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Splitting the Baby: Immigration, Family Law, and the Problem of the Single Deportable Parent

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**SPLITTING THE BABY: IMMIGRATION,
FAMILY LAW, AND THE PROBLEM OF THE
SINGLE DEPORTABLE PARENT**

*Timothy E. Yahner**

I. Introduction	769
II. The Facts of <i>Castro v. United States</i>	771
III. The Legal, Practical, and Social Underpinnings of the Problem of the Single Deportable Parent	776
A. The Workings of Child Custody.....	776
B. The Immigration System, Mixed Status Families, and Disparate Treatment.....	778
C. Immigration Statutes and Regulations: What They Empower the Border Patrol to Do	781
D. The Peculiar and Conflicted Mix at the Intersection of Immigration and Family Law.....	783
IV. The Problem of the Single Deportable Parent and its Solution.....	789
A. Problems Inherent in Leaving the Issue to the Courts.....	789
B. The Need for a Solution.....	791
C. Closing the Gap in the Immigration Scheme.....	795
V. Conclusion.....	800

I. INTRODUCTION

And the king said, Bring me a sword. And they brought a sword before the king. And the king said, Divide the living child in two, and give half to the one, and half to the other.¹

* Student at the University of Akron School of Law. I would like to thank Professor Paul Richert, Professor Bernadette Genetin, and Professor Tracy Thomas, for all of their support throughout the writing and editing process. I would also like to thank the entire staff of the Akron Law Review for all their hard work.

1. 1 *Kings* 3:24-25 (King Solomon faced the dreadful question of what to do when two parents claim the same child).

Some situations invoke the need for King Solomon's wisdom more aptly than others. In *Castro v. United States*,² the Fifth Circuit faced a very difficult choice. Monica Castro sued the federal government under the Federal Tort Claims Act ("FTCA"),³ alleging the government's negligence caused the wrongful deportation⁴ of her baby daughter R.M.G.⁵ The daughter remained in the custody of her undocumented alien father, Omar Gallardo, when he was deported because he had the baby in his possession when he was detained.⁶ The *en banc* court upheld the District Court's dismissal of the case based on the discretionary function exception of 28 U.S.C. § 2680(a), which retains the government's immunity over claims where the government actor had a choice.⁷ Although the statutes and regulations granting power to the border patrol are silent, the court found it within the patrol's discretion to leave R.M.G. in Omar's hands when he was deported.⁸ Further, the Office of the Inspector General has stated that the policy of the immigration system is not to deport U.S. citizens.⁹ Though the case was decided on procedural grounds,¹⁰ it demonstrates the legal and human consequences of the current gap in the immigration system. The Fifth Circuit faced the problem of the single deportable parent: when one parent is deportable and the other is not, the custody of the child determines whether the child will be de facto deported with the deportable parent. Unfortunately, without a custody decision from a court, agents of the immigration system will be forced to make a de facto custody determination without process and often without rationale.

2. *Castro v. United States*, 608 F.3d 266 (5th Cir. 2010).

3. The federal government waived its sovereign immunity with the Federal Tort Claims Act contained in 28 U.S.C. §§ 1291, 1346, 1402, 2401, 2402, 2411, 2412, 2671-2680 (2006).

4. From the outset, it is worth noting R.M.G. was not technically deported in the legal sense—she was left in her father's custody when he was deported, the term for which is "de facto deportation." See *infra* note 41.

5. *Castro v. United States*, No. C-06-61, 2007 U.S. Dist. LEXIS 9440 (S.D. Tex. Feb. 9, 2007), *rev'd*, 560 F.3d 381 (5th Cir. 2009), *rev'd en banc*, 608 F.3d 266 (5th Cir. 2010). The Fifth Circuit in both appellate cases adopted the District Court's findings of fact.

6. *Id.* at *9-11.

7. Under 28 U.S.C. § 2680 (a) (2006), the United States retains sovereign immunity over "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

8. *Castro*, 2007 U.S. Dist. LEXIS 9440 at *31-34.

9. U.S. DEPT. OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, OIG-09-15, REMOVALS INVOLVING PARENTS OF UNITED STATES CITIZEN CHILDREN (2009) ("OIG Report").

10. The parties focused extensively on the procedural aspects of the case in their briefs. See Brief for Appellant at 11-24, 35, 42-48, *Castro v. United States*, 608 F.3d 266 (5th Cir. 2010) (No. 07-40416), 2007 WL 7131702 at *1, *9-18, *24-27, *35, *37-48; Brief for Appellee at 8-27, *Castro v. United States*, 608 F.3d 266 (5th Cir. 2010) (No. 07-40416), 2007 WL 7131703 at *8-15.

The purpose of this article is not to suggest that the Fifth Circuit was wrong in upholding the dismissal of Monica's case. Indeed, the court was faced with a dilemma that would give King Solomon pause: what to do when two parents claim one child. This article's purpose is to show that a regulatory solution is preferable to forcing the courts to make impossible choices between parents. Part II discusses the factual and procedural history of *Castro*. Part III details the policies and rules of law of immigration and custody at play in the case. Part IV explains why the courts are not equipped to decide this issue satisfactorily, and why a regulatory solution is needed. Part IV also discusses the proposed regulation prohibiting the de facto deportation of a non-deportable child with a deportable parent, with a stay of ninety days from the date of a final decision to deport, unless the deportable parent obtains a custody order. In those ninety days, the deportable parent should seek a custody order. If there is no custody order at the end of the grace period, the child will remain with the non-deportable parent.¹¹ Part V reiterates the need for a solution and concludes that the proposed regulation is the best fit.

II. THE FACTS OF *CASTRO V. UNITED STATES*

The story of Monica Castro and Omar Gallardo is ultimately a story of two parents claiming the same child—much like King Solomon was forced to address. Monica, a United States citizen, moved into her boyfriend Omar's trailer in Lubbock, Texas, when she was sixteen.¹² Omar was an undocumented alien.¹³ On December 4, 2002, at age seventeen, Monica gave birth to R.M.G.¹⁴ The couple had a stormy relationship, and Monica claimed Omar was abusive, although she never informed her parents or the police.¹⁵ Monica did maintain, however, that Omar was a good father to R.M.G. and never abused the baby.¹⁶

11. The child stays in the United States to avoid the de facto deportation of the child. There is no reason to assume the non-deportable parent is more fit than the deportable parent.

12. *Castro*, 2007 U.S. Dist. LEXIS 9440 at *2. Monica originally moved from Corpus Christi to Lubbock with her parents when she was fifteen. *Id.* She met Omar around that time. *Id.* Omar lived near the trailer rented by her parents. *Id.*

13. *Id.*

14. *Id.* The baby was born a United States citizen. *Id.* Although the courts never give more than the baby's initials, it may be assumed her surname is "Gallardo"—Omar's last name.

15. *Id.* at *3-4. Her reasons for not informing the police are unclear from the courts' statements of fact. She may have been scared of Omar or the police. She may have invented the story after the fact, or perhaps the abuse was so recent she never had a chance to go to any authorities.

16. *Id.* at *4.

After a particularly fierce argument, Monica went to stay with her grandparents.¹⁷ She tried to get the baby back from Omar, but the local law enforcement and child protection services did not intervene because Monica and Omar were allegedly married by common law.¹⁸ Because of the disputed marriage and Omar's parentage of the child, Omar had just as much right to the child as Monica, who was told to hire a private attorney to seek a custody order.¹⁹ Fearing the attorney would take too long, Monica and her aunt reported Omar as an undocumented alien two days later.²⁰

When Monica reported Omar, Border Patrol Agent Manuel Sanchez ("Sanchez") spoke with Monica and told her Omar was wanted as a possible witness to a homicide.²¹ Sanchez also told Monica to be present when the Patrol apprehended Omar so she could be given the child.²² Monica was scared of Omar, however, and only watched the arrest from her relatives' trailer across the street.²³ R.M.G. was taken with Omar to the Border Patrol station where she was placed in a holding cell with her father and some of his relatives, who were also being deported.²⁴ Monica arrived at the station shortly thereafter and requested R.M.G. be left with her, and Sanchez called the local child protective services.²⁵ He was told protective services would not get involved unless the baby was abused, which was not the case for R.M.G.²⁶ The agents opted to reinstate an earlier deportation order against Omar.²⁷ They also opted to leave R.M.G. with Omar, rather than

17. *Id.* (her grandparents also lived in the Lubbock area).

18. *Id.* at *5. There is some dispute over their marriage because Monica was under eighteen; the trial court did not decide the issue. *Id.* at *5 n.3.

19. *Id.* at *5. Omar also had a right to custody as the child's father. *Id.* As the situation stood, Monica and Omar had a civil dispute. *Id.*

20. *Id.* at *6. Although in hindsight Monica likely regretted the decision, it is hard to fault a scared and possibly abused young woman for going to the authorities. Understanding the possible legal outcomes of one's actions is a standard lawyers are held to, not frightened teen mothers.

21. *Id.* at *7 n.4. The exact circumstances of the homicide are not given by the courts, but this knowledge may have contributed to Monica's fear of Omar.

22. *Id.* That is, without process the agents would have effectively granted Monica custody based on the immigration status of the child.

23. *Id.* at *7. If she really was abused, then it is not hard to imagine why Monica was too scared to confront Omar at the scene of the deportation she orchestrated. She may also have been leery of Omar's connection to the homicide, or unimpressed by the authorities' lack of results thus far in protecting her and her child.

24. *Id.* at *8. Monica later claimed she was also scared of Omar's family. *Id.* at *7.

25. *Id.* at *8.

26. *Id.* at *8-9. Making this one of the rare and unfortunate cases where a child's abuse makes the parent's position better.

27. *Id.* at *9.

try to make a custody decision.²⁸ The transport to Mexico was slated to leave at 3:15 that afternoon, with R.M.G. on it.²⁹ Monica frantically contacted an attorney at 1:30 to seek a temporary custody order.³⁰ It did not come in time, and R.M.G. was with her father when he was deported.³¹

In February 2006, Monica filed suit in the District Court for the Southern District of Texas against the United States seeking monetary, declarative, and injunctive relief under the Fourth,³² Fifth,³³ and Fourteenth amendments,³⁴ in addition to a number of claims under the FTCA.³⁵ Her injunction demanded the aid of the United States in finding her daughter.³⁶ In September 2006, before the case was resolved, Omar was detained on charges of illegal re-entry to the United States.³⁷ While in custody, Omar and Monica came to an agreement returning the baby to her—three long years after R.M.G. was sent to Mexico with Omar.³⁸ After Monica amended her complaint to reflect her daughter's return, the United States moved to dismiss Monica's claims in November 2006 based on the discretionary function exception of the FTCA.³⁹ The District Court reasoned that the agents' decision to deport R.M.G. was discretionary and thus retentive of sovereign immunity because "the Border Patrol Agents' conduct in the situation was not mandated by any statute, regulation or policy."⁴⁰ The District

28. *Id.* at *9-10. They also based their decision in part on Omar's assertion that Monica had "walked out on him." *Id.* at *8.

