

# Uniquely Common: The Cruel Heritage of Separating Families of Color in the United States

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*Headlines abound with news of migrant family separation at the United States-Mexico border. Many of those articles attribute the practice of family separation to recent policy shifts under the current administration. Though this administration's policies are especially cruel and punitive, they are not novel. The separation of Black families, non-citizens at the time, was a practice endemic to U.S. slavery. The historic practice of state-sponsored family separation persists today—at least in part—via criminal and immigration incarceration.*

*Family separation disproportionately impacts families of color. When confronted with family unity cases, United States courts have patched together a constitutional right to family unity. However, over time, courts have denied and/or eroded due process protections that should accompany the right. By removing due process protections, courts have removed the force of the right to family unity. And, courts have done so in a way that implicates Equal Protection violations as low-income families and families of color are disproportionately kept from enjoying a right to family unity.*

*Guaranteeing adequate and equal due process in all parental termination proceedings is central to realizing an equitable right to family unity. This Article utilizes a reproductive justice frame to investigate the ways in which the family separation we are seeing today is rooted in slavery and exacerbated in carceral settings. In response, this Article calls for federal protection.*

*First, the Article revisits the infamous Dred Scott case from a family reunification perspective and highlights how the Court's holding serves a reproductive injustice. Next, the Article evaluates the case of Abby Lassiter, in which the Supreme Court denied a right to counsel in parental termination proceedings. Together, Dred Scott and Lassiter highlight the ways in which white supremacy and the erosion of due process combine to create a legal system ripe for the immigration abuses we are currently witnessing. This Article goes on to examine some of those immigration abuses with an emphasis on family separation at the point of birth while incarcerated. In light of the heritage of family separation in the United States and the Supreme Court's failure to protect a right to family unity for families of color, this Article concludes by calling for a de jure constitutionalized right to family unity for all people subject to United States jurisdiction.*

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## INTRODUCTION

“. . . a parent’s desire for and right to ‘the companionship, care, custody and management of his or her children’ is an important interest that ‘undeniably warrants deference, and, absent a powerful countervailing interest, protection . . . If the state prevails . . . [in terminating that interest] it will have worked a unique kind of deprivation.”<sup>1</sup>

The Supreme Court has repeatedly highlighted the importance of family unity and upheld the right to family unity as fundamental.<sup>2</sup> This “natural” right to choose and be with one’s family is so important that the Supreme Court restricts states from intruding upon that right absent a “powerful

<sup>1</sup> *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981).

<sup>2</sup> *Id.* I combine the various rights that courts have recognized as implicating familial rights (i.e., the right to custody, care, integrity, companionship, etc.) and name them as one right to “family unity.” See *Stanley v. Illinois*, 405 U.S. 645 (1972); *Santosky v. Kramer*, 455 U.S. 745 (1982); *In re Chung Toy Ho*, 42 F. 398, 399–400 (C.C.D. Or. 1890) (finding that “[O]n being sent for by him . . . a Chinese merchant who is entitled to come into and dwell in the United States is thereby entitled to bring with him, and have with him, his wife and children. The company of the one, and the care and custody of the other, are his by natural right; and he ought not to be deprived of either.”); *In re Gault*, 387 U.S. 1, 80–81 (1967) (“. . . due process clearly requires timely notice of the purpose and scope of any proceedings affecting the relationship of parent and child”); *Hodgson v. Minn.*, 497 U.S. 417, 447 (1990) (“The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.” (citation omitted)); *Lehr v. Robertson*, 463 U.S. 248, 257–58 (1983) (“In some cases, however, this Court has held that the Federal Constitution supersedes state law and provides even greater protection for certain formal family relationships. In those cases, as in the state cases, the Court has emphasized the paramount interest in the welfare of children and has noted that the rights of the parents are a counterpart of the responsibilities they have assumed. Thus, the ‘liberty’ of parents to control the education of their children that was vindicated in *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), was described as a ‘right, coupled with the high duty, to recognize and prepare [the child] for additional obligations.’ *Id.*, at 535. The linkage between parental duty and parental right was stressed again in *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), when the Court declared it a cardinal principle ‘that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.’ *Ibid.* In these cases the Court has found that the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection.”); *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (“[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”).

countervailing interest.”<sup>3</sup> However, intrusions on the right to family unity, which should invoke the highest standard of judicial review, have repeatedly escaped strict scrutiny,<sup>4</sup> especially for low-income and/or non-citizen families of color. By failing to provide adequate due process to such families, courts have sanctioned the separation and destruction of families of color.<sup>5</sup>

The practice of state-sponsored family separation has deep roots in slavery.<sup>6</sup> In *Dred Scott v. Sandford*, the Supreme Court overruled a lower court opinion which upheld Dred Scott’s parental rights.<sup>7</sup> The Court determined that Scott was not a citizen according to the Constitution and therefore did not satisfy the federal court’s diversity jurisdiction requirement.<sup>8</sup> Because Scott was not recognized as a U.S. citizen at the time, he was not afforded the process due to a citizen.<sup>9</sup> The absence of standing prevented the Court from ever reaching the substance of Scott’s claims for reunification. Because this deprivation of due process inhibited any non-citizen from reaching the merits of a family re-unification claim at the time, the *Dred Scott* Court indirectly held that non-citizen families had no enforceable right to unity.

Following the *Dred Scott* decision and the Civil War that ensued, the Reconstruction Amendments were drafted to ensure in part that every family

<sup>3</sup> *Lassiter*, 452 U.S. at 27–28; see Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 139 (2011) (citing *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) for the proposition that a right to privacy can be inferred from several amendments in the Bill of Rights and it protects the family unit from government intrusion and intervention); see also Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 980 (1993).

<sup>4</sup> Erwin Chemerinsky, Remarks at the Practicing Law Institute Program on the Supreme Court (Nov. 1998) (transcript available at [https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1638&context=faculty\\_scholarship](https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1638&context=faculty_scholarship) [<https://perma.cc/H8CX-A5PQ>]); Bridges, *supra* note 3, at 131–132.

<sup>5</sup> See PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 6 (Hill and Wan eds., 1997) (“[T]he Court’s story of family liberty has thus far been written from a perspective that obscures important evidence . . . it is therefore undeveloped and unconvincing. It does not teach as well as it might why the Constitution . . . protects the right of families to function with a significant measure of autonomy.”).

<sup>6</sup> *Id.* at 9 (arguing that the right to family integrity itself developed in reaction to the destruction of African American families during slavery: “Slavery . . . required that men, women, and children be bound more surely by ties of ownership than by ties of kinship. Slave Power supported itself by annulment of marital, parental, and paternal rights.”); See Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 L. AND INEQUALITY 187, 189 (1987) (stating that the very idea of a slave family developed outside of the law: “The notion of legal autonomy within the private sphere had no meaning for the slave family, whose members could lawfully be spread to the four corners of the slave south. Notwithstanding blood ties and romantic love, the slave family could not be an organic unit of permanently linked, interdependent persons. In the eyes of the law, each slave stood as an individual unit of property, and never as a submerged partner in a marriage or family. The most universal life events—marriage, procreation, childrearing—were manipulated to meet the demands of the commercial enterprise.”).

<sup>7</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1856). Defendant John Sanford’s name is misspelled in the U.S. Reports as “John Sandford.” In this Article, the author will use the correct spelling of the Defendant’s name, John Sanford.

<sup>8</sup> *Id.* at 492.

<sup>9</sup> *Id.* at 403.

subject to U.S. jurisdiction had an equal right to due process.<sup>10</sup> Unfortunately, a century after *Dred Scott*, the Supreme Court in *Lassiter* cut back on gains made during Reconstruction, deciding that fundamental fairness and due process did not require legal representation for indigent parents in cases of parental termination.<sup>11</sup> Access to an attorney where one cannot afford representation is a hallmark of due process—especially in cases implicating denial of a fundamental right.<sup>12</sup> Despite this, the *Lassiter* Court restricted due process to exclude low-income people from equal participation in parental termination proceedings. By removing equal access to legal representation in parental termination hearings, the Court sanctioned the separation of low-income families, and, to the extent that people of color disproportionately bear the burdens of poverty, families of color.

Today we are experiencing yet another manifestation of state-sponsored separation of families of color at the United States' southern border. Specifically, due process protections are being denied to non-citizen families in a way that destroys the natural and fundamental right to family unity. To exacerbate the issue, immigrant detention serves to separate families of color like the criminal justice system has separated families of color for generations.<sup>13</sup> For pregnant people birthing in immigration detention, family separation is almost inevitable because systemic policies that first criminalize immigration and then deny family unity to "criminals" all but require the termination of parental rights.<sup>14</sup> And, as with *Dred Scott*, the procedural hurdles to reunification can be so excessive that courts rarely reach the substance

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<sup>10</sup> U.S. CONST. amend. XIV; see Dorothy Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 64–71 (2019) (citing the Reconstruction Era as a time of radical growth for Black people and families who became "rights holders" that "[changed] the Constitution's meaning to encompass their freedom . . . [t]he antebellum abolitionists' aim was to eradicate completely the institution of slavery . . . [granting to formerly enslaved people the full ability to participate as citizens in the nation's reconstructed democracy]"); see COOPER DAVIS, *supra* note 5, at 9 (stating that "those who sponsored and shaped [the fourteenth amendment] understood rights of family as aspects of liberty, fundamental to proper definitions of freedom and citizenship and necessary to the governmental structure envisioned for a reconstructed union").

<sup>11</sup> *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27–28 (1981).

<sup>12</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the right to counsel is essential to fundamental fairness in criminal proceedings and withholding counsel from indigent defendants violates the Fourteenth Amendment). *Lassiter* tested this principal as applicable to civil proceedings and the Court chose not to apply a right to counsel for low-income people in civil proceedings.

<sup>13</sup> See Anita Sinha, *Slavery by Another Name: 'Voluntary' Immigrant Detainee Labor and the Thirteenth Amendment*, 11 STAN. J. C.R. & C.L. 1 (2015) (stating that, as the largest mass incarceration movement in U.S. history, immigrant labor in detention facilities is akin to slavery and violative of the Thirteenth Amendment prohibition on low-cost labor in non-punitive settings).

