

In the Shadow of Child Protective Services: Noncitizen Parents and the Child-Welfare System

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ABSTRACT. This Essay argues that the noncitizen parent exists between two often-conflicting legal identities: that of an immigrant and that of a parent. In immigration law, the noncitizen parent is viewed as “immigrant” first. By contrast, the family law system privileges the parent-child relationship and the best interest of the child. Yet because of the realities indigent noncitizen parents face inside and out of family court, their identity as parents may be especially vulnerable. At nearly every juncture of a child-welfare proceeding, interaction with family court can expose a noncitizen parent—even one with legal status—to immigration enforcement. This Essay argues that as a player invested in the welfare of families, Child Protective Services should take an active role in shielding these parents from immigration consequences and ensure their immigration status does not disadvantage them in family court. In select cases, this would require intervening directly in criminal and immigration proceedings.

INTRODUCTION

In principle, noncitizen parents enjoy the same constitutional protection of their parental rights as citizen parents. In reality, however, this is not always the case. A parent’s immigration status shapes her interaction with the child-welfare system at every stage of a family court proceeding. This Essay argues that the indigent noncitizen parent exists between two often conflicting legal identities: that of an immigrant and that of a parent. In immigration law, the noncitizen parent is viewed as “immigrant” first.¹ By contrast, the family law system

1. Perhaps nowhere else was this demonstrated as explicitly as it was by the recent Trump Administration policy separating migrant families at the border. See Memorandum from Jefferson B. Sessions, Att’y Gen., to All Federal Prosecutors (Apr. 11, 2017), <https://www.justice.gov/opa/press-release/file/956841/download> [<https://perma.cc/X8NB-GJ4U>] (renewing the Justice Department’s commitment to “zero tolerance” on criminal immigration

theoretically privileges the parent-child relationship and the best interest of the child. Yet because of the realities indigent noncitizen parents face outside of family court, their identity as parents may be especially vulnerable. The confluence of these two legal regimes – and the fact that each field’s practitioners traditionally are siloed – creates problems for noncitizens in both areas of the law.

This Essay focuses on noncitizen parents facing neglect charges in the New York child-welfare system. As a *Yale Law Journal* Public Interest Fellow at The Bronx Defenders’ Family Defense Practice, I represent many indigent noncitizen parents in Bronx Family Court.² As time-constrained public defenders with heavy caseloads, my colleagues and I can grasp only so much of how immigration status interferes with our clients’ lives both in and out of court. Even so, we are witness to the myriad status-related injustices our noncitizen clients confront. And, as I recount below, we see that child-welfare proceedings expose our clients to immigration enforcement or otherwise jeopardize their legal status.

New York is fertile ground for the study of the interaction of immigration status and the child-welfare system for two reasons. First, the state has the second-highest immigrant population in the country,³ making it rich in case studies. Second, New York has adopted progressive policies related to immigrants, including some directly relevant to the child-welfare context.⁴ It is therefore

enforcement); see also Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken from Parents at U.S. Border*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html> [<https://perma.cc/944S-7W24>]. This Essay explores another space where forced family separations are ongoing, and where immigration status is underexplored: child protective cases.

2. Over thirty percent of Bronx residents were born abroad, *QuickFacts: Bronx County (Bronx Borough)*, New York, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/36005> [<https://perma.cc/DK5D-K68J>], and the immigration landscape of the borough is also diversifying rapidly, see, e.g., Liz Robbins, *Influx of West Africans in the Bronx Spurs Demand for Interpreters*, N.Y. TIMES (Nov. 26, 2015), <http://www.nytimes.com/2015/11/27/nyregion/influx-of-west-africans-in-the-bronx-spurs-demand-for-interpreters.html> [<https://perma.cc/B4K8-UE99>]. In nearly sixty percent of Bronx households, a language other than English is spoken at home. Noncitizen Bronx residents also live in greater poverty than either naturalized or native residents. *Selected Characteristics of the Native and Foreign-Born Populations: 2011-2015 American Community Survey 5-Year Estimates*, U.S. CENSUS BUREAU, https://factfinder.census.gov/bkmk/table/1.0/en/ACS/15_5YR/S0501/0500000US36005 [<https://perma.cc/2J24-95Q7>].
3. *A Portrait of Immigrants in New York*, OFF. N.Y. STATE COMPTROLLER 1 (Nov. 2016), https://www.osc.state.ny.us/reports/immigration/immigration_2016.pdf [<https://perma.cc/4HE2-B3FM>].
4. See, e.g., Office of the Mayor, *Exec. Order No. 41*, CITY N.Y. (Sept. 17, 2003), <https://www1.nyc.gov/assets/immigrants/downloads/pdf/eo-41.pdf> [<https://perma.cc/RPE8-X5S2>]; Office of the Mayor, *Exec. Order No. 120*, CITY N.Y. (July 22, 2008), <https://www1.nyc.gov/assets/immigrants/downloads/pdf/eo-120.pdf> [<https://perma.cc/4G6D-MKTD>]; N.Y.C.,

significant that recent studies⁵ reveal important shortcomings on the part of both the New York City Administration for Children's Services (ACS) and New York courts in grappling with status-related challenges.

Noncitizen parents are often exposed to child-welfare interventions on grounds of neglect that are intimately connected to their immigration status because this status constrains their ability to access social support systems. As Part I reviews, many noncitizen parents are ineligible for public benefits, while others face language and institutional barriers, as well as fears of immigration enforcement, which impede access to critical social services.

Once in family court, these parents – whose ability to provide for their children is undermined by rigid immigration laws – are paradoxically tasked with proving their fitness to parent. Part II discusses how these parents' immigration status often encumbers their ability to do so. Noncitizen parents face unique challenges in accessing preventive welfare services – services that already are ill-equipped to address immigration-related circumstances animating a child-welfare case. And, should Child Protective Services (CPS) remove their child, parents face further difficulty in completing already onerous reunification plans. Accordingly, children of noncitizen parents may be at higher risk of being removed from their parents' care and separated from them for extended periods of time.⁶

N.Y., LOCAL LAW 73 (2003), <https://www1.nyc.gov/assets/immigrants/downloads/pdf/local-law-73.pdf> [<https://perma.cc/2B34-KHCK>].

5. See e.g., *The Intersection of Immigration Status and the New York Family Courts*, FUND FOR MOD. CTS. (2015), <http://moderncourts.org/wp-content/uploads/2014/03/Modern-Courts-Statewide-Report-The-Intersection-of-Immigration-Status-and-the-New-York-Family-Courts.pdf> [<https://perma.cc/Q38F-8XXM>] (“Unfortunately, despite the fact that questions relating to legal status arise on a regular basis in the New York family courts, there is (1) no systematic approach training judges and advocates to recognize and deal with these questions in a consistent and comprehensive manner; (2) no broad government outreach to the undocumented community to explain their rights in family court regardless of legal status; and (3) no funding from the State of New York to support the messaging and training needed to ensure that individuals, advocates, judges, court officers and clerks are aware of the importance of immigration-related issues in family court proceedings.”); Ilze Earner, *Immigrant Families and Public Child Welfare: Barriers to Services and Approaches for Change*, 86 CHILD WELFARE 63, 84 (2007).
6. In part because of the shortened timeframe set out by the Adoption and Safe Families Act (ASFA) for the termination of parental rights, see *infra* Section II.B, immigration status may also contribute to the outright elimination of noncitizens' legal rights to their children through a proceeding called Termination of Parental Rights (TPR). See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115. In this Essay, I do not focus on TPR cases due to space constraints. But terminations do not occur without initial Child Protective Services (CPS) involvement. Moreover, a singular focus on termination cases does not do justice to the harms entailed in a child's very removal, even when temporary, or in the extended separations to which mixed-status families may be particularly susceptible. Also, many years will have lapsed before a termination hearing. During this time, the child may have bonded with the foster parent and grown more distant from the respondent parent. Thus, at

Furthermore, as Part III outlines, it is possible that children of noncitizen parents are likelier to be placed in foster care with strangers, with detrimental effects on the parent-child relationship and the child-welfare case. Thus, compromised by immigration and public welfare laws that pivot on a parent's non-citizen status, the mixed-status family is further imperiled by the child-welfare system.

In Part IV, I explain that the confluence of the two legal regimes is problematic on both sides: not only do immigration circumstances contribute to poor outcomes in child-welfare cases, but involvement in the child-welfare system may also impede the ability of members of a mixed-status family to stabilize their immigration statuses. And at nearly every juncture of a child-welfare proceeding, interaction with family court can expose a parent – even one with legal status – to immigration enforcement.

What should change? And perhaps just as critically: who should lead these changes? The Administration of Children's Services assumes the ostensible mantle to “[k]eep[] NYC children & families safe & well.”⁷ Yet this Essay is replete with examples of how the agency falls short of its mandate for mixed-status families, because of information-sharing structures and inadequate caseworker training, among other realities. There are also federal constraints: due to federal disclosure laws,⁸ an agency cannot lawfully prevent its employees from reporting unauthorized parents to immigration officers. New York now has a “don't ask” policy, with some exceptions.⁹ But in some of my clients' eyes, ACS is simply, and inescapably, the Government. And not simply any Government: for the noncitizen parent, this Government may recall the repressive regime they fled, or the deportation apparatus that increasingly looms in their conscience.

the termination stage, judges contend with different circumstances and considerations, and may be even more reluctant to find against the agency. It is the status-related factors that propel mixed-status families to the stage with which this Essay is concerned.

7. *About ACS*, N.Y. ADMIN. FOR CHILD. SERV., <https://www1.nyc.gov/site/acs/about/about.page> [<https://perma.cc/7QPC-2NEC>].
8. *See, e.g.*, 8 U.S.C. § 1644 (2018) (“Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.”).
9. *See Exec. Order No. 41, supra* note 4; *see also* Elizabeth M. McCormick, *Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement and A Poor Substitute for Real Reform* 20 LEWIS & CLARK L. REV. 165, 189 (“A number of jurisdictions, including New York City in the aftermath of the court's decision here, have put in place ‘don't ask’ provisions, presumably with the purpose of limiting the collection of immigration-related information that would be subject to the voluntary disclosures encouraged by §§ 1644 and 1373. New York City's Executive Order 41, still in effect today, no longer prohibits immigration-related information sharing but instead prohibits city employees, except in limited circumstances, from inquiring about immigration status.”).

Despite these hurdles, a well-trained, culturally competent caseworker who is versed in the difficulties mixed-status families face can be critical to the outcome of a child-welfare case. More significantly, comprehensive legal representation – a representation attuned to status-specific obstacles and pitfalls in family court proceedings and guarded by client-attorney confidentiality – might be necessary to address the anti-family structures of these different legal regimes.

