Disappearing Parents: Immigration Enforcement and the Child Welfare System

Nina Rabin

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Article

Disappearing Parents: Immigration Enforcement and the Child Welfare System

NINA RABIN

This Article presents original empirical research that documents systemic failures of the federal immigration enforcement and state child welfare systems when immigrant parents in detention and deportation proceedings have children in state custody.

The intertwined but uncoordinated workings of the federal and state systems result in severe family disruptions and raise concerns regarding parental rights of constitutional magnitude. This Article documents this phenomenon in two ways. First, it presents an “anatomy of a deportation,” providing a case study of an actual parent whose detention and eventual deportation has separated her from her four young children for over two years and threatens her with the permanent termination of her parental rights. Next, it presents the results of empirical research conducted on the child welfare system to demonstrate that the case study is not an isolated occurrence. On the contrary, the analysis of the results of over fifty surveys and twenty interviews with attorneys, caseworkers, and judges in the juvenile court system in one Arizona county makes clear the concerns identified in the case study occur with alarming frequency. The analysis section of this Article provides a discussion of the constitutional and structural concerns raised by the case study and data presented. Finally, the Article concludes with reforms that can be adopted by Immigration and Customs Enforcement, child protective services agencies, and Congress to address the systemic failures described.
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Disappearing Parents: Immigration Enforcement and the Child Welfare System

NINA RABIN*

The police were there. They didn’t let me do anything. They didn’t let me speak. . . . [M]y girls wanted to hug me, they wanted to be with me. And they would scream and cry and the policeman, he would just push them. It took about an hour for CPS to arrive. And when they took my girls, I felt as if my heart fell out.

– Parent in Immigration Detention¹

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

– Juvenile Court Judge²

I. INTRODUCTION

For the past two years, I have represented a woman in deportation proceedings whose unfolding story continually haunts me. The intertwined but uncoordinated workings of immigration enforcement, criminal proceedings, and the child welfare system combined to separate my client

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¹ Transcript of Immigration Court hearing, Eloy, Ariz. (April 21, 2009) (on file with author).

² Interview with Juvenile Court Judge, Pima County, Ariz. (Aug. 10, 2010) (transcribed notes on file with author).
from her children for two years, place the children in separate homes in the foster care system, and after two years of separation and incarceration, deport my client alone to a country she fled over ten years ago.

The destruction wreaked on her life and the lives of her four young children encapsulates many of the systemic problems with our current immigration enforcement regime. In this Article, I tell her story, and then share the information I gathered through a series of surveys and interviews I conducted with personnel in the child welfare system in an attempt to understand how such a tragedy could occur. The data collected reveal that her experience is far from unique or idiosyncratic. On the contrary, the child welfare system encounters families caught up in immigration enforcement with some frequency. Yet the data also reveal a striking absence of systemic mechanisms for addressing the challenges posed by these cases. With no policies or practices in place in the child welfare system to address the unique situation of immigrant parents in detention or deportation proceedings, results like that of my client are occurring with alarming frequency.

This in-depth examination of the relationship between the federal immigration enforcement system and the state child welfare system is important for two reasons. First, no one advocates permanently separating fit parents from their young children, regardless of the parents’ immigration status. Yet such separations are occurring, largely under the radar screen and often without any specific intent by actors within each system for this outcome to occur. There are means of avoiding these tragic results that would not require seismic shifts in current policies. This is an issue with practical implications for everyday actors in the immigration and child welfare systems.

Second, the relationship between federal immigration enforcement and the state child welfare system cuts to the heart of fundamental tensions in U.S. immigration policy—between federal and state systems, enforcement and integration, and individual rights and immigration status distinctions. The data I provide offer a helpful lens through which to consider these tensions. Examining the dire situation faced by immigrant parents in detention or deportation proceedings with children in state custody presents an opportunity to question basic assumptions about the vast immigration enforcement bureaucracy in which immigrant families become entangled. The severity of disruptions to families, and the individual rights at stake for parents, implicate concerns of constitutional magnitude.

One particularly key response, I suggest, is structural in nature. In light of the constitutional rights at stake, the federal government must reconsider the current relationship between federal and state agencies in the immigration arena. At present, the federal immigration bureaucracy focuses its coordination efforts with state agencies on measures that will
advance its enforcement goals. The situation of immigrant families in the child welfare system demonstrates the need for cooperation and coordination in matters unrelated to immigration enforcement but of pressing relevance to the welfare and liberty interests of immigrant families.

This Article proceeds in five subsequent parts. Part II offers a detailed account of my client’s case. In the spirit of Judge Stephen Reinhardt’s famous article, *The Anatomy of an Execution*, in which he provides a detailed firsthand account of the events that lead to execution of a single man in order to demonstrate systemic problems with death penalty jurisprudence, I offer this “anatomy of a deportation,” because I believe the detailed firsthand account of my client’s case is similarly rich with implications about systemic failures of our immigration enforcement and child welfare systems.

Part III describes the survey and interviews I conducted with judges, attorneys, caseworkers, and social service providers who work in juvenile court in a county in Arizona that serves a high volume of immigrant families. The fifty-two surveys and twenty interviews I conducted demonstrate that the child welfare system intersects with immigration detention and deportation proceedings with frequency, and that my client’s case is not an anomaly. Part IV draws on my client’s case, the survey responses, and the interviews to identify systemic failures with immigration enforcement and the child welfare system that are combining to separate immigrant parents and children, at times permanently.

Part V analyzes the legal implications of these failures, particularly the constitutional rights at stake and the structural issues involved. From a constitutional perspective, I argue that the government’s failure to establish procedural mechanisms to allow detained immigrant parents to meaningfully participate in the dependency proceedings of their children violates their due process rights. From a structural point of view, the problems described in this paper illustrate a federalism concern that I term “bureaucratic federalism,” in which a practical disconnect between state and federal agencies creates Kafka-esque results in which immigrant parents are trapped between the two uncoordinated systems’ processes. Much of the debate and discussion regarding federalism in immigration policy focuses on the relationship between state and federal systems in

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3 See discussion of ICE 287(g) agreements and Secure Communities program, infra notes 90–91 and accompanying text.
immigration enforcement, but the tragic results of the lack of coordination between federal and state bureaucracies documented here suggests the need for attention to a different type of structural concern: the failure of the federal government to forge cooperative relationships with state bureaucracies in order to avoid unintended rights violations of immigrants caught between federal and state systems.

Finally, Part VI offers recommendations that would address the failures described in Part IV from multiple vantage points. Any attempt to effectively address these complex tragedies will require reforms of both the federal immigration enforcement system and the state child welfare system.

II. ANA’S CASE

In 1995, Ana carried her severely disabled son across the border from Mexico to the United States, in search of better medical care. After his birth, Ana was abandoned both by her own family and the father of the child, who called him a “monster.” During her immigration hearing, she described her decision to leave rural Mexico and journey to the United States as follows:

I came looking for a better future for my son. I saw that I didn’t have enough money for the needs that he had. The money was not enough for him to have the services

....

We entered through a tunnel with a coyote [a smuggler] who said he was going to bring us... He saw that my son was ill and said that he was not responsible for us. And I asked him to pass us across and he brought us through a tunnel. I kept covering my son so he would not get wet in the tunnel. 

Once in the United States, she moved to Phoenix and enrolled her blind and partially paralyzed son in a special school. Soon after arriving, she became involved with an unstable man from Central America and over the next ten years, had three more children, all girls. Her partner supported her financially, which gave the family enough to scrape by along with public benefits she received for her U.S. citizen children.

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5 See infra Section V.B.
6 This is a pseudonym.
7 Transcript of Immigration Court hearing, Eloy, Ariz. (Apr. 21, 2009) (on file with author).
Ana's precarious world came crashing down one afternoon in the summer of 2008, when she left her children in the care of her partner while she went to run an errand. He took the girls to the park and left the disabled son alone in the apartment. A neighbor heard the child's lonely cries and called the police. When Ana returned to the apartment, the police arrested her, and subsequently her partner, and charged them with child abuse. Ana described the scene in her apartment as follows:

The police were there. They didn't let me do anything. They didn't let me speak. When [my partner] came back with the girls, my girls wanted to hug me, they wanted to be with me. And they would scream and cry and the policeman, he would just push them. It took about an hour for [Child Protective Services] to arrive. And when they took my girls I felt as if my heart fell out. My little girl was yelling that she wanted her bear and she wanted her bear. I knew where it was because I had washed it for her.

. . .

My children were yelling; they wanted to hug me. They kept saying, "Mommy no, Mommy no."\(^8\)

Once Child Protective Services ("CPS") picked up the children, they were placed in foster care because CPS was not aware of any relatives available to care for them. At this time, her disabled son was fourteen-years-old and her daughters were nine, seven, and three months old. Ana stayed briefly in county jail, but before the state brought any criminal charges, Immigration and Customs Enforcement ("ICE") transferred her and her partner to immigration detention and initiated deportation proceedings.

Once in immigration detention, Ana's partner decided not to fight his removal and was deported a few months later. Ana was determined to fight to stay in the country in order to avoid being deported without her children. For the next fifteen months, as her immigration case slowly proceeded through the immigration court system, Ana remained in immigration detention, unable to see or communicate with her children, who were in two separate foster homes.

This initial series of events is crucial to understanding the systemic problems the remainder of this Article will address. In particular, the speed with which Ana's relatively minor criminal infraction triggered her

\(^8\) *Id.*
disappearance into immigration detention, without any ability to communicate or coordinate with CPS, would have grave and lasting effects on the children’s dependency proceedings\(^9\) that would unfold over the next months and eventually years. These events are described in the following five sub-sections, which cover her immigration case, her efforts to be released from detention on bond or parole, her children’s dependency proceedings, her criminal prosecution, and finally, her deportation. A timeline of her case is also provided in Appendix A.

A. The Immigration Case

ICE transferred Ana from Maricopa County Jail to Eloy Detention Center less than two weeks after her arrest. Immigrants have no constitutional right to government appointed representation in their removal proceedings,\(^1\) and Ana lacked the resources to hire an attorney, so she proceeded with her immigration case pro se. With help from a nonprofit organization that provides legal orientation and resources to detainees, Ana submitted an application for a form of relief from deportation called “cancellation of removal.”\(^3\) Such relief is available to undocumented immigrants who have been in the country for more than ten years and can show that deportation would result in “exceptional and extremely unusual hardship” to a U.S. citizen spouse or child.\(^12\)

After several continuances to allow Ana additional time to find an attorney, her hearing before the Immigration Judge (“IJ”) was scheduled— for nearly nine months after her initial entry into the detention facility. A few months before the final hearing, the University of Arizona Immigration Law Clinic was put in touch with Ana and became her attorneys. The Clinic began to prepare a brief and materials in support of her claim for cancellation of removal.

Two weeks before the removal hearing, the Clinic submitted a brief and extensive supporting documents to the court. The Clinic argued that the lack of services and care available to a severely disabled boy in Mexico would result in exceptional and extremely unusual hardship to his three U.S. citizen sisters. Given the severity of his needs, and the absence of services or programs in Mexico of the kind he receives in the U.S., the

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\(^9\) This paper will refer to the proceedings regarding the custody of Ana’s children as “dependency proceedings.” This is the formal court process to determine if a child’s well-being requires the state to intervene in the parent-child relationship. ARIZ. REV. STAT. ANN. §§ 8-201(13), 8-801 to 8-892 (2007).

\(^1\) See Immigration and Nationality Act, 8 U.S.C. § 1362 (2006) (“In any removal proceedings before an immigration judge . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.”).

\(^3\) Id. § 1229b(b).

\(^12\) Id. § 1229b(b)(1)(D).
Clinic argued that Ana would be forced to take on extremely demanding care-taking responsibilities. This would inevitably render her, as a single parent, incapable of supporting the rest of the family, and place severe burdens on her U.S. citizen daughters.

The government submitted no evidence regarding its case against Ana before the hearing. However, unbeknownst to the Immigration Clinic, on the eve of the hearing, the government subpoenaed all documents from the State of Arizona regarding the dependency proceedings for Ana’s children. The IJ granted the subpoena the same day. At the hearing, the government did not submit the documents it subpoenaed, but used them as a basis for aggressive questioning of Ana regarding various allegations against her that were nowhere in the court record. She was questioned 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. The government attorney argued that this was all evidence that she lacked the “good moral character” required to receive cancellation of removal.\(^1\)

The unexpected topics covered in cross-examination bogged the hearing down in objections and delays. As a result, the hearing was continued another six weeks to allow the government more time for cross-examination. The IJ said she would issue a decision two months after that, despite the fact that no further evidence was to be submitted and we had requested a prompt decision in light of the pending dependency proceedings.

The IJ denied relief in late July of 2009, just over one year after Ana had initially entered detention. We appealed to the Board of Immigration Appeals (“BIA”), which issued a brief decision affirming the IJ four months later.\(^14\) We then appealed to the Ninth Circuit, where Ana’s case remains pending.

As will be discussed further below, the fact that every stage of Ana’s immigration case took many months, and eventually years, to yield results had a crucial impact on the dependency proceedings regarding Ana’s children. ICE’s aggressive prosecution of her case, particularly its use of the dependency proceedings as evidence against her claim for immigration relief, compounded the immigration court’s already lengthy processing times at each stage of the case.

\section*{B. The Bond Decision}

At the same time that Ana’s immigration case was proceeding, she was also struggling to be released from detention during the pendency of her case. Certain immigrants without criminal history can apply for a bond to

\begin{footnotes}
\item[14] Decision of Board of Immigration Appeals (Nov. 27, 2009) (on file with author).
\end{footnotes}
release them from detention while their immigration case proceeds.\textsuperscript{15} The bond determination proceeds on a separate track from the immigration proceedings, with separate evidence submitted and hearings scheduled. Release is warranted when the detainee does not present a danger to the community or a flight risk sufficient to warrant continued detention.\textsuperscript{16}

Because Ana had no criminal history, she was eligible for release from detention on bond. Ana appeared unrepresented in an initial bond hearing several weeks into her detention. The IJ refused to grant her release on bond. There is no evidence in the court record regarding this hearing other than the order denying bond, which states without explanation the reason for the denial in a single word scrawled at the bottom of the order: “Danger.”\textsuperscript{17}

Once the Immigration Law Clinic assumed representation of Ana, we requested reconsideration of this bond determination in light of the severe impact her detention was having on her children, as well as the lack of any evidence to suggest Ana posed a danger to the community or flight risk. The IJ refused to reconsider her decision.