<sup>14</sup> Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006) (coining the term "crimmigration law" to describe the increasingly blurred line between criminal and immigration law); Vasquez, Tina, *Trump Administration Separates Some Migrant Mothers From Their Newborns Before Returning Them to Detention*, REWIRE NEWS (May 28, 2019), <https://rewire.news/article/2019/05/28/trump-administration-separates-pregnant-migrants-newborns-before-returning-detention/> [<https://perma.cc/B99P-KJSP>].

of family unity claims. That is, as in *Dred Scott*, the process is the punishment.<sup>15</sup> Applying a reproductive justice frame to this issue illuminates the need for comprehensive federal protections against the historically rooted, systemic, and endemic practice of separating families of color without due process of law.

Reproductive justice (RJ) combines reproductive rights, health, and social justice to achieve a world in which bodies that are reproducing have the right to have—or not have—a family, and the ability to raise the families we do choose to have in safety with dignity and respect.<sup>16</sup> When confronted with the question of what happens to a child born into immigration detention, RJ may ask: What should happen considering the parent and child's human rights? And why, if freedom of movement and access to quality medical care are birthing conditions worthy of a human being, are people birthing while incarcerated at all? What does the birthing person need to thrive? Does the person have the social, economic, and medical resources to live in dignity? If not, how do we guarantee access to whatever resources are lacking? Asking these types of questions is more likely to create a holistic, intersectional response.

The rights that RJ recognizes—the right to have a family, or not, and raise our families in safety and with dignity and respect—are fundamentally human.<sup>17</sup> For this reason, RJ cannot co-exist with slavery, an institution that necessitates the devaluing of humans to property to propel capital.<sup>18</sup> The intersectional frame that RJ offers highlights that a complex system of institutions and “isms” are fueling the family separation crisis at the border. And while I do not set out to solve the issues of racism, classism, sexism, white supremacy, etc. impacting our criminal and immigration systems, I do suggest a framework that, when applied, can serve as a decarceration strategy that secures dignity for birthing people. This Article posits that guaranteeing adequate and equal due process in all parental termination proceedings is central to realizing an equitable right to family unity. Equal access to due process is a stepping stone that will help repair the cruel heritage of state-

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<sup>15</sup> See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006) (stating that reconstruction laws that required costly and time-consuming procedures to enforce rendered African-Americans unable to argue valid claims in a way that bolstered the spread of Jim Crow).

<sup>16</sup> LORETTA J. ROSS & RICKIE SOLINGER, *REPRODUCTIVE JUSTICE: AN INTRODUCTION* 9 (2017); SISTERSONG WOMEN OF COLOR REPRODUCTIVE HEALTH COLLECTIVE AND PRO-CHOICE PUBLIC EDUCATION PROJECT, *REPRODUCTIVE JUSTICE BRIEFING BOOK: A PRIMER ON REPRODUCTIVE JUSTICE AND SOCIAL CHANGE* 4-5 (2007), <http://protectchoice.org/downloads/Reproductive%20Justice%20Briefing%20Book.pdf> [<https://perma.cc/3M4D-B4AL>].

<sup>17</sup> See *id.* at 10 (“... safe and dignified fertility management, childbirth, and parenting together constitute a fundamental *human right*”).

<sup>18</sup> Burnham, *supra* note 6; see KALI N. GROSS, *COLORED AMAZONS: CRIME, VIOLENCE, AND BLACK WOMEN IN THE CITY OF BROTHERLY LOVE, 1880-1910* at 18 (2006).

sanctioned family separation rooted in slavery.<sup>19</sup> Because the Supreme Court has failed to provide adequate due process protections to low-income and/or non-citizen families of color, the right to family unity must be explicitly enshrined in the Constitution via constitutional amendment. In endeavoring to apply this RJ frame, this Article presents an aspirational roadmap that addresses some of the core causes of state-sanctioned family separation at the U.S.-Mexico border.

This Article proceeds in three parts. First, the Article revisits the case of *Dred Scott*, and discusses how the Court effectively mandated family separation based on race. Part II focuses on the ways in which the punishment clause of the Thirteenth Amendment allows slavery—and family separation endemic to the practice—to continue in cases of criminal punishment.<sup>20</sup> After *Dred Scott*, constitutional protections designed to protect families of color were established but Part II reveals the ways in which those protections have eroded over time. By reviewing the case of Abby Lassiter and other cases of birthing people in prison, Part II highlights the ways in which incarceration inhibits reproductive freedom and propels family separation.

Part III transitions to the treatment of pregnant people in immigration detention and the ways in which the treatment of pregnant people incarcerated for crimes in the United States parallels that of immigrants detained in custody. Finally, the conclusion uses an intersectional, RJ frame to outline potential holistic solutions to end the practice of state-sponsored family separation as we know it.

## I. ROOTED IN SLAVERY: FAMILY SEPARATION IN THE UNITED STATES

At its core, the *Dred Scott* case of 1857 was about family unity. Dred Scott, a husband, father and porter enslaved in Missouri, brought a case against John Sanford for assault and false imprisonment.<sup>21</sup> Sanford bought Scott's wife and two daughters, Harriet, Eliza, and Lizzie respectively, took the three women out of Missouri, held them against their will and physically abused them.<sup>22</sup> Unfortunately, these facts were not unique. Indeed, one of the key consequences of slavery was an assault on the Black family unit.<sup>23</sup>

. . . my poor mother, when she saw me leaving her for the last time, ran after me, took me down from the horse, clasped me in her arms, and wept loudly and bitterly over me. My master seemed to pity her, and endeavoured to soothe her distress by telling her

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<sup>19</sup> *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981); Jennifer M. Chacón, *Citizenship and Family: Revisiting Dred Scott*, 27 WASH. U. J.L. & POL'Y 45, 56, (citing expansive intent of U.S. CONST. amend. XIV).

<sup>20</sup> U.S. CONST. amend. XIII; see Roberts, *supra* note 9, at 64–65.

<sup>21</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

<sup>22</sup> *Id.*

<sup>23</sup> HEATHER ANDREA WILLIAMS, *HELP ME TO FIND MY PEOPLE* (2012); ROSS & SOLINGER, *supra* note 15, at 13.

that he would be a good master to me, and that I should not want anything. She then, still holding me in her arms, walked along the road beside the horse as he moved slowly, and earnestly and imploringly besought my master to buy her and the rest of her children, and not permit them to be carried away by the negro buyers; but whilst thus entreating him to save her and her family, the slave-driver, who had first bought her, came running in pursuit of her with a raw hide in his hand. When he overtook us he told her he was her master now, and ordered her to give that little negro to its owner, and come back with him. My mother then turned to him and cried, "Oh, master, do not take me from my child!" Without making any reply, he gave her two or three heavy blows on the shoulders with his raw hide, snatched me from her arms, handed me to my master, and seizing her by one arm, dragged her back towards the place of sale. My master then quickened the pace of his horse; and as we advanced, the cries of my poor parent became more and more indistinct—at length they died away in the distance, and I never again heard the voice of my poor mother. Young as I was, the horrors of that day sank deeply into my heart, and even at this time, though half a century.<sup>24</sup>

Violently taking children from their parents for profit encapsulates the business of slavery and directly counters the rights inherent in reproductive justice, specifically, the right to raise our families with security, dignity, and respect.<sup>25</sup> Over the course of 250 years, slavery led to the forceful separation of *millions* of Black people from their families.<sup>26</sup> Dred Scott had intimate knowledge of the cruelties of family separation endemic in slavery, and so he fought vehemently to be reunited with his family. Scott sued for his freedom and the freedom of his family, and, after eleven years of appeals in five different state and federal courts, his case came before the Supreme Court.

The case was one of first impression for the Supreme Court. Though family separation was part and parcel of the institution of slavery, few people had successfully sued in state courts to reunite with family still enslaved.<sup>27</sup>

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<sup>24</sup> CHARLES BALL, *SLAVERY IN THE UNITED STATES: A NARRATIVE OF THE LIFE AND ADVENTURES OF CHARLES BALL, A BLACK MAN, WHO LIVED FORTY YEARS IN MARYLAND, SOUTH CAROLINA AND GEORGIA, AS A SLAVE UNDER VARIOUS MASTERS, AND WAS ONE YEAR IN THE NAVY WITH COMMODORE BARNEY 17–18* (U.N.C. Chapel Hill ed., 1999).

<sup>25</sup> WILLIAMS, *supra* note 22; ROSS & SOLINGER, *supra* note 15, at 10.

<sup>26</sup> Shaun King, *Separating Migrant Families is Barbaric. It's Also What the U.S. Has Been Doing to People of Color for Hundreds of Years*, THE INTERCEPT (June 20, 2018), <https://theintercept.com/2018/06/20/family-separation-immigration-history-slavery-mass-incarceration/> [<https://perma.cc/E5XW-QFTE>].

<sup>27</sup> See OLIVE GILBERT AND SOJOURNER TRUTH, *NARRATIVE OF SOJOURNER TRUTH* 7, 14 (2000). In 1817, Sojourner Truth became one of the first Black women to petition a state court for custody of her son, Peter. Peter was separated from Truth and sold into slavery at five years old. With the help of the New York Manumission Society, Truth petitioned the New York State court for custody of her son and won—an extremely rare process and outcome. Unfortunately, the physical and mental harms Peter suffered in slavery followed him for the

The St. Louis, Missouri State Circuit Court ruled in favor of Dred Scott.<sup>28</sup> Specifically, the court held that, because Dred Scott and his family spent substantial time in free states and his daughters were born in free territory, the family was free and could therefore be reunited.<sup>29</sup> Two years after the lower court opinion, the Missouri Supreme Court stepped in to overturn the decision.<sup>30</sup> Scott and his attorney appealed to the United States Circuit Court and, eventually, the Supreme Court. On this final appeal, Sanford, despite having failed to raise a procedural objection prior to reaching the Supreme Court, argued that Scott lacked the jurisdiction to bring suit in federal court.<sup>31</sup>

Justice Taney writing for the majority held that, because Dred Scott was a descendant of the African race, he could not be a citizen of the United States.<sup>32</sup> And, as a non-citizen, Scott could not satisfy the diversity jurisdiction requirement of the federal courts. By requiring federally recognized citizenship to bring a claim in federal court, the Court essentially removed any Black family's ability to bring a federal claim. In short, the *Scott* court held that Black people had no standing to bring federal claims because they were not citizens according to the Constitution. With no means to enforce a right, the right does not practically exist.<sup>33</sup>

In an impassioned dissent, Justice McLean highlighted the fallacies in the majority's reasoning. Citing several state laws, other federal cases, and the Constitution, Justice McLean writes that "There is no averment in this plea which shows or conduces to show an inability in the plaintiff to sue in the Circuit Court . . . being born under our Constitution and laws, no naturalization is required to make him a citizen."<sup>34</sup> That is, because Dred Scott was born in the United States, he need not be naturalized as a U.S. citizen. Ultimately Justice McLean states that the majority's assessment of Scott's citizenship was "more a matter of taste than of law."<sup>35</sup> Essentially, Justice McLean proffers that the majority's interpretation of the available precedent and laws is a product of bias in that the majority opinion is rooted in racism rather than law.<sup>36</sup>

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rest of his life. See also MARGARET WASHINGTON, *SOJOURNER TRUTH'S AMERICA* 60 (2009); Burnham, *supra* note 6.