But beyond culturally competent advocacy, we must also grapple with the meanings of “family” and “child welfare” themselves. If our laws and policies are truly to promote the value of family unity, improved representation and casework alone is not enough. The legal and policy scaffolding of the New York child-welfare system itself must be revamped to rigorously – and affirmatively – combat the harms wreaked by the immigration system on families.

I. INITIAL CONTACT WITH THE CHILD-WELFARE SYSTEM: ALLEGING NEGLECT

As a public defender, I meet most of my clients at intake, the Bronx Family Court’s equivalent to the criminal arraignment process. Handed a petition that lays out allegations of child neglect, I typically have less than fifteen minutes to speak to a respondent parent until we go before a judge. In our crisis-driven practice, we often meet parents on their very worst day: their child may already have been removed, and they may be facing exclusion from their household (frequently resulting in homelessness). Some parents have had ACS involved in their lives for months, while others are confronting the system for the very first time. During intake, I have little time to pause and consider how a client’s immigration status may have played a role in bringing her to court.

From a legal perspective, whether or not immigration status plays a role in the initiation of neglect proceedings matters.¹⁰ In New York, a neglected child is

10. This Essay looks exclusively at neglect cases, for several reasons. Neglect cases are by far the most common charges of child maltreatment. See, e.g., Children’s Bureau, *Child Maltreatment 2016: Summary of Key Findings*, U.S. DEP’T HEALTH & HUM. SERVS. 3 (July 2018), <https://www.childwelfare.gov/pubPDFs/canstats.pdf> [<https://perma.cc/9CSY-9XQ9>]. Child neglect cases make up all but a few of my seventy-plus cases as a first-year attorney. Neglect is also a very broad term (some have argued that it is unconstitutionally vague, see, e.g., Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1146, 1160 (2016)), encompassing causes of action ranging from a child’s material welfare and supervision to a parent’s failure to protect him. Moreover, poverty underlies many neglect allegations. See, e.g., Lina S. Millett, *The Healthy Immigrant Paradox and Child Maltreatment: A Systematic Review*, 18 J. IMMIGRANT & MINORITY HEALTH 1199, 1200 (2016). A focus on neglect cases thus has the potential to highlight the ways in which the interplay of public welfare law (e.g., restrictions on welfare) and immigration law (e.g., restrictions on movement) expose a noncitizen parent to child neglect charges.

one “whose physical, mental or emotional condition has been impaired or is in the imminent danger of becoming impaired as a result of the failure of his parent . . . to exercise a minimum degree of care.”¹¹ Under New York case law, a “minimum baseline of proper care for children [is one] that all parents, *regardless of lifestyle or social or economic position*, must meet.”¹²

Both the decision to remove a child and the decision to refer a case to family court contemplate the family’s needs and whether preventive services successfully addressed them. Immigration status plays a role in these determinations. While appellate courts throughout the country agree that immigration status alone cannot form a basis for a finding of neglect,¹³ a “parent’s immigration status may contribute toward circumstances that present an ‘imminent danger of abuse or neglect’ for the child,”¹⁴ which is also the standard ACS must meet to justify a child’s removal.¹⁵ In New York, a finding of neglect requires a showing not only of actual or imminent physical or emotional harm to a child, but also a causal connection to a parent’s failure to exercise a minimum degree of care.¹⁶ Thus, the ways in which a parent’s legal status interferes with her efforts to provide care may be dispositive in a child-welfare case and may impact the preservation of family integrity. The causes of action for neglect under New York law illuminate the vulnerabilities a parent’s immigration status can create.¹⁷

11. N.Y. FAM. CT. ACT § 1012(f) (McKinney 2018).

12. *Matter of Antonio N.N.*, 812 N.Y.S.2d 176, 176 (App. Div. 2006) (emphasis added).

13. Ana Laquer Estin, *Global Child Welfare: The Challenges for Family Law*, 63 OKLA. L. REV. 691, 707 (2011).

14. *Id.* (quoting *Marina P. v. Ariz. Dep’t of Econ. Sec.*, 152 P.3d 1209, 1214-15 (Ariz. Ct. App. 2007)).

15. N.Y. FAM. CT. ACT §§ 1027, 1028.

16. *Id.* § 1012(f).

17. A fascinating literature explores the effect of immigration status on child neglect reporting and disposition rates. At first glance, immigration status, like poverty, might seem to be positively correlated with CPS involvement. Many of the factors correlated with CPS involvement—low neighborhood income, high family poverty, and low parental education, *see, e.g.*, Millet, *supra* note 10, at 1200, are also characteristics of many mixed-status families, *see, e.g.*, Randy Capps, Michael Fix & Jie Zong, *A Profile of U.S. Children with Unauthorized Immigrant Parents*, MIGRATION POL’Y INST. (2016). More recent quantitative and qualitative studies, however, suggest that where legal status is at issue, the usual poverty-child-welfare correlation may not be so linear. *See, e.g.*, Alan J. Dettlaff & Megan Finno-Velasquez, *Child Maltreatment and Immigration Enforcement: Considerations for Child Welfare and Legal Systems Working with Immigrant Families*, 33 CHILD. LEGAL RTS J. 37, 42 (2013); Millet, *supra* note 10. Because of space constraints, I do not attempt to synthesize their findings, which, due to the dearth of data about noncitizens in the child-welfare system, are far from conclusive.

A. *Failure to Supply Adequate Food, Clothing, Shelter or Medical Care*

Immigrant parents' financial situation, coupled with their limited access to public benefits,¹⁸ affects their ability to "exercise a minimum degree of care" in providing for their children's basic needs. For example, parents with unauthorized status overwhelmingly work in low-paying sectors and are subject to higher risk of employer abuse and labor law violations.¹⁹ Despite facing extreme poverty, however, these parents do not have access to most subsistence assistance. For instance, unauthorized immigrants are ineligible for: the Supplemental Nutrition Assistance Program (SNAP), otherwise known as food stamps; Medicaid, except for in emergency conditions; Temporary Assistance for Needy Families (TANF); Supplemental Security Income (SSI); Home Energy Assistance Program; and they have restricted access to housing programs.²⁰ Legal permanent residents are similarly ineligible for some of these benefits for their first five years of legal residence,²¹ a time when they may be most needy.

Compounding parents' ineligibility for numerous programs are immigration-related obstacles that result in low participation rates in programs for which they, or their children, may be eligible. For example, both the application and eligibility verification processes may present steep challenges for parents who are less educated or have limited English or computer literacy.²² Noncitizen parents also face difficulties in providing the requisite documentation, including certifications of income or employment and birth certificates for noncitizen children.²³

Access barriers generated by immigration-related fears are even starker. New findings document that under the Trump Administration, noncitizen parents are increasingly reluctant to enroll in publicly funded programs, such as food stamps or the Women, Infants, and Children Program (WIC), another federal food aid program, out of fear that their information will be shared with immigration

18. See Cecilia Ayón, *Economic, Social, and Health Effects of Discrimination on Latino Immigrant Families*, MIGRATION POL'Y INST. 13-15 (2015).

19. *Id.* at 5-10.

20. See, e.g., ALISON SISKIN, CONG. RESEARCH SERV., RL33809, NONCITIZEN ELIGIBILITY FOR FEDERAL PUBLIC ASSISTANCE: POLICY OVERVIEW (2016), <https://fas.org/sgp/crs/misc/RL33809.pdf> [<https://perma.cc/2R3A-DJCR>]; *Guide to Public Benefits for Immigrants*, OFF. N.Y. CITY PUB. ADVOC. (2008), <http://www.nyc.gov/html/records/pdf/govpub/moved/pubadvocate/PA002ImmigrantGuidewebv6.pdf> [<https://perma.cc/5WHB-N2BJ>].

21. SISKIN, *supra* note 20.

22. *Id.* at 13-15.

23. *Id.* at 14. Relatedly, these documents may vary by country and even province, further confusing staff. *Id.*

officials or will result in the denial of their immigration applications.²⁴ “Illegality” is experienced as a family unit, as eligible members of mixed-status families are deterred from applying for benefits when they are required to provide sensitive information about other family members who may not have legal immigration status.²⁵ Families may also fear—in some states, justifiably²⁶—that social service providers will report unauthorized family members to immigration authorities.²⁷ Additionally, noncitizens may increasingly be wary of the immigration consequences of receiving welfare benefits.²⁸

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24. Wendy Cervantes et al., *Our Children’s Fear: Immigration Policy’s Effects on Young Children*, CTR. L. & SOC. POL’Y 14-16 (Mar. 2018), https://www.clasp.org/sites/default/files/publications/2018/03/2018_ourchildrensfears.pdf [<https://perma.cc/PCC5-S9B8>]; see also Samantha Artiga & Petry Ubri, *Living in an Immigrant Family in America: How Fear and Toxic Stress are Affecting Daily Life, Well-Being, & Health*, HENRY J. KAISER FAM. FOUND. (Dec. 2017), <http://files.kff.org/attachment/Issue-Brief-Living-in-an-Immigrant-Family-in-America> [<https://perma.cc/XF44-JDGK>]; Edward D. Vargas & Maureen A. Pirog, *Mixed-Status Families and WIC Uptake: The Effects of Risk of Deportation on Program Use*, 97 SOC. SCI. Q. 555 (2016) (finding a “chilling effect” of a parent’s deportability on WIC uptake). A policy change recently proposed by the Trump Administration would not only severely raise the immigration consequences of use of public benefits, see *infra* note 29 and accompanying discussion, but also “increase confusion and fear among all legal immigrant families about using public programs for themselves and their children, regardless of whether they are directly affected by the policy changes.” *Proposed Changes to “Public Charge” Policies for Immigrants: Implications for Health Coverage*, HENRY J. KAISER FAM. FOUND. (Feb. 13, 2018), <https://www.kff.org/disparities-policy/fact-sheet/proposed-changes-to-public-charge-policies-for-immigrants-implications-for-health-coverage> [<https://perma.cc/N7RC-T3CA>] [hereinafter “*Proposed Changes*”].
25. Vargas & Pirog, *supra* note 24. Even where such information is not required for all family members, confusion—from the parent or the benefits office—discourages parents from applying. *Id.*; see also Cecilia Ayón & David Becerra, *Mexican Immigrant Families Under Siege: The Impact of Anti-Immigrant Policies, Discrimination, and the Economic Crisis*, 14 ADVANCES IN SOC. WORK 206, 208-09 (2013) (noting perceived or actual discrimination’s deleterious effects on Latino immigrants’ access to health care); cf. *Policy Guidance Regarding Inquiries into Citizenship, Immigration Status and Social Security Numbers in State Applications for Medicaid, State Children’s Health Insurance Program (SCHIP), Temporary Assistance for Needy Families (TANF), and Food Stamp Benefits*, U.S. DEP’T HEALTH & HUM. SERVS. (Sep. 21, 2000), <https://www.hhs.gov/sites/default/files/triagencyq%26as.pdf> [<https://perma.cc/R7GT-GV66>] (noting that immigrant families may be “deterred from seeking benefits.”).
26. See Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C. J.L. & SOC. JUST. 63, 95-96 (2012) (recounting a case where first an undocumented young mother, then her parents, were deported after a group contracted by the Florida Department of Children and Families called Immigration Customs and Enforcement to supervised visits).
27. While these practices do not apply strictly to children or parents without legal status, “they nonetheless affect [noncitizen children] in very real (and detrimental) ways,” including in those discussed above. John A. Castro, *Second-Class Citizens: The Schism Between Immigration Policy and Children’s Health Care*, 37 HASTINGS CONST. L.Q. 199, 208 (2009).
28. Under the current public charge policy, immigration officials can consider use of *cash* public assistance in determining whether a noncitizen should be inadmissible or denied legal status;