29. *Id.* at *9. Had the agents decided not to reinstate the deportation order there would have been considerably more time between Monica's report to the Border Patrol and Omar's deportation.

30. *Id.* at *9-10. The attorney drafted the necessary paperwork, but did not file it because she wanted a judge's signature on it first.

31. *Id.* at *10.

32. U.S. CONST. amend. IV.

33. U.S. CONST. amend. V.

34. U.S. CONST. amend. XIV.

35. *Castro*, 2007 U.S. Dist. LEXIS 9440 at *12. Those claims included negligence, intentional infliction of emotional distress, and false imprisonment. *Id.* Pursuant to a motion to dismiss, the District Court dismissed Monica's constitutional claims for monetary relief as such claims are barred by the doctrine of sovereign immunity. *Id.*

36. *Id.*

37. *Id.* at *11. R.M.G. was not with Omar at the time—she was living with his parents in Mexico. *Id.*

38. *Id.* R.M.G. was returned on December 1, 2006. *Id.*

39. *Id.* at *12-13; 28 U.S.C. § 2680(a) (2006). The United States Supreme Court has said the § 2680(a) exception to tort liability applies where the challenged government action involves "an element of judgment or choice" and the complained-of choice is "the kind that the discretionary function exception was designed to shield." *United States v. Gaubert*, 499 U.S. 315, 322-23 (1991).

40. *Castro*, 2007 U.S. Dist. LEXIS 9440 at *22-23. The District Court also found the decision involved an element of judgment or choice as required by *Gaubert*. *Id.* at *22.

Court also noted R.M.G. was not technically deported, but rather left in her father's care when he was deported.⁴¹ Finally, the court rejected Monica's claim that the Agents did not make an impermissible custody determination, in part because leaving R.M.G. with Omar or removing her from Omar's care and leaving her with Monica would both be custody decisions if Monica's argument was persuasive.⁴²

Monica appealed the dismissal, and a divided panel of the Fifth Circuit Court of Appeals reversed and remanded.⁴³ The panel majority agreed with the District Court that no policies, rules, or statutes governed the Agents' conduct in this situation.⁴⁴ The dissent likewise concluded state and federal law were silent on the issue.⁴⁵ For purposes of the FTCA's discretionary function exception, the majority concluded that violating the Constitution is never within the discretion of an official, and doing so exceeds the scope of their authority.⁴⁶ In determining whether a party has alleged facts sufficient to state a cause of action under this new doctrine, "a court must determine whether there is a specific and intelligible constitutional mandate that involves or is related to the alleged intentional torts of the accused officer(s)."⁴⁷ The majority then concluded Monica's complaint met that standard, and reversed the trial court's dismissal of her case on the relevant issues.⁴⁸

41. *Id.* at *27 n.12. The term for what happened to baby R.M.G. is "de facto deportation."

42. *Id.* at *28. This finding and the logic behind it are strained. If Monica was right, and the Agents did make a custody determination, the same would indeed be true if they did the reverse. But it makes little sense to then conclude that because both possible outcomes were impermissible, one or both must be permissible. Once it is accepted, if only for the sake of argument, that an impermissible custody decision was made, and the only alternative was another custody decision, the correct conclusion is that the only outcome is an impermissible custody decision in favor of one party or the other.

43. *Castro v. United States*, 560 F.3d 381, 381 (5th Cir. 2009), *rev'd en banc*, 608 F.3d 266 (5th Cir. 2010).

44. *Id.* at 388 n.5.

45. *Id.* at 398 (Smith, J., dissenting).

46. *Id.* at 390 (en banc). The *Gaubert* factors mentioned *supra*, in note 39, for determining whether an act is shielded from tort liability make no mention of the scope of an agent's authority. The panel could be making the understandable policy judgment that the Constitution should not be violated, agents do not have the choice of violating the Constitution, or the panel may have decided that the choice to exceed one's authority is not "the kind that the discretionary function exception was designed to shield." *United States v. Gaubert*, 499 U.S. 315, 322-23 (1991). The panel itself admitted it and other courts were unclear on where to place this scope of authority analysis within the *Gaubert* factors. *Castro*, 560 F.3d at 390.

47. *Castro*, 560 F.3d at 390. Once such a mandate exists, the court will then proceed to analyze the merits of the state intentional tort claims. *Id.*

48. *Id.* at 392. Specifically, it found Monica alleged facts sufficient to survive a motion to dismiss based on the discretionary function exception. *Id.* The majority recognized that the Border Patrol agents were faced with a difficult choice, and narrowed its holding to situations in which the Border Patrol knows the child is non-deportable. *Id.* at 391-92.

The dissent meanwhile opined that the court “face[d] a situation as old as the one faced by King Solomon, and one requiring his wisdom: what to do when two parents claim a child.”⁴⁹ In particular, the dissent took the majority to task for the pleading standard announced, and argued it would swallow the discretionary function exception to the FTCA.⁵⁰ That, in turn, would allow clever pleading to avoid sovereign immunity by alleging a constitutional violation to avoid the discretionary function exception, and a state cause of action overlapping the constitutional claim.⁵¹

Monica did not win the day, however. An *en banc* rehearing by the Fifth Circuit reversed the panel court and reinstated the District Court’s decision to dismiss Monica’s complaint.⁵² The *per curiam* majority deferred to the District Court in a terse opinion, stating, “[we] affirm [the District Court], essentially for the reasons given by the district court”⁵³ One dissenting judge, who had delivered the panel opinion, disagreed with the majority and would have found the agents exceeded their authority.⁵⁴ Another dissenter agreed with the first, but proffered another reason for waiving sovereign immunity.⁵⁵ A third judge dissented over the majority’s reading of sovereign immunity, but found that only a handful of claims survived dismissal.⁵⁶

The dissents also disagreed over whether a *de facto* custody decision was made by the agents. A custody decision would be outside the authority of the Border Patrol agents.⁵⁷ One dissenter implied there was a *de facto* custody decision,⁵⁸ while another found there was not.⁵⁹ The majority did not address the issue.

49. *Id.* at 392 (Smith, J., dissenting). It is from this astute judgment that this article takes its title.

50. *Id.* at 394.

51. *Id.* As the dissent puts it, “*Voila!* No more sovereign immunity.” *Id.*

52. *Castro v. United States*, 608 F.3d 266 (5th Cir. 2010) (*en banc*).

53. *Id.* at 268.

54. *Id.* at 274 (Stewart, J., dissenting). Judge Stewart offered essentially the same rationale he did in the panel case. *Id.*

55. *Id.* (DeMoss, J., dissenting). The additional reason proposed by Judge DeMoss is the “law enforcement proviso” of § 2680(h), which waives sovereign immunity for enumerated intentional torts and abuses of law enforcement powers. 28 U.S.C § 2680(h) (2006).

56. *Castro*, 608 F.3d at 269-71 (Dennis, J., concurring in part and dissenting in part). Judge Dennis found the only actionable claims were those under the law enforcement proviso. *Id.* While he agreed with the dissent that constitutional claims were outside the authority of officials, he found the agents acted within their authority in this case. *Id.*

57. *Johns v. Dep’t of Justice*, 653 F.2d 884, 894 n.26 (5th Cir. 1981).

58. *Castro*, 608 F.3d at 274 (Stewart, J., dissenting). Judge Stewart noted the Border Patrol lacks authority to make child custody decisions, but did not specifically inquire whether the Border Patrol made such a determination in this case. *Id.*

III. THE LEGAL, PRACTICAL, AND SOCIAL UNDERPINNINGS OF THE PROBLEM OF THE SINGLE DEPORTABLE PARENT

Child custody was at the heart of the *Castro* dispute, and its workings will be important as the end product of any proposed solution to the problem of the single deportable parent. Next, the workings of the immigration system are primarily regulatory, and the powers and duties of its agents are meticulously enumerated in Title 8 of the United States Code Service and Title 8 of the Code of Federal Regulations.⁶⁰ Congress and the Department of Homeland Security oversee these statutes and regulations. Although both the United States Code and the Code of Federal Regulations are silent on the problem of the single deportable parent, that silence both speaks to the intent of the rule-makers and needs to be filled. Further, the single deportable parent problem necessarily involves an intersection between family law and immigration law.⁶¹ Despite intersecting frequently, the two bodies of law draw on conflicting sources and follow conflicting values.⁶² The proposed solution must account for the background that created it.

A. *The Workings of Child Custody*

At the broadest level, child custody “refers to the relationship which exists between parents and child in a normal intact family.”⁶³ This encompasses living with the child, and the rights and obligations to supervise, care for, and educate the child.⁶⁴ When the family is split up for whatever reason, all the rights and obligations formerly shared in the family unit have to be broken up and distributed by the court.⁶⁵ Some statutes distinguish these rights by calling the right to live with the child

59. *Id.* at 270 (Dennis, J., concurring in part and dissenting in part). Judge Dennis found there was no custody determination because the agents elected to respect Omar’s decision to keep the baby with him, rather than take the baby from someone who had a legitimate claim to custody. *Id.* After the *en banc* rehearing, *certiorari* to the United States Supreme Court was filed. It was denied in *Castro v. United States*, 608 F.3d 266 (5th Cir. 2010), *cert. denied*, 131 S.Ct. 902 (2011).

60. 8 U.S.C. (2012); 8 C.F.R. (2012).

61. *See infra* Part III.D.

62. Family law is state law, while immigration law is federal regulatory law. Family law values things like the best interests of the child, while immigration law values the efficiency of its regulatory scheme.

63. 2 HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 20.2 (2d ed. 1987).

