servs. v. Superior Ct., 283 Cal. Rptr. 332, 338 (Ct. App. 1991) ("[O]ne of the hallmarks of the juvenile justice system has been confidentiality ensured by private hearings."); Weber, *supra* note 103, at 173 ("[P]arents will more fully participate in rehabilitative services when they trust that their disclosures will remain confidential, and they will provide the dependency court with the information it needs to resolve the case in the best interests of the child."). Some scholars more generally criticize the emphasis of confidentiality at the expense of transparency. Professor Matthew Fraidin discusses how the principle of confidentiality silences not only parents and lawyers but also the children it purportedly protects, ultimately distorting narratives about the system and harming families. *See* Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1, 33-37 (2010). Professor Kathleen Bean argues that "the closed door of dependency court has too long concealed from the public a system that leads to failure and abuse." Kathleen S. Bean, *Changing the Rules: Public Access to Dependency Court*, 79 DENV. L. REV. 1, 3 (2001).

children, they obscure the dangers inherent in gathering sensitive information accessible to immigration officials.

b. *Prelabeling Practice*

While Section III.B will address the broader implications of "marking" parents by either system, this Section focuses on the labeling of parents by the family regulation system as *pretext* for immigration enforcement. I argue that the labeling of parents by the family regulation system assists immigration officials with selecting targets and justifying such targeting.

While the criminal legal system labels individuals "violent," "disorderly," or "deviant," the family regulation system labels parents "unfit" or "bad." The family regulation system's labeling of parents does not only impact family regulation proceedings. It becomes pretext for negative immigration intervention. The "pre-marking" of individual parents by the family regulation system provides immigration officials with a sorting tool that legitimizes immigration enforcement against some families. In this way, the pre-marking of a parent provides an opportunity to contrast enforcement against "unfit" parents with enforcement against "good" parents. In the criminal legal context, similar marking practices have led to a false dichotomy of "criminal" versus "good" immigrants.[264]

But the family regulation system can pre-label or flag families in even more direct ways. Rabin discusses how a judge in an Arizona family court insisted on inquiring about everyone's status on the record to report undocumented parents.[265] This judge understood documentation and reporting—or pre-marking—of immigrant families to be their obligation.[266] As discussed, there are also documented instances of CPS reports to ICE.[267] Arguably, CPS has an incentive to report parents to immigration officials when they believe that the child should be separated from their parents permanently. This is particularly true when biased views convince them that for children, remaining in the United States is better than reunification with their parents in another country.[268]

[264] *See* Gabby DeBelen, *Deconstructing the "Good" Immigrant*, WM. & MARY L. SCH. IMMIGR. CLINIC BLOG (July 26, 2021), https://wmimmigrationclinicblog.com/2021/07/26/deconstructing-the-good-immigrant/ [https://perma.cc/2TZJ-ZMU8].

[265] Rabin, *supra* note 18, at 138.

[266] *Id.*

[267] *See, e.g.*, *In re* B & J, 756 N.W.2d 234, 237 (Mich. Ct. App. 2008) (explaining CPS reported noncitizen parents to ICE); ROBERTS, TORN APART, *supra* note 1, at 206 (noting public defense attorney's assertion that CPS in New York City has "inform[ed] law enforcement when they discover that a parent they are investigating is undocumented").

[268] In termination of parental rights proceedings for parents who have been deported, U.S.-centric understandings of a child's best interest play a significant role in determining a child's placement with their parent. ARC documents that actors in the system are influenced by the idea that placement in the U.S. foster system, rather than family reunification in another country, is in the best interest of a child. *See* WESSLER, *supra* note 254, at 46. An attorney in El Paso observes that "[t]he kneejerk reaction of almost everyone is that the children are better

The labeling of parents as "bad" by the family regulation system both provides an organizing tool for immigration enforcement and helps legitimize harsh immigration enforcement against certain parents.

2. Bolstering the Family Regulation System

On the flip side, deportation and detention expand the family regulation system's opportunities to intervene in families. Indeed, the detention and deportation of a parent may not merely result in the *physical* separation of the family; it may also further the permanent severance of the *legal* parent-child relationship through the termination of parental rights—the "civil death penalty."[269]

The relationship between deportation and the termination of parental rights is highlighted particularly well in *In re B & J*.[270] In that case, CPS caseworkers reported parents to ICE.[271] Shortly thereafter, they were deported to Guatemala, while the children remained in the U.S. foster system.[272] CPS then filed a petition to terminate their parental rights, arguing that the parents had abandoned their children.[273] The appellate court notes that even before CPS reported the parents to ICE, CPS "made meager attempts to provide services and made little effort to locate Spanish-speaking assistance" for the parents.[274] A caseworker at a family court hearing stated that it was CPS's intention to have the parents deported.[275] Admittedly, family regulation involvement will rarely trigger immigration consequences with such obvious feedback effects.

But also consider *State v. Mercedes S.*[276] In that case, the foster agency acknowledges that a mistake by the family regulation system "led to a 'domino effect,' in which [the mother] had been deported and could not now reenter the United States."[277] The mistake in this case was the inappropriate removal of the children from their mother.[278] The trial court later found that the mother had abandoned her children and terminated her parental rights.[279] Here again, family regulation intervention impacted a parent's immigration case and ultimately led

off in the U.S." *Id.* Parents who oppose placement of their child in the United States and the termination of their rights risk being viewed as not having the best interest of their child in mind because reunification would require moving the child to another country.

[269] *See, e.g.*, *In re* K.A.W., 133 S.W.3d 1, 12 (Mo. 2004) (en banc); Richard J.K. v. State, Div. of Child & Fam. Servs. (*In re* Parental Rts. as to K.D.L.), 58 P.3d 181, 186 (Nev. 2002); *In re* N.R.C., 94 S.W.3d 799, 811 (Tex. Ct. App. 2002).

[270] *In re B & J*, 756 N.W.2d 234.

[271] *Id.* at 237.

[272] *Id.*

[273] *Id.* at 238.

[274] *Id.* at 237.

[275] *Id.* at 238.

[276] (*In re* Interest of Mainor T.), 674 N.W.2d 442 (Neb. 2004).

[277] *Id.* at 451.

[278] *Id.*

[279] *Id.* at 454.

to the most punitive outcome in family court, the permanent severance of the legal parent-child relationship.