Validating these fears, on September 21, 2018, the Trump Administration announced new regulations that would penalize undocumented immigrants who use public benefits—including food assistance and housing vouchers. Under these new regulations, public benefits use would constitute “heavily weighed negative factors” when immigrants apply for permanent resident status.²⁹

These realities—whether directly or indirectly driven by immigration and public welfare policies—have repercussions for the material welfare of children.³⁰ Children’s nutritional health is one representative example. A recent study chronicling the barriers faced by SNAP-eligible children from mixed-status families concluded that “[f]or approximately two million low-income United States Citizen (USC) children, applying for SNAP may jeopardize their families and home life.”³¹ SNAP mandates reporting to United States Citizenship and Immigration Services (USCIS) undocumented individuals identified during the application process.³² Federal guidance calls for states to accommodate eligible members of mixed-status families, but many have failed to implement these guidelines.³³ Unsurprisingly, only fifty-five percent of eligible children who have noncitizen parents receive SNAP.³⁴ Children of immigrants also are at risk of

but they do not consider use of *benefits* by family members. Conversely, under President Trump’s draft proposed rule, officials could consider a variety of benefits used—including Medicaid, CHIP, SNAP, WIC—as well as use by family members, such as citizen children. See *Proposed Changes*, *supra* note 24.

29. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114, 51198-201 (proposed Oct. 10, 2018).
30. See Qingwen Xu, *In the “Best Interest” of Immigrant and Refugee Children: Deliberating on their Unique Circumstances*, 84 CHILD WELFARE 747, 763-64 (2005). Such policies undermine immigrant parents’ ability to provide adequately for their children’s nutritional health. See Ariel Kalil & Jen-Hao Chen, *Mothers’ Citizenship Status and Household Food Insecurity Among Low-Income Children of Immigrants*, in BEYOND THE FAMILY: CONTEXTS OF IMMIGRANT CHILDREN’S DEVELOPMENT 43 (Hirokazu Yoshikawa & Niobe Way eds., 2008). A 2016 study tied risk of deportation and an anti-immigrant climate with a lowered uptake of WIC, to which mixed-status families are eligible. Vargas & Pirog, *supra* note 24.
31. Johanna A. Schmidt, Note, *How to Feed the Children: Rethinking and Building Tangible Policy Recommendations for Providing Supplemental Nutrition Assistance Program (SNAP) Benefits to Children in Mixed-Immigration Status Families*, 24 GEO. J. ON POVERTY L. & POL’Y. 287, 287 (2017).
32. *Id.* at 288 n.9.
33. *Id.* at 288 n.11 and accompanying text.
34. *Id.* at 288 n.15 and accompanying text (citing a figure from the United States Department of Agriculture). News outlets have reported a rise in SNAP cancellations among immigrants in the first months of the Trump Administration. See, e.g., Pam Fessler, *Deportation Fears Prompt Immigrants to Cancel Food Stamps*, NAT’L PUB. RADIO (Mar. 28, 2017), <https://www.npr.org/sections/thesalt/2017/03/28/521823480/deportation-fears-prompt-immigrants-to-cancel-food-stamps> [<https://perma.cc/YU5B-5FWM>].

residing in overcrowded housing due to lack of financial resources and benefits ineligibility.³⁵

The lived experience of the mixed-status family also is relevant to medical-neglect cases. Even though New York children in low-income families are eligible for Children's Health Insurance Program (CHIP) regardless of immigration status,³⁶ immigration-related fears dampen participation in both this program and Medicaid.³⁷ A 2015 study found that increased risk of deportation is associated with decreased Medicaid use.³⁸ Such fears also dissuade some undocumented immigrants in New York from going to free health clinics.³⁹ The various legal statuses within a mixed-status family may also shape decisions about medical care. "[S]tratifed access to care based on legal status may usurp the family dynamic,"⁴⁰ with parents choosing to eschew services altogether to avoid intra-family disparities in treatment, or choosing to share medication between eligible and ineligible relatives. And because parents' own health care usage is a strong predictor of that of their children,⁴¹ the low usage by undocumented parents only lessens the likelihood their children receive health care as well.

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35. Filomena M. Critelli, *Parenting in a New Land: Specialized Services for Immigrant and Refugee Families in the USA*, 16 J. INT'L MIGRATION & INTEGRATION 871, 874 (2014).
36. New York is only one of a handful of states to extend this benefit to undocumented children. See Esther Yu Hsi Lee, *Thousands of Undocumented Kids Can Now Enroll in Health Care Coverage*, THINKPROGRESS (May 17, 2016), <https://thinkprogress.org/thousands-of-undocumented-kids-can-now-enroll-in-health-care-coverage-ec232cbfco20> [<https://perma.cc/7L8D-BGGR>].
37. Susan Mapp & Emily Hornung, *Irregular Immigration Status Impacts for Children in the USA*, 1 J. HUM. RTS. & SOC. WORK 61, 63 (2016).
38. Edward D. Vargas, *Immigration Enforcement and Mixed-Status Families: The Effects of Risk of Deportation on Medicaid Use*, 57 CHILD. YOUTH SERVS. REV. 83, 87-88 (2015); see also Marc L. Berk & Claudia L. Schur, *The Effect of Fear on Access to Care Among Undocumented Latino Immigrants*, 3 J. IMMIGRANT HEALTH 151, 151 (2001) (finding that "39% of the undocumented adult immigrants expressed fear about receiving medical services because of undocumented status[, and that t]hose reporting fear were likelier to report inability acquiring medical and dental care, prescription drugs, and eyeglasses"); Cynthia Z. Maldonado et al., *Fear of Discovery Among Latino Immigrants Presenting to the Emergency Department*, 20 ACAD. EMERGENCY MED. 155 (2013) (analyzing the nature and sources of immigrant fear).
39. See Benedict Moran, *Undocumented Immigrants Scared to Seek Free Health Care*, HUFFINGTON POST (Mar. 18, 2010 5:12 AM), https://www.huffingtonpost.com/benedict-moran/undocumented-immigrants-s_b_376032.html [<https://perma.cc/HL7C-7U9M>].
40. Mapp & Hornung, *supra* note 37, at 64.
41. Karla L. Hanson, *Is Insurance for Children Enough? The Link Between Parents' and Children's Health Care Use Revisited*, 35 INQUIRY 294, 294 (1998).

B. Excessive Corporal Punishment

Another ground for neglect is the alleged use of excessive corporal punishment.⁴² Here, too, the immigration experience of parents may play a role—though admittedly one more of correlation than causation. Excessive corporal punishment is defined as a parent’s unreasonable infliction of punishment, usually physical, on a child.⁴³ Many cultures, however, employ corporal punishment that might be deemed “excessive” under New York case law. Indeed, studies have reported on the relative prevalence of authoritarian parenting styles, including the use of corporal punishment, among noncitizen parents.⁴⁴ Immigrant parents are generally less aware of American norms or of the reach and practices of CPS. Thus, they may not be on notice as to what corporal punishment may be “excessive” by American standards. Nonetheless, in New York, a single incident, if severe enough, may constitute neglect.⁴⁵

ACS removed the children of one of my clients following her alleged use of excessive corporal punishment. Tara,⁴⁶ my client, is a legal permanent resident who only arrived in the United States in the last couple years. Immediately upon meeting me at intake, Tara exclaimed that she did not know this form of discipline was prohibited in the United States, and that it was prevalent in her home country. She swore she would never discipline her child in the same way again, and immediately began engaging in a service plan—parenting, anger management, counseling—that ACS had laid out to demonstrate her “rehabilitation.” Almost half a year later, however, Tara’s children are still out of her care; her ability to acknowledge and “take responsibility” for what happened are constrained by a parallel criminal case and looming, if latent, immigration consequences. As Part IV will recount, creating a record (even on minutiae such as country of origin) can have dire immigration consequences. But in family court, these status-related constraints can simultaneously work to silence parents’ stories. Forgoing an emergency hearing precisely to avoid such a record, Tara relented to following the slow timeline set by the court.

42. N.Y. FAM. CT. LAW § 1012(f)(i)(B) (McKinney 2018).

43. *Id.* § 1012(f)(i)(B) cmt. 4(e).

44. Alan J. Dettlaff, *Immigrant Children and Families and Child Welfare*, in *CHILD WELFARE PRACTICE WITH IMMIGRANT CHILDREN AND FAMILIES* 1, 6 (Alan Dettlaff & Rowena Fong eds., 2014).

45. See, e.g., *In re Steven M.*, 931 N.Y.S.2d 720, 723 (App. Div. 2011).

46. All client names are pseudonyms.

C. *Inadequate Supervision*

Under New York law, neglect can also be found when a parent has failed to exercise proper supervision of a child. Such cases include parents who have left their children alone for an extended period or with an inappropriate caretaker.⁴⁷

The immigration status of noncitizen parents contributes to the risk of neglect findings on the grounds of inadequate supervision.⁴⁸ While immigrant parents, especially undocumented workers, are subject to longer and more unpredictable working hours, they also have less access to childcare support systems due to financial, language, or other status-related barriers to public benefits.⁴⁹

Culture plays a role here too. In some cultures, young children are relied upon to care for their younger, even infant, siblings.⁵⁰ The migration experience of recent immigrants may further exacerbate this trend, with children serving as “culture brokers” between the parents and the new society, with children taking on significant responsibilities related to family functioning.⁵¹ Indeed, some have observed how these two contexts—the migration experience and cultural parenting norms—interact to reinforce reliance on children for supervision. “[I]mmigrant families draw on pre-migration frameworks and practices as ‘coping strategies’” in the face of “family instability and the need for increased resources and social support.”⁵²

D. *“Failure to Protect” Cases*

Relying on a “catch-all” provision of the Family Court Act, ACS also brings neglect actions for “failure to protect.”⁵³ These cases contemplate several different scenarios. First, despite positive steps in New York to address domestic

47. See, e.g., *In re Elijah J.*, 963 N.Y.S.2d 77 (App. Div. 2013).

48. See Michelle Johnson-Motoyama, *Does a Paradox Exist in Child Well-Being Risks Among Foreign-Born Latinos, U.S.-Born Latinos, and Whites? Findings from 50 California Cities*, 38 CHILD ABUSE & NEGLECT 1061, 1069 (2014).