<sup>28</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 400.

<sup>32</sup> *Id.* at 406.

<sup>33</sup> See generally ALEXANDER, *supra* note 14 (finding that the lack of enforcement mechanism rendered many rights "illusory" for African-Americans).

<sup>34</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 531 (1856).

<sup>35</sup> *Id.* at 533.

<sup>36</sup> Loretta J. Ross, *The Color of Choice: White Supremacy and Reproductive Justice*, BERKELEY L. CTR. ON REPRO. RTS. AND JUST. (Nov. 17, 2019, 11:19 am), [https://www.law.berkeley.edu/php-programs/centers/crrj/zotero/loadfile.php?entity\\_key=2K2QA27B](https://www.law.berkeley.edu/php-programs/centers/crrj/zotero/loadfile.php?entity_key=2K2QA27B) [<https://perma.cc/HD7L-ZEJD>] (defining white supremacy as "an interlocking system of racism, patriarchy, homophobia, ultranationalism, xenophobia, anti-Semitism, and religious fundamentalism that creates a complex matrix of oppressions faced by people of color in the United States").

Ultimately, the Supreme Court used white supremacist reasoning that, if not overturned by statute, could have denied an entire race from holding rights of federal citizenship.<sup>37</sup> The *Dred Scott* case was eventually superseded by constitutional amendment, and, after being bought and freed by another family, the Scott family was reunited.<sup>38</sup> But, the white supremacist norms and biases that disregarded Black families' rights persist as a factor in the Court's treatment of family unity claims.

## II. SLAVERY AND FAMILY SEPARATION CONTINUE VIA INCARCERATION

The *Dred Scott* ruling would go on to inspire a civil war, as well as the Reconstruction Amendments, which, collectively, ended slavery except in cases of punishment for crime,<sup>39</sup> made citizenship available to all people born or naturalized on U.S. soil, extended rights of due process to all who are subject to U.S. jurisdiction, and purported to remove race, color or previous condition of servitude as determining factors in assessing the right to vote.<sup>40</sup> The purpose of these amendments was not just to create progressive policies to combat the effects of slavery, but also to abolish the systems that supported slavery.<sup>41</sup>

Unfortunately, the Thirteenth Amendment failed to ban slavery in cases of punishment for a crime.<sup>42</sup> As a result, virtually all prison labor has

<sup>37</sup> *Dred Scott*, 60 U.S. at 406 (“It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution, recognized as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else . . . [P]eople of the United States and citizen are synonymous terms.” All of these terms then, citizen, people of the U.S., white are synonymous but, as the Court goes through great lengths to clarify, “exclusive.”)

<sup>38</sup> *Harriet Scott*, THE DRED SCOTT LIVES FOUNDATION, (Nov. 8, 2019), <https://dred-scottlives.org/harriet-scott/> [<https://perma.cc/SX2P-BZDM>].

<sup>39</sup> U.S. CONST. amend. XIII, § 1: (“Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.” (emphasis added)); Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 397–399 (2009) (stating that courts have interpreted the Thirteenth Amendment’s exception clause as allowing for “nearly all forms of forced labor by convicts” subject only to Eighth Amendment violations); see Roberts, *supra* note 9, at 67–68 (examining the legislative process behind the Thirteenth Amendment Punishment Clause).

<sup>40</sup> U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV.

<sup>41</sup> Roberts, *supra* note 9, at 50–51; see ALEXANDER, *supra* note 14, at 29 (“In addition to federal civil rights legislation, the Reconstruction Era brought the expansion of the Freedmen’s Bureau, the agency charged with [providing assistance to] former slaves. A public education system emerged in the South, which afforded many Blacks (and poor whites) their first opportunity to learn to read and write . . . the sweeping economic and political developments in [the Reconstruction era] did appear, at least for a time, to have the potential to seriously undermine, if not completely eradicate, the racial caste system in the South.”); Jennifer M. Chacón, *Citizenship and Family: Revisiting Dred Scott*, 27 WASH. U. J.L. & POL’Y 45, 56 (2008), (citing expansive intent of U.S. CONST. amend XIV); Priscilla Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CAL. L. REV. 1239, 1248 (2012).

<sup>42</sup> Roberts, *supra* note 9, at 66–67.

been allowed to persist, subject only to Eighth Amendment violations on cruel and unusual punishment.<sup>43</sup> That glaring omission has led to the legal continuation of state-sponsored exploitation akin to slavery in jails and prisons throughout the nation.<sup>44</sup> Not coincidentally, people of color, and especially Black people are overrepresented in jails and prisons in the United States.<sup>45</sup> To the extent that jails and prisons continue slavery's legacy of family separation, families of color are disproportionately impacted by family separation as a result of incarceration. This is true also for families entering at the U.S. southern border; families that are disproportionately families of color.<sup>46</sup>

The *Lassiter* case highlights the impact of family separation on a Black family and how that separation intersects with the erosion of the protections intended by the Reconstruction Amendments and the simultaneous expansion of the prison industrial complex.<sup>47</sup> In the 1980s, the United States adopted a "tough on crime" stance that led to more arrests and a rapid increase in the jail and prison population.<sup>48</sup> This stance helped spawn a mass incarceration effort beyond anything previously known despite having no correlative effect on reducing crime rates.<sup>49</sup> As the use of prisons increased, so too increased the conflation of race and criminality. For example, the myth of the "welfare queen" and "crackbaby" gained prominence in the 1980s as issues implicating Black women's reproduction.<sup>50</sup> At the same time, Black women experienced a seventy-eight percent increase in incarceration,

<sup>43</sup> Raghunath, *supra* note 38.

<sup>44</sup> Roberts, *supra* note 9 at 66–67.; See Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, HISTORY IS A WEAPON (Nov. 17, 2019, 12:16 PM), <https://www.historyisaweapon.com/defcon1/davisprison.html> [<https://perma.cc/U6A7-VWJB>].

<sup>45</sup> Ocen, *supra* note 40, at 1250–51.

<sup>46</sup> Davis, *supra* note 43. See also Daina Berry, *Breaking up Families of Color, an American Tradition as Old as the Slave Trade*, BEACON BROADSIDE (June 21, 2018), <https://www.beaconbroadside.com/broadside/2018/06/breaking-up-families-of-color-an-american-tradition-as-old-as-the-slave-trade.html> [<https://perma.cc/37VG-UYZE>]; Vanessa M. Holden, *Slavery and America's Legacy of Family Separation*, AFR. AM. INTELL. HIST. SOC'Y (July 25, 2018), <https://www.aaahs.org/slavery-and-americas-legacy-of-family-separation/> [<https://perma.cc/V9M7-KBGX>].

<sup>47</sup> The prison industrial complex is a term coined by activist and scholar Dr. Angela Davis to describe the complex, corporate, multinational ecosystem of interests fueling mass incarceration in the United States. See Roberts, *supra* note 9, at 17 ("The prison, foster care, and welfare systems operate together to form a cohesive punitive apparatus that punishes Black mothers in particular.").

<sup>48</sup> ANGELA DAVIS, ARE PRISONS OBSOLETE? (2003) (attributing the 1980s/Reagan Era with a meteoric rise in the U.S. prison population, which disproportionately impacted Black people and people of color).

<sup>49</sup> *Id.* at 12 ("[A] massive project of prison construction was initiated during the 1980s . . . . Nine prisons . . . were opened between 1984 and 1989. Recall that it had taken more than a hundred years to build the first nine prisons in California. In less than a single decade, the number of California prisons doubled.").

<sup>50</sup> KHIARA M. BRIDGES, REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION 211–220 (2011).

many of those convictions being drug related.<sup>51</sup> The derogatory narrative worked to justify an increase in state intrusion in the Black family. This moment in time is where we find the plaintiff in *Lassiter*.

Abby Gail Lassiter was a single mother who, with the help of her mother, Lucille, raised five children.<sup>52</sup> Abby's fourth child, William, was often sick and, after missing a few doctor's appointments, the hospital staff familiar with William's ailments asked a social worker to make a house visit.<sup>53</sup> That social worker picked William up from Lucille and took him to the doctor. After finding signs of malnourishment and scarring indicating an untreated infection, the social worker failed to return William to his grandmother and held the eight-month-old boy in state custody.<sup>54</sup>

There is disputed evidence about what happened next. Abby and Lucille recounted several efforts to keep William with his immediate family.<sup>55</sup> The Department of Social Services claimed that Abby abandoned and neglected William and never attempted to regain custody.<sup>56</sup> The Department sought the termination of parental rights.<sup>57</sup> Abby fought the termination on her own, without legal representation, and ultimately lost that fight.<sup>58</sup> On appeal, Abby obtained counsel and argued that, as an indigent mother, due process required that an attorney be assigned to her parental termination case.<sup>59</sup> The Supreme Court, citing the due process clause of the Fourteenth Amendment, upheld the lower court's ruling and found that fundamental fairness did not require legal representation for low-income people unless one's personal liberty was at stake (as in criminal cases).<sup>60</sup>

What was missing from the summary above were two key facts: (1) Abby Lassiter was a Black mother; and (2) Abby's ability to contest the

<sup>51</sup> Marc Mauer and Tracy Huling, "Young Black Americans and the Criminal Justice System: Five Years Later," Washington, D.C.: The Sentencing Project, October 1995 at 18.