In a rare reversal of an IJ’s bond determination, the BIA reversed and remanded this decision in November 2009, fourteen months after her initial bond determination.\textsuperscript{18} However, at that point, as described below, Ana had already been transferred back to Maricopa County Jail for her criminal proceedings and no reconsideration by the IJ was possible.

As an alternative to bond, immigrants can also be released from detention through humanitarian parole. This is left to the sole discretion of ICE, which has the power to grant parole to certain detained aliens for “urgent humanitarian reasons or significant public benefit.”\textsuperscript{19} A grant of parole allows the immigrant to continue to pursue his or her immigration case from outside detention. It can be accompanied by a range of monitoring and supervising mechanisms to ensure that the immigrant does

\textsuperscript{15} 8 U.S.C. § 1226(a)(2).
\textsuperscript{16} See In re Guerra, 24 I. & N. Dec. 37, 40–41 (B.I.A. 2006) ("In general, an Immigration Judge must consider whether an alien who seeks a change in custody status is a threat to national security, a danger to the community at large, likely to abscond, or otherwise a poor bail risk.").
\textsuperscript{17} Order of the Immigration Judge (Aug. 26, 2008) (on file with author).
\textsuperscript{18} Decision of the Board of Immigration Appeals (Oct. 28, 2009) (on file with author).
\textsuperscript{19} 8 U.S.C. § 1182(d)(5) ("The Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States . . . "). The statute’s reference to the Attorney General is a historical artifact, due to the fact that the statute was enacted before the reorganization of the immigration bureaucracy and creation of the Department of Homeland Security. The Homeland Security Act § 1517 corrected these references, stating that any reference to a function transferred from DOJ to DHS is deemed to refer to DHS. Homeland Security Act of 2002, 6 U.S.C. §§ 101–613 (2006).
The Immigration Law Clinic submitted repeated requests to ICE to release Ana from detention on humanitarian parole. ICE never responded to any of the requests.

The refusal of ICE and the immigration court to release Ana from detention while her immigration case proceeded put her in a Catch-22. As discussed further in the next section, her detention made it impossible for her to meaningfully participate in her children’s dependency proceedings. On the other hand, if she chose instead to abandon her claim for immigration relief, her imminent deportation to Mexico would present severe, potentially insurmountable challenges to reunifying with her children. The frequency and extent of this predicament for immigrant parents is explored more fully in Parts III and IV.

C. The Dependency Case

The trajectory of Ana’s child welfare case was importantly shaped by federal and state requirements that are triggered when the state assumes custody of a child. Most significantly, the Adoption and Safe Families Act (“ASFA”), passed by Congress in 1997, requires states to meet stringent time requirements for either achieving family reunification or adoption after a child is removed from home. The legislation grew out of a concern that the child welfare system’s emphasis on family reunification above all other goals could pose safety risks to children and result in long unresolved cases. In order to move children out of foster care to a permanent living arrangement more quickly, ASFA mandates that if a child remains in an out of home placement for fifteen out of twenty-two months, the state is required to initiate proceedings to terminate parental rights. Arizona has implemented ASFA’s requirements and added additional grounds for termination of parental rights after only nine months of out-of-home placement when the parent has “substantially neglected or willfully refused” to remedy the circumstances that caused the out-of-home

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22 See David J. Herring, The Adoption and Safe Families Act—Hope and Its Subversion, 34 FAM. L.Q. 329, 330 (2000) (“ASFA backs away from the promotion of aggressive family reunification efforts and attempts to alter permanency planning priorities in a way that is consistent with an emphasis on child safety.”).

placement. Along with these requirements, ASFA and the corresponding state laws also require that the state make “reasonable” or “diligent” efforts to provide the services necessary to reunify a child prior to terminating parental rights. Examples of reunification services include supervised visitation, parenting classes, and substance abuse counseling.

About six months into Ana’s detention, the juvenile court held a dependency hearing at which Ana was present telephonically, and the court affirmed a case plan of family reunification. Yet at the same time, the court ordered that “[reunification] services to be offered to mother will not be any while incarcerated.” By this order, the court found the state’s failure to provide any reunification services to Ana was reasonable, despite the fact that, without such services, there was no way that Ana could work towards achieving the case plan of reunification.

During the initial six months of her detention, before the Immigration Clinic entered the case, Ana had never once seen her children or even spoken to them on the phone. She had a court appointed attorney to represent her in the dependency proceedings. Yet she had never met her attorney, had spoken to her only once on the phone directly prior to her hearing, and had received one letter from her. She had also never met with the CPS caseworker assigned to her case, nor even succeeded in speaking with him on the phone. She always received his voicemail and the phone system in the detention facility made it impossible to leave messages for him.

Once the Immigration Clinic took Ana’s case, we established contact with her attorney, her social worker, and the guardian ad litem for the children. All three confirmed that they had never met Ana. Ana’s court appointed attorney described the case as a “train wreck,” and told us that termination of Ana’s parental rights was a near certainty. She explained that it was only a matter of time until the state could switch the case plan from reunification to severance of parental rights.

The caseworker explained that ordinarily CPS would order a psychological evaluation and other reunification services for Ana, such as parenting classes and supervised visits. But he explained that since Ana was in an ICE facility, it was no use because the facility would not

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cooperate. The basis for his assumption about the facility was unclear, since he had never made any attempt to communicate with Ana or the facility about the services available.

The social worker did agree to put the Clinic in touch with the foster family that was caring for Ana’s three daughters, and we arranged a three-way phone call between Ana and her girls in which we placed the call to the foster home and translated.\(^{29}\) It was the first time Ana had spoken with her daughters since the day she was arrested, over six months previously. The Clinic also regularly sent drawings to the children from Ana. Until our involvement, she had no way of sending them such drawings since she had neither the money for postage nor the address where she could reach them.

The “train wreck” of her case to retain her parental rights—as her own attorney described it—proceeded inexorably as the months went by in detention. In June 2009, after nearly a year in detention, the juvenile court affirmed a change in the case plan from family reunification to severance.\(^{30}\)

D. The Criminal Case

Abruptly, in September 2009, fifteen months into her detention, Ana was transferred from immigration detention to county jail for prosecution of her criminal charge for child abuse. No one notified Ana’s legal representatives at the Immigration Law Clinic about her transfer. The Clinic learned of the transfer only after going to the detention center to visit with Ana and learning that she was no longer there.\(^{31}\) We then established contact with the public defender’s office and pieced together what had happened. Her public defender promised to remain in touch to ensure that Ana did not plead guilty to a charge that would jeopardize her eligibility for immigration relief.

After several months, the Clinic received a postcard from Ana stating that she felt pressured by her criminal defense attorney and did not know what to do. When we left messages for the public defender in the heat of

\(^{29}\) Ana is a monolingual Spanish speaker. The girls had been placed in an English-speaking foster home, and the foster parents requested that the calls be conducted in English on a speaker phone. We were unable to arrange for any phone contact with her son, who was in a different foster home.

\(^{30}\) At this point, the girls had been in out-of-home placements for twelve rather than fifteen months. Therefore, the state based its motion to terminate on an allegation that Ana had “willfully abused” her children or failed to protect them from willful abuse. The statute defines this abuse to include “serious physical or emotional injury;” clearly a difficult standard to meet in Ana’s case, where she had left her one son alone for under two hours and no injuries had resulted. See \textit{ARIZ. REV. STAT. ANN.} § 8-533(B)(2) (1997). However, willful abuse is a ground for termination that does not require fifteen months. \textit{Id.} Significantly, it also does not require the state to demonstrate that it had made reasonable efforts to provide reunification services. \textit{Id.}

\(^{31}\) Ana was unable to contact us because she was not permitted to take any of her property with her upon transfer and did not have our contact information memorized.
plea negotiations, she responded with a brief message that abruptly shifted tone: "I am not going to give out information that could lead to advice from people other than myself or my office on how she should proceed. I will let you know the outcome of the settlement conference." The Clinic responded with an email providing thorough information about the immigration consequences of various convictions. In particular, it was crucial that Ana avoid a conviction under the state child abuse statute, which would be an offense that would make her ineligible for cancellation of removal. Instead, a conviction under the state "endangerment" statute would be far preferable, as it would leave the door open to immigration relief. Despite this information, the public defender negotiated a plea under the child abuse statute because the government would not agree to endangerment.

On the day of the sentencing hearing, the Immigration Clinic received a call from the chambers of the sentencing judge, where the judge had called in the prosecutor and public defender to discuss the plea further. The judge was clearly moved by Ana’s situation and wanted to avoid a sentence that would result in deportation. I explained to him over the phone the difference between the child abuse and endangerment statutes for Ana’s prospects of immigration relief. Shortly after the call concluded, I received a call from the public defender, explaining that the judge had talked the prosecutor into a misdemeanor charge under the endangerment statute. Ana’s chance at staying in the country with her children was still hanging on by a thread.

Certain aspects of this episode in Ana’s case are idiosyncratic. Ordinarily, if the state seeks to pursue criminal charges, it does so before transferring a detainee to ICE. In Ana’s case, the state waited over fifteen months before pursuing its charges against her, and it did so after she had lost her immigration case and was awaiting a decision on the appeal. The reason for this highly unusual decision remains a mystery.

Yet other aspects of this chapter in her story are far from uncommon. The fact that relatively minor offenses trigger deportation proceedings and often render immigrants ineligible from receiving relief from deportation

32 Email from Public Defender to Immigration Clinic (Mar. 11, 2010) (on file with author).
33 Email from Immigration Clinic to Public Defender (Mar. 11, 2010) (on file with author).
36 One possibility could be coordination between the State Attorney General’s office, which was preparing its case for termination of parental rights, and the Maricopa County Prosecutor. This is pure conjecture, however, since there is no way to know whether any communication between the two offices occurred.
affects countless immigrants.\textsuperscript{37} One of the larger issues Ana's story illustrates is the devastating consequences of this interplay between the immigration and criminal justice systems for immigrant parents with children in state custody.

In addition, Ana's public defender and criminal judge exemplify the challenges faced by the criminal justice system in navigating the complex immigration consequences of various guilty pleas. In March 2010, less than two weeks after Ana's guilty plea, the Supreme Court held that failure to explain the immigration consequences of guilty pleas constitutes ineffective assistance of counsel.\textsuperscript{38} The exchange between Ana's public defender, me, and the sentencing judge reflects the challenge of implementing this ruling in a manner that fully conveys to players in the criminal justice system the complexities and stakes of guilty pleas for immigrant defendants. For immigrant parents with children in state custody, the impact that deportation could have on their parental rights is another collateral consequence of a conviction to be considered.

Finally, the fact that the Immigration Clinic received no notice of Ana's abrupt transfer and scrambled to locate her and remain in touch during this period is a common problem faced by immigration detainees and their representatives. Transfers of detainees either between detention facilities or between criminal justice and immigration detention facilities are common, and although the standards that govern detention state that attorneys "shall be" notified of detainee transfers, numerous reports have documented that ICE routinely fails to comply with this requirement.\textsuperscript{39}

E. Deportation

In February 2010, Ana had a severance hearing in which the juvenile court judge refused to terminate parental rights, finding insufficient evidence to justify such a termination. Her case plan returned to reunification. She was transferred back to the detention center and we prepared to reinitiate our request for humanitarian parole from ICE. Before we had a chance to do so, however, the Ninth Circuit refused to

\textsuperscript{37} See Human Rights Watch, Forced Apart (By the Numbers): Non-Citizens Deported Mostly for Nonviolent Offenses 33 tbl.9 (2009), available at http://www.hrw.org/node/82173 (showing that seventy-two percent of deportees are deported for nonviolent offenses).

\textsuperscript{38} Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010).

issue a stay of removal while its review of her appeal was pending.\textsuperscript{40} Ana was deported on May 28, 2010.

III. HOW COMMON IS ANA’S STORY?

It is exceedingly difficult to obtain concrete data on the numbers of families in the child welfare system with parents who are in detention and/or in deportation proceedings. The child welfare system does not systematically collect this information.\textsuperscript{41} ICE does not release information about the number of parents who are detained.

ICE does, however, track the number of parents of U.S. citizens who are deported. In January 2009, DHS’s Inspector General reported that between 1998 and 2007, the government deported 108,434 alien parents of U.S. citizen children.\textsuperscript{42} The report noted several gaps in and limitations of the data gathered by ICE that formed the basis for this figure;\textsuperscript{43} however, it stated, “[E]ven in the absence of complete and accurate documentation, ICE records show that a significant number of alien parent removals occurred.”\textsuperscript{44} The frequency with which parents are deported was further confirmed by an independent analysis of DHS data that estimated that from 1997 to 2007, the United States deported the lawful permanent resident mother or father of approximately 103,000 children.\textsuperscript{45} Neither of these figures captures the number of families involved with the state child welfare system, but the significant numbers of children impacted by the deportation of a parent suggests that a substantial subset of these cases involved children in state custody.

In order to gather information about how often these issues arise on a

\textsuperscript{40} The Ninth Circuit did not provide any discussion in its decision, and rejected without discussion an emergency motion for reconsideration. The court may have been influenced by the Supreme Court’s decision in \textit{Nken v. Holder}, 129 S. Ct. 1749, 1759 (2009), in which the Court rejected the Ninth Circuit’s standard for granting requests for stays of removal. After Ana’s deportation, the Ninth Circuit issued a published decision clarifying its analysis of stay requests in the aftermath of \textit{Nken}. Leiva-Perez v. Holder, 640 F.3d 962 (9th Cir. 2011).

\textsuperscript{41} \textsc{Yali Lincroft & Jen Resner, Anne E. Casey Found., Undercounted, Underserved: Immigrant and Refugee Families in the Child Welfare System 4} (Alice Bussiere ed., 2006), http://www.aecf.org/upload/publicationfiles/ir3622.pdf (“This information is not collected uniformly on a national, state, or local level.”).


\textsuperscript{43} See id. (“ICE does not collect data on the following requested items; (1) the number of instances in which both parents were removed; (2) the length of time a parent lived in the United States before removal; or (3) whether the U.S. citizens children remained in the United States after the parents’ removal.”).