The barriers that parents face to preserve their parental rights increase exponentially while detained or after being deported. Parents in family regulation proceedings are expected to maintain contact with the foster agency, complete their service plan, and maintain contact with their children.[280] Individuals who are detained are often difficult to locate during the first few days following their arrest.[281] The location of prisons, their strict security protocols, and limited programming makes it nearly impossible to keep up with expectations of the family regulation system.[282] Many detention centers significantly limit family visits.[283] All of this can later be used against a parent in termination of parental rights proceedings.[284] Those who can engage in services risk that their attendance exacerbates immigration consequences because their statements in treatment may be used against them in immigration proceedings.[285]

Deported parents may not receive notice of family court proceedings.[286] Even if they are aware of court appearances, deportation impacts a parent's ability to physically attend court proceedings and intervene in the legal process in person. Many courts proceed with termination proceedings even when a deported parent is unable to attend court physically.[287] In 2013, NPR documented stories of

[280] *See* Andrea L. Dennis, *Criminal Law as Family Law*, 33 GA. ST. U. L. REV. 285, 329 (2017) ("If the inmate is unsuccessful at maintaining a child-parent relationship or providing for the care of the child by a third-party, it is not just the social relationship that is lost. In the extreme, an inmate's parental rights may be terminated for lack of contact or relationship maintenance." (footnote omitted)).

[281] *See* GREENBERG ET AL., *supra* note 92, at 8; *see also* Rabin, *supra* note 18, at 113.

[282] *See* GREENBERG ET AL., *supra* note 92, at 8.

[283] *See id.*

[284] *See supra* Section II.B.

[285] *See supra* Section II.B.3.a.

[286] *See, e.g.*, *In re* Elias P., 44 N.Y.S.3d 516, 521 (App. Div. 2016) (Hinds-Radix, J., dissenting) ("The father testified that after he was deported to Mexico, he was unable to contact the children because he did not have his own telephone, and when he was able to telephone the foster mother, she would not speak to him, apparently because the foster mother did not speak or understand Spanish . . . .").

[287] *See, e.g.*, Perez-Velasquez v. Culpeper Cnty. Dep't of Soc. Servs., No. 0360-09-4, 2009 WL 1851017, at *1 (Va. Ct. App. June 30, 2009) (explaining that the father was not present at trial regarding termination of parental rights because he had been deported); Waukesha Cnty. Dep't of Health & Hum. Servs. v. Teodoro E. (*In re* Termination of Parental Rts. to Adrianna A.E.), 745 N.W.2d 701, 704-05 (Wis. Ct. App. 2007) ("Teodoro moved for a dismissal or adjournment of the proceeding on the grounds that because he could not appear other than by telephone, his right to meaningfully participate and assist counsel could not be protected. . . . He informed the court that he had investigated the possibility of returning to the country for trial but that the U.S. government would not allow it."). In the context of the pandemic, the Wisconsin Court of Appeals held in 2020 that parents' due process rights were not violated by conducting a termination hearing virtually rather than in person. *See* La Crosse

parents fighting to regain custody of their children at the United States-Mexico border in San Diego after deportation:

> One of the families that I spoke with . . . really talked about how frustrating it was for them not to be able to be physically present at their hearings for their child custody case. You know, they couldn't see the judge. They rarely had contact with the social worker because she would not come to the border to meet with them.[288]

B. *Intersystemic Harms: Marking and Subordination*

The interplay between the family regulation and immigration system produces intersystemic harms through the marking and subordination of noncitizen and mixed-status families. By marking, I am referring to what Professor Issa Kohler-Hausmann has described as "the practice of indexing certain behaviors and status determinations about individuals."[289] Kohler-Hausmann observes that mere contact with the police and criminal courts "constitutes a formal and enduring classification of social status" for marginalized groups.[290] This "social status" is used to sort, trace, and punish individuals either immediately or in the future.[291] Scholars have applied this framework to different aspects of the criminal legal system.[292] The practice of marking or indexing is also a useful framework for the fammigration context. The following Sections provide some examples of the ways marking impacts noncitizen and mixed-status families ensnared in the fammigration web.

1. Considering Immigration Status in Termination of Parental Rights Proceedings

Parents in the family regulation system are already stigmatized as "bad" parents. The interconnectedness with the immigration system provides another discriminatory layer by blurring the line between "bad" parenting and a parent's status as a noncitizen. As Professor David Thronson observes, "Family courts sometimes purport to rely on reasons unrelated to immigration status in reaching their decisions; while in reality their stated reasoning is simply a pretext for a

Cnty. Dep't of Hum. Servs. v. B.B. (*In re* J.B.), Nos. 2020AP2030, 2020AP2031, 2021 WL 4469002, at *9-11 (Wis. Ct. App. Sept. 30, 2021).

[288] *Deported Parents Struggle To Regain Custody*, NPR (Dec. 31, 2013, 12:29 PM), https://www.npr.org/2013/12/31/258661702/deported-parents-struggle-to-regain-custody [https://perma.cc/N6BM-MZE2].

[289] KOHLER-HAUSMANN, *supra* note 72, at 144.

[290] *Id.* at 145.

[291] *Id.* at 143-45 (discussing the forward- and backward-looking components of managerial justice).

[292] Jain observes how policing marks individuals. *See* Eisha Jain, *The Mark of Policing: Race and Criminal Records*, 73 STAN. L. REV. ONLINE 162, 165 (2021). Professor Jamelia Morgan has expanded the "marking" literature to include the criminalization of disability. *See* Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1670-76 (2021).

decision based on immigration status."[293] Although emphasizing that deportation cannot be the sole basis for the termination of parental rights, several appellate courts have affirmed the termination decisions with little consideration for the barriers to family reunification faced by detained and deported parents. These decisions argue that the deported parent "abandoned" or "endangered" their children by creating the "conditions" for deportation. In *In re H.J.Y.S.*,[294] the Tenth Court of Appeals of Texas discusses that "deportation, like imprisonment, is a factor that is properly considered when assessing endangerment" of a child.[295] The court provides, "A parent who repeatedly commits criminal acts subjects herself to the possibility of deportation and negatively impacts a child's living environment and emotional well-being. Generally, conduct that subjects a child to a life of uncertainty and instability endangers the physical and emotional well-being of a child."[296] In that case, the court affirmed the termination of the child-parent relationship.[297]

Similarly, in *B.V. v. Department of Children & Families*,[298] the Florida First District Court of Appeals affirmed the trial court's decision to terminate a father's parental rights after he was deported and unable to return to the United States.[299] From El Salvador, the father cooperated with CPS in the United States, engaged in the services required of him, participated in biweekly scheduled video visits with his child, and attempted to return to the United States.[300] Still, CPS ultimately filed a petition to terminate his parental rights.[301] After a hearing, the trial court granted the termination request.[302] The court found that the father's deportation constituted "past behavior" that he was "unable to remedy."[303] The appellate decision relies, in part, on Texas case law that compares deportation with criminal legal incarceration.[304] The appellate court concludes: "we note that termination here is not based solely on [the father's] deportation, but rather the effects of that deportation, such as the continued absence on the child and [the father's] inability to parent."[305] The court stated that the father's deportation "threatens the . . . mental, or emotional health of the

[293] David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45, 64 (2005).