49. See Carol Hafford, *Sibling Caretaking in Immigrant Families: Understanding Cultural Practices to Inform Child Welfare Practice and Evaluation*, 33 EVALUATION & PROGRAM PLAN. 294, 297 (2010).

50. See Tracy Vericker et al., *Latino Children of Immigrants in the Texas Child Welfare System*, 22 AM. HUMANE 20, 24 (2007).

51. Hafford, *supra* note 49, at 295, 297.

52. *Id.* at 297.

53. N.Y. FAM. CT. ACT § 1012(f)(i)(B) (stating that a child is “neglected” if the guardian has not “provid[ed] the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm” (emphasis added)).

violence,⁵⁴ a “failure to protect” case may still be brought against a victim of domestic violence herself if the violence occurred in front of her child.⁵⁵ Second, a parent may “fail to protect” a child against neglect perpetrated by another household member.⁵⁶ In both cases, immigration status can play a role in the ultimate disposition of a case.

For a noncitizen victim of domestic violence, her immigration status may inform her response. The legal, social, and financial barriers present in many cases of domestic violence are exacerbated when immigration status is at issue, as immigrant women may have even more limited social and financial support systems.⁵⁷ In addition, the looming possibility of deportation and fear of authorities might deter her from reporting domestic violence.

For similar reasons, noncitizen parents may be deterred from reporting or intervening in a child’s abuse or neglect at the hands of another caregiver. A recent New York case is illustrative. A child had allegedly been abused by his stepfather, resulting in a broken leg. However,

[o]n the way to the hospital in a taxi, [the step-father] told [the mother] that they would have to lie about what happened . . . or else he would call immigration authorities and have her deported. She was reliant on [him] to have her legal residency extended from the two-year visa she had at that time.⁵⁸

Thanks to an attentive attorney and a judge receptive to coercive immigration realities – and possibly because the mother left the abusive relationship soon

54. The most important of these have been changes in family courts’ approaches to domestic violence. See, e.g., *Nicholson v. Scopetta*, 3 N.Y.3d 357 (2004) (holding that a parent who is the victim of domestic violence does not neglect her child merely by exposing that child to domestic violence). The creation of the New York City Mayor’s Office to Combat Domestic Violence is another positive development. See *About the Commissioner*, NYC MAYOR’S OFFICE TO END DOMESTIC & GENDER-BASED VIOLENCE, <https://www1.nyc.gov/site/ocdv/about/about-the-commissioner.page> [<https://perma.cc/E9CL-7K3C>].

55. See, e.g., Lynn F. Beller, *When in Doubt, Take Them Out: Removal of Children from Victims of Domestic Violence Ten Years After Nicholson v. Williams*, 22 DUKE J. GENDER L. & POL’Y 205, 238 (2015) (noting the agency’s continued practice of “alleg[ing] neglect against battered mothers, who are much easier targets than those who perpetrated the family violence). These cases typically are brought as “failure to protect-plus” cases, with additional allegations in the petition (e.g., the victim failed to leave the home; the victim admitted smoking to marijuana; etc.).

56. See, e.g., *In re Scott G.*, 508 N.Y.S.2d 669 (App. Div. 1986).

57. See Ijeoma Nwabuzor Ogbonnaya et al., *Domestic Violence and Immigration Status Among Latina Mothers in the Child Welfare System: Findings from the National Survey of Child and Adolescent Well-Being II (NSCAW II)*, 39 CHILD ABUSE & NEGLECT 197, 203 (2015).

58. *Carlos P. v. Rafael P.*, 2014 WL 7482169, at *3 (N.Y. Fam. Ct. Dec. 23, 2014).

after this incident—the charges against the mother were dismissed. But judges often rule the other way, and many seem to conceive of immigration-related vulnerabilities as intractable barriers to parents’ ability to protect their children.⁵⁹

* * *

Focusing on the mixed-status family specifically illustrates how immigration law weakens a family’s integrity, even prior to entry into the child-welfare system. Public policies redraw dependency lines and shape family decisions and relationships. For instance, public welfare law undermines the mixed-status family by conditioning eligibility on immigration status, atomizing the family unit. Through “sponsor deeming”⁶⁰ and by conditioning status on spousal relationships, for example, immigration law traps many noncitizens within cycles of poverty and in coercive situations. In all these ways, the experience of the indigent mixed-status family exemplifies how a parent’s precarious legal status compromises family unity and welfare.

II. IMPROPER AND EXTENDED REMOVALS OF NONCITIZEN PARENTS’ CHILDREN

This Part analyzes the continued salience of noncitizen parents’ immigrant identity in the possible next stages of a child-welfare proceeding: removal of a child and a family’s reunification. This Part tracks the tension between noncitizen parents’ dual identities, drawing on growing evidence that mixed-status families may be more susceptible to adverse case outcomes.⁶¹

A. Background on Removal and Reunification

In a child-welfare proceeding, one of the most significant decisions is whether a child will be removed from his or her parent’s care. A child’s removal is not only excruciating for the family but also significant for the ultimate legal

59. For example, a Massachusetts appellate court affirmed a finding of unfitness that considered a father’s immigration status. The court noted that his “immigration status explained his dependence on the mother and his tolerance for the mother’s drug addiction notwithstanding its obviously harmful effects on the children.” *In re Adoption of Leilani*, No. 09-P-1511, 2010 WL 889941, at *2 (Mass. App. Ct. Mar. 15, 2010).

60. Many immigrants who apply for green cards through a family member are required to have a sponsor sign an “affidavit of support.” “Sponsor deeming” refers to the way in which the sponsor’s income is considered in a determination of an immigrant’s public benefits eligibility. See *Sponsored Immigrants & Benefits*, NAT’L IMMIGR. L. CTR. 2 (Aug. 2009), <https://www.nilc.org/wp-content/uploads/2016/05/sponsoredimmigrants-na-2009-08.pdf> [<https://perma.cc/R94D-B9DG>].

61. See Dettlaff & Finno-Velasquez, *supra* note 17, at 48.

outcome of a child neglect case. This is partially, but by no means exclusively, because of the enactment of the Adoption and Safe Families Act (ASFA).⁶² Under ASFA, ACS must file termination of parental rights petitions for all children who have been in foster care for fifteen of the previous twenty-two months, with only a few exceptions.⁶³ Furthermore, ASFA requires permanency hearings to be held within twelve months (rather than eighteen, as had previously been the case), shortening the length of time services are offered to parents before they can contest a child's continued removal.⁶⁴

ACS can remove a child prior to a finding of neglect in several different ways. A child may be removed on an emergency basis without a court order,⁶⁵ but ACS is mandated to appear before court the next court day.⁶⁶ A court can grant a request for removal before or after the agency files a petition alleging maltreatment if "immediate removal is necessary to avoid imminent danger to the child's life or health."⁶⁷ To assess imminent danger, New York law requires a court to consider both the best interests of the child and the agency's efforts, such as through provision of services and other assistance, to prevent the need for removal. These preventive services include day care, homemaker services, parent training, transportation services, emergency shelter, and rent subsidies.⁶⁸

Upon a child's removal, a primary focus of a child-welfare proceeding becomes the family's reunification. With certain exceptions, the state retains the burden to take reasonable steps towards reunification by helping the parent overcome what it alleges are "parental inadequacies."⁶⁹ Under New York law, the child-welfare agency must assess a family's needs after a child is removed and come up with a "family service plan" in consultation with the parent and based on an assessment of the family's needs.⁷⁰ This plan must include relevant time frames and necessary services and assistance for the family. To identify these services, the agency is supposed to consider the projected *effectiveness* of the plan, including the family's *concurrence* with the plan; the *ability* and the motivation of the family to access the services; and the consistency of the plan with the family's

62. Pub. L. No. 105-89, 111 Stat. 2115 (1997).

63. Adoption and Safe Families Act § 103(a)(3), 42 U.S.C. § 675(5)(E) (2012).

64. *Id.* § 302(2). Of course, one can argue that having the case *heard* within a shorter timeframe might provide that parent an earlier possibility to reunite.

65. N.Y. FAM. CT. ACT § 1024 (McKinney 2018).

66. *Id.* § 1022(a)(ii).

67. *Id.* § 1022(a)(i)(B).

68. N.Y. COMP. CODES R. & REGS. tit. 18, § 423.2(b) (2018).

69. See Subha Lembach, *The Right to Legal Representation at Service Plan Reviews in New York State*, 6 U.C. DAVIS J. JUV. L. & POL'Y 141, 144 (2002).

70. N.Y. SOC. SERV. LAW § 409-c (McKinney 2018).

needs and socio-economic and cultural circumstances.⁷¹ In particular, the agency “must always determine the particular problems facing a parent with respect to the return of his or her child”⁷² As with preventive services, family service plans may include a range of assistance and service referrals for parents, as well as provide for visitation with the child. For example, where relevant, the agency should help the caregiver “obtain[] adequate housing, employment, counseling, medical care or psychiatric treatment,” and facilitate visitation.⁷³

A 2011 U.S. Department of Health and Human Services report identified several predictive factors for successful reunification. These include the stability of foster care placement; visitation with parents and siblings; the family’s needs and the services provided to it; the family’s involvement in case planning; and the caseworker’s visits with the child and parent.⁷⁴ Service delivery was also often dispositive, and complicated by problems including a dearth of certain services, barriers to transportation, and long wait periods.⁷⁵ Relatedly, the study found that inaccurate assessments of family needs impeded reunification.⁷⁶

B. Assessing the Needs of a Mixed-Status Family

Children of mixed-status families might be subjected to higher rates of improper and extended removals than children in families where immigration status is not at issue.⁷⁷ Crucially, the system itself creates a blind spot for a parent’s immigration-related realities. Child-welfare workers are instructed not to inquire about immigration status unless absolutely necessary.⁷⁸ Consequently,

71. *Id.*

72. *Matter of Sheila G.*, 462 N.E.2d 1139, 1148 (N.Y. 1984).