<sup>52</sup> Brooke D. Coleman, *Lassiter v. Department of Social Services: Why Is It Such a Lousy Case?*, 12 NEV. L. REV. 591, 592 (2012).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* See also Chris Gottlieb, *Reflections on Judging Mothering* 39 U. BALT. L. REV. 371, 377–78 (2010) ("Whatever the potential benefits of this system, a few truths about it must be understood. First, most of these suspicions involve neglect, not abuse; they do not involve even allegations that a parent has intentionally hurt a child in any way. Instead, the investigations begin because someone (and that someone can be anyone—a teacher, a neighbor, a guy who passed the child on the street) feels that the parent may not be taking proper care of the child. Second, the vast majority of suspicions reported are suspicions about poor parents. Third, minorities, particularly African-Americans, are drastically over-represented in these reports. Unsurprisingly, because the system primarily affects the poor and minorities, it has not been subject to the same scrutiny or political accountability as have other government programs. None of which is to say, of course, that it is not important to have a system in place to protect children from abuse. But these are the realities of the system we now have and they must be attended to if we are to understand and take responsibility for the system we support.").

<sup>55</sup> *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 23 (1981).

<sup>56</sup> *Id.* at 20–21; Coleman, *supra* note 51, at 592.

<sup>57</sup> *Lassiter*, 452 U.S. at 20–21.

<sup>58</sup> *Id.* at 23–24; Coleman *supra* note 51, at 594.

<sup>59</sup> *Lassiter*, 452 U.S. at 25 (citing *Gideon v. Wainwright*, 372 U.S. 335).

<sup>60</sup> *Id.*

termination of her parental rights was hampered by interventions of the criminal justice system, incarceration, court bias, and a lack of knowledge of and access to the legal system.<sup>61</sup> And, while the Court did not mention Abby's race in the majority opinion, it did manage to overlook glaring procedural and substantive errors by the lower court indicating race, class, and gender-based bias.<sup>62</sup> For example, procedurally, the lower courts violated rules of evidence, allowing in hearsay and character evidence about whether Abby or Lucille could and should have custody of William.<sup>63</sup> On appeal, Abby's fitness as a mother was not at issue, but the Court included information of a previous conviction despite it serving no analytical purpose. Also included in the record was a transcript of the lower court proceeding. The transcript highlights the ways in which the lower court failed to adhere to court room procedure. When Abby presented her case, it was clear that she, like most non-lawyers, did not know how to cross-examine a witness. Instead of guiding Abby through the process and giving her leeway as a layperson, the court repeatedly cautioned Abby against making statements and speculating despite having previously allowed hearsay from the Department of Social Services.<sup>64</sup> The court strictly enforced rules of evidence with Abby where it had not done so with the Department. After several exchanges with Abby, the judge became so frustrated that he asked the plaintiff's attorney to take over as he no longer wanted to try: "I tell you what, let's just stop all this. You question her, please [county attorney]. Just answer his questions. We'll be here all day at this rate. I mean, we are just wasting time."<sup>65</sup>

On review, the Supreme Court did not question the substance of the record, and, like the lower court offered opinions on Abby's fitness as a parent, including her unwillingness to fight for custody of her son—a heavily contested assertion.<sup>66</sup> A separate criminal system intervention meant that

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<sup>61</sup> See Coleman, *supra* note 51, at 596–97.

<sup>62</sup> Gottlieb, *supra* note 53.

<sup>63</sup> *Lassiter*, 452 U.S. at 52–53. (The court's unchecked procedural errors were many. First, a different social worker than the one who removed William from his home testified that she spoke with people in Abby's community and heard that neither Abby nor Lucille were capable or desirous of having custody of William. Abby and Lucille vehemently denied these hearsay accounts, but, having limited knowledge of legal proceedings, did not know to make formal objections and the family court judge failed to step in to prevent the admission of hearsay. In fact, as the Department of Social Services, represented by an attorney, presented several witnesses and questioned Abby and Lucille, the family court judge, citing an unpublished state appellate decision, introduced evidence of Abby's conviction for second degree murder—a crime for which she was imprisoned at the time of the parental termination hearing. There were several inaccuracies with Abby's murder trial, but the court still decided to include information about Abby's conviction as evidence that Abby was an unfit mother.)

<sup>64</sup> *Id.* (Blackmun, J., dissenting).

<sup>65</sup> *Id.* at 55 n.25.

<sup>66</sup> *Id.* at 33. The Court stated that Abby failed to fight for custody of William. Facts about whether Abby fought for her son were irrelevant as the issue before the Court was whether due process mandated a right to counsel for indigent parents in parental termination hearings. Despite this, the Court uplifted facts about Abby missing Department planned visits with William or Abby not maintaining contact with the Department or adhering to the departmental remediation plan. During most of the time that William was in state custody Abby was

Abby was incarcerated during many of these court proceedings.<sup>67</sup> Despite that fact Abby never willingly terminated her parental rights. Abby sought help from other women inside prison.<sup>68</sup> She requested that William remain with her mother, Lucille.<sup>69</sup> Though she missed initial court dates, Abby sought an attorney and appealed all the way to the Supreme Court for a chance to be reunited with her son.<sup>70</sup> In essence, Abby fought as hard as she could from inside prison where she had no freedom of movement, extremely limited access to outside resources, and no legal representation for many of the lower court proceedings.

Yet these facts failed to enter the Supreme Court's reasoning. The Court utilized facts irrelevant to the proceedings only where it served the seemingly foregone conclusion that Abby—a low-income, Black mother—was an unfit parent. As the Court laid the foundation for its reasoning, the Court's tepid use of facts—privileging facts presented by the Department and dismissing facts presented by Abby—indicated that bias was at the base. The Court reduced a complex and intersectional story about race, class, and the ways in which the criminal justice system disrupts and destabilizes low-income families to a finding that Abby was an unfit mother. Why? How can the Court avoid grappling with these issues?

The Court has repeatedly upheld the right to family unity as fundamental<sup>71</sup> but, in *Lassiter*, the Court failed to query how compelling the government's interest in separating the Lassiter family was. In essence, the *Lassiter* Court failed to apply strict scrutiny despite implicating the loss of a fundamental right. At no point did the state have to prove that removing William from his mother, grandmother, and four siblings was necessary to achieve a compelling government interest. At no point did the state have to prove that its interest was greater than Abby's right to have custody of her child. Even adopting the Court's finding that due process only requires legal representation in cases of loss of personal physical, liberty, how is the removal of a child from a parent—especially a mother whose very DNA changes as a result of carrying her child—not a deprivation of personal liberty?<sup>72</sup> Avoiding the strict scrutiny hurdle not only eased the state's burden

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detained in a state prison. In fact, it was in prison that the Department requested that Abby terminate her parental rights.

<sup>67</sup> Coleman, *supra* note 51, at 598.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See *supra* note 2.

<sup>72</sup> *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981). See also Nathalie Lambert, *Microchimeric cells: Guardians or Actors of Immunity in Scleroderma*, 46(3) RHEUMATOLOGY, 382, 382–83 (2007); Katherine Rowland, *We are Multitudes*, AEON (Jan. 11, 2018), <https://aeon.co/essays/microchimerism-how-pregnancy-changes-the-mothers-very-dna> [<https://perma.cc/3TPX-F8NZ>].

but, in combination with a lack of legal representation, left Lassiter at a loss of her right to family unity without due process of law.<sup>73</sup>

It is clear that Abby's right to family unity did not "warrant deference" as the *Lassiter* Court indicated it should, but rather depended on whether Abby could assimilate to the state's and, by adoption, the Court's model of a fit parent.<sup>74</sup> As the North Carolina Court of Appeals stated: "There is no question but that there is a fundamental right to family integrity protected by the U.S. Constitution . . . [however] while this state action does invade a protected area of individual privacy, the invasion is not so serious or unreasonable as to compel us to hold that appointment of counsel for indigent parents is constitutionally mandated."<sup>75</sup> The state appellate court, like the Supreme Court, notes the importance of family unity but says that, in the particular case of Abby Gail Lassiter, family unity is not all that important.<sup>76</sup> Similarly, the *Lassiter* Court failed to apply the great value it assigned to family unity to the case of a low-income, Black family. As with the *Dred Scott* Court, Black family unity was (at least) secondary to the state's interests.<sup>77</sup> Or, to borrow a phrase from Justice McLean in his dissent in *Dred Scott*, the Court disregards Lassiter's right to family unity as "more a matter of taste than of law."<sup>78</sup>

*Lassiter* would eliminate many of the gains made as a result of the *Dred Scott* case by lessening the force of the Fourteenth Amendment's due process clause.<sup>79</sup> The "War on Drugs" and policies driving mass incarceration left Black families torn apart. Some families like Abby's turned to the legal system to preserve their constitutional right to family but, as with *Dred Scott*, the courts once again sanctioned the separation and destruction of Black

<sup>73</sup> Cf. *Lassiter*, 452 U.S. at 33 (finding that the trial court failing to appoint legal representation for Abby Lassiter was not a deprivation of due process).

<sup>74</sup> *Id.* at n.1. See also Gottlieb, *supra* note 53, at 385–86 ("For those whose parenting is never questioned by the state, it is difficult to imagine the levels of intrusiveness, subjectivity, and pure ridiculousness that are imposed when we tell state actors that their job is to assess whether parents can meet their children's best interests. The results are appalling, but they shouldn't be surprising. We are inviting caseworkers and judges to impose the standards that so many of us mentally impose when we see a parent with her children on the street. We are taking the common inclination to disdain and condemn, and imbuing that inclination with legal authority").

<sup>75</sup> *In re Lassiter*, 259 S.E.2d 336, 337 (N.C. Ct. App. 1979).