64. *Id.*

65. *Id.*

“physical custody” and the right to make decisions about the child’s care “legal custody.”⁶⁶

Related to physical and legal custody is joint custody (which can be broken up into joint legal custody⁶⁷ and joint physical custody),⁶⁸ which generally preserves custody rights in both parents even though they are separated.⁶⁹ In the case of joint legal custody, each parent has equal decision-making power over things like health care, religion, and education.⁷⁰ In the event of a disagreement, the parents can go to a court to “break the tie.”⁷¹ When deciding whether to award joint custody, some courts consider factors like the couple’s geographic proximity.⁷² In cases where the parents live some distance from each other, the courts must necessarily award sole physical custody to one parent.⁷³ There is a general consensus amongst courts that joint custody will not be awarded where the parents are antagonistic to each other.⁷⁴ Proponents of joint custody maintain that it allows the child to feel loved by both parents, and provides a sense of emotional stability.⁷⁵ There is also some scholarly concern over the effect this “judicial parenting” has on the family.⁷⁶

66. *Id.* In the facts of *Castro*, Omar received both physical custody (the child lived with him in Mexico) and legal custody (he had the right to make choices about the child’s care).

67. CLARK, *supra* note 63, §20.5; *see also* Randall H. Warner, *Parenting from the Bench*, 46 AUG ARIZ. ATT’Y 24, 26 (2010).

68. CLARK, *supra* note 63, §20.5; *see also* Susan A. Dwyer, *How to Share Parenting*, 33-SUM FAM. ADVOC. 4 (2010) (joint physical custody generally means the child spends time living with each parent).

69. CLARK, *supra* note 63, §20.5; Warner, *supra* note 67, at 26. When a writer refers to “joint custody” without denoting it is joint legal custody or joint physical custody, the writer is generally referring to joint legal custody. *See* CLARK, *supra* note 63, §20.5 (courts, commentators, and statute drafters are not always clear in their use of these terms, however).

70. Warner, *supra* note 67, at 26; CLARK, *supra* note 63, §20.5.

71. Warner, *supra* note 67, at 26.

72. CLARK, *supra* note 63, §20.5.

73. *Id.*

74. *Id.* (noting that courts take this approach because joint custody ideally involves cooperation amongst the parents).

75. *Id.*

76. Warner, *supra* note 67, at 26; *see also* Julie Hixson-Lambson, *Consigning Women to the Immediate Orbit of a Man: How Missouri’s Relocation Law Substitutes Judicial Paternalism for Parental Judgment by Forcing Parents to Live Near One Another*, 54 ST. LOUIS U. L.J. 1365, 1370 (2010) (suggesting joint physical custody impairs the parents’ ability to live where they want); Christy M. Buchanan & Parissa L. Jahromi, *A Psychological Perspective on Shared Custody Arrangements*, 43 WAKE FOREST L. REV. 419, 426-31 (2008) (pointing out there are issues with the psychological and economic well-being of the child in joint custody arrangements). However, some states feel that joint custody is better for the child, and create a presumption in its favor. CLARK, *supra* note 63, §20.5; *see also* Noel Semple, *Whose Best Interests? Custody and Access Law and Procedure*, 48 OSGOODE HALL L.J. 287, 299 (2010).

B. The Immigration System, Mixed Status Families, and Disparate Treatment

The immigration system treats mixed status families, that is, those containing multiple immigration statuses,⁷⁷ differently. The immigration system's treatment of a mixed status family is plainly unfair because it can break up the family.

1. The Workings of the Immigration System

The immigration system functions like a machine—well-oiled, but blind to the human consequences of its actions. Just as importantly, it assigns a status to each immigrant, thereby creating the “illegal immigrant” class.⁷⁸ The immigration system is vast, but it does not cover all possible contingencies. Many critiques are leveled at it,⁷⁹ but the immigration system is not easily assailable for failing to account for a possibility such as the problem of the single deportable parent.

The typical deportation proceeding begins with a choice to pursue deportation. Once the immigration authorities decide to pursue deportation, and there is reason to suspect the alien is deportable, the potential deportee is given written notice⁸⁰ to appear in the removal proceeding held before an immigration judge.⁸¹ The alien has the privilege of being represented, but not on the government dollar.⁸² The burden is on the alien to prove legal presence in the United States by

77. See *infra* note 112 and accompanying text.

78. Immigration law “not only define[s] who is a legal immigrant but also, by necessity, create[s] the converse – the ‘illegal’ or undocumented [immigrant].” Lenni B. Benson, *The Invisible Worker*, 27 N.C. J. INT’L L. & COM. REG. 483, 484 (2002).

79. To be fair, critiques of the immigration system are too varied to generalize. For a critique of Border Patrol violence against undocumented immigrants, see Jesus A. Trevino, *Border Violence Against Illegal Immigrants and the Need to Change the Border Patrol’s Current Complaint Review Process*, 21 HOUS. J. INT’L L. 85 (1998). For a critique of the immigration system’s treatment of family separation, see S. Adam Ferguson, *Not Without My Daughter: Deportation and the Termination of Parental Rights*, 22 GEO. IMMIGR. L.J. 85 (2007). For a critique of the “crazy conglomeration” of provisions defining what a child is for purposes of immigration, see David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453, 506-07 (2008).

80. 8 U.S.C. § 1229 (2012). Such notice must contain certain information, including the nature of the charges. *Id.*

81. 8 U.S.C. § 1229a (a)(1) (2012). The judge may consider evidence, examine witnesses, issue subpoenas, and issue sanctions, among other things. 8 U.S.C. § 1229a (b)(1). In lieu of deportation proceedings, the alien may elect to leave voluntarily. 8 U.S.C. § 1229b (2006).

82. 8 U.S.C. § 1229a (b)(4)(A). The alien does not have the right to representation. The alien has other privileges, including presenting evidence and cross-examining witnesses. 8 U.S.C. § 1229a (b)(4)(B).

clear and convincing evidence.⁸³ If the alien has been admitted to the United States, the burden is on the immigration authorities to prove the alien is deportable by clear and convincing evidence.⁸⁴ The alien may apply for relief from removal, in which case the burden is on the alien to prove eligibility and that the alien's case merits discretionary relief.⁸⁵ If the immigration judge decides the alien is deportable, and elects deportation, the alien is given notice of the right to appeal.⁸⁶ Once an alien is ordered removed, the Attorney General will remove the alien, generally within 90 days.⁸⁷

The immigration laws and regulations, particularly those granting relief for undue hardship, also take into account the potential deportee's family status, such as for the hardship to one's self or citizen spouse or child.⁸⁸ The policy for making exceptions is to grant some relief from the otherwise harsh mechanical application of the immigration laws.⁸⁹ Although efficiency is an important value of the immigration scheme, it seems there is some compassion in its tin man's heart.

2. The Mixed Status Family and Its Different Treatment by the Immigration System

When a family is mixed status,⁹⁰ the harshness of the immigration laws applies unevenly to each family member.⁹¹ In the instance of a

83. 8 U.S.C. § 1229a (c)(2)(B). Although it resembles a criminal trial, deportation is a civil proceeding.

84. 8 U.S.C. § 1229a (c)(3)(A). This statute and others use the terms "remove" and "removable" instead of "deport" and "deportable." *Id.*

85. 8 U.S.C. § 1229a (c)(4). The judge also has to weigh the credibility of witnesses. The immigration judge's discretion extends to considering "the totality of the circumstances, and all relevant factors" when weighing witness credibility. 8 U.S.C. § 1229a (c)(4)(C). In determining whether the alien has met their burden, the judge has wide discretion, limited to weighing credible evidence and testimony of the record. 8 U.S.C. § 1229a (c)(4)(B).

86. 8 U.S.C. § 1229a (c)(5). The alien may also file one motion to reconsider within thirty days of the final order of removal. 8 U.S.C. § 1229a (c)(6).

87. 8 U.S.C. § 1231 (a)(1)(A) (2012). The period begins from the final deportation order, the date of a court's final order in the event of judicial review, or if the alien has been detained, the date of release from detention. 8 U.S.C. § 1231 (a)(1)(B). This ninety-day period is why the grace period in the proposal lasts ninety days.

88. *See* 8 C.F.R. § 240.65 (2010) (eligibility for suspension of deportation); 8 C.F.R. § 1240.58(a) (2010) (suspension of deportation requires, *inter alia*, a showing of extreme hardship to self or citizen spouse or child); 8 C.F.R. § 1240.64(d) (rebuttable presumption of extreme hardship for certain classes of aliens).

89. *See Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1029 (9th Cir. 2005).

90. A mixed status family is one whose members have different immigration statuses, and the numbers are on the rise. David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45, 49-50 (2005). Thronson suggests the increase in mixed status families leads to an increasing focus

whole family subject to deportation, the consequences are natural and uniform, if no less harsh: the entire family is uprooted and returned to their country of origin.⁹² In the case of the mixed status family, any application of immigration law is likely to split up the family.⁹³

The mixed status family is not simply the result of an influx of undocumented immigrants⁹⁴ with the desire to get married.⁹⁵ The mixed status family is the child of tightening legalization and naturalization

on immigration status in family courts. *Id.* Interestingly, homes headed by immigrants are more likely to have children, and are more likely to retain both parents. *Id.* The operation of immigration law to the mixed status family may thus produce any number of disparate results; in the case of the single deportable parent, the parents can be separated from each other in much the same way as the child may be separated from a parent. Of families that are mixed-status, forty-one percent have parents with different immigration statuses, which is the scenario that gives rise to the problem of the single deportable parent. See Valerie Leiter et al., *Challenges to Children's Independent Citizenship: Immigration, Family, and the State*, 13 CHILDHOOD 11, 17 (2006).

91. Despite the importance of family in immigration law, "immigrant families are not viewed as a unit, and individual family members are not equal." David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 993 (2002).

92. Admittedly, there are still serious concerns for whole families subject to deportation. If they have mortgaged a home, what do they do about the payments that need to be made? See Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOC. INQUIRY 561, 587 (2010). What if the wage-earner has learned a specific skill that will be wasted if forced to seek a job outside the state? *Id.* How will the family be provided for when deported? *Id.* How can one support the family in the long term if the threat of being deported looms large? *Id.*

93. See *infra* note 112 and the accompanying text. The nature of the mixed status family is to have immigration law require something different for different family members, which may well include deporting an undocumented father while allowing a citizen mother to remain, or any number of other combinations.