73. N.Y. FAM. CT. ACT § 1055(c) (McKinney 2018).

74. Children’s Bureau, *Family Reunification: What the Evidence Shows*, U.S. DEP’T HEALTH & HUM. SERVS. 3 (2011), https://permanent.access.gpo.gov/gp023146/family_reunification.pdf [<https://perma.cc/M5H6-5XA4>].

75. *Id.* at 5.

76. *Id.* at 8.

77. Prior to and following a child’s removal, child-welfare agencies are supposed to provide family services to families, termed “preventive” and “reunification” services respectively. N.Y. SOC. SERV. LAW § 409-a (McKinney 2018); Merrill Sobie, *Practice Commentaries*, N.Y. FAM. CT. ACT § 1011 (McKinney 2018); N.Y. FAM. CT. ACT § 1012 (McKinney 2018)§ . ACS is obligated to make “reasonable efforts” towards reunification. N.Y. FAM. CT. ACT §§ 1089. The following sections consider access barriers to both preventive and reunification services. Because these barriers often overlap, I treat them largely interchangeably.

78. See Antonio Garcia et al., *Pathways to Service Inequalities Among Latinos in the Child Welfare System*, 34 CHILD. & YOUTH SERVS. REV. 1060, 1064 (2012) (arguing that “agency policy discourages caseworkers from asking clients directly about immigration status,” resulting in more time committed to generic questions).

they might be unable to identify the extent and nature of these parents' actual needs.⁷⁹ Compounding this dynamic, caregivers with undocumented relatives or who are undocumented themselves might withhold information critical to preventing removal or facilitating reunification.⁸⁰ Such information could include informal employment and other resources that may be available to them, such as undocumented friends or relatives who could serve as viable support sources.⁸¹ I have had clients hesitate about identifying family or friends—potential “resources,” in ACS parlance—because these individuals do not have a legal immigration status. In these ways, these parents' immigration statuses “hinder[] the ability [of caseworkers] to capitalize on client strengths and resources.”⁸²

In addition, both bias and lack of cultural awareness operate to expose these families to more frequent removals. Some have advocated for providing child-welfare workers with cultural-competence training, noting that from the outset, caseworkers are tasked with making very subjective assessments about a child's safety in his parent's care, and on the parent's ability even to benefit from services.⁸³ In a similar vein, others have suggested that cultural differences between caseworker and client can result in erroneous assessments that ignore the underlying, immigration-related issues confronting immigrant families.⁸⁴ Concurrently, language and cultural barriers may undermine parents' capacity to respond adequately to child-welfare interventions in order to prevent removal. Thus, a lack of training may further impede caseworkers' ability to identify, or

79. This is not to suggest that this approach is not preferable. Especially in the current political environment, letting the government obtain this information could prove hazardous for mixed-status families. However, the consequences of the lack of information are significant for the child-welfare case itself.

80. *Id.* (reporting that caseworkers working with noncitizen parents described “a high level of distrust, hesitance, and fear to fully disclosing the challenges the clients encounter”).

81. *Id.*

82. *Id.*

83. See Lori Klein, *Doing What's Right: Providing Culturally Competent Reunification Services*, 12 BERKELEY WOMEN'S L.J. 20, 31 (1997) (“From the outset . . . , the [caseworker] makes highly subjective decisions about whether and to what degree the parent poses a risk to her child, and about whether and to what degree the parent would benefit from reunification services.”).

84. See Alan J. Dettlaff, *Immigrant Children and Families and the Public Child Welfare System: Considerations for Legal Systems*, 63 JUV. & FAM. CT. J. 19, 25 (2012); see also Wendy Cervantes & Yali Lincroft, *The Impact of Immigration Enforcement on Child Welfare*, CAUGHT BETWEEN SYSTEMS 1, 4-5 (Mar. 2010), <https://firstfocus.org/wp-content/uploads/2010/05/Caught-Between-Systems.pdf> [<https://perma.cc/F6JK-RTDA>] (“In some cases, biased family court judges may inappropriately base their decision on a parent's immigration status rather than their demonstrated parenting capacity.”).

respond to, challenges specific to noncitizen parents. Field studies substantiate the significant role these biases play.⁸⁵

C. Developing a Family Service Plan

Service plans for mixed-status families may be especially deficient.⁸⁶ Ostensibly, these plans must be tailored to the specific needs and circumstances of a given parent,⁸⁷ and they must “affirmative[ly], repeated[ly], and meaningful[ly]”⁸⁸ address those handicaps that led to the child’s removal in the first place. However, the agency is limited in its ability to remedy the situation where immigration status is an underlying factor of the child-welfare case.⁸⁹ The most direct intervention would be to help a noncitizen parent access more stable

85. Ilze Earner conducted focus group studies of immigrant parents involved in the New York child-welfare system. She found that “the characteristics and behaviors of new immigrant families may have provoked caseworkers to remove children more hastily . . .” Ilze Earner, *Immigrant Families and Public Child Welfare: Barriers to Services and Approaches to Change*, 86 CHILD WELFARE 63, 84 (2007).

86. This is not to say that reunification plans are not consistently criticized for being boilerplate lists rubberstamped by the presiding judge. See, e.g., Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System [An Essay]*, 48 S.C. L. REV. 577, 601 (1997) (“Instead of offering meaningful assistance, caseworkers too often take a cookie cutter approach to the families and their problems.”); Kathleen A. Bailie, *The Other Neglected Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285, 2319 (1998). With regards to neglect cases, critics also note the tactical inadequacy of resolving the cycle of poverty with a list of limited services—and a fifteen-month ticking clock. See, e.g., Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 130 (1997) (“[N]eglect tends to be the most deeply embedded and difficult [type of child protection case] to treat, so these parents need to get working as quickly as possible.” (footnote omitted)).

87. See *In Re Amber W.*, 481 N.Y.S.2d 886, 890 (App. Div. 1984).

88. *In re Sheila G.*, 462 N.E.2d 1139, 1148 (N.Y. 1984).

89. See, e.g., *In re Gabriella A.*, 104 A.3d 805 (Conn. App. Ct. 2014), *aff’d*, 127 A.3d 948 (Conn. 2015) (affirming termination where, *inter alia*, the parent was unable to benefit from reunification services—a Connecticut statutory requirement—because her immigration status was a significant barrier). In *In re Gabriella A.*, the contracting agency’s ability to help with case management was limited “because [the parent’s] ability to obtain housing and employment was contingent on her resolving her immigration status, which she could not resolve without having a sponsor.” *Id.* at 811. Other cases have followed a similar logic. See, e.g., *Juan G. v. Arizona Dept. of Econ. Sec.*, No. 1 CA–JV 11–0083, 2011 WL 5374431, at *5 n.9 (Ariz. Ct. App. Nov. 8, 2011) (“We reject entirely the notion that Father’s neglect of his children triggered a duty on the part of the State to cure his illegal status.”); *In re Kyara-Alaze H.*, No. W10CP11016006A, 2013 WL 1223864, at *9 (Conn. Super. Ct. Feb. 28, 2013) (“There is very little [the agency] . . . can offer to address an illegal immigration status, that leads to an entirely surreptitious lifestyle.”).

status. Indeed, one New York court found that the agency had made reasonable efforts where it assisted the mother with, among other things, her immigration status.⁹⁰ Yet an agency's ability to assist parents seeking a different immigration status is limited in most cases, with only some parents eligible for adjustment and with limited financial resources and immigration training for agency staff.⁹¹ Troublingly, when an agency does provide immigration assistance (and even when it does not), a parent's ability to adjust successfully may become a measure of her fitness to parent.⁹²

D. Complying with a Service Plan

More than anything else, a noncitizen parent's immigration status interferes with her ability to complete her service plan in a timely and successful manner, or to take advantage of preventive services necessary for the completion of the plan. For citizen parents, family service plans impose onerous requirements;⁹³ immigrant parents face additional and unique obstacles to completing them.

1. Lack of Linguistically and Culturally Appropriate and Financially Accessible Services and Casework

The same barriers that mediate a noncitizen parent's use of public benefits affect a parent's interaction with court-mandated and supportive services – even though New York child-welfare authorities are explicitly required to provide reunification services to parents ineligible for public benefits.⁹⁴

90. *In re Dina Loraine P.*, 969 N.Y.S.2d 15 (App. Div. 2013) (upholding a finding of permanent neglect where agency made diligent efforts including assistance with parent's immigration status). The decision does not detail what precise steps were taken in this regard. I expect such assistance could have included connecting the respondent with a legal aid provider specializing in immigration assistance.

91. *See In re Oreoluwa O.*, 116 A.3d 400, 406 (Conn. App. Ct. 2015), *rev'd*, 139 A.3d 674 (Conn. 2016) (rejecting the argument that the department's failure to provide a father with immigration counsel impeded his ability to obtain a visa and thereby reunite with his son).

92. *See In re Gabriella A.*, 127 A.3d 948, 953 (Conn. 2015). *But see In re M.M.*, 587 S.E.2d 825 (Ga. Ct. App. 2003) (reversing a termination where the agency had argued that the father had failed to comply with a reunification plan because he had, among other things, not become a legal resident).

93. Service plans consistently are criticized for being boilerplate lists, all too often rubberstamped by the presiding judge. *See supra* note 86.

94. *In re Kittridge*, 714 N.Y.S.2d 653, 657 (Fam. Ct. 2000) (ordering the Department of Social Services to "provide, or arrange for Ms. Kittridge to receive, all court-ordered services designed to reunite her with her son," which included emergency public assistance, emergency housing, and emergency Medicaid for treating her sickle cell anemia).

First, a dearth of linguistically and culturally appropriate services hinders noncitizen parents' access to meaningful services; where these exist, long waiting times hamper timely access.⁹⁵ For example, in New York the child-welfare agency "is obligated to accommodate a parent's special needs, including use of a language other than English . . ."⁹⁶ However, these services are few and far between, especially—from my experience—for less common languages, resulting in delayed and limited access.⁹⁷ Based on my colleagues' experiences, and those of my clients, this is one of the obstacles most frequently faced by our noncitizen-parent clients who speak little English. In several of my cases, ACS took months to locate services in the appropriate language. Even once they did, they provided referrals only in English—further delaying my clients' ability to engage in services and reunite with their children. Where our clients are undocumented, their lack of insurance also results in significant delays, as free-of-charge services are usually far and few in between, and as litigation usually is needed before ACS pays for services.