<sup>76</sup> Bridges, *supra* note 3, at 132 (arguing that rights are a function of class, and wealth is a condition for the possibility of privacy.)

<sup>77</sup> See VIVEK SANKARAN, A NATIONAL SURVEY ON A PARENT'S RIGHT TO COUNSEL IN TERMINATION OF PARENTAL RIGHTS AND DEPENDENCY CASES 1, <http://youthrightsjustice.org/Documents/SurveyParentRighttoCounsel.pdf> (last accessed Dec. 2, 2019) (finding that just eighteen states explicitly and clearly recognize a parental right to counsel in termination hearings as a part of state due process).

<sup>78</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 533 (1857). See also Burnham, *supra* note 6 (arguing that the lack of constitutional protections for families of color may be rooted in slavery. That is, modern notions of family law and the constitutional protections afforded families began to be constructed during the period of chattel slavery in the United States. Because Black family separation was a necessary component of chattel slavery, the doctrines protecting families necessarily excluded Black families and families of color at the foundation).

<sup>79</sup> *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26–27 (1981).

families by limiting due process protections. Unfortunately, Abby Lassiter's case is especially common for imprisoned parents whose parental rights are often terminated as a result of incarceration.<sup>80</sup>

Mothers and fathers who have a child placed in foster care because they are incarcerated—but who have not been accused of child abuse, neglect, endangerment, or even drug or alcohol use—are more likely to have their parental rights terminated than those who physically or sexually assault their kids, according to a Marshall Project analysis of approximately 3 million child-welfare cases nationally. In about 1 in 8 of these cases, incarcerated parents lose their parental rights, regardless of the seriousness of their offenses, according to the analysis of records maintained by the U.S. Department of Health and Human Services between 2006 and 2016. That rate has held steady over time. Female prisoners, whose children are five times more likely than those of male inmates to end up in foster care, have their rights taken away most often.<sup>81</sup>

In the roughly forty years since *Lassiter*, the number of people incarcerated in women's prisons has ballooned by more than 700 percent.<sup>82</sup> Though the United States has four percent of the world's female population, it has thirty percent of the female incarcerated population.<sup>83</sup> Women of color are overrepresented among these statistics with Black women incarcerated at a rate twice that of their white counterparts.<sup>84</sup> The increase in incarceration correlates with an increase in police enforcement, including zero-tolerance policies enacted in the 1970s and 1980s.<sup>85</sup> Whether in schools, prisons, or immigration detention centers, zero tolerance policies have proven ineffec-

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<sup>80</sup> Eli Hager and Anna Flagg, *How Incarcerated Parents Are Losing Their Children Forever*, THE MARSHALL PROJECT (Dec. 2, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever> [https://perma.cc/RW2G-K2WC] (“But the [Adoption and Safe Families Act’s] largely unintended consequence was to make incarcerated parents, who now spend well more than 15 months on average behind bars because of the tough prison sentences of the same era, more vulnerable to losing their children.”). See also Caitlin Mitchell, *Family Integrity and Incarcerated Parents: Bridging the Divide*, 24 YALE J.L. & FEMINISM, 175, 184–86 (2012) (documenting the ways in which incarceration attacks the right to family unity for people in prison and the disproportionate impact on low-income families and families of color).

<sup>81</sup> Hager & Flagg, *supra* note 79.

<sup>82</sup> THE SENTENCING PROJECT, FACT SHEET: INCARCERATED WOMEN AND GIRLS (June 2019), <https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf> [https://perma.cc/U48B-GSC5].

<sup>83</sup> Aleks Kajstura, *States of Women's Incarceration: the Global Context 2018*, PRISON POLY INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/women/2018.html> [https://perma.cc/GX5K-265D].

<sup>84</sup> See generally Davis *supra* note 43 (citing racially disparate impact of policing/prisons); see also E. Ann Carson, *Prisoners in 2016* U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics 8 (Jan. 2018) <https://www.bjs.gov/content/pub/pdf/p16.pdf> [https://perma.cc/LM9Z-BPRG] (finding that the incarceration for Black women is 97/100,000 and the rate for white women is 49/100,000.)

<sup>85</sup> MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 122 (2015).

tive in reaching the desired result of limiting violence or drug use.<sup>86</sup> While zero tolerance policies, like the Reagan Era “War on Drugs,” do not work in achieving their stated goals, such policies are remarkable in disproportionately punishing people of color.<sup>87</sup> As a result, more parents of color are incarcerated, and more families of color are separated.<sup>88</sup>

This dynamic is especially clear in the case of pregnant people who birth in prison. The chances of a healthy pregnancy increase with the receipt of baseline prenatal care.<sup>89</sup> However, prisons continually violate human rights by refusing to provide baseline care and by conditioning such care on payment.<sup>90</sup> The one and only study on pregnancy outcomes in United States prisons was published in early 2019.<sup>91</sup> Though prisons are required to provide health care, there are no mandatory standards, oversight, or data reporting requirements and incarcerated people are excluded from national health statistics.<sup>92</sup> Accordingly, pregnant people in prison have particular needs, including the need for baseline prenatal care, but there is no government system in place to guarantee that pregnant people in prisons get reproductive care at all. In fact, many prisons harm pregnant people inside by disregarding their needs and even shackling mothers during pregnancy, labor, and delivery:

Every time I went for a “medical” run, I had to get a humiliating strip-search when I left and returned to prison. Prisoners are placed in belly chains and out hands are cuffed for the duration of the visit unless the doctor asks that they be removed. At about the sixth month of pregnancy, the strip-searches became difficult. By this time, my emotional state was up and down and most of the time I left the “strip room” in tears from shame and humiliation.<sup>93</sup>

Such cruelty during pregnancy increases the likelihood of miscarriage or complications during labor and delivery, but the disturbing lack of political will data in this arena allows policies like shackling to persist.<sup>94</sup>

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<sup>86</sup> See Catherine Winter, *Spare the Rod: Amid Evidence Zero Tolerance Doesn't Work, Schools Reverse Themselves*, APM REPORTS (Aug. 25, 2016) <https://www.apmreports.org/story/2016/08/25/reforming-school-discipline> [<https://perma.cc/LA7E-FMAH>].

<sup>87</sup> DRUG POLICY ALLIANCE, FACT SHEET: 10 FACTS ABOUT COCAINE (2018), [http://www.drugpolicy.org/sites/default/files/cocaine\\_facts\\_august\\_2018\\_1.pdf](http://www.drugpolicy.org/sites/default/files/cocaine_facts_august_2018_1.pdf) [<https://perma.cc/C7TW-JRJX>].

<sup>88</sup> Hager & Flagg, *supra* note 79.

<sup>89</sup> DRUG POLICY ALLIANCE, *supra* note 86 (stating that poverty and harm and stress associated with it are more likely to cause harm than cocaine use during pregnancy).

<sup>90</sup> See Amy Petre Hill, *Death Through Administrative Indifference: The Prison Litigation Reform Act Allows Women to Die in California's Substandard Prison Health Care System*, 13 HASTINGS WOMEN'S L.J. 223, 252–53 (2002).

<sup>91</sup> Carolyn Suffrin, et al, *Pregnancy Outcomes in US Prisons 2016–2017*, 109 AM. J. PUB. HEALTH 799 (2019).

<sup>92</sup> *Id.* at 799 (“. . . [t]here has never been a systematic assessment of abortions, stillbirths, miscarriages, ectopic pregnancies, or neonatal and maternal deaths in prisons.”).

<sup>93</sup> Ocen, *supra* note 40, at 1257.

<sup>94</sup> See *id.*

To document pregnancy outcomes in prison, several doctors collected twelve months of pregnancy statistics from prisons in twenty-two states.<sup>95</sup> The doctors found that 1,396 pregnant women were admitted to state and federal prisons over twelve months, and that fifty percent of those prisons contracted out healthcare delivery to a private corporation.<sup>96</sup> The majority of those pregnancies ended in either live birth or miscarriage with a third of live births leading to cesarean delivery.<sup>97</sup> The study only tracked birth outcomes in prisons and did not track family separation; however, the study revealed that “the majority of women who give birth while in custody will be separated from their newborns soon after delivery, which imposes significant limitations on breastfeeding, bonding, and parental rights.”<sup>98</sup> After having a child in prison, it is highly likely that mother and child will be separated.<sup>99</sup> Considering the disproportionate impact that incarceration has on communities of color, termination of parental rights and family separation due to incarceration disproportionately impacts low-income families of color.

### III. STATE-SANCTIONED FAMILY SEPARATION AND THE EROSION OF DUE PROCESS COMBINE TO CREATE AN ATMOSPHERE RIPE FOR ABUSE OF MIGRANT FAMILIES

The expansion of the prison industrial complex that impacted Lassiter and many other mothers of color in the United States also included the expansion of immigration detention centers.<sup>100</sup> During the 1980s an increase in immigration from the Caribbean and Central America contributed to a shift in immigration practices in the United States.<sup>101</sup> Specifically, as with imprisoning low-income people, federal policy pushed for greater use of incarceration in immigration cases and the length of time that immigrants were detained increased.<sup>102</sup> As the “War on Drugs” raged on in low-income communities, the policies created to prop up the “War on Drugs” also increased the number of removable offenses and criminalized undocumented labor.<sup>103</sup>

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<sup>95</sup> Sufrin, *supra* note 90, at 804 (noting that California, Florida, and New York did not participate in the survey).

<sup>96</sup> *Id.* at 801.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 804. See also Carolyn Sufrin, Alexa Kolbi-Molinas & Rachel Roth, *Reproductive Justice, Health Disparities and Incarcerated Women in the United States*, 47(4) PERSP. ON SEXUAL & REPROD. HEALTH 213, 213–19 (2015).

<sup>99</sup> See U.S. DEP’T OF JUSTICE, FED. BUREAU OF PRISONS, FEMALE OFFENDER MANUAL (2016), <https://www.bop.gov/policy/progstat/5200.02.pdf> [<https://perma.cc/UWN6-VWC3>] (mandating separation of newborn child from mother except in regards to the bureau’s visitation policy); see Shaila Dewan, *Family Separation: It’s a Problem for U.S. Citizens, Too*, N.Y. TIMES (June 22, 2018), <https://www.nytimes.com/2018/06/22/us/family-separation-americans-prison-jail.html> [<https://perma.cc/9VK5-MYN5>] (documenting the regular practice of separating women who give birth in prison from their newborns).