94. Mexico continues to be synonymous with immigration regulation and its relative successes and failures. Interestingly, the number of deportable aliens located (not to be confused with the number of aliens deported) in 2009 was 613,003, the lowest number since 1972. Immigration Yearbook at 91. 528,139 were from Mexico. *Id.* at 92.

95. Some undocumented immigrants mistakenly believe marrying a United States citizen will remedy their undocumented status. Julie Mercer, *The Marriage Myth: Why Mixed-Status Marriages Need an Immigration Remedy*, 38 GOLDEN GATE U. L. REV. 293 (2008). The immigration system greatly burdens mixed status families by forcing spouses to weigh the risks and benefits of leaving the country to attempt compliance with the law and seek reentry, or stay and risk being discovered. *Id.* at 294-95. The current state of immigration law can encourage the separation of spouses by barring legal reentry for three to ten years for those attempting to correct their immigration status. *Id.* at 295. Further, this mistaken belief shows one way the mixed status family will grow in the coming years. Similarly, any person who is barred from adjusting their immigration status can only petition for a legal permanent resident status from outside the United States. See Thronson, *supra* note 90, at 51. However, there is a second provision that prevents the reentry for three years of an alien that had been in the country unlawfully for 180 days and voluntarily departed. 8 U.S.C. § 1182(a)(9)(B)(i)(I) (2006). The cumulative effect of these denial of reentry provisions may be a perverse incentive to remain in the United States illegally and hope for a means of legitimizing one's status. Benson, *supra* note 78, at 488.

requirements.⁹⁶ Because of the lack of prospects for legitimization and limited enforcement of immigration regulations beyond border areas,⁹⁷ the “shadow population” of undocumented immigrants continues to grow.⁹⁸ As the population of undocumented immigrants grows,⁹⁹ contact with legal residents is certain to grow, along with the number of mixed status families.¹⁰⁰ And where there are mixed status families, there is the problem of the single deportable parent.¹⁰¹

C. Immigration Statutes and Regulations: What They Empower the Border Patrol to Do

The immigration framework set out in Title 8 of the United States Code and Title 8 of the Code of Federal Regulations is so extensive it seems to leave no contingency unplanned for.¹⁰² Though

96. Thronson, *supra* note 90, at 49-52 (tracing the rise in mixed status families to policies of declaring more aliens illegal, generating barriers to legitimization, and lack of interest in deporting after arrival); BRYAN C. BAKER, U.S. DEP'T. OF HOMELAND SEC., NATURALIZATION RATES AMONG IRCA IMMIGRANTS: A 2009 UPDATE (2010), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/irca-natz-fs-2009.pdf> (last visited May 2, 2012) (reflecting much lower rates of naturalization for Mexican immigrants in two major categories of potential candidates for lawful permanent residency; other countries of origin have much higher success rates). See also Thronson, *supra* note 79, at 454 (“As the number of immigrants and children of immigrants in the United States grows, it is increasingly common to find mixed-status families in which all family members do not share a single immigration or citizenship status.”) (internal citations omitted).

97. See Thronson, *supra* note 90, at 49-50.

98. See *id.* at 51-53. As of 2005, estimates of the size of the undocumented population range from seven million to eleven million. *Id.* at 50. Further, households headed by immigrants are more likely to have children. MICHAEL F. FIX, WENDY ZIMMERMAN & JEFFREY S. PASSEL, THE URBAN INST., THE INTEGRATION OF IMMIGRANT FAMILIES IN THE UNITED STATES 14 (2001), available at http://www.urban.org/UploadedPDF/immig_integration.pdf (last visited Feb. 26, 2011) (fifty-five percent of immigrant families have children, compared to thirty-five percent of nonimmigrant families).

99. “The illegal alien of today may well be the illegal alien of tomorrow.” *Plyler v. Doe*, 457 U.S. 202, 207 (1982) (internal citations and quotation marks omitted); see also Thronson, *supra* note 90, at 52 (the United States has “increasingly become home to a long-term undocumented population [and] it is not surprising that members of this population marry and have children, creating mixed-status immigrant households” and “[t]he formation of family ties between undocumented immigrants and persons with legal immigration status in turn influences the decisions of undocumented immigrants to remain in this country.”) Of families headed by a noncitizen with children, eighty-five percent are mixed-status families. FIX, ZIMMERMAN & PASSEL, *supra* note 98, at 15.

100. See *supra* notes 90, 95, and 96.

101. Further, as “immigrants and immigrant families arrive at family courts, voluntarily or not, they bring immigration related issues with them.” See Thronson, *supra* note 90, at 50.

102. “The best-laid schemes o’ mice an’ men Gang aft agley”. Robert Burns, *To a Mouse, in KILMARNOCK VOLUME* (1785). In standard English, the line reads, “the best laid schemes of mice and men Often go awry.”

comprehensive, the immigration scheme is not foolproof.¹⁰³ Its gaps are simply smaller and less noticeable than most.

The most crucial definition is the term “alien,” which 8 U.S.C. § 1101(a)(3) defines as “any person not a citizen or national of the United States.”¹⁰⁴ The Border Patrol is given significant power relating to the detention and eventual deportation of aliens,¹⁰⁵ but has power over United States citizens in only two enumerated situations: when crimes are committed in the agent’s presence, and when they have a reasonable belief a felony occurred.¹⁰⁶ There is no statutory or regulatory authority concerning the single deportable parent.¹⁰⁷

An *expressio unius* analysis of the statute’s definition of “alien” flows thusly: Congress said “alien,” which cannot be a United States citizen.¹⁰⁸ Aliens may be deported, while citizens and American nationals are not mentioned in any statute authorizing deportation.¹⁰⁹ Congress knew how to give power to the agents over United States citizens, and did so only in limited cases. Nowhere does any statute even mention deporting United States citizens,¹¹⁰ implying Congress had no intent to allow it.

103. See *supra* note 101; see also *infra* note 113 and accompanying text. Further, the increase in border security means that border crossings have become increasingly dangerous. See Thronson, *supra* note 90, at 51.

104. 8 U.S.C. § 1101(a)(3) (2006).

105. See *Immigration & Naturalization Serv. v. Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (explaining the broad discretion Immigration and Naturalization Services, the predecessor of the Department of Homeland Security, has “in determining who, among a class of eligible aliens, may be granted relief” from removal); 8 U.S.C. § 1103 (a)(1) (2006) (the Secretary is “charged with the administration and enforcement of this chapter and all other laws relating to immigration and naturalization of aliens . . .”); 8 U.S.C. § 1226 (2006) (power granted over “[a]pprehension and detention of aliens”); 8 U.S.C. § 1227 (2006) (power granted over “[d]eportable aliens”); and 8 U.S.C. § 1231 (power granted over “[d]etention and removal of aliens ordered removed.”).

106. The only authority granted to the Patrol over United States citizens is in 8 U.S.C. § 1357 (a)(5) (2006). The border patrol agents may make arrests if a crime is committed in their presence or they have a reasonable belief a felony occurred, regardless of the immigration status of the perpetrator. *Id.*

107. The District Court explicitly noted this in *Castro v. United States*, No. C-06-61, 2007 U.S. Dist. LEXIS 9440, at *26 n.11 (S.D. Tex. Feb. 9, 2007), *rev’d*, 560 F.3d 381 (5th Cir. 2009), *rev’d en banc*, 608 F.3d 266 (5th Cir. 2010).

108. 8 U.S.C. § 1101(a)(3).

109. *Castro*, 2007 U.S. Dist. LEXIS 9440 at *26 n.11.

110. Part of the problem here is that the child in the single deportable parent problem is not actually deported, but rather is left in the custody of the parent being deported. This reading of the statutes and regulations thus produces the general conclusion that deportation or its analogues were disfavored by the drafters. It does not, however, create any express prohibition of the de facto deportation of a United States citizen child.

Case law and official reports confirm this reading of the statutes and regulations.¹¹¹ The Ninth Circuit has already spoken on this issue, and concluded the immigration authorities lack the power to deport United States citizens.¹¹² In 2009, the Inspector General released a report entitled “Removals Involving Parents of United States Citizen Children.”¹¹³ It states that known United States citizens apprehended alongside undocumented aliens are not placed in immigration detention.¹¹⁴ Instead, if Immigration and Customs Enforcement determines a child is a United States citizen, that child will be released to the parent’s designated custodian or Child Protective Services.¹¹⁵ In reviewing more than 180,000 instances of removal of alien parents with citizen children between the years 1998 and 2007,¹¹⁶ the Office of the Inspector General told Congress “there were no instances of detaining United States citizen children and that Immigration and Customs Enforcement would not knowingly hold a United States citizen child in detention.”¹¹⁷ Thus, the immigration system itself has expressed a policy of not deporting or detaining United States citizens.

D. The Peculiar and Conflicted Mix at the Intersection of Immigration and Family Law

Immigration and family law are two different fields of law built on entirely different foundations. There are, however, areas of significant overlap and conflict,¹¹⁸ including situations in which one body of law usurps the function of the other.¹¹⁹ Although this intersection is rarely addressed in scholarly works,¹²⁰ the treatment of immigration issues in family court and the treatment of family law issues in immigration court have significant implications for the problem of the single deportable

111. See *infra* notes 112 and 113.

112. See *Flores-Torres v. Mukasey*, 548 F.3d 708, 710-12 (9th Cir. 2008) (“There is no dispute that if Torres is a citizen the government has no authority under the [Immigration and Nationality Act] to detain him, as well as no interest in doing so, and that his detention would be unlawful under the Constitution”)

113. OIG Report, *supra* note 9.

114. *Id.* at 11.

115. *Id.*

116. *Id.* at 5. This period includes the detention and removal of R.M.G. in December 2003. *Castro*, 2007 U.S. Dist. LEXIS 9440, at *8. How Monica Castro’s case was omitted is unknown.

117. OIG Report, *supra* note 9, at 11.

118. Thronson, *supra* note 90, at 47-48 (arguing these areas merit far more attention than they receive in scholarly circles).