At least as pivotal as access to meaningful services is a caseworker's ability to communicate effectively with a parent. While caseworkers have access to translators, this telephonic recourse is not ideal because building a trusting rapport with a client is often critical to a caseworker's success. In at least two of my cases, a caseworker's misinterpretation of a parent's statements resulted in inaccurate allegations and unhelpful service referrals.

But caseworkers' cultural competence also matters. One study found a positive relationship between a caseworker's cultural competence training and the use of family support services by immigrant clients.⁹⁸ As an example, appropriately trained caseworkers might recognize that some services, such as mental

95. See, e.g., Dettlaff, *supra* note 84, at 25 ("Language barriers can also result in delays in service delivery . . ."); Kathy Lemon Osterling & Meekyung Han, *Reunification Outcomes Among Mexican Immigrant Families in the Child Welfare System*, 33 CHILD. & YOUTH SERVS. REV. 1658, 1660 (2011) ("Citizenship status and access to services in Spanish may influence the ability of Mexican immigrant families to complete court-mandated family reunification services."); Xu, *supra* note 30, at 760 ("[S]ocial services were not always provided in the refugee and immigrants' native language and few services were culturally appropriate.").

96. *In re Sorin P.*, 873 N.Y.S.2d 89, 90-91 (App. Div. 2009); see also *In re Richard W.*, 696 N.Y.S.2d 298, 300 (App. Div. 1999) (dismissing petition to adjudicate a child permanently neglected because the agency "failed to adequately address respondent's language difficulty").

97. See *In re Jaime S.E.*, 791 N.Y.S.2d 870 (Fam. Ct. 2004), 2004 WL 1797562, at *1 (unpublished table decision); see also *In re Interest of Aaron D.*, 691 N.W.2d 164, 171 (Neb. 2005) (reversing termination, noting that the mother was told "she was supposed to speak English to the children . . . although the children speak Spanish and [the mother's] English is very limited," and noting that "the family support worker's Spanish was poor").

98. Khushmand Rajendran & Claude M. Chemtob, *Factors Associated with Service Use Among Immigrants in the Child Welfare System*, 33 EVALUATION & PROGRAM PLAN. 317, 322 (2010).

health services, are stigmatized in certain communities,⁹⁹ and work with parents by raising these issues affirmatively or by seeking alternative services. Furthermore, caseworkers are also tasked with working with support networks who could be a resource for a child's placement or to supervise visits, many of whom will be part of the client's particular cultural community.¹⁰⁰

Cultural competence also facilitates accurate caseworker representations to courts. In particular, unexamined cultural differences may greatly affect how a caseworker perceives a parent's compliance with a service plan,¹⁰¹ which in my experience is often dispositive in hearings for expanded visits or return of a child. When measuring compliance, caseworkers look at a parent's responsiveness to feedback, attendance rate at services, interactions with providers, and help-seeking behavior, among other factors.¹⁰² Cultural differences modulate these determinations. For example, a parent may be less tolerant of strangers in the family home and less comfortable with relying on nonfamily assistance. Such sensitivity, or lack of sensitivity, to cultural norms "color[s] the impression formed by service providers."¹⁰³

2. *Obstacles to Supportive Social Services*

In addition to facing obstacles to meaningful court-mandated services, immigrant parents are ineligible for many other supportive social services.¹⁰⁴ Already, immigrant parents face financial, housing, and legal difficulties that impede their ability to complete reunification plans.¹⁰⁵ Unlike similarly situated

99. Cecilia Ayón, *Shorter Time-Lines, Yet Higher Hurdles: Mexican Families' Access to Child Welfare Mandated Services*, 31 CHILD. & YOUTH SERVS. REV. 609, 610 (2009).

100. Wesley T. Church II, *From Start to Finish: The Duration of Hispanic Children in Out-of-Home Placements*, 28 CHILD. & YOUTH SERVS. REV. 1007, 1009 (2006).

101. See Klein, *supra* note 83, at 31 ("From the outset . . . , [the caseworker] assigned to the case makes highly subjective decisions about whether and to what degree the parent poses a risk to her child, and about whether and to what degree the parent would benefit from reunification services.").

102. See Sandra T. Azar & Corina L. Benjet, *A Cognitive Perspective on Ethnicity, Race, and Termination of Parental Rights*, 18 LAW & HUM. BEHAV. 249, 254-56 (1994).

103. *Id.* at 255.

104. Estin, *supra* note 14, at 708 ("Immigration status issues may . . . render parents ineligible to participate in the services that are ordinarily available to help preserve and reunify families, such as food stamps, SSI, or TANF.").

105. See, e.g., Xu, *supra* note 30, at 761-62. One father's circumstances are illustrative: the court noted that the "[f]ather resided with friends or extended family and was unable to obtain stable housing. Although Father had worked odd . . . jobs, his income varied from \$100 to \$300 each week, and challenges associated with his immigration status prevented him from

citizen parents, however, many immigrant parents do not have access to public subsistence benefits.¹⁰⁶ Fear of detection or of disqualification from some kinds of immigration relief on public-charge grounds¹⁰⁷ also discourages eligible parents (or those with eligible children) from seeking the benefits for which they or their children are otherwise eligible.¹⁰⁸

At the Bronx Defenders, we are able to refer noncitizen clients to our benefits advisor as well as to immigration, criminal, and civil practice attorneys. Many of my noncitizen clients were not sure what public benefits they or their children were eligible to receive before our benefits advisor conducted a benefits screening with them and helped them submit an application. In at least one case, determining a client's access to benefits required conversations with both a criminal and immigration attorney, as the availability of those benefits was contingent on renewing the client's immigration visa. If and when Trump's proposed regulations go into effect, immigration attorneys will be able to advise our clients as to the risks attendant to public benefits enrolling.

This dynamic is compounded by the fact that mixed-status families may lose benefits when child protective services intervenes. Mixed-status families experience hardships that are often ignored by, or unknown to, the child-welfare bureaucracy. In mixed-status families, for example, the benefits that U.S. citizen children receive—such as SNAP and housing subsidies—may mitigate some of the financial uncertainty an out-of-status parent experiences. A citizen child's removal therefore exposes that parent to the loss of these benefits, which in turn makes reunification even harder.

3. *Immigration-Related Risk and Reunification Requirements*

Immigration status also makes it risky to meet certain reunification requirements, such as disclosure of participation in drug treatment, or simply agreeing to drug testing. These actions could be problematic for a noncitizen parent because admitting to drug addiction could have severe immigration

securing full-time work." *In re M.P.*, Eo61933, 2015 WL 2250792, at *4 (Cal. Ct. App. May 12, 2015).

106. See Dettlaff, *supra* note 84, at 25 ("Undocumented parents may also be ineligible for certain supportive services that could facilitate reunification."); Seth Freed Wessler, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, ATLANTIC PHILANTHROPIES 18 (2011), http://www.atlanticphilanthropies.org/wp-content/uploads/2015/09/ARC_Report_Shattered_Families_FULL_REPORT_Nov2011Release.pdf [<https://perma.cc/C9RT-LMD3>] (finding that unauthorized parents "struggl[ed] to maintain custody of their children because of immigration status-related barriers to services, including lack of access to Medicaid, public housing, or TANF").

107. See *supra* note 28 and accompanying discussion.

108. See *supra* notes 22-28 and accompanying text.

consequences.¹⁰⁹ Parents working towards reunification might also be wary to provide a government agency with a home address, fearing immigration enforcement. One colleague's client rented a room in an apartment where other, unrelated tenants were undocumented. This complicated and delayed her ability to seek overnight visits with her children—a provision that the courts and ACS view as a critical step towards reunification.¹¹⁰

As a result of the employment markets to which they have access, noncitizen parents may also find it harder to abide by inflexible visitation requirements. Undocumented parents especially are more vulnerable to employer abuse and coercion,¹¹¹ and would therefore find it more difficult to accommodate regular visits into their work schedules. Many caseworkers are oblivious to the immigrant parents' particular employment situation, and the fact “that taking time off from their jobs in order to comply with visitation requirements placed undue hardship on families.”¹¹²

* * *

If nothing else, after tracing the impact of legal status through a child neglect proceeding, it is clear that “[i]n these cases, process controls outcomes.”¹¹³ As Martin Guggenheim explains,

This is because child welfare process is all about family case planning: promptly identifying the barriers to the immediate return of foster children to their families of origin, agreeing upon appropriate services for parents, encouraging parents to take full advantage of these services, and working assiduously with parents to place them in a position to take back their children safely.¹¹⁴

On all of these fronts, noncitizen parents are gravely disadvantaged.

109. See, e.g., 8 U.S.C. § 1227(a)(2)(B)(ii) (2018) (declaring that drug abuse constitutes grounds for removal from the United States); *id.* § 1182(a)(1)(A)(iv) (determining that drug abuse constitutes grounds for a permanent bar to receiving visas or admission to the United States). In our office, we are wary of one drug counseling program that ICE has been known to patrol.

110. FAMILY VISITING POLICY FOR CHILDREN IN FOSTER CARE, 17-OCFS-ADM-14, N.Y. OFFICE OF CHILDREN AND FAMILY SERVS. 5 (Oct. 5, 2017) (“As a general rule, a child should not be trial- or final-discharged without first having experienced successful overnight and weekend visits with the parent over a period of time.”).

111. See Rebecca Smith et al., *Undocumented Workers: Preserving Rights and Remedies after Hoffman Plastic Compounds v. NLRB*, NAT’L EMP. L. PROJECT (2015), <https://www.nelp.org/wp-content/uploads/2015/03/wlghoffo40303.pdf> [<https://perma.cc/QZ6U-FNX2>].

112. Earner, *supra* note 85, at 78.

113. Martin Guggenheim, *Parental Rights in Child Welfare Cases in New York City Family Courts*, 40 COLUM. J.L. & SOC. PROBS. 507, 508 (2007).

114. *Id.*

III. INAPPROPRIATE PLACEMENTS

Once the decision to remove a child is made, where that child is placed also has important ramifications for the child's well-being, the parent-child relationship, and, relatedly, the progression of the parent's legal case. A child can be placed with relatives ("kinship placement") through either direct placement or foster care, or with strangers in foster care. As noted above, where the child is placed and the frequency of family visitation are two of the leading predictors for successful reunification; if a child is placed with family, a parent is likely to see their child more frequently and to be able to do so in a less restrictive setting.