<sup>100</sup> Sinha, *supra* note 12, at 13–21.

<sup>101</sup> *Id.* at 13.

<sup>102</sup> *Id.* at 13–19.

<sup>103</sup> *Id.* at 13–15 (finding that policies like the Anti-Drug Abuse Act (ADAA) and the Immigration Reform and Control Act (IRCA) ignited the war on drugs, added categories of

At the same time, for-profit corporations began to engage in the prison industry.<sup>104</sup> In the wake of the terrorist attacks of September 11, 2001, the Department of Homeland Security (DHS) was created in 2003, and, by 2009, as many as 33,400 immigrants were detained by the government every day.<sup>105</sup> What has ensued is “the largest mass incarceration movement in U.S. history.”<sup>106</sup> The human rights abuses and lack of due process for low-income migrants results in state-sanctioned family separation.<sup>107</sup>

Like its zero tolerance predecessors of the 1980s, the Trump administration’s 2018 “zero tolerance” policy is punitive. The policy penalizes all migrants—predominately people and families of color—entering the United States without authorization anywhere except a designated port of entry.<sup>108</sup> Those detained under zero tolerance are almost always convicted of a misdemeanor crime, and asylum seekers are not exempt.<sup>109</sup> By making criminal what was previously a civil infraction, a new criminal proceeding is launched and the incarcerated person is transferred into the custody of the United States Marshals Service (USMS).<sup>110</sup> Like other zero tolerance policies, this

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offenses like “aggravated felonies” as removable, and contributed to a blurring of “the boundary between civil detention and penal detention by encouraging the confinement of excludable and deportable individuals in prisons operated by the Federal Bureau of Prisons”).

<sup>104</sup> *Id.* at 21.

<sup>105</sup> *Id.* at 17–19 (“The drastic changes to the immigration system have indicated a broader shift in immigration policy from pursuing a largely administrative function to having a retributive agenda, the latter of which is ‘rooted in mythologies of migrant criminality. . .’ This trend is part of the broader pattern of criminalizing communities of color in the United States.”).

<sup>106</sup> *Id.* at 3 (citing *Melissa Harris Perry: Working in America for \$1 a Day* (MSNBC television broadcast June 1, 2014), <http://www.msnbc.com/melissa-harris-perry/watch/working-in-america-for-1-a-day-271647299870> [<https://perma.cc/UHS6-P87M>]).

<sup>107</sup> See Roberts, *supra* note 9, at 17–18 (“[I]mmigration law makes entering the United States without documentation a crime; and militarized border security results in deportation, family separation and detention in prisons and squalid concentration camps. As carceral logics take over ever-expanding aspects of our society, so does the cruelty that government agents visit on people who are the most vulnerable to state surveillance and confinement. Torture has been accepted as a technique of racialized carceral control.”); Holden, *supra* note 45; Berry, *supra* note 45.

<sup>108</sup> See Tina Vasquez, *Meet the Federal Agency Helping to Criminalize Pregnant Migrants*, REWIRE NEWS (May 14, 2019), <https://rewire.news/article/2019/05/14/meet-the-federal-agency-helping-to-criminalize-pregnant-migrants/> [<https://perma.cc/SEB3-TFRQ>].

<sup>109</sup> See *id.*

<sup>110</sup> *Id.* Not coincidentally, as the United States’ oldest federal law enforcement agency, the USMS was the agency charged with enforcement of the Fugitive Slave Act. On its website, the U.S. Marshals Service describes enforcement of the Fugitive Slave Act as follows: “Upon passage of the Fugitive Slave Law of 1850 by Congress, U.S. Marshals enforced the Act by arresting fugitive slaves and returning them to their southern masters. Marshals were required to enforce the law. Any negligence in doing so exposed Marshals and deputies to severe financial penalties.” *Historical Timeline*, U.S. MARSHALS SERVICE, <https://www.usmarshals.gov/history/timeline.html> [<https://perma.cc/YK2K-M643>]. To this day, the organization does not characterize the kidnapping of free people and return to slavery as anything other than business as usual. The USMS shirks responsibility for its vicious actions by suggesting that USMS agents had no choice but to enforce the fugitive slave act. Despite the death sentence that slavery was for so many, USMS notes that its agents had to uphold slavery to avoid financial penalty. When asked to comment on its treatment of pregnant women in custody, the USMS response was eerily similar to the above: “USMS cannot choose to release pregnant migrants facing charges under zero-tolerance, even women with high risk pregnancies. The medical

policy criminalizing immigrants has failed to achieve its stated goal of deterring unlawful immigration but succeeded greatly at punishing and incarcerating low-income people of color:<sup>111</sup>

After the “Zero Tolerance” announcement, a parent would be prosecuted, but usually receive a sentence of time served that amounted to approximately 48 hours or less in jail, after which the parent would be returned to immigration custody. During the brief time the parent was incarcerated, the child would be taken away, often flown across the country, and not returned to the parent even after the parent was returned to ICE custody. In fact, one border patrol agent noted that it was possible that a parent could go to court and come back to the detention center *the very same day*, only to find his or her child already missing, either moved to another CBP facility or transferred to ORR custody. In some cases, parents were purposely transferred to ICE custody after the prosecution in order to ensure that they were separated from their children—who remained in CBP custody for some period after the separation occurred.<sup>112</sup>

Criminal proceedings worked to separate asylum seeking families. For pregnant women held in USMS criminal custody, birth means automatic separation because the same rules that prevent incarcerated U.S. citizens from remaining with their children while in federal custody, prevent mothers in USMS custody from staying with their newborn child beyond forty-eight and seventy-two hours (depending on the delivery method).<sup>113</sup> As an added layer, mothers under USMS control are responsible for placing their child with a documented family member in the United States or they risk losing custody altogether.<sup>114</sup> Much like *Lassiter*, mothers incarcerated in immigration prisons are expected to overcome the trauma of whatever impossible situation they fled and coordinate child custody with no freedom of movement and extremely limited resources.<sup>115</sup> In addition, people giving birth inside detention centers must, within days of giving birth, advocate for their families in a language they likely do not understand.<sup>116</sup> The absence of due

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care, including any outside care, provided to USMS prisoners is the same that the facility uses for its other prisoners. . . . The U.S. Marshals Service follows the order of federal court judges regarding detention of prisoners remanded to our custody.” Again, the USMS avoids responsibility by evoking obligation.

<sup>111</sup> Winter, *supra* note 85.

<sup>112</sup> Complaint at ¶ 161, *A.I.I.L. v. Sessions*, No. 4:19-cv-00481-JAS (D. Ariz. Oct. 3, 2019) [hereinafter *ACLU Complaint*].

<sup>113</sup> *Id.*; see also Sufrin, *supra* note 98.

<sup>114</sup> See Tina Vasquez, *Trump Administration Separates Some Migrant Mothers From Their Newborns Before Returning Them to Detention*, REWIRE NEWS (May 28, 2019), <https://rewire.news/article/2019/05/28/trump-administration-separates-pregnant-migrants-newborns-before-returning-detention/> [<https://perma.cc/G2XN-45TD>]

<sup>115</sup> *Id.*

<sup>116</sup> See *id.* (stating that even if the parent overcomes all of these obstacles to find a placement for their child, they may be denied any visitation until the parent is released from USMS custody).

process from family separation determinations echoes that of the *Dred Scott* and *Lassiter* Courts. Here again, we see the uniquely common heritage of depriving low-income and/or non-citizen families of color of a fundamental right without due process of law.

One Texas-based doctor reports that, recently, the Texas Department of Family and Protective Services attempted to place a detained woman's newborn child in foster care.<sup>117</sup> The woman became distraught and cried for three days straight.<sup>118</sup> The doctor, fearing that the woman might harm herself, placed the woman on a five day psychiatric hold to delay her return to immigration detention.<sup>119</sup> Eventually, the mother located an aunt-in law to take custody of her child, but the aunt was denied visitation with the woman even when coming to take custody of the baby.<sup>120</sup>

When the nurses still thought the baby was going into foster care, they tried to help [the mother] memorize the name of the hospital . . . . They were saying, 'We have your fingerprints, we have your baby's footprints. You have a legal right to your baby.' In case she got deported without her baby, the nurses wanted her to know the hospital where she gave birth and understand that [it] had the records to prove this was her baby.<sup>121</sup>

Because an OB-GYN reported these state-sanctioned efforts at separating a newborn from its family, it is not likely that this separation occurred following a hearing. It is also unlikely that the mother retained counsel. Apparently, it was clear to the nurses that an injustice would occur as they frantically tried to arm the mother with the tools needed to fight for family reunification before separation had officially taken place.

The injustice that the mother in Texas and so many other parents experienced amounts to a constitutional violation. It is unclear what happens to birthing mothers who are unable to find a home in the United States for their child.<sup>122</sup> The people being detained in immigration prisons are non-citizens, but their children born in immigration detention are U.S. citizens. We don't know where these citizen children are placed or if their parents are made aware of their location.<sup>123</sup> We don't know if citizen children are being deported with their parents.<sup>124</sup> Regardless of status, the entire migrant family has a natural and fundamental right to family unity protected by the Fifth

<sup>117</sup> See *id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* ("[The doctor] doesn't know if the U.S. citizen newborns of detained parents are eventually adopted or whether detained patients are deported without regaining custody of their babies. The OB-GYN is also unsure if foster parents have any obligation to remain in communication with parents remanded to USMS custody").

<sup>122</sup> See *Vazquez*, *supra* note 114.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

and Fourteenth Amendments.<sup>125</sup> Under the Fourteenth Amendment's Equal Protection Clause, the right to family unity extends to "any person within [U.S.] jurisdiction."<sup>126</sup> Unfortunately, the state continually and cruelly violates the right to family unity.<sup>127</sup> Each parent facing separation is supposed to have access to a hearing in the state court of jurisdiction and no parental rights should be terminated absent a judge's orders.<sup>128</sup> However, immigrant rights activists report that, absent a person with lawful status to take the child, parental rights are being routinely terminated as a result of "emergency ex parte placements" where caseworkers launch proceedings and serve as witnesses in those proceedings.<sup>129</sup> The result is a termination of parental rights that is later approved by a judge.<sup>130</sup> At no point does the state have to prove its interest in removing the child from its parent. At no point do parents in immigration detention have a right to an attorney when it comes to parental termination.