119. See *infra* notes 148, 150-51.

120. Thronson, *supra* note 90, at 47-48.

parent and any proposed solution. There are also constitutional issues at play, particularly the rights of parents to raise their child.¹²¹

1. Immigration in Family Law and Family Law in Immigration Law

Immigration law is predominantly federal,¹²² while family law is the province of the states.¹²³ Indeed, federal authority over immigration is almost absolute, and few areas of state authority are more sacrosanct than family law.¹²⁴ However, one author has declared there is a “massive oversimplification in the traditional notion that family law is the exclusive province of the states while immigration law is entirely federal.”¹²⁵ Moreover, the two bodies of law revolve around two highly different standards, and emphasize different values.¹²⁶ Immigration law relies on a carefully enumerated clockwork system of regulations, while family law typically centers on the amorphous “best interests” standard when child custody is an issue.¹²⁷ Thus, their sources are different, their analysis is different, and what they value is different.¹²⁸

121. See *infra* notes 140–45.

122. See, e.g., *Reno v. Flores*, 507 U.S. 292, 305 (1993) (“For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.” (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976))); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“[O]ver no conceivable subject [than immigration] is the legislative power more complete.”) (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909))); see also *Mathews*, 426 U.S. at 79–80 (In exercising its considerable immigration power “Congress regularly makes rules that would be unacceptable if applied to citizens.”)

123. See, e.g., *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States.”); *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992) (“We conclude, therefore, that the domestic relations exception . . . divests the federal courts of power to issue divorce, alimony, and child custody decrees.”); see also *Ferguson*, *supra* note 79, at 89 (noting federalism concerns arise whenever immigration and family law meet).

124. *Infra* notes 144 and 145.

125. See *Thronson*, *supra* note 79, at 508.

126. Specifically, those values are the child’s best interests for family law and efficiency for the immigration system. *Thronson*, *supra* note 79, at 506 (the immigration system is “fundamentally at odds with the child-centered values of family law”). Professor *Thronson* argues the immigration system is so complex it has become difficult to administer, and it creates “meaningless traps for the unwary and misinformed.” *Id.* at 506–07. He further argues the immigration system’s “inconsistent requirements create an uneven playing field that lacks reasoned justification for its disparate treatment of children and families.” *Id.* at 507.

127. Almost all “nations are guided by the precept that the primary consideration underlying any [child] custody decision must be the best interests of the child.” D. Marianne Blair & Merle H. Weiner, *Resolving Parental Custody Disputes—A Comparative Exploration*, 39 *FAM. L.Q.* 247, 247 (2005). Every state in the United States uses the best interests standard. *Id.* See also *Thronson*, *supra* note 79, at 506–13 (analyzing and critiquing the conflicting values of best interests and

Due primarily to federalism concerns,¹²⁹ there is a tendency to attempt separation of immigration and family law.¹³⁰ However, the reality is that such attempts are only partially successful at best.¹³¹ Realistically, the two bodies of law each have something to say about the mixed status family, whether it is when immigration officials say R.M.G. has to stay with Omar, or if a family court were to award custody based solely on the immigration status of the parents.¹³² Certainly, whenever the problem of the single deportable parent rears its ugly head, family law and immigration law will meet.

As was the case with Monica, Omar, and their daughter, immigration law can effectively make custody decisions supposedly reserved for family courts.¹³³ Such de facto custody determinations violate the principle of federalism by having a federal authority like the Border Patrol make decisions denied it but granted to the States.¹³⁴

Conversely, family law also can make decisions ostensibly reserved for immigration courts.¹³⁵ Family law courts are apparently all too eager to consider the parents' immigration status in making custody decisions.¹³⁶ The family courts reflect the same anti-immigration attitude reflected in the regulations¹³⁷ and popular opinion.¹³⁸

regulatory efficiency in the context of child custody, particularly how immigration law functions as federal family law). Also of note in the same article is the suggestion that Congress may use its power over immigration to impermissibly legislate in the area of family law, for example, by defining family to exclude a child born out of wedlock. *Id.* at 510.

128. See *infra* notes 148 and 149 and accompanying text.

129. Congress is not given Constitutional authority over family law matters, and may not encroach on the states' domain in this area, while the states will be preempted in the event of conflicting laws by implication of the Supremacy Clause contained in U.S. CONST. art. VI, cl. 2.

130. The Fifth Circuit, which decided the *Castro* case, has itself held the border patrol has no authority to make custody decisions in *Johns v. Department of Justice*, 653 F.2d 884, 894 n.26 (5th Cir. 1981); see also *supra* note 28.

131. See Thronson, *supra* note 79, at 508.

132. Professor Thronson notes that whenever immigration law functions as family law, it is often "[w]ithout analysis or rationale." *Id.* at 454. The solution proposed in this article aims to prevent one such instance of unguided de facto family law decisions.

133. For example, one author suggests immigration law can function as family law in the regulation of marriage. See generally Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625 (2007); Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005). Professor Thronson argues the immigration system functions as family law when it determines where and with whom children live. Thronson, *supra* note 79, at 508.

134. See *infra* notes 144 and 145.

135. See Thronson, *supra* note 90, at 47 (providing a striking example of a family court expressly basing its decision on the immigration status of the mother).

136. *Id.* Professor Thronson divides the approaches to immigration that family courts take into four categories: discrimination (the "I Have a Problem With Your Immigration Situation" approach), manipulation (the use of family law's flexible equitable powers to achieve immigration

2. Constitutional Issues in Child Custody for Immigrants

Parents and children faced with the problem of the single deportable parent may argue that the de facto deportation of their child is unconstitutional.¹³⁹ De facto deportation occurs where a United States citizen child remains with their parent when that parent is deported. Further, when de facto deportation acts to interfere with families, such interference could be unconstitutional under doctrines protecting the family from government intrusion.

Few rights are more cherished in constitutional tradition than the right of a parent to raise his or her biological child, and the broad protection of the family, regardless of its form.¹⁴⁰ Such rights are “more

outcomes), obfuscation (masking the real impact immigration status has on the outcome of the proceeding), and accommodation (where the court does not attempt to shape a party’s immigration status, but rather responds to the consequences of the status). *Id.* at 53-71. Discrimination based on immigration status stems from perceiving “illegality” as a license to discriminate. *Id.* at 54. Professor Thronson notes this behavior is best addressed through Due Process and Equal Protection. *Id.* at 57-58. Manipulation often involves a request from the undocumented party to consider immigration status. *Id.* at 60. Although manipulation is frequently done with good intentions, Professor Thronson warns that it will frequently have unintended negative consequences. *Id.* at 60-64. Obfuscation, meanwhile, involves stating a standard such as the best interests of the child as a shield to considering immigration concerns both legitimate and illegitimate. *Id.* at 64-68. Finally, accommodation is the broadest and most common category of family court approaches to immigration law. *Id.* at 68. In accommodation cases, the court simply acknowledges the consequences for immigration status without basing its decision on such concerns. *Id.* Regardless of which approach is taken, the immigration status of a party sometimes determines the outcome of a family case. *Id.* at 72.

137. *See supra* note 78 and accompanying text, detailing how the immigration system creates a class of undocumented aliens.

138. *See supra* note 86 and accompanying text.

139. Professor Thronson recognizes that the immigration system’s treatment of families and children has constitutional dimensions. *See* Thronson, *supra* note 101, at 510 (mentioned in a discussion of the *Castro* district court opinion).

140. *See, e.g.,* *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that parents have a constitutionally protected interest in allowing their children to learn German); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (holding that parents have a constitutionally protected interest in choosing for their children to attend private parochial schools); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (holding that a grandmother has a constitutionally protected interest in living with grandchildren who are each other’s first cousin); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding that individuals have a constitutionally protected interest in being able to marry, and finding unconstitutional a statute preventing marriage for those behind on child support payments); *Troxel v. Granville*, 530 U.S. 57 (2000) (holding that parents have a constitutionally protected interest in limiting the visitation rights to their children for a deceased spouse’s grandparents); *Santosky v. Kramer*, 455 U.S. 745 (1982) (holding the burden of proof for the state to remove children from the parent’s custody cannot constitutionally be less than clear and convincing evidence); *Stanley v. Illinois*, 405 U.S. 645 (1971) (holding that a law automatically divesting an unwed father’s custody rights in his children upon the death of the mother is constitutionally repugnant).

precious than property rights.”¹⁴¹ Even in the rare cases where the government may intrude upon the family, it must still comply with procedural due process.¹⁴² Immigrants, even those here illegally, are guaranteed certain fundamental liberties by the Constitution,¹⁴³ such as rights to raise children and have families.¹⁴⁴ For Equal Protection purposes, the states have considerably less judicial deference when it comes to classifying people based on alienage.¹⁴⁵

Each time United States citizen children are effectively deported, the parent’s constitutional right to raise the child is implicated.¹⁴⁶ Each

141. *Stanley*, 405 U.S. at 651 (internal citation omitted).

142. *See id.* (requiring both notice and the opportunity to be heard before the government may abridge the parent’s liberty to raise their child, and that notice must be done in a time and manner that is actually effective for informing the parent how to challenge); *see also* *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (opportunity to be heard “must be granted at a meaningful time in a meaningful manner”); *Goss v. Lopez*, 419 U.S. 565 (1975) (the process that is due depends on the nature of the deprivation); and *Mathews v. Eldridge*, 424 U.S. 319 (1976) (individual interest in additional procedures is weighed alongside the value of prevention and the government’s interest in speedy, efficient procedures).

143. The Supreme Court has interpreted Due Process and Equal Protection to include a variety of rights for aliens. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886):

The fourteenth amendment to the constitution is not confined to the protection of citizens . . . [due process and equal protection] are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is the pledge of the protection of equal laws.

See also *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (holding the Fourth Amendment forbids the stopping and searching a car on less than a reasonable suspicion its occupants might be immigrants); *City of Cleburn v. Cleburn Living Ctr.*, 473 U.S. 432, 440 (1985) (general rule of deference to legislature gives way when a statute classifies by race, alienage, or national origin; these classifications are subject to strict scrutiny, in part because these factors are “so seldom relevant” to any legitimate state interest, and reflect prejudice that the burdened class is unworthy of protection); *Yamataya v. Fisher (The Japanese Immigrant Case)*, 189 U.S. 86, 100-01 (1903) (holding the Fifth Amendment entitles aliens to due process of law in deportation proceedings); and *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-71 (1990) (listing constitutional rights aliens enjoy).

144. *See Plyler v. Doe*, 457 U.S. 202, 210-17 (1982) (holding undocumented immigrant children are entitled to equal protection and due process). The rights listed in *supra* note 165 all arise from interpretations of those two constitutional guarantees.