\textsuperscript{44} Id. at 7.

local level, I conducted surveys and interviews with personnel in the Pima County Juvenile Court system in the summer of 2010. As a county on which to focus, Pima County has several distinguishing features from Maricopa County, where Ana’s case took place. First, it is a border county, with a one hundred and twenty mile long border along the southern and central region of Arizona. Second, it contains Tucson, the second largest city in the state, which is known to be politically liberal, particularly in comparison with Maricopa County, which contains Phoenix. Pima County has a population of roughly one million. In 2009, the Juvenile Court reported that it had 1744 open dependency cases and 3104 dependent children. Finally, Pima County Juvenile Court is a “Model Court.” The Model Courts consist of twenty-five juvenile and family courts that work with the National Council of Juvenile and Family Court Judges and use a best-practices bench book as a guide to systems reform.

Through the Juvenile Court’s training center, which offers training opportunities to judges, attorneys, caseworkers, and other personnel in the county’s child welfare system, I offered a training program on immigration issues in June 2010. Attendees were invited to fill out a survey at the training or complete it online. Those interested could volunteer to participate in a follow up interview in which they could discuss the issues in more detail.

I received a total of fifty-two survey responses from a mix of attorneys, CPS caseworkers and other personnel, social service providers that work in partnerships with CPS, and juvenile court judges. I conducted a total of twenty interviews, some individually and some in focus groups. While

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46 I also sought permission to conduct surveys and interviews in Maricopa County, where Ana’s dependency case took place, but was informed that the Juvenile Court was not interested in participating in the study.


51 Id. at 18 n.1.

52 The makeup of the fifty-two survey participants is as follows: fifteen attorneys, thirty social service providers (including CPS personnel, nonprofit organizations that work with families in CPS, and staff of the Mexican consulate), and seven judges. See generally Survey Responses (on file with author).

53 The twenty interviewees consisted of six attorneys, eight social service providers, and six judges. See generally Interview Notes (on file with author).
the number of participants is modest, the participants' responses confirm that Ana's case is not an outlier. On the contrary, the responses make clear that her experience taps into issues faced by many immigrant families caught in the intersecting systems of immigration and child welfare.

One of the questions on the survey asked how often the social service provider, attorney, or judge encounters families in which at least one member is undocumented. More than half of the respondents reported that it occurs in more than ten percent of their cases. When asked whether they had encountered cases in which one or more family members were in immigration detention facilities, six of the seven judges, nineteen of the twenty-seven social service providers, and thirteen of the fifteen attorneys had encountered such cases at least one to five times in the past five years, and many reported encounters with such cases significantly more than five times in the past five years. Finally, in response to a question about how often they worked with families in which one member was deported, all of the judges reported that they had encountered deportation at least one to five times in the last five years, and twenty-two out of twenty-seven social service providers and thirteen out of fifteen attorneys said the same.

Perhaps unsurprisingly, these figures rise steeply when only social service providers who speak Spanish are considered. Of this subpopulation, eleven of the fifteen Spanish speakers reported that at least ten

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54 See Survey Responses (on file with author). Of the thirty social service providers, fourteen reported undocumented family members in more than ten percent of their cases, and of these, four reported it came up in more than fifty percent of their cases. Eight reported it occurred in less than ten percent of their cases, and eight did not know.

Of the fifteen attorneys surveyed, nine reported encountering an undocumented family member in more than ten percent of their cases and six reported that it occurred in less than ten percent of their cases.

Of the seven judges, two reported encountering an undocumented family member in more than ten percent of the families in their courtroom, two reported that it occurred in less than ten percent of their cases, and three reported that they did not know.

55 Of the social service providers, five reported having cases with a family member in immigration detention more than ten times in the last five years.

Of the attorneys, nine reported between one and five times in the last five years, four reported between five and ten times, and only two reported that it had never occurred.

One of the judges reported that it occurred more than ten times in the last five years, the other three reported that it occurred between one and five times.

56 Six of the social service providers, two of the attorneys, and three of the judges reported that deportation occurred more than ten times in the last five years. In addition, fifteen of the twenty-two social service providers who had cases with a deportation had never had a case in which the child or children were reunified with the deported parent. Of the attorneys with such cases, ten of the thirteen had never seen the children reunified. See generally Survey Responses (on file with the author).

57 Fifteen of the thirty social service providers surveyed spoke Spanish fluently. Only three of the fifteen attorneys surveyed spoke Spanish fluently. All three reported that more than ten percent of their clients were in families with at least one undocumented family member, that detention had come up between one and five times in the last five years, and that deportation had come up at least between one and five times in the last five years. See generally Survey Responses (on file with the author).
percent of the families had at least one undocumented family member, and four estimated that this constituted more than fifty percent of their families. One third (five out of fifteen) of the Spanish-speaking social service providers had a family member in a detention facility more than ten times in the past five years, and the same number had a case in which a family member was deported occur more than ten times in the past five years.\footnote{Id.}

In interviews, child welfare personnel confirmed the indications from the survey of the prevalence of immigration issues. The following comments are illustrative.\footnote{In order to maintain the anonymity of interviewees, the citations refer to the source of each comment by numbers assigned to each subject, preceded by either “A” for attorneys, “J” for judges, or “S” for CPS workers or other service providers.}

- One CPS supervisor who had worked for years beforehand as an investigator in South Tucson confirmed that the proportion of families facing these issues varies greatly based on language and geography. In her previous position in South Tucson, where the city’s Latino population has historically lived in high numbers, she estimated that ninety percent of the families with whom she worked had at least one family member without legal status. In contrast, in her current zip code in central Tucson, she estimated that only ten to fifteen percent of the families have undocumented family members.\footnote{Interview with S3, in Pima County, Ariz. (on file with author).}

- A staff member at the Mexican consulate estimated that the consulate office in Tucson receives five or six new cases every month in which children with at least one Mexican national parent are in the care of CPS and the Mexican consulate gets involved. He felt strongly that this was only a small fraction of the cases in which undocumented immigrants were involved in the child welfare system. He commented, “[w]e are here working with one reality but there is a whole other reality that we don’t see.”\footnote{Interview with S4, in Pima County, Ariz. (in Spanish; translated by author) (on file with author).}
• One Spanish-speaking social services provider with a nonprofit organization that contracts with CPS to facilitate parenting classes and support groups estimated that ninety percent of the families with whom she works have at least one member without legal status.62

• A judge who has been on the bench for over a decade reported a notable increase in the cases in which immigration issues arise, to the point where now more than twenty-five percent of his cases involve immigration issues in one way or another. When asked how he knows, the judge explained that he does not explicitly ask about immigration status but it always comes up in the CPS report, because it impacts the undocumented parents' access to services and/or employment prospects.63

Taken as a whole, the survey responses and interviews addressing the numbers of such cases in the system suggest that immigration status arises frequently enough for it to be an issue about which personnel in the child welfare system are aware, but not so frequently that they are accustomed to dealing with such cases in a prescribed, uniform manner. The consequences of this lack of uniformity are explored more fully in the remainder of the Article.

IV. THE SYSTEMIC FAILURES THAT SHAPED ANA’S CASE

In this Part, I consider the key failures that led to Ana’s losses, and draw on data from the surveys and interviews I conducted to demonstrate how these failures are systemic in nature. The destruction of Ana’s family is due to failures of both the federal immigration system and the state child welfare system. I address these in Sections A and B, respectively.

A. Failures of Immigration Enforcement

1. Disappearing Parents

As recounted above, Ana was completely disconnected from her children’s lives and the dependency proceedings for the first six months following her arrest and detention.64 Once the Immigration Law Clinic

62 Interview with S1, in Pima County, Ariz. (on file with author).
63 Interview with J2, in Pima County, Ariz. (on file with author).
64 See supra Part II.
became involved, we were able to ensure that she had phone calls and eventually visits with her children, that she participated telephonically in hearings regarding their custody, and that she sent and received drawings in the mail for and from her daughters.

The fact that none of this happened for six months had very real and harmful repercussions for Ana and her children. First of all, one would assume that the abrupt disappearance of a parent would have serious psychological effects on a child. It clearly had a severe impact on Ana, who was especially emotionally fragile and distraught when the Clinic first began to work with her.

In terms of her child welfare case, had the caseworker been able to meet with Ana and discuss the situation with her early on, such contact might have altered the case plan. Although Ana has no blood relatives with whom the children could be placed, she had friends in the Phoenix area who could have served as potential placements for the children. In addition, had the caseworker communicated to the IJ in the bond hearing the importance of Ana’s release for the sake of her children, perhaps the IJ would have weighed the evidence in favor of release differently.

Interviews conducted with child welfare personnel suggest that this type of abrupt lapse in communication with parents who are placed in detention facilities is very common. Nearly everyone I interviewed commented on this issue. Across the board, judges, social workers, and attorneys all used strikingly similar language to describe the phenomenon of parents “disappearing” after they are picked up by ICE. One CPS investigator described it as follows:

Parents get taken to Pima County Jail, there we have them on [a] website, we know they are on an [immigration] hold, and then it seems like from one minute to the next they disappear. What I mean by disappear is that they are no longer at the Pima County Jail and we don’t know where they went. . . . As you know, INS65 facilities are not public, are not published, there’s not a web page that we can go to, to see if parents are there . . . . [I]t’s just a big mess.66

A judge described cases where parents are in detention facilities as “a big mystery to everyone involved in the case.” He explained:

66 Interview with S3, supra note 60.
Where the parent is, what their status is, what is going on with them, [it's a] complete mystery; let alone how to reach them and how to get them to participate in the case. It’s just a mystery. I’ll get reports that say “we believe Dad is being held, we don’t know where, we don’t know what is going on.”

Another judge said immigration cases are especially hard to track. She reported that “the lawyers can’t find their clients.” A third judge commented that when an attorney or caseworker cannot locate a parent, often “there is a sense of willfulness, that they have abandoned the child or the case plan, and it may be that [in fact] their absence is involuntary and they have been detained or deported.

All of the attorneys interviewed commented on the difficulty of communicating with parents once detention or deportation occurred. One attorney reported that it was a challenge to set up a phone call with his detained client. He had to talk with multiple people, and noted, “it took a lot of finagling to set something up.” Another attorney stated that in her opinion it was significantly harder to communicate with clients in detention than in jail. She has had to “call and call” to find someone once they are picked up by ICE. Another attorney noted that, in her observation, court-appointed attorneys for parents are unlikely to go to the trouble of locating detained clients because they lack the familiarity with the detention system that they have with the prison system. Another attorney reported that in her experience CPS workers do not even bother to try to call parents in detention.

One recurring theme mentioned by several attorneys was the “disappearing dad.” They all described that noncitizen fathers who are in deportation proceedings tend to disappear. It is difficult to know how much of this is due to their failure to be proactive and how much is due to their circumstances, which make receiving phone calls and providing contact information exceedingly difficult. Many players in the child welfare system are quick to write off these fathers and cease efforts to track them down.

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67 Interview with J2, supra note 63.
68 Interview with J1, in Pima County, Ariz. (on file with author).
69 Interview with J5, in Pima County, Ariz. (on file with author).
70 Interview with A2, in Pima County, Ariz. (on file with author).
71 Interview with A5, in Pima County, Ariz. (on file with author).
72 Id.
73 Interview with A3, in Pima County, Ariz. (on file with author).
74 Interview with A4, in Pima County, Ariz. (on file with author).
75 See Interview with A2, supra note 70 (providing an example of judge who did not even inquire into whether notice had been given to parents who were in jail in Mexico in a private dependency
One judge described a specific case in which a dad was well on his way to reunification through his active efforts to work the case plan. The judge explained:

This was a dad on the verge of getting his children back and he’s just gone. None of us know where he is. We know he was picked up and was being detained pending deportation, but we don’t know where. His lawyer can’t get any information, can’t get a hold of him, he’s gone. For me, that’s the norm—I hope that’s an anomaly.76

2. Better Off in Jail

In Ana’s case, her caseworker and attorney were able to track her down and knew that she was detained in Eloy. Yet she still encountered significant obstacles in participating in the dependency proceedings from detention. Her ability to participate telephonically in the status conferences was hit or miss; her attorney contacted the facility to give them advance notice of the hearings, but she was only present telephonically some of the time. She never met in person with her attorney, the caseworker, or her children while detained. Perhaps most significantly, she was unable to receive any services that would make progress towards reunification. Psychological evaluations, parenting classes, and supervised visits were all unavailable to her so long as she remained detained.

Ironically, being transferred to Maricopa County Jail for her criminal prosecution improved the situation for Ana with regard to her ability to participate in the dependency proceedings. She had two visits with her older daughters while in jail, and one visit with her caseworker, none of whom she ever succeeded in arranging to visit while detained in Eloy.

Ana’s experience appears to be very typical in this regard. One CPS worker, who has worked intensively with immigrant families for seven years, stated that she has never encountered a case in which a parent has participated in reunification efforts from detention. She stated, “[t]he most we’ve gotten is confirmation that parents are there.”77 She contrasted that with the situation for parents in jail: “If a parent is in Pima County Jail . . . [w]e have relations, liaisons with the jail who make sure they participate telephonically—this doesn’t happen in detention. In dependency, even assigned attorneys have a hard time ensuring they participate. It’s just a
difficult situation."\textsuperscript{78}

Several attorneys contrasted this situation with the one faced by parents in jail, many of whom have more services available to them, such as substance abuse counseling courses and psychological evaluations. One attorney explained: "If that parent is in detention . . . they are not getting any services; none. It's not because CPS is holding out . . . it's \textit{not} a legal issue but more as a practical matter . . . in those places there just are not services."\textsuperscript{79} Another attorney commented that programs available in some jails like Alcoholics Anonymous and Narcotics Anonymous can make a difference in parents' ability to "work" their case plan, and to her personal knowledge, there are not any such programs in immigration detention.\textsuperscript{80}

One attorney offered a similar account of parents' ability to participate in hearings from detention:

When they're in local jail or state prison, it's a lot easier. When they're in a state run facility, there are some protocols that have been worked out by the court and the local jails and detention facilities in this county to have people transported, and it's incredibly easy, just get the judge to sign a transport order. If you do it two days in advance, your client will be there.\textsuperscript{81}

In contrast, in the detention facility, it is a struggle even to arrange for telephonic participation. One CPS worker provided an example of a Cuban family with parents arrested for selling crack to an undercover officer in the presence of their daughters. They were arrested, taken to Pima County Jail, and then "disappeared."\textsuperscript{82} Eventually, through an adult relative, the CPS worker was able to learn that the parents were in immigration detention in Florence. She continued,

[s]o . . . the dependency proceedings went on, and we knew that they were there, and the court knew that they were there, but they were not able to be a part of that process. And so when they wound up being released five or six months later . . . they knew that the children were in our custody and they came to be a part of the process, but by then they had lost five or six months. And in the

\textsuperscript{78} Id.
\textsuperscript{79} Interview with A1, in Pima County, Ariz. (on file with author).
\textsuperscript{80} Interview with A4, \textit{supra} note 74.
\textsuperscript{81} Interview with A6, in Pima County, Ariz. (on file with author).
\textsuperscript{82} Interview with S3, \textit{supra} note 60.
dependency action, there are time frames . . . . [W]hen we have parents that are in prison, they can start working . . . towards their case plan, and when they get released, they’re not so far behind. But in INS facilities, I don’t know if they offer any services. There’s no way for us to figure out what they offer, where they’re at.  