It is possible that children of mixed-status families are less likely to be placed with relatives and more likely to move around in the foster system.¹¹⁵ To date, the most comprehensive study on the placement of children of immigrant families looked at variances in Texan children's out-of-home placements based on their ethnicity and that of their parents.¹¹⁶ The study found that Texan children born in Latin America or to immigrant parents were less likely to benefit from placement with a relative.¹¹⁷ The study's authors point to the fact that many relatives may be undocumented, and therefore may fear government contact or be reluctant to apply for benefits, such as child-only TANF, that would enable them to provide the care the child needs.¹¹⁸

A more recent study, which documented lower use of nonparent-caregiver TANF for kinship care among Latino families, seems to corroborate this hypothesis.¹¹⁹ Another focus-group study of caseworkers also identified "fear of system involvement and subsequent deportation" as deterring undocumented relatives from coming forward as kinship caregivers.¹²⁰ It may also be possible that in some areas, mixed-status families enjoy lower levels of kinship support

115. See, e.g., Dettlaff, *supra* note 84, at 23; *Promising Practices When Working with Immigrant Kinship Caregivers*, AM. BAR ASS'N (Jan. 09, 2018), https://www.americanbar.org/groups/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/july-aug-2017/promising-practices-when-working-with-immigrant-kinship-caregive.html [<https://perma.cc/WD45-4R5P>].

116. See Tracy Vericker et al., *Foster Care Placement Settings and Permanency Planning: Patterns By Child Generation and Ethnicity*, URBAN INST. 1 (2007), <https://www.urban.org/sites/default/files/publication/46261/311459-Foster-Care-Placement-Settings-and-Permanency-Planning-Patterns-by-Child-Generation.PDF> [<https://perma.cc/VGT3-29AM>].

117. *Id.*

118. See *id.* at 3.

119. See Jane Mauldon et al., *TANF Child-Only Cases: Who Are They? What Policies Affect Them? What Is Being Done?*, CHILD & FAM. POL'Y INST. CAL. 24 (2012), <http://www.cfpic.org/sites/default/files/TANF-Child-Only%20Cases-The-Report-0113.pdf> [<https://perma.cc/4DBV-BPMQ>].

120. Garcia et al., *supra* note 78, at 1064.

generally. One study found that most New York City immigrant parents had few friends or family to turn to for placement assistance,¹²¹ and likely fewer still with stable legal statuses. While parents could in theory turn to relatives in other countries, most child-welfare agencies do not routinely search for, nor could they easily monitor, foreign placements.¹²² Parents may also be unwilling for a number of reasons to send their child back to their home country.

My client, Chanice, faced such a predicament. She had only a few family members to turn to in the United States, and after some time with a relative, her children were placed in different stranger foster homes for months. While she had family resources in her home country, she had fled that country because of violence and because she had wanted her children to receive an American education. Sending her children back to her home country was out of question.

In New York, undocumented relatives can serve as foster parents under agency guidelines.¹²³ But immigration-related challenges may discourage undocumented relatives from coming forward as potential resources. Regardless of the formality of the placement arrangement, relatives that choose to take in a child must accept certain conditions imposed by a court. In New York, release or remand to a relative or other suitable person requires a background check, which could include fingerprinting.¹²⁴ Furthermore, that person's home typically must be approved according to the regulations of the Office of Children and Family Services.¹²⁵ Finally, the volunteer caregiver must submit to the jurisdiction of the family court, which may require cooperation with court officials and the child-welfare agency, and this typically entails agency appointments and home visits.¹²⁶ A court could also impose an "order of protection" on the relative to ensure that the relative caregiver complies with the terms and conditions of the

121. See Earner, *supra* note 6, at 84.

122. See Jodi Berger Cardoso et al., *What Happens When Family Resources Are Across International Boundaries?: An Exploratory Study on Kinship Placement in Mexican Immigrant Families*, 88 CHILD WELFARE 67, 74 (2009).

123. See Zeinab Chahine & Justine van Straaten, *Serving Immigrant Families and Children in New York City's Child Welfare System*, 84 CHILD WELFARE 713, 718 (2005).

124. *Having a Voice & a Choice: New York State Handbook for Relatives Raising Children*, N.Y. ST. OFF. CHILD. & FAM. SERVS. 20 [hereinafter *Having a Voice*], <http://www.ocfs.state.ny.us/main/publications/Pub5080.pdf> [<https://perma.cc/RL9V-ZBVF>].

125. N.Y. FAM. CT. ACT § 1017(2)(iii) (McKinney 2018); see also N.Y. SOC. SERV. LAW § 378-a(2)(a) (McKinney 2018) (authorizing a criminal history record check with the division of criminal justice services regarding any prospective foster parent, adoptive parent, or successor guardian)§ ; *Having a Voice*, *supra* note 123, at 11 (noting that even in direct placement, "a case-worker . . . will visit your home regularly").

126. N.Y. FAM. CT. ACT. § 1017.

placement,¹²⁷ and these may expose the caregiver to immigration-related consequences as detailed in Part IV.

Foster licensing requirements may also deter relatives with no status or those living in mixed-documentation households, cutting off an important source of foster funding that some relatives might well depend on to take in removed children. In New York, foster care licensing, or “approval,” includes a home study; background checks; fingerprinting of all adults in the household; a medical report; and reference checks.¹²⁸ These fingerprinting practices can expose some noncitizens to immigration enforcement. Under its current policy, the agency in charge of fingerprinting individuals for family court proceedings, the New York Division of Criminal Justice Services, contacts U.S. Immigration and Customs Enforcement (ICE) when it is alerted that a noncitizen who it has fingerprinted has been convicted for a New York offense or has been previously deported.¹²⁹ Citing this policy and the ICE arrest of a noncitizen after he was fingerprinted during the course of a guardianship application, a 2017 New York Practice Advisory alerted practitioners that fingerprint requests in family court proceedings could imperil noncitizens.¹³⁰

Lack of information and language-related obstacles further constrain undocumented and even legal residents from becoming foster parents. Indeed, “[b]ecoming a licensed caregiver is a complicated process that includes a time-sensitive home study [and] training and physical space requirements”¹³¹ Such a time-intensive and complex process proves an insurmountable burden to many potential caregivers unfamiliar with the U.S. child-welfare system and with limited English proficiency.¹³²

127. *Id.*

128. See *Having a Voice*, *supra* note 123, at 19-20.

129. *Advisory Memorandum #3 to Chief Administrative Judge Lawrence Marks: Adverse Consequences to Family Court Dispositions*, ADVISORY COUNCIL ON IMMIGR. ISSUES FAM. CT. 6 (Oct. 27, 2017), <https://www.immigrantdefenseproject.org/wp-content/uploads/AdverseConsequences-GuidanceMemoCharftGlossary1.pdf> [<https://perma.cc/P2QH-RSXN>].

130. *New York Practice Advisory: When Does Fingerprinting Put Your Client at Risk with ICE?*, N.Y. CIVIL LIBERTIES UNION & IMMIGRANT DEF. PROJECT, (July 27, 2017), <https://www.immigrantdefenseproject.org/wp-content/uploads/DCJS-advisory-7-27-17-6-PM-updated1.pdf> [<https://perma.cc/6ZJW-FVZX>]; see also Ryan Devereaux & John Knefel, *ICE Evades Sanctuary Rules by Using NYPD Fingerprints to Find Immigrants and Send Them Call-In Letters*, MAKE ROAD N.Y. (Apr. 26, 2018), <https://maketheroadny.org/ice-evades-sanctuary-rules-by-using-nypd-fingerprints-to-find-immigrants-and-send-them-call-in-letters/> [<https://perma.cc/Q5DE-EKfV>].

131. Cecilia Ayón et al., *Latino Families in the Nexus of Child Welfare, Welfare Reform, and Immigration Policies: Is Kinship Care a Lost Opportunity?*, 58 SOC. WORK 91, 92 (2013).

132. *Id.*

Placement in stranger foster care can be traumatic for any child, but may be uniquely detrimental for children of immigrants. While many states, including New York, direct agencies to help preserve the cultural heritage of children in their custody, studies find that children are almost never placed with language-appropriate foster homes.¹³³ Such practices also create barriers for the parent-child relationship over time, because as children lose their native language skills, members of the family lose the capacity to communicate with one another and to connect over cultural common ground. On the surface what may seem to be “minor” transgressions onto the language integrity of families may be destabilizing to the parent-child relationship. One colleague’s client was chastised by a caseworker not to converse in Spanish—the family’s native tongue—with her child, because the visit was “supervised” and the caseworker was a non-Spanish speaker.

In New York, ACS often falls short of providing appropriate placements for children of immigrant families, and court responses seem to vary greatly in accounting for these failings. One New York appellate court condemned the agency for removing a child from a Polish-speaking home to an English-speaking foster home.¹³⁴ There, the court noted how “[o]ver the years, the record reflects that respondent and her child had difficulty communicating,” but that the agency nevertheless “supplied an interpreter for only portions of the supervised periods of visitation.”¹³⁵ In another New York case, one judge ordered the child-welfare agency “to diligently search for Spanish-speaking foster homes . . . and to provide meaningful exposure to Spanish language for the children, sufficient for them to learn the language and begin to communicate in Spanish with their mother.”¹³⁶ Over the next four years, the court would repeatedly determine that the agency had failed to make reasonable efforts in that direction and would order anew—and futilely, since the agency repeatedly failed to comply—that these steps be taken.¹³⁷ In another example, in *In re Elias P.*, after spending over five years with a non-Spanish speaking foster parent, only one of the four children retained any ability to converse in Spanish. As a result, upon the father’s deportation, he was unable to communicate over the phone with either the foster

133. See Lisette Austin, *Immigrant Children and Families in the Foster Care System*, 22 CONNECTION 6, 9 (2006).

134. *In re Richard W.*, 696 N.Y.S.2d 298, 300 (App. Div. 1999).

135. *Id.*

136. *In re Jaime S.E.*, B-10683-03, 2004 WL 1797562, at *2 (N.Y. Fam. Ct. Aug. 6, 2004) (internal quotation marks omitted).

137. *Id.* at *2, *8 (describing the result of these “repeated failings” as “devastating”).

parent or children. The appellate majority affirming the termination of his parental rights was silent on this aspect of the children's placement.¹³⁸

IV. IMMIGRATION CONSEQUENCES OF CPS INVOLVEMENT

When I meet a client on intake, one of the first questions I pose is where he or she was born, and, if abroad, what his or her immigration status is. While this question can sometimes be alarming to a noncitizen client, as a practice, we are aware of the many ways a neglect proceeding can expose a family to harmful immigration consequences. Upon the close of intake, I may make a number of referrals for the clients whom I have just met—referrals to a social worker, a parent advocate, or a civil practice advocate or attorney. Where relevant, I always make a referral to the immigration attorney on my team.