145. In general, “state anti-immigration discrimination . . . has been subject to strict scrutiny (and therefore invalidated), but . . . identical federal discrimination has been subject only to rational basis review (and therefore upheld).” Michael J. Wishnie, *Laboratories of Bigotry? Devolution of Immigration Power, Equal Protection and Federalism*, 76 N.Y.U. L. REV. 493, 496 (2001). *See also supra* note 165. However, noncitizens “as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate.” *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938)). *See also* Thronson, *supra* note 90, at 57-60 (discussing the Due Process and Equal Protection rights of aliens despite the limits of those rights when compared to the considerable power of Congress over immigration).

146. *See supra* note 145.

time these citizen children are detained, their right to be free from unreasonable search and seizure is implicated.¹⁴⁷ Each time the mixed status families of the United States are separated, their constitutional rights are implicated.¹⁴⁸ Each time the children are effectively deported and their families split up, their right to a hearing is implicated.¹⁴⁹

There is one further wrinkle in the constitutional aspect of the single deportable parent problem. There is authority from the federal appellate courts that de facto deportation is constitutional where both parents are deportable, or where the only parent is deportable.¹⁵⁰ The courts have given two reasons for this outcome. First, the child is not barred from returning—residence is only postponed.¹⁵¹ Second, a finding that de facto deportation is unconstitutional would create an exception that would swallow the rule—any immigrant could have a child in the United States and become effectively immune from deportation.¹⁵²

These cases are, however, distinguishable from the problem of the single deportable parent. This jurisprudence all arose from the context of both parents being deported.¹⁵³ As its name implies, the problem of the single deportable parent necessarily involves one parent remaining in the United States. Further, part of the issue is that the family is broken up by the government's action, rather than being kept together by being deported as a unit.¹⁵⁴ The rationale sustaining this jurisprudence also does not hold true as applied to the single deportable parent.¹⁵⁵ An exception against de facto deportation in the context of a single deportable parent would not allow the deportable parent to escape deportation—it could only allow the otherwise non-deportable child to remain. Further, although the child is not permanently deprived of the

147. See *Brignoni-Ponce*, 422 U.S. at 884.

148. See *supra* note 145, and *infra* notes 164 and 165.

149. See *supra* note 42.

150. See, e.g., *Urbano de Malaluan v. Immigration & Naturalization Serv.*, 577 F.2d 589, 594 (9th Cir. 1978); *Gallanos v. United States*, 785 F.2d 116, 120 (4th Cir. 1986); *Newton v. Immigration & Naturalization Serv.*, 736 F.2d 336, 342-43 (6th Cir. 1981); *Acosta v. Gaffney*, 558 F.2d 1153, 1157 (3d Cir. 1977); *Mendez v. Major*, 340 F.2d 128 (8th Cir. 1965); *Schleiffer v. Meyers*, 644 F.2d 656, 663 (7th Cir. 1981); and *Gonzales-Cuevas v. Immigration & Naturalization Serv.*, 515 F.2d 1222, 1224 (5th Cir. 1975).

151. See *Schleiffer*, 644 F.2d at 663.

152. See *Urbano de Malaluan*, 577 F.2d at 594.

153. See *supra* note 150 and accompanying text.

154. This makes the situation analogous to cases like *Stanley v. Illinois*, where the government's actions broke up the family. 405 U.S. 645 (1971).

155. See *infra* notes 173 and 174 and accompanying text.

opportunity to re-enter the United States, realistically they are still deprived of the right to live with one of their parents.

IV. THE PROBLEM OF THE SINGLE DEPORTABLE PARENT AND ITS SOLUTION

The need for a solution to the problem of the single deportable parent stems from multiple sources. First, the courts are simply not equipped to offer a satisfactory resolution. Second, there are practical and humanitarian reasons for resolving the issue—for both the mixed status family and the immigration system itself. The ultimate proposed solution in this paper, to provide a ninety-day grace period to seek a custody determination, attempts to account for the myriad factors that must inform its ultimate shape.

A. *Problems Inherent in Leaving the Issue to the Courts*

Although courts will invariably do their best, the judicial system lacks certain key tools needed for an effective solution.¹⁵⁶ The courts function well when presented with wrongs to redress and violations of individual rights.¹⁵⁷ However, their ability to prevent future problems is limited to addressing future wrongs of the same genus in whatever case happens to be immediately before the court.¹⁵⁸ While this is fine in many cases, the problem of the single deportable parent demands to be prevented, not redressed after the fact.

Monica Castro's situation is illustrative of this point. In Monica's case, she was fortunate to reclaim her daughter after only three years.¹⁵⁹ When she first filed her claim, by far the most meaningful relief she sought was an injunction ordering the United States to help find her

156. The most important of these tools is the ability to fashion prospective solutions.

157. On the duties owed by a public official directed by law to perform a given task, Chief Justice Marshall said, "[b]ut where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Marbury v. Madison*, 5 U.S. 137, 166 (1803). Marshall says, in other words, that an individual wronged on an individual level by a nondiscretionary government action may seek redress in the courts.

158. That great strength of the courts noted in *supra* note 157 is also their great limitation. Courts lack jurisdiction to address issues relating to broader social ills—political questions. *Marbury*, 5 U.S. at 166.

159. Her good fortune in being torn from her daughter for a mere three years was no doubt lost on Monica Castro.

daughter.¹⁶⁰ Monica was limited to declaratory and monetary relief once her daughter was returned.¹⁶¹ The awkward inadequacy of the remedial measures demonstrates the need for a preventative solution.

The courts' involvement in the problem of the single deportable parent does nothing to resolve the problem that *any* custody decision by federal agents violates the principle of federalism.¹⁶² To say that doing nothing is not making a custody decision is to ignore that the practical effect is the same as deciding the child must go with the deportable parent.¹⁶³ Because the current state of the immigration regulations forces the Border Patrol to make impermissible de facto and de jure custody decisions, the courts' only redress is to resort to legal fiction declaring no custody decision has been made.¹⁶⁴

Any Circuit could address the problem of the single deportable parent differently from the Fifth Circuit. The differences of opinion between the judges of the Fifth Circuit demonstrate there is an array of possible outcomes.¹⁶⁵ Unless the Supreme Court decides the issue, inconsistency will be the inevitable result. Inconsistency raises numerous problems for a federal agency like the Department of Homeland Security.¹⁶⁶ Inconsistent judgments from courts mean inconsistent obligations for the Border Patrol based on what region it is operating in.¹⁶⁷ Uniformity is one of the reasons immigration is left in federal hands, and one of the reasons why the solution should originate from the Department of Homeland Security.¹⁶⁸

160. See *Castro v. United States*, No. C-06-61, 2007 U.S. Dist. LEXIS 9440, at *9-10 (S.D. Tex. Feb. 9, 2007), *rev'd*, 560 F.3d 381 (5th Cir. 2009), *rev'd en banc*, 608 F.3d 266 (5th Cir. 2010).

161. *Id.* at *12.

162. See *supra* note 145 and accompanying text.

163. In speaking of the *Castro* dispute, Professor Thronson states that “plainly, the operation of immigration effectively functioned to determine the custody of the child for the next three years.” Thronson, *supra* note 79, at 510. He also states that child custody “was effectively determined without process and without any consideration of the interests of the child.” *Id.*

164. See *supra* note 42 and accompanying text.

165. See *Castro*, 560 F.3d 381; *Castro*, 608 F.3d 266.

166. Avoiding inconsistency is one of the primary purposes of a singular immigration authority. See *infra* note 194 and accompanying text.

167. For example, the de facto deportation of a child in the single deportable scenario may raise no issues if taken in Texas, but could be deemed unconstitutional in California.

168. See U.S. CONST. art. I, § 8, cl. 4 (Congress shall have the power to “establish an uniform Rule of Naturalization. . .”); U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state where they reside. . . .”); and U.S. CONST. amend. XIV, § 5 (“Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

B. *The Need for a Solution*

A resolution to the problem of the single deportable parent is needed for a plethora of reasons. The problem produces unfair results for some members of mixed status families without any offsetting benefit. However, protecting parents and children from unwarranted harm is not the only reason to adopt a solution to the single deportable parent issue. The Department of Homeland Security and the Border Patrol also stand to benefit from guidance in future cases, preventing federalism problems inherent in having federal agents make de facto custody decisions, and avoiding litigation.

1. Uneven Application and Inequitable Results

It is too harsh to impose both deportation and a de facto custody determination in the problem of the single deportable parent. The current immigration system has inconsistent consequences for mixed status families, with scant reasons for those inconsistencies. In *Castro*, Omar received an unexpected benefit from his own deportation—he was effectively given custody of his child without ever seeking the benefit of a family court determination. The harsh results on affected families weigh in favor of adopting a solution to the problem of the single deportable parent. Monica Castro spent three years searching for her daughter when she was sent to Mexico with her father.¹⁶⁹ Others may be lucky to see their children again within a lifetime, much less actually obtain custody. Meanwhile, without a custody decision, there is no assurance the child's best interests are met. While Omar was not abusive to his daughter, future deported parents could be. Such parents could get the effects of a custody decision they never would have earned had there been an actual custody proceeding.

Those in R.M.G.'s position are American children—although it makes sense that they can be deportable-in-fact in very limited cases to keep families together,¹⁷⁰ breaking families up based on the immigration status of the parents is unsupportable.¹⁷¹ Regardless of whether any family member has broken the law, due process requires the State to

169. *Castro v. United States*, No. C-06-61, 2007 U.S. Dist. LEXIS 9440, at *11 (S.D. Tex. Feb. 9, 2007), *rev'd*, 560 F.3d 381 (5th Cir. 2009), *rev'd en banc*, 608 F.3d 266 (5th Cir. 2010).

170. The panel dissent recognized the importance of keeping a family together when both parents are deportable but the child is not. *Castro*, 560 F.3d at 396 (Smith, J., dissenting).

171. *See infra* note 201. Because alienage may be a suspect classification according to *City of Cleburn v. Cleburn Living Center*, it may well be that breaking up families because of their alienage violates equal protection, or is at least subject to strict scrutiny. 473 U.S. 432, 440 (1985).

meet a heavy burden before it may separate a family.¹⁷² The essence of substantive due process is that the State cannot invade certain protected areas without justification. This is a case where there is no sufficient justification for interfering with existing parental relationships. Because this is a situation where action and inaction have the same disruptive results, an affirmative solution is needed to avoid violations of due process and equal protection.