The judges expressed substantial frustration with their efforts to coordinate participation with federal detention facilities. One judge described the contrast between parents in state or local jails and those in immigration detention: “It’s very difficult. It’s nowhere near that difficult with the state DOC [Department of Corrections]. They’re great about making parents available; or [at] the jail . . . [parents are] always available.” She continued, “[b]ut in federal facilities we have a terrible time because we have no authority.”

Another judge said that in the over twenty years he has been on the bench, he has never had a parent successfully participate in a hearing from immigration detention. He also contrasted the services available in jails and prisons as compared to detention:

I don’t have any idea what if anything is available to folks in a detention facility while they are awaiting deportation—my guess is, very little. There’s very little available in the prison, but there are some things available . . . . I mean, a person in prison can go to AA, NA groups, for example; we can send someone to the prison to do a psych[ological] eval[uation], they could establish paternity, they can get their GED, they can do some things in a prison that would better prepare them to get out [and] complete the CPS case plan. I don’t think the folks in federal detention facilities awaiting deportation have those benefits.

It is important to note that many of the participants’ comments

83 Id.
84 Interview with J1, supra note 68.
85 Id. Another judge echoed the same account of the differences between the state and federal systems. “[A]ny time we are dealing with the federal system it is more difficult. We don’t have authority over them. We can’t order writs for example for parents to appear without going through the U.S. Attorney. And so it becomes a lot more cumbersome.” Interview with J5, supra note 69. Without having the threat of a writ, the federal government has little motivation to comply. As this judge put it, “if they’re nice they’ll submit; if they’re not, they won’t.” Id.
86 Interview with J2, supra note 63.
87 Id.
regarding jails may have been shaped by their work in Pima County in particular. The jails in Maricopa County are infamous for their poor conditions for citizens and noncitizens alike. However, for immigrants living in Pima County and other counties where constitutional standards are met with regard to jail conditions, parents involved in the child welfare system are often better off in jail than in immigration detention.

3. The Climate of Fear

These are unquestionably fearful times for undocumented immigrants in this country. Numerous scholars and advocates have described the way the shift in immigration enforcement policies over the past decade, from a focus on the border to the interior, has made the possibility of detection and deportation a constant threat in undocumented immigrants’ daily lives. Ana’s case and the surveys and interviews suggest that this pervasive climate of fear has distinctive and particularly troubling implications for families involved in the child welfare system.

The climate is the creation of both federal and state immigration enforcement measures. On the federal level, ICE has undertaken a number of programs, including the National Fugitive Operations Program, the 287(g) agreements, and Secure Communities, which pursue an explicit goal of deporting aliens with serious criminal histories by ramping up enforcement measures in a variety of sites including workplaces, homes, and local jails and prisons. In practical effect, the majority of immigrants apprehended and deported under these programs are not serious criminal offenders and, in many cases, have no criminal records whatsoever; they are undocumented immigrants deported solely for immigration violations.

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88 See, e.g., JJ Hensley, Judge: County Failed to Improve Jails’ Medical, Mental-Health Conditions, ARIZ. REPUBLIC, Apr. 8, 2010, at B8 (reporting that a federal court found Maricopa County officials failed to improve conditions in county jails sixteen months after the court had found the jails “failed to meet constitutional standards in key areas, including” food quality, “access to recreation,” and “quality and availability of medical and mental health care”).


90 Hagan, supra note 89, at 1807 (discussing so-called “287(g)” programs); MENDELSON, supra note 89, at 1-4.

91 See RANDY CAPPS ET AL., MIGRATION POLICY INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 2 (2011) (finding that, nationally, the program is not focused “primarily or even mostly” on serious criminal offenders), available at
At the state level, Arizona attracted national and international attention with its passage of state law SB 1070, which, among its provisions, required local law enforcement officials to inquire into immigration status. The bill was broadly decried for the terrorizing effect it would have on the immigrant community in Arizona. While many aspects of the law were novel, this terrorizing effect was just the culmination of a wave of acts passed by the state legislature in recent years linking immigration reporting requirements with the criminal justice system and the receipt of public benefits.

Cumulatively, these acts and programs have created a widespread sense of fear in the immigrant community of interactions with any governmental authorities. The next sections describe the distinctive implications of this climate of fear for immigrant families involved with the child welfare system.

a. Kinship Placements in Mixed Status Families

When a child is placed in state custody, Arizona state law requires that CPS give preference to placing the child with kin rather than with foster care providers. In Ana’s case, there may have been options for her children short of placement in non-Spanish speaking foster homes. While she has no relatives in this country, she has friends and her partner’s father has family. Yet from within detention, even if she had the opportunity to discuss placement options with CPS, she would have been unlikely to volunteer information about any potential contacts to anyone, given her fearful experience with law enforcement and ICE. In particular, she would

http://www.migrationpolicy.org/pubs/287g-divergence.pdf; NAT’L DAY LABORER ORG. NETWORK ET AL., BRIEFING GUIDE TO “SECURE COMMUNITIES”—ICE’S CONTROVERSIAL IMMIGRATION ENFORCEMENT PROGRAM: NEW STATISTICS AND INFORMATION REVEAL DISTURBING TRENDS AND LEAVE CRUCIAL QUESTIONS UNANSWERED 1–2 (2010) (analyzing data provided by ICE that document that seventy-nine percent of the people deported due to Secure Communities from October 2008 through June 2010 were non-criminals or were picked up for low-level offenses, such as traffic offenses or petty juvenile mischief).


The order of placement preference is (1) With a parent; (2) With a grandparent; (3) In kinship care with another member of the child’s extended family, including a person who has a significant relationship with the child; (4) In licensed family foster care; (5) In therapeutic foster care; (6) In a group home; (7) In a residential treatment facility. Id.
not want to jeopardize the wellbeing of any of these contacts, some of whom may lack immigration status themselves or have family members without legal status.

This is a serious issue for immigrant families, particularly because, as more than one judge emphasized, family networks play such a central role in Hispanic families.95 One judge explained:

[W]e are disproportionally underrepresented with Hispanic kids [in the foster care system] here because . . . of extended families; people come in and help each other. Whereas, for other folks, this is a very transient town. People move here, they have no family, they have no family support. So for our Caucasian families, our refugee families, there is nobody . . . [when] the bottom falls out . . . The reason the undocumented parent/kid thing is not a much huger issue than it is, is because there is support, there is family support.96

CPS does not have a formal policy against placements with undocumented relatives. There is a requirement that any candidate for placement complete a criminal background check, which requires a social security number. Several CPS workers and judges interviewed, however, suggested that the agency could work around this requirement,97 as caseworkers can run checks on a name or address with local law enforcement, and they can also make temporary placements without running a background check.

One CPS worker, who specializes in “home studies” in which she provides evaluations of potential placements to the court, gave an example of a family in which two sisters who were in Arizona on expired student visas were taking care of their sister’s children. The caseworker’s evaluation “was that this was a good placement for the boys, they would be taken care of, and it was family.”98 She knew, however, that because of their lack of legal status, they could not be considered as a permanent placement. She provided her evaluation to the judge, and “the verdict was that the boys could stay there ‘until an appropriate placement is found.’”99 She went on:

95 Interview with JI, supra note 68; Interview with JS, supra note 69.
96 Interview with JI, supra note 68.
97 See, e.g., Interview with JI, supra note 68; Interview with JS in Pima County, Ariz. (on file with author); Interview with JS, supra note 69; Interview with S2 in Pima County, Ariz. (on file with author); Interview with S3, supra note 60.
98 Interview with S2, supra note 97.
99 Id.
We are all on the same page[

... trying to follow

protocol but finding a loophole. The thing about ACYF
[Administration for Children, Youth, and Families, the
state umbrella agency for CPS] is we are all about
families. We know there are laws but if there is a loophole
for our kids to be safe, that’s what we’re going to do.100

Several judges’ remarks reflected a willingness to approve placements
of children with undocumented relatives.101 One judge reported that these
placements do occur with some frequency in her caseload, and she does
not know how these caregivers provide the required background checks.
She felt, however, that it is not her role as judge to ask about specific
checks, and stated, “they are not presenting that [information about
background checks] to us, and I think it’s just ‘don’t ask don’t tell.’”102

Thus, the hurdle with kinship placements is less related to willingness
by CPS or judges to place children with undocumented family and more
tied to the challenge of gaining sufficient trust from the families so that
they are willing to provide the necessary information. Nearly all of the
attorneys and caseworkers interviewed commented on the difficulty of
identifying kinship placements for immigrant families because of the
culture of fear created by the intermingling of local, state, and federal
immigration enforcement. One CPS worker commented:

[I]t’s becoming increasingly difficult as new legislative
acts take effect because the families automatically
associate us with . . . . having the ability and the duty to
enforce whatever immigration law debate is going on at
that time. And so, thank goodness, we have been exempt
from having to report or enforce those laws, but the
families don’t know that. And so the biggest barrier up
front is engaging the family to let them know . . . . they
avoid us—it’s understandable because they’re afraid. And
so it takes a lot of effort to give them some education as to
our role. . . . [Y]es, we are a government agency, but our
role is not immigration enforcement. Our role is child
safety.103

The direct correlation between state immigration legislation and

100 Id.
101 Interview with J1, supra note 68; Interview with J3, supra note 97; Interview with J5, supra
note 69.
102 Interview with J1, supra note 68.
103 Interview with S3, supra note 60.
families' willingness to identify potential kinship placements for CPS was brought into high relief by one of the CPS workers interviewed. She stated that before the state legislature passed Senate Bill 1070, she received roughly one kinship referral in twenty that involved an undocumented family member. At the time of her interview, however, over two months had passed since the law's passage, and she had not received a single referral to an undocumented family member.  

Similarly, a social service provider that contracts with CPS to provide parenting classes and other social services described her work with immigrant families to develop a “Plan B”: a plan for what they will do in the event that one parent is deported. She commented that recently, parents are finding this process increasingly difficult because many relatives don’t want to be part of “Plan B” anymore. Often, they, too, are out of status and therefore fear getting involved.

One judge commented that the viability of placing children with undocumented relatives hangs in precarious balance, and could be brought to a halt by legislative or administrative change. He stated:

I'm thinking that in this mood, in this day, there will be more of a move towards finding [undocumented status] as an issue of preclusion for placement.

...

If things continue to go on the path that they're on, we could easily get to the point where administratively CPS would be forbidden from offering a placement unless it were documented. Right now it is silent or ad hoc. Different units have different standards, different supervisors, caseworkers, have their own views.

....

I'd hope it wouldn't devolve to that, but I wouldn't be surprised if it were to.

b. Opting Out of the System Altogether

In addition to the problems the climate of fear creates for establishing kinship placements, child welfare personnel reported that, in some cases, it

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104 Interview with S2, supra note 97.
105 Interview with S1, supra note 62.
106 Interview with J5, supra note 69.
drove families out of the child welfare system altogether. One judge described a case with a mother and three children, all of whom were undocumented. The mother was in detention and the children were scheduled to come in for a dependency review, a hearing during which the juvenile court reviews the parent’s progress on the case plan. She described that the children recently refused to come to court. She went on:

I want all my kids to come to court; I like to meet all my kids and I encourage it so I get kids to come to almost all the hearings. But [these kids] don’t want to come because they are afraid they’re going to get arrested in the courtroom. They’re old enough to read the paper and to talk to their friends. . . . I told the lawyer to tell them . . . I have no obligation to have ICE here. You know, I can’t promise that it wouldn’t ever happen, but . . . .

At the time of her interview, the children had not shown up to the hearing and she had to proceed in their absence.

An attorney reported that he has seen a “marked increase in fear and anxiety since SB 1070.” He stated, “I must have 15 to 20 clients who are undocumented who are just scared to death.” He did not think it directly prevents parents from participating in their case plan, “but it adds a level of anxiety to everything.”

Sometimes this level of stress and anxiety can reach such a level that parents abscond with their children, rather than continue to participate in the dependency proceedings. One social services provider described a family in which both parents were undocumented and the children were U.S. citizens. The case was going well; the parents were receiving services and following through on the case plan. Yet abruptly one day during a supervised visit, the supervising family member left and the parents fled with two of the three children, leaving their sixteen-year-old child behind. No one has heard from them since. The service provider explained, “they just got scared with everything that was going on.”

Attorneys also reported cases in which parents absconded. One attorney described a case that began when parents living in Mexico brought their daughter to Tucson for urgent medical care on two occasions. On the second occasion, CPS was contacted because there appeared to be the possibility of abuse. CPS assumed custody of both children. The father’s visa expired and he was forced to return to Mexico. He was

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107 Interview with J1, supra note 68.
108 Interview with A6, supra note 81.
109 Id.
110 Interview with S5 in Pima County, Ariz. (on file with author).
unable to see his children for the next nine months. The mother was able to obtain a temporary visa and was complying with the case plan. According to this attorney, she was about three weeks away from regaining custody of the children when she had the children for a weekend visit and fled. He explained, “[s]he ran for the border and [we] never heard from her again. I can’t really say I blame them.”\footnote{Interview with A6, supra note 81. This same attorney described another case he had in which the parents fled with two of their three children, leaving the oldest son behind. He said in this case he was “shocked” when this happened because they were eight months into the case plan and making good progress. \textit{Id}.}

Another attorney described a case in which her client, a teenage child, absconded to be with her mother, who was deported.\footnote{Interview with A1, supra note 79.}

Finally, a judge described a case in which the intensity of fear prevented reunification from occurring. In this case, a mother was deported and her infant child was left with her sister, who was undocumented. The father, also undocumented, lived in Texas. CPS arranged for a site visit of the father’s home and approved it. Yet the transfer of the child never occurred because the judge could not find a satisfactory means of transporting the child from Tucson to Houston. The father wanted to take the child, but told the judge in court that he was too fearful of taking the bus to Tucson. The judge described the case: “It’s really heartbreaking. It’s a real dilemma. I wanted to make sure it wasn’t a financial barrier and he said, ‘[n]o, I’m afraid that if I get on a bus I’ll be stopped and I’ll be detained.’”\footnote{Interview with J5, supra note 69.} At the time of the interview, the child was in foster care because the aunt was unable to keep the child long term.