In sum, migrant families' face myriad infringements on their fundamental right to family unity. Notably, families are separated without notice or an adversarial procedure in violation of procedural due process protections.<sup>131</sup> In addition, migrant families' substantive due process rights remain illusory as the state continually intrudes on the right to family unity without a compelling government purpose.<sup>132</sup> What is clear is that these due process violations amount to an unconstitutional interference with the fundamental right to family unity.

Immigrant families are fighting back. Just as the U.S. prison system has a disturbing lack of data about pregnancy in prison, advocates have mainly anecdotal information about the types and magnitude of ongoing abuses in immigrant detention facilities.<sup>133</sup> However, people subject to family separa-

<sup>125</sup> U.S. CONST. amend. V; U.S. CONST. . amend. XIV. See COOPER DAVIS, *supra* note 5, at 9 (stating that "those who sponsored and shaped [the Fourteenth Amendment] understood rights of family as aspects of liberty, fundamental to proper definitions of freedom and citizenship and necessary to the governmental structure envisioned for a reconstructed union").

<sup>126</sup> U.S. CONST. amend. XIV.

<sup>127</sup> *ACLU Complaint*, *supra* note 112, at ¶ 288 (finding that "[DHS, ICE, CBP, ORR, and USCIS officials] have developed, adopted, implemented, enforced, sanctioned, encouraged, condoned, and acquiesced to a pattern, practice, or custom of violating the clearly established Fifth Amendment due process rights of [families] by forcibly separating and then delaying reunification of families while in immigration detention, depriving family members in whole or in part of the ability to communicate by phone or otherwise while separated, and failing to maintain personal information regarding detainees in immigration custody that was necessary for the reunification of [families]").

<sup>128</sup> See Vazquez, *supra* note 108.

<sup>129</sup> *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27–28 (1981). This parallels the lack of due process in *Lassiter* where an overzealous caseworker removed William from his home and another caseworker, with limited knowledge of the case, was allowed to offer hearsay statements about Abby Lassiter's fitness as a mother in an effectively non-adversarial proceeding.

<sup>130</sup> Vazquez, *supra* note 108.

<sup>131</sup> See *ACLU Complaint*, *supra* note 112, at ¶¶ 235–37 (citing inconsistently deficient documentation, health of the parent, minor court cases like possession of marijuana as pretextual bases for the continuation of family separation).

<sup>132</sup> See *id.*

<sup>133</sup> Vazquez, *supra* note 108 ("Advocates also report that some asylum seekers in the Western District of Texas who have given birth in USMS custody were forced to hand over their

tion in immigration detention provide insight into those abuses by suing the U.S. government under the Federal Torts Claims Act. In 2016, the Asylum Seeker Advocacy Project (ASAP) sued the federal government for money damages on behalf of Suny Rodriguez and her son.<sup>134</sup> In the first case of its kind, Suny sued to hold immigration guards who are federal employees liable for egregious misconduct while acting within their official duties. She won \$125,000 and set a precedent for other people facing family separation and cruel treatment at the hands of the U.S. government. So far, dozens more families are preparing to sue the U.S. government for more than \$200 million collectively.<sup>135</sup> In October 2019, The American Civil Liberties Union (ACLU) filed a class action lawsuit on behalf of separated families requesting compensatory and punitive damages for violations of immigrant families' Fifth Amendment right to family unity, among other things.<sup>136</sup> These legal efforts are essential to stopping the practice of state-sanctioned family separation. However, litigation can be long and the numbers of impacted families are greater than we know.<sup>137</sup> I suspect that time will reveal that the abuses against low-income families immigrating to the United States will be so widespread, that reparations will be inevitable.<sup>138</sup>

Today, over 150 years since *Dred Scott*, a city in Mississippi is making the same argument as the *Dred Scott* Court to deny a non-citizen family

newborns to the Texas Department of Family and Protective Services (DFPS). Reuniting with their newborn hinges on their release from federal custody, and whether they can access legal help to navigate the child welfare system. We learned that women who find their way to advocacy organizations appear to be reuniting with their newborns, but *Rewire.News* was unable to verify what happens to the children of women who do not have access to legal help.”); see also Sufrin, *supra* note 90, at 804.

<sup>134</sup> See *Rodriguez-Alvarado v. United States*, ASYLUM SEEKER ADVOC. PROJECT, <https://asylumadvocacy.org/ftca-litigation/> [https://perma.cc/A45K-E667]; Sarah Stillman, *How Families Separated at the Border Could Make the Government Pay*, THE NEW YORKER (June 15, 2019), <https://www.newyorker.com/news/news-desk/how-families-separated-at-the-border-could-make-the-government-pay> [https://perma.cc/SY6K-U46U].

<sup>135</sup> Garance Burke, Juliet Linderman, & Martha Mendoza, *Claims: Migrant children molested in US-funded foster care*, ASSOCIATED PRESS (Aug. 16, 2019) <https://apnews.com/b44559a135654616aa0e69a3ec7d2339> [https://perma.cc/QT7N-4AEJ].

<sup>136</sup> See *ACLU Complaint*, *supra* note 111, at ¶ 52.

<sup>137</sup> Editorial Board, *Only Now Do We Understand the True Cruelty of Trump's Family Separation*, WASH. POST (Oct. 29, 2019), [https://www.washingtonpost.com/opinions/only-now-do-we-understand-the-true-cruelty-of-trumps-family-separation/2019/10/29/8294ef9e-f9cf-11e9-ac8c-8eced29ca6ef\\_story.html](https://www.washingtonpost.com/opinions/only-now-do-we-understand-the-true-cruelty-of-trumps-family-separation/2019/10/29/8294ef9e-f9cf-11e9-ac8c-8eced29ca6ef_story.html) [https://perma.cc/M2MU-KLNL] (finding that thousands more families than previously known were separated by the Trump Administration bringing the known total to nearly 6000 families).

<sup>138</sup> See, e.g., ERICA HARTH, *LAST WITNESSES: REFLECTIONS ON THE WARTIME INTERNMENT OF JAPANESE AMERICANS* 23–24 (2001); TETSUDEN KASHIMA, *JUDGMENT WITHOUT TRIAL: JAPANESE AMERICAN IMPRISONMENT DURING WORLD WAR II* 208–10 (2003) (showing that after the widespread, state-sanctioned detention of Japanese-Americans, advocacy efforts of impacted families forced the U.S. government to recognize its role in propelling race-based detention and pay reparations to impacted families. Though family separation was not a policy of the U.S. government during Japanese internment, there are reports that separation was used as a tool to punish activist detainees); see also Jorge Rivas, *A Former Japanese Internment Camp Prisoner on the Dire Effects of Putting Kids in Detention*, SPLINTER NEWS (June 18, 2018), <https://splinternews.com/a-former-japanese-internment-camp-prisoner-on-the-dire-1826858234> [https://perma.cc/2K5G-FFUY].

rights of due process.<sup>139</sup> In a case of mistaken identity, police murdered Ismael Lopez when they fired live ammunition through his front door while enforcing a warrant intended for Lopez's neighbor.<sup>140</sup> In defense of the police action, the city attorney argued that, because Lopez is not a citizen, he has no Fourteenth Amendment rights to due process.<sup>141</sup> Just like the *Dred Scott* Court, the attorney argues that non-citizens "are not the 'We, the People of the United States' entitled to the civil rights invoked in [the] lawsuit."<sup>142</sup> The city's argument is that undocumented people, like Dred Scott and Ismael Lopez, have no right to bring a claim in court at all.<sup>143</sup> The wrongful death implicates the fundamental right to family unity because law enforcement literally invaded a private, family space that is constitutionally protected, and permanently separated Lopez from his family by killing him.

Applying an RJ frame to the cases reviewed thus far highlights that courts have repeatedly allowed family separation without due process for low-income and/or non-citizen families of color over the last 163 years. Therefore, any efforts at reproductive freedom must apply to all families in the United States regardless of citizenship status. Because our system of laws is rooted in racism<sup>144</sup> and those roots continue to manifest strange fruit in 2019, a constitutional amendment safeguarding the right to family unity should be crafted with this in mind.<sup>145</sup>

#### IV. A CALL FOR A CONSTITUTIONALIZED RIGHT TO FAMILY UNITY

The state-sanctioned family separation we are witnessing at the U.S.-Mexico border is yet another manifestation of the U.S. heritage of separating low-income and/or non-citizen families of color. To guarantee a right to family unity that protects against prejudice and judicial bias<sup>146</sup> and incorporates procedural safeguards, I call for a constitutional amendment enumerating the right to family unity as fundamental for all families subject to U.S. jurisdiction. We must endeavor to eliminate state-sanctioned family separa-

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<sup>139</sup> See Ralph Ellis & Amir Vera, *City Says Man Killed by Police in Case of Mistaken Identity Had No Constitutional Rights Because He Wasn't a Citizen*, CNN (Sept. 30, 2017), <https://www.cnn.com/2019/09/29/us/ismael-lopez-southaven-mississippi/index.html> [https://perma.cc/FB6U-PY4D].

<sup>140</sup> *See id.*

<sup>141</sup> *See id.*

<sup>142</sup> *See id.*

<sup>143</sup> *See id.*

<sup>144</sup> *See, e.g.*, Johnson v. M'Intosh, 21 U.S. 543 (1823); Dred Scott v. Sandford, 60 U.S. 393 (1856); Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 32 YALE L. & POL'Y REV. 57, 94 (2013); Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 YALE J.L. & HUMAN. 413, 447–48 (2001).