[294] No. 10-19-00325-CV, 2019 WL 8071614 (Tex. Ct. App. Feb. 26, 2019).

[295] *Id.* at *5.

[296] *Id.* (citation omitted).

[297] *Id.* at *9.

[298] 328 So. 3d 48 (Fla. Dist. Ct. App. 2021).

[299] *Id.* at 49.

[300] *Id.* at 49-50.

[301] *Id.* at 49.

[302] *Id.* at 50.

[303] *Id.* at 50-51.

[304] *Id.* at 51.

[305] *Id.* at 52.

child" and affirmed the permanent severance of the legal relationship between the father and his three-year-old child.[306]

By comparing deportation to incarceration, courts mischaracterize deportation as a fixed physical barrier to the parent-child relationship. The inquiry becomes focused on the likelihood that a parent returns to the United States.[307] Certainly, sending children to live with their parents in another country is not impossible. But the comparison to incarceration suggests even more. It invokes notions of individual blame and stigma associated with the criminal legal system. Indeed, these notions are reflected in characterizations of deportation as child "endangerment" or a "threat" to the child's well-being.[308] In *In re Doe*,[309] an Idaho trial court terminated the legal relationship between a daughter and her father who had been deported to Mexico.[310] When he learned that his daughter had been removed from his wife and placed in the foster system, he made every attempt to keep in touch with the agency caseworker and communicated with her on a regular basis.[311] He expressed that if his daughter could not reunify with her mother, he wanted to care for her in Mexico.[312] When it became apparent that CPS no longer planned to reunify the child with her mother, the father contacted the equivalent of CPS in Mexico to initiate a clearance of his home and facilitate reunification with his daughter.[313] Nonetheless, CPS filed papers requesting the permanent termination of his parental rights and adoption.[314] The father was not notified.[315] His rights were terminated by the trial court. Three months later, after obtaining legal counsel, his case was reopened.[316] The trial court again terminated his rights holding that he had abandoned his daughter after being deported to Mexico.[317] The Supreme Court of Idaho ultimately reversed the decision approximately six months later.[318]

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[306] *Id.* at 53 (alteration in original) (quoting FLA. STAT. ANN. § 39.806(1)(c) (West 2022)).

[307] *See, e.g.*, Perez-Velasquez v. Culpeper Cnty. Dep't of Soc. Servs., No. 0360-09-4, 2009 WL 1851017, at *2-3 (Va. Ct. App. June 30, 2009) (terminating parental relationship after father was deported and prohibited from returning to United States).

[308] *See, e.g.*, *B.V.*, 328 So. 3d at 53; *In re* E.N.C, 384 S.W.3d 796, 801-05 (Tex. 2012); *In re* H.J.Y.S., No. 10-19-00325-CV, 2019 WL 8071614, at *4-5 (Tex. Ct. App. Feb. 26, 2019).

[309] 281 P.3d 95 (Idaho 2012).

[310] *Id.* at 99-100.

[311] *Id.* at 99.

[312] *Id.* at 99-100.

[313] *Id.*

[314] *Id.* at 99.

[315] *Id.* at 100.

[316] *Id.*

[317] *Id.*

[318] *Id.* at 102-03.

2. Considering the Label of Neglect in Immigration Proceedings

The procedural particularities of the family regulation system create a uniquely impactful mark for subsequent immigration proceedings: During the pendency of a family regulation case, the family is under constant supervision. Case workers assess and document everyday family activity. Communication between the children and parents, observations of the home, perceptions of how much "progress" a parent has made are reflected not only in CPS case notes but also in family court reports.[319] In other words, family court documents contain subjective character assessments that may later be used for "good moral character" determinations in immigration proceedings.[320] Given the purported supportive and rehabilitative nature of family regulation proceedings, negative assessments may weigh particularly heavily. The immigration system's reliance on discretion and subjective "good moral character" makes it particularly susceptible to biased family regulation determinations. In this way, noncitizens may experience a form of "double punishment": first, through biased labeling by family regulation actors with consequences in family court; and second, by using the same biased information in immigration proceedings.

The labeling of parents as neglectful can have long-lasting impacts for noncitizen parents' ability to get relief in immigration proceedings, even when the allegations are never adjudicated and ultimately dismissed in family court.[321] Take for example the case of a mother with a closed family regulation case who applies for naturalization a few years after the dismissal of her family court case. Imagine that she is a holder of a U Visa with a documented history of domestic violence. When she attempts to adjust her status to become a U.S. citizen, she is required to disclose her family court case. Her application includes a family court document noting the dismissal of her case and compliance with and completion of her family court service plan. Although USCIS might acknowledge that she is a victim of domestic violence and complied with all aspects of the family court process, her application for renewal of status may be denied on the basis of the family court allegations. USCIS may give very little

[319] As one study shows, racial and gender bias in these reports can be pervasive. *See* THE CTR. FOR THE STUDY OF SOC. POL'Y, RACE EQUITY REVIEW: FINDINGS FROM A QUALITATIVE ANALYSIS OF RACIAL DISPROPORTIONALITY AND DISPARITY FOR AFRICAN AMERICAN CHILDREN AND FAMILIES IN MICHIGAN'S CHILD WELFARE SYSTEM 31-33 (2009), https://ocfs.ny.gov/main/recc/presentations/Race-Equity-Review-Michigan-2009.pdf [https://perma.cc/29PC-Y7JW].

[320] As I and others have discussed, the family regulation system pathologizes poor parents of color. *See* Washington, *Pathology Logics*, *supra* note 61 (manuscript at 42-61). This pathologizing can transfer over into immigration assessments.