4. Prolonged Detention

Ana was in detention from July 2008 until August 2009 simply waiting for a decision on her initial application for immigration relief. It took over a year for the judge to hear her case and issue a decision. She was then confined for another ten months while her case was on appeal. Because Ana had no criminal history, she was not subject to mandatory detention. Instead, ICE chose to continue to detain her despite repeated requests by her and her counsel to provide her with some manner of supervised release. Similarly, the IJ refused to reconsider her initial determination to deny bond until she was forced to do so by the BIA.

The lengthy period of time Ana was detained had serious consequences for her child welfare case because of the mandatory state and federal timelines described in Section II.C. Several participants commented on the way a lengthy stay in detention can impact an immigrant parent’s child welfare case.
One attorney described a client who was a victim of domestic violence. She had no criminal convictions, but ICE held her in detention for three months. This gave her abusive spouse, a U.S. citizen, time to start litigation in divorce court in an attempt to gain custody of their children. He used her immigration status and the possibility of deportation as an argument for why the court should assign him custody.\textsuperscript{114}

It is not just the length of detention but also its uncertain nature that make it particularly problematic for the child welfare system. As one attorney explained, the problem with deportation and detention:

\begin{quote}
[F]rom an attorney’s perspective, at least mine, is that you never really know when it is going to end. . . . It just seems [that it] can go on for a really long time, there aren’t really any deadlines with which you can make expectations. At least with a parent who is incarcerated . . . . you know what your timelines are. It’s hard to really gauge that when they’re in immigration detention.\textsuperscript{115}
\end{quote}

One judge described a case where “the father was working the case plan, he was doing everything asked of him, the case was on track for reunification and then boom he’s gone . . . .”\textsuperscript{116} It turned out he had been picked up by immigration and was placed in detention. Eventually his lawyer was able to establish some communication with him and reported to the court, “well, he’s going to have a hearing” in immigration court.\textsuperscript{117} The case was in limbo, and then three months later, the lawyer returned with the same information, “he’s going to have a hearing.” The judge described his frustration:

\begin{quote}
[There is] no concrete information. We don’t know, don’t have a straight answer. So, [it’s] pretty frustrating. [And] what’s going to wind up happening is this father’s rights are going to end up terminated and [the kids] are going to wind up with someone else. And that’s with being really patient, giving a lot of time to get to the bottom of it.\textsuperscript{118}
\end{quote}

5. Prosecutorial Discretion

Intertwined with the problem of prolonged detention is ICE’s failure to exercise prosecutorial discretion. There are several points at which ICE

\begin{footnotes}
\textsuperscript{114} Interview with A1, supra note 79.
\textsuperscript{115} Interview with A4, supra note 74.
\textsuperscript{116} Interview with J2, supra note 63.
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{Id.}
\end{footnotes}
can exercise discretion in the removal process. As summarized by the Government Accountability Office in 2007:

ICE officers exercise discretion when they decide whom to stop, question, and arrest; how to initiate removal; whether to grant voluntary departure . . . and whether to detain an alien in custody. . . [O]nce an ICE officer has made a decision to pursue removal, ICE attorneys exercise discretion when they decide whether and how to settle or dismiss a removal proceeding or to appeal a decision rendered by an immigration judge.119

In Ana's case, ICE failed to exercise prosecutorial discretion in two key instances: first in its decision to initiate deportation proceedings against her in the absence of any crime, and then in its decision to detain her. Based solely on unconfirmed allegations about her parenting—allegations made by a handful of neighbors that she left her children unattended on occasion and had an untidy apartment—ICE steadfastly refused to reconsider its custody determination and prosecuted her immigration case as though she were a serious criminal offender. These decisions run counter to agency guidance that humanitarian considerations, including the fact that an immigrant is a primary caregiver of young children, should be taken into account in decisions regarding removal and detention.120

The Immigration Clinic repeatedly requested ICE to take into account her separation from her young children and their placement in foster homes. In a perverse twist, while ICE steadfastly refused to consider the children in its determinations regarding her continued detention, it actively sought to introduce the dependency proceedings as evidence against her in her case for immigration relief. At the immigration hearing, the


120 See Memorandum from Assistant Secretary John Morton, Immigration and Customs Enforcement, U.S. Dep't of Homeland Security, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (June 30, 2010), available at www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf [hereinafter Morton Memo] (“Absent extraordinary circumstances or the requirements of mandatory detention, field office directors should not expend detention resources on aliens who . . . demonstrate that they are the primary caretakers of a child . . . or whose detention is not in the public interest.”); Memorandum from Doris Meissner, Commissioner of Immigration and Naturalization Service, Exercising Prosecutorial Discretion (Nov. 17, 2000) (describing prosecutorial discretion for INS agents and discussing factors relevant to determining when to exercise it); see also Shoba Sivaprasad Wadhia, The Role of Prosecutorial Discretion in Immigration Law, 9 CONN. PUB. INT. L.J. 243, 295 (2010).
government attorney pursued a line of questioning intended to suggest that the fact that the children were in state custody demonstrated Ana’s lack of fitness as a parent. At one point, the government attorney asked her, “[c]an you tell me why you believe that your children are better served by being with you as opposed to this foster home that they’ve been living in for almost a year?” Ana responded: “Of course, because I am their mother. And my children are not orphans yet. I’m still, I’m still alive.”

The mystifying forcefulness of ICE’s prosecution of immigrants with little to no criminal histories is not an isolated occurrence: rather, it appears to happen quite routinely. One juvenile court judge mused about immigration enforcement:

To me, it seems very inconsistently applied. I don’t understand why they would want to deport the fifteen-year-old who is in court for a very minor offense, whose parents brought him here illegally, why they would want to deport him, and not want to deport a seventeen-year-old kid who came across illegally without his parents who’s committing felonies. I don’t understand.

6. The Criminalization of Immigrants

Ana’s case also illustrates the way the current immigration enforcement regime criminalizes immigrants, even those who are not criminal offenders, and how this shapes public perceptions of immigrants in ways that have insidious effects far beyond the simple threat of actual immigration enforcement measures. One striking example is the fact that Ana’s court appointed attorney in her child welfare case described her case as a “train wreck” long before any determination of Ana’s case for immigration relief had been made or facts relating to her parental fitness had been gathered. The mere fact of Ana’s undocumented status and her detention clearly shaped the approach that her attorney and caseworker took to her case.

This research also suggests that the criminalization of immigrants
encourages personnel in the child welfare system to “write off” parents in detention and/or deportation proceedings, and to assume that they will be unable to regain custody of their children. One question in the survey asked, “To the best of your knowledge, have all people in immigration detention facilities been convicted of a crime?” The results were skewed by the fact that the majority of participants took the survey directly after a training that covered the basics of immigration detention, in which one of the key points was that many people in immigration detention have not been convicted of a crime. Yet even after the presentation, twelve out of thirty caseworkers and other child welfare personnel and five out of thirteen attorneys answered “yes” or “maybe” to the question.\(^\text{126}\)

In reality, a recent report estimated that fifty-eight percent of immigrants in detention have not been convicted of any crime.\(^\text{127}\) In addition, even for those who have been convicted of a crime, the majority have been convicted of nonviolent offenses with little to no incarceration imposed.\(^\text{128}\) In most cases, these convictions would be unlikely to sever parental rights were it not for the fact that the parent is then transferred to ICE custody. The perception by CPS that the parent is a serious criminal as a result of her lengthy stay in detention creates a dynamic in which the dependency proceedings take on a momentum of their own once this initial impression about the parent is formed.

B. Failures of Child Welfare

On the whole, the surveys and interviews conducted portrayed a child welfare system difficult to reconcile with the outcome in Ana’s case. The attorneys, caseworkers, and judges who participated were sensitive to the unique concerns of immigrant parents and thoughtful in their perceptions regarding the challenges posed by the immigration enforcement system. How, then, did actors in this same state welfare system pursue Ana’s case with such seeming disregard for her exceedingly difficult circumstances? The answer may lie in part in the self-selective nature of the survey and interview participants; surely many who would volunteer to participate in this study would tend to be interested in and/or sensitive to immigration issues. In addition, the focus on personnel in Pima rather than Maricopa County may account for some of the difference in approach, as the two counties have different political climates particularly with regard to

\(^{126}\) See Survey Responses (on file with author).


\(^{128}\) See Forced Apart, supra note 37, at 33 tbl.9.
immigration issues.\textsuperscript{129} Yet, despite the awareness and thoughtfulness of the survey and interview respondents, their responses also highlight striking systemic weaknesses of the state child welfare system. The following sections outline three key areas in which the child welfare system failed Ana, and, in spite of the fact that individuals and even counties may take a more sensitive approach, these failures threaten many immigrant families throughout the state.

1. \textit{Ad Hoc Approach to Immigration Issues}

Not a single one of the participants in the interviews and focus groups mentioned a policy or written guidance regarding work with families with undocumented family members. Instead, participants repeatedly described a process in which outcomes are highly dependent on the personnel involved, most significantly the CPS caseworker and, to a lesser extent, attorneys and judges.

a. CPS Caseworkers

CPS caseworkers play an especially crucial role in shaping the trajectory of a case, since they make the initial decisions about placements and reunification efforts that establish the probability of severance proceedings in the future. Many participants reported a wide variation in how individual CPS caseworkers handle cases in which immigration status is an issue. According to one attorney, some caseworkers go “above and beyond” to keep a parent facing deportation involved in a case, while others are very minimally involved.\textsuperscript{130} One attorney described that, in her experience, when a parent is in detention, “CPS workers don’t even bother to call, they’ll maybe write a letter.”\textsuperscript{131} Others described specific cases in which CPS workers worked hard to locate parents in Mexico.\textsuperscript{132} One judge commented that the view that immigration status is a barrier or obstacle for family reunification is not system-wide, but is expressed by individual caseworkers or supervisors.\textsuperscript{133}

On the whole, however, the attorneys interviewed found CPS

\begin{footnotesize}

\textsuperscript{130} Interview with A1, supra note 79.

\textsuperscript{131} Interview with A4, supra note 74.

\textsuperscript{132} Interview with A6, supra note 81; Interview with S4, supra note 61.

\textsuperscript{133} Interview with J5, supra note 69.
\end{footnotesize}
caseworkers reluctant to undertake reunification efforts when a parent has been deported or is facing deportation. Many commented on the tendency to write off parents who are facing deportation. This could be attributed to several factors. First, the high turnover of CPS workers makes it difficult for them to adequately understand how to work with the equivalent of CPS in Mexico, Desarrollo Integral de la Familia (“DIF”), to coordinate reunification services in Mexico. Second, even if DIF is involved, CPS workers often do not trust the Mexican agency to provide services as they would be provided in this country. Finally, CPS workers’ reluctance to undertake reunification efforts could also be attributed to their high caseload and lack of resources.

Language and culture barriers also play a key role in shaping CPS workers’ relationships with immigrant families. In Ana’s case, she was unable to communicate directly with anyone in her child welfare case; both her attorney and her caseworker spoke no Spanish. Part of the extremely limited contact they had with her might be attributed to the additional layer of planning and resources required to arrange for a translator for any phone call or visit. At the same time, her daughters were placed in an English-speaking home. When Ana finally arranged for phone contact with them after six months of separation, they required a translator on the phone to assist with the conversation.

Several participants lamented the dearth of Spanish-speakers in the child welfare system. One attorney said it was a “giant problem” that Mexican parents “simply cannot communicate with their caseworker because their caseworker doesn’t speak Spanish.” In discussing the pervasive climate of fear surrounding immigrant communities, one CPS worker emphasized the importance of being bilingual and bicultural in order to make any headway in establishing trust. Relatedly, one judge noted that caseworkers are also less likely to pursue relative placements in Mexico if they do not have the “cultural or linguistic ability to engage.” They are overworked and simply do not have the time or language skills necessary to make this happen.