As the Supreme Court has recognized, when the law categorizes individuals by their immigration status, the lack of fault on the part of a minor child is constitutionally significant for purposes of equal protection.¹⁷³ The immigration system may be harsh, but it reserves its ire for those who break the law. For the most part it succeeds. However, not only was R.M.G. an innocent child, but also a United States citizen. She had done nothing to deserve de facto deportation.¹⁷⁴

2. Practical Concerns

There are a number of practical concerns for the Department of Homeland Security that weigh in favor of amending the immigration regulations to account for the single deportable parent issue. The source for many of these concerns is the probability of the recurring single deportable parent issue. Each time the scenario occurs, the Department will again have to face constitutional challenges and negative publicity. Worse still, it risks treading into the states' family law dominion, where federal agencies are unwelcomed intruders.¹⁷⁵

The problem of the single deportable parent is not limited to the unusual facts in *Castro*. It looms large over every mixed status family, whether or not the couple is married.¹⁷⁶ Because of the growth of the mixed status family,¹⁷⁷ the problem is bound to happen again.

172. See *Santosky v. Kramer*, 455 U.S. 745, 747 (1982) (to satisfy Due Process, where the state attempts to extinguish parents' custody rights, the burden of proof the state must bear of showing abuse cannot be less than clear and convincing).

173. *Plyler v. Doe*, 457 U.S. 202, 220 (1982). In *Plyler*, the Court struck down on equal protection grounds a Texas law refusing funding to school districts that did not spend money on education for legal resident children. *Id.* at 230. At the same time, undocumented aliens are not a suspect class for the purposes of equal protection. *Id.* at 219 n.19.

174. R.M.G. was not technically deported. However, the result was the same.

175. See *supra* note 145 and accompanying text; see also *Johns v. Dep't of Justice*, 653 F.2d 884, 894 n.26 (5th Cir. 1981).

176. As a recent Missouri case demonstrates, the problem may apply to a single parent whose child is the subject of a disputed adoption, as well. Tony Messenger, *Adopted boy at center of immigration dispute*, WWW.STLTODAY.COM (Nov. 10, 2010), http://www.stltoday.com/news/local/metro/article_3e99fc06-5fe5-56a6-9826-47b140bc41d1.html. In this news story, undocumented immigrant Encarnacion Romero's then one year old son was

The single deportable parent issue threatens litigation for the Department of Homeland Security each time it arises. Whether the Department wins or loses, it loses fees and costs every time the issue is litigated. Among the most troubling potential suits are those regarding the substantive Due Process rights of parents to raise their children, the procedural Due Process right to a procedure for determining custody, and Equal Protection¹⁷⁸ for mixed status families.¹⁷⁹ Causes of action under the FTCA,¹⁸⁰ or direct constitutional challenges of the practice, may be more successful than Monica's,¹⁸¹ given the right set of facts, and ought not be left out of the calculus.

There is a fair argument that de facto deportation in the problem of the single deportable parent is unconstitutional under Equal Protection, Due Process, or as unreasonable search and seizure. Monica herself made the argument, but its merits were never reached.¹⁸² Although avoiding unconstitutional acts is good for protecting personal liberties, there are also practical reasons to give unconstitutionality a wide berth. Firstly, there are costs associated with defending the suit. Further, those in the position of Monica Castro have a fair argument¹⁸³ that deportation of United States citizens is unconstitutional under doctrines protecting the liberty of parents to raise their child.¹⁸⁴

privately adopted by a local couple after Romero was arrested in an immigration raid. *Id.* The couple raised the child for four years before Romero challenged the adoption. *Id.* She based her challenge on the couple's failure to disclose prior criminal convictions, and the clear conflict of interest that arose when the couple hired an attorney to act on Romero's behalf. *Id.* Though not raised squarely by these facts, the need to determine the best interests of the child, whether for an adoption or parental custody, prior to deportation is central to the cases of both Romero and Monica.

177. See *supra* notes 112 and 118 and accompanying text.

178. Because immigration laws at the federal level are only subject to the rational basis review, the chances of the single deportable parent prevailing against the Border Patrol are lessened, but not eliminated. See Wishnie, *supra* note 145.

179. See *supra* Part III.D.2.

180. 28 U.S.C. §§ 1291, 1346, 1402, 2401, 2402, 2411, 2412, 2671-2680.

181. The Fifth Circuit affirmed dismissal of Monica's claims in *Castro v. United States*, 608 F.3d 266 (2010).

182. *Castro v. United States*, No. C-06-61, 2007 U.S. Dist. LEXIS 9440, at *9-10 (S.D. Tex. Feb. 9, 2007), *rev'd*, 560 F.3d 381 (5th Cir. 2009), *rev'd en banc*, 608 F.3d 266 (5th Cir. 2010).

183. Namely, Monica could argue the law separating her family is subject to strict scrutiny under the line of cases beginning with *Meyer v. Nebraska*, 262 U.S. 390 (1923); see also *supra* note 162. She could also argue the law as applied to her daughter is subject to heightened scrutiny for equal protection purposes under *Plyler v. Doe*, 457 U.S. 202 (1982).

184. *Troxel v. Granville* makes it clear parents have a strong right to raise their children free of interference by the state. Making de facto custody decisions and separating parents from their children could well be such interference. 530 U.S. 57 (2000).

The problem of the single deportable parent also raises the concern that the Department of Homeland Security is impermissibly acting in the states' sphere of family law by making de facto custody determinations. The Department and the Border Patrol are not empowered to make such determinations,¹⁸⁵ even with the sweeping power of the federal government to regulate immigration.¹⁸⁶ Unfortunately, both action and inaction by Border Patrol Agents may result in the same impermissible de facto custody determination.¹⁸⁷ The best way to avoid this is through the adoption of a solution that places the right to make a custody determination where it belongs: with a family court.

Border Patrol Agents like Sanchez need guidance when only one parent is deportable. Sanchez and his colleagues did their best, but as the District Court recognized, they were faced with a "difficult choice."¹⁸⁸ Although the implication of the statutes governing Border Patrol conduct is that only aliens may be deported,¹⁸⁹ at least two courts have found that deportation may be permissible.¹⁹⁰ Further, Border Patrol Agents need guidance in this area. The status quo forces agents to make ad hoc de facto custody decisions regarding children in the position of R.M.G.¹⁹¹ Inconsistent guidance by Circuit is not good enough, because inconsistency creates the same sort of uncertainty that led to the de facto deportation of R.M.G.

The Department of Homeland Security can preempt all of these problems by adopting the proposal contained in this paper. The status quo still leaves both the problems from the dissent and the majority of the *Castro* panel case.¹⁹² Further, the practice of deporting-in-fact United States citizens reflects poorly on the Department in a time of heated immigration debate. The practice of making de facto custody decisions also impermissibly treads on the states' family law dominion. Finally, Border Patrol Agents need guidance to deal with the problem effectively, and silent regulations led to the problem in the first place.

185. See *Johns v. Dep't of Justice*, 653 F.2d 884, 894 n.26 (5th Cir. 1981).

186. See *supra* note 144.

187. See *supra* note 42.

188. *Castro v. United States*, 2007 U.S. Dist. LEXIS 9440, at *23 (S.D. Tex. Feb. 9, 2007), *rev'd*, 560 F.3d 381 (5th Cir. 2009), *rev'd en banc*, 608 F.3d 266 (5th Cir. 2010).

189. See *supra* notes 130-32 and accompanying text.

190. See *Castro*, 2007 U.S. Dist. LEXIS 9440, and *Castro v. United States*, 608 F.3d 266 (5th Cir. 2010).

191. See *Castro v. United States*, 560 F.3d 381, 392 (5th Cir. 2009), *rev'd en banc*, 608 F.3d 266 (5th Cir. 2010).

192. *Id.*

C. *Closing the Gap in the Immigration Scheme*

In the interest of preventing issues in the future, the immigration regulations must be amended to account for the problem of the single deportable parent. The proposal itself needs to account for multiple factors. The most fundamental and important aspect of the proposal is its requirement of a custody determination where one parent is deportable and the child and other parent are not. Alternative proposals are also included in the interests of being thorough, to provide further context and opportunities for debate.

1. The Proposal

This Article's proposed solution¹⁹³ is a Department of Homeland Security regulation prohibiting deportation of a non-deportable child when one parent is deportable (under section 8 USC 1227 or any other applicable provision) and the other is not deportable, unless the deportable parent has a custody order in his or her favor. In the event neither parent has a custody order, deportation is stayed pending a valid custody ruling.¹⁹⁴ If neither parent obtains a permanent or temporary custody order within ninety days¹⁹⁵ of a final deportation order,¹⁹⁶ the child will be left in the custody of the non-deportable parent. During the

193. The proposed solution is designed to account for the constitutional rights of both parents and the child, the Border Patrol agents' need for guidance, the States' interest in retaining control over family law matters, the Department of Homeland Security's interest in a uniform immigration system that does not risk litigation, and society's interest in avoiding punishment of the innocent.

194. Joint physical or joint legal custody may be awarded, but the family court will need to be wary of the practical concerns facing the family, such as moving the child from parent to parent across national borders. Professor Thronson's accommodation model provides the best approach for a family court to take when considering a joint custody arrangement of some kind. *See supra* note 136. Some courts already consider factors like geographical proximity of the parents, which is particularly appropriate in the context of the problem of the single deportable parent. *See supra* note 72.

195. Admittedly, this grace period poses additional burdens on the Department of Homeland Security, including the possibility of a deportable parent taking advantage of the grace period to remain in the United States longer. With this in mind, the grace period is limited to ninety days—the same timeframe generally allowed from a final deportation order to removal under 8 U.S.C. § 1231 (a)(1)(A) (2006).

196. A final deportation order may be any of the following: the passing of thirty days from an Immigration Judge's oral or written decision, after which a notice of appeal to the Board of Immigration Appeals may not be filed pursuant to 8 C.F.R. § 1003.38 (b) (2010); a final decision of the Board of Immigration Appeals pursuant to 8 C.F.R. § 1003.1 (d)(7) (2010); or a review by the Attorney General pursuant to 8 C.F.R. § 1003.1 (h). This list need not be exhaustive. The purpose of this final decision rule is to give reasonable certainty that the single deportable parent is in fact deportable. Otherwise, there is a risk of needless custody determinations regarding a family that may not be split up.

ninety-day grace period, the non-deportable parent shall have temporary custody. If it is determined the non-deportable parent poses a flight risk, reasonable restrictions on travel may be imposed by the court.¹⁹⁷ If the parents can come to an agreement on who should have the child, they may sign a waiver allowing one parent to keep the child.¹⁹⁸

During the grace period, the child will be left in the custody of the non-deportable parent.¹⁹⁹ If that parent is determined to be a flight risk, the immigration court may order suitable travel restrictions for that parent.²⁰⁰ The deportable parent, meanwhile, should be detained or monitored in the same fashion he or she would be while awaiting deportation. The deportable parent should be given reasonable visitation opportunities.