[321] This example is a modified version of a case scenario from my practice as a public defender representing parents ensnared in the family regulation system and from conversations with former colleagues working specifically on the overlaps of family court and immigration enforcement. The names and specific details are omitted for confidentiality purposes. I also omit details to highlight that these risks are not specific to a single family or a single set of allegations but can impact many noncitizen and mixed-status families scrutinized by the family regulation system.

weight to the judicial determination and even the dismissal of the case and instead rely largely on the mere existence of the case. In other words, while the allegations are taken at face value, the resolution of the case may not be. USCIS has wide discretion in what and what not to consider in making decisions for immigration relief.[322] Every aspect of a family regulation case can become part of that determination.

3. The Invisibility of Fammigration

Legal and social science literature has long discussed the phenomenon of system avoidance. Professor Monica Bell examines marginalized mothers' situational engagement and avoidance of interactions with the state in light of the risk associated with such engagement.[323] Kimberlé Crenshaw observes how system avoidance creates a form of "double subordination" for immigrant women who have experienced gender-based violence.[324] Professor Asad Asad observes documented immigrants' avoidance of record-keeping institutions due to a perceived risk of deportation.[325] Kelley Fong argues that marginalized mothers avoid social service providers out of fear of the family regulation system.[326] The fammigration web provides another source of fear for noncitizen parents: This Article argues that the family regulation system creates conditions that make punitive immigration system involvement more likely for noncitizens and once immigration involvement is triggered, navigation out of the fammigration web becomes increasingly difficult.

But the harms of system interconnectedness go beyond system avoidance. Indeed, the marking of parents as "neglectful" furthers their subordination. At the same time, the stigma of family regulation involvement aids in keeping these harms invisible. Parents express deep shame about their association with the family regulation system.[327] One study discusses how labeling practices of the family regulation system make it particularly difficult for parents to mobilize against and shed light on the harms of the system.[328] Shame silences directly

[322] *See generally* Shoba Sivaprasad Wadhia, *Darkside Discretion in Immigration Cases*, 72 ADMIN. L. REV. 367 (2020).

[323] *See* Monica C. Bell, *Situational Trust: How Disadvantaged Mothers Reconceive Legal Cynicism*, 50 LAW & SOC'Y REV. 314, 316 (2016).

[324] *See* Crenshaw, *supra* note 20, at 1247.

[325] *See* Asad, *supra* note 48, at 149-51.

[326] *See* Kelley Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers' Institutional Engagement*, 97 SOC. FORCES 1785, 1786, 1792-93 (2019) [hereinafter Fong, *Concealment and Constraint*].

[327] *See* RISE & TAKEROOT JUST., AN UNAVOIDABLE SYSTEM: THE HARMS OF FAMILY POLICING AND PARENTS' VISION FOR INVESTING IN COMMUNITY CARE 11 (2021), https://www.risemagazine.org/wp-content/uploads/2021/09/AnUnavoidableSystem.pdf [https://perma.cc/P7HJ-6MPA].

[328] *See id.* at 8.

impacted parents from sharing their lived experiences.[329] One woman in the study, after discussing her family regulation case, noted, "This is my first time speaking about my case, because I felt ashamed."[330] Silence about the harms of the system reproduces the notion that the family regulation system is a benevolent system that offers support to marginalized families.

In recent years, a parent-led movement has brought visibility to the punitive nature of the family regulation system.[331] For immigrant parents, however, making themselves visible by speaking up against the system carries additional risks.[332] Labeling immigrant parents does more than remove support; it furthers their visibility to the state, all while the deep connections between family regulation and immigration remain invisible.[333] Indeed, the fear of being marked by the system, losing support, and even facing deportation encourages silence and furthers the invisibility of fammigration system impacts.

The marking of parents by the family regulation system does not only impact noncitizens currently investigated or prosecuted by the family regulation system. It also sends the signal to the broader immigrant community that compliance with the expectations of the family regulation system is necessary to avoid pre-marking and exposure to immigration consequences. The marking of a parent as

[329] *See id.* (explaining family regulation system "shames, silences, dehumanizes and labels Black and Indigenous mothers as child abusers").

[330] *Id.* at 11.

[331] In January 2021, parents protested in Harlem, demanding an end to family policing. *See* Megan Conn, *Pressure Builds To Reduce Racial Disproportionality in New York's Child Welfare System*, IMPRINT (Jan. 19, 2021, 5:39 PM), https://imprintnews.org/child-welfare-2/new-york-calls-grow-address-racism-child-welfare/51073. In October 2021, parents mobilized outside of the Assembly Standing Committee on Children and Families in New York City. *See* Michael Fitzgerald & Megan Conn, *New York City's "Family Defense" Movement Presses Case Against Child Welfare System in Public Hearings and Rallies*, IMPRINT (Oct. 21, 2021, 8:50 PM), https://imprintnews.org/top-stories/new-york-citys-family-defense-movement-presses-case-against-child-welfare-system/59808. The movement has grown far beyond New York City. In May 2022, the Black Mothers March on the White House condemned the "terror on our communities under the guise of 'protecting children' using the Department of Human Services, euphemistically referred to as Child Protective Services." BLACK MOTHERS MARCH ON THE WHITE HOUSE, https://www.blackmothersmarch.com/ [https://perma.cc/D8W8-V4EJ] (last visited Jan. 18, 2023).

[332] Undocumented parents' ability to seek financial or other state support is extremely limited. *See* Eisenzweig, *supra* note 44, at 500-03 (discussing barriers noncitizen parents face in receiving state support, including linguistic and cultural barriers, ineligibility, and fear of disqualification from some types of immigration relief); Kathy Lemon Osterling & Meekyung Han, *Reunification Outcomes Among Mexican Immigrant Families in the Child Welfare System*, 33 CHILD. & YOUTH SERVS. REV. 1658, 1658 (2011) ("Once in the U.S., Mexican immigrant families experience disproportionately high rates of poverty, unemployment and crowded housing conditions, yet, they are less likely than non-immigrant families to receive housing assistance, food stamps, mental health services, or to have health insurance."). Those who can obtain treatment risk that their attendance exacerbates immigration consequences, either because they must fear ICE presence at treatment facilities or because their statements in treatment could be used against them in immigration proceedings. *See supra* Part II.

[333] *See supra* Part II.

"bad" gives undocumented immigrants good reason to avoid state actors and institutions, including the family regulation system.[334] But when a family becomes ensnared in the system, those in their proximity are implicated as well. Caseworkers may question neighbors and extended family during their investigations.[335] Caseworkers' presence in the community can be cause for alarm for undocumented friends, neighbors, and other community members who may seek to avoid association with the case. For undocumented immigrants, isolation from their community is particularly harmful. Given limited access to state resources, the community may be their only source of support. Removing it leaves already marginalized families with even less support.