134 Interview with A5, supra note 71.
135 Interview with A1, supra note 79; Interview with A5, supra note 71.
136 Interview with A1, supra note 79 (“One of the issues with the child welfare system is that it’s just overworked. There’s such a high volume of cases that it’s very hard to find opportunities for the counterparts of these respective countries . . . to have a meaningful conversation and communicate about ways that we can collaborate better and have a smoother integration of services and exchange of information so that the border is not a barrier.”); Interview with A6, supra note 81.
137 Whether the girls’ inability to communicate directly with their mother was due to actual language loss, trauma, or complex dynamics in the relationships is impossible to know.
138 Interview with A6, supra note 81.
139 Interview with S4, supra note 61.
140 Interview with J5, supra note 69.
141 Id.
Finally, there is the problem of conscious or unconscious bias regarding immigrant parents or Mexicans. One CPS supervisor discussed the range of perspectives of her caseworkers:

Just like any other issue that we encounter in social work, different people come with their own experiences and biases and thought processes on how the world should work. . . . We hire a lot of brand new college graduates. That means that people come from different experiences than our families. People that come into this field want to make a difference, help a child, but the reality is that families have the right to be families, to stay together. Just because someone is poor doesn’t mean they are abusing their children. Just because a child isn’t as clean doesn’t mean they are unsafe. I’m sure there are cases where [case workers] think reunification shouldn’t occur, but if you look at child safety, it isn’t related to safety.\textsuperscript{142}

Both the representative from the Mexican consulate and one of the social service agencies interviewed reported encountering certain CPS workers who felt strongly that if a child is a U.S. citizen, he or she should stay in this country, regardless of the deportation of his or her parents.\textsuperscript{143}

On a small scale, the survey results confirmed this mix of perspectives among caseworkers on the significance of immigration status. In response to a question about whether parents who are undocumented immigrants are more likely than native-born parents to have problems with abuse, neglect, abandonment, substance abuse, poverty, domestic violence, and mental health, nearly all of the twenty-six CPS workers who responded thought undocumented parents would be more likely to have problems with poverty. More than half also thought the undocumented parents would be more likely to have problems with domestic violence, and roughly one quarter thought they would be more likely to have problems with child neglect, abandonment, substance abuse, and mental health. These figures suggest that a significant number of caseworkers assume negative characteristics of immigrant families in the absence of any individualized

\begin{footnotesize}
\begin{enumerate}
\item Interview with S3, supra note 60.
\item Interview with S4, supra note 61 ("At times, although it shouldn’t be this way, CPS workers say [the lack of status of the parents], is a risk to the well being of the children. . . . There are really professional people in CPS and also people who are very closed-minded, and they say, the child is American, the parents are illegal, they have to go back to Mexico and the children have to stay here."); Interview with S5, supra note 110 ("I don’t think a lot of [CPS case] workers are going the route of reunification. I think they’re saying, ‘well, this is a child, she’s a citizen, let’s keep her here. We’re going to have to sever the rights because mom is going to Mexico,’ not thinking of all that’s attached to severance.").
\end{enumerate}
\end{footnotesize}
basis for the assumption.

b. Judges

Just as there is no written protocol or guidance for CPS caseworkers regarding immigration issues, there is also no statutory guidance or case law regarding how, if at all, judges should consider immigration status. The judges interviewed were fairly uniform in their view that immigration status is not a factor to be considered in determining a case plan. In addition, in contrast to the range of responses of caseworkers to the survey question posed above regarding a correlation between immigration status and other concerns, of the seven judges surveyed, only one found a greater likelihood of problems with abandonment and two found a greater likelihood of poverty. The rest found no greater likelihood of any of the problems listed.

However, many of the judges interviewed noted that it was up to each judge to determine what factors are appropriate considerations, and there were some judges who would feel otherwise. As one judge recalled:

We used to have a judge who believed it was his obligation to ask everyone their legal status and then to report. So that is a view on the bench. It is definitely a minority view, but I think there are judges who think it is their obligation. I don’t know how it was handled, I don’t know if he ever actually reported anyone. [It] was a big topic of debate and disagreement.

Another judge commented that immigration status is not an issue that judges currently discuss. He said the judges in his courthouse are “probably less likely to adopt any severe attitudes about undocumented status, but that’s the situation right now, a few years ago [it] may have been quite different.” He also noted that superior court judges rotate in and out of the juvenile court system, and could have other views on how to

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144 See Interview with J1, supra note 68 ("For me, it's not really a factor. If they're working a case plan, and doing everything they need to be doing, their obligation is minimally adequate parenting."); Interview with J2, supra note 63 ("There are serious concerns in these cases. It certainly would not prohibit me from returning the child to the parent, but what it would do for me would be to generate the question of what can we do, in the context of this case, to help."); Interview with J5, supra note 69 ("I'll tell the parent or the relative that I don't care what their immigration status is, that we need to find a way to work around it so that the child can be placed back with them and it can be done so safely. . . . And if I see a caseworker who is using it as a barrier to reunification . . . I'll state that I'm not going to accept that as a barrier, unless we know that there is a current order for deportation, or the parent is in detention.").

145 See Survey Responses (on file with author).

146 Interview with J1, supra note 68.

147 Interview with J5, supra note 69.
consider immigration status.\textsuperscript{148}

A few participants described experiences in which judges appeared to be leery of a case plan that worked towards reunification in Mexico. The consulate described a case in which a mother was deported to Mexico, had completed all the requirements for reunification, and yet the reunification was not moving forward. He stated: “This case is very typical, unfortunately for the family, in that everyone involved—the judge, the attorneys, the therapists—has an outside idea that can’t escape from their minds . . . . It is about an image here of Mexico and Mexicans that unfortunately we can’t get rid of.”\textsuperscript{149}

Along similar lines, an attorney stated that “some judges think . . . returning a kid to Mexico is like returning them to the moon.”\textsuperscript{150} He went on to describe a case in which a child would need ongoing medical treatment and the parents were in Agua Prieta. The judge was very reluctant to return the child to her parents because of concerns about the availability of care. The attorney recalled, “[w]e were saying that she can get treatment in Mexico, it’s not like medieval Europe. [And the] judge said, ‘[w]ell, I don’t know about that.’ . . . I can understand if she was going to the farm eighty miles outside of Guanajuato, but she was going to Agua Prieta.”\textsuperscript{151}

c. Attorneys

Ana’s court appointed attorney in her dependency case described her case as a “train wreck” months before there was any decision on Ana’s case for immigration relief. The clear assumption was that Ana would be deported and therefore lose her children. Her attorney never visited Ana, even when she was transported to Phoenix, where her attorney was located, and only spoke to her briefly on the phone on a handful of occasions in the minutes immediately before a court hearing.

According to many of the survey participants, the minimal contact Ana experienced with her attorney while she was detained was not unusual. According to one attorney, who represents a Native American tribe that regularly has cases with family members in immigration detention, a visit by the attorney to a client in immigration detention is the exception rather than the norm. This also came through in the survey responses. Only two of the fifteen attorneys who took the survey had ever been to an immigration detention facility, despite the fact that nearly all (thirteen of the fifteen) had multiple cases that involved a family member in

\textsuperscript{148} Id.
\textsuperscript{149} Interview with S4, supra note 61.
\textsuperscript{150} Interview with A6, supra note 81.
\textsuperscript{151} Id.
This is not to say that all attorneys were uninvolved with their clients who had immigration issues. On the contrary, several of the attorneys interviewed described extensive and creative efforts to work with immigrant families. In one example, an attorney contacted the consulate for assistance in arranging with DIF for a visit with a potential relative caregiver across the border in Sonora, Mexico. She took the children, along with a consulate worker, and found the relatives to be “incredibly warm and devoted to the kids.” In the end, CPS agreed to place the children with these relatives, and the attorney believes if it were not for her effort, they would have been severed and adopted.

There is a risk, however, that, just like the CPS caseworkers, a mix of a high caseloads, limited resources, and conscious or unconscious biases can lead attorneys to view severance as inevitable once a parent is in detention and/or deportation proceedings. One judge commented that attorneys often report to him that they have been unable to locate a client in immigration detention. He described,

[t]here is a certain sense of, “well, it’s inevitable what’s going to happen.” I think that there’s a mentality out there with some of [the attorneys]: “What, is he going to reunify?” But I think that the ones who have a successful reunification with a parent in Mexico, they would never [think] that.

A staff member of a social services organization described that the majority of attorneys are not likely to make extensive efforts in a case involving trans-border issues because they do not want to throw a wrench into the case’s trajectory. She explained, “[t]he juvenile court attorneys work with one another, they see each other on case after case after case, so rather than being a strong advocate for a family member, it’s easier to row together . . . . They make it easy for each other.”

2. Timeline for Dependency/Permanency

As discussed in Part II, the state has detailed statutory timelines that must be met once a child is in state custody. These timelines are necessary in order to ensure that a child does not remain in limbo without a permanent home for too long. However, they are difficult to reconcile with the timeline of immigration cases, which tend to be long and unpredictable.

152 See Survey Responses (on file with author).
153 Interview with A5, supra note 71.
154 Interview with J6 in Pima County, Ariz. (on file with author).
155 Interview with S5, supra note 110.
Many participants commented on this tension. One CPS worker explained,

[w]e’re running on a timeframe. Once we serve that notice of temporary custody . . . [w]e have seventy-two hours to return the child or initiate the dependency process.

. . . .

A lot happens in those seventy-two hours. We have a TDM [“Team Decision Making’] meeting to develop [a] plan to determine if children can safely go home. If a parent is in Pima County Jail, it is really easy for parent to be part of that process. We have relations, liaisons with the jail who make sure that they participate telephonically—this doesn’t happen in detention.156

This initial seventy-two hours, culminating in the TDM meeting, is a crucial time period that determines the future trajectory of the case. If a parent cannot be involved in the TDM meeting because they cannot be located or cannot access a telephone to participate, there is no way to arrange for an alternative in the dependency process. Once this process gets started and attorneys get involved, “it gets much more complicated. [It] restricts the placements you can look at . . . [t]here are options before dependency, there are services, but [you] need [the] parent to agree.”157

Once a dependency is initiated, there are new timelines that establish when the state can move to terminate parental rights. All of the judges interviewed stated that the timelines are ultimately discretionary, and extensions can be granted when warranted.158 In addition, there are creative ways to avoid severance while still allowing for the child to remain with an out of home placement, particularly when a relative can be located to take the child until the parents’ immigration issues are resolved. But all the judges agreed that their ability to avoid severance can only be pushed so far. One judge stated, “I think there’ll be a point in which you can’t [avoid it] anymore. Nobody wants an infant growing up in foster

156 Interview with S3, supra note 60.
157 Id.
158 See Interview with J1, supra note 68 (“Ultimately, it is completely discretionary. The timelines—we have twelve months, then fifteen, then eighteen is kind of the drop dead, but I’ve got mentally retarded parents and everything is going to take three times as long, and I just keep making findings that everything is going to take three times as long and . . . no one has ever challenged it. The feds have not come in and said you’re losing your money over this”); Interview with J2, supra note 63 (explaining that for parents in detention, just like other incarcerated parents, when they get out, if they are engaged right away, “they are cut some slack. Not a lot of slack, but some slack.”); Interview with J5, supra note 69 (“There is some flexibility but there needs to be some basis—for example, if the child is bonded to the parent, and there is no substitute to nurture the child . . . .”).
care. So at that point . . . the bottom line is, they can’t parent and you’ve got a six month old.”

One judge described a case in which the father was working the case plan, doing everything asked of him, and the case was on track for reunification when he suddenly disappeared. He had been detained and it took time for his lawyer to locate him. When his lawyer eventually tracked him down and communicated with him, it was impossible to get any concrete information about his situation. The judge anticipated that in the end, the father’s rights would likely be terminated and the children would wind up with someone else.

3. Under-Utilization of Consular Offices

Across the board, participants reported positive experiences working with the Mexican consulate. Perhaps the consulate’s most important contribution is to facilitate communication between CPS and DIF, as without the consulate acting as a go-between, arrangements with DIF for home studies or other services are much more difficult to coordinate.

The consular representative who was interviewed agreed that this was a crucial role the consulate can play.

There is willingness by DIF to prepare things specifically for a given family, but they need the consulate to act as a go between. If CPS called DIF directly, DIF would say “we don’t do that.” But if the consulate is there, we can explain the importance of things to CPS and DIF. We can get a home study done in a couple days, whereas if CPS asks for it, it will take month.

According to the representative interviewed, the greatest challenge faced by the Mexican consulate in Pima County is simply getting involved

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159 Interview with J1, supra note 68. Another judge expressed similar sentiments: “[If the] child is not bonded to the parent and the parent is in limbo and we’re approaching these time lines—I have to look at what is best for the child and that’s going to enter to the detriment of the parent. There are no exemptions for people whose immigration or criminal status is undetermined for a protracted period of time; they are just no exemptions. Whether incarcerated or in immigration [detention], they are unable to parent; doesn’t matter if they are in a coma. I’m not imputing any ill intent on the part of the parent, but they’re just unavailable.” Interview with J5, supra note 69.

160 Interview with J2, supra note 63.

161 Interview with A1, supra note 79; Interview with A5, supra note 71; Interview with A6, supra note 81 (“[The consulate is helpful—they are hard to get a hold of, but pretty good.”); Interview with J1, supra note 68 (explaining, “the consulate has been amazing; incredibly helpful”); Interview with S3, supra note 60 (“I’m thankful that we have the kind of relationship we do with the Mexican consulate.”); Interview with S5, supra note 110; Interview with J6, supra note 154; Interview with J5, supra note 69.

162 Interview with A1, supra note 79.

163 Interview with S4, supra note 61.
in cases. He expressed frustration that they are "working with one reality but there is a whole other reality that we don’t see."\textsuperscript{164} They have tried to enter into a formal agreement in which CPS would automatically notify the consulate if either or both parents are Mexican nationals, but no such formalized relationship has materialized.\textsuperscript{165}

In the absence of such an agreement, most of the calls the consulate receives come directly from families. "It is rare that the call comes from CPS." However, as one judge commented, many families may be leery of contacting the consulate without encouragement from their caseworkers and/or attorneys. She explained,

\begin{quote}
I think the parents need to know, which means the department needs to know, and the lawyers need to know, to send the parents. Because these are people with very marginalized life styles, very afraid of doing anything that puts them on anybody’s radar screen, and so I don’t know if they would be uncomfortable even going into their own consul.\textsuperscript{166}
\end{quote}

V. ANALYSIS

This Part considers the legal implications of the systemic failures described in the foregoing sections. From a legal perspective, a system that results in family separation of the magnitude of Ana’s case raises constitutional and structural concerns. These are discussed in the next two sections.\textsuperscript{167}

A. Constitutional Concerns: Immigrant Parents’ Due Process Rights

The Supreme Court has repeatedly held that the right to parent is of such a fundamental nature that the Constitution requires that a parent receive significant procedural protections when a state seeks to permanently sever the parent-child relationship.\textsuperscript{168} Undocumented

\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Interview with J1, \textit{supra} note 68.
\textsuperscript{167} In addition, the treatment of immigrant parents with children in the child welfare system raises international law concerns that are beyond the scope of this Article. For an extensive discussion of the ways in which involuntary family separation violates international laws, see Sonja Starr & Lea Brilmayer, \textit{Family Separation as a Violation of International Law}, 21 \textit{BERKELEY J. INT’L L.} 213, 215 (2003) (describing a “patchwork of treaty provisions and the glimmerings of a developing customary norm against the involuntary separation of families”).
\textsuperscript{168} See M.L.B. v. S.L.J., 519 U.S. 102, 119 (1996) (holding that due process and equal protection require the state to provide a right to appeal parental termination decisions); Santosky v. Kramer, 455 U.S. 745, 751 (1982) (holding that due process requires that the state support allegations regarding severance of parental rights with clear and convincing evidence); Lassiter v. Dep’t of Soc. Services of
immigrant parents are entitled to these same due process protections in the context of proceedings regarding their parental rights. A system that afforded them different rights in this context would be irreconcilable with the long-standing precedent establishing that undocumented immigrants retain certain constitutional rights by virtue of their presence in the country. In particular, they have an equal right to protection from governmental violations of their fundamental rights. Thus, for example, in the context of the criminal justice system, they have the same right to due process before they are convicted and punished as any person charged with a crime. In the context of regulations unrelated to immigration, they have a right to equal protection from governmental discrimination. In determining that the Constitution protects undocumented immigrants' rights in these contexts, the Supreme Court has emphasized the fundamental or quasi-fundamental nature of the rights at stake.