<sup>145</sup> Perhaps one of Billie Holiday's most iconic songs, *Strange Fruit*, a poem written by a Jewish-American activist in protest of lynching, speaks to American racism and the immense loss of life that racism in the United States has claimed. See Elizabeth Blair, *The Strange Story Of The Man Behind 'Strange Fruit,'* NPR MUSIC (Sept. 5, 2012), <https://www.npr.org/2012/09/05/158933012/the-strange-story-of-the-man-behind-strange-fruit> [https://perma.cc/9H8T-5KWH]; see also Dred Scott v. Sandford, 60 U.S. 393 (1856).

<sup>146</sup> *See* COOPER DAVIS, *supra* note 5, at 6.

tion because failure to do so will propel the continuation of a system rooted in slavery that disproportionately destroys low-income and/or non-citizen families. “An unamendable constitution, adopted by a generation long since dead, could hardly be viewed as a manifestation of the consent of the governed.”<sup>147</sup> When government no longer serves the needs of the people, it is time for the people to adjust the government. An amendment is timely, especially considering the on-going abuses taking place at the U.S.-Mexico border. Rooting the construction of an amendment in reproductive justice provides a road map to achieving equality.

Because RJ is rooted in human rights, we can look to human rights law for guidance on drafting a constitutional amendment. The United Nations High Commissioner for Refugees refers to family unity as an essential right:

A right to family unity is inherent in the universal recognition of the family as the fundamental group unit of society, which is entitled to protection and assistance. This right is entrenched in the universal and regional human rights instruments and international humanitarian law, and it applies to all human beings, regardless of their status.<sup>148</sup>

There are no less than seven international human rights laws and conventions that adhere to the right to family unity.<sup>149</sup> One such convention, the Convention on the Right of the Child (CRC), seeks to protect the right to family unity by protecting the children in any family.<sup>150</sup> Specifically, Article 7 of the CRC provides that parents have the right to raise their children and “ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine this is in the best interests of the child.”<sup>151</sup> The CRC further requires that states assist parents in their child rearing responsibilities including providing institutions and services to care for the children.<sup>152</sup> Perhaps most important is the CRC’s recognition that the right to family unity is a part of any “best interest of the child” analysis.<sup>153</sup> The CRC values family unity so much that it requires that the state must act to protect family unity and that safeguards must be put in place to prevent the separation of families. The CRC recognizes that drawing a difference between the best interest of the child and family unity is a false dichotomy.

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<sup>147</sup> Walter Dellinger, *The Legitimacy of Constitution Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 387 (1983).

<sup>148</sup> Frances Nicholson, *The Right to Family Life and Family Unit of Refugees and Others in Need of International Protection and the Family Definition Applied*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES LEGAL AND PROTECTION POLICY RESEARCH SERIES 3, 7 (Jan. 2018), <https://www.unhcr.org/5a8c40ba1.pdf> [<https://perma.cc/KDS6-NSAZ>].

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 5.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

Placing a high burden on the state to avoid separation altogether and pursue separation only when necessary is a key component of the human right to family unity. The American right to family unity should incorporate this scheme. That is, more than a finding of parental neglect, the state should have to answer a quintessential RJ question before separating any family: Does the birthing person have the social, economic, and medical resources to thrive? Any negative answer to this question should spawn actions by the state to bring the family to a state of security prior to making a separation determination. Such a heightened burden for the state is not without precedent.

In 1978, Congress enacted the Indian Child Welfare Act (ICWA) to protect Indian or First Nations families.<sup>154</sup> The legislature acknowledged that about one third of indigenous children were being removed from Indian homes and placed in majority non-Indian homes often without justification.<sup>155</sup> Congress recognized that, if it failed to act to protect the First Nations family unit, the historic genocide against the First Nations would continue via family separation.<sup>156</sup> Therefore Congress established minimum federal standards for the removal of Indian children from their families.<sup>157</sup> Prior to taking a child from a First Nations home, a party must: (1) “demonstrate that ‘active efforts have been made to provide remedial services and rehabilitative programs;” (2) provide evidence beyond a reasonable doubt that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child; and (3) show that, in cases of adoption, preference for placement was given to family member, other members of the tribe, or other Indian families.<sup>158</sup>

ICWA is instructive legislation for crafting a constitutional amendment enumerating the right to family. Like the human rights mentioned above, ICWA places the burden upon the state to make efforts to keep the family together and prove its interest in removing a child from the home in a way that weighs the state’s interest against the parent’s interest in maintaining custody. The state also has the burden of finding placement within the child’s familial networks before adopting the child to an unknown entity. What I argue is that, as with ICWA, it is time for Congress to recognize that state-sanctioned family separation has deep roots in slavery and continues today via the carceral state. If the legislature acknowledges the disproportionate impact of the destruction of low-income and/or non-citizen

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<sup>154</sup> Indian Child Welfare Act of 1978, 25 U.S.C §§ 1901–63 (2018); National Indian Child Welfare Association, *About ICWA*, <https://www.nicwa.org/about/> [<https://perma.cc/BPH2-Y3VM>] (last accessed Nov. 10, 2019). First Nations is a term used to describe the sovereign indigenous nations of Canada and the Pacific Northwest. I use the phrase more broadly to honor the multitudinous and sovereign nations of people who honored and cared for the land we know of as the United States long before it was known that way.

<sup>155</sup> *See id.*; *see also* *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013).

<sup>156</sup> *See id.*

<sup>157</sup> Indian Child Welfare Act of 1978, 25 U.S.C §§ 1901–63 (2018).

<sup>158</sup> *See Adoptive Couple*, 570 U.S. at 643; Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (2018).

families of color, it must act to limit separation when possible. With about 6,000 known families separated at the U.S.-Mexico border and one in eight incarcerated parents losing parental rights permanently just by virtue of being incarcerated, the state should have a heightened burden to terminate incarcerated people's parental rights. The burden should be on the government to prove, beyond a reasonable doubt, its interest in terminating familial rights and separating families.

Also, because the separation of families of color is rooted in slavery, slavery and all of its vestiges must be outlawed with no exceptions.<sup>159</sup> Adopting the intent of the abolitionists who fought for equity in the Reconstruction Era, we must eliminate all forms of slavery including in carceral settings. Only then can we combat incarceration's—whether for a crime or civil immigration offense—inequitable intrusion on the fundamental right to family unity.

Finally, *Dred Scott* and *Lassiter* remind us that a right to family unity is rendered unenforceable without adequate due process protections, and courts are ill-equipped to provide those protections. The Fifth and Fourteenth Amendments guarantee a right to procedural and substantive due process.<sup>160</sup> Procedural due process requires that the government supply adequate procedure—often notice and a hearing—prior to taking away a fundamental liberty interest.<sup>161</sup> Substantive due process queries whether the state has adequate justification for depriving someone of a liberty interest.<sup>162</sup> The question of due process is one of law that judges determine utilizing the Constitution and precedent.<sup>163</sup> However, this deference to judges too often “leave[s] determinations unusually open to the subjective value of the judge.”<sup>164</sup> As a result, courts deprive some families of fundamental liberty interests without sufficient justification. Families have a heavy liberty interest in staying together, and no family on U.S. soil should be subject to separation absent due process of law. That is, no family should be separated without notice, an adversarial proceeding with legal representation, and a balancing of the interests with the burden on the state to show that its interest in separating families is a necessary one that outweighs the fundamental interest in family unity. Because courts to date have largely failed in providing due process to low-income and/or non-citizen families of color, a constitutional amendment may limit the role judicial bias plays in separating families.

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<sup>159</sup> See U.S. CONST. amend. XII; Roberts, *supra* note 9, at 68–70 (finding that the punishment exception to the 13th Amendment was meant to be narrowly construed and was never meant to support a system of convict leasing or “wage servitude.” Despite this, “the Thirteenth Amendment provided insufficient protection to Black citizens from being exploited, tortured, and killed in the system of bondage that replaced chattel slavery”).

<sup>160</sup> Erwin Chemerinsky, *Procedural Due Process Claims*, 16 *TOURO L. REV.* 871 (2000)

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 890.

<sup>164</sup> *Santosky v. Kramer*, 455 U.S. 745, 762 (1982).

If we acknowledge America's past and painful present of disrupting and destroying families of color for profit, then it is clear that a right to family unity should mandate that no child be removed from their parent without satisfaction of a heavy burden on the state. Like the ICWA and CRC, any entity intent on separating a family should (1) acknowledge that the right to family unity is fundamental; (2) have to take meaningful and positive steps to secure the family unit; and (3) prove that disruption of family unity serves a compelling governmental interest for which separation is necessary and narrowly tailored to achieve that compelling interest. With the U.S. heritage of family separation in mind, fundamental fairness requires at least this much.

### CONCLUSION

This Article provides a framework for creating an enumerated, fundamental right to family unity in the United States that incorporates principles of reproductive justice. Specifically, I argue that guaranteeing adequate and equal due process in all parental termination proceedings is central to realizing an equitable right to family unity. To date, courts have been charged with establishing and shaping the fundamental right to family unity. If we trace family unity claims to *Dred Scott*, we learn that a liberty interest in family unity historically excluded Black families. Unfortunately, courts have continued to exclude largely low-income and/or non-citizen families of color from enjoying the fundamental right to family through the erosion of due process. By shifting the goal posts from contriving a right to family unity based on judicial precedent to creating a right to family unity based on the aspirational principles of reproductive justice, I endeavor to secure equal access to the fundamental right to family for all families on U.S. soil.

Reproductive justice maintains that we will realize reproductive freedom when we have eliminated all forms of reproductive oppression and its tools. As long as prisons and immigration detention centers are allowed to operate in a way that all-but necessitates the disproportionate separation of low-income families of color, they operate as a tool of reproductive oppression. This is especially true when considering that slavery—which required Black family separation—is allowed in the United States as punishment for a crime. A constitutional amendment may not eradicate the system of white supremacy that informed the *Dred Scott* decision, but it will supersede *Lassiter* and provide clear and adequate due process protections from family separation. If we, like the slavery abolitionists constructing the Reconstruction Amendments, want to uproot slavery and family separation as an output of slavery, we have to dig deep. Combatting slavery's legacy, including family separation, will require a comprehensive, deeply expansive and holistic approach. The process may be punishing and there will be costs, but these costs pale in comparison to the actual and moral costs of failing to secure a universal, fundamental right to family unity, a right all families should enjoy.