IV. DISENTANGLING THE FAMMIGRATION WEB

The remaining Part of this Article emphasizes the need to expand knowledge and sever threads of the fammigration web. It then proposes ways to shrink the contact points of the family regulation and immigration systems. My suggestions here are based on the view that to limit system convergence, the entry points to the family regulation system must be constricted.

A. *Expanding Knowledge of the Web*

Many marginalized parents are acutely aware of the profound impacts of family regulation intervention on their lives. Indeed, fear profoundly shapes marginalized families' interaction with the family regulation system.[336] It informs their interaction with service providers who may report them to CPS and limits their ability to seek state support. What directly impacted parents may not always be fully aware of, however, are the complex cross-implications of immigration and family regulation. In fact, some system actors themselves do not seem to fully grasp these complex, ever-changing intersections. Others actively avoid considering them.[337] Rabin cites a statement by one juvenile court judge:

> For me, there is just so much confusion. Nobody really understands how the [immigration] system works. No one understands it. The children

[334] *See* Fong, *Concealment and Constraint*, *supra* note 326, at 1786, 1792-93 (discussing how some families may not be able to avoid the family regulation system and instead try to navigate CPS involvement in the least harmful way).

[335] *See* DIANE DEPANFILIS, CHILD PROTECTIVE SERVICES: A GUIDE FOR CASEWORKERS 64 (2018), https://www.childwelfare.gov/pubPDFs/cps2018.pdf [https://perma.cc/LR67-ZDZV] (including family members and neighbors as among those who may be interviewed during CPS investigations).

[336] *See* S. Lisa Washington, *Weaponizing Fear*, 132 YALE L.J.F. 163, 177-94 (2022).

[337] An interview conducted by ARC with a Los Angeles-based CPS caseworker illustrates the reluctance of system actors to acknowledge and consider fammigration implications: "[O]ur role is to reunify families. I'm not saying that ICE is right or wrong; what I'm saying is, let us do our job, let us reunify families. We are not here to deal with immigration; we are here to reunify children." WESSLER, *supra* note 254, at 46.

> certainly don't understand it, their parents don't understand it, their child welfare lawyers don't understand it, we as judges really don't have a sufficient understanding of the way the process works . . . it is such a mystery to everyone. It just seems like this big, amorphous mystery.[338]

Despite its importance and complexity, there exists little counseling geared specifically towards fammigration. Against the backdrop of increased arrests of noncitizens in civil and criminal courts,[339] New York's Advisory Council on Immigration Issues in Family Court recommended that families seek legal advice about potential immigration consequences but without ensuring the necessary resources, including access to specialized counsel.[340] The Supreme Court has yet to extend a blanket right to counsel to all parents prosecuted by the family regulation system.[341] Many states do recognize an independent right to counsel for indigent parents in *all* family regulation proceedings.[342] Other states limit the right to counsel to termination of parental rights proceedings[343] or otherwise qualify free access to counsel.[344] Some states have established and then abolished the right to counsel in family regulation proceedings.[345] Even where states recognize an unqualified right to counsel at all stages, it is not always implemented effectively in practice.[346] Some public defense offices have responded to the need for comprehensive, holistic representation in family

[338] Rabin, *supra* note 18, at 101 (alterations in original) (quoting Interview with Juvenile Court Judge, in Pima Cnty., Ariz. (Aug. 10, 2010)).

[339] *See supra* Section II.A.

[340] *See* Advisory Memorandum #3, *supra* note 161, at 2 ("Individuals should always consult with a competent immigration attorney to determine the potential for adverse immigration consequences and to identify any available options that may pertain to his or her specific case.").

[341] *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 33 (1981) (holding incarcerated mother did not have constitutional right to free counsel in termination of parental rights hearing).

[342] *See, e.g.*, FLA. STAT. ANN. §§ 8.320(a)(2), 39.013(1) (West 2022); MICHIGAN COURT RULES OF 1985, r. 3.915(B)(1) (2023), https://www.courts.michigan.gov/48e581/siteassets/rules-instructions-administrative-orders/michigan-court-rules/michigan-court-rules.pdf [https://perma.cc/3D7M-RTFR].

[343] *See, e.g.*, OKLA. STAT. ANN. tit. 10A, § 1-4-306(A)(1)(a) (West 2022).

[344] *See, e.g.*, MISS. CODE ANN. § 43-21-201(2) (West 2022); MO. ANN. STAT. § 211.211 (West 2022); NEV. REV. STAT. ANN. § 432B.420(1) (West 2021); OR. REV. STAT. ANN. § 419B.205(1) (West 2022); VT. STAT. ANN. tit. 13, § 5232(3) (West 2022).

[345] *See, e.g.*, *In re* C.M., 48 A.3d. 942, 945 (N.H. 2012) ("[T]he legislature amended RSA 169-C:10, II(a), abolishing the statutory right to counsel for an indigent parent alleged to have abused or neglected his or her child.").

[346] *See* Vivek Sankaran & Itzhak Lander, *Procedural Injustice: How the Practices and Procedures of the Child Welfare System Disempower Parents and Why It Matters*, MICH. CHILD WELFARE L.J., Fall 2007, at 11, 13 (stating that, in Michigan, "[c]ustodial parents are only represented by attorneys in approximately 60 percent of removal hearings and 50 percent of non-removal hearings" despite recognizing the right to counsel in family regulation proceedings).

regulation cases in major cities. Holistic defense significantly reduces the amount of time that children remain in the foster system, separated from their parents.[347] Still, the holistic defense model has not been widely implemented.[348] To date, the state of parent representation can be described as "inconsistent at best."[349] Even in the best of circumstances, counsel may not be well-versed in the specialized knowledge necessary to counsel and strategize about fammigration.

In New York City, there are at least two providers that advise about fammigration implications in individualized cases. The Immigrant Defense Project ("IDP") runs the Padilla Support Center for both court-appointed criminal defense attorneys and family defense attorneys in New York.[350] IDP provides individualized immigration advice to appointed family court

[347] *See* Lucas A. Gerber, Yuk C. Pang, Timothy Ross, Martin Guggenheim, Peter J. Pecora & Joel Miller, *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 CHILD. & YOUTH SERVS. REV. 42, 44 (2019); Elizabeth Thornton & Betsy Gwin, *High-Quality Legal Representation for Parents in Child Welfare Cases Results in Improved Outcomes for Families and Potential Cost Savings*, 46 FAM. L.Q. 139, 140-48 (2012).