Yet in the child welfare system, immigrant parents are at risk of losing their children without the same constitutional due process protections in place that other parents receive. This is not the result of an explicit set of rules requiring differential treatment, but rather, it is the product of the failure of federal and state systems to coordinate their efforts. In Ana's case, she had a court appointed attorney to represent her in the dependency proceedings, just like any other parent receives. Yet this right was rendered virtually meaningless because of her extremely limited ability to participate in her dependency proceedings.

Ana's court appointed attorney can be faulted for her minimal efforts...

N.C., 452 U.S. 18, 32 (1981) (holding that parental interest in a just and correct decision in termination proceedings is "commanding" and "extremely important," but due process does not require the appointment of counsel in all cases).  

170 Wong Wing v. United States, 163 U.S. 228, 236–38 (1896).  
171 Yick Wo v. Hopkins, 118 U.S. 356, 369, 373–74 (1886) (finding that the Fourteenth Amendment is not confined to the protection of citizens, and holding that Chinese nationals are protected from discriminatory enforcement of a local ordinance regulating laundries). In contrast, discriminatory treatment of immigrants has been upheld when it is for immigration-related purposes. See, e.g., Mathews v. Diaz, 426 U.S. 67, 83–84 (1976) (holding that conditioning aliens' eligibility for a federal medical insurance program upon the character and duration of their residence in the United States was constitutional).

172 See Plyler, 457 U.S. at 210 (holding that undocumented children in Texas had a right to public school education).  
173 See, e.g., Plyler, 457 U.S. at 221; Wong Wing, 163 U.S. at 237; Yick Wo, 118 U.S. at 370.
to involve Ana in the process, and, as I suggest below in Part VI, improving the representation of immigrant parents is a key part of any attempt to address this problem. Yet to frame the constitutional argument in terms of ineffective assistance of counsel would greatly oversimplify the problem and unfairly scapegoat the attorneys in these cases. The limited efforts of Ana’s attorney were largely due to systemic problems far beyond her control. She had little ability to access her client, little information about where she was, no services to offer her, and no knowledge about how soon she would be released or to where.

This is not to say that individual immigrant parents may not have strong ineffective assistance of counsel claims based on their individual circumstances. But the systemic nature of the problems arising for immigrant parents in the child welfare system suggests a constitutional problem that goes beyond individual circumstances. In Mathews v. Eldridge, the Supreme Court laid out a balancing test to be applied in determining what due process requires. The Mathews test weighs “the private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions.” In applying the Mathews test to the specific context of parental termination proceedings, the Supreme Court has described the parent’s interests at stake as “extremely important,” and has noted that the government shares the parent’s interest in a correct decision. The Supreme Court has also noted that the complex nature of termination proceedings can make the chance of erroneous deprivation of the parent’s rights “insupportably
As detailed in Part IV, the risk of error is systemically high for detained parents, given the many ways they are unable to meaningfully participate in the process. Thus, there is a strong argument that the government is violating immigrant parents’ rights to procedural due process by failing to establish cost-effective procedural mechanisms that would allow them to meaningfully participate in their children’s dependency proceedings.

B. Structural Concerns: Escaping Bureaucratic Federalism

Much of the focus of recent scholarship on immigration and federalism has centered on the appropriate role of federal versus state or local law in regulating immigration. To be sure, this aspect of federalism plays a key role in the issues discussed here, as many parents are caught up in the immigration enforcement system through coordinated efforts by state and federal authorities. For example, in Ana’s case, her detention and deportation were triggered by an initial contact with the local police in response to concerns about a child alone in her apartment, who then turned her over to ICE. Furthermore, the concerns and complications created by the “climate of fear” discussed in Section IV.A.3 are due in large measure to the ways in which immigrant families are fearful of all government authorities—federal, state, or local—as a result of the increasing devolution of immigration enforcement authority to the local level.

Yet the fundamental problem illustrated by Ana’s story, and echoed by many comments of the interviewees, is a different type of federalism concern, which might be called bureaucratic federalism. This refers to the practical disconnect between state agencies undertaking traditional state functions and federal immigration enforcement authorities. The two systems do not communicate with or understand one another, and the differences in timeframes, locations, court rules, and decision-makers create Kafka-esque results in which immigrant parents are trapped between

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178 Id.
179 It is important to note that achieving the “correct result” is a determination based on parental fitness, which has no relation to the parent’s immigration status or likelihood of deportation. For a discussion of the appropriate bases for termination of parental rights and the inappropriate ways in which immigration status often enters the determination, see Marcia Yablon-Zug, Separation, Deportation, Termination, B.C. THIRD WORLD L.J. 9–10, 12, 19 (forthcoming) (discussing the fitness standard and its ability to ensure the rights of parents, and how immigration law and cultural biases are unintentionally facilitating parent-child separations).
The sprawling bureaucracy needed to carry out the federal government’s immigration enforcement agenda is by definition singularly federal; no state or local role in the regulation of immigration is permitted in the absence of a specific federal mandate. Yet while the extent to which states can participate in immigration regulation is the topic of much discussion and debate, the degree to which the federal government should or must coordinate with state and local agencies has received very little attention from scholars or policy makers.

Perhaps this lack of attention is due to the fact that, in general, advocates on behalf of immigrants view this disconnect between state and federal systems as a positive dynamic. In the context of public education, for example, the fact that public school officials do not and cannot concern themselves with immigration status is a crucial means of protecting immigrant children’s rights. This “don’t ask, don’t tell” regime permits students to attend school on equal footing with their peers, with no questions asked about their immigration status and no reason to fear immigration enforcement measures on school grounds.

In the context of the child welfare system, it may be that a similar bright line rule is appropriate. Many interviewed expressed the view that a “don’t ask, don’t tell” regime respects families’ rights to have child custody determinations considered separate and apart from immigration status considerations. In addition, questions about immigration status from personnel in the child welfare system would further the perception among immigrant families that interaction with the child welfare system could lead to problems with immigration enforcement.

Yet while this bright line approach is appealing in its simplicity and moral stance, it does not reflect the reality of the many ways immigration status shapes a family’s circumstances, making its consideration essential in any attempt to work effectively with a family. Furthermore, as the interviews reflected, the “don’t ask, don’t tell” regime is not particularly accurate as a practical matter. Caseworkers often discuss immigration matters with families, and judges often know the immigration status of the families in their courtroom. However, because immigration status is not a

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181 See DeCanas v. Bica, 424 U.S. 351, 352–65 (1976) (establishing a three-prong test for preemption analysis, the first prong of which determines if the state statute is designed to regulate immigration, in which case the state statute is preempted).


183 But see Nina Rabin et al., Understanding Plyler’s Legacy: Voices from Border Schools, 37 J.L. & EDUC. 15, 29–30, 57–60 (2008) (discussing how empirical data from public schools suggests that the “don’t ask, don’t tell” regime does not fully shield students from the harmful effects of immigration status distinctions).
formally recognized factor in a case plan, it ends up being considered on an ad hoc basis.

The interviews also reflected that this ad hoc approach leaves much to the discretion of an individual caseworker or judge. This can allow for bias, stereotypes, and cultural gaps to emerge. This concern has been well documented and studied in the context of racial discrimination in the child welfare system. The disproportionate number of minority children in the child welfare system has been a focus of academic study and policy analysis, with controversy over the extent to which the disproportionate numbers are attributable to higher risk factors in minority families versus bias in the child welfare system. Scholars have only recently begun to note similar indications of bias with regard to immigration status.

Thus, bureaucratic federalism—the failure of the federal and state systems to coordinate in a formal, organized manner—results in an ad hoc system that can result in tragic consequences for immigrant families. To avoid these results, state actors must be sensitive and responsive to the issues raised by immigration status, without creating the perception or the reality for immigrant families that the child welfare system is concerned with immigration enforcement measures. This requires a complex relationship between the federal and state systems, in which the systems work together for fundamentally different ends.

In a recent article on the legal complexities presented by undocumented immigrants, Professor Hiroshi Motomora has discussed this possible relationship between the federal and state systems. He describes a flip side to states’ and localities’ participation in immigration enforcement, in which they opt instead to participate in “community building,” a role that focuses on the integration of noncitizens into the community rather than the effort to exclude them from it. In this relationship between the federal and state systems, the federal system

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[185] Id. at 8 (discussing three competing theories about what factors cause the disproportionate number of minority children in the child welfare system).


[188] Id. at 2070–71.
accounts for immigration status to undertake enforcement, while the state system accounts for immigration status to accomplish integration. Some states and localities have opted for this approach to varying degrees, establishing sanctuary cities, permitting undocumented immigrants to obtain drivers' licenses or other forms of identification, and encouraging access to higher education for undocumented immigrant students. Part VI describes efforts by some state child welfare agencies to undertake measures that are sensitive to the unique needs and circumstances of immigrants in the specific context of the child welfare system.

However, in the absence of federal authority cabining the ways in which immigration status can be used, a bright line, "don't ask, don't tell" approach may be necessary in a state like Arizona. To have otherwise, by opening the door to questions about immigration status by child welfare personnel, could potentially further marginalize and intimidate immigrant families, who are already leery of coming into contact with the child welfare system. If they were to be questioned about their status, they would be rightfully concerned about working closely with the system, especially without a strong assurance that there would be no reporting or enforcement measures involved. The interviews made clear that in Arizona today, the state simply cannot give this type of strong assurance.

Thus, for all its shortcomings, the current "don't ask, don't tell" regime appears necessary and appropriate in Arizona. A move away from it would require state or federal law to protect CPS workers and judges from reporting requirements. Until that day, the bureaucratic federalism that results from the separation of the two systems—the practical inability of the immigration and child welfare systems to communicate and coordinate with one another—persists. The severity of harms that result from bureaucratic federalism suggest that the federal government has improperly focused entirely on the exclusivity of its power to regulate immigration, and neglected to consider the affirmative responsibilities that accompany this role. In particular, in creating a bureaucracy on the scale of immigration enforcement, there is a structural need for the federal government to consider cooperation and coordination with state bureaucracies to avoid unintended rights violations of individuals caught between federal and state systems.

VI. RECOMMENDATIONS

This Part discusses several key legislative and administrative reforms that could address the concerns identified on a local, state, and federal level. A more detailed list of recommendations is provided in Appendix B.

A. Federal Reforms

1. Effective Assistance of Counsel in Child Welfare Proceedings

Many of the problems that Ana confronted, and that interviewees described, could be eliminated or at least ameliorated by an effective and resourceful advocate for the immigrant parent’s rights in the child welfare system. Being an effective advocate requires expertise in the practical and legal considerations of immigrant parents. From a practical standpoint, familiarity with detention facilities’ policies with regard to telephonic participation, access to visitation and services, and release procedures would greatly increase the chances that a parent could participate in dependency proceedings while detained. Developing contacts within the consulate and DIF would permit more coordination of efforts with relatives in Mexico. Legally, if the attorney had an understanding of the parent’s prospects for immigration relief, and could convey to the court and the caseworker the likely timeline and possible future scenarios facing the parent, the information could greatly increase the system’s ability to develop a case plan that realistically reflects the parent’s circumstances.

Given the caseloads of most juvenile law attorneys and their lack of exposure to immigration law, this type of representation tailored to immigrant parents seems unlikely to emerge without a concerted effort. Thus, one recommendation emerging from this research is for the government to provide resources to the bar to ensure that this type of effective representation is readily available.

One means of doing so would be to lift the funding restrictions currently in place for the Legal Service Corporation (LSC), the federal institution that provides federal funding to legal aid organizations around the country, in order to provide targeted legal assistance to indigent immigrant parents in dependency proceedings. Currently, LSC is prohibited from providing funds for services to undocumented immigrants.90 In the reenactment of the Violence Against Women Act (“VAWA”) in 2005, Congress enacted an exception to this rule for victims of domestic violence, sexual assault, or trafficking.91 This decision

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reflected the view that, "[a]cross the country, many immigrant victims have nowhere to turn for legal help."\textsuperscript{92}

Like domestic violence victims, undocumented immigrant women whose children are in state custody often have nowhere to turn for legal help. The government has an interest in ensuring that these parents have effective representation in light of the constitutional rights at stake and the U.S. citizen children involved. Providing resources for family law attorneys to provide this specialized representation would be an efficient means of addressing the complex challenges that arise in these types of dependency proceedings.

2. Key Liaison in ICE Facilities

The most significant factor leading to the problem of "disappearing parents" has been the lack of any centralized system for tracking detainees. As the interviews made plain, very often caseworkers and attorneys do not know how to locate a client who has been transferred to ICE custody. These interviews only begin to capture the need for a centralized locator system, since they only tap into child welfare personnel in Arizona. The majority of detainees are transferred to detention facilities from out of state. Thus, their dependency proceedings are in a different state, and the caseworkers and attorneys involved in the case would be even less likely to know that a parent has been transferred to Arizona.

In 2010, ICE launched an online locator system that permits anyone with a detainee's alien registration number or name and country of birth to locate a detainee.\textsuperscript{193} The accuracy and accessibility of the tool remains to be seen, but assuming the system is effective, it is a very positive development. The challenge now is to ensure that caseworkers and attorneys know about this resource so they can use it to track down parents in detention.

It is not simply a matter of locating parents, however, but also successfully communicating with them. As discussed, if CPS is unable to communicate with a parent quickly, it can have crucial impacts on the children's custody status. By law, the state is required to file a dependency petition with the state within seventy-two hours of removal of a child from the home.\textsuperscript{194} If CPS can establish contact with the parent during this window and communicate with them about potential kinship placements, they can avoid initiating the dependency proceedings, which can take on a momentum of their own once they are underway. Thus, while the online locator system is a step in the right direction, further reforms are needed to

\textsuperscript{194}ARIZ. REV. STAT. ANN. § 8–802(D) (2009).
deal with the problem of the "disappearing parent."