Although R.M.G. and Monica were United States citizens, Omar and those in his position are entitled to the same constitutional protections over their rights to the children.²⁰¹ Any proposed solution has to account for his rights. Failure to do so will at least pose the same risk of litigation to the Department of Homeland Security. Accordingly, the Omars and Monicas of the world need to have a similar opportunity to seek custody of the child.

The proposed regulation should not limit its protection to natural parents.²⁰² Nothing about the problem of the single deportable parent is unique to natural parents, and the proposed solution must account for this reality. Further, the United States Supreme Court has accorded protection to nontraditional families.²⁰³ Adopted children need to be

197. The restriction on travel may need to be imposed on the child in some cases. The burden of proof to determine a parent is a flight risk should be on the State, with that burden being a preponderance of the evidence to compensate. The exact form and nature of the proceedings and enforcement is outside the scope of this paper, but practicality demands a place to start be suggested.

198. This is not an impermissible de facto custody determination because the parents are deciding who keeps the child, not the federal immigration authority. The purpose of this waiver provision is to alleviate some of the administrative burden on the courts and the Department of Homeland Security.

199. This is done primarily to avoid having the child detained with the deportable parent, as R.M.G. was. There is reason to believe that the non-deportable parent could be a better parent without the custody proceeding.

200. The form and enforcement such restrictions take is beyond the scope of this paper.

201. For discussion of the constitutional rights of undocumented immigrants in child-rearing, see *supra* Part III.D.2.

202. That is, biological parents—the birth mother and birth father.

203. See *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (holding that Due Process forbids a state from interfering with a grandmother's right to live with several grandchildren).

included.²⁰⁴ The Supreme Court has recognized encouraging adoption is a laudable goal,²⁰⁵ and it is worth protecting and fostering. The simplest way to account for all of the possible quasi parent-child relationships is to have a section of the proposed regulation enumerating those relationships which will be accorded protection. This objective could be done by adopting section 201 of the Uniform Parentage Act.²⁰⁶ A provision that allows protection for “parent-child relationships” could also be included.²⁰⁷

This solution is preferable because it balances conflicting values²⁰⁸ and accounts for the realities of the political and regulatory processes. It allows for United States citizen children to remain with their parents in the event both are deportable; even if the whole family has to be deported, at least the family stays together.²⁰⁹ A blanket prohibition on deportation of citizens would be both over-inclusive²¹⁰ and under-inclusive.²¹¹

The proposed solution also avoids ad hoc custody determinations,²¹² but limits the time the proceedings have to be held up to ninety days from a final custody determination. Although this additional process would seem to generate more proceedings, it also avoids future litigation over constitutional and FTCA suits. This solution also avoids federalism problems by having state courts make the

204. Children born out of wedlock should not be excluded, either. Moral concerns aside, the Supreme Court has struck down on Equal Protection grounds several laws that discriminate against children born out of wedlock. *See, e.g.,* *Trimble v. Gordon*, 430 U.S. 762, 769 (1977) (“[W]e have expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships.”); and *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972) (“[V]isiting this condemnation on the head of an infant is illogical and unjust.”) It is unlikely that a regulation affording protection to “legitimate” children only would pass judicial muster.

205. *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 872 (1992) (observation made in the context of permissible state avenues for discouraging abortion).

206. UNIF. PARENTAGE ACT § 201 (amended 2002).

207. The Uniform Probate Code makes a similar effort to account for the changing face of the American family. *See* UNIF. PROBATE CODE § 2-116 (amended 2008).

208. Specifically, it balances the family courts’ emphasis on the best interests of the child with the immigration system’s emphasis on regulatory efficiency. *See supra* note 148 and accompanying text.

209. This helps avoid the constitutional issues discussed in *supra* Part III.D.2.

210. Over-inclusive in the sense that a blanket prohibition would allow a citizen parent to keep the child even though the deportable parent has a custody order. Such a custody order would be there for a reason, and ought not be disturbed.

211. The same single deportable parent problem arises with children who are naturalized or otherwise not deportable, so a blanket prohibition would only address one way the issue might arise.

212. That is, custody determinations made without process. This also includes impermissible de facto custody determinations.

custody decision, rather than have a federal authority meddle in that realm. It may be less efficient than continuing to allow ad hoc custody determinations, but due process and other fundamental rights do not always follow the path of least resistance, or the path of highest efficiency.²¹³ It has to be remembered that this is a stop-gap provision for the unlikely but heart-wrenching event that other safeguards fail. This being an unlikely scenario also means it is less of a drain on the courts' dockets.

Finally, the proposed solution accounts for the political realities surrounding its passage. Because immigration is generally unpopular, the proposal could be attacked for being too soft on immigration. Regardless of how we may feel about immigration, however, it must be recognized that the proposal aims to protect United States citizens and legal residents as well as immigrants. We would expect the same for our citizens abroad. The opposite argument could also be made: that the proposal needlessly favors United States citizens. The proposal accounts for possible favoritism by requiring a determination following a neutral custody hearing.²¹⁴

The proposal will also be regulatory, and thus free from the problems of delay inherent in Congressional action due to bicameralism and presentment,²¹⁵ prolonged debate, riders, secret vetoes, and the like. While there is nothing wrong with vigorous debate over complex and contentious issues, in this scenario, the problems discussed are best avoided by the speediest possible resolution.

2. Alternative Proposals

Other potential proposals are not as effective. The alternative proposals were a blanket prohibition on the de facto deportation of a United States citizen or national child and a regulation preventing the Department of Homeland Security from leaving a United States citizen or national child with the deportable parent when there is a parent who is not deportable. Both solutions were rejected using the same criteria used to arrive at the proposed solution.

A blanket prohibition on leaving the child in a deported parent's custody fails for two key reasons: it fails to encompass the whole

213. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972).

214. Any problems with bias once the case reaches family court are not problems with the proposal itself. For a critique of the family law system's eagerness to consider immigration status in determining what is in a child's best interests, see Thronson, *supra* note 90, at 47.

215. U.S. CONST. art. I, § 7, cl. 2; U.S. CONST. art. I, § 7, cl. 3.

problem, and it risks disturbing existing family court determinations. A prohibition on leaving a United States citizen child with the deported parent ignores the naturalized child. It erects a barrier at the irrelevant line between citizens, who are here legally, and legal immigrants, who are also here legally. It should not matter why the child is not deportable—the fact the child is not deportable is sufficient. The prohibition also fails to resolve the question of with whom the child must go. It simply gives the child to the non-deportable parent, assuming erroneously that immigration status will always determine which parent is in the child's best interests.²¹⁶ Just as bad, it makes an impermissible intrusion into the state realm of family law.²¹⁷ Finally, simply allowing the non-deportable parent to keep the child could have the effect on annulling duly decided custody decisions.²¹⁸

A regulation preventing a deportable parent from taking the child with them runs into similar problems. While the two alternatives look similar, the difference is in the functional directness. This solution acts based on the immigration status of the parent and assigns custody accordingly, while the blanket prohibition acted based on the immigration status of the child and allowed the de facto custody decision to take place by the system's own silence on the subject. Even more than a blanket prohibition, this solution intrudes into the area of family law. Whereas the previous solution only issued a de facto custody decision if one parent was a United States citizen, this solution grants custody to any non-deportable parent, thereby increasing the number of family law matters it usurps. Additionally, while this solution accounts for existing custody decisions, it gives the deportable parent no chance to plead his or her case. In so doing it raises constitutional questions for that parent.²¹⁹

There are serious problems with the alternative solutions presented, but this paper is not intended to corner the market on solutions. What

216. Best interests and immigration status may be tenuously linked on rare occasions, but there is nothing about being undocumented that makes a parent inherently worse for the child. See Thronson, *supra* note 79, at 465-68 (discussing why immigration status is almost per se irrelevant to many family law considerations, including the best interests of the child). For a critique of the family court system's occasional practice of custody determinations based on immigration status without any consideration of the child's best interests, see Thronson, *supra* note 79, at 454.

217. See *supra* notes 145, 151, and 152 and accompanying text.

218. Whether annulling or ignoring the effect of these decisions, the effect is the same. This would be a more egregious intrusion into the states' family law territory because the decisions have already been made by a presumably competent family court. To ignore such decisions would clearly violate the principles articulated in *supra* note 145.

219. See *supra* notes 162-67.

matters is that a solution needs to be adopted that adequately accounts for the myriad concerns impacting this intersection of family and immigration law.

V. CONCLUSION

The consequences are severe for the current gap in immigration regulations. Parents facing the problem of the single deportable parent are torn from their children without the benefit of a custody hearing. Children like R.M.G. are ripped from their parents. Border Patrol agents are forced to make impossible choices without any guidance. Further, the Department of Homeland Security must defend lawsuits brought on by easily avoided tragedies. The harshness of the immigration system is amplified for those children who have committed no wrong, but have had the misfortune of being born into a mixed status family.

For those unlucky few who fall through the cracks, the size of the omission in the regulations matters little. Courts offer no uniform solution, and are limited to redressing the wrong after the fact. However, a single regulation could prevent any problems before they begin. The regulation proposed here is not a dramatic sea change. Nor is it a radical expansion of immigrants' rights.²²⁰ Instead, it builds on the existing regulatory and statutory framework to close a gap in the immigration system. The system has nothing to lose and everything to gain in adopting the proposed regulation, and the longer the delay the more likely the recurrence of the problem of the single deportable parent.

A child was ripped from its mother's arms so very long ago, and King Solomon had to summon all of his considerable wisdom to find the best parent for the child. The problem of the single deportable parent does not require a solution of his caliber. All it requires is the time and devotion to sift through the many concerns at issue, and the dedication to see it through. This country owes that much to those who cannot defend themselves. And just like Solomon's solution, no baby actually needs to be split at the end of the day.

220. Indeed, the regulation is concerned with protecting the rights of legal immigrants and United States citizens, and aims to curtail undocumented immigrants and citizens alike from benefitting from a loophole.