[348] In 2021, the Eastbay Family Defenders lost their contract with the Judicial Counsel of California. *See* Jeremy Loudenback, *Parent Defender Firm Loses High-Profile Contract in California's East Bay*, IMPRINT (Oct. 27, 2021, 12:33 PM), https://imprintnews.org/top-stories/parent-defender-firm-loses-contract-in-californias-east-bay/59919. Following a holistic model, lawyers at the Eastbay Family Defenders had worked alongside social workers and other advocates to provide representation to parents entangled in the family regulation system. *Id.* Professor Martin Guggenheim called this a "significant step backwards" for legal representation of parents. *Id.* The contract ultimately went to an attorney panel with attorneys working alone rather than on interdisciplinary teams. *Id.*

[349] Gerber et al., *supra* note 347, at 42. Outside of major cities like New York City, Detroit, and a few other places, the holistic defense model remains rare, and the existence and quality of parent representation is inconsistent across jurisdictions. *See* Jane M. Spinak, *Family Defense and the Disappearing Problem-Solving Court*, 20 CUNY L. REV. 171, 179 (2016) (discussing how, historically, "[m]any states were far less committed to providing counsel for indigent parents"); Vivek Sankaran, *The Lawyer Illusion in Child Welfare Court*, IMPRINT (Feb. 21, 2021, 7:00 PM), https://imprintnews.org/child-welfare-2/lawyer-illusion-child-welfare-courts/52016 ("Outside of major cities, even when parents get an attorney, the attorney is likely to be underpaid and overworked, and lack any specialty knowledge of the child welfare system."). Even where they exist, institutional providers for parent representation are subject to budget cuts. Funding for public defense offices differs considerably across the country and informs the quality of representation. *See* Jessica Horan-Block & Elizabeth Tuttle Newman, *Accidents Happen: Exposing Fallacies in Child Protection Abuse Cases and Reuniting Families Through Aggressive Litigation*, 22 CUNY L. REV. 382, 409 (2019) ("[D]ifferent attorneys have various resources at their disposal, including access to potential expert witnesses or even access to adequate time for litigating these cases.").

[350] *Padilla Support Center*, IMMIGRANT DEF. PROJECT, https://www.immigrantdefenseproject.org/what-we-do/padilla-support-center/ [https://perma.cc/X39Y-EJAN] (last visited Jan. 18, 2023).

attorneys.[351] Attorneys seeking advice can reach out to IDP directly.[352] This model accounts for the fact that most family court attorneys will not have specialized immigration knowledge. It does require that they first consider the possibility that family court involvement implicates immigration proceedings, which requires at least some knowledge of fammigration and an inquiry into their client's status. The Bronx Defenders, a public defense office in New York City, has a specialized project that is specifically dedicated to the convergence of parent representation and immigration. Attorneys at The Bronx Defenders representing parents in family court can make referrals to this specialized project. A point person there will meet with the attorney and the client, provide counseling, and possibly make further referrals to criminal defense or immigration attorneys all within the office. Both IDP and The Bronx Defenders aim to anticipate and avoid future implications alongside their clients. These practices, however, are few and far between and track larger issues of parent representation both inside and outside of major cities.[353]

Counseling is important. It can empower people to make informed decisions about their priorities and goals. But often this choice amounts to balancing one punitive outcome against another. Diligent counseling can help families make strategic decisions and even avoid some harms. However, counseling does not change disproportionate targeting of marginalized families by fammigration. It does not address the fundamental ways system convergence marks and subordinates immigrant families. Diligent counseling about fammigration implications is both necessary and insufficient.

B. *Severing Threads of the Web*

Another step towards mitigating the impact of fammigration includes severing some of the connections between the family regulation and immigration systems through state legislation and federal policy.

Some states are taking steps to limit the disclosure of information by actors in the family regulation system to immigration officials. In New York City, for example, city employees—including CPS caseworkers—are generally prohibited from disclosing immigration status.[354] In Washington, an executive

[351] *Id.*

[352] *Id.*

[353] In April 2022, a *New York Times* article problematized the impact of low attorneys' fees for panel attorneys in New York family court. *See* Jonah E. Bromwich, *Family Court Lawyers Flee Low-Paying Jobs. Parents and Children Suffer.*, N.Y. TIMES (Apr. 29, 2022), https://www.nytimes.com/2022/04/29/nyregion/family-court-attorneys-fees.html. Professor Cynthia Godsoe observed that "[n]ot paying these attorneys remotely close to what they need to be able to do a good job, reflects either ignorance about or disdain for those people's fundamental rights as parents and their lives as families." *Id.*

[354] *See* OFF. OF THE MAYOR, CITY OF N.Y., EXECUTIVE ORDER NO. 34: CITY POLICY CONCERNING IMMIGRANT ACCESS TO CITY SERVICES 2 (2003), https://www1.nyc.gov/assets/immigrants/downloads/pdf/eo-34.pdf [https://perma.cc/WAQ3-H455] (mandating that "City officer or employee . . . shall not inquire about a person's immigration status" except under

order mandates that "immigration or citizenship status or place of birth shall not be collected [by state agencies], except as required by federal or state law or state agency policy."[355] In Connecticut, child welfare officials are encouraged to inquire about families' immigration status but are told that they are not required to report this information to ICE.[356] San Diego County's child welfare guidelines provide that the immigration status of a child in care and their family members shall not be disclosed to federal immigration authorities without prior consultation with a supervisor and county counsel.[357] The Los Angeles County Department of Children and Family Services claims that it does not report families to ICE.[358] These steps are especially helpful in deterring active cooperation and intentional disclosures to immigration officials. But they are not comprehensive nor do they fully account for the fact that immigration officials may obtain information despite CPS's unwillingness to cooperate.

Federal policy could much more comprehensively sever ties between the family regulation and immigration system. For example, federal policy could make explicit that information produced by the family regulation system should not be considered in immigration proceedings. This, however, would require the political will to significantly cut down on wide discretion and the reliance on "good moral character" assessments in immigration enforcement.