This is because at every stage of a neglect case, the family court proceeding can lead to numerous adverse consequences for a mixed-status family's permanency and livelihood in the United States. For example, family court judges routinely grant orders of protection, many of them *ex parte* and some addressing nonviolent situations.¹³⁹ Violating an order of protection, including civil and temporary orders, is a deportable offense.¹⁴⁰ Even the mere existence of an order of protection could have immigration consequences, including higher risks of denials of benefits and heightened scrutiny of a noncitizen parent after travel abroad.¹⁴¹ As a practice, the Bronx Defenders requests short orders, instead of orders of protections, in family court, because the latter are automatically sent to a registry shared with the FBI and accessible by immigration officials.¹⁴² Despite recent court trainings regarding immigration consequences of orders of protection, some judges remain reluctant to issue these substitute orders in certain cases—even though family court proceedings are supposed to be rehabilitative and not punitive.¹⁴³ (Other judges understand immediately why we request short orders, and almost always agree to supplant orders of protections with these.) Where the allegations are violations of orders of protection, I have advised several undocumented clients not to risk trial—even where I believe they

138. See *In re Elias P.*, 44 N.Y.S.3d 516, 521 (App. Div. 2016) (Hinds-Radix, J., dissenting); *id.* at 517-21 (majority opinion).

139. In New York State, immigration authorities enjoy easy access to family court orders of protection through the New York State Order of Protection Registry. Telephone Interview with Lee Wang, Attorney, Immigrant Def. Project, in N.Y.C., N.Y. (July 27, 2016).

140. See 8 U.S.C. § 1227(a)(2)(E)(ii) (2012).

141. See *Advisory Memorandum #3*, *supra* note 129.

142. Orders of protection stay on file for five years upon expiration. *Id.* at 5.

143. See, e.g., *People v. Roselle*, 643 N.E.2d 72, 74 (N.Y. 1994).

have strong cases or where I suspect the nonrespondent might be acting vindictively. These concerns have sharply amplified in recent years, with the federal government broadening targets for deportation and increasing ICE arrests. Indeed, under the Trump Administration, immigration judges have denied bond and relief from deportation relying explicitly on family court findings, family court petitions, and family court orders of protections.

Short of removal, noncitizen parents face other serious immigration ramifications from a neglect proceeding. The issues raised in family court cases, such as drug use or suspected child neglect or abuse, can raise conduct-based bars to re-admission, to status adjustment, and to many forms of relief from deportation.¹⁴⁴ Further, given the extensive weight the immigration system places on “good moral character,” family court involvement may lead to the discretionary denials of immigration benefits even if the findings are seemingly mild.¹⁴⁵ Immigration attorneys are also documenting an uptick in “requests for evidence,” which can include requests for family court records and questioning at borders.¹⁴⁶

These “red flags” for immigration officials may arise at different junctures of a family court proceeding; they may also emerge outside of those proceedings. For example, parents often agree to settle for alternative dispositions, such as suspended judgments or submissions, in order to speed up the return of their children. Immigration officials, however, may treat these orders akin to formal findings of abuse or neglect. Various admissions that are routine in family court—such as admissions to drug use or addiction, made to persuade the court that the parents are serious about obtaining treatment—present unique risks for noncitizen parents. Those admissions constitute a ground of inadmissibility to the United States.¹⁴⁷ If a noncitizen parent is incarcerated during the course of a child-welfare proceeding, for example after being held in contempt of family court, he or she may come to the attention of immigration authorities. Finally, because many statuses and forms of relief are derivative of family relationships, a child’s removal or the termination of a noncitizen’s parental rights may undermine that parent’s immigration applications. Thus, whereas the ability to maintain custody or reunite with one’s child are core family defense objectives, for

144. See *supra* note 109.

145. Notably, the applicant bears the burden of demonstrating good moral character. See 8 C.F.R. § 316.10(a)(1) (2018).

146. Immigrant Def. Project Training (January 2018).

147. Theo Liebmann, *Family Court and the Unique Needs of Children and Families Who Lack Immigration Status*, 40 COLUM. J.L. & SOC. PROBS. 583, 594 (2007) (“Such admissions need not be in a criminal court and have included admissions to a medical doctor or merely checking off a box on a customs form” (footnotes omitted)).

noncitizen parents, these may offer only Pyrrhic victories because the parents may lose their ability to remain in the United States.

Most of my noncitizen clients wish to stabilize their status in this country. Some are actively in the process of naturalizing, or applying for status, when I first meet them. Nearly all my legal permanent resident clients have asked me, sometimes in great anxiety, about the consequences of an ACS case on their ability to stabilize their status.

Because of the structure of our office, I am lucky to be able to connect my clients with an immigration attorney and to hold cross-practice client meetings. All too often, the immigration attorney's advice is to pause any ongoing immigration application until the case is over. This was the scenario confronting my client Chanice, who is legally married to a U.S. citizen, and whose eldest child is undocumented like her. Due to her continuing family court case and an active order of protection, she has put on pause her immigration application and that of her child. Permanent status would have eased her daily anxieties about enforcement, broadened her employment options, and provided access to basic benefits such as health insurance. Instead, the continued monitoring of her family due to an open ACS case means continued exposure to the vagaries and risks of the immigration system.

* * *

A child's removal is not the only form of family separation a noncitizen parent can face in family court. Many of my colleagues have clients who have been picked up by ICE during their family court case—including clients who have been picked up *because* of the allegations at the heart of their ACS case. Generally, this seems to occur when there are concurrent criminal cases—proceedings that have alerted ICE to the parents' presence. Yet orders of protection can also alert ICE to the possibility of an ongoing ACS case. In some cases, ACS has subsequently withdrawn the petition, presumably on the logic that it is pointless to pursue an ACS case, or perhaps because someone in ACS recognized that having an open case might be detrimental to the parent's fight to remain in the country and with her family. But there is no uniform policy in this regard. And it is not at all clear that just because ACS disappears from a detained parent's life, that parent will not disappear from her child's life.

CONCLUSION

Only in the mixed-status family are notions of family unity and family safety additionally threatened by national fault lines of citizenship and legal status. While immigration status alone cannot be a basis for a finding of neglect, the lack of stable status affects parents' ability to provide for the material welfare of their children. In New York, the agency in charge of child welfare is relatively

pro-immigrant in its mission, policies, and practices. Yet when noncitizen parents do come in contact with the New York child-welfare system, their immigration status encumbers their ability to navigate family court proceedings. These same proceedings can expose families to a form of family destruction foreign to parents who are citizens: deportation.

Armed with knowledge of her client's legal status, a competent and well-intentioned caseworker may be able to better assist a parent with status-related barriers. Yet even that will often not be enough. The noncitizen parent's limited access to benefits, and her fears of disclosing status to obtain benefits for her eligible children, remain consistent barriers to ensuring the safety of the child and integrity of the family. These fears are real: federal disclosure laws¹⁴⁸ prevent agencies from barring their employees from reporting undocumented parents to immigration officers. And the Trump Administration has proposed policies that would block parents whose families rely on public benefits from securing or keeping legal status. Furthermore, ACS increasingly works alongside law enforcement officials, including in parallel criminal cases. Finally, even competent caseworkers are rarely sufficiently trained in immigration and cultural competency issues. Thus, in many cases it may be preferable for the parent to remain silent on her legal status—even though this silence might also work to her disadvantage.

Comprehensive legal representation can help address this dilemma. Where noncitizen parents are increasingly denied due process in the immigration realm,¹⁴⁹ assiduous and holistic legal representation can help ensure prompt and fair process in the child-welfare system. Handicapped by their lack of true independence and limited immigration knowledge, even the best caseworker—whether ACS-affiliated or contracted—is most often an inadequate resource. By contrast, because lawyers must abide by attorney-client confidentiality rules and can work alongside immigration practitioners, they can help move forward the process of reunification at every stage of the proceeding.

But while comprehensive legal representation can best serve noncitizen parents facing charges of child neglect, the systems of child protection and family and child services must also change. If we are to live out the value of family unity, we must overhaul the public welfare, immigration, and family legal regimes. Short of that, numerous changes to state and local policies may be attainable.

148. 8 U.S.C. § 1644 (2012) (“Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.”).

149. The horror of the family separations conducted at the border are but one recent example. See *supra* Introduction.

First, New York State and its municipalities should take steps to protect parents from immigration enforcement and adverse immigration consequences as a result of their contact with child-welfare proceedings. As discussed above, practitioners and scholars have increasingly shed light on the ways a family court proceeding can render a mixed-status family vulnerable to a variety of immigration consequences. Perhaps most drastically, by subjecting parents to state surveillance and monitoring, an ACS case might expose, even inadvertently, undocumented parents to immigration enforcement. Implementing alternatives to fingerprinting and to orders of protection, as well as limiting federal access to these databases, are steps that would go far in shielding families from immigration enforcement. Latent immigration consequences also include discretionary rejections of immigration applications—denying a family’s ability to access services and stability in the United States, and sometimes leading directly to deportation. Here, ACS cooperation with requests to limit the record made in family court proceedings could help preserve a family’s wellbeing.

Merely shielding family court proceedings from federal immigration authorities is not enough: more can be done within the child-welfare system itself to ensure noncitizens get equal access to and quality of services. For example, ACS policies should be modified to ease the draconian requirements of clearing all household members—whether for visits or release. Guidelines for determining who and how people get cleared that are sensitive to immigration concerns of individuals while remaining effective to ensure child safety should be developed. ACS should agree to pay for services to which noncitizens may not have access, without forcing them to resort to litigation. More funding should be allocated to providing services in different languages, and caseworkers should be required to undergo recurring cultural competency and immigration trainings.

But if ACS truly intends to “[k]eep[] NYC children & families safe & well,” it cannot remain a passive player.¹⁵⁰ It can and must intervene in criminal proceedings that could put immigrant families at risk.¹⁵¹ For example, ACS could advocate withdrawing a criminal case where a matter in family court addresses the exact same conduct—with the aim to rehabilitate rather than punish a family. ACS can and must intervene in removal proceedings instead of abdicating its responsibility and leaving family preservation to the whims of an immigration judge. For instance, ACS should withdraw its family court petition where prosecution in family court would further endanger a detained parent’s immigration status. An ACS caseworker or ACS lawyer could also contextualize any family court record and could advocate for the release of a detained parent on bond.

150. *About ACS*, *supra* note 7.

151. ACS regularly cooperates with assistant district attorneys and the New York police department already.

ACS could articulate for the immigration judge how release on bond would enable engagement in services and family counseling that are crucial for the welfare of a child. Finally, ACS should also advocate for the favorable use of discretion to permit a parent to remain in the country for the wellbeing of her child, drawing on its stature as an authority on child welfare. With such interventions, ACS can and must challenge the false siloes of child welfare, poverty, and immigration.

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