One means of rapidly increasing the ability of CPS to interface with the facility would be to appoint a key ICE liaison for each detention facility that could be a point of contact for dependency matters. CPS caseworkers and attorneys could contact this person to arrange for telephonic contact with a parent. Without this sort of direct assistance, it is nearly impossible for caseworkers or attorneys to reach a parent by telephone in the facility. The liaison could also be the key contact regarding visitation arrangements, since often children in state custody will not be able to visit during the facility’s regular weekend family visitation hours.

This key liaison could also assist with arrangements with the juvenile court for telephonic appearances by parents. The judges interviewed expressed frustration with their inability to ensure that parents are available by telephone, something they routinely arrange for in state and local jails. Appointing a key liaison to ensure that these types of arrangements are made would greatly facilitate this process.

3. Detention Reform

While it is an obvious point, it is worth stating that the single most effective way to address many of the problems described in this Article would be to avoid immigration detention altogether. A thorough discussion of the need for reforms of the detention system is beyond the scope of this Article. However, the detention of parents with children in state custody highlights several of the most concerning aspects of immigration detention: its overuse, its prolonged nature, and its contribution to the criminalization of immigrants.

The overuse of detention stems from two separate and distinct problems: mandatory and discretionary detention. With regard to mandatory detention, the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), federal legislation passed by Congress in 1996, mandates the government to hold in detention during their removal proceedings virtually any noncitizen with a criminal conviction and arriving aliens who lack proper documentation.\(^{195}\) Mandatory detention means that there is no consideration of whether individuals that fall under one of these categories pose a flight risk or threat while their deportation is pending. Instead, noncitizens in these categories must be detained for the entire duration of their removal proceedings.

In the context of parents who are primary caregivers for young children, this means that there is no capacity for a decision-maker in the

system—either judicial or administrative—to consider the fact that young children will be placed in state custody as a factor in the decision to detain. As a result, parents who are arrested for relatively minor criminal infractions that have little to do with their parental fitness can be subject to mandatory detention, triggering out-of-home placement for children and extended dependency proceedings that would not, in all likelihood, have occurred had the parent not have “disappeared” into the detention system.

In addition, even noncitizens who are not in a category in which detention is mandatory are often detained. Although ICE has the authority to grant detainees who are not subject to mandatory detention humanitarian parole or release on bond, it does not often exercise its discretion to authorize such releases. In cases where detainees are given a bond, it is often too high for them to pay to gain release.

In June 2010, ICE issued a memorandum regarding its enforcement priorities. The memo emphasized that, given limited resources and detention space, ICE should focus its efforts on aliens who pose national security or public safety risks, aliens who recently entered the country illegally, and aliens who have not complied with a final order of removal. It then stated,

>a)bsent extraordinary circumstances or the requirements of mandatory detention, [ICE] should not expend detention resources on aliens who are known to be suffering from serious physical or mental illness, or who are disabled, elderly, pregnant, or nursing, or demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest.

The memo goes on to state that if aliens in these categories are not subject to mandatory detention, there must be approval by a director of the decision to detain. Furthermore, if they are subject to mandatory detention, ICE counsel should be contacted for guidance.

This memo is a positive step in acknowledging the particular hardship detention poses to primary caregivers. However, thus far, there is no indication that it has translated into actual changes in ICE’s widespread use of detention. On the contrary, a recent report suggests that the problem of detaining primary caregivers continues.

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196 See GAO REPORT ON ALIEN REMOVAL DECISION MAKING, supra note 119, at 1–17; TRAC Report on Criminal Aliens, supra note 123, at 1–5.
197 Morton Memo, supra note 120, at 1–4.
198 Id. at 3–4.
199 Id.
200 See WOMEN’S REFUGEE COMMISSION, TORN APART BY IMMIGRATION ENFORCEMENT: PARENTAL RIGHTS AND IMMIGRATION DETENTION 1, 1–12 (2010), available at
The damage caused by detaining parents with children in state custody is greatly compounded by the prolonged nature of detention. If a parent wishes to fight her deportation, she is facing a minimum of several months in detention while the immigration case proceeds. As was described in Part II, in Ana’s case, it took over a year just to receive an initial determination on Ana’s application for relief from deportation, before any appeals were filed. While there were aspects of her case that were arguably idiosyncratic, the length of her detention itself is not an anomaly. In 2009, an Associated Press investigation obtained data that on a single day in January 2009, at least 4170 individuals had been subject to detention for six months or longer, and 1334 of these individuals had been subjected to detention for one year or longer. A recent ICE report acknowledges that while the average length of time in detention is thirty-seven days, this number is significantly skewed by the number of Mexicans subject to expedited removal. The report states that approximately 2100 aliens are detained for a year or more.

As discussed, the lengthy and uncertain period of time that parents spend in detention has very serious effects on the trajectory of their child welfare proceedings. So, too, does the remote location of the detention facilities, the frequency with which detainees are transferred, and the lack of any programming or services available to detainees. All of these issues are the product of the fundamental problem at the heart of the detention system: the facilities are indistinguishable from criminal penal institutions, despite the fact that immigration detention is a purely administrative system. The sole purpose of immigration detention is to ensure that immigrants do not abscond during the pendency of their deportation proceedings. And yet, as one scholar recently described, “detention has embraced the ‘aesthetic’ and ‘technique’ of incarceration, evolving for many detainees into a quasi-punitive regime far out of alignment with immigration custody’s permissible purposes.”

201 In Ana’s case, there were several delays in the initial months because she did not have legal representation, so the judge repeatedly scheduled her for another “master calendar hearing,” rather than scheduling her final “merits hearing.” When she did retain counsel, the government’s last minute subpoena on the eve of her hearing caused the case to be continued. The judge then took another two months simply to issue her decision after all the evidence was submitted.


204 Kalhan, supra note 20, at 49 (quoting Sharon Dolovich, Foreword: Incarceration American-Style, 3 HARV. L. & POL’Y REV. 237, 237–39 (2009)).
Recently, ICE has publicly acknowledged the inappropriately criminal nature of the detention system. It has pledged to overhaul the system to make it "truly civil." Many have expressed concerns that the measures undertaken by the government to achieve this goal have had no notable effect thus far and seem unlikely to result in the kind of systemic change necessary to truly reform the system. The impact detention has on parental rights is yet another indication of the pressing need for effective reform.

B. State Measures

While Ana’s experience and the surveys and interviews tell the story of a federal system crying out for reform, they also capture a story particular to immigrants in Arizona. There is strong evidence that immigrant parents are at risk of losing their children in many states throughout the country. But it also appears that there are some states where these types of losses are not happening, or at least not happening with any systemic frequency. It is clear that some states have established a much more robust set of policies and practices when it comes to working with immigrant families than is the case in Arizona. Drawing on these other states as helpful models, this section highlights several state measures that could ameliorate the problems faced by immigrant parents in the child welfare system, either in concert with federal measures or in the absence of federal reforms.

1. Increased Utilization of Consular Offices

In my interview with a representative from the Mexican consulate in Tucson, he expressed frustration that Arizona has not been receptive to their repeated efforts to establish a formal Memorandum of Understanding ("MOU") between Arizona’s CPS and the Mexican consulate. He believes that a formal agreement that required notification would greatly enhance the consulate’s ability to help. At present, the consulate is generally involved when they are contacted directly by the family; "it is rare that a call comes from CPS." He commented, "[i]t is sad because you can see how things work in other states. Other authorities see that you have to collaborate in this type of case, but here there isn’t that type of


207 See generally Torn Apart, supra note 200 (documenting the plight of families in America with immigrant parents).
comprehension of the system." 208

Several CPS agencies have implemented MOU’s with the Mexican consulate. 209 The MOU’s vary in their scope and precise terms, but all create the expectation that the consulate will be notified when CPS encounters a case involving Mexican nationals. Ideally, a formal MOU would give the immigrant parent the opportunity to opt-out of notification if they prefer not to have the consular office notified due to privacy or security concerns.

In Arizona, a decision regarding a formal MOU would have to be made at the state rather than the county level. In the current political climate, it seems unlikely that the state will implement a formal MOU with the Mexican consulate. However, in the absence of a formal MOU, CPS caseworkers, attorneys, and judges should be encouraged to make greater use of consular offices as a resource in cases involving foreign nationals.

2. Key Liaison in CPS

CPS should establish a key liaison position to deal with immigration and international issues in each region. The surveys and interviews conducted suggest that cases involving immigration issues arise with regularity, but not with such frequency that any particular caseworker is likely to develop an expertise in handling detention and deportation issues. This is particularly true in light of the high turnover of CPS caseworkers and limited resources available to them, as discussed in Section IV.B.1. An efficient means of addressing this concern would be to appoint one person for caseworkers to contact when immigration related issues arise. Other states have established these positions and reported positive outcomes. 210

3. Training

Particularly in the absence of any federal or state measures to address the concerns identified on a systemic level, training is a crucial means of addressing the problems of the ad hoc system. Attorneys, CPS workers, and judges should receive specific training in what immigrant detention is, how to locate detained parents and interface with detention facilities, what

208 Interview with S4, supra note 61.
209 These arrangements have been made at the county and the state level. See FAMILY TO FAMILY CALIFORNIA, SAMPLE FORMS FROM PUBLIC CHILD WELFARE AGENCIES, http://www.f2f.ca.gov/sampleMOUs.htm (last visited Aug. 15, 2011) (listing sample forms from public child welfare agencies from various states, as well as memoranda of understanding with the Mexican Consulate).
deportation proceedings mean, and how to work with the consulate and DIF.

VII. CONCLUSION

At the time of this writing, Ana remains in Mexico, separated from her four children and awaiting a decision on her immigration case, which is pending before the Court of Appeals for the Ninth Circuit. Meanwhile, her efforts to comply with the current case plan of reunification are exceedingly limited, as she continues to struggle to communicate with her attorney, her caseworker, and her children. The interviews and surveys presented in this paper make clear that there are countless parents facing similarly dim prospects of reunifying with their children after an encounter with immigration enforcement.

This Article has identified specific steps that federal and state actors could take in the immediate term to avoid these severe family disruptions. In addition, Ana’s story and the data collected highlight the need for a broad scale re-thinking of the relationship between federal immigration enforcement and state agencies. In particular, the federal government should adopt a cooperative and coordinating role with state child welfare agencies to avoid the harsh results and constitutional violations currently occurring in an unknown number of immigrant households each day.
APPENDIX A: TIMELINE OF ANA’S CASE

- **JUNE 2008**: The police are called when Ana’s son is left by himself in the apartment. She and her partner are arrested and turned over to ICE. CPS is called and places the four children in two separate foster homes.
- **AUGUST 2008**: At a hearing in which Ana is unrepresented, the IJ refuses to release her from detention on bond, finding she is a “danger” based on the circumstances of her arrest.
- **JANUARY 2009**: The Immigration Law Clinic becomes Ana’s legal representative in her immigration proceedings.
- **APRIL 21 AND MAY 29, 2009**: Ana’s immigration hearing for cancellation of removal.
- **APRIL 22, 2009**: CPS requests change of case plan from reunification to severance/adoption.
- **JULY 24, 2009**: IJ denies cancellation of removal and refuses to reconsider her bond determination.
- **SEPTEMBER 11, 2009**: Ana is transferred from immigration detention to Maricopa County Jail for criminal proceedings on the charges that triggered her initial arrest and detention.
- **OCTOBER 28, 2009**: BIA reverses IJ’s bond decision, but there is no longer jurisdiction for the remand since Ana is no longer in the physical custody of ICE.
- **NOVEMBER 27, 2009**: The BIA affirms the IJ’s denial of cancellation of removal.
- **FEBRUARY 16, 2010**: The Juvenile Court refuses to terminate Ana’s parental rights.
- **MARCH 23, 2010**: Ana accepts a guilty plea to child endangerment, a misdemeanor. Shortly thereafter she is transferred back to Eloy.
- **MAY 21, 2010**: Ninth Circuit refuses to stay Ana’s deportation pending review of her appeal of her immigration case.
- **MAY 25, 2010**: Ninth Circuit rejects emergency motion to reconsider denial of the stay.
- **MAY 28, 2010**: Ana is deported.
APPENDIX B: SUMMARY OF RECOMMENDATIONS

FOR THE DEPARTMENT OF HOMELAND SECURITY

- Establish a mechanism for early identification of cases in which immigrant parents in detention and/or deportation proceedings have children in the child welfare system.
- Increase the use of parole, prosecutorial discretion, and alternatives to detention for these cases.
- Improve detention facilities’ compliance with telephonic appearances and establish procedures for parents to appear in person in child welfare hearings.
- Increase the availability of services in detention facilities, such as parenting classes, substance abuse counseling, and access to psychiatric evaluations.
- Establish a key liaison position in each detention facility that can be a point of contact for all child welfare personnel.
- Train deportation officers and detention facility personnel to be familiar with the challenges facing detained parents with children in state custody.
- Reform immigration enforcement measures that rely on local law enforcement agencies and create a climate of fear for immigrant families that chills their ability to interact with the child welfare system.

FOR THE CHILD WELFARE SYSTEM

- Establish mandatory and regular trainings for judges, attorneys, and CPS caseworkers regarding immigration detention and deportation proceedings.
- Create a key liaison position in each CPS region for caseworkers to contact when immigration issues arise.
- Increase utilization of the consulate in cases that involve Mexican nationals, ideally through adoption of a formal Memorandum of Understanding.
- Establish a statewide policy that all child welfare personnel will not report immigration status to the federal government except pursuant to federal law.
- Establish statewide policies or practices to improve the provision of reunification services to immigrants in detention facilities.

FOR CONGRESS

- Provide funding for attorneys specializing in representation of immigrant parents with U.S. citizen children, in part by waiving the restriction on Legal Services Corporation (“LSC”) funds for
these purposes.

- Increase funding for the Legal Orientation Program, which informs immigrant detainees of their legal rights, to allow for education on the dependency process for immigrant parents with children in state custody.

- End mandatory detention. Establish judicial discretion to consider urgent circumstances, including young children in state custody, in determining whether detention is warranted.

- Increase judicial discretion in cases for relief from deportation involving parents with children in state custody.