C. *Shrinking the Web*

1. Shrinking Contact Points with the Family Regulation System

Given the impact that even minimal contact with the family regulation system can have for noncitizens and their families, shrinking system entry points is central. The most common entry points are public schools, the criminal legal system, and public hospitals. In 2020, 66.7% of child maltreatment reports were

certain circumstances); OFF. OF THE MAYOR, CITY OF N.Y., EXECUTIVE ORDER NO. 41: CITY-WIDE PRIVACY POLICY AND AMENDMENT OF EXECUTIVE ORDER NO. 34 RELATING TO CITY POLICY CONCERNING IMMIGRANT ACCESS TO CITY SERVICES 1-3 (2003), https://www1.nyc.gov/assets/immigrants/downloads/pdf/eo-41.pdf [https://perma.cc/HXN4-LNBM] (clarifying Executive Order No. 34).

[355] OFF. OF THE GOVERNOR, STATE OF WASH., EXECUTIVE ORDER 17-01: REAFFIRMING WASHINGTON'S COMMITMENT TO TOLERANCE, DIVERSITY, AND INCLUSIVENESS 2 (2017), https://www.governor.wa.gov/sites/default/files/exe_order/eo_17-01.pdf [https://perma.cc/U8N3-SQUE].

[356] CONN. DEP'T OF CHILD. & FAMS., IMMIGRATION PRACTICE GUIDE 1 (2017), https://portal.ct.gov/-/media/DCF/Policy/BPGuides/21-13-PG-Immigration.pdf?la=en [https://perma.cc/QQ5W-8KVK].

[357] HEALTH & HUM. SERVS. AGENCY, CNTY. OF SAN DIEGO, INTERNATIONAL CHILD WELFARE—UNDOCUMENTED CHILDREN 8 (2022), https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/cs/cws/policies/special_populations_international_child_welfare/Undocumented%20Children.pdf [https://perma.cc/3KHS-E42Z].

[358] *See Immigration*, L.A. CNTY. DEP'T. OF CHILD. & FAM. SERVS., https://dcfs.lacounty.gov/youth/immigration/ [https://perma.cc/R6W6-GVML] (last visited Jan. 18, 2023).

initiated by "professionals."[359] The highest number of reports come from school staff, law enforcement, and medical personnel.[360] This Section will address all three of these access points as potential spaces for intervention.

School staff and medical personnel are frequently unaware of the punitive consequences of a report to CPS. Given the widespread narrative that the family regulation system serves a supportive function, many reporters will genuinely believe that calling CPS will provide families with resources. Some service providers report families to CPS with the explicit goal of connecting them to services, not to separate them.[361] As scholars have articulated, "Incorrect assumptions of the system's interactions with vulnerable families often ensnare them in a web of coercion and surveillance, one from which it is difficult to detach."[362] For noncitizen families, the inability to detach from the system after making contact may result in permanent separation through deportation or the legal termination of parental rights subsequent to deportation.

Further, discriminatory practices funnel marginalized women into the family regulation system. One example is nonconsensual drug testing of pregnant and birthing people in public hospitals.[363] The tests occur without knowledge and counseling of the patient. This practice is widespread and invites racial profiling.[364] In January 2022, National Advocates for Pregnant Women and the American Civil Liberties Union filed a complaint with the Illinois Department

[359] *See* CHILD.'S BUREAU, *supra* note 210, at xi.

[360] *Id.*

[361] *See* Fong, *Getting Eyes in the Home*, *supra* note 129, at 620-21 (observing most "professional" reporters did not believe that child was in imminent danger and instead, contacted CPS to connect families to services).

[362] Harvey et al., *supra* note 62, at 592.

[363] This practice is widely opposed by the medical community. *See* AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, SUBSTANCE ABUSE REPORTING AND PREGNANCY: THE ROLE OF THE OBSTETRICIAN-GYNECOLOGIST 1-2 (2011), acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2011/01/substance-abuse-reporting-and-pregnancy.pdf [https://perma.cc/G89V-XCCM].

[364] *See* Ira J. Chasnoff, Harvey J. Landress & Mark E. Barrett, *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1204 (1990) (finding Black women were 9.6 times more likely to be reported by medical providers for substance use during pregnancy); Marc A. Ellsworth, Timothy P. Stevens & Carl T. D'Angio, *Infant Race Affects Application of Clinical Guidelines When Screening for Drugs of Abuse in Newborns*, 125 PEDIATRICS e1379, e1382-83 (2010) (finding infants born to Black mothers were two times more likely to be screened for drugs than infants of white mothers); Troy Anderson, *Race Tilt in Foster Care Hit; Hospital Staff More Likely to Screen Minority Mothers*, DAILY NEWS L.A., June 30, 2008, at A1 (describing evidence that "hospital staff are more likely to suspect drug use on the part of [B]lack mothers and these mothers are more likely to have their children removed and put in foster care"); Brenda Warner Rotzoll, *Black Newborns Likelier To Be Drug-Tested: Study*, CHI. SUN-TIMES, Mar. 16, 2001, at 18 (noting Black babies are more likely than white babies to be tested for cocaine).

of Human Rights against a public hospital in Illinois.[365] The lawsuit alleges that the hospital "routinely drug tests perinatal patients without seeking their informed consent, despite the fact that they do not drug test any other class of patients—including fathers—and reports perinatal patients who receive positive test results" to CPS.[366] A complaint filed in 2021 by the New York Civil Liberties Union makes similar allegations against a public hospital in New York City.[367] So does a 2020 class action lawsuit against the University of Pittsburgh Medical Center.[368] Directly impacted mothers are amongst the leaders in the fight against nonconsensual drug testing in hospitals.[369] Ending the practice of nonconsensual drug testing could reduce contact points with the system for some of the most marginalized families, including undocumented parents.[370] Because of limited access to coverage, undocumented immigrants are often uninsured.[371] For them, public community health centers are often the only accessible providers. Even if they do have access to other facilities, the geography of marginalization limits many immigrants in low-income communities of color to public hospitals, while affluent families have access to, and insurance that covers, a wider range of facilities where they are less likely to be tested without consent. Given the immigration system's focus on drug use and the vague concept of "good moral character," nonconsensual drug tests create tremendous risk for noncitizen mothers.

Aside from school staff and medical providers, police are another major source of reporting to CPS.[372] Discriminatory police practices such as racial

[365] *See New Mother Files Complaint After Enduring Non-Consensual and Discriminatory Drug Testing, Reporting to DCFS Because of Poppy Seed Consumption*, ACLU ILL. (Feb. 3, 2022), https://www.aclu-il.org/en/press-releases/new-mother-files-complaint-after-enduring-non-consensual-and-discriminatory-drug [https://perma.cc/N5XH-JMAP].

[366] NAT'L ASS'N OF PREGNANT WOMEN & ACLU OF ILL., CHARGE OF DISCRIMINATION 3 (2022), https://www.aclu-il.org/sites/default/files/ms._f._charge.pdf [https://perma.cc/UPU3-YB8B].

[367] *See* Arianna Fishman, *NYCLU and National Advocates for Pregnant Women File Complaints on Behalf of Mothers Reported to Child Protective Services After Poppy Seed Consumption Caused False Positive Drug Test Results*, N.Y. C.L. UNION (Dec. 17, 2021), https://www.nyclu.org/en/press-releases/nyclu-and-national-advocates-pregnant-women-file-complaints-behalf-mothers-reported [https://perma.cc/ZW95-ZKYX].

[368] *See Mothers Suing UPMC, Allegheny Co. After Test Results Reported to CYF*, WPXI NEWS (Mar. 12, 2020, 8:24 AM), https://www.wpxi.com/news/investigates/mothers-suing-upmc-allegheny-co-after-test-results-reported-cyf/PKLVEDQSYVEMPGPB62XTWLGBGU/ [https://perma.cc/VE7E-FND3].

[369] *See Reimagine Support*, MOVEMENT FOR FAM. POWER, https://www.movementforfamilypower.org/reimagine-support [https://perma.cc/885N-5Y7B] (last visited Jan. 18, 2023).

[370] *See, e.g.*, S.D. 4821A, 2021-22 Leg., Reg. Sess. (N.Y. 2021) (prohibiting drug or alcohol testing and screening of pregnant or postpartum individuals).

[371] *See* Osterling & Han, *supra* note 332, at 1658, 1660 ("[F]inding services for undocumented Mexican families involved considerably more work because of their ineligibility for Medi-Cal funded services.").

[372] CHILD.'S BUREAU, *supra* note 210, at xi.

profiling can directly impact other system interventions. The high number of reports made by the police underscores the need to shrink carceral responses to health and safety needs more broadly.[373] The police produce pathways to other punitive systems and their intersections, including the family regulation system. The fammigration system is one example. The project of redefining safety, therefore, must include severe reductions of reliance on the police and policing practices more broadly.

2. Shrinking Information Produced by Family Regulation

One major issue identified in Part II is the production of information by the family regulation system that then becomes accessible to federal immigration officials. The issuance of orders of protection and the fingerprinting of family members are two central examples. As discussed above, even temporary, unadjudicated orders of protection can have significant impact. One potential strategy for public defenders representing noncitizens is to, if the issuance of an order cannot be avoided, request a short order in the pre-adjudication stage. A short order can contain the same language as a temporary order of protection but is not uploaded to a federal database. As a public defender, I often requested short orders without making statements about a client's immigration status on the court record. Given the importance of avoiding such statements, this strategy depends on two things. One, a judge must understand the "code" an attorney is using when making a short order request. This will only be the case in jurisdictions where judges are sensitive to fammigration issues. And two, a family court judge would have to be receptive to arguments that impact the immigration sphere. Whether or not that is the case will depend on the individual judge's knowledge of fammigration, subjective assessments, and judicial philosophy.[374] For example, a judge may very well be aware of the implications of family regulation orders in the immigration sphere but be unwilling to consider this as a factor in deciding whether or not to issue family court orders. Other judges may be inclined to consider immigration factors only when the parents appear particularly sympathetic to them.

Family court findings make up another piece of the fammigration puzzle. Family court allegations may be settled with a withdrawal, a consensual settlement, or a fact-finding or dismissal order after trial. If a judge finds that a parent maltreated their child by a preponderance of the evidence, they issue an order documenting their findings. Some judges will provide more detail than others. Some might simply reference the allegations in the petition filed by CPS at the first court appearance. All documented factual determinations can be used against a parent in immigration proceedings. If a parent decides to settle a case, all findings can be negotiated. Effective counsel will advise a parent about the

[373] *See id.* (noting 20.9% of reports alleging child abuse and neglect are authored by law enforcement personnel).

[374] *See* Eisenzweig, *supra* note 44, at 509 (discussing different judicial responses to requests of short orders in family court to mitigate immigration consequences).

immigration consequences of all potential settlements. Counsel can even seek to obtain a blank finding—one that contains little to no information of the adjudicated facts. This allows the court to make orders without detailing the underlying factual circumstances. While strategic settlements offer mitigation opportunities, they are significantly diminished by the lack and specialized knowledge of counsel in family court.

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Implementing counseling obligations for fammigration impacted parents and severing the threads of the web wherever possible is an important but insufficient step. Shrinking the entry points into and the production of information by the family regulation system can further help limit the impact of fammigration.

CONCLUSION

The relationship between the family regulation and immigration systems is best described as a web. An action in one system may trigger movement in the other, creating feedback effects, and ultimately even deeper connections. The mere existence of a family regulation case, charging document, or temporary order of protection creates entry points for the immigration system, while the substantive family court record—produced throughout the life of a case—is used to legitimize negative immigration consequences. By obtaining family regulation records, immigration officials make use of the family regulation system's coercive nature and ability to gather detailed information from parents. On the flip side, negative immigration outcomes can later impact a parent's ability to maintain their parental rights in family court. Together, both systems engage in family separation and further subordinate already marginalized families. To be clear, this is not an issue of intentional cooperation between systems. While there are documented instances of CPS reports to ICE, this Article examined the structures that create the fammigration web.

Mitigating the effects of the connections between the family regulation and immigration systems will require at least three things. One, establishing an epistemology of system convergence. Two, severing the threads of the web wherever possible. And three, shrinking the family regulation system. The mapping of the fammigration web in this Article does not purport to be a comprehensive or fixed account of the carceral web. Instead, it is meant to be generative for future scholarship. For example, future scholarship should closely track the ways narratives are produced in one part of the web and reproduced or used in other parts to establish a more comprehensive epistemology of knowledge production in and across systems.

Scholars, advocates, and directly impacted people have called for the abolition of the family regulation and the immigration systems. Against this backdrop, fammigration is ripe for a close examination of broader resistance strategies. Roberts puts forth cross-movement strategies to address "multiple

forms of systemic injustice."[375] Cross-movement organizing recognizes the intertwined nature of systems, embraces collective resistance responses, and interrogates solutions outside of carceral punishment. Future scholarship can draw on the relationship between cross-movement organizing and resistance lawyering to understand and dismantle the carceral web.

[375] Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1500 (2012).